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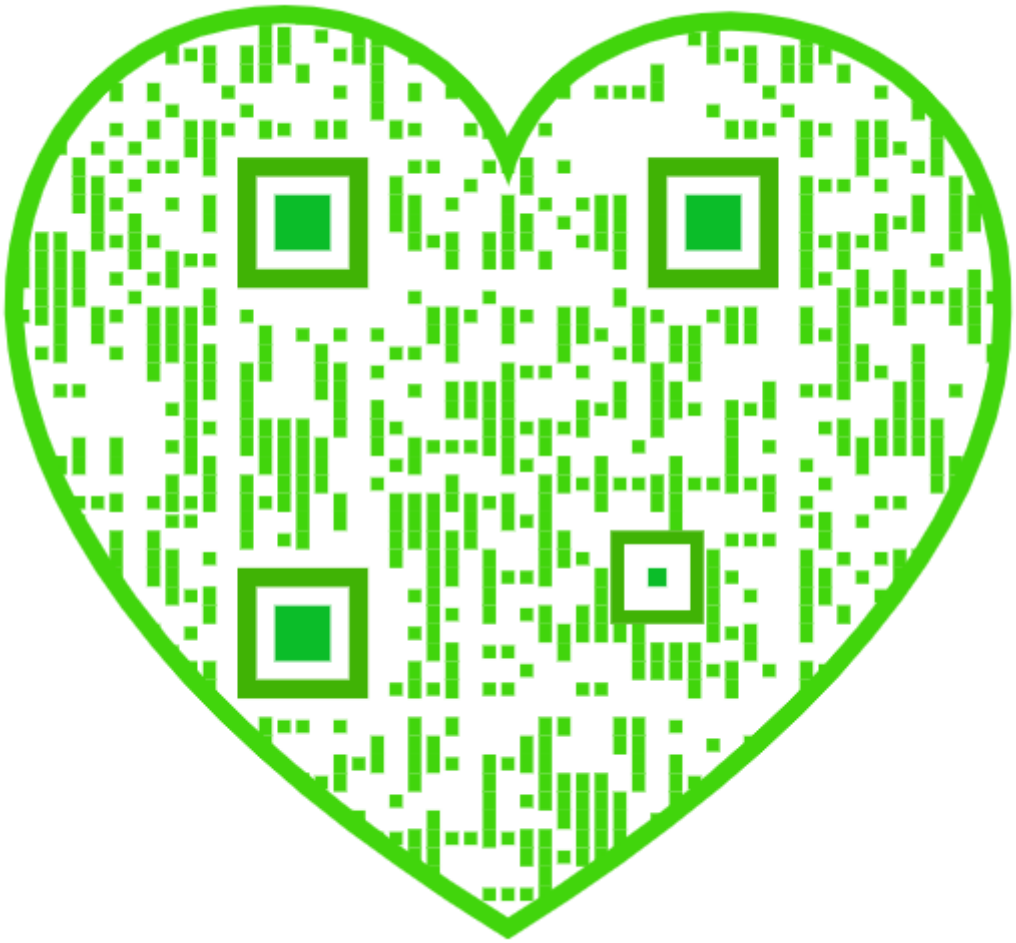

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* Sometime one of the Supreme Court Commissioners of Nebraska.

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* Editions of the following text books cited in this article: Barton's Suit in Equity, London edition of 1796; Daniell's Chancery Practice, first edition, 1837; and Mitford's Equity Pleading, London edition of 1787.

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I. INTRODUCTION.

A. Definition, Origin, and Nature of Equity — 1. DEFINITION. As the term is used in American cases and texts, equity is that portion of remedial justice which was formerly administered in England by the high court of chancery[1] by virtue of its extraordinary jurisdiction[2] as extended, limited, and modified by statute, and adapted to our conditions by judicial construction.[3]

2. ORIGIN AND HISTORY. The extraordinary jurisdiction of the court of chancery sprang from the conception that the king "is the fountain of justice," that is, that the supreme judicial power rests in the crown and that the law courts exercise merely an authority derived from it. When for any reason the subject was unable to obtain justice in the law courts the practice arose of petitioning the king directly, or the king in council, or the chancellor, for relief. Many early petitions presented as a ground for this appeal merely the poverty and weakness of plaintiff and the power and violence of defendant. The rigidity and limited character of the original writs and the impossibility of obtaining writs to meet cases not strictly within the precedents soon became the principal ground of such petitions. The chancellor, as the keeper of the seal and royal secretary, issued the original writs, and to him therefore petitions for relief for this latter reason would naturally be addressed. Nevertheless the early cases disclose a jurisdiction exercised indiscriminately by the council and the chancellor, whatever might be the grounds of petition. At last, by 3 Hen. VII, c. 1, a distribution of jurisdiction was effected whereby petitions based on the peculiar situation of the parties were relegated to the council, leaving to the chancellor cases based on the inadequacy of the common law. After many struggles with the law judges, notable among which is that led on the one side by Lord Ellesmere and on the other by Sir Edward Coke, the independent, and for some purposes superior, authority of chancery as a distinct court, administering independent remedies by its own procednre, became thoroughly established. Later chancellors developed through this jurisdiction a system of rules, principles, procedure, and remedies, which together form what we know as equity.[4]

3. NATURE OF MODERN EQUITY. Equity is therefore now a separate but incomplete system of jurisprudence, administered side by side with the common law, supplementing the latter where it is deficient, in places overlapping and there usually prevailing as against the law. It has its own fixed precedents and principles, now scarcely more elastic than those of the law. The relief it affords is

1. Certain other courts in England formerly exercised a jurisdiction analogous to that of chancery and called equitable. The court of exchequer exercised a very extensive jurisdiction of this character which was in 1841 transferred to the chancery by 5 Vict. c. 5. The influence of these courts on equity in America, if felt at all, was so slight as to be negligible. For a statement of the relation of such courts to the court of chancery see Jeremy Eq. Jur. Appendix.

2. Styled extraordinary to distinguish it from certain jurisdiction exercised at law — largely the issuing of original writs. Mitford Ch. Pl. 6.

3. "Equity jurisprudence may therefore properly be said to be that portion of remedial justice which is exclusively administered by a Court of Equity as contradistinguished from that portion of remedial justice which is exclusively administered by a Court of Common Law." 1 Story Eq. Jur. (13th ed.) 20. For other definitions see Abbott L. Dict.; Bispham Eq. §§ 1, 11; Burrill L. Dict.; Rapalje & L. L. Dict. See also *infra*, I, A, 2.

4. Although "every true definition of equity must, therefore, be, to a greater or less extent, a history" (Bispham Eq. § 1) such a history is beyond the scope of the present article and the statement of the text is necessarily suggestive rather than comprehensive. For the history of equity and the court of chancery see the following: Adams Eq. Introd.; Hardy Introd. Close Rolls; Jeremy Eq. Jur. Introd.; Kerly Hist. Sk. Eq. Jur. Ct. Ch.; Parkes Hist. Ct. Ch.; Pike Introd. Y. B.; Seton Early Rec. Eq.; Spence Eq. Jur. II, 1; Story Eq. Jur. cc. 1, 2. Collections of early proceedings of the highest historical value are: A Calendar of the Proceedings in Chancery in the Reign of Queen Elizabeth (published by the Record Commission in 1827); Select Cases in Chancery (publications of the Selden Society, vol. x). The latter contains a learned introduction of a historical character.

usually different, and the procedure, in some jurisdictions entirely distinct, in all varies more or less from that of law.[5]

B. Systems of Administration. The American jurisdictions may be grouped with respect to their systems of equity administration with practical accuracy into three classes: In the first class equity is administered by courts distinct from those administering the common law. In these the procedure is based upon that of the English high court of chancery, modified to a greater or less extent by statutes and rules of court. In the second class jurisdiction of cases at law and in equity is vested in the same courts, but the procedure is kept distinct and is in general the same as in the first class. This general system of procedure in force in the first and second classes of jurisdiction is that specially treated in this article. In the third class fall those states where law and equity are administered by the same court and where codes or practice acts abolish the distinctions in procedure.[6] Changes made from time to time in the system of administration in certain jurisdictions and minor departures from the typical systems render any tabular arrangement of the American jurisdictions in this respect misleading, each presenting its own peculiar history.[7]

5. The lay notion of equity is that its purpose is to administer natural justice in the particular case without regard to fixed or general rules, and indeed to set aside rules of law when essential to do so to the ends of natural justice. Such was undoubtedly the principle guiding the early chancellors. Such a state of affairs inevitably led to the condition depicted by the well known statement of Selden that "Equity is a roguish thing. For law we have a measure, and know what we trust to, Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is Equity. 'Tis all one as if they should make his foot the standard for the measure we call a Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience." Table Talk Eq.

The modern theory follows that of Lord Eldon: "The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are not to be applied according to the circumstances of each case." Gee *v.* Pritchard, 2 Swanst. 402, 414, 19 Rev. Rep. 87, 36 Eng. Reprint 670. "The principles are as fixed and certain as the principles on which the Courts of Common Law proceed." Bond *v.* Hopkins, 1 Sch. & Lef. 413. "Equity is not the chancellor's sense of moral right, or his sense of what is just and equal. It is a complex system of established law." Savings Inst. *v.* Makin, 23 Me. 360, 366.

6. The codes do not purport to affect substantive rights or to abolish the essential distinctions between legal and equitable rights and relief, but merely to assimilate the processes by which such rights are asserted and such relief obtained. For their effect in these respects see ACTIONS, II, J [1 Cyc. 734]. Where a code is enacted, suits in equity pending when it took effect generally proceed to decree under the former practice. Walker *v.* Armstrong, 2 Kan. 198; Green *v.* Moore, 66 N. C. 425.

7. In this note the general system in force from time to time in each jurisdiction is indicated, but only with sufficient particularity to assist in the study of cases of different periods.

Alabama, prior to Jan. 26, 1839, belonged to the second class of jurisdictions described in the text, administering law and equity by the same court but following the chancery procedure in equity cases. On that date separate courts of chancery were established and the state passed into the first class. This system still prevails. Code (1897), c. 16; Const. (1875) art. 6, §§ 1, 7, 8; Rules Pr. Ch. Ct. (Code, p. 1202).

Arizona has always been in the third class. Laws (1864), p. 1.

Arkansas.— The same courts generally administer law and equity but separate courts of chancery have been from time to time established in certain counties. The procedure was distinct until 1868 when a code was adopted largely assimilating procedure at law and in equity, but preserving certain distinctions.

California.— The first session of the California legislature enacted a Practice Act (Laws (1849–1850), c. 142) essentially similar to the New York and other codes of procedure. The state has therefore always belonged to the third class. As to the effect of this act see De Witt *v.* Hays, 2 Cal. 463, 56 Am. Dec. 352.

Colorado.—While a territory and until 1877 law and equity were administered by the same courts, but the procedure was distinct. 12 U. S. St. at L. p. 174, § 9; Palmer *v.* Cowdrey, 2 Colo. 1. In 1877 a code of procedure was adopted and the state fell into the third class.

Connecticut was in the second class until 1879, when a code was adopted known as the Practice Act (Pub. Acts (1879), c. 83) whereby the state was transferred to the third class. A section of this act provides that "wherever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail." For detailed

C. Sources of Jurisdiction — 1. The English Court of Chancery. From what has been said as to the nature and origin of equity it follows that the basis

history of the judicial system to 1848 see 1 Conn. Pref.

Delaware.— A separate court of chancery was created under the constitution of 1792 and the state has ever since been in the first class. Rev. St. (1893) p. 704.

District of Columbia.— The supreme court of the District of Columbia exercises both legal and equitable jurisdiction, but the procedure, as in federal circuit courts, is distinct. Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210; Page *v.* Burnstine, 102 U. S. 664, 26 L. ed. 268.

Florida has always been in the second class, except from 1870 to 1873, during which period a code was in force assimilating the procedure.

Georgia was in the second class until 1860, when a code was adopted assimilating the procedure at law and in equity but leaving the mode of trial as to each unchanged. Mackenzie *v.* Flannery, 90 Ga. 590, 16 S. E. 710; Littleton *v.* Spell, 77 Ga. 227, 2 S. E. 935. Prior to the code the superior courts had all the powers of the English chancery. Bolton *v.* Flournoy, R. M. Charlt. 125.

Idaho was organized as a territory in 1863. 12 U. S. St. at L. 808. In 1864 a code was enacted assimilating the procedure. Laws (1864), tit. 1, pp. 77–233. The state constitution (art. 5, § 1) prohibits distinctions in procedure and establishes a single form of action. In case of a variance between law and equity, equity shall prevail. Rev. St. § 4020. There have never been separate courts.

Illinois has always been in the second class. See Maher *v.* O'Hara, 9 Ill. 427.

Indiana.— From 1807 to 1814 there was a separate court of chancery. From 1814 until 1852 equity and law were administered by the same courts but the procedure was distinct. See McCord *v.* Ochiltree, 8 Blackf. 15. In 1852 a code was enacted. Rev. St. (1852) p. 2, c. 1. Since then the state has been in the third class.

Indian Territory.— The United States courts of the Indian Territory have both legal and equitable jurisdiction administered under an act of congress, adopting for that purpose the pleading and practice statutes of Arkansas. 26 U. S. St. at L. c. 182.

Iowa was until 1851 in the second class. In that year a code was enacted which was held, however, not to embrace chancery proceedings. Claussen *v.* Lafrenz, 4 Greene 224. A revised code was adopted in 1860 which has been the basis of the procedure since. It provides for "uniformity in the pleadings of law and equity, with a possible uniformity throughout, but a right of dissimilarity in the mode of proof, trial, and appeal." Report on Civil Code (Rev. (1860) p. 450 note). There have never been distinct courts.

Kansas belonged to the second class until 1859 when a code was adopted. When the rules of law and equity differ equity prevails. Deering *v.* Boyle, 8 Kan. 525, 12 Am. Rep. 480.

Kentucky.— Prior to 1891 there had been from time to time established separate chancery courts in certain counties. Otherwise law and equity were administered by the same courts. Until 1851 the procedure was distinct. In that year a code was adopted (Laws (1851), p. 106) which abolished "the forms of all actions and suits heretofore existing" but provided that "the proceedings in a civil action may be of two kinds: (1) Ordinary; (2) equitable." It has been held that this provision was intended to preserve the distinction between proceedings at law and in equity (Grigsby *v.* Barr, 14 Bush 330), and that the only change made by the code is that if an action be brought in the wrong court it shall not be dismissed but transferred, or else tried and decided as if properly brought (Fraley *v.* Peters, 12 Bush 469). The separate chancery courts were, however, abolished by the constitution of 1891. Const. §§ 109, 135. Notwithstanding the cases cited the code has practically assimilated the procedure and requires simply a separation of the cases on the docket. Hepburn Dev. Code Pl. § 193.

Maine.—The common-law courts were given from time to time limited equitable powers, but no complete system existed until by Laws (1874), c. 173, the supreme judicial court was given "full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law." The state is now in the second class.

Maryland.—The procedure in Maryland has always been distinct from that at law. From April 3, 1777, to March 10, 1854, there was a chancellor. Since 1854 the same courts have administered both law and equity except in the city of Baltimore where there is a separate chancery court.

Massachusetts.— From time to time statutes granted to the courts of law specific equitable powers. In 1877 the supreme judicial court was constituted a court of general equity jurisdiction. Laws (1877), c. 178. The state belongs in the second class. For detailed history of chancery in Massachusetts see article by Edwin H. Woodruff, 5 L. Q. Rev. p. 370, and for the colonial period alone, article by Solon D. Wilson, 18 Am. L. Rev. 226.

Michigan.— Except from 1836 to 1847, when there was a separate court of chancery, the same courts have administered both law and equity. See Harrington Ch. (Rev. ed.) Pref.; Richards *v.* Morton, 18 Mich. 255. A constitutional provision authorized the legislature to abolish, as far as practicable, distinctions between law and equity proceedings. The legislature in pursuance thereof passed an act giving a right to trial by jury in equity cases. Laws (1887), p. 358. This was held unconstitutional on the ground that

of our equity jurisprudence must be sought in the extraordinary jurisdiction of the high court of chancery of England, and so it is held that equity jurisprudence

the constitution authorized the removal of nominal distinctions alone and that it was beyond the power of the legislature to take away the functions of judges in equity cases. Brown *v.* Kalamazoo Cir. Judge, 75 Mich. 274, 42 N. W. 827, 13 Am. St. Rep. 438, 5 L. R. A. 226.

Minnesota belonged to the second class until 1853 when a code was enacted, St. (1853) c. 1, and the state has since been in the third class.

Mississippi.— Equity was administered by the law courts but by distinct procedure until 1821 when separate courts of chancery were established which still exist. 1 Freem. Ch. Pref.; Annot. Code (1892), c. 20; Const. art. 6, §§ 159, 160, 161; Laws (1898), c. 64.

Missouri.— Const. (1820) art. 5, §§ 1, 9, 11, provided for a chancellor and a court of chancery. An amendment in 1822 (art. 1, § 1), abolished the office of chancellor and transferred jurisdiction in chancery to the law courts. The legislature was authorized to establish separate courts of chancery, but never did so. From 1822 to 1849 Missouri was in the second class. A code was then adopted which places it in the third class. Laws (1849), p. 78.

Montana.— A civil practice act assimilating procedure in law and equity was passed by the territorial legislature in 1867, but for several years its validity in this respect was in doubt. See *infra*, this note, "In the Territories."

Nebraska has practically always been in the third class. The first territorial legislature adopted a large part of the Iowa code. Laws (1855), p. 55. In 1858 a complete code was adopted. Laws (1858), p. 110. A certain distinction was observed between actions at law and suits in equity, and there were special provisions regulating the latter, until the state was admitted into the Union, when these distinctions were abolished. Laws (1867), p. 71.

Nevada has always been in the third class. Laws (1861), p. 314.

New Hampshire.—For a long time no courts had chancery powers, but the courts of law adopted equitable principles when necessary to prevent injustice. In 1832 an act was passed conferring equitable powers upon the superior court of judicature which was sometime later construed as conferring general equity jurisdiction. Truesdale *v.* Straw, 58 N. H. 207; Walker *v.* Cheever, 35 N. H. 339; Wells *v.* Pierce, 27 N. H. 503. The procedure is distinct.

New Jersey has always belonged to the first class of jurisdictions. For detailed history of court of chancery see articles by Edward Q. Keasbey, 18 N. J. L. J. 69, and by W. M. Clevenger, 18 N. J. L. J. 229.

New Mexico was in the second class until 1897 when a practice act was adopted, Laws (1897), c. 73, which practically assimilates the procedure but preserves the former practice "in all cases and proceedings not comprehended within the terms and intent of this code."

New York.— From 1683 to the Revolution there was, except for brief intervals, a separate court of chancery. This court was reorganized by the constitution of 1777, and with some changes in 1821, existed until 1846, when by the constitution of that year its jurisdiction was transferred to the supreme court. The distinct chancery practice of course prevailed. From 1846 to 1848 equity was administered under chancery forms by the supreme court. In 1848 New York, first of all the states, adopted a code and has since been in the third class. See article by L. B. Proctor, 56 Alb. L. J. 173.

North Carolina was in the second class until 1868 when the constitution provided for the abolition of the distinctions in procedure (art. 4, § 1). A code was adopted the same year.

North Dakota.— The first legislature of Dakota territory adopted a code abolishing the distinctions in procedure at law and in equity. Doubts being entertained as to the validity of this act under the Organic Act, congress confirmed the code. 18 U. S. St. at L. 27; Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132. When the territory was divided and the two states of North and South Dakota were formed in 1889, the codes were continued in force.

Ohio was in the second class until 1853 when a code was adopted. Laws (1853), p. 57.

Oklahoma.— The first legislature of Oklahoma territory enacted a code (St. (1890) c. 70), placing it in the third class. But this code is ineffectual where its operation would deprive a party of a jury trial within the terms of the seventh amendment of the U. S. constitution. Black *v.* Jackson, 177 U. S. 349, 20 S. Ct. 648, 44 L. ed 801 [*reversing* 6 Okla. 751, 52 Pac. 406]; Potts *v.* Hollon, 177 U. S. 365, 20 S. Ct. 654, 44 L. ed. 808 [*reversing* 6 Okla. 696, 52 Pac. 917].

Oregon was in the second class until 1863, proceedings in equity being regulated by a separate practice act after 1854. Laws (1854), p. 173. In 1863 a code was adopted assimilating the pleadings at law and in equity but preserving in a measure the distinction between actions at law and suits in equity. See Burrage *v.* Bonanza Gold, etc., Min. Co., 12 Oreg. 169, 6 Pac. 766; Beacannon *v.* Liebe, 11 Oreg. 443, 5 Pac. 273; Delay *v.* Chapman, 2 Oreg. 242.

Pennsylvania.— There have never been distinct chancery courts, except from 1720 to 1736, and thence until the middle of the nineteenth century equity jurisprudence had no distinct existence. The necessity of enforcing equitable principles and remedies led to various devices whereby they were enforced under common-law forms, the courts asserting in themselves substantial chancery

generally embraces the same matters of jurisdiction and modes of remedy as

powers to be executed in that manner. Bisbing *v.* Graham, 14 Pa. St. 14, 53 Am. Dec. 510. This involved in most cases charging equitable principles to the jury and taking a verdict on the facts but reserving the form of judgment to the court. Hawthorn *v.* Bronson, 16 Serg. & R. 269; Hawk *v.* Geddis, 16 Serg. & R. 23 [*affirming* 1 Watts 280]. In 1836 full chancery powers were given over specified subjects covering a large portion of the field of equity to the courts of Philadelphia. Later further local grants were made, and in 1857 this jurisdiction was extended throughout the state. While the courts recognize the power of the legislature to give equity jurisdiction over what was formerly of common-law cognizance (Commonwealth Bank *v.* Schuykill Bank, 1 Pars. Eq. Cas. 180), they also hold that such grant of chancery powers does not deprive the courts of their former power to work out equity under common-law forms. Biddle *v.* Moore, 3 Pa. St. 161. The procedure under the legislative grants is analogous to the general chancery procedure, but has many important variations. For the peculiar history of equity in Pennsylvania see Equity in Pennsylvania, by Anthony Laussatt, Jr., reprinted in Pennsylvania Bar Association Reports (1895), p. 221, and Equity through Common Law Forms, by Sidney G. Fisher, 1 L. Q. Rev. 455.

Rhode Island.— Until 1842 the general assembly exercised judicial powers, especially those of chancery. The constitution then adopted (art. 10, § 2) prohibited the exercise of judicial powers by the general assembly, and authorized the assembly to confer such powers on the supreme court. Soon after full equity jurisdiction was given to the supreme court. The state belongs in the second class. See Gen. Laws (1896), c. 222, § 4; Brown *v.* Meeting St. Baptist Soc., 9 R. I. 179.

South Carolina.— Until 1784 chancery powers were exercised by the lieutenant-governor and a majority of the privy council. A court of chancery was established in 1784 (Grimke Pub. Laws 337), which existed until it was abolished by the constitution of 1868, and its jurisdiction transferred to the common pleas. Art. 4, §§ 15–17. The procedure remained separate until 1870 when a code was adopted. See 1 Desauss. Eq. Pref. Introd. and pp. 65–106; 1 McCord Eq. Pref.; 1 Richardson Rep. N. S. Adv.

South Dakota.— See *supra*, this note, "North Dakota."

Tennessee belonged to the second class until 1835 when a court of chancery was established which still exists. See 1 Memphis L. J. 1; 7 Tenn. Bar Assoc. Rep. 193.

Texas has never recognized law and equity as constituting distinct branches of jurisprudence. Its courts administer legal and equitable rights without regard to form. Smith *v.* Doak, 3 Tex. 215. Except where controlled by legislation, the courts devise their own procedure, adopting common-law and equity forms where convenient and in harmony with their own established practice. Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117; 30 Am. L. Rev. 813; Hepburn Dev. Code Pl. § 174.

Utah was in the second class until 1870 when a code was adopted. Laws (1870), p. 17; Hontz *v.* Gisborn, 1 Utah 173.

Vermont.— Since the date of its earliest reports Vermont has belonged to the first class. The judges of the supreme court are the chancellors.

Virginia.— From 1777 to 1830 there were separate courts of chancery. Since 1830 jurisdiction at law and in equity has been vested in the same courts, except that a separate chancery court for the city of Richmond has long existed. The distinctions in procedure have always been observed, but equitable defenses may be interposed in law actions. Brown *v.* Rice, 76 Va. 629. See, generally, Wythe Mem. in Wythe Ch. Rep. and 3 Leigh (Va.) Pref.

Washington has always been in the third class. Laws (1854–1856), p. 129.

West Virginia has always been in the second class. W. Va. Const. art. 8, § 12.

Wisconsin was in the second class until 1856 when a code was adopted. Laws (1856), c. 120.

Wyoming.— The first territorial legislature adopted a code which provided a distinct chancery procedure. Laws (1869), c. 75. This distinction was abolished in 1886. Laws (1886), c. 60.

United States.— The circuit courts, from their organization, have had jurisdiction both at law and in equity (1 U. S. St. at L. p. 72, § 11), but the distinctions in procedure have always been strictly observed. See COURTS, 11 Cyc. 633. By the Practice Act of 1792, 1 U. S. St. at L. 275; Rev. St. § 913, the procedure in equity cases is that of the English chancery, as modified by rules promulgated by the supreme court. See Eq. Rule 90.

In the territories.— It will have been observed that many territorial legislatures enacted codes or practice acts abolishing distinctions in procedure at law and in equity, and that the validity of these provisions was doubted. See *supra*, this note, "Montana" and "North Dakota." The supreme court of the United States had held that a territorial court could not by virtue of such act in a foreclosure suit award execution for a deficiency, because such practice was not authorized in the federal courts (Orchard *v.* Hughes, 1 Wall. (U. S.) 73, 17 L. ed. 560; Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278); also that a judgment in a proceeding in the nature of a creditor's bill was erroneous because the proceedings had been in legal form (Dunphy *v.* Kleinschmidt, 11 Wall. (U. S.) 610, 20 L. ed. 223). Following these cases it was held in Montana that legal and equitable relief could not be ob-

existed in that court.[8] This is true in matters of procedure as well as in matters of substance, as far as the former English practice may reasonably be applied.[9] And where a statute confers in general terms jurisdiction in equity or in chancery the jurisdiction so conferred is that of the English chancery.[10]

2. Statutes — a. Effect of Statutes in General. The principles of jurisdiction and rules of procedure derived from the English chancery have been vastly affected in many jurisdictions by the operation of statutes. These statutes are of two classes, the first operating directly by extending, limiting, or modifying such principles and rules, and the second operating indirectly, by creating or altering legal remedies. The operation of the second class, depending upon the applica-

tained in the same proceeding. Woolman *v.* Garringer, 1 Mont. 535. See also Stevens *v.* Baker, 1 Wash. Terr. 315. The supreme court of the United States, however, expressly overruled its former decisions in Hornbuckle *v.* Toombs, 18 Wall. (U. S.) 648, 21 L. ed. 966, holding that the procedure of the territorial courts might be regulated by the territorial legislature, and that the Montana provisions for joining legal and equitable causes were valid. Hornbuckle *v.* Toombs has been followed in Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, 9 S. Ct. 293, 32 L. ed. 688; Davis *v.* Bilsland, 18 Wall. (U. S.) 659, 21 L. ed. 969; Herschfield *v.* Griffith, 18 Wall. (U. S.) 657, 21 L. ed. 968, and supported by *dicta* in Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237; Page *v.* Burnstine, 102 U. S. 664, 26 L. ed. 268. See Woolman *v.* Garringer, 2 Mont. 405; Chumasero *v.* Potts, 2 Mont. 242; Gallagher *v.* Basey, 1 Mont. 457 [*affirmed* in 20 Wall. (U. S.) 670, 22 L. ed. 452]. The question involved is part of the larger one as to whether territorial courts are courts of the United States. See Courts, 11 Cyc. 633.

8. 1 Story Eq. Jur. § 57. And see the following cases:

Illinois.— Mahar *v.* O'Hara, 9 Ill. 424.

Maryland.— Amelung *v.* Seekamp, 9 Gill & J. 468.

New Hampshire.— Wells *v.* Pierce, 27 N. H. 503.

New York.— Boyd *v.* Dowie, 65 Barb. 237.

South Carolina.— Mattison *v.* Mattison, 1 Strobh. Eq. 387, 47 Am. Dec. 541.

United States.— Payne *v.* Hook, 7 Wall. 425, 19 L. ed. 260; Noonan *v.* Braley, 2 Black 499, 17 L. ed. 278; U. S. *v.* Howland, 4 Wheat. 108, 4 L. ed. 526; Robinson *v.* Campbell, 3 Wheat. 212, 4 L. ed. 372; Hudson *v.* Wood, 119 Fed. 764; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95.

The equity jurisdiction of the federal courts is governed by this principle and is not affected by state legislation extending or restricting remedies. McConihay *v.* Wright, 121 U. S. 201, 7 S. Ct. 940, 30 L. ed. 932; Payne *v.* Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260; Hudson *v.* Wood, 119 Fed. 764; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95.

The so-called equity jurisdiction of Louisiana is of a different character, requiring the judge where the positive law is silent to proceed and decide according to natural law and reason or received usages. Clarke *v.* Peak, 15 La. Ann. 407. In Livingston *v.* Story, 9 Pet. (U. S.) 632, 9 L. ed. 255, the court declared that there were no equitable claims or rights recognized in Louisiana nor any courts of equity.

9. *Alabama.*— See Childress *v.* Harrison, 47 Ala. 556; Goodrich *v.* Goodrich, 44 Ala. 670.

Illinois.— Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 365.

Maryland.— Carroll *v.* Waring, 3 Gill & J. 491; Thompson *v.* McKim, 6 Harr. & J. 302; Ringgold's Case, 1 Bland 5. See also Ridgely *v.* Bond, 18 Md. 433.

New Jersey.— Jones *v.* Davenport, 45 N. J. Eq. 77, 17 Atl. 570; West *v.* Paige, 9 N. J. Eq. 203.

Wisconsin.— Burrall *v.* Eames, 5 Wis. 260.

United States.— Smith *v.* Burnham, 22 Fed. Cas. No. 13,018, 2 Sumn. 612; Eq. Rule 90.

10. People *v.* Davidson, 30 Cal. 379; Fox *v.* Wharton, 5 Del. Ch. 200; Rutherford *v.* Jones, 14 Ga. 521, 9 Am. Dec. 655; Walker *v.* Morris, 14 Ga. 323; Jones *v.* Dougherty, 10 Ga. 273; Lamb *v.* Harris, 8 Ga. 546; Williams *v.* McIntyre, 8 Ga. 34; Beall *v.* Fox, 4 Ga. 403; Smith *v.* Everett, 50 Miss. 575.

In states where equity jurisdiction was formerly restricted within specific statutory grants, later statutes conferring jurisdiction in general terms extend the equity powers of the court to those exercised by courts of equity generally. McLarren *v.* Brewer, 51 Me. 402; Hurd *v.* Turner, 156 Mass. 205, 30 N. E. 1137; Billings *v.* Mann, 156 Mass. 203, 30 N. E. 1136; Genet *v.* Delaware, etc., Canal Co., 6 Luz. Leg. Reg. (Pa.) 73. But it has also been held in Pennsylvania that as there was in the early history of the colony a court of equity, followed by a long period when equity was administered only under legal forms, the restoration of equity powers revived in many cases the powers formerly exercised by the colonial court, and that the act creating that court must be resorted to to ascertain the restored powers. Walsh *v.* Leonard, 8 Luz. Leg. Reg. (Pa.) 282.

The jurisdiction or practice of the exchequer affords no basis for jurisdiction or practice in equity in the United States. People *v.* Davidson, 30 Cal. 379; Smith *v.* Burnham, 22 Fed. Cas. No. 13,018, 2 Sumn. 612. Nor of course does that of an ecclesiastical court. Mattison *v.* Mattison, 1 Strobh. Eq. (S. C.) 387, 47 Am. Dec. 541.

tion of general equitable principles, is treated in connection with those principles.[11] With regard to the first class but few general principles can be induced.[12]

b. Validity of Statutes. Aside from cases involving constitutional guaranties of jury trial the courts have recognized a broad power in the legislatures to change the boundaries of equity jurisprudence as well as to regulate procedure.[13] Where the effect of a statute giving a remedy in equity for what was formerly a legal demand is directly to defeat the right of trial by jury the statute is usually void.[14] But where such effect is incidental to the conferring of power to administer complete relief in equity, the legislation is sustained.[15] Special acts authorizing a proceeding in equity in a particular matter are also sustained.[16]

c. Construction of Statutes. Statutes creating or extending equitable rights or remedies have generally received a strict construction.[17] But this rule is not

11. See *infra*, II, A, 2.

12. For particular classes of statutes and their effect see the specific topics to which they relate. In some cases attempts have been made to define by statute the entire scope of equity jurisdiction, as for instance, Ala. Code, § 602, the first clause of which is construed as embracing the original jurisdiction of chancery, and subsequent clauses all statutory extensions. Waldron *v.* Simmons, 28 Ala. 629.

13. A statute prohibiting the granting of injunctions in certain cases where they were formerly allowed does not invade a constitutional grant of jurisdiction in all cases in equity. Spreckels *v.* Hawaiian Commercial, etc., Co., 117 Cal. 377, 49 Pac. 353. In New Jersey the statute authorizing the court of chancery to compel railroad companies to erect gates at crossings was sustained as being consistent with general equity jurisdiction and modes of procedure. Palmyra Tp. *v.* Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369 [*affirmed* in 63 N. J. Eq. 799, 52 Atl. 1132]. So with a statute giving chancery power generally to abate a public nuisance. State *v.* Murphy, 71 Vt. 127, 41 Atl. 1037. A statute may grant an equitable remedy for a right acquired before its enactment, as the statute affects only the remedy and not the right. Hamlen *v.* Keith, 171 Mass. 77, 50 N. E. 462; Rogers *v.* Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710. But where a statute seeks to create a right and to provide an equitable remedy, if the substantive portion is unconstitutional the remedial portion being incidental cannot be availed of for any purpose. Green *v.* Roane, 26 Ark. 15.

14. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 695. In Michigan it was held equally beyond the power of the legislature to enforce a jury trial in a distinctly equitable suit. Brown *v.* Kalmazoo Cir. Judge, 75 Mich. 274, 42 N. W. 827, 13 Am. St. Rep. 438, 5 L. R. A. 226. So "if congress undertook . . to make the finding of a jury anything more than advisory to the chancellor, it would be held unconstitutional." *In re* Toledo, 73 Fed. 220, 224, per Ricks, D. J.

15. See *infra*, II, C. Code Md. art. 16, § 194, provides that, when a purchaser at a trustee sale refuses to complete the purchase, the trustee by bill or petition in equity may obtain a decree for a resale and for the payment by such purchaser of any excess of his bid over the price at the resale. This was held not to invade the right to jury trial and to be a proper enlargement of equity jurisdiction. Capron *v.* Devries, 83 Md. 220, 34 Atl. 251.

16. Hepburn's Case, 3 Bland (Md.) 95; Seely *v.* State, 11 Ohio 501, 12 Ohio 496; Hampson *v.* State, 8 Ohio 315; Commonwealth Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. Where such statute is silent as to the mode of proceeding, the court must be governed by the established principles of law and equity. Hepburn's Case, *supra*. But if the statute itself prescribes rules those must prevail as against general principles. Seely *v.* State, *supra*; Hampson *v.* State, *supra*.

17. *Iowa.*— Brown *v.* Chicago, etc., R. Co., (1900) 82 N. W. 1003.

Maryland.— Hepburn's Case, 3 Bland 95, as to a special act.

Massachusetts.—Angell *v.* Stone, 110 Mass. 54; Buck *v.* Dowley, 16 Gray 555; Wheatland *v.* Lovering, 10 Gray 16; Whitney *v.* Stearns, 11 Metc. 319; Mitchell *v.* Green, 10 Metc. 101; Attaquin *v.* Fish, 5 Metc. 140; Fiske *v.* Slack, 21 Pick. 361; Holland *v.* Cruft, 20 Pick. 321; Holland *v.* Dickinson, 10 Pick. 4; Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148; Tirrell *v.* Merrill, 17 Mass. 117.

Michigan.— Greenfield Tp. *v.* Norton, 111 Mich. 53, 69 N. W. 95; Norris *v.* Hill, 1 Mich. 202.

Mississippi.— Farish *v.* State, 2 How. 826.

Oregon.— King *v.* Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 361.

Tennessee.— Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080; Saudek *v.* Nashville, etc., Turnpike Co., 3 Tenn. Ch. 473.

West Virginia.— Summers County *v.* Monroe County, 43 W. Va. 207, 27 S. E. 307; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451.

Particular statutes.—A Massachusetts statute (Rev. St. c. 81, § 8), conferring jurisdiction in equity in all "cases in which there are more than two parties having distinct rights or interests, which cannot be justly and definitely decided and adjusted in one action at the common law" has been held to require the elements of a bill of interpleader and not to embrace cases where a judgment

without exception.[18] General equitable principles will not be extended for the purpose of bringing a case within a legislative grant.[19] When, however, equity jurisdiction is conferred over a particular subject, such jurisdiction includes with respect to that subject all the powers of courts of chancery.[20] The creation by statute of a new equitable remedy does not it seems exclude a remedy already existing by virtue of a statute conferring general equity jurisdiction, which is not repealed or amended.[21] While a right may be enforced under a statute giving equity jurisdiction, passed after the acquisition of the right,[22] such an act confers no jurisdiction over bills filed before the act was passed,[23] or after its passage and before it took effect.[24]

II. GROUNDS AND SUBJECTS OF JURISDICTION.

A. General Ground — Lack of Remedy at Law — 1. JURISDICTION DEPENDENT UPON LACK OF ADEQUATE REMEDY AT LAW — a. General Rule. As indicated by the historical development of the court of chancery,[25] equity has jurisdiction generally

at law would not expose a party to litigation by a third person. Angell *v.* Stone, 110 Mass. 54, 55; Attaquin *v.* Fish, 5 Metc. (Mass.) 140. A Michigan statute conferring jurisdiction in equity "in all matters concerning nuisances where there is not a plain and adequate remedy at law" (Comp. Laws 11, 213) was held not to enlarge the chancery jurisdiction, which was confined to the prevention of irreparable injury and preventing oppressive litigation and multiplicity of suits. Norris *v.* Hill, 1 Mich. 202. On the other hand statutes giving jurisdiction in equity to ascertain and fix boundaries where they have become confused or uncertain are held to extend the chancery jurisdiction, as conferring authority independent of any equity superinduced by acts of the parties. King *v.* Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 361; Washington Co. *v.* Matteson, 11 R. I. 550. But in the former case it was held not to permit the trial of titles when brought in issue.

18. A statute giving jurisdiction of suits between joint owners of personal property relative to such property (Mass. Rev. Laws (1902), c. 159, § 3) applies to cases where the property belonged to two or more in undivided shares and is not limited to technical joint tenancy. Haven *v.* Haven, 181 Mass. 573, 64 N. E. 410. In Mississippi and Virginia a statute giving jurisdiction in equity extends to cases where plaintiff has an adequate remedy at law. Freeman *v.* Guion, 11 Sm. & M. (Miss.) 58; Ruffin *v.* Commercial Bank, 90 Va. 708, 19 S. E. 790. In Michigan, however, under a statute conferring jurisdiction in equity "to hear and determine all cases of encroachments upon the public highways" the court will not in the absence of special circumstances assume jurisdiction, as an adequate remedy at law is also provided. Greenfield Tp. *v.* Norton, 111 Mich. 53, 69 N. W. 95. A New Jersey statute (Pub. Laws (1895), p. 462) gives equity jurisdiction under certain circumstances to make provision for the crossing of railroads at grade outside the limits of cities. It was held that where the crossing was to be within the limits of a city the court would by consent of parties take jurisdiction and determine the matter on the same principles as if the case fell within the act. Jersey City, etc., St. R. Co. *v.* New York, etc., R. Co., 62 N. J. Eq. 390, 53 Atl. 709. In Pennsylvania, owing perhaps to the inadequacy of the early grants of power, such statutes have received a very liberal construction. Thus an act conferring power to prevent or restrain the commission of acts contrary to law and prejudicial to the interests of the community or the rights of individuals was held to authorize an injunction to prevent repeated trespasses (Grubb *v.* Grubb, 9 Lanc. Bar (Pa.) 109), and to give jurisdiction over municipal corporations grossly abusing their privileges (Hill *v.* Kensington, 1 Pars. Eq. Cas. (Pa.) 501). See also Johnson *v.* De Camp, 3 Luz. Leg. Obs. (Pa.) 38. But jurisdiction will not be assumed by forced construction, especially where a statutory remedy is at all adequate. Bruce *v.* Jennings, 1 Leg. Op. (Pa.) 33.

19. Where jurisdiction had been granted in matters involving trusts, but not in cases of fraud, the court will not by treating one guilty of fraud as a trustee assume jurisdiction. Whitney *v.* Stearns, 11 Metc. (Mass.) 319; Mitchell *v.* Green, 10 Metc. (Mass.) 101. See, however, Huxley *v.* Rice, 40 Mich. 73. But when jurisdiction exists on other grounds the court will consider and determine a question of fraud incidentally arising. Holland *v.* Cruft, 20 Pick. (Mass.) 321. Where jurisdiction is given on the ground of fraud, the court will not extend the term by construction for the purpose of assuming jurisdiction. Galvin *v.* Shaw, 12 Me. 454.

20. Jones *v.* Boston Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358.

21. Jordan *v.* Everett, 93 Tenn. 390, 24 S. W. 1128.

22. Hamlen *v.* Keith, 171 Mass. 77, 50 N. E. 462.

23. Buck *v.* Dowley, 16 Gray (Mass.) 555; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451.

24. Wheaton *v.* Lovering, 10 Gray (Mass.) 16.

25. See *supra*, I, A, 2.

in cases of rights recognized and protected by the municipal jurisprudence, where an adequate remedy cannot be had in the courts of common law.[26] The rule is generally stated in negative form that equity will not entertain jurisdiction where there is an adequate remedy at law.[27]

26. 1 Story Eq. Jur. 33. And see the following cases:

Alabama.— Gulf Red Cedar Co. *v.* Crenshaw, 138 Ala. 134, 35 So. 50.

Illinois.— Rhoten *v.* Baker, 104 Ill. App. 653; Hahn *v.* Gates, 102 Ill. App. 385; Lanzit *v.* J. W. Sefton Mfg. Co., 83 Ill. App. 168.

Kentucky.— Mattingly *v.* Corbit, 7 B. Mon. 376; Darnall *v.* Jones, 72 S. W. 1108, 24 Ky. L. Rep. 2090.

Maryland.— Webb *v.* Ridgely, 38 Md. 364.

Michigan.— Rowland *v.* Doty, Harr. 3.

New Jersey.— Jersey City, etc., St. R. Co. *v.* New York, etc., R. Co., 62 N. J. Eq. 390, 53 Atl. 709.

New York.— Minturn *v.* Farmers' L. & T. Co., 3 N. Y. 498.

Oregon.— Union Power Co. *v.* Lichty, 42 Oreg. 563, 71 Pac. 1044.

Pennsylvania.— Brush Electric Co.'s Appeal, 114 Pa. St. 574, 7 Atl. 794; Bierbower's Appeal, 107 Pa. St. 14; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

England.— Curtis *v.* Curtis, 2 Bro. Ch. 620, 29 Eng. Reprint 342; Manaton *v.* Squire, Freem. 26, 22 Eng. Reprint 1036; Agar *v.* Fairfax, 17 Ves. Jr. 533, 34 Eng. Reprint 206; Carlisle Corp. *v.* Wilson, 13 Ves. Jr. 276, 33 Eng. Reprint 297.

See 19 Cent. Dig. tit. "Equity," §§ 151, 164–166.

27. *Alabama.*— Randle *v.* Carter, 62 Ala. 95; Youngblood *v.* Youngblood, 54 Ala. 486; McCullough *v.* Walker, 20 Ala. 389; Herring *v.* McElderry, 5 Port. 161; Standifer *v.* McWhorten, 1 Stew. 532.

Alaska.— Allen *v.* Myers, 1 Alaska 114.

Arkansas.— Crane *v.* Randolph, 30 Ark. 579; Murphy *v.* Harbison, 29 Ark. 340; Moore *v.* Duncan, 27 Ark. 157; Memphis, etc., R. Co. *v.* Woodruff, 26 Ark. 649; Cummins *v.* Bentley, 5 Ark. 9; *Ex p.* Conway, 4 Ark. 302.

California.— Ketchum *v.* Crippen, 37 Cal. 223; Chipman *v.* Bowman, 14 Cal. 157; Lewis *v.* Tobias, 10 Cal. 574; Merrill *v.* Gorham, 6 Cal. 41; Lupton *v.* Lupton, 3 Cal. 120.

Colorado.— Jaeger *v.* Whitsett, 3 Colo. 105.

Connecticut.— Welles *v.* Rhodes, 59 Conn. 498, 22 Atl. 286; Foote *v.* Percy, 40 Conn. 85; Hood *v.* New York, etc., R. Co., 23 Conn. 609; Salem, etc., Turnpike Co. *v.* Lyne, 18 Conn. 451; Beach *v.* Norton, 9 Conn. 182; Sheldon *v.* Sheldon, 2 Root 512; Willet *v.* Overton, 2 Root 338, 1 Am. Dec. 72; Bird *v.* Holabard, 2 Root 35; Beardsly *v.* Curtice, 1 Root 499; Fitch *v.* Broomfield, 1 Root 467; Strong *v.* McDonald, 1 Root 364; Staniford *v.* Deit, 1 Root 317; Samson *v.* Hunt, 1 Root 207.

District of Columbia.— Buscher *v.* Murray, 21 D. C. 612; Sunderland *v.* Kilbourn, 3 Mackey 506.

Georgia.— Williams *v.* Haynes, 78 Ga. 133; Stokes *v.* McLendon, 73 Ga. 798; Mulligan *v.* Hammil, 60 Ga. 594; Huff *v.* Ripley, 58 Ga. 11; Collins *v.* Clayton, 53 Ga. 649; Irvin *v.* Sanders, 52 Ga. 350; Seago *v.* Harrison, 42 Ga. 189; Gardner *v.* Kersey, 39 Ga. 664, 99 Am. Dec. 484; Koockogey *v.* Flewellen, 24 Ga. 608; Whittington *v.* Summerall, 20 Ga. 345; Hearne Manual Labor School *v.* Robbins, 19 Ga. 134; Shockley *v.* Davis, 17 Ga. 177, 63 Am. Dec. 233; Taylor *v.* Buchan, 16 Ga. 541; Thompson *v.* Manly, 16 Ga. 440.

Idaho.— Washington, etc., R. Co. *v.* Cœur d'Alene R., etc., Co., 2 Ida. (Hasb.) 580, 21 Pac. 562.

Illinois.— Field *v.* Western Springs, 181 Ill. 186, 54 N. E. 929; Archer *v.* Terre Haute, etc., R. Co., 102 Ill. 493; Long *v.* Barker, 85 Ill. 431; Craft *v.* Dickens, 78 Ill. 131; Comstock *v.* Henneberry, 66 Ill. 212; Fisher *v.* Sievres, 65 Ill. 99; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303; Conghron *v.* Swift, 18 Ill. 414; Ross *v.* Buchanan, 13 Ill. 55; Woodward *v.* Seely, 11 Ill. 157, 50 Am. Dec. 445; State Bank *v.* Stanton, 7 Ill. 352; Allebone *v.* North Side Riding Academy, 108 Ill. App. 392; Shorman *v.* Hurd, 107 Ill. App. 471; Chicago, etc., Electric R. Co. *v.* Ferguson, 106 Ill. App. 356; Detroit Copper, etc., Rolling Mills *v.* Ledwidge, 58 Ill. App. 351; Booth *v.* Koehler, 51 Ill. App. 370.

Indiana.— Shoemaker *v.* Axtell, 78 Ind. 561; Kyle *v.* Frost, 29 Ind. 382.

Iowa.— Smith *v.* Short, 11 Iowa 523; Claussen *v.* Lafrenz, 4 Greene 224.

Kansas.— Jordan *v.* Updegraff, McCahon 103.

Kentucky.— Jones *v.* Letcher, 13 B. Mon. 363; Young *v.* Young, 9 B. Mon. 66; Helm *v.* Smith, 4 J. J. Marsh. 288; Scroggin *v.* Allin, 2 J. J. Marsh. 466; Watkin *v.* Owen, 2 J. J. Marsh. 142; Keas *v.* McMillan, 2 J. J. Marsh. 12; Collins *v.* Farquar, 4 Litt. 153; Waggoner *v.* McKinney, 1 A. K. Marsh. 479; Cunningham *v.* Caldwell, Hard. 123.

Maine.— Milliken *v.* Dockray, 80 Me. 82, 13 Atl. 127; Denison Paper Mfg. Co. *v.* Robinson Mfg. Co., 74 Me. 116; Spofford *v.* Bangor, etc., R. Co., 66 Me. 51; Piscataqua F. & M. Ins. Co. *v.* Hill, 60 Me. 178; Coombs *v.* Warren, 17 Me. 404.

Maryland.— Schall *v.* Nusbaum, 56 Md. 512; Hazelhurst *v.* Baltimore, 37 Md. 199; Clayton *v.* Carey, 4 Md. 26.

Massachusetts.— Bushnell *v.* Avery, 121 Mass. 148; Suter *v.* Matthews, 115 Mass. 253; Jones *v.* Newhall, 115 Mass. 244, 15 Am. Rep. 97; Fuller *v.* Cadwell, 6 Allen 503; Pool *v.* Loyd, 5 Metc. 525.

Michigan.— Detroit, etc., Plank Road Co. *v.* Oakland R. Co., 131 Mich. 663, 92 N. W. 346; Cole *v.* McFall, 48 Mich. 227, 12 N. W. 166; Bay City Bridge Co. *v.* Van Etten, 36 Mich. 210; Bonebright *v.* Pease, 3 Mich. 318.

b. Application of Rule in General. This rule, simple enough in terms, becomes very difficult in application, especially in America. It often happens that by statute or judicial development an adequate remedy at law now exists in a class of cases where jurisdiction in chancery was established at a time when there was no remedy at law or where such remedy was inadequate. It also happens that a court of law may afford a remedy entirely adequate in the specific case, whereas chancery jurisdiction has been established in cases of the same class, because in general the legal remedy is inadequate in such cases. Out of this state of affairs two theories have been developed: (1) That the rule is to be taken in a generic sense, as indicating the origin of the jurisdiction and defining generally its grounds and subjects; (2) that it is a constant limit upon the exercise of jurisdiction in the particular case. The former theory is generally adopted.[28]

Mississippi.— McKinney *v.* Willis, 64 Miss. 82, 1 So. 3; Partee *v.* Kortrecht, 54 Miss. 66; Echols *v.* Hammond, 30 Miss. 177; Shotwell *v.* Lawson, 30 Miss. 27, 64 Am. Dec. 145; McAffee *v.* Lynch, 26 Miss. 257.

Missouri.— Cabanne *v.* Lisa, 1 Mo. 683; Cadwaleder *v.* Atchison, 1 Mo. 659.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New Hampshire.— Walker *v.* Walker, 63 N. H. 321, 56 Am. Rep. 514; Moore *v.* Carpenter, 63 N. H. 65; Brown *v.* Concord, 56 N. H. 375; Miller *v.* Scammon, 52 N. H. 609; Rockingham Ten Cent Sav. Bank *v.* Portsmouth, 52 N. H. 17; Kimball *v.* Grafton Bank, 20 N. H. 347.

New Jersey.— Osborne *v.* O'Reilly, 42 N. J. Eq. 467, 4 Atl. 669, 9 Atl. 209; Hoagland *v.* Delaware Tp., 17 N. J. Eq. 106; Redmond *v.* Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418; Higgins *v.* Princeton, 8 N. J. Eq. 309; Freeman *v.* Elmendorf, 7 N. J. Eq. 475.

New York.— Heywood *v.* Buffalo, 14 N. Y. 534; Mutual Ben. L. Ins. Co. *v.* New York, 3 Abb. Dec. 344, 3 Keyes 182, 2 Abb. Pr. N. S. 233, 32 How. Pr. 359 [*affirming* 33 Barb. 322, 20 How. Pr. 416]; Woodruff *v.* Fisher, 17 Barb. 224; Wiswall *v.* McGown, 2 Barb. 270; Smith *v.* Moffat, 1 Barb. 65; Chatfield *v.* Campbell, 35 Misc. 355, 71 N. Y. Suppl. 1004 [*affirmed* in 78 N. Y. Suppl. 1113]; Madison Ave. Baptist Church *v.* Madison Ave. Baptist Church, 26 How. Pr. 72; Hendrickson *v.* Winne, 3 How. Pr. 127; Seymour *v.* Delancey, 3 Cow. 445, 15 Am. Dec. 270 [*reversing* 6 Johns. Ch. 222]; Wiggin *v.* New York, 9 Paige 16; Teller *v.* Van Deusen, 3 Paige 33; Livingston *v.* Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598.

North Carolina.— Smitherman *v.* Allen, 59 N. C. 17; Anderson *v.* Arrington, 54 N. C. 215; Wheeler *v.* Taylor, 41 N. C. 225; Justice *v.* Scott, 39 N. C. 108; Spear *v.* Gillet, 16 N. C. 466; Long *v.* Merrill, 4 N. C. 549, 7 Am. Dec. 700; Glasgow *v.* Flowers, 2 N. C. 233.

Ohio.— Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591; McKee *v.* Mt. Pleasant Bank, 7 Ohio, Pt. II, 176.

Oregon.— Union Power Co. *v.* Lichty, 42 Oreg. 563, 71 Pac. 1044.

Pennsylvania.— Koch's Appeal, 93 Pa. St. 434; Gallagher *v.* Fayette County R. Co., 38 Pa. St. 102; Patterson *v.* Lane, 35 Pa. St. 275; Spangelberger *v.* Leger, 2 Kulp 29; Albert *v.* March, 7 Pa. Co. Ct. 502; Kershaw *v.* Philadelphia Water Department, 15 Wkly. Notes Cas. 415; Henrie *v.* Orangeville Loan Assoc., 1 C. Pl. 43; Pittsburgh, etc., R. Co.'s Appeal, 39 Leg. Int. 414.

Rhode Island.— Stone *v.* Peckham, 12 R. I. 27; Wilbor *v.* Matteson, 8 R. I. 166.

South Carolina.— Atty.-Gen. *v.* Baker, 9 Rich. Eq. 521; Miller *v.* Furse, Bailey Eq. 187.

Tennessee.— Williams *v.* Patterson, 2 Overt. 229.

Texas.— Hinzie *v.* Kempner, 82 Tex. 617, 18 S. W. 659.

Vermont.— Druon *v.* Sullivan, 66 Vt. 609, 30 Atl. 98; Safford *v.* Gallup, 53 Vt. 291; Holmes *v.* Clark, 46 Vt. 22; Barrett *v.* Sargeant, 18 Vt. 365.

Virginia.— Green *v.* Spaulding, 76 Va. 411; Poage *v.* Bell, 3 Rand. 586; Maupin *v.* Whiting, 1 Call 224.

West Virginia.— Zinn *v.* Zinn, 54 W. Va. 483, 46 S. E. 202; Alleman *v.* Kight, 19 W. Va. 201; Hall *v.* Taylor, 18 W. Va. 544.

Wisconsin.— Kelley *v.* Kelley, 80 Wis. 486, 50 N. W. 334; McMillen *v.* Mason, 71 Wis. 405, 37 N. W. 253; Knight *v.* Ashland, 61 Wis. 246, 21 N. W. 72; Shepard *v.* Genung, 5 Wis. 397; Marsh *v.* Edgerton, 2 Pinn. 230, 1 Chandl. 198.

United States.— Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 18 L. ed. 765; Knox *v.* Smith, 4 How. 298, 11 L. ed. 983; Dade *v.* Irwin, 2 How. 383, 11 L. ed. 308; Russell *v.* Clarke, 7 Cranch 69, 3 L. ed. 271; Sawyer *v.* Atchison, etc., R. Co., 119 Fed. 252; Corbus *v.* Alaska Treadwell Gold-Min. Co., 99 Fed. 334; Pullman Palace-Car Co. *v.* Central Transp. Co., 34 Fed. 357; Whitehead *v.* Entwhistle, 27 Fed. 778; Hausmeister *v.* Porter, 21 Fed. 355; Curry *v.* McCauley, 20 Fed. 583; Dahlman *v.* Jacobs, 15 Fed. 863, 5 McCrary 130; Kropholler *v.* St. Paul, etc., R. Co., 2 Fed. 302, 1 McCrary 299; Railroad Co. *v.* Neal, 20 Fed. Cas. No. 11,534, 1 Woods 353; Blakeley *v.* Biscoe, 30 Fed. Cas. No. 18,239, Hempst. 114.

See 19 Cent. Dig. tit. "Equity," § 121.

28. See *infra*, II, A, 2. Where the latter or narrower theory prevails the courts in adopting it have generally been influenced by statutes in terms restricting equity powers to cases where there is no adequate remedy at law. See the following cases:

c. Concurrent Jurisdiction. By virtue of the former of the two theories just stated, wherever equity jurisdiction has been once established, and a remedy at law subsequently created or made effective, and whenever a case is of a class cognizable in equity, but the circumstances render a legal remedy available in the particular case, a party may proceed either at law or in equity. The broad field thus created constitutes what is known as the concurrent jurisdiction of equity.[29] In matters within the concurrent jurisdiction, where equity is first invoked, its jurisdiction will not be defeated by a subsequent proceeding at law.[30] If the action at law be first commenced equity will not assume jurisdiction without the intervention of some special cause rendering the jurisdiction at law inadequate.[31]

Connecticut.— Bulkeley *v.* Welch, 31 Conn. 339; Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421; Willet *v.* Overton, 2 Root 338, 1 Am. Dec. 72. "Equity has cognizance of matters in which adequate relief cannot be had in the ordinary course of law." Rev. St. tit. 12, § 1.

Georgia.— Huff *v.* Ripley, 58 Ga. 11; Collins *v.* Clayton, 53 Ga. 649; Newton Mfg. Co. *v.* White, 47 Ga. 400; Persons *v.* Hill, 33 Ga. Suppl. 141; Norwood *v.* Dickey, 18 Ga. 528; Osborn *v.* Harris County, 17 Ga. 123, 63 Am. Dec. 230; Coleman *v.* Freeman, 3 Ga. 137; McGough *v.* Columbus Ins. Bank, 2 Ga. 151, 46 Am. Dec. 382. Several statutory provisions contain restrictive words. Code, §§ 3084, 3095, 3210.

Maine.— Titcomb *v.* McAllister, 77 Me. 353; Chase *v.* Palmer, 25 Me. 341; Gray *v.* Call, 10 Fed. Cas. No. 5,712, 2 Hask. 242. But see Taylor *v.* Taylor, 74 Me. 582, holding that Rev. St. (1883) c. 77, § 6, gives full equity powers in cases of fraud, limited only by the usage and practice of chancery courts, concurrent with courts of law.

Massachusetts.— Suter *v.* Matthews, 115 Mass. 253; Jones *v.* Newhall, 115 Mass. 244, 15 Am. Rep. 97.

South Carolina.— Hall *v.* Joiner, 1 S. C. 186.

Wisconsin.— In this state there has been quite a strict adherence to the narrower rule without any restrictive statutes. See cases cited *infra*, II, A, 2.

See also Curtis *v.* McIlhenny, 58 N. C. 290, and cases cited *infra*, II, A, 2.

In other jurisdictions such language in general statutes is held to be merely descriptive of general equity jurisdiction and not intended to restrict such jurisdiction. Consequently the broader doctrine prevails in spite of such statutes.

Alabama.— Waldron *v.* Simmons, 28 Ala. 629.

Arkansas.— Hempstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696; *Ex p.* Conway, 4 Ark. 302.

Ohio.— Cram *v.* Green, 6 Ohio 429.

Oregon.— Phipps *v.* Kelly, 12 Oreg. 213, 6 Pac. 707.

United States.— Arkansas Bldg., etc., Assoc. *v.* Madden, 175 U. S. 269, 20 S. Ct. 119, 44 L. ed. 159; Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167; Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358; Whitehead *v.* Shattuck, 138 U. S. 146, 11 S. Ct. 276, 34 L. ed. 873; Lewis *v.* Cocks, 23 Wall. 466, 23 L. ed. 70; Barthet *v.* New Orleans, 24 Fed. 563; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95; U. S. *v.* Myers, 27 Fed. Cas. No. 15,844, 2 Brock. 516. The federal decisions, even those of the supreme court, are not all in harmony with those above cited. Several of these refer to section 16 of the judiciary act of 1789 (Rev. St. § 723), limiting suits in equity to cases where there is no plain, adequate, and complete remedy at law, as requiring the dismissal of bills. Buzzard *v.* Houston, 119 U. S. 347, 7 S. Ct. 249, 30 L. ed. 451, is the strongest of these, reversing a decree and directing a dismissal for want of jurisdiction where the bill sought rescission of a contract on the ground of fraud, it being held that an action of deceit was an adequate remedy under the circumstances. Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. 616, 20 L. ed. 501, expressly recognizes the jurisdiction of equity in such cases, but says it will not generally be exercised when the remedy at law is adequate. The other cases in the supreme court are cases where there was no equity in the bill and therefore no question of concurrent jurisdiction was involved. These are Killian *v.* Ebbinghaus, 110 U. S. 568, 4 S. Ct. 232, 28 L. ed. 246; New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 2 S. Ct. 279, 27 L. ed. 484; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Lewis *v.* Cocks, 23 Wall. 466, 23 L. ed. 70; Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. ed. 174; Hipp *v.* Babin, 19 How. 271, 15 L. ed. 633. In Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394, it was said that there cannot be concurrent jurisdiction at law and in equity where the right and remedy are the same.

29. For the extent and limits of the concurrent jurisdiction see the specific subjects *infra*, II, B. Suits by slaves for freedom seem to have been of concurrent jurisdiction. Aleck *v.* Tevis, 4 Dana (Ky.) 242; Dempsey *v.* Lawrence, Gilm. (Va.) 333.

30. Gainty *v.* Russell, 40 Conn. 450; Meyer *v.* Saul, 82 Md. 459, 33 Atl. 539; Bell *v.* Dewoody, 1 Overt. (Tenn.) 478.

31. *Alabama.*—Wilkinson *v.* Stuart, 74 Ala. 198; Hause *v.* Hause, 57 Ala. 262; Lee *v.* Lee, 55 Ala. 590; Campbell *v.* Conner, 42 Ala. 131.

Illinois.— Cleland *v.* Campbell, 78 Ill. App. 624.

2. EFFECT OF ENLARGEMENT OF REMEDY AT LAW — a. By Statute — (I) *JURISDICTION OF EQUITY GENERALLY NOT OUSTED.* The general rule is that where jurisdiction in equity has become established a statute creating a remedy at law or removing the obstacles at law upon the existence of which the equity jurisdiction was originally founded does not oust equity of that jurisdiction, unless the statute affirmatively discloses the legislative intent to make the legal remedy exclusive.[32] Such intent, however, may appear in the new legislation either from

Massachusetts.— Nash *v.* McCathern, 183 Mass. 345, 67 N. E. 323.

Michigan.— Eaton *v.* Trowbridge, 38 Mich. 454.

New Jersey.— Sweeny *v.* Williams, 36 N. J. Eq. 627.

New York.— Erste Sokolower Congregation Anshe Yosher *v.* First United Royatiner Sokolower Verein, 32 Misc. 269, 66 N. Y. Suppl. 356.

Tennessee.— Williams *v.* Patterson, 2 Overt. 229.

See 19 Cent. Dig. tit. "Equity," §§ 141–145.

Simultaneous suits.— It has been held that where suits have been brought contemporaneously in equity and at law defendant after full answer may move to compel plaintiff to elect which he will pursue. Brooke *v.* Phillips, 6 Phila. (Pa.) 392. See, generally, ELECTION OF REMEDIES, *ante*, p. 251.

Equitable relief with denial of costs.— It has been held that where a defendant in a law action fails to plead a defense there available, and brings suit in equity based on the matter he might have so pleaded, equity will relieve, but deny costs. Sailly *v.* Elmore, 2 Paige (N. Y.) 497. But in some such cases there have been intimations that the jurisdiction becomes exclusive in the court which first acquires it. Hailey *v.* Boyd, 64 Ala. 399; Hardeman *v.* Battersby, 53 Ga. 36.

32. *Alabama.*— Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480; Hailey *v.* Boyd, 64 Ala. 399; Lee *v.* Lee, 55 Ala. 590; Waldron *v.* Simmons, 28 Ala. 629.

Arkansas.— Branton *v.* Branton, 23 Ark. 569.

Connecticut.— Security Co. *v.* Hardenburgh, 53 Conn. 169, 2 Atl. 391.

Florida.— Thrasher *v.* Doig, 18 Fla. 809.

Georgia.— Hardeman *v.* Battersby, 53 Ga. 36.

Illinois.— Labadie *v.* Hewitt, 85 Ill. 341; Babcock *v.* McCamant, 53 Ill. 214; McNab *v.* Heald, 41 Ill. 326.

Kansas.— Shoemaker *v.* Brown, 10 Kan. 383.

Kentucky.— Case *v.* Fishback, 10 B. Mon. 40; Wood *v.* Kendall, 7 J. J. Marsh. 212; Harlan *v.* Wingate, 2 J. J. Marsh. 138; Moore *v.* Waller, 1 A. K. Marsh. 488.

Maryland.— Schroeder *v.* Loeber, 75 Md. 195, 23 Atl. 579, 24 Atl. 226; Barnes *v.* Crain, 8 Gill 391 [*affirming* 1 Md. Ch. 151].

Mississippi.— Mitchell *v.* Otey, 23 Miss. 236; Shaw *v.* Thompson, Sm. & M. Ch. 628.

Missouri.— Dobyns *v.* McGovern, 15 Mo. 662; Clark *v.* Henry, 9 Mo. 339.

New Hampshire.— *In re* Londonderry Baptist Church of Christ, 51 N. H. 424; Wells *v.* Pierce, 27 N. H. 503.

New Jersey.— Sweeny *v.* Williams, 36 N. J. Eq. 627; Irick *v.* Black, 17 N. J. Eq. 189.

New York.— Mayne *v.* Griswold, 3 Sandf. 463, 9 N. Y. Leg. Obs. 25; New York Ins. Co. *v.* Roulet, 24 Wend. 505 [*affirming* 7 Paige 560]; Sailly *v.* Elmore, 2 Paige 497; White *v.* Meday, 2 Edw. 486.

North Carolina.— Oliveira *v.* State University, 62 N. C. 69; Shepherd *v.* Monroe, 4 N. C. 427.

Oregon.— Phipps *v.* Kelly, 12 Oreg. 213, 6 Pac. 707.

Pennsylvania.— Mortland *v.* Mortland, 151 Pa. St. 593, 25 Atl. 150. *Contra*, Gans *v.* Drum, 24 Pa. Co. Ct. 481; Albert *v.* Marsh, 7 Pa. Co. Ct. 502; Buchanan *v.* Noel, 12 Phila. 431; Smith *v.* School Dist., 4 L. T. N. S. 12.

Tennessee.— Williams *v.* Pile, 104 Tenn. 273, 56 S. W. 833; Smith *v.* Taylor, 11 Lea 738; Bright *v.* Newland, 4 Sneed 440; McKoin *v.* Cooley, 3 Humphr. 559; Williams *v.* Patterson, 2 Overt. 229; Hendrick *v.* Dallum, 1 Overt. 427; Hoggat *v.* McCrory, 1 Overt. 8; Chadwell *v.* Jones, 1 Tenn. Ch. 493.

Utah.— Enright *v.* Grant, 5 Utah 334, 15 Pac. 268.

Virginia.— Kelly *v.* Lehigh Min., etc., Co., 98 Va. 405, 36 S. E. 511, 81 Am. St. Rep. 736; Durrett *v.* Davis, 24 Gratt. 302.

Washington.— Anderson *v.* Provident Life, etc., Co., 25 Wash. 20, 64 Pac. 933; Carl *v.* West Aberdeen Land, etc., Co., 13 Wash. 616, 43 Pac. 890.

West Virginia.— Corrothers *v.* Board of Education, 16 W. Va. 527.

Wisconsin.— Catlin *v.* Wheeler, 49 Wis. 507, 5 N. W. 935.

United States.— Barthet *v.* New Orleans, 24 Fed. 563; Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

England.— Atkinson *v.* Leonard, 3 Bro. Ch. 218, 29 Eng. Reprint 499; Kemp *v.* Pryor, 7 Ves. Jr. 237, 32 Eng. Reprint 96; Bromley *v.* Holland, Coop. Ch. 9, 10 Eng. Ch. 9, 7 Ves. Jr. 3, 32 Eng. Reprint 2; Toulmin *v.* Price, 5 Ves. Jr. 235, 31 Eng. Reprint 563.

See 19 Cent. Dig. tit. "Equity," §§ 146–150.

Statutes illustrating rule.— It has been held that jurisdiction in equity continues notwithstanding the creation of a special proceeding available to plaintiff (Kinnan *v.* Forty-Second St., etc., R. Co., 140 N. Y. 183, 35 N. E. 498 [*affirming* 1 Misc. 457, 21 N. Y. Suppl. 789]) and after a statute allowing treble damages (Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625). An act

the express language of the enactment or by clear implication deduced from such language.[33]

(II) *Exceptions to Foregoing Rule.* To the general rule above stated there are many exceptions. In those states where the existence of a remedy at law, adequate in the particular case, defeats the jurisdiction of equity, it is held that the statutory enlargement of legal remedies ousts *pro tanto* the jurisdiction of equity.[34] There are in other states, however, cases denying jurisdiction solely upon the ground that a legal remedy created by statute is adequate.[35] And everywhere the rule has been departed from to a greater or less extent with regard to specific subjects and grounds of jurisdiction.[36]

of parliament provided for an exchange of lands by an award of commissioners and allowed an appeal to the quarter sessions from such award. This was held not to deprive chancery of jurisdiction to relieve against mistake in the award. Beaufort *v.* Neeld, 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399. So where by act of parliament a city was authorized to borrow money and required to account annually to parliament, a bill in chancery on behalf of all rate-payers asking for an accounting was sustained. Plunkett *v.* Dublin, 1 Bligh N. S. 312, 30 Rev. Rep. 43, 4 Eng. Reprint 888.

33. Dorsey *v.* Reese, 14 B. Mon. (Ky.) 157; Beecher *v.* Mead, 49 Mich. 162, 13 N. W. 498; Oliveira *v.* State University, 62 N. C. 69. In Virginia it is said that in order to oust equity of jurisdiction the statute must use restrictive or prohibitory words. Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235. Where a statute creates a right and also provides a remedy the general rule in such cases prevails, that the remedy so provided is exclusive. Askew *v.* Myrick, 54 Ala. 30; Salem, etc., Turnpike Co. *v.* Lyme, 18 Conn. 451; Woodruff *v.* State, 77 Miss. 68, 25 So. 483; Dimmick *v.* Delaware, etc., R. Co., 180 Pa. St. 468, 36 Atl. 866; Patterson *v.* Lane, 35 Pa. St. 275. The act of congress providing an income tax (12 U. S. St. at L. 432) permitted an appeal from the assistant tax assessor to the tax assessor (§ 93). It was held that there could be no relief in equity, at least until this remedy had been exhausted. Magee *v.* Denton, 16 Fed. Cas. No. 8,943, 5 Blatchf. 130. As to the refusal of equity to interfere where the entire subject, right as well as remedy, is dependent on statute, see Armstrong *v.* Cincinnati, 5 Ohio 223; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Lawrence *v.* Knight, 4 Phila. (Pa.) 355.

34. *Georgia.*— Norwood *v.* Dickey, 18 Ga. 528; Osborn *v.* Harris County, 17 Ga. 123, 63 Am. Dec. 230; McGough *v.* Columbus Ins. Bank, 2 Ga. 151, 46 Am. Dec. 382. The Georgia court confines this restrictive principle to statutory enlargements of the legal remedy, and as to enlargements by judicial development follows the general rule. Newton Mfg. Co. *v.* White, 47 Ga. 400. And see cases cited *infra*, II, A, 2, b.

Maine.—Titcomb *v.* McAllister, 77 Me. 353; Chase *v.* Palmer, 25 Me. 341.

Massachusetts.— Weiss *v.* Levy, 166 Mass. 290, 44 N. E. 225; Curtis *v.* Mansfield, 11 Cush. 152. In Husband *v.* Aldrich, 135 Mass. 317, the decision went upon the ground that the statute creating the remedy by implication excluded other remedies, rather than that the mere existence of such a remedy in itself ousted equity.

Wisconsin.— Wells *v.* Walsh, 87 Wis. 67, 57 N. W. 969; Mackey *v.* Michelstetter, 77 Wis. 210, 45 N. W. 1087; Remington *v.* Foster, 42 Wis. 608; Almy *v.* Platt, 16 Wis. 169; Graham *v.* La Crosse, etc., R. Co., 10 Wis. 459.

United States.— Gray *v.* Call, 10 Fed. Cas. No. 5,712, 2 Hask. 242, construing laws of Maine.

See 19 Cent. Dig. tit. "Equity," §§ 146–150.

35. *Alabama.*—Troy Fertilizer Co. *v.* Prestwood, 116 Ala. 119, 22 So. 262. In Perrine *v.* Carlisle, 19 Ala. 686, a defendant to a judgment at law was not permitted to obtain credit in equity for a part payment because a statutory proceeding to supersede the execution was available, but this is not the case of a statutory creation of a remedy but merely a statutory change of remedy, substituting this proceeding for *audita querela*. See Lockhart *v.* McElroy, 4 Ala. 572.

Arkansas.—Crow *v.* Dallas County, 13 Ark. 625.

Idaho.— Ada County *v.* Bullen Bridge Co., 5 Ida. 188, 47 Pac. 818, 36 L. R. A. 367.

Indiana.— Barnes *v.* Sammons, 128 Ind. 596, 27 N. E. 747.

Kansas.— Linvill *v.* Brown, 9 Kan. App. 747, 60 Pac. 476.

Michigan.— Torrent *v.* Muskegon Booming Co., 22 Mich. 354.

New Hampshire.— Miller *v.* Scammon, 52 N. H. 609.

New Jersey.—Chamberlain *v.* Chamberlain, (Ch. 1890) 20 Atl. 1085.

New York.— Wilber *v.* Wilber, 83 Hun 203, 31 N. Y. Suppl. 661; Smith *v.* Moffat, 1 Barb. 65.

North Carolina.— Davidson *v.* Nelson, 9 N. C. 113.

Washington.— Meeker *v.* Gilbert, 3 Wash. Terr. 369, 19 Pac. 18.

See 19 Cent. Dig. tit. "Equity," §§ 146–150.

36. See Creditors' Suits, 12 Cyc. 1; Discovery, 14 Cyc. 301 *et seq.* See also *infra*, II, B.

Attachment and garnishment.— It is generally held that a bill in equity will not lie

(III) *Jurisdiction Declined When Legal Remedy Adequate.* When jurisdiction has become concurrent through statutory enlargement of legal remedy or from other causes, a court of equity, although recognizing the existence of its jurisdiction, will generally decline to exercise it where the remedy at law is complete and adequate, and no special circumstances exist demanding the interference of equity.[37] Stronger equitable features must appear, and the court is more reluctant to exercise its power where doubts arise as to the existence of jurisdiction.[38] Where the existence of a concurrent jurisdiction is recognized, whether it will be exercised or declined rests largely in the discretion of the court, considerations as to the adequacy of the legal remedy controlling the exercise of such discretion.[39]

(IV) *When Statutory Remedy Is Inadequate.* The rule is uniform that where a remedy at law after statutory enlargement remains incomplete or otherwise inadequate, as where its pursuit is obstructed by such obstacles as would originally have grounded jurisdiction in equity, jurisdiction is not ousted and the court will not hesitate to exercise it.[40] It has been held, however, that equity

where a plaintiff could attain his object by attachment, garnishment, or a similar statutory remedy.

Alabama.— Phillips *v.* Ash, 63 Ala. 414.

Georgia.— Stephens *v.* Whitehead, 75 Ga. 294; Field *v.* Jones, 10 Ga. 229; McGough *v.* Columbus Ins. Bank, 2 Ga. 151, 46 Am. Dec. 382. But see Carter *v.* Lipsey, 70 Ga. 417.

Illinois.— Newman *v.* Commercial Nat. Bank, 156 Ill. 530, 41 N. E. 156 [*affirming* 55 Ill. App. 534].

Indiana.— Latham *v.* Barlow, 6 Blackf. 97.

Michigan.— Ideal Clothing Co. *v.* Hagle, 126 Mich. 262, 85 N. W. 735.

Rhode Island.— See Goding *v.* Pierce, 13 R. I. 532.

South Carolina.— Dickison *v.* Palmer, 2 Rich. Eq. 407.

Virginia.— Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223.

On the other hand it has been held that a chancery power to proceed by garnishment or sequestration continues as a concurrent remedy after the enactment of a statute providing for garnishment at law. King *v.* Payan, 18 Ark. 583; Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74. And this is true where the legal remedy is complicated with matters of purely equitable cognizance. Galveston, etc., R. Co. *v.* Hume, 59 Tex. 47.

Married women's acts.— The effect of the statutes removing the disabilities of married women depends so much on the particular language employed and upon cognate legislation that it is impossible to generalize very broadly as to their operation on equity jurisdiction. Cases hold that the statutes securing to married women their separate property and permitting them to sue and be sued as *femes sole* do not deprive equity of jurisdiction to impose a liability upon their separate estates. Rooney *v.* Michael, 84 Ala. 585, 4 So. 421; Ogden *v.* Guice, 56 Miss. 330; Mitchell *v.* Otey, 23 Miss. 236; Phipps *v.* Kelly, 12 Oreg. 213, 6 Pac. 707; Meyers *v.* Rahte, 46 Wis. 655, 1 N. W. 353. In Alabama it is held that such a statute permitting the woman to sue at law forbids a bill in equity to recover her separate estate. Daniel *v.* Stewart, 55 Ala. 278; Sessions *v.* Sessions, 33 Ala. 522. But in Maryland the contrary is held. Schroeder *v.* Loeber, 75 Md. 195, 23 Atl. 579, 24 Atl. 226.

Usury does not justify a resort to equity to set aside the agreement unless some independent equity exists, where the defense of usury is available at law. Allerton *v.* Belden, 49 N. Y. 373; Skinner *v.* Christmas, Clarke (N. Y.) 268.

37. *District of Columbia.*— Mann *v.* MacDonald, 3 App. Cas. 456.

Idaho.— Ada County *v.* Bullen Bridge Co., 5 Ida 79, 47 Pac. 818, 95 Am. St. Rep. 180, 36 L. R. A. 367.

Illinois.— Weir *v.* Mowe, 81 Ill. App. 287; Hales *v.* Holland, 92 Ill. 494; Robinson *v.* Chesseldine, 5 Ill. 332.

New York.— Gorman *v.* Low, 2 Edw. 324.

Ohio.— Rosenstiel *v.* Jones Bros. Electric Co., 6 Ohio Cir. Dec. 27.

United States.— See Brown *v.* Arnold, 127 Fed. 387, lost instrument.

See 19 Cent. Dig. tit. "Equity," §§ 146–150.

The courts frequently fail to distinguish between holding that they have no jurisdiction and declining to exercise jurisdiction possessed. Many of the cases cited *supra*, II, A, 1, a, would doubtless appear here if this distinction had been observed. Such would necessarily be true of all those cases cited from jurisdictions holding the broader theory (see *supra*, II, A, 2, a, (I)) where the remedy at law was derived from statute.

38. Knight *v.* Hardeman, 17 Ga. 253; Hood *v.* North Eastern R. Co., L. R. 11 Eq. 116, 40 L. J. Ch. 17, 23 L. T. Rep. N. S. 433, 19 Wkly. Rep. 266.

39. Brush Electric Co.'s Appeal, 114 Pa. St. 574, 7 Atl. 794; Bierbower's Appeal, 107 Pa. St. 14; New York Mut. L. Ins. Co. *v.* Pearson, 114 Fed. 395.

40. *Georgia.*— Heidingsfelder *v.* Slade, 60 Ga. 396; Osborn *v.* Harris County, 17 Ga. 123, 63 Am. Dec. 230.

Kentucky.— Darnall *v.* Jones, 72 S. W. 1108, 24 Ky. L. Rep. 2090; Robertson *v.* Robertson, 20 S. W. 543, 14 Ky. L. Rep. 505.

cannot so supply the defects of a statutory remedy incorporate with the right itself.[41]

(v) *State Statutes Inoperative on Federal Jurisdiction.* A federal court is not deprived of jurisdiction in equity because a state statute has provided a remedy at law in such cases, however adequate such remedy may be.[42] When a right is dependent on a state statute, the jurisdiction of the federal court, as between law and equity, must be determined by the essential character of the case.[43] A state statute giving a remedy in equity does not confer equitable powers in such cases on the federal court.[44]

b. By Judicial Development. Equity jurisdiction once established because of the original inadequacy or absence of remedy at law is not defeated because the law courts without statutory authority have extended the scope of their remedies so far as to render them adequate. This rule is practically uniform.[45]

Michigan.— Torrent *v.* Muskegon Booming Co., 22 Mich. 354.

New Jersey.— Chamberlain *v.* Chamberlain, (Ch. 1890) 20 Atl. 1085.

New York.— Morse *v.* Hovey, 1 Barb. Ch. 404; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. 625.

Ohio.— Rote *v.* Stratton, 3 Ohio S. & C. Pl. Dec. 156, 2 Ohio N. P. 27.

Wisconsin.— Wells *v.* Walsh, 87 Wis. 67, 57 N. W. 969; Mackey *v.* Michelstetter, 77 Wis. 210, 45 N. W. 1087; Remington *v.* Foster, 42 Wis. 608.

United States.— New Orleans *v.* Fisher, 91 Fed. 574, 34 C. C. A. 15.

England.— Troup *v.* Ricardo, 4 De G. J. & S. 489, 10 Jur. N. S. 1161, 34 L. J. Ch. 91, 11 L. T. Rep. N. S. 399, 13 Wkly. Rep. 147, 69 Eng. Ch. 376.

See 19 Cent. Dig. tit. "Equity," §§ 146–150.

41. As where a statute incorporating a canal company provided a special remedy for the assessment of damages caused by its works, and the remedy failed because of the insolvency of the company. Stump's Appeal, 1 Walk. (Pa.) 420.

Attachment or garnishment.— In Rhode Island it is held that rights and remedies by attachment or garnishment are of this character and cannot be aided in equity. Godding *v.* Pierce, 13 R. I. 532. Elsewhere it is held that if the remedy by attachment or garnishment is inadequate resort may be had to equity, where equitable grounds appear. Carter *v.* Lipsey, 70 Ga. 417; Galveston, etc., R. Co. *v.* Hume, 59 Tex. 47; Jones *v.* Stewart, (Tenn. Ch. App. 1900) 61 S. W. 105.

42. Smith *v.* Reeves, 178 U. S. 436, 444, 20 S. Ct. 919, 44 L. ed. 1140; Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052; McConihay *v.* Wright, 121 U. S. 201, 7 S. Ct. 940, 30 L. ed. 932; Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453; Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Peck *v.* Ayers, etc., Tie Co., 116 Fed. 273, 53 C. C. A. 551; Pokegama Sugar Pine Lumber Co. *v.* Klamath River Lumber, etc., Co., 96 Fed. 34; Chicago First Nat. Bank *v.* Steinway, 77 Fed. 661; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 68 Fed. 19, 15 C. C. A. 184; Missouri, etc., R. Co. *v.* Elliott, 56 Fed. 772; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. 970; De la Vergne Refrigerating Mach. Co. *v.* Montgomery Brewing Co., 46 Fed. 829. But see Bloch *v.* Abrahams, 30 Fed. 546; Fletcher *v.* New Orleans, etc., R. Co., 20 Fed. 345; Frazer *v.* Colorado Dressing, etc., Co., 5 Fed. 163, 2 McCrary 11; Cropper *v.* Coburn, 6 Fed. Cas. No. 3,416, 2 Curt. 465; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95. The supreme court has, however, held that where the only ground of equitable interposition was that plaintiff had not the legal title to the demand, if the state statute permitted the real party in interest to sue at law such procedure would be adopted under the Practice Conformity Act (U. S. Rev. St. § 914) and that a federal action should be at law. Thompson *v.* Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765. So too it has been held that the Practice Conformity Act adopts a state statute providing for setting aside a judgment on the ground of fraud, casualty, or misfortune, and excludes federal equity jurisdiction in cases within the act. Travelers' Protective Assoc. of America *v.* Gilbert, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538.

43. Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453.

44. Morrison *v.* Marker, 93 Fed. 692; Gombert *v.* Lyon, 80 Fed. 305. In the latter case a suit to quiet title brought under a state statute against a defendant in possession was removed to the federal court, which held that while it could not be therein prosecuted it should not be dismissed but should be remanded to the state court. But "where a state statute creates a right and a remedy for its protection or enforcement, and such remedy substantially conforms to the procedure in chancery, it, in the absence of a plain, adequate and complete remedy at law, may be pursued on the equity side of a federal court." Jones *v.* Mutual Fidelity Co., 123 Fed. 506, 518, per Bradford, C. J.

45. *Georgia.*— Newton Mfg. Co. *v.* White, 47 Ga. 400; Persons *v.* Hill, 33 Ga. Suppl. 141. See *dictum contra*, Norwood *v.* Dickey, 18 Ga. 528.

Illinois.—New York Bank Note Co. *v.* Kerr, 77 Ill. App. 53, as to relief of sureties.

Indiana.— Peck *v.* Braman, 2 Blackf. 141.

3. Loss of Remedy at Law — a. Remedy Lost by Neglect, Etc. It is well settled that where an adequate remedy at law has been available but has been lost, either through positive negligence or merely by failure to seek it at the proper time, equity will not interpose to grant relief.[46] This rule is usually

New Hampshire.— Walker *v.* Cheever, 35 N. H. 339.

New Jersey.— Reeves *v.* Morgan, 48 N. J. Eq. 415, 21 Atl. 1040, lost instruments.

New York.— Minturn *v.* Farmers' L. & T. Co., 3 N. Y. 498 (suretyship); Varet *v.* New York Ins. Co., 7 Paige 560 (extension of assumpsit); Gridley *v.* Garrison, 4 Paige 647; Sailly *v.* Elmore, 2 Paige 497; King *v.* Baldwin, 17 Johns. 384, 8 Am. Dec. 415.

Ohio.— Cram *v.* Green, 6 Ohio 429.

Pennsylvania.— Ressler *v.* Witmer, 1 Pearson 174. It is held that when the legislature granted equity powers to the court such grant was of the full chancery jurisdiction and was not restricted by the system theretofore enforced, whereby equitable relief was administered through the medium of common-law forms. Wesley Church *v.* Moore, 10 Pa. St. 273.

Tennessee.— Bell *v.* Dewoody, 1 Overt. 478 (lost instruments); Wilson *v.* Kilcannon, 1 Overt. 201 (equitable defense allowed in ejectment).

Vermont.— Viele *v.* Hoag, 24 Vt. 46, suretyship.

Virginia.— Hull *v.* Watts, 95 Va. 10, 27 S. E. 829, mistake.

United States.— Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063, lost instruments.

England.— Slim *v.* Croucher, 1 De G. F. & J. 518, 6 Jur. N. S. 437, 29 L. J. Ch. 273, 8 Wkly. Rep. 347, 62 Eng. Ch. 401; Eyre *v.* Everett, 2 Russ. 381, 382, 3 Eng. Ch. 381, in which latter case Lord Eldon used the following language, which has served as a text for many of the American opinions: "This court will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to have fallen in love with the same or a similar jurisdiction, and has attempted (the attempt for the most part is not very successful) to administer such relief as originally was to be had here and here only."

46. *Alabama.*—Herbert *v.* Hobbs, 3 Stew. 9.

Arkansas.— Jamison *v.* May, 13 Ark. 600.

California.— Merrill *v.* Gorham, 6 Cal. 41.

Illinois.— Smith *v.* Powell, 50 Ill. 21; Ramsey *v.* Perley, 34 Ill. 504; Lucas *v.* Spencer, 27 Ill. 15; Peoria *v.* Kidder, 26 Ill. 351; Elston *v.* Blanchard, 3 Ill. 420; Beaugenon *v.* Turcotte, 1 Ill. 167; Morel *v.* Bagley, 1 Ill. 94, 12 Am. Dec. 144; Klinesmith *v.* Van Bramer, 104 Ill. App. 384; Commercial Nat. Bank *v.* Stoddard, 70 Ill. App. 79; Beveridge *v.* Hewitt, 8 Ill. App. 467.

Iowa.— Dalter *v.* Laue, 13 Iowa 538.

Kentucky.— Paynter *v.* Evans, 7 B. Mon. 420; Mershon *v.* Commonwealth Bank, 6 J. J. Marsh. 438; Young *v.* Dorsey, 2 Litt. 202; Veech *v.* Pennebaker, 2 Bibb 326; Holt *v.* Graham, 2 Bibb 192.

Maryland.—Smith *v.* Meredith, 30 Md. 429; East Baltimore Station Methodist Protestant Church *v.* Baltimore, 6 Gill 391, 48 Am. Dec. 540; Nelson *v.* Turner, 2 Md. Ch. 73.

Massachusetts.— Forward *v.* Hampshire, etc., Canal Co., 22 Pick. 462.

Mississippi.— Shipp *v.* Wheeless, 33 Miss. 646; Finney *v.* Harris, 30 Miss. 36.

New Jersey.— Vaughn *v.* Johnson, 9 N. J. Eq. 173.

New York.— Schroeppell *v.* Shaw, 3 N. Y. 446; Penny *v.* Martin, 4 Johns. Ch. 566.

North Carolina.— Wells *v.* Goodbread, 36 N. C. 9; Alley *v.* Ledbetter, 16 N. C. 449; Gatlin *v.* Kilpatrick, 4 N. C. 147, 6 Am. Dec. 557.

Ohio.— Johnson *v.* Laughead, Tapp. 61.

Oregon.— Fahie *v.* Pressey, 2 Oreg. 23, 80 Am. Dec. 401.

Pennsylvania.— U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31.

South Carolina.— Williamson *v.* King, 1 McMull. 41; Dyson *v.* Leek, 2 Strobh. Eq. 239; Wilson *v.* Chesire, 1 McCord Eq. 233; Inglis *v.* Nutt, 2 Desauss. 623.

Tennessee.— Staunton *v.* Clark, 9 Heisk. 669.

Texas.— Crawford *v.* Wingfield, 25 Tex. 414; Moore *v.* Torrey, 1 Tex. 42.

United States.— Walker *v.* Robbins, 14 How. 584, 14 L. ed. 552; Hendrickson *v.* Hinckley, 17 How. 443, 15 L. ed. 123 [*affirming* 11 Fed. Cas. No. 6,357, 5 McLean 211]; Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201; Kidwell *v.* Masterson, 14 Fed. Cas. No. 7,758, 3 Cranch C. C. 52; Wynn *v.* Wilson, 30 Fed. Cas. No. 18,116, Hempst. 698.

England.— Bateman *v.* Willoe, 1 Sch. & Lef. 201.

See 19 Cent. Dig. tit. "Equity," § 122.

Voidable assessment.— Where a remedy at law was provided against a voidable assessment and not pursued, the court refused an injunction restraining a sale of property under the assessment. Cleveland *v.* Essex Public Road Bd., 31 N. J. Eq. 473.

New trial.— The court of exchequer refused on a bill in equity to set aside a verdict at law because of facts discovered after the trial, where such facts might have been established at the trial on cross-examination. Taylor *v.* Sheppard, 1 Y. & C. Exch. 271.

Failure to perfect right.— Where one through his own fault fails to perfect his legal right equity refuses relief on the same principle as in cases where he has neglected to assert such right. Thus where one refused to join his partner in procuring the allowance of a preëmption claim and the partner secured it alone the heirs of the former were not permitted to share in the land. Farber *v.* Levi, Morr. (Iowa) 372. Where one took a foreign bill of exchange in pay-

invoked in cases where a defendant in an action at law fails to interpose a defense which was there available, and then applies to a court of equity for relief against the judgment.[47] It is invoked also where defendant at law might have obtained redress by appeal or certiorari,[48] and in cases where a remedy was available by motion in the law proceeding.[49] Where, however, the bill is founded upon matters of original equity jurisdiction and not merely upon the loss of the remedy at law, it is held sometimes that relief will be given, although plaintiff might have availed himself of the equitable feature in the law action.[50] And where the legal defense would be futile, as where it depends on evidence inadmissible at law but potent in equity, plaintiff may have relief without showing any other excuse for not defending at law.[51]

b. Loss of Remedy by Accident or Fraud. On the other hand the fact that one has lost his remedy at law through accident or the fraud of his adversary is in itself a familiar ground for invoking the aid of equity.[52] To obtain such relief plaintiff must affirmatively show that the loss of legal remedy was occasioned

ment for slaves and payment was refused and the bill not protested, equity refused to compel either a return of the slave or payment of the price. Love *v.* Raper, 39 N. C. 475. See also Stokes *v.* Lebanon, etc., Turnpike Co., 6 Humphr. (Tenn.) 241; Roberts *v.* Moody, 107 Wis. 245, 83 N. W. 307.

47. *Alabama.*— Nelms *v.* Prewitt, 37 Ala. 389.

Connecticut.— Webb *v.* Fitch, 1 Root 177.

Delaware.— Conner *v.* Pennington, 1 Del. Ch. 177.

Illinois.— Dickerson *v.* Highway Com'rs, 18 Ill. App. 88.

Iowa.— Murphy *v.* Cuddihy, 111 Iowa 645, 82 N. W. 999; McFaul *v.* Woodbury County, 57 Iowa 99, 10 N. W. 296.

Mississippi.— Fleming *v.* Nunn, 61 Miss. 603; Moody *v.* Harper, 38 Miss. 599.

New Jersey.— Isham *v.* Cooper, 56 N. J. Eq. 398, 37 Atl. 462, 39 Atl. 760; Quackenbush *v.* Van Riper, 1 N. J. Eq. 476.

Virginia.— Terrel *v.* Dick, 1 Call 546; Maupin *v.* Whiting, 1 Call 224.

Wisconsin.— Barber *v.* Rukeyser, 39 Wis. 590; Marsh *v.* Edgerton, 2 Pinn. 230, 1 Chandl. 198.

England.— Bateman *v.* Willoe, 1 Sch. & Lef. 201; Protheroe *v.* Forman, 2 Swanst. 227, 36 Eng. Reprint 602; *Ex p.* Goodwin, 2 Vern. Ch. 696, 23 Eng. Reprint 1051; Stephenson *v.* Wilson, 2 Vern. Ch. 325, 23 Eng. Reprint 811; Anonymous, 1 Vern Ch. 119, 23 Eng. Reprint 356. See also JUDGMENTS.

See 19 Cent. Dig. tit. "Equity," § 122.

Failure to seek evidence in proof of a defense pleaded debars relief as well as a failure to plead the defense. Marsh *v.* Edgerton, 2 Pinn. (Wis.) 230, 1 Chandl. (Wis.) 198.

Statutory jurisdiction.— The rule was held not to apply to a failure to defend on the ground that a contract sued on was founded on a gambling consideration, where the statute expressly conferred jurisdiction in equity in all cases of gambling consideration. Cheatham *v.* Young, 5 Ala. 353.

48. Klinesmith *v.* Van Bamer, 104 Ill. App. 384; Dickerson *v.* Highway Com'rs, 18 Ill. App. 88; Beveridge *v.* Hewitt, 8 Ill. App. 467; McFaul *v.* Woodbury County, 57 Iowa 99, 10 N. W. 296; Greenup *v.* Rennix, Hard. (Ky.) 594; Fleming *v.* Nunn, 61 Miss. 603.

49. Commercial Nat. Bank *v.* Stoddard, 70 Ill. App. 79; Nelson *v.* Turner, 2 Md. Ch. 73; Barber *v.* Rukeyser, 39 Wis. 590.

50. *Alabama.*— Cheatham *v.* Young, 5 Ala. 353.

Georgia.— Waters *v.* Perkins, 65 Ga. 32; Elder *v.* Allison, 45 Ga. 13.

Kentucky.— Harlan *v.* Wingate, 2 J. J. Marsh. 138.

Maryland.— Harwood *v.* Jones, 10 Gill & J. 404, 32 Am. Dec. 180.

Massachusetts.— Gargano *v.* Pope, 184 Mass. 571, 69 N. E. 343.

New Jersey.— Quackenbush *v.* Van Riper, 1 N. J. Eq. 476.

West Virginia.— Black *v.* Smith, 13 W. Va. 780, construing Code (1868), c. 126, §§ 5, 6.

See 19 Cent. Dig. tit. "Equity," § 122.

51. Roxbury *v.* Huston, 39 Me. 312; Marsh *v.* Edgerton, 2 Pinn. (Wis.) 230, 1 Chandl. (Wis.) 198. The cases relating to attempts to base jurisdiction on the loss of a legal remedy, once but no longer available, must be distinguished from those relating to the adequacy of a legal remedy still available. As to the latter see *infra*, II, A, 5.

52. See *infra*, II, B, 2, 4. The excuse must be founded upon matter of modern equitable cognizance. An early Kentucky case denied relief in equity against a judgment, where the equity asserted was that the action was brought by a tory, in a tory neighborhood, and that plaintiff had been afraid to go there and defend. It was intimated that relief might have been given if it had been clearly shown that there was a reasonable belief of personal danger. Holt *v.* Graham, 2 Bibb (Ky.) 192. On the principle stated in the text a court of equity will appraise the future rent under a lease providing arbitration for that purpose, where the arbitration fails without fault of plaintiff. Grosvenor *v.* Flint, 20 R. I. 21, 37 Atl. 304. Otherwise where the arbitration is to assess past damages, for there the legal remedy is available. Quaide *v.* Pennsylvania R. Co., 6 Pa. Dist. 391.

by such matters of equitable excuse, unmixed with negligence on plaintiff's part.[53]

c. Remedy Barred by Statute of Limitations. It should follow from the foregoing principles that an appeal to equity cannot be made on the ground that plaintiff has lost his remedy at law through the operation of the statute of limitations, unless at least he was prevented from suing by accident or fraud. The refusal of courts of equity to consider such statutes as binding upon them has led to many applications on this ground, which have generally been disposed of on the question of laches rather than jurisdiction.[54] These cases are generally treated as cases where plaintiff has lost his legal remedy through his own neglect.[55] While it is said that equity will remove the bar proceeding from lapse of time, as it would any other legal advantage, if sought to be used unconscientiously,[56] such relief is in America usually denied.[57] A court of equity will entertain a bill where one would be unnecessary except for the fact that the early termination of the statutory period would defeat another remedy.[58] And where one carries on in a court of equity an unfounded litigation until his adversary's legal rights are barred equity will itself afford a substitute for the legal right which has been lost.[59]

d. Remedy at Law Unsuccessfully Attempted. Where one has asserted a demand or defense in an action at law and has been defeated upon the ground that such matter was of equitable cognizance, he is not thereby barred from relief in equity.[60] In such case a court of equity will not consider whether the rejection of the matter by the court of law was proper or improper, its decision thereof being conclusive.[61] If, however, the matter is one of concurrent jurisdiction and the party seeks his remedy at law, and is there defeated on the merits, he cannot have relief in equity except upon the ground of fraud, accident, or mistake.[62]

53. Thomason *v.* Fannin, 54 Ga. 361; Jevne *v.* Osgood, 57 Ill. 340; Sanger *v.* Fincher, 27 Ill. 346; Elston *v.* Bowman, 3 T. B. Mon. (Ky.) 37; Cunningham *v.* Caldwell, Hard. (Ky.) 123; Atherton *v.* Hull, 12 W. Va. 170.

54. See *infra*, IV.

55. U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Baker *v.* Cummings, 169 U. S. 189, 18 S. Ct. 367, 42 L. ed. 711; Glenn *v.* Dorsheimer, 24 Fed. 536. In Chemical Nat. Bank *v.* Kissane, 32 Fed. 429, 13 Sawy. 20, the decision went upon the ground that the statute in question (that of California) provided for every exception intended to be allowed. In Walker *v.* Smith, 8 Yerg. (Tenn.) 238, it was held that a court of equity has no power, on account of any supposed inequity, to restrain a party from pleading the statute. The court will not establish a lien in a partition suit relating to lands of a decedent where the creditor presented no claim within the prescribed period. Baird *v.* Chapman, 120 Ill. 537, 12 N. E. 73.

56. Bond *v.* Hopkins, (1802) 1 Sch. & Lef. 413.

57. Professions of honest intentions and of solicitude to discharge the debt will not give equity jurisdiction to relieve against the statute. Wickliffes *v.* Lyon, 5 J. J. Marsh. (Ky.) 84. Nor will the fact that a creditor residing abroad did not learn of the decease of his debtor until a special statute had run. Sykes *v.* Meacham, 103 Mass. 285.

58. McDonald *v.* Vinson, 56 Miss. 497, where a bill to enforce a deed of trust was entertained upon the ground that there was no time for the trustee to advertise the sale before the statute of limitations would operate upon the debt.

59. East India Co. *v.* Campion, 11 Bligh N. S. 158, 6 Eng. Reprint 291. See *infra*, IV, C, 11.

60. Nelson *v.* Dunn, 15 Ala. 501; King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415 [*reversing* 2 Johns. Ch. 554]; Varick *v.* Edwards, Hoffm. (N. Y.) 382; Sims *v.* Aughtery, 4 Strobh. Eq. (S. C.) 103.

61. Brooks *v.* Carneal, Litt. Sel. Cas. (Ky.) 164; Ford *v.* Wilson, 2 Bibb (Ky.) 538; Asbury Park First Nat. Bank *v.* Albertson, (N. J. Ch. 1900) 47 Atl. 818; Rees *v.* Smith, 1 Ohio 124, 13 Am. Dec. 599. This is sometimes put upon the ground that defendant, having successfully excluded the matter at law, is estopped from asserting in equity that it should have been received at law. Radcliff *v.* High, 2 Rob. (Va.) 271. But where judgment was suffered at law because of the incompetency of defendants as witnesses, and two of defendants then assigned their interests to the others, who sought relief in equity, such relief was denied upon the ground that the assignors might have rendered themselves competent by assigning prior to the trial at law, and so have rendered the legal proceeding available. Campbell *v.* Briggs, 4 Rich. Eq. (S. C.) 370.

62. Nelson *v.* Dunn, 15 Ala. 501; Haughy *v.* Strang, 2 Port. (Ala.) 177, 27 Am. Dec. 648; Hempstead *v.* Watkins, 6 Ark. 317, 42

4. What Constitutes Adequacy of Remedy — a. In General. The existence of a remedy at law does not deprive equity of jurisdiction unless such remedy be adequate.[63] By this is meant that it must be clear, complete, and "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."[64]

b. Efficiency of Remedy. To render a remedy efficient it must afford an actual and substantial protection of the precise right of the party. Therefore, although a remedy might be had at law sufficient in a general way to balance the wrong complained of, it is inefficient if either the nature of the relief afforded or obstacles in the procedure for attaining it render it incommensurate with the right.[65]

Am. Dec. 696; Morrison *v.* Hart, 2 Bibb (Ky.) 4, 4 Am. Dec. 663. In West Virginia the statute (Code, c. 126, § 6) is practically declaratory of the foregoing principles and it is there held that where equitable matter was pleaded, as permitted by the statute (Code, c. 126, § 5), in the law action, and a verdict found against defendant, but the verdict was set aside and the plea withdrawn, the matter of the plea might be asserted by bill in equity. Knott *v.* Seamands, 25 W. Va. 99.

63. *Arkansas.*— Black *v.* Bowman, 9 Ark. 501; Witter *v.* Arnett, 8 Ark. 57; *Ex p.* Conway, 4 Ark. 302.

Connecticut.— Swift *v.* Larrabee, 31 Conn. 225; Hartford *v.* Chipman, 21 Conn. 488; New London Bank *v.* Lee, 11 Conn. 112, 27 Am. Dec. 713.

Indiana.— Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370.

Kentucky.— Dunwidie *v.* Kerley, 6 J. J. Marsh. 501; Collins *v.* Farquar, 4 Litt. 153; Jasper *v.* Quarles, Hard. 461.

Michigan.— Olson *v.* Morrison, 29 Mich. 395.

Pennsylvania.— Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534; Weir *v.* Mundell, 3 Brewst. 594; Walsh *v.* Leonard, 8 Luz. Leg. Reg. 282.

Tennessee.— Kerr *v.* Kerr, 3 Lea 224; Pearl *v.* Nashville, 10 Yerg. 179.

West Virginia.— Michael *v.* Workman, 5 W. Va. 391.

Wisconsin.— Lawson *v.* Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. Rep. 528.

United States.— Dow *v.* Berry, 18 Fed. 121; Boyce *v.* Grundy, 3 Pet. 210, 7 L. ed. 655.

See 19 Cent. Dig. tit. "Equity," § 151.

64. Boyce *v.* Grundy, 3 Pet. (U. S.) 210, 215, 7 L. ed. 655, per Johnson, J. The older cases and many of the modern state that the remedy at law, in order to oust equity of jurisdiction, must be "plain, adequate and complete." To cite the cases using this language would render this note almost interminable, and as such language is not in itself definitive, would serve no useful purpose. Plainness and completeness of remedy are merely elements of adequacy. The language of the text with occasional slight variations appears in many cases.

Georgia.— Conyers *v.* Bowen, 31 Ga. 382; Hollingshead *v.* McKenzie, 8 Ga. 457.

Mississippi.— Irwin *v.* Lewis, 50 Miss. 363; Barnes *v.* Lloyd, 1 How. 584.

Nebraska.— Keplinger *v.* Woolsey, (1903) 93 N. W. 1008; Carter *v.* Warner, 2 Nebr. (Unoff.) 688, 89 N. W. 747.

Wisconsin.— Miller *v.* Drane, 100 Wis. 1, 75 N. W. 413.

United States.— May *v.* La Claire, 11 Wall. 217, 20 L. ed. 50; Barrett *v.* Twin City Power Co., 118 Fed. 861, 865; Smith *v.* American Nat. Bank, 89 Fed. 832, 32 C. C. A. 368; Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389; Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525; Mayer *v.* Foulkrod, 16 Fed. Cas. No. 9,341, 4 Wash. 349.

See 19 Cent. Dig. tit. "Equity," §§ 151, 152.

Other statements of the rule.— The legal remedy must be as practicable and efficient, both in respect to the final relief and the mode of obtaining it, as the equitable remedy. Smith *v.* Bates Mach. Co., 79 Ill. App. 519; Michener *v.* Springfield Engine, etc., Co., 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59. It must be as "perfect and adequate." Barrington *v.* Ryan, 88 Mo. App. 85. It must be as "prompt, adequate, and efficient." South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5. If the right is equitable, or if legal and the remedy is only equitable, or both legal and equitable, and there is no legal remedy commensurate with the right, equity has jurisdiction. Smith *v.* American Nat. Bank, 89 Fed. 832, 32 C. C. A. 368. Equity jurisdiction will be sustained where the remedy at law will not be so effectual as the remedy in equity and the proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all the parties. Oelrichs *v.* Williams, 15 Wall. (U. S.) 211, 21 L. ed. 43. The remedy at law must be complete, prompt, and efficient. If rights can only be enforced at law by long continued, strenuous, and expensive litigation, and can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of this power. Crane *v.* McCoy, 6 Fed. Cas. No. 3,354, 1 Bond 422. Although an action of account may be maintained, yet if it appears that it could not be tried without great difficulty, and the verdict could not from the nature of the case be equally satisfactory with the proceedings under a decree, equity will decree an account. O'Connor *v.* Spaight, 1 Sch. & Lef. 305; Carlisle Corp. *v.* Wilson, 13 Ves. Jr. 276, 33 Eng. Reprint 297.

65. A few cases will suffice to illustrate the principle. Assets of an insolvent debtor were

c. Convenience of Remedy. Equity jurisdiction has been sustained solely on the ground that the remedy at law would be cumbersome or inconvenient and therefore inadequate,[66] or because the equitable remedy is more convenient, speedy, and economical.[67] But this element is almost invariably combined with other circumstances of inadequacy, and is too indefinite to safely afford an independent ground.[68]

d. Promptness of Remedy. The greater promptness of the remedy in equity is often given as a reason for sustaining its jurisdiction.[69] This does not mean promptness in administration, depending on the state of the calendar, nor does it mean that the progress of a suit in equity is inherently more speedy, for on the contrary such progress has been generally and notoriously slow. It relates rather to directness of remedy and the avoidance of circuity of action and multiplicity of suits.[70]

e. Clearness of Remedy. To divest a court of equity of jurisdiction the remedy at law must be plain. This is an element of adequacy so important that it is usually emphasized by specific statement.[71] It is sometimes said that the legal remedy must be obvious.[72] The rule is usually stated less radically that equity will take jurisdiction where it is "doubtful" whether relief could be had at law,[73] or where it is doubtful whether a recognized legal remedy would be

in the hands of a third person charged with the payment of a claim tainted by usury. A bill by a creditor was sustained to reach so much as might remain after purging the other debt of the usury, garnishment being ineffectual to enforce the entire right. Pope *v.* Solomon, 36 Ga. 541. A bill was sustained by the owner of buildings against the owner of the land whereon they were situated to enforce plaintiff's right to remove the building and for an account of rents and profits, ejectment and trover being ineffectual. Watkins *v.* Owens, 47 Miss. 593. Goods were purchased by means of fraudulent representations, defendant aiding in the fraud by taking a chattel mortgage of the goods sold and others. A replevin suit would determine only vendor's right to retake the goods, while by a bill in equity, if bad faith in the mortgagee appeared, plaintiff could have stricken from the recorded mortgage the goods by him sold; and if bad faith did not appear he could require the mortgagee to first resort to the other goods, thus protecting his entire right as regards the vendee instead of staking it all upon issue of good faith. Morse *v.* Nicholson, 55 N. J. Eq. 705, 38 Atl. 178. In an action in the nature of ejectment defendant filed under Oreg. Code, § 381, a cross complaint to reform a mistake in a deed through which he claimed. It was urged that his remedy by defense to the ejectment was sufficient, but it was held that the remedy sought by cross complaint was proper for an efficient protection of defendant's right — to perfect his title. South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5. See also Wollenberg *v.* Rose, 41 Oreg. 314, 68 Pac. 804. An administrator may maintain a bill for the possession of notes belonging to his decedent, their possession being important for the settlement of the estate, although not for the recovery of their amount. Sears *v.* Carrier, 4 Allen (Mass.) 339. A party will not be relegated to law when to do so would be practically to deny him reasonable means for enforcing either legal or equitable rights. Fryberger *v.* Berven, 88 Minn. 311, 92 N. W. 1125.

66. Conemaugh Gas Co. *v.* Jackson Farm Gas Co., 186 Pa. St. 443, 40 Atl. 1000, 65 Am. St. Rep. 865; Boyd *v.* American Carbon Black Co., 182 Pa. St. 206, 37 Atl. 937 [*reversing* 6 Pa. Dist. 209].

67. Gregg *v.* Thurber, 69 N. H. 480, 45 Atl. 241.

68. In Sanderson *v.* Whitmyer, 8 Pa. Dist. 312, 2 Dauph. Co. Rep. (Pa.) 174, it was said that the doctrine of greater convenience applies only to cases attended with or involving a trust or fraud or partnership account, and not to cases where the legal remedy is otherwise adequate.

69. *New Hampshire.*—Gregg *v.* Thurber, 69 N. H. 480, 45 Atl. 241.

Oregon.— South Portland Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5.

Pennsylvania.—Johnson *v.* De Camp, 3 Luz. Leg. Obs. 38.

United States.— Oelrichs *v.* Williams, 15 Wall. 211, 21 L. ed. 43; Crane *v.* McCoy, 6 Fed. Cas. No. 3,354, 1 Bond 422.

England.— Manaton *v.* Squire, 2 Freem. 26, 22 Eng. Reprint 1036.

See 19 Cent. Dig. tit. "Equity," §§ 151, 152. And see cases cited *supra*, II, A, 4, a.

70. This will appear from an examination of the cases already cited under this head.

71. See cases cited *supra*, II, A, 4, a.

72. Witter *v.* Arnett, 8 Ark. 57; Swift *v.* Larrabee, 31 Conn. 225; Hartford *v.* Chipman, 21 Conn. 488; New London Bank *v.* Lee, 11 Conn. 112, 27 Am. Dec. 713; Weir *v.* Mundell, 3 Brewst. (Pa.) 594.

73. *Alabama.*— Brevard *v.* Jones, 50 Ala. 221.

Florida.— Carter *v.* Bennett, 6 Fla. 214.

Michigan.— Edsell *v.* Briggs, 20 Mich. 429.

Mississippi.— Richardson *v.* Brooks, 52 Miss. 118.

Missouri.— West *v.* Wayne, 3 Mo. 16.

adequate.[74] In some cases it is said that equity will interpose where the remedy at law is "difficult and doubtful."[75] In England the difficulty alone of the legal remedy has been held sufficient to require such interposition.[76]

f. Completeness of Remedy. Where a legal remedy is available but would afford only a partial protection of plaintiff's entire right, or would not entirely adjust the rights of the parties, such remedy is incomplete, and for that reason equity will interpose.[77]

New York.— Ludlow *v.* Simond, 2 Cai. Cas. 1, 2 Am. Dec. 291.

Pennsylvania.— Weir *v.* Mundell, 3 Brewst. 594.

Tennessee.— Drew *v.* Clarke, Cooke 374, 5 Am. Dec. 698.

Vermont.— French *v.* Winsor, 36 Vt. 412.

West Virginia.— Cleavenger *v.* Franklin F. Ins. Co., 47 W. Va. 595, 35 S. E. 998.

England.— Southampton Dock Co. *v.* Southampton Harbor, etc., Bd., L. R. 11 Eq. 254, 23 L. T. Rep. N. S. 698.

See 19 Cent. Dig. tit. "Equity," § 151.

Cases of doubt.— An administrator paid to the guardian of an infant heir more than was due to him, and after the heir came of age agreed with him upon the amount of overpayment. A bill to recover this money was sustained because of doubt as to the availability of assumpsit, the money having been paid to the guardian and not to the heir directly. French *v.* Winsor, 36 Vt. 412. A bill for an account was sustained after an action at law had been commenced against plaintiff, the court saying that the subject-matter of the dispute would not be withdrawn from the jurisdiction of a court of law where it was unquestionable that the latter could do full justice, but that if there be any doubt as to this plaintiff has a right to maintain a suit in equity. Southampton Dock Co. *v.* Southampton Harbor, etc., Bd., L. R. 11 Eq. 254, 23 L. T. Rep. N. S. 698.

74. *Alabama.*— Hodge *v.* McMahan, 137 Ala. 171, 34 So. 185.

New York.— Mount *v.* Suydam, 4 Sandf. Ch. 399.

Pennsylvania.— Nestel *v.* Knickerbocker L. Ins. Co., 12 Phila. 477; Philadelphia *v.* Keyser, 10 Phila. 50.

Virginia.— Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. 613.

United States.— Hunter *v.* U. S., 5 Pet. 173, 8 L. ed. 86; German-American Invest. Co. *v.* Youngstown, 68 Fed. 452.

See 19 Cent. Dig. tit. "Equity," § 151.

Cases of doubt.— Defendant instructed plaintiff to lend money for him on a mortgage. Plaintiff took a bond and mortgage payable to defendant and himself advanced a portion of the money. Defendant refused to complete the loan or to repay plaintiff his advancement. It was held that plaintiff was entitled to a decree compelling an assignment of the bond and mortgage, as this was probably a more adequate indemnity than an action to recover the money advanced. Here the doubt seems to have been as to the practical efficiency of the legal remedy. Mount *v.* Suydam, 4 Sandf. Ch. (N. Y.) 399. A bill in equity was sustained where a widow, who was also administratrix of her husband's estate, and the heir sought to recover on a policy of fire insurance, it being doubtful whether the proceeds were to be deemed personal assets to be recovered by the administratrix or realty, in which latter event a court of equity alone could secure the payment of the widow's portion to the heir upon her death. Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. (Va.) 613. Equity has jurisdiction of a bill to determine the validity of municipal bonds where plaintiff's bid was accepted, but it refused to take the bonds on the ground that they were void and the city threatened to hold plaintiff liable for loss. The reason was that if relegated to law plaintiff would have to decide at its peril whether the bonds were valid. German-American Invest. Co. *v.* Youngstown, 68 Fed. 452.

Equitable relief discretionary.— But where the adequacy of the legal remedy is doubtful the interposition of equity has been held to be discretionary and not of right. Nestel *v.* Knickerbocker L. Ins. Co., 12 Phila. (Pa.) 477.

75. Teague *v.* Russell, 2 Stew. (Ala.) 420; Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; American Ins. Co. *v.* Fisk, 1 Paige (N. Y.) 90; Livingston *v.* Livingston, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; Whitlock *v.* Duffield, 2 Edw. (N. Y.) 366; Rees *v.* Smith, 1 Ohio 124, 13 Am. Dec. 599.

Difficulty in the method of enforcing execution against a municipal corporation for appropriation of property without compensation therefor will not alone furnish sufficient ground for the interposition of equity. Fogarty *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 753, 7 Ohio N. P. 100. As to obstacles merely to the enforcement of the legal remedy see *infra*, II, A, 4, g.

76. Curtis *v.* Curtis, 2 Bro. Ch. 620, 29 Eng. Reprint 342; Agar *v.* Fairfax, 17 Ves. Jr. 533, 34 Eng. Reprint 206; Carlisle Corp. *v.* Wilson, 13 Ves. Jr. 276, 33 Eng. Reprint 297; Weymouth *v.* Boyer, 1 Ves. Jr. 423, 30 Eng. Reprint 414.

77. *Alabama.*— Bolman *v.* Overall, 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107.

Connecticut.— Sherwood *v.* Salmon, 5 Day 439, 5 Am. Dec. 167.

Georgia.— Fleming *v.* Blosser Printing Co., 118 Ga. 86, 44 S. E. 805; Milner *v.* Neel, 114 Ga. 118, 39 S. E. 890; Scott *v.* Scott, 33 Ga. 102.

Illinois.—Durburrow *v.* Niehoff, 37 Ill. App. 403.

g. Practicality of Remedy. Notwithstanding repeated statements that to oust equity of jurisdiction the remedy at law must be as practical as that in equity,[78] some decisions indicate that the rule of practicality does not relate to ability to obtain the fruits of the remedy but to its fitness in nature to the end in view.[79] Accordingly it has been said that insolvency alone is not a ground for equitable interference.[80] Nevertheless injunctions are frequently granted where if defendant was solvent plaintiff would be relegated to his action for damages,[81] and in a very familiar class of cases equity does interfere after and sometimes even before judgment at law, to enable a party to obtain the "fruits of his remedy" because the ordinary process is impeded.[82] It is submitted therefore that the statements in the cases hereinbefore cited[83] are too broad, and that equity will interfere where the remedy at law has been exhausted and has proved unavailing, and often where without actual test it is shown that such remedy would be unavailing, provided the established principles and modes of relief existing in equity afford a practical remedy.[84]

Kentucky.— Beasley *v.* Deboe, 9 B. Mon. 434.

Maine.— Boynton *v.* Payrow, 67 Me. 587.

Maryland.— Gough *v.* Crane, 3 Md. Ch. 119.

Michigan.— Wing *v.* Commercial, etc., Bank, 103 Mich. 565, 61 N. W. 1009.

New Jersey.— Terhune *v.* Sibbald, 55 N. J. Eq. 236, 37 Atl. 454.

Oregon.— South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5.

Pennsylvania.— Bonebrake *v.* Summers, 8 Pa. Super. Ct. 55, 43 Wkly. Notes Cas. 568; Skilton *v.* Webster, Brightly 203.

Vermont.— Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613.

United States.— Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83, 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284; Boyce *v.* Grundy, 3 Pet. 210, 7 L. ed. 655; Hedlund *v.* Dewey, 105 Fed. 541; National Bank of Commerce *v.* Wade, 84 Fed. 10.

England.— Jackson *v.* Butler, 2 Atk. 306, 9 Mod. 297, 26 Eng. Reprint 587.

See 19 Cent. Dig. tit. "Equity," §§ 151, 152.

Pending action at law.— Equity will even take jurisdiction in such case while an action is pending at law. Condon *v.* Knoxville, etc., R. Co., (Tenn. Ch. App. 1895) 35 S. W. 781.

78. See cases cited *supra*, II, A, 4, a.

79. Baltimore Safe Deposit, etc., Co. *v.* Anniston, 96 Fed. 661. In Rees *v.* Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72, the court denied the power of equity to appoint an officer to levy and collect a tax to pay a judgment against a municipality, or to subject the property of citizens to its payment, although several writs of mandamus had proved ineffectual through the resignations of officers and similar devices. While this case might have been disposed of on the ground that the levy of a tax is not the exercise of judicial power, and that individual property was subject to the payment of the judgment only through the medium of a tax levy, the reasoning of the court was that the remedy by mandamus is in theory adequate and perfect, and that difficulty in obtaining the fruits of the remedy was no ground for the interference of equity. In Thompson *v.* Allen County, 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 412, the tax had been levied but the sentiment of the community was such that no person could be found willing to accept the office, the duties of which comprised the collection of the tax. The court refused to collect the tax through a receiver, Miller, J., saying: "By inadequacy of the remedy at law is here meant, not that it fails to produce the money (that is a very usual result in the use of all remedies) but that in its nature or character it is not fitted or adapted to the end in view." See also Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292.

80. Heilman *v.* Union Canal Co., 37 Pa. St. 100.

81. See INJUNCTIONS.

82. CREDITORS' SUITS, 12 Cyc. 1.

83. See *supra*, note 79.

84. The method of securing the avails of a judgment through a creditor's bill, and the protection afforded by injunction and through receivers, where insolvency would render a judgment uncollectable, amply support the statement of the text. See the specific heads referred to. It is impossible to reconcile this vast array of cases with the principle stated and the cases cited *supra*, note 79, this section. Those cases if otherwise decided would have required the court, if not to usurp governmental functions of a non-judicial character, at least to clothe its officers with powers conferred by law solely upon non-judicial officers. The proposed remedy in equity was as little practical as the remedy at law.

Cases where legal remedy ineffectual.— In granting a decree for the specific performance of a contract relating to personal property because of the insolvency of the person against whom alone a judgment at law could be recovered the supreme judicial court of Massachusetts said: "On what plausible ground can it be contended that a judgment against an insolvent contractor is an adequate remedy? It would be manifestly against equity and justice for a court to decline jurisdiction in such a case. If the party injured by a breach of a contract can-

5. What Remedies at Law Are Deemed Adequate — a. In General. While it has been said that remedy at law means a remedy in a court of law, and that no other remedy ousts the jurisdiction of equity,[85] and such is the general significance of the term, a remedy will nevertheless bar relief in equity, provided it affords efficient protection, although it be not according to the ordinary course of the common law. Thus equity will not interfere where an adequate remedy is afforded in a court of admiralty,[86] or in bankruptcy,[87] or by judicial review on appeal or certiorari of the acts of public boards or officers.[88] Equity will not take jurisdiction if there is available a single remedy at law sufficient for plaintiff's protection,[89] or several remedies which are together sufficient.[90] But plaintiff will not be relegated to the pursuit of several remedies at law where the interference of equity will avoid circuity of action and a multiplicity of suits.[91]

b. On Money Demands. Where compensation in money will afford a party complete and efficient relief the law is usually adequate for that purpose, and plaintiff will be relegated thereto, if the legal remedy is unimpeded. Thus general assumpsit, or the common counts, having at an early date been adapted to the enforcement of equitable demands on equitable bases of compensation, must be resorted to where available.[92] This is true even where plaintiff claims a

not avail himself of his remedy at law for any beneficial purpose, or if it be doubtful whether he can or not, a court of equity, if it can relieve him, ought certainly to interpose." Clark *v.* Flint, 22 Pick. (Mass.) 231, 238, 33 Am. Dec. 733. A bill to apply securities in the hands of a surety to the satisfaction of a debt, where the securities were mortgages subject to prior encumbrances, on lands in two states, was sustained because the remedy by execution on an equity of redemption of such character was "nominal and fancied." New London Bank *v.* Lee, 11 Conn. 112, 27 Am. Dec. 713. A bill in equity will lie against the representatives of one of several joint obligors where the survivors are insolvent. Shubrick *v.* Russell, 1 Desauss. (S. C.) 315. Where a theoretical remedy existed by procuring the appointment of an administrator *de bonis non* and suing him at law, but such remedy would be ineffectual because the management of the estate had been committed to a receiver appointed by the federal court, a bill in equity was sustained to establish a lien upon land and for its enforcement. Milner *v.* Neel, 114 Ga. 118, 39 S. E. 890. In sustaining a bill for the sale of a railroad as an entirety to pay numerous judgments and liens unenforceable except at great sacrifice by execution, the same court declared that the powers of equity will be invoked to aid the defects of the law, and where the facts and circumstances are novel and peculiar, analogous principles will be applied to the existing emergency. Macon, etc., R. Co. *v.* Parker, 9 Ga. 377. But in New Jersey the court refused to assume jurisdiction of the sale of chattels for the payment of debts on the ground that such sale could be made more advantageously than at law. Lambert *v.* Miller, 37 N. J. Eq. 344.

85. Webb *v.* Ridgely, 38 Md. 364.

86. Mitford & T. Pl. & Pr. Eq. 220; Daniell Ch. Pl. & Pr. (4th Am. ed.) 553; *In re* The Danish Ship Noysomhed, 7 Ves. Jr. 593, 32 Eng. Reprint 239; Castelli *v.* Cook, 7 Hare 89, 13 Jur. 675, 18 L. J. Ch. 148, 27 Eng. Ch. 89. This rule is tacitly recognized in Knapp *v.* McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290.

87. Preston *v.* Wilson, 5 Hare 185, 11 Jur. 201, 16 L. J. Ch. 137, 26 Eng. Ch. 185; Saxton *v.* Davis, 18 Ves. Jr. 72, 34 Eng. Reprint 245; Tarleton *v.* Hornby, 1 Y. & C. Exch. 172.

88. See *infra*, II, A, 5, f, (II).

89. So held where because replevin was not available plaintiff sought to restrain a marshal from selling chattels. Relief was denied because trover was adequate. La Mothe *v.* Fink, 14 Fed. Cas. No. 8,032, 8 Biss. 493. Where joint owners of a chattel could obtain at law adequate relief against a stranger they were not permitted to proceed in equity in order to adjust at the same time rights among themselves. Comby *v.* McMichael, 19 Ala. 747. A remedy at law against the personal representative of a deceased obligor in a bond prevents a resort to equity. Dawson *v.* Trimble, 3 Litt. (Ky.) 252. A remedy against a constable who parted with a bond given him for collection on the promise of a surety to pay it bars relief in equity against constable and surety. McIntyre *v.* Reeves, 43 N. C. 150. But a remedy at law against a surety was said not to bar equitable relief against the principal. Middletown Bank *v.* Russ, 3 Conn. 135, 8 Am. Dec. 164.

90. Bennett *v.* Nichols, 12 Mich. 22; Gotcher *v.* Haefner, 107 Mo. 270, 17 S. W. 967; Von Beck *v.* Rondout, 15 Abb. Pr. (N. Y.) 48; Smith *v.* Pettingill, 15 Vt. 82, 40 Am. Dec. 667.

91. See *infra*, II, B, 1.

92. *Alabama.*— Davidson *v.* Adams, 119 Ala. 310, 24 So. 420; Cockrell *v.* Coleman, 55 Ala. 583; Sadler *v.* Robinson, 2 Stew. 520.

Arkansas.— Wolf *v.* Irons, 8 Ark. 63.

Connecticut.— Stone *v.* Stone, 32 Conn. 142; West *v.* Howard, 20 Conn. 581; Dutton

specific fund or a part of a specific fund which defendant has received, provided no further equity exists.[93] Special assumpsit or analogous actions affording generally adequate relief by way of damages for the breach of express contracts must likewise be resorted to.[94] But the refusal of equity to take jurisdiction is not due

v. Connecticut Bank, 13 Conn. 493; Berlin *v.* New Britain, 9 Conn. 175.

Florida.— Bellamy *v.* Hawkins, 16 Fla. 733.

Georgia.— Oliver *v.* McDuffie, 28 Ga. 522.

Illinois.— Crane *v.* Lord, 101 Ill. 41; Ramsay *v.* Clinton County, 92 Ill. 225; Arbuckle *v.* Illinois Midland R. Co., 81 Ill. 429.

Indiana.— Egbert *v.* Thomas, 1 Ind. 393; Coquillard *v.* Suydam, 8 Blackf. 24.

Kentucky.— Adams *v.* Dunlap, 1 Dana 584; Steel *v.* Steel, 4 J. J. Marsh. 231; Burns *v.* Rowland, 2 A. K. Marsh. 232.

Maine.— Russ *v.* Wilson, 22 Me. 207.

Maryland.— Hopkins *v.* Hopkins, 86 Md. 681, 37 Atl. 371; Zeigler *v.* Sentzner, 8 Gill & J. 150, 29 Am. Dec. 534.

Massachusetts.— Bassett *v.* Brown, 100 Mass. 355; Blood *v.* White, 3 Cush. 416; Law *v.* Thorndike, 20 Pick. 317.

Michigan.— Atty.-Gen. *v.* Moliter, 26 Mich. 444.

New Jersey.— Torrey *v.* Camden, etc., Co., 18 N. J. Eq. 293.

North Carolina.— Howard *v.* Jones, 40 N. C. 75.

Pennsylvania.— Roland *v.* Lancaster County Nat. Bank, 135 Pa. St. 598, 19 Atl. 951; Russell's Appeal, 1 Walk. 131; Fisher *v.* Walter, 3 C. Pl. 161; Hully *v.* Havens, 3 Luz. Leg. Reg. 185.

West Virginia.— Zinn *v.* Zinn, 54 W. Va. 483, 46 S. E. 202; Bier *v.* Smith, 25 W. Va. 830.

United States.— Gaines *v.* Miller, 111 U. S. 395, 4 S. Ct. 426, 28 L. ed. 466; Paton *v.* Majors, 46 Fed. 210.

See 19 Cent. Dig. tit. "Equity," §§ 127–129.

93. *Alabama.*— Davidson *v.* Adams, 119 Ala. 310, 24 So. 420; Cockrell *v.* Coleman, 55 Ala. 583.

Connecticut.— Berlin *v.* New Britain, 9 Conn. 175.

Florida.—Bellamy *v.* Hawkins, 16 Fla. 733.

Illinois.— Crane *v.* Lord, 101 Ill. 41; Ramsay *v.* Clinton County, 92 Ill. 225.

Indiana.— Egbert *v.* Thomas, 1 Ind. 393.

Maine.— Russ *v.* Wilson, 22 Me. 207.

Maryland.— Hopkins *v.* Hopkins, 86 Md. 681, 37 Atl. 371.

Massachusetts.— Blood *v.* White, 3 Cush. 416; Law *v.* Thorndike, 20 Pick. 317.

Michigan.—Atty.-Gen. *v.* Moliter, 26 Mich. 444.

Pennsylvania.— Fisher *v.* Walter, 3 C. Pl. 161.

United States.— Gaines *v.* Miller, 111 U. S. 395, 4 S. Ct. 426, 28 L. ed. 466.

See 19 Cent. Dig. tit. "Equity," §§ 125–127.

94. *Alabama.*—Pace *v.* Smith, 137 Ala. 511, 34 So. 1006; Turner *v.* Flinn, 67 Ala. 529; Hudson *v.* Vaughn, 57 Ala. 609.

Arkansas.— Porter *v.* Clements, 3 Ark. 364.

Connecticut.— Coe *v.* Turner, 5 Conn. 86.

Georgia.— Beysiegel *v.* Rome Mut. Loan Assoc., 113 Ga. 1071, 39 S. E. 405.

Illinois.— Anderson *v.* Olsen, 188 Ill. 502, 59 S. E. 239; Stewart *v.* Mumford, 80 Ill. 192; Thomas *v.* Caldwell, 50 Ill. 138; Naugle *v.* Yerkes, 83 Ill. App. 310.

Indiana.— Eastman *v.* Ramsey, 3 Ind. 419; Coquillard *v.* Suydam, 8 Blackf. 24.

Kentucky.— Berryman *v.* Orr, 4 J. J. Marsh. 393.

Maryland.— Chew *v.* Perkins, (1895) 31 Atl. 507; Gibbs *v.* Clagett, 2 Gill & J. 14.

Michigan.— Linn *v.* Gunn, 56 Mich. 447, 23 N. W. 84.

Mississippi.— Santacruz *v.* Santacruz, 44 Miss. 714; Fulton *v.* Woodman, 40 Miss. 593; Freeman *v.* Winchester, 10 Sm. & M. 577.

New York.— Hawes *v.* Dobbs, 137 N. Y. 465, 33 N. E. 560 [*affirming* 18 N. Y. Suppl. 123]; Everett *v.* De Fontaine, 78 N. Y. App. Div. 219, 79 N. Y. Suppl. 692; Black *v.* Vanderbilt, 67 N. Y. App. Div. 617, 74 N. Y. Suppl. 629; Levy *v.* Hill, 50 N. Y. App. Div. 294, 63 N. Y. Suppl. 1002.

Pennsylvania.— Sanderson *v.* Witmyer, 8 Pa. Dist. 312.

Tennessee.— Blair *v.* Brabson, 3 Hayw. 18.

Virginia.— Shenandoah Valley R. Co. *v.* Robinson, 82 Va. 542.

United States.—Shields *v.* Barrow, 17 How. 130, 15 L. ed. 158; McCabe *v.* Rapid Transit Subway Constr. Co., 127 Fed. 465; Clarke *v.* Shirk, 121 Fed. 340, 57 C. C. A. 554; Thomas *v.* Council Bluffs Canning Co., 92 Fed. 422, 34 C. C. A. 428.

See 19 Cent. Dig. tit. "Equity," §§ 125–127, 156.

Instances of adequacy.— A school-district having been consolidated with another, a person who had advanced money to the former was not permitted to enforce his claim against the consolidated district, because he held notes of certain of the school directors for the amount, and had an adequate remedy thereon. School Directors *v.* Miller, 54 Ill. 338. A and B gave C their obligations on a contract which was afterward rescinded. A entered into a new contract with C and delivered him the same obligation as security. It was held that the obligation was binding at law on A, and that C must resort to his action thereon. McCreery *v.* Lewis, 4 Bibb (Ky.) 323. After recovery of damages for a partial breach of contract compensation for that part which has been performed must be sought at law. Pennebaker *v.* Wathan, 2 A. K. Marsh. (Ky.) 315. Where the bill of a third person who turned out to be insolvent was given by a debtor to his creditor, it was held that the remedy was by action on the original contract and not in equity to enforce payment of the bill. Gover *v.* Christie, 2

to any inability to render a decree for damages alone,[95] and such relief will be given in support of established equities even though assumpsit would lie and afford a measure of protection.[96] Pursuant to the general rule equity refuses to interfere to protect a vendee or lessee of land from the consequences of a failure of title or encumbrances, where he has a remedy available at law upon the covenants contained in his deed.[97] So too if a party is adequately protected by a con-

Harr. & J. (Md.) 67. An act of the legislature abolished a school-district. The superintendent undertook by equitable proceedings to establish his continued right to the office on the ground that the act was unconstitutional. It was held that his right of action to recover his salary was an adequate remedy. Gatchell *v.* Day, 21 Misc. (N. Y.) 98, 47 N. Y. Suppl. 52. Receiver of an insolvent bank rejected a claim on which the holder recovered judgment against the bank. Equity refused to compel the receiver to allow the claim on the ground that an action at law against him was adequate. Denton *v.* Baker, 79 Fed. 189, 24 C. C. A. 476. An action on the original contract and not a bill in equity is the proper remedy where a counterfeit note has been received. Kilgour *v.* Parker, 3 J. J. Marsh. (Ky.) 577; Smith *v.* Clay, 3 Bibb (Ky.) 272; Ramsey *v.* Ellis, 1 Mo. 402. Where one has taken acceptances or similar obligations affording him a remedy at law he cannot disregard them and seek the aid of equity to enforce the claim against funds which might otherwise be chargeable. Oliver *v.* Palmer, 11 Gill & J. (Md.) 426; Bernz *v.* Marcus Sayre Co., 52 N. J. Eq. 275, 30 Atl. 21; Sioux Nat. Bank *v.* Cudahy Packing Co., 58 Fed. 20. Attorneys who had acted on behalf of a large number of creditors of an insolvent, having been employed by a committee of creditors, filed a bill in equity for a discovery of the names of all the creditors for whom they had acted and for compensation. The bill was dismissed because the remedy at law was adequate against the members of the committee. Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342. Rents accruing under leases must be recovered by action at law (Lockard *v.* Lockard, 16 Ala. 423), unless the extent of liability or time of payment is uncertain, when equity has sometimes intervened (Dawson *v.* Williams, (Miss. 1843) Freem. 99; Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453). A mortgagee cannot sue his mortgagor in equity to recover a deficiency remaining after a sale on foreclosure. Giesy *v.* Gregory, 15 App. Cas. (D. C.) 49. As to recovery of the deficiency in the foreclosure suit see MORTGAGES.

95. Alexander *v.* Relfe, 74 Mo. 495; Commonwealth Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

96. As where the fund is impressed with a trust. People *v.* Houghtaling, 7 Cal. 348; New York Ins. Co. *v.* Roulet, 24 Wend. (N. Y.) 505; Varet *v.* New York Ins. Co., 7 Paige (N. Y.) 560. But see Kimball *v.* Moody, 27 Ala. 130; Taylor *v.* Turner, 87 Ill. 296; Downs *v.* Downs, 75 Vt. 383, 56 Atl. 9. Or where there is occasion for an adjustment or distribution among several parties. Claflin *v.* Doggett, 3 Colo. 413; Brooks *v.* Howison, 63 N. H. 382. Or where it is sought to transfer a lien on property to the proceeds of its sale. Bellinger *v.* Lehman, 103 Ala. 385, 15 So. 600. Or where plaintiff is entitled to discovery and account. Keys *v.* McDermott, (Wis. 1903) 93 N. W. 553.

Where assumpsit will not lie equity will of course aid in the recovery of money equitably due plaintiff. A county collector had deposited a county's funds in a bank. After his term of office had expired he had refused to transfer his account to his successor and the bank refused to pay except on his order. The court, construing the deposit as one to the individual credit of the collector, held that the contract was with him alone and that the county might therefore resort to equity to reach the money. Essex County *v.* Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185 [*reversed* in 48 N. J. Eq. 627, 23 Atl. 268, only for the reason that the terms of deposit rendered the county the creditor and it could sue at law]. See also San Diego County *v.* California Nat. Bank, 52 Fed. 59.

97. *Illinois.*— Ohling *v.* Luitjens, 32 Ill. 23.

Kentucky.— English *v.* Thomasson, 82 Ky. 280; Ogden *v.* Yoder, 5 J. J. Marsh. 424; Campbell *v.* Whittingham, 5 J. J. Marsh. 96, 20 Am. Dec. 241; Watkins *v.* Owen, 2 J. J. Marsh. 142; Miller *v.* Long, 3 A. K. Marsh. 334; Lawless *v.* Helm, 1 A. K. Marsh. 457; Ferguson *v.* Bullock, 1 A. K. Marsh. 71; Bradford *v.* Long, 4 Bibb 225.

Massachusetts.— Allen *v.* Storer, 132 Mass. 372.

Missouri.— Cabanne *v.* Lisa, 1 Mo. 683; Swain *v.* Burnley, 1 Mo. 404.

New York.— Gillilan *v.* Norton, 6 Rob. 546, 33 How. Pr. 373; Tallman *v.* Green, 3 Sandf. 437; Chesterman *v.* Gardner, 5 Johns. Ch. 29, 9 Am. Dec. 265.

Tennessee.— Stipe *v.* Stipe, 2 Head 169; Sypert *v.* Sawyer, 7 Humphr. 413.

West Virginia.— Laidley *v.* Laidley, 25 W. Va. 525.

United States.—Alger *v.* Anderson, 92 Fed. 696.

See 19 Cent. Dig. tit. "Equity," §§ 130, 158.

Application and qualification of rule.— The fact that complainant is not in possession will not give the chancellor jurisdiction where there is no obstacle to the legal remedy. Eubank *v.* Poe, 3 Dana (Ky.) 143. And it is held that in the absence of fraud the failure to take covenants merely deprives him of all remedy and does not give him a remedy in equity. Chesterman *v.* Gardner, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265. But where discovery is required or the legal

tractual or statutory bond, he must resort to an action on the bond.[98] For like reasons one will not be permitted to resort to equity to reach assets of a decedent, where an action against the administrator would afford protection.[99]

c. Torts. Aside from the frequently exercised jurisdiction to prevent by injunction the commission of irreparable torts,[1] a court of equity is reluctant to afford its remedies in such cases,[2] damages usually constituting adequate redress. Therefore, where personal property has been taken, withheld, or otherwise dealt with under circumstances creating a cause of action in trover or trespass against the wrong-doer, and such remedy at law is unimpeded, the injured party must pursue it and cannot resort to a court of equity against the tort-feasor.[3]

remedy is impeded equity will interfere. Kyle *v.* Fauntleroy, 9 B. Mon. (Ky.) 620; Donelson *v.* Polk, 64 Md. 501, 2 Atl. 824. In an early Virginia case it was held that where a vendor had conveyed away all his property in trust, the vendee might proceed at once in equity against the trustee, vendor, and *cestui que trust* to recover for breach of contract for title. Sims *v.* Lewis, 5 Munf. (Va.) 29. But as to the enforcement generally of such pecuniary claims without first procuring judgment at law see CREDITORS' SUITS, 12 CYC. 9 *et seq.* In the absence of special equities one must rely on his action at law for the breach by a railroad company of its covenant to maintain a farm crossing. Illinois Cent. R. Co. *v.* Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862.

98. *California.*— Long Beach School Dist. *v.* Lutge, 29 Cal. 409, 62 Pac. 36; White *v.* Fratt, 13 Cal. 521; Miller *v.* Sanderson, 10 Cal. 489.

Georgia.— Osborn *v.* Harris County, 17 Ga. 123, 63 Am. Dec. 230.

Illinois.— Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229.

Indiana.— Mitchell *v.* Jones, 2 Ind. 38.

Kentucky.— Cosby *v.* Slaughters, 4 Bibb 253. *Contra*, Moore *v.* Waller, 1 A. K. Marsh. 488.

Maryland.— Stem *v.* Cox, 16 Md. 533.

Massachusetts.— Conant *v.* Kendall, 21 Pick. 36.

Oregon.— Ruble *v.* Coyote Gold, etc., Min. Co., 10 Oreg. 39.

Vermont.— Washburn *v.* Titus, 9 Vt. 211.

Contra.— Philadelphia *v.* Keyser, 10 Phila. 50.

See 19 Cent. Dig. tit. "Equity," §§ 123, 130.

99. *Alabama.*— Sessions *v.* Sessions, 33 Ala. 522.

Georgia.— Jones *v.* Parker, 60 Ga. 500; Collins *v.* Stephens, 58 Ga. 284; Pease *v.* Scranton, 11 Ga. 33.

Illinois.— Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229.

Virginia.— Bacheldor *v.* Elliot, 1 Hen. & M. 10.

United States.— Bedford Quarries Co. *v.* Thomlinson, 95 Fed. 208, 36 C. C. A. 372.

See 19 Cent. Dig. tit. "Equity," § 126.

Executor de son tort.— A creditor of a decedent cannot have relief against a stranger for interfering with the assets, where he can charge him at law as executor *de son tort.* Guyton *v.* Flack, 7 Md. 398; Bridges *v.* Moye, 45 N. C. 170.

Where the acts charged constitute a devastavit the rule stated in the text applies. Edes *v.* Garey, 46 Md. 24; Halfacre *v.* Dobbins, 50 Miss. 766.

Waste by fraudulent transfers.— But where waste is imputed to both the administrator and his surety, in the way of fraudulent transfers, a hill will lie against all parties concerned and others interested in the estate. McLaughlin *v.* Potomac Bank, 7 How. (U. S.) 220, 12 L. ed. 675.

1. See INJUNCTIONS.

2. The jurisdiction of equity in trespass is purely preventive. Lords *v.* Carbon-Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812. It has even been said that a court of equity has no jurisdiction of cases arising out of torts. Meres *v.* Chrisman, 7 B. Mon. (Ky.) 422. The latter statement standing alone is entirely too broad, as equity will interfere in some cases, not only to prevent but to redress torts where the remedy in damages is inadequate. See the next note.

3. *Alabama.*— Thames *v.* Schloss, 120 Ala. 470, 24 So. 835; Chambers *v.* Chambers, 98 Ala. 454, 13 So. 674.

Connecticut. — Johnson *v.* Connecticut Bank, 21 Conn. 148.

Georgia.— Paramore *v.* Fitzgerald, 67 Ga. 360.

Illinois.— Fuller *v.* John S. Davis' Sons Co., 184 Ill. 505, 56 N. E. 791 [*affirming* 84 Ill. App. 295]; Tanton *v.* Boomgarden, 79 Ill. App. 551.

Kentucky.— Meredith *v.* Hickman, 1 A. K. Marsh. 242; Estill *v.* Estill, 3 Bibb 177.

Maine.— Smith *v.* Sullivan, 71 Me. 150.

Michigan.— Ideal Clothing Co. *v.* Hale, 126 Mich. 262, 85 N. W. 735.

Mississippi.— Fulton *v.* Woodman, 40 Miss. 593.

Missouri.— Seibel *v.* Siemon, 52 Mo. 363.

Nevada.— Conley *v.* Chedic, 6 Nev. 222.

New Jersey.— Schwalber *v.* Ehman, 62 N. J. Eq. 314, 49 Atl. 1085.

New York.— Deklyn *v.* Davis, Hopk. 135.

North Carolina.— McKeil *v.* Cutlar, 57 N. C. 381.

South Carolina.— Price *v.* Nesbit, 1 Hill Eq. 445.

See 19 Cent. Dig. tit. "Equity," § 132.

The doctrine has been applied in some cases where the property consisted of stocks or bonds. Machinists' Nat. Bank *v.* Field. 126

Unless an accounting[4] or a discovery[5] is required, one must rely on his remedy at law against an attorney,[6] an agent,[7] or a public officer,[8] for negligence or misconduct. A completed injury to real property stands on the same basis as one to personalty, and the remedy must be sought at law where such remedy is unimpeded.[9]

d. Recovery of Personal Property — (1) *Remedy at Law Generally Deemed Adequate.* For the recovery of personal property wrongfully withheld the common-law actions of detinue or replevin, or analogous proceedings at law under the codes, generally afford an adequate remedy. Accordingly equity will not, when such remedies are available, take jurisdiction for the sole purpose of decreeing a delivery of chattels.[10]

Mass. 345; Sawyer *v.* Atchison, etc., R. Co., 119 Fed. 252. See also Arbogast *v.* American Exch. Nat. Bank, 125 Fed. 518, 60 C. C. A. 538. A bill was dismissed on this ground when brought by a corporation against its former trustees for the misappropriation of its assets, it being held that when defendants ceased to be officers jurisdiction could no longer be invoked on the ground of enforcing a trust. Bay City Bridge Co. *v.* Van Etten, 36 Mich. 210. A distributee of an estate cannot proceed in equity against one who has converted the property of the decedent, the personal representative having an adequate remedy at law. Caleb *v.* Mearn, 72 Me. 231.

Where the legal remedy is inadequate the rule is otherwise. The legal representative of a wife brought a bill against those of the husband to obtain possession of her choses in action. It was held that trover was inadequate because it would lie only after demand and refusal, which could not be made until after letters of administration had been granted. Gough *v.* Crane, 3 Md. Ch. 119. A bill was sustained, where chattels had been converted and sold, to compel discovery and payment over of the proceeds, upon the ground that such proceeds constituted a specific trust fund to which the owner was entitled, while damages at law would be confined to the value of the property. Dow *v.* Berry, 18 Fed. 121. A bill was sustained against an auctioneer who still retained the proceeds of the sale of chattels of plaintiff, wrongfully taken by the auctioneer's principal, although an action at law was pending against the purchaser to recover the chattel. Schmidt *v.* Dietericht, 1 Edw. (N. Y.) 119.

4. See Accounts and Accounting, 1 Cyc. 416.

5. Davis *v.* Wilson, (N. J. Ch. 1903), 56 Atl. 704.

6. Ramsey *v.* Temple, 3 Lea (Tenn.) 252.

7. Shields *v.* McCandlish, 73 Fed. 318; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335. See also American Spirits Mfg. Co. *v.* Easton, 120 Fed. 440.

8. McKee *v.* Coffee, 58 Miss. 653; Pool *v.* Ehringhaus, 39 N. C. 33; Ramsey *v.* Temple, 3 Lea (Tenn.) 252.

9. Jordan *v.* Updegraff, McCahon (Kan.) 103; Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Hamilton County *v.* Cincinnati, etc., Turnpike Co., Wright (Ohio) 603; Rhea *v.* Hooper, 5 Lea (Tenn.) 390. See also Morse *v.* Bates, 99 Mo. App. 560, 74 S. W. 439. But where an action at law for waste by a remainder-man against a life-tenant might defeat the right of a legatee whose legacy was charged on the land, a bill in equity was sustained in order to hold the damages for the benefit of the legatee. Dawson *v.* Tremaine, 93 Mich. 320, 322, 53 N. W. 1044. And where defendant had wrongfully removed a monument to the memory of deceased persons, jurisdiction in equity being sustained to prevent further interference, it was also suggested that because of the peculiar character of the property a restoration may be compelled. McCullom *v.* Morrison, 14 Fla. 414. In Illinois preventive relief is denied to an abutting owner whose property is injured by the construction of a street railway, when the fee of the street is in the city, because there is then no appropriation of property, and the personal remedy is sufficient. Mills *v.* Parlin, 106 Ill. 60 [*affirming* 11 Ill. App. 396]; Truesdale *v.* Peoria Grape Sugar Co., 101 Ill. 561; Peoria, etc., R. Co. *v.* Schertz, 84 Ill. 135; Chicago, etc., R. Co. *v.* Cole, 75 Ill. 588; Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74; Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569. See Hutton *v.* London & S. W. R. Co., 7 Hare 259.

10. *Alabama.*—Coffey *v.* Hunt, 75 Ala. 236; Coleman *v.* Camp, 36 Ala. 159; Bibb *v.* McKinley, 9 Port. 636.

Florida.— Bowes *v.* Hoeg, 15 Fla. 403.

Georgia.— McLeroy *v.* McLeroy, 25 Ga. 100.

Illinois.— Thompson *v.* Vernay, 106 Ill. App. 182.

Kentucky.— Wright *v.* Wright, 2 Litt. 8.

Michigan.— Ideal Clothing Co. *v.* Hale, 126 Mich. 262, 85 N. W. 735.

Minnesota.— Barkey *v.* Johnson, (1903) 95 N. W. 583.

Mississippi.— Bates *v.* Bates, Walk. 356.

North Carolina.— Ellington *v.* Currie, 40 N. C. 21; Ingrams *v.* Terry, 9 N. C. 122.

Ohio.— Ireland *v.* Loomis, 17 Ohio Cir. Ct. 37, 9 Ohio Cir. Dec. 393.

South Carolina.— Farley *v.* Farley, 1 McCord Eq. 506; Rees *v.* Parish, 1 McCord Eq. 56.

Virginia.— Moore *v.* Steelman, 80 Va. 331; Hale *v.* Clarkson, 23 Gratt. 42; Brent *v.* Peyton, 1 Rob. 604; Parks *v.* Rucker, 5 Leigh 149; Hardin *v.* Hardin, 2 Leigh 572; Mayo *v.* Winfree, 2 Leigh 370.

United States.— Jones *v.* MacKenzie, 122 Fed. 390, 58 C. C. A. 96; Ottoman Empire *v.* Providence Tool Co., 23 Fed. 572.

(II) *EXCEPTIONS*—(A) *Property of Peculiar Nature or Value.* In many cases, however, equity will interfere to compel the delivery of specific personal property on the ground that an adequate remedy is afforded neither by an action at law to recover possession, nor by damages. In the most important class of cases of this character the jurisdiction arises out of the peculiar nature or value of the property. Replevin and other legal possessory actions do not always restore possession, and if the legal process so fails the owner is relegated to a judgment for the value of the property. The remedy in equity is in this respect more efficient, and may be resorted to, in view of the probability of the failure of legal process to reach the property, when from the peculiar nature of the property or its special and peculiar value to the owner a judgment for damages would not afford complete redress.[11]

See 19 Cent. Dig. tit. "Equity," §§ 137, 154.

Application of rule.— The fact that there are several claimants or joint owners of chattels so withheld does not justify a resort to equity as against a stranger withholding them. Jurisdiction for the purpose of compelling delivery does not attach because of the necessity of distribution among the claimants. Comby *v.* McMichael, 19 Ala. 747; Hale *v.* Clarkson, 23 Gratt. (Va.) 42. By an antenuptial agreement the property of each party to be married was to be retained by each separately, the husband's property to go "to his children, and hers to her heirs and relatives." The wife died leaving her husband in possession of her property. After his death the next of kin of the wife filed a bill against the executor of the husband and others asking for a delivery of all the property derived from the wife's estate. It was held that this was merely a legal demand and that there was no jurisdiction. Strong *v.* Wiggins, 13 Fed. 418. A landlord claiming a right to distress should exercise it and leave the tenant to try the right in replevin; a bill to declare the property subject to distress will not lie. Haynes *v.* McGeehee, 17 Fla. 159.

Redemption of pledge.— While a New York case held that equity will not entertain a proceeding to redeem pawned chattels where an action at law can be maintained to recover them after tender of the amount due (Durant *v.* Einstein, 5 Rob. (N. Y.) 423, 35 How. Pr. (N. Y.) 223), the contrary is held elsewhere (Bates *v.* Crowell, 122 Ala. 611, 25 So. 217; Colburn *v.* Riley, 11 Colo. App. 184, 52 Pac. 684). See also Lang *v.* Thacher, 48 N. Y. App. Div. 313, 62 N. Y. Suppl. 956.

11. Bills in equity have been sustained on this ground to recover heirlooms and similar articles, the value of which is representative rather than intrinsic, and the loss of which cannot be compensated in money; as for example wampum-belts used by Indians to commemorate important events and to perpetuate the history of their race (Onondaga Nation *v.* Thacher, 29 Misc. (N. Y.) 428, 61 N. Y. Suppl. 1027 [*affirmed* in 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014]), drawings and sketches (Lang *v.* Thacher, 48 N. Y. App. Div. 313, 62 N. Y. Suppl. 956), battle-flags (Orbin *v.* Stevens, 13 Pa. Super. Ct. 591), an altarpiece, remarkable for a Greek inscription (Somerset *v.* Cookson, 2 Eq. Cas. Abr. 164, 22 Eng. Reprint 140, 3 P. Wms. 390, 24 Eng. Reprint 1114), a silver tobacco-box belonging to a club and by custom kept by its overseer for the time being (Fells *v.* Read, 3 Ves. Jr. 70, 30 Eng. Reprint 899), dresses, decorations, etc., of a lodge of free masons (Lloyd *v.* Loaring, 6 Ves. Jr. 773, 31 Eng. Reprint 1302), a certificate of registry of a ship (Gibson *v.* Ingo, 6 Hare 112, 31 Eng. Ch. 112), and heirlooms (Pusey *v.* Pusey, 1 Vern. Ch. 273, 23 Eng. Reprint 465; Macclesfield *v.* Davis, 3 Ves. & B. 16, 35 Eng. Reprint 385). And see, generally, Bowes *v.* Hoeg, 15 Fla. 403; Equitable Trust Co. *v.* Garis, 190 Pa. St. 544, 42 Atl. 1022, 70 Am. St. Rep. 644; McGowin *v.* Remington, 12 Pa. St. 56, 51 Am. Dec. 584; Hall *v.* Joiner, 1 S. C. 186; North *v.* Great Northern R. Co., 2 Giff. 64, 6 Jur. N. S. 244, 29 L. J. Ch. 301, 1 L. T. Rep. N. S. 510; Lowther *v.* Lowther, 13 Ves. Jr. 95, 33 Eng. Reprint 230. But books of a newspaper company containing the accounts and names of special subscribers have not such special value, and the remedy for their recovery is at law. Lawrence *v.* Times Printing Co., 90 Fed. 24. Nor has a seal-skin sack bequeathed by will, at least where the executor rather than the legatee seeks its recovery. Squires *v.* Howell, 43 Wkly. Notes Cas. (Pa.) 456. Although certain chattels are as a rule necessary to the exercise of the franchises of a corporation they cannot be recovered in equity without at least averring that their possession is essential to the exercise of the franchise. Keystone Electric Light, etc., Co. *v.* Peoples' Electric Light, etc., Co., 200 Pa. St. 366, 49 Atl. 951.

An artist's picture.— A court of equity has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where by the terms of an agreement an artist seeking the restitution of a picture had in effect put a fixed price upon it, and as damages would be an adequate remedy, there was no jurisdiction in a court of equity to interfere. Dowling *v.* Betjemann, 2 Johns & H. 544, 8 Jur. N. S. 538, 6 L. T. Rep. N. S. 512, 10 Wkly. Rep. 574.

Letters.— A bill in equity will lie to compel the delivery of letters to the person to whom they belong, because aside from questions of

(B) *Other Exceptions.* In some other cases equity will decree the delivery of chattels. This is so when such relief is incidental to the exercise of an underlying equitable jurisdiction, as when it is required for the purpose of enforcing a

literary value they may be the safeguards of property and reputation. Evans *v.* Van Hall, Clarke (N. Y.) 22; Dock *v.* Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617.

Evidences of indebtedness.— Notes and bills of third persons may be recovered in equity by the person entitled. Scarborough *v.* Scotten, 69 Md. 137, 14 Atl. 704, 9 Am. St. Rep. 409; Benson *v.* Keller, 37 Oreg. 120, 60 Pac. 918; Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046. But it seems that government or municipal bonds have no special value calling for relief in equity to secure their delivery. Cone *v.* East Haddam Bank, 39 Conn. 86; Dumont *v.* Fry, 12 Fed. 21. The delivery of notes given as collateral for a gambling debt will not be compelled, but this is because plaintiff does not appear with clean hands. Beer *v.* Landman, 88 Tex. 450, 31 S. W. 805.

Stock.— Where corporate stock has no special value apart from its market value, certificates therefor cannot be recovered in equity. Edelman *v.* Latshaw, 159 Pa. St. 644, 28 Atl. 475. But such a bill was sustained where the depositary of the certificate was held to be a trustee. Hill *v.* Rockingham Bank, 44 N. H. 567. Where defendant had sold the stock belonging to plaintiff the bill was dismissed, although defendant held other shares of like character. Lamb Knit-Goods Co. *v.* Lamb, 119 Mich. 568, 78 N. W. 646. The question of compelling delivery of certificates of stock must be distinguished from that of compelling by specific performance or otherwise the assignment or transfer of stock. See CORPORATIONS, 10 Cyc. 605 *et seq.*; SPECIFIC PERFORMANCE.

Muniments of title.— Deeds and other instruments which are evidence of plaintiff's title have for that reason a peculiar value, and equity will compel their delivery. Folsom *v.* McCague, 29 Nebr. 124, 45 N. W. 269; Stanton *v.* Miller, 65 Barb. (N. Y.) 58; Hammond *v.* Morgan, 51 N. Y. Super. Ct. 472; Equitable Trust Co. *v.* Garis, 190 Pa. St. 544, 42 Atl. 1022, 70 Am. St. Rep. 644; Jackson *v.* Butler, 2 Atk. 306, 9 Mod. 297, 26 Eng. Reprint 587. Plaintiff and defendant compromised a disputed claim to public lands by agreeing that plaintiff should make a homestead entry and place a deed to defendant for a portion of the land in escrow for delivery after final proof. Defendant before final proof obtained possession of the deed. It was held that plaintiff's grantor could maintain a bill to compel its return to the depositary. Paxton *v.* Danforth, 1 Wash. 120, 23 Pac. 805. And the grantee of a deed placed in escrow may likewise compel a delivery to him after the condition has been performed. Stanton *v.* Miller, 65 Barb. (N. Y.) 58. A statute (Va. Code, c. 138) rendering effective the action of detinue does not oust the jurisdiction of equity to compel the delivery of title papers. Kelly *v.* Lehigh Min., etc., Co., 98 Va. 405, 36 S. E. 511, 81 Am. St. Rep. 736. But an heir was denied relief where he sought to recover in equity from a devisee the title papers of his ancestors merely upon the allegation that the will was void. Watson *v.* Bothwell, 11 Ala. 650. And where a deed with other property had been delivered as indemnity to a surety, it was held that the remedy was at law after the surety was released, the bill praying merely for the delivery of the deed and not for reconveyance. Surber *v.* McClintic, 10 W. Va. 236.

Slaves.— Bills for the delivery of slaves, although no longer presenting questions of specific practical interest, illustrate the principle stated in the text. Some cases hold that slave property was in its essence of such peculiar character that a bill in equity would lie for the delivery of the slaves, without alleging any special character or value in the particular slaves in controversy. Brown *v.* Goolsby, 34 Miss. 437; Hull *v.* Clark, 14 Sm. & M. (Miss.) 187; Murphy *v.* Clark, 1 Sm. & M. (Miss.) 221; Sims *v.* Shelton, 2 Strobh. Eq. (S. C.) 221; Bobo *v.* Grimke, McMull. Eq. (S. C.) 304; Young *v.* Burton, McMull. Eq. (S. C.) 255; Heyward *v.* Glover, Rilcy Eq. (S. C.) 53, 2 Hill Eq. (S. C.) 515; Martin *v.* Fancher, 2 Humphr. (Tenn.) 510; Loftin *v.* Espy, 4 Yerg. (Tenn.) 84. In others it was held that there was not in general any such peculiar character or value, and that the remedy at law was adequate.

Alabama.— Bibb *v.* McKinley, 9 Port. 636.

Georgia.— McLeroy *v.* McLeroy, 25 Ga. 100.

Kentucky.— Wright *v.* Wright, 2 Litt. (Ky.) 8.

Mississippi.— Bates *v.* Bates, Walk. 356.

North Carolina.— Ellington *v.* Currie, 40 N. C. 21; Ingrams *v.* Terry, 9 N. C. 122.

South Carolina.— Farley *v.* Farley, 1 McCord Eq. 506; Rees *v.* Parish, 1 McCord Eq. 56.

Virginia.— Hale *v.* Clarkson, 23 Gratt. 42; Brent *v.* Peyton, 1 Rob. 604; Armstrong *v.* Huntons, 1 Rob. 323; Parks *v.* Rucker, 5 Leigh 149; Hardin *v.* Hardin, 2 Leigh 572.

See 19 Cent. Dig. tit. "Equity," §§ 137, 154.

Family slave.— But allegations that the slave in controversy was a family slave and that a strong attachment existed toward him was sufficient to ground equitable jurisdiction. Hardeman *v.* Sims, 3 Ala. 747; McRea *v.* Walker, 4 How. (Miss.) 455.

Relief pending suit.— On allegations that defendants were without property and that there was danger of their removing slaves from the state the court sustained a bill to take possession of the slaves and hire them

trust,[12] where plaintiff is entitled to an account,[13] where discovery is required and jurisdiction is retained to administer relief[14] or to prevent multiplicity of suits.[15] Of course where replevin or detinue would not afford a complete remedy equity will interfere, and as a part of the relief decree the delivery which might be had through replevin.[16] Where the remedy at law is impeded equity will take jurisdiction.[17]

e. Recovery of Land and Trial of Title. One relying on a legal title, who seeks only to recover possession of land held adversely, or whose rights are sufficiently protected by putting him in possession, has an adequate remedy at law by ejectment, writ of entry, or whatever possessory action prevails in the particular jurisdiction, and equity will not take jurisdiction for the sole purpose of restoring possession.[18] The rule is applied where the issue to be tried is one that

cut pending the suit. Spendlove *v.* Spendlove. 1 N. C. 174.

12. See, generally, TRUSTS.

Chattels obtained through abuse of fiduciary relation.— The jurisdiction of the court by injunction to protect the possession, and to decree the delivery up, of specific chattels, is not merely as to such the loss or injury to which would not be adequately compensated by damages, but extends to all cases where the possession has been acquired through an alleged abuse of power on the part of one standing in a fiduciary relation to plaintiff. Wood *v.* Rowcliffe, 11 Jur. 915, 17 L. J. Ch. 83, 2 Phil. 382, 41 Eng. Reprint 990.

13. Neeley *v.* Roberts, (S. D. 1903) 95 N. W. 921.

14. See *infra*, II, C.

15. Cross *v.* Cross, 4 Gratt. (Va.) 257. See *infra*, II, B, 1.

16. Holmes *v.* Woodworth, 6 Gray (Mass.) 324.

17. As where the goods are in the hands of a collector of customs against whom by force of statute (U. S. Rev. St. § 934) replevin could not be brought. Pollard *v.* Reardon, 65 Fed. 848, 13 C. C. A. 171. Bills have also been sustained for the reasons grounding jurisdiction in the case of property of peculiar nature or value, apparently without regard to such special character of the property; as because replevin required the giving of a bond and permitted defendant upon giving bond to regain possession (Gough *v.* Crane, 3 Md. Ch. 119), or because damages were not susceptible of proof or computation (Redfield *v.* Widdleton, 1 Rob. (N. Y.) 79). In Massachusetts by statute (St. (1823) c. 140) a bill lies where chattels are secreted or withheld so that they cannot be found and replevied. Under this it is held that notes delivered by an insolvent to defendant on a secret trust in fraud of creditors and which defendant refused to deliver or to exhibit were within the statute, and that a bill would lie without first attempting replevin. Gibbens *v.* Peeler, 8 Pick. (Mass.) 254. It was also held in the same case that jurisdiction attaching in that manner could not be defeated by an offer made after filing the bill to produce the note. But jurisdiction depending on this statute, delivery of a deed cannot be compelled without showing that it is secreted or withheld so that it cannot be replevied. Travis *v.* Tyler, 7 Gray (Mass.) 146. See, however, Mills *v.* Gore, 20 Pick. (Mass.) 28. In Ohio where there is no such statute it is held that personalty, except heirlooms and actionable writings, cannot be recovered in equity, although concealed and although defendant is insolvent. Ireland *v.* Loomis, 17 Ohio Cir. Ct. 37, 9 Ohio Cir. Dec. 393.

18. *Alabama.*— Howison *v.* Baird, 138 Ala. 129, 35 So. 62; Inglis *v.* Freeman, 137 Ala. 298, 34 So. 394; Jordan *v.* Phillips, etc., Co., 126 Ala. 561, 29 So. 831; Belcher *v.* Scruggs, 125 Ala. 336, 27 So. 839; Brown *v.* Hunter, 121 Ala. 210, 25 So. 924; Cox *v.* Boyleston, 57 Ala. 270.

Arkansas.— Cole *v.* Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945; Cloyes *v.* Keatts, 18 Ark. 19.

California.— Ohm *v.* San Francisco, (1890) 25 Pac. 155; Ritchie *v.* Dorland, 6 Cal. 33.

Illinois.— Lomax *v.* Dore, 45 Ill. 379; Green *v.* Spring, 43 Ill. 280; Field *v.* Golconda, 81 Ill. App. 165.

Iowa.— Harrington *v.* Cubbage, 3 Greene 307.

Kentucky.— Payne *v.* Riley, 4 Dana 38; Brown *v.* Brown, 1 Dana 39; Hinton *v.* Fox, 3 Litt. 380; Blanchard *v.* Kenton, 4 Bibb 451.

Maine.— Robinson *v.* Robinson, 73 Me. 170.

Maryland.— Hecht *v.* Colquhoun, 57 Md. 563; Crook *v.* Brown, 11 Md. 158.

Massachusetts.— Woodman *v.* Saltonstall, 7 Cush. 181.

Michigan.— Detroit, etc., Plank-Road Co. *v.* Oakland R. Co., 131 Mich. 663, 92 N. W. 346; Pittman *v.* Burr, 79 Mich. 539, 44 N. W. 951.

Mississippi.— Ross *v.* Barland, Walk. 489.

Missouri.— Odle *v.* Odle, 73 Mo. 289; Bobb *v.* Woodward, 42 Mo. 482.

New Jersey.— Mead *v.* Camfield, 11 N. J. Eq. 38; Miller *v.* English, 6 N. J. Eq. 304.

New Mexico.— Lasswell *v.* Kitt, (1902) 70 Pac. 561.

New York.— Kramer *v.* Amberg, 3 N. Y. Suppl. 240.

Ohio.— Harper *v.* Crawford, 13 Ohio 129.

Oregon.— Love *v.* Morrill, 19 Oreg. 545, 24 Pac. 916.

Pennsylvania.— Williams *v.* Fowler, 201 Pa. St. 336, 50 Atl. 969; Leininger *v.* Summit Branch R. Co., 180 Pa. St. 287, 36 Atl. 738; Saunders *v.* Racquet Club, 170 Pa. St. 265,

could be raised in ejectment, as where the title depends upon whether or not a

33 Atl. 79; Long's Appeal, 92 Pa. St. 171; Graver *v.* Otto, 23 Pa. Co. Ct. 227; Boyd's Appeal, 3 Walk. 473; Boyd *v.* Reid, 1 Chest. Co. Rep. 191; Farr *v.* Mullen, 5 Lack. Leg. N. 318; Bentley *v.* Kenyon, 2 Luz. Leg. Obs. 31.

Rhode Island.— Rogers *v.* Rogers, 17 R. I. 623, 24 Atl. 46.

South Carolina.— Butler *v.* Ardis, 2 McCord Eq. 60; Bussy *v.* McKie, 2 McCord Eq. 23, 16 Am. Dec. 628.

West Virginia.— Freer *v.* Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 910, 59 L. R. A. 556; Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694; Jones *v.* Fox, 20 W. Va. 370.

Wisconsin.— Kilbourn Lodge No. 3, A. F. & A. M. *v.* Kilbourn, 74 Wis. 452, 43 N. W. 168.

United States.— Smyth *v.* New Orleans Canal, etc., Co., 141 U. S. 656, 12 S. Ct. 113, 35 L. ed. 891 [*affirming* 34 Fed. 825]; Lewis *v.* Cocks, 23 Wall. 466, 23 L. ed. 70; Hipp *v.* Babin, 19 How. 271, 15 L. ed. 633; Ringo *v.* Binns, 10 Pet. 269, 9 L. ed. 420; Preston *v.* Tremble, 7 Cranch 354, 3 L. ed. 369; Hanley *v.* Kansas, etc., Coal Co., 110 Fed. 62; McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Johnson *v.* Munday, 104 Fed. 594, 44 C. C. A. 64; Lanier *v.* Alison, 31 Fed. 100; Allen *v.* Halliday, 28 Fed. 261; McAlpine *v.* Tourtelotte, 24 Fed. 69; Speigle *v.* Meredith, 22 Fed. Cas. No. 13,227, 4 Biss. 120.

See 19 Cent. Dig. tit. "Equity," §§ 134–136, 153.

Application of rule.— A plaintiff, seeking to compel a defendant to convey to him, disclosed in his complaint that he already held the legal title. He was relegated to ejectment. Dalton *v.* Hamilton, 50 Cal. 422. A conveyed to B and B to plaintiff. Subsequently through collusion the deed from A to B was destroyed and A made a deed to C who in turn deeded to D. A bill to set aside the fraudulent deed was dismissed. Willet *v.* Overton, 2 Root (Conn.) 338, 1 Am. Dec. 72. But this was in a state where by statute equity jurisdiction is prohibited when a remedy exists at law. See *supra*, II, A, 1, b, In Florida, a mortgage not passing the legal title, a grantor in a deed absolute in form but given as security may recover in ejectment from the grantee wrongfully in possession, and therefore cannot resort to equity. Endel *v.* Walls, 16 Fla. 786. A statute (N. H. Laws (1883), c. 43) provided that one in possession claiming an estate of freehold or an unexpired term of not less than ten years might maintain a bill in equity against an adverse claimant. Plaintiff had conveyed land to himself for life with remainder to defendant, with a condition avoiding the deed if defendant should neglect suitably to support plaintiff. Plaintiff filed a bill to annul the deed for a breach of condition. It was held that the statute did not confer jurisdiction in equity in cases where the law was adequate, and that the law permitted an action for a remainder in fee expectant upon a life-estate. Walker *v.* Walker, 63 N. H. 321, 56 Am. Rep. 514. And a remainder-man may not proceed in equity against a life-tenant to adjudicate title; the remedy is at law against the adverse claimants of the remainder. Preston *v.* Smith, 26 Fed. 884.

A court of equity is astute to detect attempts to accomplish ejectment under the guise of asserting equitable rights. Thus where a tenant sets up an independent title in himself, equity will not interfere in favor of the landlord on the theory of remedying a breach of trust. Whiting *v.* Taylor, 8 Dana (Ky.) 403. And a bill by a mortgagee against the mortgagor and an adverse claimant for foreclosure is as to the adverse claimant merely an ejectment bill and cannot be sustained. Jones *v.* Weed, 4 Sandf. Ch. (N. Y.) 208. So a bill in form to quiet title where plaintiff is not in possession will not be sustained because of the extensive character of plaintiff's grant and the difficulty of acquiring possession of all the land included therein. Northern Pac. R. Co. *v.* Amacker, 49 Fed. 529, 1 C. C. A. 345. A bill will not be sustained to enjoin a railroad company from constructing its road on land of which it had taken possession, where the controversy was as to the title (North Shore R. Co. *v.* Pennsylvania Co., 193 Pa. St. 641, 44 Atl. 1083), or to restrain an adverse claimant in possession from committing waste (Barry *v.* Shelby, 4 Hayw. (Tenn.) 229). A bill for possession may not be maintained against a tenant setting up an independent title, on the theory that his acts amounted to fraud and breach of trust. Whiting *v.* Taylor, 8 Dana (Ky.) 403.

Mesne profits.— Rents and profits recoverable at law in an ejectment action or after judgment in ejectment cannot be recovered by a bill in equity for that purpose.

Florida.— Cavedo *v.* Billings, 16 Fla. 261.

Kentucky.— Moore *v.* Lockitt, 2 A. K. Marsh. 526.

Maryland.— Drury *v.* Conner, 1 Harr. & G. 220.

New York.— Mollan *v.* Griffith, 3 Paige 402.

United States.— Forest Oil Co. *v.* Crawford, 101 Fed. 849, 42 C. C. A. 54; Newman *v.* Westcott, 29 Fed. 49.

See 19 Cent. Dig. tit. "Equity," § 140.

Where a discovery is necessary a bill will lie after ejectment. Apalachicola *v.* Apalachicola Land Co., 9 Fla. 340, 79 Am. Dec. 284; Elliott *v.* Armstrong, 4 Blackf. (Ind.) 421.

Remedy at law inadequate.— Where judgment for rents and profits had been rendered against several hundred defendants who were insolvent, to whom a common warrantor was liable and plaintiff had no remedy at law upon the warranty from want of privity, a bill was sustained against the warrantor.

deed was delivered,[19] or upon the sufficiency of a description.[20] It is also invoked where the legal title depends upon construction of a will, the jurisdiction of equity in such cases not extending to the determination of legal title created by will, unencumbered by trusts.[21] Even when one of the parties is already fortified by judgment in ejectment another action in ejectment, rather than in equity, must be resorted to in order to obtain possession, where another action is available.[22] Relief of the character obtainable in ejectment has sometimes been denied even in cases where equity would ordinarily retain jurisdiction for the purpose of a complete adjustment of the controversy.[23] The courts have also refused to entertain bills requiring the trial of titles which might be tried at law, where the object was other than the recovery of possession.[24] On the same principle the court will not restrain proceedings in ejectment on a bill setting up matter available in defense in the ejectment suit and no supervening equity.[25] The general rule applies where the party in possession traces title through a void conveyance,[26] even where the invalidity is due to fraud,[27] and also where the conveyance is based on void judicial proceedings, and restitution of possession is the only relief sought, or all that is essential to plaintiff's protection,[28] at least where

Gaines *v.* New Orleans, 17 Fed. 16, 4 Woods 213.

19. Pratt *v.* Pond, 5 Allen (Mass.) 59; Woodward *v.* Woodward, 8 N. J. Eq. 127.

20. Gamble *v.* Voll, 15 Cal. 507; McAlpine *v.* Tourtelotte, 24 Fed. 69.

21. Ragland *v.* Green, 14 Sm. & M. (Miss.) 194; Hayday *v.* Hayday, (N. J. Ch. 1898) 39 Atl. 373; Torrey *v.* Torrey, 55 N. J. Eq. 410, 36 Atl. 1084; Dill *v.* Wisner, 88 N. Y. 153; Bailey *v.* Briggs, 56 N. Y. 407; Onderdonk *v.* Mott, 34 Barb. (N. Y.) 106; Bowers *v.* Smith, 10 Paige (N. Y.) 193.

22. As where one action is not conclusive (Morgan *v.* Lehman, 92 Ala. 440, 9 So. 314), or when plaintiff was evicted under a judgment in an action to which he was not a party. Lacassagne *v.* Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. ed. 368. A bill was dismissed where defendant had succeeded in ejectment by showing fraud in procuring the patent under which plaintiff derived title. Williams *v.* Rhodes, 33 Miss. 137. But a bill was sustained where defendant reëntered and expelled plaintiff after having been evicted under a judgment in ejectment in plaintiff's favor. Romero *v.* Muños, 1 N. M. 314. And see *infra*, II, B, 1.

23. As where the suit was originally properly brought in equity and a change of conditions pending the action divested it of its equitable feature and left only a claim for possession. Daniel *v.* Green, 42 Ill. 471; Hickman *v.* Irvine, 3 Dana (Ky.) 121. So, where plaintiff sought by bill to set aside a tax deed, the court sustained a demurrer to a cross bill setting up legal title in defendant derived from a distinct source. Gage *v.* Mayer, 117 Ill. 632, 7 N. E. 97. See *infra*, II, C.

24. Seeley *v.* Baldwin, 185 Ill. 211, 56 N. E. 1075; Burns *v.* Mearns, 44 W. Va. 744, 30 S. E. 112. And see Crooks *v.* Whitford, 40 Mich. 599. A bill seeking a sale of lands devised in trust was dismissed when the question involved was the validity of a prior sale to defendant. Cowmans *v.* Colquhoun, 60 Md. 127. A vendee of land cannot have relief against the vendor on the ground of failure of title until the title has been tried at law. Waddell *v.* Beach, 9 N. J. Eq. 793; Steed *v.* Baker, 13 Gratt. (Va.) 380.

Title to money awarded for land taken by eminent domain may be determined by a court of equity in a proper case, since title to the land is not the subject of the suit. Gardiner *v.* Baltimore, 96 Md. 361, 54 Atl. 85.

25. *Alabama.*— Turner *v.* Mobile, 135 Ala. 73, 33 So. 132.

Florida.— Freeman *v.* Timanus, 12 Fla. 393.

Michigan.— Stockton *v.* Williams, Walk. 120.

Virginia.— Manchester Cotton Mills *v.* Manchester, 25 Gratt. 825.

Wisconsin.— Rogers *v.* Cross, 3 Pinn. 36, 3 Chandl. 34.

See 19 Cent. Dig. tit. "Equity," §§ 135, 136, 153.

Application of rule.— Plaintiff in ejectment claimed title by patent from the United States issued in 1861, and defendants under a tax-sale in 1840 followed by twenty years' adverse possession. Defendants in ejectment filed a bill to restrain plaintiff from using his patent on the ejectment trial and to compel a conveyance. It was held that defendant's possession — if available at all — was available in defense of the ejectment, and the bill was dismissed. Wells *v.* Lammey, 88 Ill. 174. But one may maintain a bill to enforce an equitable title although a defense might be made at law on the same ground. Massenburg *v.* Denison, 71 Fed. 618, 18 C. C. A. 280.

26. Wilkinson *v.* Wilkinson, 129 Ala. 279, 30 So. 578; Campbell *v.* Campbell, 57 Wis. 288, 15 N. W. 138; Smythe *v.* New Orleans Canal, etc., Co., 34 Fed. 825; Chamberlain *v.* Marshall, 8 Fed. 398.

27. Hogueland *v.* Arts, 113 Iowa 634, 85 N. W. 818; Thayer *v.* Smith, 9 Metc. (Mass.) 469; Holtz *v.* Borgmann, 6 Pa. Dist. 217.

28. *Alabama.*— Watts *v.* Fraser, 80 Ala. 186.

Minnesota.— Bolles *v.* Carli, 12 Minn. 113.

the invalidity appears on the face of the proceedings.[29] The essential adequacy of a legal remedy creates the restriction on equitable jurisdiction, and not primarily the nature of the issue or of the relief. Equity will therefore try titles,[30] or decree the delivery of possession of lands, in many cases where equitable jurisdiction exists on other grounds, and such action is incidental to a complete adjudication of the controversy,[31] or where it is uncertain whether the legal remedy is available,[32] or where the legal remedy is not in itself adequate.[33]

Missouri.— Benton County *v.* Morgan, 163 Mo. 661, 64 S. W. 119; Janney *v.* Spedden, 38 Mo. 395.

Rhode Island.—McCudden *v.* Wheeler, etc., Mfg. Co., 23 R. I. 528, 51 Atl. 48.

West Virginia.— Gilkeson *v.* Smith, 5 W. Va. 128.

United States.— McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Eiffert *v.* Craps, 58 Fed. 470, 7 C. C. A. 319; Jenkins *v.* Hannan, 26 Fed. 657.

See 19 Cent. Dig. tit. "Equity," §§ 135, 153.

A judicial sale will not be restrained where it would be void against plaintiffs, not parties to the proceedings, and could not be made the basis of a title adverse to them. Rea *v.* Longstreet, 54 Ala. 291; Modisett *v.* Kalamazoo Nat. Bank, 23 Tex. Civ. App. 589, 56 S. W. 1007.

Where lands were sold at tax-sale under a void warrant it was held that the owner's remedy was to redeem under the statute, and not by bill in equity against the purchaser for a reconveyance. Adams *v.* Castle, 30 Conn. 404.

29. Tyson *v.* Brown, 64 Ala. 244; McClanahan *v.* West, 100 Mo. 309, 13 S. W. 674. A bill for possession will not be sustained even upon an equitable title against one in possession without title, or under an adverse claim and not subject to the equity, the remedy in such case being for the equitable owner to clothe himself with the legal title and then proceed at law. Pell *v.* Lander, 8 B. Mon. (Ky.) 554; Jasper *v.* Quarles, Hard. (Ky.) 461; Haythorn *v.* Margerem, 7 N. J. Eq. 324; Morrison *v.* Balkins, 6 Ohio Dec. (Reprint) 882, 8 Am. L. Rec. 577; Fussell *v.* Gregg, 113 U. S. 550, 5 S. Ct. 631, 28 L. ed. 993 [*affirming* 8 Fed. 384]; Independence Church of Christ *v.* Reorganized Church of Jesus Christ, etc., 70 Fed. 179, 17 C. C. A. 387. *Aliter* where defendant is subject to the equity, even though ejectment may be maintained on an equitable title. Church's Appeal, (Pa. 1886) 7 Atl. 751. The holder of an equitable title cannot maintain a bill to declare defendant's title void and to restrain the digging of ore on the land, without showing that the holder of the legal title refused to join plaintiff in enforcing the legal remedy. Jones *v.* Snapp, 1 Tenn. Cas. 56, Thomps. Cas. (Tenn.) 82.

30. See QUIETING TITLE.

31. See Kilgore *v.* Norman, 119 Fed. 1006; and *infra*, II, C. If plaintiff's right to equitable relief depends on his having a good legal title, equity will determine whether he has disclosed such title. Griffin *v.* Carter, 40 N. C. 413. Although an equitable title will support ejectment, plaintiff clothed with such title may proceed in equity to compel a conveyance and for possession. Jordan *v.* Faircloth, 27 Ga. 372. Jurisdiction being founded on the cancellation of a title bond, recovery was likewise given for the land. Turner *v.* Newman, 39 S. W. 504, 19 Ky. L. Rep. 231. Plaintiff sought an injunction to prevent defendants from tearing up railroad tracks on certain land, from selling coal therefrom, and from interfering with plaintiff's taking possession. There was a demurrer to so much of the bill as sought to restrain defendant from interfering with plaintiff's taking possession, but the demurrer was overruled on the ground that equity would grant complete relief. New York, etc., Coal Co. *v.* Spencer, 3 Lack. Leg. N. (Pa.) 286.

32. Pope *v.* Stansbury, 2 Bibb (Ky.) 484; Buck *v.* Williams, 10 Heisk. (Tenn.) 264; Ruckman *v.* Cory, 129 U. S. 387, 9 S. Ct. 316, 32 L. ed. 728.

33. *Alabama.*— Haley *v.* Bennett, 5 Port. 452.

Illinois.— Maywood Co. *v.* Maywood, 118 Ill. 61, 6 N. E. 866 [*affirming* 17 Ill. App. 253].

Maine.— Chapman *v.* Butler, 22 Me. 191.

Vermont.— Payne *v.* Hathaway, 3 Vt. 212.

West Virginia.—Sperry *v.* Gibson, 3 W. Va. 522.

United States.— Stewart *v.* Masterson, 131 U. S. 151, 9 S. Ct. 682, 33 L. ed. 114; Ruckman *v.* Cory, 129 U. S. 387, 9 S. Ct. 316, 32 L. ed. 728; U. S. *v.* Flournoy Live-Stock, etc., Co., 69 Fed. 886; Hudson *v.* Randolph, 66 Fed. 216, 13 C. C. A. 402.

See 19 Cent. Dig. tit. "Equity," §§ 136, 153.

Examples of inadequate remedies.— A will charged land with plaintiff's support and gave him a right of entry, but it was held that the right to recover possession at law was inadequate, not being an equivalent for the money charged upon the land. Swift *v.* Larrabee, 31 Conn. 225. Plaintiff having only an easement in a street, and therefore barred from ejectment, was permitted to maintain a bill to evict defendant. Lyman *v.* Suburban R. Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645. A lessor having dispossessed the lessee on a technical forfeiture, which the lessor was equitably estopped from asserting, equity had jurisdiction because the estoppel could not be used in support of ejectment. Pokegama Sugar-Pine Lumber Co. *v.* Klamath River Lumber, etc., Co., 96 Fed. 34. Where one was entitled to immediate possession under a homestead entry, delays inci-

f. Rights Protected at Law Otherwise Than by Ordinary Actions — (i) *Extraordinary Legal Remedies.* Because quo warranto or proceedings in the nature of quo warranto afford an adequate and generally exclusive remedy in such cases, a court of equity will not usually interfere to try the title to a public office,[34] or an office in a corporation,[35] or to try the validity of a corporate organization.[36] For a similar reason equity will not interfere for the purpose of compelling the performance of a duty imposed by law, where mandamus is available for that purpose.[37]

dent to forcible entry and detainer proceedings, and due to rights of appeal and stays, and to the arrangement of terms of court, were held to justify a resort to equity. Woodruff *v.* Wallace, 3 Okla. 355, 41 Pac. 357. Where one of several joint owners of a ferry franchise ousts the others, their remedy is by a bill in equity to be let into the enjoyment. Roy *v.* Henderson, 132 Ala. 175, 31 So. 457. And where the titles and interests of tenants in common of land have become complicated so that they cannot be adjusted at law, an action of ejectment will be restrained and equity will settle all the titles (Smith *v.* King, 50 Ga. 192), although ordinarily a cotenant must assert his rights to possession by ejectment. Messimer's Appeal, 92 Pa. St. 168; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530; Gloninger *v.* Hazard, 42 Pa. St. 389.

Relief in equity denied.— The fact that the statute allows two trials in ejectment is not ground for the intervention of equity. Blackwood *v.* Van Vleet, 11 Mich. 252. And the fact that twenty-seven persons occupied separate portions of a tract under a void tax deed was held not to justify a resort to equity to set aside the deed. Hughes *v.* Hannah, 39 Fla. 365, 22 So. 613.

34. *Connecticut.*— Hinckley *v.* Breen, 55 Conn. 119, 9 Atl. 31.

Indiana.— Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679.

Michigan.— Detroit *v.* Board of Public Works, 23 Mich. 546.

Missouri.— Arnold *v.* Henry, 155 Mo. 48, 55 S. W. 1089, 78 Am. St. Rep. 556; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393.

New Jersey.—Bergen Traction Co. *v.* Ridgefield, (Ch. 1895) 32 Atl. 754.

New York.— Demarest *v.* Wickham, 63 N. Y. 320; People *v.* New York Canal Bd., 55 N. Y. 390; Hartt *v.* Harvey, 32 Barb. 55; McNiece *v.* Sohmer, 29 Misc. 238, 61 N. Y. Suppl. 193.

Pennsylvania.— Hagner *v.* Heyberger, 7 Watts & S. 104, 42 Am. Dec. 220, 3 Pa. L. J. 370.

United States.— White *v.* Berry, 171 U. S. 366, 18 S. Ct. 917, 43 L. ed. 199; Green *v.* Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90.

See 19 Cent. Dig. tit. "Equity," § 123.

Office vacant.— So held even when a bill alleged that there was no one in possession of the office against whom quo warranto could be directed. State *v.* Aloe, 150 Mo. 466, 54 S. W. 494, 47 L. R. A. 393.

Incidental jurisdiction.— But it is held that a title to office may be inquired into as incidental to the exercise of independent equity jurisdiction. Hurley *v.* Mississippi Levee Com'rs, 76 Miss. 141, 23 So. 580.

Mandamus.— In Maryland it was said that the usual and appropriate proceeding is by mandamus to try the title to an office, where the former incumbent refuses to permit the claimant to obtain possession. Washington County School Com'rs *v.* Washington County School Com'rs, 77 Md. 283, 26 Atl. 115.

35. Christ Church *v.* Phillips, 5 Del. Ch. 429; Bedford Springs Co. *v.* McMeen, 161 Pa. St. 639, 29 Atl. 99. But where the determination of title is merely incidental to jurisdiction existing for other purposes the question will be determined. Boggiano *v.* Chicago Macaroni Mfg. Co., 99 Ill. App. 509; Garmire *v.* American Min. Co., 93 Ill. App. 331.

36. Keigwin *v.* Drainage Com'rs, 115 Ill. 347, 5 N. E. 575.

37. *Illinois.*— Chicago, etc., R. Co. *v.* St. Anne, 101 Ill. 151.

Massachusetts.— Carlton *v.* Salem, 103 Mass. 141.

Mississippi.— Woodruff *v.* State, 77 Miss. 68, 25 So. 483.

New York.— Demarest *v.* Wickham, 63 N. Y. 320; People *v.* Canal Bd., 55 N. Y. 390; McNiece *v.* Sohmer, 29 Misc. 238, 61 N. Y. Suppl. 193.

North Carolina.— Cooper *v.* Dismal Swamp Canal Co., 6 N. C. 195.

West Virginia.— Hall's Safe, etc., Co. *v.* Scites, 38 W. Va. 691, 18 S. E. 895.

United States.— White *v.* Berry, 171 U. S. 366, 18 S. Ct. 917, 43 L. ed. 199; Green *v.* Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90; Walkley *v.* Muscatine, 6 Wall. 481, 18 L. ed. 930.

See 19 Cent. Dig. tit. "Equity," § 123.

To levy tax.— A water company sought in equity to compel a city to levy a tax to pay indebtedness under a continuing contract and to levy taxes annually in the future for the same purpose, and also to restrain the city from diverting funds already collected for that purpose to other purposes. The injunction was granted to prevent the diversion of the funds, but for the remainder of the relief plaintiff was relegated to law. Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113.

Redress for past grievance.— It has been said that mandamus is prospective, and where redress of a past privation as well as restoration to enjoyment for the future is required, equity and not mandamus affords the remedy.

(II) *Certiorari, Appeal, Etc.* It is not the province of equity to review proceedings at law and grant relief against mere errors or irregularities, the remedy for such being by appellate proceedings.[38] The same principle has been applied where the statute afforded an adequate remedy against proceedings of an administrative or non-judicial character, either by appeal[39] or by certiorari.[40]

g. Defenses Available at Law. Relief will be denied to a party who seeks the aid of a court of equity against pending or threatened proceedings at law, where it appears that the matters relied upon are such as if established would constitute a defense in the law action, and where the complainant's right will be fully protected by a successful defense; that is, where no wrong is threatened beyond the assertion of the legal demand, open as it is to such defense.[41]

But of course this can only be true where law will not afford adequate redress. American Deaf, etc., Asylum *v.* Phœnix Bank, 4 Conn. 172.

38. See *infra*, II, E, 30. The same rule applies where relief can be had in the law court by motion. Huening *v.* Buckler, 87 Ill. App. 648; Reed *v.* Prescott, 70 N. H. 88, 46 Atl. 457. But although the complainant might have had an execution set aside for irregularity he is not barred thereby from maintaining a bill against the purchaser to have a homestead right set apart, legal title being in defendant. Clark *v.* Allen, 87 Ala. 198, 6 So. 272.

39. So held in attempts to obtain relief from taxes. Merrill *v.* Gorham, 6 Cal. 41; McBride *v.* Chicago, 22 Ill. 574. But where an appeal was not permitted by law, an unsuccessful attempt to prosecute such an appeal was held not to bar relief in equity. Matteson *v.* Whaley, 20 R. I. 412, 39 Atl. 754.

40. So held with regard to proceedings to obtain relief from an illegal assessment. Murphy *v.* Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345; Jewel *v.* West Orange, 36 N. J. Eq. 403; Lewis *v.* Elizabeth, 25 N. J. Eq. 298. That the remedy by certiorari has been lost makes no difference. Cleveland *v.* Essex Public Road Bd., 31 N. J. Eq. 473. There must be some independent equity to ground the jurisdiction. Jersey City *v.* Lembeck, 31 N. J. Eq. 255; Dusenbury *v.* Newark, 25 N. J. Eq. 295. So held also as to setting aside proceedings for the opening of a road (Buckley *v.* Drake, 9 N. Y. Civ. Proc. 336), for laying out a drain (Moore *v.* McIntyre, 110 Mich. 237, 68 N. W. 130), and where the question was as to the validity of resolutions directing the issue of county bonds (Siedler *v.* Hudson County, 39 N. J. L. 632). But equity has jurisdiction to relieve against an illegal assessment when the invalidity does not appear of record. Harkness *v.* District of Columbia, 1 MacArthur (D. C.) 121.

41. *Alabama.*— Turner *v.* Mobile, 135 Ala. 73, 33 So. 132; Saunders *v.* Saunders, 20 Ala. 710.

Connecticut.— Bulkeley *v.* Welch, 31 Conn. 339.

Kentucky.— Thomas *v.* Ferqueran, 2 J. J. Marsh. 28; Yelton *v.* Hawkins, 2 J. J. Marsh. 1; Dickerson *v.* Morgan, Ky. Dec. 310.

Maine.— York *v.* Murphy, 91 Me. 320, 39 Atl. 992.

New York.— Morse *v.* Hovey, 9 Paige 197; Perrine *v.* Striker, 7 Paige 598.

United States.— Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. ed. 174.

Application of rule.—An attempt to recover back taxes paid, and to restrain the collection of future taxes, on the ground that the statute creating the collector's office was unconstitutional, was defeated because an action lay at law to recover back the taxes paid, and plaintiff could refuse to pay future taxes and defend an action brought to collect them. Crawford *v.* Bradford, 23 Fla. 404, 2 So. 782. Plaintiff sought to restrain an action of trespass on the ground that the rule of damages at law would under the circumstances be unjust. Relief was denied. Atlantic, etc., Coal Co. *v.* Maryland Coal Co., 62 Md. 135. In Massachusetts, where an action to enforce an award of arbitrators was pending, the court refused to entertain a bill to set aside the award for mistake, because the matter could be pleaded in defense. Mickles *v.* Thayer, 14 Allen (Mass.) 114. An action was brought to recover on an instrument acknowledging the borrowing of certain bonds to be returned on demand. The action was against principal and surety, and it was held that the fact that the bonds were sold and the proceeds accounted for to the lender was a defense at law and not a discharge of the surety assertable in equity. Linn *v.* Neldon, 23 N. J. Eq. 169. Failure to plead a defense does not permit a resort to equity where it might be availed of by amendment. Graham *v.* Stagg, 2 Paige (N. Y.) 321. In England in many cases where the defense was of an equitable character but available at law, the court while asserting jurisdiction has declined to exercise it. Ochsenbein *v.* Papelier, L. R. 8 Ch. 695, 69 L. J. Ch. 861, 28 L. T. Rep. N. S. 459, 21 Wkly. Rep. 516; Kemp *v.* Tucker, L. R. 8 Ch. 369, 42 L. J. Ch. 532, 28 L. T. Rep. N. S. 458, 21 Wkly. Rep. 470; Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43. See also Johnston *v.* Young, Ir. 10 Eq. 403; Scotland L. Assoc. *v.* McBlain, Ir. R. 9 Eq. 176.

Where obstacles exist to the interposition of the defense equity will interfere. Bassett *v.* Mason, 18 Conn. 131. So where the remedy by defense at law is not necessarily adequate. Hodge *v.* McMahan, 137 Ala. 171, 34 So. 185.

h. Effect of Prayer For Relief. Whether or not jurisdiction should be denied or declined because of the existence of an adequate remedy at law depends sometimes upon the nature of the relief demanded. Although a bill contains averments which might sustain a prayer for equitable relief and ground equitable jurisdiction, nevertheless if plaintiff asks only a decree for the payment of money or for other relief which he might obtain upon the facts stated at law, he will be relegated to his law action.[42] The same result follows where an equity exists and the bill prays, not for relief which might be granted, but for relief equitable in form and not grantable in equity because the legal remedy is adequate to accomplish the purpose sought.[43]

6. General Causes of Legal Deficiencies — a. Classification. The causes of those deficiencies of the law which give rise to jurisdiction in equity may be classified as follows: (1) The failure of the law to recognize a substantive right; (2) the inadequacy of the relief afforded at law to protect a right; (3) the inadequacy of the procedure at law to establish a right.[44]

An equitable estoppel may be enforced in equity, although it might be used as a defense to the action at law. Heath *v.* Derry Bank, 44 N. H. 174. *Contra,* Vermont Copper Min. Co. *v.* Ormsby, 47 Vt. 709. See Pokegama Sugar Pine Lumber Co. *v.* Klamath River Lime, etc., Co., 96 Fed. 34.

Negotiable instruments.— The interposition of equity to compel the surrender of negotiable instruments against the enforcement of which a legal defense exists is for the purpose of preventing plaintiff from being deprived of the defense by a transfer of the instrument to one not subject to the defense. Therefore where such an injury is not possible equity will not entertain jurisdiction for the purpose of compelling a surrender. Askew *v.* Hooper, 28 Ala. 634; Hoffman *v.* Treadwell, 39 N. Y. Super. Ct. 183; Dorr *v.* Peters, 3 Edw. (N. Y.) 132; Geer *v.* Kissam, 3 Edw. (N. Y.) 129; Hughes *v.* Pratt, 37 Oreg. 45, 60 Pac. 707; Glenwood Mfg. Co. *v.* Syme, 109 Wis. 355, 85 N. W. 432. The fact that a note contains a power of attorney to confess judgment on it does not take the case out of the rule. Vannatta *v.* Lindley, 98 Ill. App. 327. Where the complainant, an administrator, had made a note to the decedent which was in the possession of decedent's husband, it was held that complainant might as administrator recover possession of the note, although individually he could defend at law an action by the husband to recover thereon. Wales *v.* Newbould, 9 Mich. 45. And a note and chattel mortgage will both be canceled where there is a complete legal defense to the note but the mortgage might be foreclosed without suit. Badgett *v.* Frick, 28 S. C. 176, 5 S. E. 355.

Avoidance of defense.—On the same principle that a defendant must generally rely upon matters of law by way of plea or answer in the law action, it is held that a plaintiff at law cannot resort to equity to restrain the pleading of a defense, where the matter he relies on might be pleaded at law by way of replication. Hoboken Ferry Co. *v.* Baldwin, 58 N. J. Eq. 36, 43 Atl. 417.

42. A bill averred that defendant's intestate had sold property of plaintiff, agreeing to invest the proceeds in a home for her, but instead thereof had bought property and taken title in his own name and had sold the property. The prayer was only for the recovery of the money and the bill was dismissed. King *v.* Pate, 60 Ga. 106. Refusal of a party to a contract to permit the other party to see it will not justify a resort to equity to recover on the contract, in the absence of a prayer for discovery of its contents. Thomas *v.* Caldwell, 50 Ill. 138. A bill by a creditor, a party to a composition agreement, alleging fraud in procuring the composition but praying for damages and not rescission, should be dismissed. Denny *v.* Gilman, 26 Me. 149. Equity has no jurisdiction where an author seeks damages for a past violation of his copyright and to recover possession of the stereotype plates of his work, if he does not seek an injunction against further violation. Monk *v.* Harper, 3 Edw. (N. Y.) 109.

43. A creditor holding a mortgage on the debtor's chattels brought a bill, not asking foreclosure, but to restrain proceedings by an attaching creditor, and to have the court take control of the chattels and apply them to plaintiff's debt. It was held that for the purpose of the bill he had a remedy at law. Polk *v.* Gardner, 67 Ark. 441, 55 S. W. 840. A bill by a patentee of bird-cages against a licensee to compel him to disclose the number of cages made and sold and for general relief presented no equity when it failed to make a case for discovery. Nothing could be granted under the prayer for general relief except what could be recovered at law. Perkins *v.* Hendryx, 23 Fed. 418.

44. See 1 Story Eq. Jur. 26. All grounds of equity jurisdiction will be found to fall under one or another of these heads, but perhaps no analysis based on a classification of legal defects would permit the grouping of subjects of jurisdiction in a complete and categorical manner. With regard to some subjects equity jurisdiction is traced to several defects of the law or to a combination of defects. What is said under this head is merely illustrative of the general principles and not by way of remote or exhaustive

b. Right Not Recognized at Law. While the chancellor derived his jurisdiction from the inadequacy of the original writ to enforce recognized legal rights, equity in time came to recognize and enforce substantive rights which the law either denied or refused to recognize. In such cases the remedy at law is not only inadequate but entirely absent, or at least was so when the jurisdiction was established.[45]

c. Legal Relief Inadequate. In a very large class of cases there is no special obstacle to a judgment at law, but such judgment if obtained would not afford an adequate protection to the right asserted. The jurisdiction of equity in such cases is based upon the superior adequacy of the remedy, whereby specific relief is granted, adapted to the nature of the right and of the wrong committed or threatened.[46]

d. Inadequacy of Legal Procedure. Sometimes, although the right at law is fully recognized and a money judgment would afford adequate relief, the rules of procedure present obstacles to the attainment of such relief at law, and equity is invoked to remove such obstacles, or to grant relief itself because they are not presented in equity.[47] These obstacles are traceable largely, directly or indirectly, to the limitations imposed by jury trials, the necessity of arranging the parties so as to present only a dual contest, the rules of evidence and the singleness of issue. With regard to parties, beside the necessity of resorting to equity to avoid the legal requisite of duality,[48] the impossibility of the same persons being both plaintiff and defendant at law,[49] and the rules requiring those having a joint interest to unite,[50] often ground jurisdiction in equity to enforce a legal demand.[51] Historically, the principal obstacle to legal relief arising from the rules of evidence was the incompetency of parties as witnesses, hence the broad jurisdiction

analysis. The grounds of jurisdiction as to each subject are treated elsewhere. See *infra*, II, B.

45. Of this character are the rights accompanying a trust, the equity of redemption of a mortgagor, the rights of an assignee of a chose in action, and others of like character which the law formerly ignored. While most of these have achieved at least partial recognition at law, the jurisdiction founded on their ancient denial generally remains (see *supra*, II, A, 2), and they are still called equitable rights (see *infra*, II, B).

46. The most familiar instances of this class are the cases where because of the inadequacy of a judgment for damages equity grants relief by way of injunction, specific performance, reformation, rescission, etc. See *infra*, II, B, 7.

47. See *infra*, II, B, 8.

48. At the common law, however numerous might be the parties, plaintiffs must have a common interest and defendants be charged with a common liability. See PARTIES. Therefore, a resort to equity is necessary, or was formerly necessary, wherever complete relief required an adjustment of diverse rights among the parties, as in adjusting liens, distributing funds, and often in matters of account.

49. Where the cause of action was in favor of several owners of a vessel against a partnership, and one of the owners of the vessel was a member of the partnership, a resort to equity was held necessary. Hayden *v.* Whitmore, 74 Me. 230. And also where the contest is between two partnerships with a common member. Bosanquet *v.* Wray, 2 Marsh. 319, 6 Taunt. 597, 16 Rev. Rep. 677. Where the legal remedy would be on a refunding bond payable to an executrix, a claim against such executrix must be asserted in equity. Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113. So also a suit on a joint lease, one of defendants being both a lessor and a lessee. Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63. For similar cases see Ramsey *v.* Johnson, Minor (Ala.) 418; Cumberland Justices *v.* Armstrong, 14 N. C. 284. Creditors of an estate may resort to equity where the administratrix is the real owner of a claim against the estate nominally held by another, the two having combined to subject property to the payment of the claim to the exclusion of other creditors, because the administratrix, who alone could be heard at law, cannot properly represent the estate. Cambridge Cent. Nat. Bank *v.* Fitzgerald, 94 Fed. 16.

50. As where one refuses to join in the necessary proceeding (Hoyt *v.* Fass, 64 Wis. 273, 25 N. W. 45), or where one has released the debt for an improper consideration (Piercy *v.* Fynney, L. R. 12 Eq. 69, 40 L. J. Ch. 404, 19 Wkly. Rep. 710). For this reason one executor may sue another in equity. Croker *v.* Hambden, Choyce Cas. Ch. 118, 21 Eng. Reprint 72; Peake *v.* Ledger, 8 Hare 313, 32 Eng. Ch. 313.

51. A bill in equity will lie also where those who would be defendants at law are numerous or shifting, as where the demand was against an unincorporated society with many members constantly changing by accessions, withdrawals, and deaths, the property

based on the necessity for discovery.[52] Other obstacles are, however, sufficient to invoke the jurisdiction, as where it is sought to set aside an instrument which is void, the invalidity not appearing on its face,[53] or where rules peculiar to law prevent the establishment of a fact.[54] Equity will also take jurisdiction where it is impossible from the nature of the case to produce evidence to establish the amount of damages,[55] as well as where the legal measure of damages affords inadequate relief.[56]

B. Specific Subjects and Grounds of Jurisdiction —1. Multiplicity of Suits, and Circuity of Action — a. Principles Governing Jurisdiction.[57] It is frequently stated that equity will assume jurisdiction for the purpose of preventing a multiplicity of suits.[58] But this statement in its broad form is somewhat misleading. The mere fact that one is threatened with a multiplicity of suits and that he is likely to become involved in numerous proceedings does not alone entitle him to the aid of equity to avoid such situation. He must in addition show that some legal or equitable right is invaded or threatened.[59] The jurisdiction having

being held in common. Shakers Soc. *v.* Watson, 68 Fed. 730, 15 C. C. A. 632. See *infra*, II, B. 1.

52. See Discovery, 14 Cyc. 301.

53. As to set aside conveyances made by a corporation in pursuance of resolutions of the directors apparently valid but passed at a meeting unlawfully held (Mobile Land Imp. Co. *v.* Gass, 129 Ala. 214, 29 So. 920), or to set aside an invalid ordinance fixing water-rates where evidence *aliunde* is necessary to show the invalidity (Anoka Waterworks, etc., Co. *v.* Anoka, 109 Fed. 580; Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 20 S. Ct. 736, 44 L. ed. 886). See also Arnold *v.* Grines, 2 Greene (Iowa) 77; Heyward *v.* Buffalo, 14 N. Y. 534. Where the instrument is void on its face the rule is otherwise. Van Doren *v.* New York, 9 Paige (N. Y.) 388.

54. Where there had been part performance of an oral contract for the sale of land but the vendor had disabled himself from performing, a bill for compensation was sustained, it being thought that there could be no recovery at law upon the oral contract. Lee *v.* Howe, 27 Mo. 521. So a bill was sustained where plaintiff relied on an estoppel which could not be proved at law. Drexel *v.* Berney, 122 U. S. 241, 7 S. Ct. 1200, 30 L. ed. 1219. See *supra*, II, A, 5, g. But equity refused to come to the rescue of one who could prove his defense at law by only one witness whom he feared might deny it, and whom he could not impeach, being his own witness. Matthews *v.* Dodd, 3 Del. Ch. 159.

55. Cheeseborough *v.* Green, 10 Conn. 318, 26 Am. Dec. 396; Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370; Davidson *v.* Sadler, 23 Tex. Civ. App. 600, 57 S. W. 54; Dittmar *v.* New Braunfels, 20 Tex. Civ. App. 293, 48 S. W. 1114; Buhl *v.* Stephens, 84 Fed. 922.

56. Atlanta *v.* Macon, etc., R. Co., 59 Ga. 251.

57. For specific rules governing the exercise of jurisdiction to prevent a multiplicity of suits see Injunctions; Quieting Title; Trespass; and other titles relating to the special subject in question.

58. *Alabama.*— Morgan *v.* Morgan, 3 Stew. 383, 21 Am. Dec. 638.

Illinois.— Scott *v.* Moore, 4 Ill. 306.

Iowa.— Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422.

Kentucky.— Harrison *v.* Fleming, 7 T. B. Mon. 537.

Mississippi.— Tate County *v.* De Soto County, 51 Miss. 588.

Missouri.— Barrington *v.* Ryan, 88 Mo. App. 85.

New Jersey.— Shimer *v.* Morris Canal, etc., Co., 27 N. J. Eq. 364; Black *v.* Shreeve, 7 N. J. Eq. 440.

New York.— Nicoll *v.* Huntington, 1 Johns. Ch. 166.

North Carolina.— Long *v.* Beard, 6 N. C. 337.

Pennsylvania.— Freeman *v.* Stine, 34 Leg. Int. 96; Blackwell *v.* Ace, 3 C. P. 177.

United States.— Nichols *v.* Jones, 19 Fed. 855.

See 19 Cent. Dig. tit. "Equity," § 167.

"Application of the principles upon which jurisdiction has been suggested or denied has been various, both in England and in this country, and it is difficult, if not impossible, to reconcile the cases." Hale *v.* Allinson, 188 U. S. 56, 72, 23 S. Ct. 244, 47 L. ed. 380 [*affirming* 106 Fed. 258, 45 C. C. A. 270], per Peckham, J.

59. *Alabama.*— Turner *v.* Mobile, 135 Ala. 73, 33 So. 132.

District of Columbia.— Pechstein *v.* Smith, 14 App. Cas. 27.

Florida.— Storrs *v.* Pensacola, etc., R. Co., 29 Fla. 617, 11 So. 226.

New York.— Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495.

Rhode Island.— New York, etc., R. Co. *v.* Providence, 16 R. I. 746, 19 Atl. 759.

See 19 Cent. Dig. tit. "Equity," §§ 167, 168.

Application of rule.— Equity will interfere to avoid a multiplicity of suits, to remove a cloud upon title, and to enforce a trust. Dodge *v.* Briggs, 27 Fed. 160. But not in the absence of such equities. Schulenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422. And where numerous defendants are

been exercised for preventive purposes, it must be invoked in time to have a preventive effect.[60] To justify the interference of equity it must appear that all rights involved can be as well protected in the equity suit as in the separate action,[61] and that the proceedings at law must necessarily be multiplex.[62] Plain-

in possession of land, each being entitled to a jury trial, equity cannot entertain a bill for the recovery of the land, although a multiplicity of suits would be thereby avoided. McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670.

Other equitable rights.— The avoidance of a multiplicity of suits affords the occasion of appealing to equity, and affects the extent of the relief, where plaintiff shows some other equitable right, as to relief against fraud (Rynearson *v.* Turner, 52 Mich. 7, 17 N. W. 219; Biddle *v.* Ramsey, 52 Mo. 153), contribution (Walker *v.* Cheever, 35 N. H. 339), an accounting (Biddle *v.* Ramsey, *supra*; Plummer *v.* Connecticut Mut. L. Ins. Co., 19 Fed. Cas. No. 11,232, 1 Holmes 267), the construction of a will (Withers *v.* Sims, 80 Va. 651), or administration of estates (Kendall *v.* Creighton, 23 How. (U. S.) 90, 16 L. ed. 419). So after a partition sale a supplemental bill was entertained by a cotenant purchaser for an accounting and distribution of the proceeds as between him and his cotenant. Williams' Appeal, (Pa. 1889) 16 Atl. 810.

60. Thus the frequent applications for an accounting for damages growing out of repeated wrongs, as for waste, are incidental only to injunctions to prevent a continuance of the wrongs. Lippincott *v.* Barton, 42 N. J. Eq. 272, 10 Atl. 884. After a number of actions has been actually brought to issue it is too late to maintain an equitable action on the ground of multiplicity of suits. Richardson *v.* Davidson, 53 Hun (N. Y.) 630, 5 N. Y. Suppl. 617. An indorser of five notes, having a defense to all, had suffered one to go to judgment, suit was pending on another, and the remainder would soon be barred by the statute. She was denied relief in equity. Hoffman *v.* Treadwell, 39 N. Y. Super. Ct. 183. See also Page *v.* Kennen, 38 Wis. 320; Mt. Zion *v.* Gillman, 14 Fed. 123, 9 Biss. 479.

61. Eureka, etc., R. Co. *v.* California, etc., R. Co., 109 Fed. 509, 48 C. C. A. 517.

62. Jurisdiction was declined where all the questions in dispute could be settled in a single action at law. Burroughs *v.* Cutter, 98 Me. 178, 56 Atl. 649. See also Workman *v.* Smith, 155 Mass. 92, 29 N. E. 198; Johnston *v.* Stone, 71 Miss. 593, 14 So. 81. A bill by a railroad company claiming land under a grant, but not in possession, alleged that two defendants were withholding possession and that a large number of other persons were claiming adversely to plaintiffs. All persons in possession might have been joined in one action in ejectment. The bill was held insufficient to make out a case to prevent a multiplicity of suits. Northern Pac. R. Co. *v.* Amacker, 49 Fed. 529, 1 C. C. A. 345 [*affirming* 46 Fed. 233]. See also McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Smythe *v.* New Orleans Canal, etc., Co., 34 Fed. 825. Taxes on bank-stock were assessable against stock-holders but the bank was required to withhold sufficient funds from dividends for the payment thereof. A bank paid over moneys so retained on an illegal assessment. The bank sought by a bill in equity to avoid multiplicity of suits to recover it back. It was held that the tax being void the bank paid in its own wrong and that therefore one action at law by the bank would be sufficient for its recovery. It was also held that the bill could not be sustained to prevent multiplicity, or to restrain the collector from distributing the money among several municipal corporations, because such distribution would not absolve the collector from liability, and require separate actions against each municipality. Kimball *v.* Corn Exch. Nat. Bank, 1 Ill. App. 209 [*affirmed* in 89 Ill. 611]. A bill against several railroad companies for an accounting and repayment of over-charges, asserting that each was liable for a fractional part, was held bad, because plaintiff had a remedy at law for the whole amount against the company making the excessive charges. Scott *v.* Erie R. Co., 34 N. J. Eq. 354. Separate suits by two heirs on the same instrument was held not to be such multiplicity as to be relievable in equity. Druon *v.* Sullivan, 66 Vt. 609, 30 Atl. 98. But where two persons, each claiming as assignee, brought actions upon an instrument, it was held that defendant in the action might maintain a suit against both claimants to cancel the instrument on the ground of fraud in its inception. McHenery *v.* Hazard, 45 N. Y. 580. Bills by a number of insurance companies to set aside an adjustment for fraud were held bad because the fraud rendered the adjustment void and could be used as a defense at law, and if the relief should be granted actions at law must still be brought on the policies. Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. 378. But a bill was sustained to set aside a judicial sale which was absolutely void, and which plaintiff might have defended against at law, where many persons claimed distinct parcels under the sale. De Forest *v.* Thompson, 40 Fed. 375. The theory of a bill for relief against a tax was that a penalty was imposed for each day's delay in payment and that an action would lie for each penalty. The court held that this failed to make a case, as it would not be presumed that the state would institute vexatious litigation. Pacific Express Co. *v.* Seibert, 44 Fed. 310. But a bill was sustained against municipal officers under similar circumstances. Hutchinson *v.* Beckham, 118 Fed. 399, 55 C. C. A. 333. A suit to avoid an assessment will not

tiff must not have voluntarily rendered himself liable to the multiplicity of actions threatened.[63]

b. Conditions For Invoking Jurisdiction — (i) *Many Controversies Between Same Parties.* The multiplicity of suits which may be prevented by a single suit in equity may grow out of a complication of controversies between the same parties or it may grow out of the multiplicity of parties to the same or similar controversies. The earlier instances of the exercise of the jurisdiction in the first class of cases were for the purpose of preventing one who had been defeated at law from vexatiously reiterating his claim.[64] It seems to have been first thought that equity should interfere only after defendant had been repeatedly defeated at law. The rule now is that plaintiff must first have established his right at law, but the establishment of the right and not the number of trials founds the jurisdiction.[65] This early exercise of jurisdiction to protect one from the reiteration of unfounded demands has been extended to other cases, as to the protection of plaintiff from the necessity of reiterating a well founded demand against defendant.[66] The jurisdiction has also been extended to

be entertained, although the assessment is divided into ten parts, payable annually, where one might at his election pay it all at once, and test its validity in a single action to recover it back. Greenhood *v.* MacDonald, 183 Mass. 342, 67 N. E. 336.

The number of actions which would constitute such multiplicity as to require relief in equity is not fixed, and depends on circumstances. Where actions by two plaintiffs were pending, which the court was without jurisdiction to restrain, and actions by two others only were threatened, jurisdiction was denied. McAlpine *v.* Tourtelotte, 24 Fed. 69.

63. As by splitting up a cause of action against him. Jones *v.* Chester Oil Co., 17 Ill. App. 111.

64. This jurisdiction arose chiefly from the inconclusiveness of a judgment in ejectment, injunctions being granted to restrain repeated actions. Bath *v.* Sherwin, Prec. Ch. 261, 24 Eng. Reprint 126; Leighton *v.* Leighton, 1 P. Wms. 671, 24 Eng. Reprint 563. See Injunctions; Quieting Title.

65. *California.*— Knowles *v.* Inches, 12 Cal. 212.

Georgia.— Bond *v.* Little, 10 Ga. 395.

Illinois.— Woodward *v.* Seely, 11 Ill. 157, 50 Am. Dec. 445; Cleland *v.* Campbell, 78 Ill. App. 624; Taylor *v.* Pearce, 71 Ill. App. 525.

Kentucky.— Newport *v.* Taylor, 16 B. Mon. 699.

Michigan.— Lapeer County *v.* Hart, Harr. 157.

Mississippi.— Illinois Cent. R. Co. *v.* Garrison, 81 Miss. 257, 32 So. 996, 95 Am. St. Rep. 469; Nevitt *v.* Gillespie, 1 How. 108, 26 Am. Dec. 696.

Nebraska.— Kinkaid *v.* Hiatt, 24 Nebr. 562, 39 N. W. 600.

New Jersey.— Paterson, etc., R. Co. *v.* Jersey City, 9 N. J. Eq. 434.

New York.— Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 31 N. Y. 91; Huntington *v.* Nicoll, 3 Johns. 566; Eldridge *v.* Hill, 2 Johns. Ch. 281.

Ohio.— Douglass *v.* McCoy, 5 Ohio 522.

United States.— Nichols *v.* Jones, 19 Fed. 855; Harmer *v.* Gwynne, 11 Fed. Cas. No. 6,075, 5 McLean 313.

England.— Leighton *v.* Leighton, 1 P. Wms. 671, 24 Eng. Reprint 563. St. 25 & 26 Vict. c. 42, empowered the court of chancery to determine the legal right, or to direct an issue for that purpose.

See 19 Cent. Dig. tit. "Equity," §§ 167, 168.

Repeated trespasses.— It has been sometimes held that relief against repeated trespasses will be awarded without any prior establishment of the plaintiff's rights at law. Musselman *v.* Marquis, 1 Bush (Ky.) 463, 89 Am. Dec. 637; Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301; Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189.

Repeated actions under contract.— A deed having been made in consideration of a grantee's maintaining the grantor for life, a bill to revoke the deed, alleging that the grantee had deserted plaintiff, and not alleging any determination at law, was sustained upon the ground that otherwise repeated actions for necessaries would result. Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17.

66. **Alimony in instalments.**— Thus bills have been entertained to enforce a contract to pay alimony in instalments, to avoid the necessity of repeated actions as the instalments fell due. Peterson *v.* Fleming, 63 Ill. App. 357. But where the alimony accrued under a foreign decree enforcement in equity was refused and the party relegated to successive actions at law. Bennett *v.* Bennett, 63 N. J. Eq. 306, 49 Atl. 501.

Prosecutions under municipal ordinances.— In Iowa the court seemed to recognize the existence of a power to prevent repeated prosecutions under a municipal ordinance, even after a conviction, where an appeal was pending to test the validity of the ordinance, but refused to exercise it unless to prevent irreparable injury, holding that by temporary obedience to the ordinance such injury could be avoided. Ewing *v.* Webster City, 103 Iowa 226, 72 N. W. 511.

a distinct class of cases, where a complexity of controversies arising out of the same contract or transaction would require several actions at law for entire relief. In such cases equity may take jurisdiction and adjust all the controversies so connected in one suit.[67]

(II) *Avoiding Circuity of Action.* Where, instead of a complexity of controversies between two parties with respect to the same subject-matter, the complexity arises from there being involved the several rights of more than two, each demanding adjustment, and each requiring at law a separate action, equity will frequently take jurisdiction of a suit to which all are parties and therein adjust all rights and determine the whole controversy.[68] The entertainment of bills to enforce directly a demand against the person ultimately chargeable, where at law the remedy would be against one secondarily liable, has in some cases been placed upon the same ground, of preventing circuity of action.[69]

67. *Georgia.*— Dwelle *v.* Roath, 29 Ga. 733.

Illinois.— Chicago Telephone Co. *v.* Illinois Manufacturers' Assoc., 106 Ill. App. 54.

Iowa.— Gibbs *v.* McFadden, 39 Iowa 371.

Kentucky.— Barnett *v.* Montgomery, 6 T. B. Mon. 327; Stip *v.* Alkire, 2 A. K. Marsh. 257.

Nebraska.— Haynes *v.* Union Invest. Co., 35 Nebr. 766, 53 N. W. 979.

New York.— Golden *v.* Health Department, 21 N. Y. App. Div. 420, 47 N. Y. Suppl. 623.

West Virginia.— Rader *v.* Neal, 13 W. Va. 373.

United States.— Garrison *v.* Memphis Ins. Co., 19 How. 312, 15 L. ed. 656.

See 19 Cent. Dig. tit. "Equity," §§ 167–169, 172.

Where rule inapplicable.— A bill showing the institution of suits on several notes which plaintiff had given to defendant, a non-resident, for the purchase-price of machinery which had been returned as defective, was held to be insufficient to show jurisdiction to prevent a multiplicity of suits. Krause *v.* Scott, 86 Ill. App. 238. So also a bill which stated that plaintiff had conveyed his property to defendant on the latter's agreement to pay the former's debts, that plaintiff had been obliged to pay a large part, and that defendant had failed to pay other debts, the bill seeking an accounting and reconveyance. Ellis *v.* Southwestern Land Co., 102 Wis. 409, 78 N. W. 583.

68. Many cases of this character are in the nature of bills of interpleader (see Interpleader) or involve trusts or other matters of equitable cognizance, but others are sustained solely on the ground of preventing multiplicity of suits and are therefore cited under this head.

Massachusetts.— Pease *v.* Supreme Assembly R. S. of G. F., 176 Mass. 506, 57 N. E. 1003.

New Jersey.— Bryan *v.* Bryan, 61 N. J. Eq. 45, 48 Atl. 341; American Cent. Ins. Co. *v.* Landau, 56 N. J. Eq. 513, 39 Atl. 400, 62 N. J. Eq. 73, 49 Atl. 738.

Pennsylvania.— Crawford County *v.* Merchants' Nat. Bank, 164 Pa. St. 109, 30 Atl. 302; Steigerwalt *v.* Rife, 9 Pa. Super. Ct. 363.

Virginia.— Hartford Nat. L. Assoc. *v.* Hopkins, 97 Va. 167, 33 S. E. 539.

West Virginia.— St. Lawrence Boom, etc., Co. *v.* Price, 49 W. Va. 432, 38 S. E. 526; Nease *v.* Ætna Ins. Co., 32 W. Va. 283, 9 S. E. 233.

United States.— Reynes *v.* Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. ed. 934; Missouri Broom Mfg. Co. *v.* Guymon, 115 Fed. 112, 53 C. C. A. 16; Chase *v.* Cannon, 47 Fed. 674; Newcomb *v.* New York Mut. L. Ins. Co., 18 Fed. Cas. No. 10,147.

See 19 Cent. Dig. tit. "Equity," §§ 169, 172.

Suit by corporation against directors.— In Empire State Sav. Bank *v.* Beard, 81 Hun (N. Y.) 184, 30 N. Y. Suppl. 756, an equitable action was sustained on behalf of a corporation against directors for negligent loss of corporate property, where defendants were directors during different periods, and it was necessary to apportion the loss among them. But in O'Brien *v.* Fitzgerald, 6 N. Y. App. Div. 509, 39 N. Y. Suppl. 707, equitable jurisdiction was denied in a similar action where the complaint alleged that defendants were accountable in distinct amounts, although it was also alleged that as to some matters all were liable and as to others part only were liable. See also O'Brien *v.* Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Higgins *v.* Tefft, 4 N. Y. App. Div. 62, 38 N. Y. Suppl. 716.

Jurisdiction cannot be invoked for the recovery of chattels on the theory that subsequent proceedings to partition the chattels among the different plaintiffs would be thereby avoided. Hale *v.* Clarkson, 23 Gratt. (Va.) 42.

In Massachusetts a statute (Gen. St. c. 113, § 2) gives equity jurisdiction where "there are more than two parties having distinct rights or interests which cannot be justly and definitely decided and adjusted in one action at the common law," but this has received a strict construction. McNeil *v.* Ames, 120 Mass. 481, 486; Gould *v.* Gould, 5 Metc. 274.

69. *Delaware.*— Dodd *v.* Wilson, 4 Del. Ch. 399.

Missouri.— Smith *v.* Harley, 8 Mo. 559, in which case the right of an assignee to sue in equity traced to principle stated in the text.

New Jersey.— Rue *v.* Meirs, 43 N. J. Eq.

(III) *Similar Controversies With Many Persons.* The jurisdiction based upon preventing a multiplicity of suits is also invoked where rights, simple enough in themselves, threaten a vexatious number of actions because of the great number of persons interested. Bills founded on this ground are "bills of peace," but that term is also frequently applied to other cases, where the jurisdiction is exercised to prevent a multiplicity of suits, particularly those where plaintiff seeks protection against the reiteration of an unsuccessful legal demand.[70] The earliest instances of bills of this character were brought by one claiming a general right against many persons to establish such right and thus avoid actions at law with each adversary.[71] The jurisdiction is exercised, however, either to protect the right of one asserted against many,[72] or the rights of many asserted against one.[73] In spite of some authority to the effect that it is only the person who would otherwise be subjected to a multiplicity of suits who can maintain the bill,[74] the rule undoubtedly is that either party may invoke the jurisdiction,[75] and the suit

377, 12 Atl. 369; Irick *v.* Black, 17 N. J. Eq. 189.

South Carolina.— Carlton *v.* Felder, 6 Rich. Eq. 58.

Virginia.— Chalmers *v.* McMurdo, 5 Munf. 252, 7 Am. Dec. 684.

United States.— Riddle *v.* Mandeville, 5 Cranch 322, 3 L. ed. 114, right of creditor to sue legatee of his debtor traced to same principle.

See 19 Cent. Dig. tit. "Equity," §§ 169, 172.

70. See *supra*, II, B, 1, b, (I).

71. See Mitford Ch. Pl. 127.

Leading cases are York *v.* Pilkington, 1 Atk. 282, 26 Eng. Reprint 180 (a suit to establish a right of fishery opposed by riparian owners); London *v.* Perkins, 3 Bro. P. C. 602, 1 Eng. Reprint 1524 (where the city claimed a right to a certain duty per ton on cheese brought by masters of ships eastward of London bridge to the port of London to be sold).

Right to float logs on stream.— In Oregon a plaintiff was permitted to maintain a bill to restrain repeated invasions of a right to float logs down a stream, after he had established such right against one person who had invaded it. Haines *v.* Hall, 17 Oreg. 165, 20 Pac. 831, 3 L. R. A. 609.

72. *Alabama.*— Morgan *v.* Morgan, 3 Stew. 383, 21 Am. Dec. 638.

District of Columbia.— Painter *v.* Drane, 2 MacArthur 163.

Georgia.— Smith *v.* Dobbins, 87 Ga. 303, 13 S. E. 496; Dart *v.* Orme, 41 Ga. 376.

Massachusetts.— Carr. *v.* Silloway, 105 Mass. 543, based on Gen. St. c. 113, § 2, quoted *supra*, note 68.

Mississippi.—Pollock *v.* Okolona Sav. Inst., 61 Miss. 293; Nevitt *v.* Gillespie, 1 How. 108, 26 Am. Dec. 696. See also Illinois Cent. R. Co. *v.* Garrison, 81 Miss. 257, 32 So. 996, 95 Am. St. Rep. 469.

Nebraska.— Crawford Co. *v.* Hathaway, (1903) 93 N. W. 781.

New Mexico.— Waddingham *v.* Robledo, 6 N. M. 347, 28 Pac. 663.

New York.— Saratoga County *v.* Deyoe, 77 N. Y. 219 [*reversing* 15 Hun 526].

Vermont.— Stockwell *v.* Fitzgerald, 70 Vt. 468, 41 Atl. 504.

Virginia.— Baird *v.* Bland, 3 Munf. 570.

United States.—De Forest *v.* Thompson, 40 Fed. 375.

England.— Sheffield Waterworks *v.* Yeomans, L. R. 2 Ch. 8, 15 L. T. Rep. N. S. 342, 15 Wkly. Rep. 76; York *v.* Pilkington, 1 Atk. 282, 26 Eng. Reprint 180.

See 19 Cent. Dig. tit. "Equity," §§ 167–169.

Dispute as to legal title.— Jurisdiction was denied where a bill sought to restrain a number of persons from taking possession of land claimed by plaintiff, because the dispute was as to the legal title. Washburn's Appeal, 105 Pa. St. 480.

73. *Dakota.*— Bode *v.* New England Invest. Co., 6 Dak. 499, 42 N. W. 658, 45 N. W. 197.

New Hampshire.— Smith *v.* New England Bank, 69 N. H. 254, 45 Atl. 1082.

New York.— Bauer *v.* Platt, 72 Hun 326, 25 N. Y. Suppl. 426.

North Carolina.— Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689.

Pennsylvania.— Commonwealth Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

United States.— Pennefeather *v.* Baltimore Steam-Packet Co., 58 Fed. 481.

See 19 Cent. Dig. tit. "Equity," §§ 167–170.

74. Bouton *v.* Brooklyn, 15 Barb. (N. Y.) 375; Dyer *v.* Rutland School Dist. No. 1, 61 Vt. 96, 17 Atl. 788; Thomas *v.* Council Bluffs Canning Co., 92 Fed. 422, 34 C. C. A. 428.

75. See cases cited in the last note but one. In South Carolina the rule is broadly stated that one may proceed in equity in the first instance where if he should sue at law defendant might proceed in equity, and this to prevent circuity of action. Pedrieau *v.* Hunt, Riley Eq. 88; Hinson *v.* Pickett, 1 Hill Eq. 35.

Suits by representatives.— In some cases it seems that one who would not be a party at all to any of the legal proceedings may be plaintiff to the bill, as a representative of others, or as asserting a demand of his own in equity to protect others from vexatious litigation. Thus, a county having collected a tax to the entire amount authorized, and a city having been entitled to levy one half of such tax, it was held that the city might sue the county in equity for its proportion be-

may be brought by one of the many on behalf of all.[76] The nature of the relationship which must subsist between the claims of the numerous persons cannot be stated with precision. It is clear that such claims must not be entirely distinct, unconnected, and independent.[77] On the other hand it is often said that the individuals composing a numerous body must claim in privity, or at least claim a common right, in order to found the jurisdiction.[78] Nevertheless bills have been sustained where there was no connection among the different claims other than that they all depended upon the same question of fact or law arising out of the same transaction.[79] Elsewhere it is held that such connection is insufficient.[80]

cause a multiplicity of suits against and by the taxpayers would be therefore avoided. Frederick County *v.* Frederick, 88 Md. 654, 42 Atl. 218. Here it would seem the city was permitted to proceed to prevent a multiplicity of suits, not between itself and its inhabitants, but between the county and its inhabitants. But a bank may not maintain a suit to restrain actions against its stock-holders. Peoples' Nat. Bank *v.* Marye, 107 Fed. 570. In Missouri *v.* Illinois, 180 U. S. 208, 21 S. Ct. 331, 45 L. ed. 497, and in Kansas *v.* Colorado, 185 U. S. 125, 22 S. Ct. 552, 46 L. ed. 838, the supreme court of the United States has affirmed its original jurisdiction in equity of a bill by one state against another to prevent, in the former case the pollution of a stream, and in the latter the withdrawal of its waters for irrigation purposes, to the deprivation of the rights of the inhabitants of plaintiff state. While in the former case the sovereign powers of plaintiff state for the protection of public health were involved, in the latter its interest as such is less evident, and the rights protected were practically the individual rights of a large number of its citizens.

76. Smith *v.* New England Bank, 69 N. H. 254, 45 Atl. 1082; Bauer *v.* Platt, 72 Hun (N. Y.) 326, 25 N. Y. Suppl. 426; Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689; Pennefeather *v.* Baltimore Steam-Packet Co., 58 Fed. 481.

77. *Alabama.*— Jones *v.* Hardy, 127 Ala. 221, 28 So. 564.

Idaho.— Wilkerson *v.* Walters, 1 Ida. 564.

New York.— New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592 [*reversing* 1 Abb. Pr. 417].

Ohio.— Merrill *v.* Lake, 16 Ohio 373, 47 Am. Dec. 377.

Virginia.— Randolph *v.* Kinney, 3 Rand. 394.

United States.— Hale *v.* Allinson, 188 U. S. 56, 23 S. Ct. 244, 47 L. ed. 380 [*affirming* 106 Fed. 258, 45 C. C. A. 270] (an excellent case); Schulenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422.

England.— Ward *v.* Northumberland, 2 Anstr. 469. See also Birkley *v.* Presgrave, 1 East 220, 227, 6 Rev. Rep. 256.

See 19 Cent. Dig. tit. "Equity," § 167.

78. *Alabama.*— Turner *v.* Mobile, 135 Ala. 73, 33 So. 132.

Connecticut.— Dodd *v.* Hartford, 25 Conn. 232.

Michigan.— Lapeer County *v.* Hart, Harr. 157.

New Jersey.— Marselis *v.* Morris Canal, etc., Co., 1 N. J. Eq. 31.

New York.— Howell *v.* Buffalo, 2 Abb. Dec. 412, an action to set aside illegal assessments.

Oregon.—Van Auken *v.* Dammeier, 27 Oreg. 150, 40 Pac. 89.

United States.—Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621.

See 19 Cent. Dig. tit. "Equity," §§ 167, 169.

Bill by several retiring partners.— In Pennsylvania several partners who had sold their interests with an agreement that they should be exonerated from firm debts, and who had been compelled to pay such debts, united in a bill to enforce the agreement. The bill was dismissed because the jurisdiction in equity in Pennsylvania was purely statutory, and no statute provided for such a proceeding; but it was said that the want of community of interest would have defeated the bill if the general jurisdiction existed. Clarke's Appeal, 107 Pa. St. 436.

79. *Colorado.*— Dumars *v.* Denver, 16 Colo. App. 375, 65 Pac. 580.

Georgia.— Blaisdell *v.* Bohr, 68 Ga. 56.

Illinois.— German Alliance Ins. Co. *v.* VanCleave, 191 Ill. 410, 61 N. E. 94.

New York.— Saratoga County *v.* Deyoe, 77 N. Y. 219; McHenry *v.* Hazard, 45 N. Y. 580. See also New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592.

North Carolina.— Worth *v.* Fayetteville Com'rs, 60 N. C. 617.

United States.— Wyman *v.* Bowman, 127 Fed. 257, 62 C. C. A. 189; Sang Lung *v.* Jackson, 85 Fed. 502. See also Hale *v.* Allinson, 188 U. S. 56, 78, 23 S. Ct. 244, 47 L. ed. 380 [*affirming* 106 Fed. 258, 45 C. C. A. 270] (per Justice Peckham); Tift *v.* Southern R. Co., 123 Fed. 789. But *compare* Scottish Union, etc., Ins. Co. *v.* Mohlman Co., 73 Fed. 66.

See 19 Cent. Dig. tit. "Equity," §§ 167–169.

80. Swift *v.* Larrabee, 31 Conn. 225; Doggett *v.* Hart, 5 Fla. 215, 58 Am. Dec. 464; Wilkerson *v.* Waters, 1 Ida. 564. "There must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there 'is a community of interest merely in the question of law or of fact involved,' etc., as stated by Pomeroy in section 268 [Eq. Jur.]. Although he asserts that this early theory has long been abandoned, he fails utterly to prove it." Tribette *v.* Illinois Cent. R. Co., 70 Miss. 182,

While all attempts to harmonize the authorities have failed, the rule which most nearly approaches that result is that the bill must relate to matters of the same nature and having a connection with each other, and in which all the parties are more or less concerned, although their rights in respect to the general subject of the case may be distinct.[81] Where the controversy is between one and a large number of persons, even though the right claimed be legal, no prior establishment thereof at law is essential.[82]

2. Accident and Mistake — a. Terms Defined and Distinguished. The terms "accident" and "mistake" have acquired generic and technical senses indicating grounds upon which courts of equity from a very early period have interposed to relieve a party from certain unjust legal burdens. By "accident" is meant an occurrence unforeseen and not reasonably to be anticipated, whereby the legal rights of a party are affected to his injury without neglect or misconduct on his part.[83] "Mistake" is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time.[84] An accident is something occurring

188, 12 So. 32, 35 Am. St. Rep. 642, 19 L. R. A. 660, per Campbell, C. J.

81. Brinckerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139 [*followed* in New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592], per Kent, Ch.

The confusion on this subject seems to result from several causes. Chancery refused to establish a private right as against a public right, as to a highway, because this would be to restrain the entire community. 2 Eq. Cas. Abr. 171, 22 Eng. Reprint 147. Therefore there must be some common bond distinguishing the body of persons against whom the right is claimed. In the early cases the bond thus required was a privity or community of title or interest, and such cases present the technical "bills of peace." Tenham *v.* Herbert, 2 Atk. 483, 26 Eng. Reprint 692; Carlisle Corp. *v.* Wilson, 13 Ves. Jr. 276, 33 Eng. Reprint 297. But the principle of these bills was extended to other bills where there was no such community of interest, and called bills in the nature of bills of peace. Sheffield Waterworks *v.* Yeomans, L. R. 2 Ch. 8, 15 L. T. Rep. N. S. 342, 15 Wkly. Rep. 76; Ware *v.* Horwood, 14 Ves. Jr. 28, 33 Eng. Reprint 432. A contrariety of opinion has developed in several classes of cases, probably because of the intervention of principles of public policy. One of these classes consists of bills to restrain the enforcement of taxes claimed to be illegal. See Taxation. With regard to suits to enforce the liability of stock-holders in corporations, the apparent conflicts are largely due to the diverse character of such liabilities. See Corporations, 10 Cyc. 649–736.

82. Lapeer County *v.* Hart, Harr. (Mich.) 157; Eldridge *v.* Hill, 2 Johns. Ch. (N. Y.) 281; Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689.

83. It has been said that all attempts to define the term have been unsuccessful (1 Spence 628), and there have been few judicial attempts in this direction. "By accident is meant when a case is distinguished from others of a like nature by unusual circumstances." Bath *v.* Sherwin, 10 Mod. 1. Doubtless the difficulty of definition is largely due to the laxity of principle under which the relief was formerly exercised. Modern writers are in substantial if not verbal accord.

"Such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party." 1 Story Eq. Jur. § 78 [*followed* in Smith Princ. Eq. (3d ed.) 232; Snell Eq. 346].

"An unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct." Smith Manual Eq. 36 [*followed* in Bispham Eq. § 174, and *quoted* in Magann *v.* Segal, 91 Fed. 252, 261, 34 C. C. A. 323].

"An unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right, or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." 2 Pomeroy Eq. Jur. § 823 [*quoted* in Gotthelf *v.* Stranahan, 19 N. Y. Suppl. 161, 167].

84. 2 Pomeroy Eq. Jur. § 839. The term is even more difficult of definition than accident. It is "some intentional act or omission or error arising from ignorance, surprise, imposition or misplaced confidence." 1 Story Eq. Jur. § 110. This it will be observed does not distinguish between mistake and fraud.

Mistake exists "where a person acting upon some erroneous conviction, either of law or of fact, executes some instrument or does some act which, but for that erroneous conviction, he would not have executed or done." Hayne Outlines Eq. (5th ed.) 85.

"A mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake, and consisting

subsequent to the transaction and reacting injuriously upon the legal rights of the party; it is objective. Mistake is subjective, relating to the mental condition of the parties at the time of the transaction, and thereby affecting the quality of the transaction in its inception.[85] The fundamental principle of relief in either case being the injustice of permitting the enforcement of legal rights not contemplated by the parties, the subjects are closely related and may well be treated in juxtaposition.

b. Accident. The common law always protected parties against the consequences of certain accidents,[86] but in cases not within the protection of the common law equity has jurisdiction to grant relief.[87] The state of facts which must in general be shown to warrant the relief is indicated by the terms of the definition given in the preceding section. It should, however, be added that relief will not be given as against an equity superior to that arising from the accident, as where it is sought against a purchaser for value without notice of the accident,[88] or where plaintiff has a mere expectancy and no vested right.[89] Nor will relief be given against an express covenant, where the parties may be fairly deemed to have contracted in view of the possibility of such an accident.[90] The most familiar instance of the exercise of the jurisdiction is perhaps in the case of written instruments which have been lost or destroyed by accident.[91] It has been held on similar principles that relief may be given against the loss of judicial records,[92] but such jurisdiction has been elsewhere denied.[93] Relief is accorded against judgments at law suffered through accident and without negligence, where a legal remedy is not available.[94] The death of a person who should perform an act may justify the interposition of equity to give plaintiff the benefit he would have received by its performance.[95] To this ground of jurisdiction is also

in unconsciousness, ignorance, or forgetfulness of a fact." *In re* Mutual Bldg., etc., Assoc., 33 Pittsb. Leg. J. (Pa.) 324.

85. See 2 Pomeroy Eq. Jur. § 839; Smith Princ. Eq. (3d ed.) 232.

86. 3 Blackstone Comm. 431.

87. *Alabama.*— English *v.* Lane, 1 Port. 328.

Connecticut.— Matson *v.* Parkhurst, 1 Root 404.

Georgia.— Wyche *v.* Greene, 11 Ga. 159.

Kentucky.— Cave *v.* Trabue, 2 Bibb 444.

Virginia.— Byrne *v.* Edmonds, 23 Gratt. 200.

United States.— Burgess *v.* Graffam, 10 Fed. 216.

England.— Croft *v.* Lyndsey, 2 Freem. 1, 22 Eng. Reprint 1014; Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803; May *v.* Bennett, 1 Russ. 370, 25 Rev. Rep. 72, 46 Eng. Ch. 370; Davies *v.* Wattier, 1 Sim. & St. 463, 1 Eng. Ch. 463.

See 19 Cent. Dig. tit. "Equity," § 13.

88. Malden *v.* Menill, 2 Atk. 8, 26 Eng. Reprint 402.

89. Whitton *v.* Russell, 1 Atk. 448, 26 Eng. Reprint 285.

90. As to relief against a covenant to pay rent after an accidental destruction of the demised premises see Brewer *v.* Herbert, 30 Md. 301, 96 Am. Dec. 582; Fowler *v.* Bott, 6 Mass. 63; Pym *v.* Blackburn, 3 Ves. Jr. 34, 30 Eng. Reprint 878.

91. See LOST INSTRUMENTS. A suit in equity will lie to compel the reëxecution of a deed which has been destroyed (Boyes *v.* Ramsden, 34 Oreg. 253, 55 Pac. 538), to establish a lost deed (Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063), or to establish an unrecorded deed destroyed by the grantor (Allen *v.* Waldo, 47 Mich. 516, 11 N. W. 366). An attorney, holding a note for collection, with the consent of the maker transferred it to a third person in payment of his own debt. It was held that a suit in equity would lie to recover the amount from the maker, the ground being the necessity of producing the note in a suit at law. It would seem that jurisdiction might more properly have been based on fraud. Craig *v.* Ely, 5 Stew. & P. (Ala.) 354.

92. As to confirm a title depending upon a judicial sale where the records have been lost (Garrett *v.* Lynch, 45 Ala. 204), or to entertain a new suit where after final decree and pending an appeal the records were destroyed and could not be supplied (Sproles *v.* Powell, 10 Heisk. (Tenn.) 693).

93. Keen *v.* Jordan, 13 Fla. 327; Clingman *v.* Hopkie, 78 Ill. 152.

94. See JUDGMENTS. The failure of a clerk to set aside a judgment *pro forma* and enter a plea after direction so to do will be relieved against. Mayo *v.* Bentley, 4 Call (Va.) 528. Plaintiff applied to a justice to appoint commissioners to appraise damages caused by public improvements, under Vt. St. § 3360. The justice instituted proceedings, but after the statutory time for commencing them had expired dismissed them on the ground that he was disqualified to act. Equity reassessed plaintiff's damages. Fairbank *v.* Rockingham, 73 Vt. 124, 50 Atl. 802.

95. Stewart *v.* Stokes, 33 Ala. 494, 73 Am. Dec. 429; Jones *v.* Woodhull, 1 Root (Conn.)

traced the relief given upon the defective execution of powers,[96] and the relief often granted to executors and administrators in such cases, as the overpayment of legacies.[97] Accident is also often the ground of jurisdiction in cases involving confusion of boundaries,[98] and the relief accorded against penalties and forfeitures has been attributed to the same source.[99]

c. Mistake — (i) *Mistakes of Fact* — (a) *In General.* The jurisdiction of equity to relieve against the consequences of a mistake of fact has existed from an early period and is thoroughly established.[1] The nature of the relief granted and the particular circumstances requiring it are matters belonging to the specific subject involved.[2] Certain general principles may, however, be here stated.

(b) *Privity and Mutuality Required.* The equity is one existing between the parties to the contract or transaction affected by the mistake, and it will be enforced only as between them or those in privity with them.[3] The mistake at least when reformation is sought must be mutual,[4] and if so relief is given, although both parties are entirely innocent.[5] Where relief is given because of

298. But equity can do no more in that case than to adopt such an arrangement as would have been made by the parties had the contingency been foreseen. Case *v.* Barrett, 4 Paige (N. Y.) 148. But see Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045, Baldw. 464.

96. See Powers; Wills.

97. See Executors and Administrators.

98. See Boundaries, 5 Cyc. 952 note.

99. See 1 Pomeroy Eq. Jur. § 433 note. Whatever may be the historical connection between relief against accident and against penalties and forfeitures, the latter has certainly become a distinct subject of jurisdiction, and is therefore treated separately. See *infra*, II, B, 3.

1. *Alabama.*— Arnold *v.* Fowler, 44 Ala. 167; English *v.* Lane, 1 Port. 328.

Arkansas.— Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228.

Connecticut.— Blakeman *v.* Blakeman, 39 Conn. 320; Doty *v.* Judson, 2 Root 427; Bundy *v.* Sabin, 2 Root 209; Parsons *v.* Hosmer, 2 Root 1, 1 Am. Dec. 58; Matson *v.* Parkhurst, 1 Root 404; Gay *v.* Adams, 1 Root 105.

Georgia.— Molyneaux *v.* Collier, 30 Ga. 731; Wyche *v.* Greene, 26 Ga. 415.

Illinois.— Shafer *v.* Davis, 13 Ill. 395; Barker *v.* Fitzgerald, 105 Ill. App. 536 [*affirmed* in 204 Ill. 325, 68 N. E. 430].

Indian Territory.— Hampton *v.* Mayes, 3 Indian Terr. 65, 53 S. W. 483.

Iowa.— Mastelar *v.* Edgarton, 44 Iowa 495.

Kentucky.— Watson *v.* Stucker, 5 Dana 581.

Maine.— Robinson *v.* Sampson, 23 Me. 388.

Maryland.— Watkins *v.* Stockett, 6 Harr. & J. 435; Wesley *v.* Thomas, 6 Harr. & J. 24.

Michigan.— Garlinghouse *v.* Dixon, Walk. 440.

Mississippi.— Dunbar *v.* Newman, 46 Miss. 231; Nabours *v.* Cocke, 24 Miss. 44; Simmons *v.* North, 3 Sm. & M. 67; Harrington *v.* Harrington, 2 How. 701.

New Jersey.— Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

New York.— Champlin *v.* Laytin, 18 Wend. 407, 31 Am. Dec. 382; Marvin *v.* Bennett, 8 Paige 312.

North Carolina.— Newsom *v.* Bufferlow, 16 N. C. 379.

Ohio.— Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Pennsylvania.— Gross *v.* Leber, 47 Pa. St. 520; Jenks *v.* Fritz, 7 Watts & S. 201, 42 Am. Dec. 227; Brady *v.* Standard Loan Assoc., 14 Wkly. Notes Cas. 419; *In re* Mutual Bldg., etc., Assoc., 33 Pittsb. Leg. J. 324.

South Carolina.— Johnson *v.* Slawson, Bailey Eq. 463.

Vermont.— McKenzie *v.* McKenzie, 52 Vt. 271.

United States.— Oolagah Coal Co. *v.* McCaleb, 68 Fed. 86, 15 C. C. A. 270; Carter *v.* Treadwell, 5 Fed. Cas. No. 2,480, 3 Story 25; Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349.

England.— Bingham *v.* Bingham, 1 Ves. 126, 27 Eng. Reprint 934; Mitford Ch. Pl. 116.

See 19 Cent. Dig. tit. "Equity," § 14.

2. See Accounts and Accounting, 1 Cyc. 466, 467; Cancellation of Instruments, 6 Cyc. 286; Compromise and Settlement, 8 Cyc. 524, 527; Contracts, 9 Cyc. 392, 393; Deeds, 13 Cyc. 576 *et seq.*; and, generally, Executors and Administrators; Judgments; Mortgages; Reformation of Instruments; Sales; Vendor and Purchaser; Wills.

3. Smith *v.* Turrentine, 55 N. C. 253; Knight *v.* Bunn, 42 N. C. 77; Anthony *v.* Granger, 22 R. I. 359, 47 Atl. 1091; Blumberg *v.* Mauer, 37 Tex. 2.

4. Young *v.* McGown, 62 Me. 56; Renshaw *v.* Lefferman, 51 Md. 277; Groff *v.* Rohrer, 35 Md. 327; Ludington *v.* Ford, 33 Mich. 123; Whitney *v.* Denton, 7 Ohio Dec. (Reprint) 547, 3 Cinc. L. Bul. 870. But see Harding *v.* Egin, 2 Tenn. Ch. 39.

5. Wood *v.* Patterson, 4 Md. Ch. 335; Titus *v.* Phillips, 18 N. J. Eq. 541; Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621. It has been held that in such case plaintiff on discovering the mistake must before applying to equity request defendant to correct it or else

the mistake of one party alone it is where it is induced by the conduct of the other party, or because the other seeks unconscionably to take advantage of it, and the ground of jurisdiction is really fraud.[6] Where such circumstances do not exist, as where the opportunities for information have been on both sides equal, where there has been no concealment by one of facts which the other was entitled to know, and where both have acted in good faith, there can be no relief.[7]

(c) *Relief Given Only in Furtherance of Justice.* The jurisdiction is exercised only in furtherance of justice,[8] and relief will not be given against an equal or a superior equity,[9] or unless the parties can be placed *in statu quo*.[10]

(d) *Negligence of Party Seeking Relief.* A party will not be given relief against a mistake induced by his own negligence,[11] as where he has failed to avail himself of means of knowledge of the facts.[12] The degree of carelessness which

he must show a sufficient reason for not doing so. Black *v.* Stone, 33 Ala. 327.

6. See *infra*, II, B, 4.

7. Rawson *v.* Harger, 48 Iowa 269; Groff *v.* Rohrer, 35 Md. 327; Wood *v.* Patterson, 4 Md. Ch. 335; Moore *v.* Des Arts, 1 N. Y. 359 [*affirming* 2 Barb. Ch. 636]: Newton *v.* Bennett, 38 Vt. 131. In Pennsylvania it was held that one should be relieved against a purchase of land, the contract being founded upon the expectation of both parties that the land would become the site of a great city through the construction of a canal by the state and of a harbor by the United States, and such improvements were not made. Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621. On the other hand it has been held that a mistake to be relievable must relate to an existing fact, and not the probability of a future event. Parke *v.* Boston, 175 Mass. 464, 56 N. E. 718. In Georgia the court refused to enforce the compromise of a judgment entered into by the creditor under an erroneous belief that the debtors were insolvent, there being no fraud or concealment. Molyneaux *v.* Collier, 30 Ga. 731.

Known uncertainty.— Where the parties predicate their contract upon the known uncertainty of a fact or condition affecting the subject-matter, neither can be relieved when the fact is ascertained. There is in such case no mistake. Delta County *v.* Gunnison County, 17 Colo. 41, 28 Pac. 476; Ashcom *v.* Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382. An agreement to prevent a domestic feud is of this character. Lies *v.* Stub, 6 Watts (Pa.) 48.

8. New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 512. Equity will not order the removal of a house placed through mutual ignorance of the boundaries so as to encroach a little on plaintiff's land, where the damage caused by the removal would be grossly disproportionate to plaintiff's injury. Hunter *v.* Carroll, 64 N. H. 572, 15 Atl. 17. A deed conveying in one part too much will not be reformed where in another part it conveys too little and the mistakes practically balance one another. Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

9. Kilpatrick *v.* Strozier, 67 Ga. 247; Williams *v.* Allen, 17 Ga. 81; Young *v.* Coleman, 43 Mo. 179; Smith *v.* Turrentine, 55 N. C. 253.

10. *Indiana.*— Gray *v.* Robinson, 90 Ind. 527.

Missouri.— Cassidy *v.* Metcalf, 66 Mo. 519.

Pennsylvania.— Peters *v.* Florence, 38 Pa. St. 194.

Texas.— Kesler *v.* Zimmerschitte, 1 Tex. 50.

United States.— Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

See 19 Cent. Dig. tit. "Equity," §§ 18, 19.

11. *Alabama.*— Stewart *v.* Stewart, 31 Ala. 207.

California.— Belt *v.* Mehen, 2 Cal. 159, 56 Am. Dec. 329.

Connecticut.— Foot *v.* Foot, 1 Root 308.

Delaware.— Ross *v.* Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86.

Georgia.— Marshall *v.* Means, 12 Ga. 61, 56 Am. Dec. 444.

Nebraska.— Farrell *v.* Bouck, 60 Nebr. 771, 84 N. W. 260, 61 Nebr. 874, 86 N. W. 907.

New Jersey.— Pennsylvania, etc., R. Co. *v.* Trimmer, (Ch. 1895) 31 Atl. 310.

New York.— Stettheimer *v.* Killip, 75 N. Y. 282.

Oklahoma.— Marshall *v.* Homier, 13 Okla. 264, 74 Pac. 368.

Pennsylvania.— *In re* Mutual Bldg., etc., Assoc., 33 Pittsb. Leg. J. 324.

Rhode Island.— Rhode Island Exch. Bank *v.* Hawkins, 6 R. I. 198.

See 19 Cent. Dig. tit. "Equity," § 16.

The rule is not inexorable.— Cancellation of a mortgage before satisfaction of the debt was set aside without requiring a showing of diligence from the creditor, who was aged and infirm. Banta *v.* Vreeland, 15 N. J. Eq. 103, 82 Am. Dec. 269.

Consequences of tort.— One will not be relieved against the consequences of a tort committed as the result of a mistake, against one who was free from fault. Pettes *v.* Whitehall Bank, 17 Vt. 435.

12. Roberts *v.* Hughes, 81 Ill. 130, 25 Am. Rep. 270; Capehart *v.* Mhoon, 58 N. C. 178; Montgomery *v.* Charleston, 99 Fed. 825, 40 C. C. A. 108, 48 L. R. A. 503; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382. This reason has been given for refusing to give relief against a

will prevent relief is stated in varying terms, and depends largely upon the circumstances of the case.[13]

(E) *Mistake Available as a Defense.* A defendant may set up mistake in a contract or transaction defensively, to rebut an equity apparently arising from such contract or transaction.[14]

(F) *Ratifying Mistake.* One may preclude himself from relief by ratifying the mistake, as by availing himself of his legal rights under an instrument after the discovery of a mistake affecting it.[15]

(G) *Degree of Proof, and Quality of Evidence.* To justify the granting of relief,[16] at least where the alleged mistake is in a written instrument executed by the parties and the terms of the instrument are unequivocal,[17] there must be more than a mere preponderance of evidence,[18] since the strong presumption that the instrument expresses the true intent of the parties[19] must be overcome; and the rule is that proof of mistake must be clear and convincing.[20] But proof

partner after judgment against the other partner alone, ignorance of the partnership being due to a failure to investigate. Penny *v.* Martin, 4 Johns. Ch. (N. Y.) 566; U. S. *v.* Ames, 24 Fed. Cas. No. 14,440 [*affirmed* in 99 U. S. 35, 25 L. ed. 295].

Only where the party is bound to make inquiry which if made would have obviated the mistake will equity refuse aid on the ground of negligence. Snyder *v.* Ives, 42 Iowa 157.

13. The mistake unless clearly proved must not be the consequence of his own folly (Porter *v.* Cain, McMull. Eq. (S. C.) 81), his wilful ignorance (Schaffner *v.* Schilling, 6 Mo. App. 42), his culpable negligence (Campau *v.* Godfrey, 18 Mich. 27, 100 Am. Dec. 133), his gross negligence (Picot *v.* Page, 26 Mo. 398; Schaffner *v.* Schilling, *supra*), his carelessness or inattention (Wood *v.* Patterson, 4 Md. Ch. 335: Robertson *v.* Smith, 11 Tex. 211, 60 Am. Dec. 234), his carelessness (Francis *v.* Parks, 55 Vt. 80), want of such diligence as might fairly be expected from a reasonable person (Kearney *v.* Sasser, 37 Md. 264), want of ordinary prudence and vigilance (Capehart *v.* Mhoon, 58 N. C. 178), want of due diligence (Lamb *v.* Harris, 8 Ga. 546; Thomas *v.* Bartow, 48 N. Y. 193), want of reasonable diligence (Keith *v.* Brewster, 114 Ga. 176, 39 S. E. 850; Brown *v.* Fagan, 71 Mo. 563), or want of vigilance (Trippe *v.* Trippe, 29 Ala. 637; Atlantic F. & M. Ins. Co. *v.* Wilson, 5 R. I. 479), nor result from a violation of a legal duty (Barker *v.* Fitzgerald, 105 Ill. App. 536).

14. *Alabama.*— Trippe *v.* Trippe, 29 Ala. 637.

Georgia.— Rogers *v.* Atkinson, 1 Ga. 12.

Illinois.— Morton *v.* Smith, 86 Ill. 117.

Kentucky.— McCann *v.* Letcher, 8 B. Mon. 320.

New Jersey.— Hendrickson *v.* Ivins, 1 N. J. Eq. 562.

Pennsylvania.— Mays *v.* Dwight, 82 Pa. St. 462.

See 19 Cent. Dig. tit. "Equity," § 14.

15. McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731.

16. Settlement of accounts between two persons will not be set aside in favor of a creditor on the ground of mistake unless upon the clearest and most positive proof. Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893. And see 1 Cyc. 463, 464.

Relief against a judgment on the ground of mistake in the entry thereof can be granted only on "clear, explicit, and conclusive proof" of the mistake. Russell *v.* McKenzie, 13 Md. 560, 570.

Mistake in running a boundary line between two states will not sanction relief in the United States supreme court, except on the clearest proof, if at all. Rhode Island *v.* Massachusetts, 4 How. (U. S.) 591, 11 L. ed. 1116.

17. Apparent mistake.— Conflict between calls in a deed constitutes an intimation of mistake so as to require no more than a preponderance of evidence to prove it. Cooper *v.* Deal, 114 Mo. 527, 22 S. W. 31. For similar cases of manifest mistake see Leitensdorfer *v.* Delphy, 15 Mo. 160, 167, 55 Am. Dec. 137; Clement's Appeal, 2 Pennyp. (Pa.) 313.

18. Sweetser *v.* Dobbins, (Cal. 1884) 3 Pac. 116; Warrick *v.* Smith, 36 Ill. App. 619; Layman *v.* Minneapolis Realty Co., 60 Minn. 136, 62 N. W. 113. But see Baylor *v.* Hopf, 81 Tex. 637, 27 S. W. 230. As to the preponderance rule which prevails in ordinary civil cases see EVIDENCE.

Where mistake is admitted, a preponderance of evidence may suffice to show what was intended to be inserted. Bunse *v.* Agee, 47 Mo. 270.

19. Cooper *v.* Deal, 114 Mo. 527, 22 S. W. 31; State *v.* Frank, 51 Mo. 98; Stamper *v.* Hawkins, 41 N. C. 7; Jessop *v.* Ivory, 158 Pa. St. 71, 27 Atl. 840; Harter *v.* Christoph, 32 Wis. 245.

20. Mistake "must be clearly established by satisfactory proofs." Southard *v.* Curley, 134 N. Y. 148, 154, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561, per Parker, J. Phrases equally strong, and in some instances stronger, will be found in the following cases, consisting chiefly of suits for reformation of instruments, in many of which cases the language in the text is used:

Alabama.— Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488.

California.— Capelli *v.* Dondero, 123 Cal.

beyond a reasonable doubt, as in criminal cases, is not required.[21] Moreover, mistake may be established by evidence of the circumstances and nature of the transaction and the conduct of the parties in relation thereto, provided the natural and reasonable inferences therefrom clearly and decidedly prove the alleged mistake.[22] Courts are extremely reluctant to grant relief in these cases on the uncorroborated, even though uncontradicted,[23] testimony of an interested party.[24]

324, 55 Pac. 1057; Cox *v.* Woods, 67 Cal. 317, 7 Pac. 722.

Florida.— Jackson *v.* Magbee, 21 Fla. 622.

Georgia.— Crockett *v.* Crockett, 73 Ga. 647, 650 [*quoting* Ga. Code, § 3117]; Muller *v.* Rhuman, 62 Ga. 332; Wyche *v.* Greene, 11 Ga. 159, 171.

Illinois.— Miner *v.* Hess, 47 Ill. 170; Adams *v.* Robertson, 37 Ill. 45.

Indiana.— Givan *v.* Masterson, 152 Ind. 127, 51 N. E. 237; Linn *v.* Barkey, 7 Ind. 69.

Iowa.— Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61; Tufts *v.* Larned, 27 Iowa 330.

Kansas.— Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. 901.

Kentucky.— Worley *v.* Tuggle, 4 Bush 168, 171.

Maine.— Fessenden *v.* Ockington, 74 Me. 123.

Maryland.— Coale *v.* Merryman, 35 Md. 382. See also Goldsborough *v.* Ringgold, 1 Md. Ch. 239.

Massachusetts.— Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45; Sawyer *v.* Hovey, 3 Allen 331, 81 Am. Dec. 659.

Minnesota.— Layman *v.* Minneapolis Realty Co., 60 Minn. 136, 62 N. W. 113.

Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri.— State *v.* Frank, 51 Mo. 98; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137; Bohb *v.* Bobb, 7 Mo. App. 501, 504.

New Hampshire.— Busby *v.* Littlefield, 31 N. H. 193.

New Jersey.— Whelen *v.* Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692; Rowley *v.* Flannelly, 30 N. J. Eq. 612.

New York.— Christopher, etc., R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, 58, 43 N. E. 538; Ford *v.* Joyce, 78 N. Y. 618; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Nevins *v.* Dunlap, 33 N. Y. 676; Devereux *v.* Sun Fire Office, 51 Hun 147, 4 N. Y. Suppl. 655; White *v.* Williams, 48 Barb. 222; Little *v.* Webster, 1 N. Y. Suppl. 315; Boardman *v.* Davidson, 7 Abb. Pr. N. S. 439; Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559; Hill *v.* Hill, 10 N. Y. Wkly. Dig. 239.

North Carolina.— Giles *v.* Hunter, 103 N. C. 194, 9 S. E. 549.

Ohio.— Potter *v.* Potter, 27 Ohio St. 84; Clayton *v.* Freet, 10 Ohio St. 544.

Pennsylvania.— Jessop *v.* Ivory, 158 Pa. St. 71, 27 Atl. 840; Zeiger's Estate, 11 Pa. Co. Ct. 517.

Vermont.— Lyman *v.* Little, 15 Vt. 576.

West Virginia.— Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902; Weidebusch *v.* Hartenstein, 12 W. Va. 760.

Wisconsin.— Harter *v.* Christoph, 32 Wis. 245; Newton *v.* Holley, 6 Wis. 592.

United States.— Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 435, 12 S. Ct. 239, 35 L. ed. 1063; Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6; Kinney *v.* Consolidated Virginia Min. Co., 17 Fed. Cas. No. 7,827, 4 Sawy. 382; U. S. *v.* Munroe, 27 Fed. Cas. No. 15,835, 5 Mason 572.

England.— Bold *v.* Hutchinson, 5 De G. M. & G. 558, 2 Jur. N. S. 97, 25 L. J. Ch. 598, 4 Wkly. Rep. 3, 50 Eng. Ch. 441, 43 Eng. Reprint 986; Henikle *v.* Royal Exch. Assur. Co., 1 Ves. 317, 27 Eng. Reprint 1055, per Lord Hardwicke.

See 19 Cent. Dig. tit. "Equity," § 20. See also 6 Cyc. 337 note 48; 9 Cyc. 393; REFORMATION OF INSTRUMENTS.

21. Southard *v.* Curley, 134 N. Y. 148, 155, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561, where Judge Parker quoted from many of the cases cited in the preceding note, some of which, as he said, contain "apparently unconsidered expressions . . . to the effect that the mistake must be established beyond a reasonable doubt."

Other cases supporting the text are the following:

Alabama.— Miller *v.* Morris, 123 Ala. 164, 27 So. 401.

Georgia.— Crockett *v.* Crockett, 73 Ga. 647.

Illinois.— Warrick *v.* Smith, 36 Ill. App. 619.

Minnesota.— Wall *v.* Meilke, (1903) 94 N. W. 689 [*overruling pro tanto* Guernsey *v.* American Ins. Co., 17 Minn. 104]; Layman *v.* Minneapolis Realty Co., 60 Minn. 136, 62 N. W. 113.

Nebraska.— Topping *v.* Jeanette, 64 Nebr. 834, 90 N. W. 911.

New York.— Jamaica Sav. Bank *v.* Taylor, 76 N. Y. Suppl. 790.

North Carolina.— Harding *v.* Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775.

Oregon.— Newsom *v.* Greenwood, 4 Oreg. 119, 123.

Texas.— Howard *v.* Zimpleman, (Sup. 1890) 14 S. W. 59; American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

22. Layman *v.* Minneapolis Realty Co., 60 Minn. 136, 62 N. W. 113. See also Topping *v.* Jeanette, 64 Nebr. 834, 90 N. W. 911; Buffalo Commercial Bank *v.* State Bank, 4 Edw. (N. Y.) 32.

Mistake is sometimes presumed or inferred from the nature of the transaction. Hyde *v.* Tanner, 1 Barb. (N. Y.) 75.

23. Harter *v.* Christoph, 32 Wis. 245, 249. Penn Iron Co. *v.* Diller, (Pa. 1885) 1 Atl. 924.

24. Andrews *v.* Hyde, 1 Fed. Cas. No. 377, 3 Cliff. 516. As to the effect of bias, from

(H) *Instances of Exercise of Jurisdiction.* The mistakes relieved against in equity relate most frequently to written instruments, and may be either mistakes in expression, affecting the sense of the instrument itself,[25] or mistakes inducing the parties to execute the instrument.[26] In the former case the mistake does not affect the equities of the agreement itself, but by reason thereof the agreement actually made has not been correctly embodied in the instrument, and the appropriate remedy is by reformation.[27] In the latter case the instrument correctly embodies the agreement made, or is appropriate to its execution, but the parties would not have entered into such an agreement but for the mistake, and the remedy is in the nature of rescission.[28] The jurisdiction has been also frequently exercised to reopen and correct accounts stated in consequence of errors in computation and otherwise.[29] Equity is also frequently called upon to relieve against a mistake as to the quantity of land embraced within a tract sold, by abating the purchase-price, and if necessary decreeing repayment proportioned to the deficiency.[30] Mistakes affecting judicial sales have also been corrected in equity.[31]

interest or otherwise, upon the credibility of witnesses see EVIDENCE; WITNESSES.

On the other hand it has not escaped comment that defendant usually denies mistake. Deakins *v.* Alley, 9 Lea (Tenn.) 494, 498, where mistake was held to have been sufficiently proved against such denial.

25. *Georgia.*—Wyche *v.* Greene, 11 Ga. 159.

Illinois.— Foster *v.* Clark, 79 Ill. 225.

Maine.— Tucker *v.* Madden, 44 Me. 206.

Massachusetts.— Wilcox *v.* Lucas, 121 Mass. 21.

New Jersey.— Long *v.* Hartwell, 34 N. J. L. 116; Tatem *v.* Powell, 50 N. J. Eq. 316, 24 Atl. 436; Lewis *v.* Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631.

North Carolina.— Johnson *v.* Lee, 45 N. C. 43.

Ohio.— Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Virginia.— Slagle *v.* Rust, 4 Gratt. 274.

West Virginia.— Western Min., etc., Co. *v.* Peytonia Cannel Coal Co., 8 W. Va. 406.

United States.— Bradford *v.* Tennessee Union Bank, 13 How. 57, 14 L. ed. 49; McCall *v.* Harrison, 15 Fed. Cas. No. 8,671, 1 Brock. 126; Oliver *v.* Mutual Commercial Mar. Ins. Co., 18 Fed. Cas. No. 10,498, 2 Curt. 277.

See 19 Cent. Dig. tit. "Equity," §§ 14, 17.

Wrong figures.— The court restrained the enforcement of a bid for doing public work on the ground that plaintiff's engineer had by mistake entered the wrong figures in the proposal. Moffett Co. *v.* Rochester, 82 Fed. 255.

26. *Iowa.*— Sweezey *v.* Collins, 36 Iowa 589; Loomis *v.* Hudson, 18 Iowa 416.

Kentucky.— Lyle *v.* Williamson, 6 T. B. Mon. 142.

Michigan.— French *v.* De Bow, 38 Mich. 708.

New York.— Barnes *v.* Camack, 1 Barb. 392.

Ohio.— Irwin *v.* Longworth, 20 Ohio 581.

See 19 Cent. Dig. tit. "Equity," §§ 14, 17.

A mistake in respect to the title to land purchased is no ground for relief where there was no agreement for a warranty. Sutton *v.* Sutton, 7 Gratt. (Va.) 234, 56 Am. Dec. 109. See Bogarth *v.* Caldwell County, 9 Mo. 358.

27. See REFORMATION OF INSTRUMENTS.

28. See CANCELLATION OF INSTRUMENTS, 6 Cyc. 282; CONTRACTS, 9 Cyc. 406, 407; SALES; VENDOR AND PURCHASER.

29. See ACCOUNTS AND ACCOUNTING, 1 Cyc. 463 *et seq.* On the division of a county the boards of commissioners of the two counties were required to apportion the indebtedness and fix the amount to be paid by each. By mistake the total amount to be apportioned was made too great. The injured county was given relief in equity. Delta County *v.* Gunnison County, 17 Colo. 41, 28 Pac. 476. A mistake in computing the amount due distributees under an agreement may be corrected. Pool *v.* Docker, 92 Ill. 501. But where a mistake in settling partnership accounts was caused by the ignorance of defendant and the laches of plaintiff relief was refused. Belt *v.* Mehen, 2 Cal. 159, 56 Am. Dec. 329.

30. Hosleton *v.* Dickinson, 51 Iowa 244, 1 N. W. 550; Jenks *v.* Fritz, 7 Watts & S. (Pa.) 201, 42 Am. Dec. 227; Hull *v.* Watts, 95 Va. 10, 27 S. E. 829; Boschen *v.* Jurgen, 92 Va. 756, 24 S. E. 390; Yost *v.* Mallicote, 77 Va. 610.

31. As where there is a mistake in the description of the land. Baxter *v.* Tanner, 35 W. Va. 60, 12 S. E. 1094. *Contra,* where the proceedings were in another court. Mahan *v.* Reeve, 6 Blackf. (Ind.) 215. A mistake of description in a sheriff's deed may be corrected. Reddick *v.* Long, 124 Ala. 260, 27 So. 402. See also Gardner *v.* Moore, 75 Ala. 394, 51 Am. Rep. 454; Vanderbeck *v.* Perry, 28 N. J. Eq. 367. A mistake in the report of a commissioner whereby it appeared that an entire interest instead of a two-thirds interest had been sold was corrected at the instance of creditors seeking to subject the unsold interest to the payment of debts. Cosby *v.* Wickliffe, 12 B. Mon. (Ky.) 202. Several years after a partition of land correction was made of a mistake whereby an excessive quantity was allotted to one of the parties. Fore *v.* Foster, 86 Va. 104, 9 S. E. 497. A mistake in description in the advertisement of a sheriff's sale cannot be relieved against in favor of a purchaser who was present, the sheriff having announced correctly

Mistake in an award of arbitrators is a ground for setting it aside in equity.[32] A conveyance defective through mistake will be aided,[33] and where a lien or encumbrance has been canceled by mistake it will be reinstated.[34] Money paid under mistake cannot be recovered by a bill in equity where assumpsit will lie.[35]

(II) *Mistakes of Law*—(A) *Rule That Equity Will Not Relieve.* The rule has often been stated with great positiveness that equity will never relieve against a mistake of law,[36] but such relief has nevertheless frequently been given.[37] The

what would be sold. Keith *v.* Brewster, 114 Ga. 176, 39 S. E. 850. Where counterfeit money was innocently paid and received in redemption from a sheriff's sale, equity will permit the redemption to be perfected on payment of good money and interest. Pownall *v.* Hall, 45 Cal. 189. See, generally, Judicial Sales.

32. See Arbitration and Award, 3 Cyc. 753, 756.

33. See Deeds, 13 Cyc. 576 *et seq.* Even against a judgment creditor of the grantor purchasing at execution sale, his judgment being junior to the attempted conveyance. Barr *v.* Hatch, 3 Ohio 527. But a defective release will be aided only when supported by a valuable consideration. Robson *v.* Jones, 3 Del. Ch. 51.

34. French *v.* De Bow, 38 Mich. 708; Barnes *v.* Camack, 1 Barb. (N. Y.) 392.

35. Lesslie *v.* Richardson, 60 Ala. 563; Russell *v.* Little, 28 Ala. 160. *Contra*, Wilkins *v.* Woodfin, 5 Munf. (Va.) 183. See also *supra*, II, A, 5, b.

36. *Alabama.*— Hemphill *v.* Moody, 64 Ala. 468; Clark *v.* Hart, 57 Ala. 390; Gwynn *v.* Hamilton, 29 Ala. 233.

California.— Kenyon *v.* Welty, 20 Cal. 637, 81 Am. Dec. 137; Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561; Goodenow *v.* Ewer, 16 Cal. 461, 76 Am. Dec. 540; Smith *v.* McDougal, 2 Cal. 586.

Illinois.— Long *v.* Long, 132 Ill. 72, 23 N. E. 591 [*affirming* 30 Ill. App. 559]; Goltra *v.* Sanasack, 53 Ill. 456; Ruffner *v.* McConnel, 17 Ill. 212, 63 Am. Dec. 362; Campbell *v.* Carter, 14 Ill. 286; Shafer *v.* Davis, 13 Ill. 395; Beebe *v.* Swartwout, 8 Ill. 162; Broadwell *v.* Broadwell, 6 Ill. 599; Paullissen *v.* Loock, 38 Ill. App. 510.

Indiana.— Hollingsworth *v.* Stone, 90 Ind. 244.

Iowa.— Glenn *v.* Statler, 42 Iowa 107; Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

Maryland.— Williams *v.* Hodgson, 2 Harr. & J. 474, 3 Am. Dec. 563.

Mississippi.— Nabours *v.* Cocke, 24 Miss. 44; Lyon *v.* Sanders, 23 Miss. 530.

Missouri.— Norton *v.* Highleyman, 88 Mo. 621; St. Louis *v.* Priest, 88 Mo. 612; Price *v.* Estill, 87 Mo. 378.

New Jersey.— Hampton *v.* Nicholson, 23 N. J. Eq. 423; Bentley *v.* Whittemore, 18 N. J. Eq. 366.

New York.— Weed *v.* Weed, 94 N. Y. 243; Marble *v.* Whitney, 28 N. Y. 297; Kelly *v.* Connecticut Mut. L. Ins. Co., 27 N. Y. App. Div. 336, 50 N. Y. Suppl. 139; Gilbert *v.* Gilbert, 9 Barb. 532.

North Carolina.— Bledsoe *v.* Nixon, 68 N. C. 521; Foulkes *v.* Foulkes, 55 N. C. 260.

Pennsylvania.— Gross *v.* Leber, 47 Pa. St. 520; Peters *v.* Florence, 38 Pa. St. 194; Good *v.* Herr, 7 Watts & S. 253, 42 Am. Dec. 236; Rankin *v.* Mortimere, 7 Watts 372; Snavely *v.* Musselman, 3 Lanc. Bar 23.

Vermont.— Freeman *v.* Holt, 51 Vt. 538; Mellish *v.* Robertson, 25 Vt. 603.

Virginia.— Zollman *v.* Moore, 21 Gratt. 313.

West Virginia.— Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660.

United States.— Hunt *v.* Rousmaniere, 8 Wheat. 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342]; *In re* Dunham, 8 Fed. Cas. No. 4,146, 9 Phila. 471; Sims *v.* Lyle, 22 Fed. Cas. No. 12,891, 4 Wash. 301.

England.— Pullen *v.* Ready, 2 Atk. 587, 26 Eng. Reprint 751; Wildey *v.* Cooper's Co., 3 P. Wms. 127 note, 24 Eng. Reprint 997; Comyns Dig. c. 3, F, 8.

See 19 Cent. Dig. tit. "Equity," § 15.

37. *California.*— Remington *v.* Higgins, 54 Cal. 620.

Colorado.— Morgan *v.* Dod, 3 Colo. 551.

Georgia.— Clayton *v.* Bussey, 30 Ga. 946, 76 Am. Dec. 680; Cartledge *v.* Cutliff, 21 Ga. 1.

Iowa.— Bottorff *v.* Lewis, 121 Iowa 27, 95 N. W. 262; Baker *v.* Massey, 50 Iowa 399.

Kentucky.— Blakemore *v.* Blakemore, 44 S. W. 96, 19 Ky. L. Rep. 1619.

Maryland.— Lammot *v.* Bowly, 6 Harr. & J. 500.

Mississippi.— Sparks *v.* Pittman, 51 Miss. 511.

Missouri.— Nelson *v.* Betts, 21 Mo. App. 219.

Ohio.— Evants *v.* Strode, 11 Ohio 480, 38 Am. Dec. 744; McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731; Bigelow *v.* Barr, 4 Ohio 358.

Pennsylvania.— Gross *v.* Leber, 47 Pa. St. 520.

Texas.— Harrell *v.* De Normandie, 26 Tex. 120.

Washington.— MacKay *v.* Smith, 27 Wash. 442, 67 Pac. 982.

United States.— Taylor *v.* Holmes, 14 Fed. 498; Bailey *v.* American Cent. Ins. Co., 13 Fed. 250, 4 McCrary 221.

England.— Cooper *v.* Phibbs, L. R. 2 H. L. 149, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049; Bingham *v.* Bingham, 1 Ves. 126, 27 Eng. Reprint 934.

See 19 Cent. Dig. tit. "Equity," § 15.

Public policy.— Equity will not relieve where to do so would violate a rule of public

doctrine is universally traced to the maxim, *Ignorantia juris neminem excusat.* Regarding the rule as settled, courts and authors have made great efforts to discover and classify principles upon which the large and increasing number of exceptional cases may be based. None of these efforts has been altogether successful.[38] While recognizing the rule the courts are ready and even astute to seize upon any element of fact as sufficient in connection with mistake of law to justify the granting of relief.[39] Relief is also given where there has been a mistake of law by one party induced by misrepresentation or undue influence on the part of the other.[40] Equity frequently reforms a deed or other instrument which fails to express the true agreement of the parties as it existed when the instrument was drawn, especially where the mistake was that of a scrivener;[41] but where the instrument is drawn in conformity with that agreement and has been deliberately selected to effectuate the intention of the parties, relief will not be given, although it fails, through their misconception of the law, to operate as the parties intended.[42] In some cases, where a transaction has been equitably consummated before the discovery of the mistake, relief is refused upon that ground.[43] In some cases where the arrangement was entered into improvidently and without deliberation, relief will be given on the theory of surprise.[44] The maxim, *Ignorantia juris neminem excusat*, refers to domestic and not to foreign law, so that the rule has never been applied to a mistake of the law of another state, which is treated as a mistake of fact.[45]

policy. Schaffner *v.* Schilling, 6 Mo. App. 42.

Restoration of status quo.— If relief can be given in any case it is where defendant has lost nothing by the mistake and the *status quo* can be restored. Crosier *v.* Acer, 7 Paige (N. Y.) 137. See also *supra*, II, B, 2, c, (I), (C).

38. In Cooper *v.* Phibbs, L. R. 2 H. L. 149, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049, Lord Westbury undertook to distinguish between general law and private rights, holding that a mistake as to the general law was not relievable but a mistake as to private right might be. This theory has secured for itself some adherents. See Bispham Eq. § 187. The distinction, however, seems too subtle and difficult of application for practical purposes. Private rights, unless in very exceptional cases, rest on general law. If the facts are known and a mistake is made with relation to a private right depending upon those facts, it must be a mistake of general law. For discussions of the exceptions see 1 Story Eq. Jur. § 110 *et seq.*; 2 Pomeroy Eq. Jur. § 841 *et seq.*; Bispham Eq. § 187 *et seq.*; Smith Princ. Eq. (2d ed.) p. 210 *et seq.*

39. Hollingsworth *v.* Stone, 90 Ind. 244; Carley *v.* Lewis, 24 Ind. 23; McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731; Bigelow *v.* Barr, 4 Ohio 358; Russell's Appeal, 75 Pa. St. 269; Gross *v.* Leber, 47 Pa. St. 520.

40. *Alabama.*— Hardigree *v.* Mitchum, 51 Ala. 151; Haden *v.* Ware, 15 Ala. 149.

California.— Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561.

Illinois.— Sands *v.* Sands, 112 Ill. 225; Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

Indiana.— Hollingsworth *v.* Stone, 90 Ind. 244.

Kentucky.— Bryan *v.* Masterson, 4 J. J. Marsh. 225.

Missouri.— Smith *v.* Patterson, 53 Mo. App. 66.

Pennsylvania.— Whelen's Appeal, 70 Pa. St. 410.

Rhode Island.— Olney *v.* Weaver, 24 R. I. 408, 53 Atl. 287, *obiter.* Relief denied because there were no equitable circumstances.

United States.— Wheeler *v.* Smith, 9 How. 55, 13 L. ed. 44.

See 19 Cent. Dig. tit. "Equity," § 15.

41. See REFORMATION OF INSTRUMENTS. These cases are often treated as involving mistakes of fact.

42. Lanning *v.* Carpenter, 48 N. Y. 408; Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393; Hunt *v.* Rousmanier, 1 Pet. (U. S.) 1, 7 L. ed. 27 [*affirming* 12 Fed. Cas. No. 6,897, 3 Mason 294]. See also Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589. The mistake must be perfectly distinct from the sense of the instrument. Jarrell *v.* Jarrell, 27 W. Va. 743.

43. Long *v.* Long, 132 Ill. 72, 23 N. E. 591 [*affirming* 30 Ill. App. 559]; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

44. Evans *v.* Llewellyn, 2 Bro. Ch. 150, 1 Cox Ch. 333, 1 Rev. Rep. 49, 29 Eng. Reprint 86; Pusey *v.* Desbouvrie, 3 P. Wms. 315, 24 Eng. Reprint 1081.

45. *Connecticut.*—Patterson *v.* Bloomer, 35 Conn. 57, 95 Am. Dec. 218.

Massachusetts.— Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353.

New York.— Merchants' Bank *v.* Spalding, 12 Barb. 302; Chillicothe Bank *v.* Dodge, 8 Barb. 233.

Texas.—Moreland *v.* Atchison, 19 Tex. 303.

England.— McCormick *v.* Garnett, 5 De G. M. & G. 278, 2 Eq. Rep. 536, 18 Jur. 412, 23 L. J. Ch. 777, 2 Wkly. Rep. 403. 54 Eng. Ch. 278, 43 Eng. Reprint 877; Leslie *v.* Baillie,

(B) *Principle of Rule Discussed.* No general principle can be stated which will harmonize the cases.[46] While the rule has been too often declared to be ignored, it seems to be founded upon a misconception of the maxim to which it is traced and the efforts of the courts to engraft exceptions have led practically in many cases to an annulment of the rule itself. In most of the cases where the rule is applied relief would have been denied under similar circumstances were the mistake one of fact. These are cases where one or both parties acted merely in ignorance of the law, with opportunity to inform themselves. A similar neglect as to a matter of fact would bar relief.[47] Of course to correct every transaction entered into in ignorance of the law would destroy the law itself by making it in each case what a party to be affected thought it was or ought to be. In cases, however, where both parties enter into the agreement, basing it on a mistaken assumption of the law relating to it, and are thus drawn into an arrangement different from that they had in contemplation, the courts with more or less frankness find some means of affording relief.

3. PENALTIES AND FORFEITURES — a. Relief Against Penalties — (I) *DEVELOPMENT OF JURISDICTION.* Equity, always expressing its abhorrence of penalties, first interposed to relieve against them by restraining actions at law for the penalty of bonds conditioned for the payment of money, on the obligor's paying or tendering the amount justly due.[48] There has never been practical necessity in the United States for a resort to equity in such cases, but the jurisdiction remains notwithstanding the availability of legal remedies.[49] At first jurisdiction was not asserted beyond relieving, where the penalty was designed only to secure the payment of money;[50] but in Lord Thurlow's time it was held that relief might be given where the penalty was inserted to secure the enjoyment of any collateral object.[51] It has since been generally considered that the jurisdiction extends to all such cases, where adequate compensation can be made.[52]

(II) *PRESENT EXTENT OF JURISDICTION.* Now whatever be the form of the contract, where there is a provision for the payment of a sum of money, evidently designed to secure the payment of a lesser sum, equity regards such provision as a penalty and relieves on payment of the lesser sum with interest.[53]

7 Jur. 77, 12 L. J. Ch. 153, 2 Y. & Coll. 91, 21 Eng. Ch. 91.

See 19 Cent. Dig. tit. "Equity," § 15.

46. Any attempt to discuss the cases *in extenso* would involve a repetition of matters treated under the different heads already referred to *supra*, p. 46, note 2.

47. See *supra*, II, B, 2, c, (I), (D). Cases very clearly of this class are the following:

Alabama.—Hemphill *v.* Moody, 64 Ala. 468.

California.— Kenyon *v.* Welty, 20 Cal. 637, 81 Am. Dec. 137.

Illinois.— Campbell *v.* Carter, 14 Ill. 286; Beebe *v.* Swartwout, 8 Ill. 162.

Maryland.— Lamont *v.* Bowly, 6 Harr. & J. 500; Williams *v.* Hodgson, 2 Harr. & J. 474, 3 Am. Dec. 563.

Missouri.— Norton *v.* Highleyman, 88 Mo. 612; Nelson *v.* Betts, 21 Mo. App. 219.

United States.— *In re* Dunham, 8 Fed. Cas. No. 4,146, 9 Phila. (Pa.) 471; Sims *v.* Lyle, 22 Fed. Cas. No. 12,891, 4 Wash. 301.

See 19 Cent. Dig. tit. "Equity," § 15.

Cases explained.— In Ruffner *v.* McConnel, 17 Ill. 212, 63 Am. Dec. 362, the attempt was to reform a covenant so as to charge a party who had refused to enter into it when it was made. In Lyon *v.* Sanders, 23 Miss. 530, the agreement was entered into deliberately, as in Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [*reversing* 15 Fed. Cas. No. 6,898, 2 Mason 342], induced by the mistake of law of a stranger.

48. See Reynolds *v.* Pitt, 19 Ves. Jr. 134, 2 Price 212 note, 34 Eng. Reprint 468, 2 Lead. Cas. Eq. 1098. In England necessity of resort to equity in such cases was obviated by statutes restricting recovery at law. St. 8 & 9 Wm. III, c. 11; 4 & 5 Anne, c. 16.

49. See *supra*, II, A, 2. See Jackson *v.* Baker, 2 Edw. (N. Y.) 471. See also note to Peachy *v.* Somerset, 1 Str. 447, 2 White & T. Lead. Cas. Eq. 1245.

50. Peachy *v.* Somerset, 1 Str. 447, 2 White & T. Lead. Cas. Eq. 1245.

51. Sloman *v.* Walter, 1 Bro. Ch. 418, 28 Eng. Reprint 1213.

52. Nevada County *v.* Hicks, 38 Ark. 557; Hacket *v.* Alcock, 1 Call (Va.) 533; Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739. Relief was refused a contractor for public work from a provision that fifteen per cent of the price should be retained and forfeited if plaintiff failed to complete the work. Grassman *v.* Bonn, 32 N. J. Eq. 43.

53. Giles *v.* Austin, 38 N. Y. Super. Ct. 215 [*affirmed* in 62 N. Y. 486]; Moore *v.* Hylton, 16 N. C. 429; Nesbit *v.* Brown, 16 N. C. 30; Solomon *v.* Wilson, 1 Whart. (Pa.) 241; Schofield *v.* Preston, 16 Phila.

Relief is also given where the provision is for the payment of a certain sum on failure to perform promises other than for the payment of money, where the damages resulting from non-performance can be readily ascertained and are less than the stipulated sum.[54]

(III) *Stipulations For Increased Rate of Interest.* A familiar application of the doctrine, where the contract is one for the payment of money, is where it is provided that a higher rate of interest shall be paid unless the debt is paid upon its maturity. This provision is treated as a penalty, and equity forbids the enforcement of the higher rate.[55] In this respect, however, a distinction has sometimes been taken between a retroactive provision for a higher rate, and one merely stipulating for a higher rate after maturity, the former being deemed a penalty, the latter not.[56] A stipulation that on default of payment of interest the principal shall become due is not even in equity deemed a penalty.[57]

(IV) *Circumstances Affecting Right to Relief.* Although the fact that the stipulation is for a penalty is alone sufficient to invoke the jurisdiction, relief will more readily be given where other special equitable circumstances exist,[58] and will not be given at all where the default was wilful and persistent,[59] or was incurred under a contract in violation of public policy.[60]

(V) *Statutory Penalties.* Whether a penalty imposed by statute is sub-

(Pa.) 100; Dawson *v.* Winslow, Wythe (Va.) 114. And see, generally, Penalties. But where a judgment creditor agreed to accept one half the judgment in instalments in consideration of prompt payment and the withdrawal of an appeal, in default whereof the full amount might be collected, it was held that this was not a penalty and the judgment might be enforced. Ackerson *v.* Lodi Branch R. Co., 31 N. J. Eq. 42.

54. Allison *v.* Cocke, 106 Ky. 763, 51 S. W. 593, 21 Ky. L. Rep. 434; Skinner *v.* White, 17 Johns. (N. Y.) 357; Jackson *v.* Baker, 2 Edw. (N. Y.) 471.

55. *Iowa.*— Conrad *v.* Gibbon, 29 Iowa 120.

Minnesota.— White *v.* Iltis, 24 Minn. 43; Newell *v.* Houlton, 22 Minn. 19; Bailey *v.* Weller, 2 Minn. 384; Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Missouri.— Watts *v.* Watts, 11 Mo. 547.

Washington.— Krutz *v.* Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676.

England.— Nicholls *v.* Maynard, 3 Atk. 519, 26 Eng. Reprint 1100; Holles *v.* Wyse, 2 Vern. 289, 23 Eng. Reprint 787; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124, 32 Eng. Reprint 108.

Contra.— Finger *v.* McCaughey, 114 Cal. 64, 45 Pac. 1004. See also Thompson *v.* Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81.

See 19 Cent. Dig. tit. "Equity," § 70.

Non-usurious rate.— An agreement for a very high rate of interest, but one not usurious, will not be treated as a penalty in the absence of evidence of oppression on the part of the creditor. Palmer *v.* Leffler, 18 Iowa 125.

56. *Arkansas.*— Miller *v.* Kempner, 32 Ark. 573.

Kansas.— Sheldon *v.* Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709. *Compare* Ansel *v.* Olson, 39 Kan. 767, 18 Pac. 939, where the provision was for the increased rate from date, and it was relieved against on the ground of accident, the maker being unable to ascertain where the note was at maturity.

Maine.— Capen *v.* Crowell, 66 Me. 282.

Nebraska.— Sanford *v.* Litchenberger, 62 Nebr. 501, 87 N. W. 305; Crapo *v.* Hefner, 53 Nebr. 251, 73 N. W. 702; Home F. Ins. Co. *v.* Fitch, 52 Nebr. 88, 71 N. W. 940; Omaha L. & T. Co. *v.* Hanson, 46 Nebr. 870, 65 N. W. 1058; Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932. *Compare* Connecticut Mut. L. Ins. Co. *v.* Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101; Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560; Upton *v.* O'Donahue, 32 Nebr. 565, 49 N. W. 267; Weyrich *v.* Hobleman, 14 Nebr. 432, 16 N. W. 436.

North Carolina.— Pass *v.* Schine, 113 N. C. 284, 18 S. E. 251.

Washington.—Haywood *v.* Miller, 14 Wash. 660, 45 Pac. 307.

57. Whitcher *v.* Webb, 44 Cal. 127; Houston *v.* Curran, 101 Ill. App. 203; Gulden *v.* O'Byrne, 7 Phila. (Pa.) 93; Ruggles *v.* Southern Minnesota R. Co., 20 Fed. Cas. No. 12,121. Acceptance of a later instalment during foreclosure proceedings is not a waiver of the provision. Houston *v.* Curran, 101 Ill. App. 203. But where the failure to pay is due to the creditor's misconduct or to accident, relief will be given. Broderick *v.* Smith, 26 Barb. (N. Y.) 539; Adams *v.* Rutherford, 13 Oreg. 78, 8 Pac. 896.

58. As where the interposition of the other party has contributed to the incurring of the penalty. Broderick *v.* Smith, 26 Barb. (N. Y.) 539; Skinner *v.* White, 17 Johns. (N. Y.) 357; Adams *v.* Rutherford, 13 Oreg. 78, 8 Pac. 896; Dawson *v.* Winslow, Wythe (Va.) 114.

59. Houston *v.* Curran, 101 Ill. App. 203; Skinner *v.* White, 17 Johns. (N. Y.) 357.

60. De Witt Wire-Cloth Co. *v.* New Jersey Wire-Cloth Co., 16 Daly (N. Y.) 529, 14 N. Y. Suppl. 277.

ject to the equitable doctrines governing in case of contract is a question upon which the courts are divided.[61]

(VI) *Relief Not Given From Liquidated Damages.* Where it is impracticable to admeasure the damages resulting from plaintiff's default, and the sum stipulated is reasonable, it is regarded as a liquidation of damages, not as a penalty, and no relief will be given.[62]

(VII) *Election Between Penalty and Performance.* Finally it is observed that the court will not permit a party to evade performance of a contract by payment of the penalty fixed for non-performance.[63] Care must, however, be taken to distinguish such cases from those where the contract contemplates an option on the part of one party either to do or abstain from doing a certain act or in the alternative to pay a sum of money. This is not a penalty.[64]

b. Relief Against Forfeitures — (I) *In General.* A similar jurisdiction as in the case of penalties is exercised by equity to relieve against the consequences of forfeitures incurred at law,[65] the rule being that such relief will be given

61. In some cases equity has refused to enforce a statutory penalty. Gordon *v.* Lowell, 21 Me. 251; Mississippi R. Commission *v.* Gulf, etc., R. Co., 78 Miss. 750, 29 So. 789; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625; Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633. In others it has denied relief against the penalty. Chandler *v.* Crawford, 7 Ala. 506; Powell *v.* Redfield, 19 Fed. Cas. No. 11,359, 4 Blatchf. 45. In one case at least such a penalty has been enforced. State *v.* Hall, 70 Miss. 678, 13 So. 39. Broadly speaking it would seem therefore that equity will not grant relief against such a penalty, nor on the other hand will it enforce the penalty.

Perhaps the distinction should be taken between a penalty in aid of a private right and one in support of public policy, treating the former in the same manner as if it were based on contract, and holding the latter binding in equity as well as at law. This would reconcile the cases cited, except Chandler *v.* Crawford, 7 Ala. 506, which refused relief from a penalty imposed upon a sheriff for not making a return, although this might be deemed a matter of public policy, and Mississippi R. Commission *v.* Gulf, etc., R. Co., 78 Miss. 750, 29 So. 789, in which case the decision was based largely upon the question whether the statute gave the court jurisdiction in such cases. But this distinction would certainly not hold good in England, where relief is never given against penalties imposed by or under authority of statute. Parker *v.* Butcher, L. R. 3 Eq. 762, 36 L. J. Ch. 552; Keating *v.* Sparrow, 1 Ball & B. 367.

In Maine a bond to procure the obligor's relief from arrest on mesne process was held to be within a statute (Rev. St. c. 77, § 8) authorizing the court to give relief from penalties under "civil contracts and obligations." Downes *v.* Reily, 53 Me. 62. But a recognizance for an appeal in a civil action could not be relieved against under a statute (St. (1821) c. 50) enabling equity to order executions for no more than is due in good conscience on specialties under seal, and recognizances taken in criminal cases. Paul *v.* Nowell, 6 Me. 239. The peculiar special statutory origin of equity jurisdiction in Maine explains these cases. See *supra*, I, B.

62. For the principles governing this distinction see DAMAGES, 13 Cyc. 89 *et seq.*; PENALTIES.

63. Gordon *v.* Brown, 39 N. C. 399; French *v.* Macale, 1 C. & L. 459, 2 Dr. & War. 269. But see Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 8 L. ed. 120.

64. Fisher *v.* Shaw, 42 Me. 32; Rolfe *v.* Peterson, 2 Bro. P. C. 436, 1 Eng. Reprint 1048.

65. *Colorado.*— Bliley *v.* Wheeler, 5 Colo. App. 287, 38 Pac. 603.

Illinois.— Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53.

Michigan.— Sandford *v.* Flint, 24 Mich. 26.

North Carolina.— Stamps *v.* Cooley, 91 N. C. 316.

Wisconsin.— Hall *v.* Delaplaine, 5 Wis. 206, 68 Am. Dec. 57.

United States.— Fletcher *v.* New Orleans, etc., R. Co., 20 Fed. 345; U. S. *v.* White, 17 Fed. 561; Burr *v.* Duryee, 4 Fed. Cas. No. 2,190, 2 Fish. Pat. Cas. 275 [*affirmed* in 1 Wall. 531, 17 L. ed. 650, 660, 661].

England.— Page *v.* Broom, 4 Russ. 6, 4 Eng. Ch. 6.

See 19 Cent. Dig. tit. "Equity," §§ 69, 70.

Application of rule.— On a purchase of land by A and B, it was agreed that if A should have any portion of B's share of the purchase-money to pay, then A should have all the land on repaying to B what he might have paid already. It was held that equity would relieve against this as a forfeiture. Asher *v.* Pendleton, 6 Gratt. (Va.) 628. Relief will be given against a forfeiture incurred by a wife, because she was under her husband's dominion. Frederick County Farmers', etc., Bank *v.* Wayman, 5 Gill (Md.) 336. Relief will be given from a forfeiture incurred under a mistake of law. Scott *v.* Dunn, 21 N. C. 425, 30 Am. Dec. 174. Equity will prevent resort to a legal fiction for the purpose of creating a forfeiture. Eveleth *v.* Little, 16 Me. 374. But in Georgia it is held that no relief can be given against a forfeiture provided for by a contract otherwise legal, and in

where compensation can be fully made,[66] and on the tender or payment of such compensation.[67]

(II) *Distinction Between Conditions Subsequent and Precedent.* Courts have sometimes distinguished between forfeitures for breach of conditions subsequent and those for breach of conditions precedent, holding uniformly that relief may be given in the former case,[68] and sometimes asserting and sometimes denying the power to relieve in the latter.[69]

(III) *Essentiality of Time as Affecting Relief.* The exercise of the jurisdiction to relieve against forfeitures demands in most cases the application of the equitable doctrine that time is not essential, and that a failure to perform within the appointed time may be relieved against where compensation can be made for the delay.[70] But relief will be denied where the time of performance is made essential by the express terms of the contract,[71] or where by the general

unmistakable terms. Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93. Every case recognizing the mortgagee's equity of redemption is an illustration of the doctrine of relief against forfeitures. See, generally, Mortgages.

66. *Connecticut.*— Walker *v.* Wheeler, 2 Conn. 299.

Kentucky.— Jones *v.* Bennet, 9 Dana 333.

New Jersey.— Grigg *v.* Landis, 21 N. J. Eq. 494.

Rhode Island.— Thompson *v.* Whipple, 5 R. I. 144; Carpenter *v.* Westcott, 4 R. I. 225.

Vermont.— Hagar *v.* Buck, 44 Vt. 285, 8 Am. Rep. 368.

Wisconsin.— Donnelly *v.* Eastes, 94 Wis. 390, 69 N. W. 157.

United States.— Cheney *v.* Bilby, 74 Fed. 52, 20 C. C. A. 291.

England.— Davis *v.* Hone, 2 Sch. & Lef. 341, 9 Rev. Rep. 89; Peachy *v.* Somerset, 1 Str. 447.

67. Beecher *v.* Beecher, 43 Conn. 556; Walker *v.* Wheeler, 2 Conn. 299; Thompson *v.* Whipple, 5 R. I. 144; Carpenter *v.* Westcott, 4 R. I. 225; Hagar *v.* Buck, 44 Vt. 285, 8 Am. Rep. 368; Donnelly *v.* Eastes, 94 Wis. 390, 69 N. W. 157; Hall *v.* Delaplaine, 5 Wis. 206, 68 Am. Dec. 57. Where one in an effort to enforce a technical forfeiture has refused the tender of the principal when due, equity will not require the payment with interest as a condition of relieving against the forfeiture. Cheney *v.* Bilby, 74 Fed. 52, 20 C. C. A. 291.

See 19 Cent. Dig. tit. "Equity," §§ 69, 70.

68. *Arkansas.*— Worthen *v.* Ratcliffe, 42 Ark. 330.

Connecticut.— Walker *v.* Wheeler, 2 Conn. 299.

Massachusetts.— Hancock *v.* Carlton, 6 Gray 39.

Vermont.— Henry *v.* Tupper, 29 Vt. 358.

England.— Popham *v.* Bampfeild, 1 Vern. 79, 23 Eng. Reprint 325.

See 19 Cent. Dig. tit. "Equity," § 69.

69. Relief will not be given to one who has failed in the performance of a condition precedent.

Kentucky.— Bucks *v.* Jouitt, 3 Litt. 229.

New York.— Wells *v.* Smith, 2 Edw. 78.

Rhode Island.— New York, etc., R. Co. *v.* Providence, 16 R. I. 746, 19 Atl. 759.

Vermont.— Barnet *v.* Passumpsic Turnpike Co., 15 Vt. 757.

England.— Harvey *v.* Aston, 1 Atk. 361, Cas. t. Talb. 212, 26 Eng. Reprint 230; Popham *v.* Bampfeild, 1 Vern. 79, 23 Eng. Reprint 325.

See 19 Cent. Dig. tit. "Equity," § 69.

Relief may be given under such circumstances. Baltimore City Bank *v.* Smith, 3 Gill & J. (Md.) 265; Sweet *v.* Anderson, 2 Bro. P. C. 256, 1 Eng. Reprint 927 (forfeiture was due to accident); Bertie *v.* Falkland, Colles 10, 1 Eng. Reprint 155 (condition became impossible of performance); Hayward *v.* Angell, 1 Vern. 222, 23 Eng. Reprint 428 (holding doctrine broadly). But there is no power to vest an estate which is to arise on a condition precedent until that condition is performed. Baltimore City Bank *v.* Smith, 3 Gill & J. (Md.) 265; Robinson *v.* Cropsey, 2 Edw. (N. Y.) 138; Harvey *v.* Aston, 1 Atk. 361, Cas. t. Talb. 212, 26 Eng. Reprint 230. The older English cases are collated in 1 Eq. Cas. Abr. 107 B.

70. *Colorado.*— Bliley *v.* Wheeler, 5 Colo. App. 287, 38 Pac. 603.

Kansas.— Shade *v.* Oldroyd, 39 Kan. 313, 18 Pac. 198.

Kentucky.— Chancellor *v.* Vanhook, 2 B. Mon. 447.

Illinois.— Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53.

New York.— Wiswall *v.* McGown, 2 Barb. 270 [*affirmed* in 10 N. Y. 465].

Pennsylvania.— Greaves *v.* Gamble, 1 Leg. Gaz. 1.

Vermont.— Washburn *v.* Washburn, 23 Vt. 576.

Wisconsin.— Button *v.* Schroyer, 5 Wis. 598.

See 19 Cent. Dig. tit. "Equity," § 72.

Abandonment.—But an extended delay may be taken as evidence of abandonment of the contract and prevent relief. Lloyd *v.* Collett, 4 Bro. Ch. 469, 29 Eng. Reprint 992.

71. Brink *v.* Steadman, 70 Ill. 241; Wells *v.* Smith, 2 Edw. (N. Y.) 78; Drown *v.* Ingels, 3 Wash. 424, 28 Pac. 759; Davis *v.* Thomas, 9 L. J. Ch. O. S. 232, 1 Russ. & M. 506, 5 Eng. Ch. 506, 39 Eng. Reprint 195,

nature of its requirements time is evidently regarded by the parties as an important factor.[72]

(iv) *Relief Forbidden by Nature of Contract.* The doctrine being that of compensation in lieu of forfeiture, relief will not be given where compensation in damages is impracticable,[73] and it has therefore been held that while equity will relieve a tenant from forfeiture for non-payment of rent,[74] it will not do so for breach of other covenants.[75] In certain other cases the nature of the contract forbids relief against forfeitures, as in the case of a failure to pay premiums on life-insurance policies,[76] and forfeitures of corporate stock.[77]

(v) *Statutory Forfeitures.* It is quite generally held that equity will not relieve against a forfeiture provided for by statute,[78] but an ordinance or other act of a municipal body, declaring a forfeiture of a franchise or public contract, is not in the nature of a statute and is within the general rules.[79]

(vi) *Effect of Equitable Circumstances.* Relief is given because of the inequity of the forfeiture, and generally plaintiff need not show any other special equity. He will be relieved although negligent,[80] provided the default was not

Taml. 416, 12 Eng. Ch. 416. But equity will seize upon slight circumstances to avoid sustaining a forfeiture even in such cases. National Land Co. *v.* Perry, 23 Kan. 140.

72. Foster's Estate, 6 Pa. Co. Ct. 223. Thus a condition in an oil lease that the lessee will bore for oil within a certain time will be strictly enforced. Brown *v.* Vandergrift, 80 Pa. St. 142; Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544. Applications for relief from failure to perform within the appointed time are generally in the nature of bills for specific performance. For the principles relating thereto see Specific Performance.

73. Parsons *v.* Smilie, 97 Cal. 647, 32 Pac. 702; Wafer *v.* Mocato, 9 Mod. 112; Fry *v.* Porter, 1 Mod. 300; Elliott *v.* Turner, 13 Sim. 477, 36 Eng. Ch. 477.

74. Palmer *v.* Ford, 70 Ill. 369; Bacon *v.* Western Furniture Co., 1 Wils. (Ind.) 567; Kemble *v.* Graff, 6 Phila. (Pa.) 402; Davis *v.* West, 12 Ves. Jr. 475, 33 Eng. Reprint 180.

75. Baxter *v.* Lansing, 7 Paige (N. Y.) 350; Townsend *v.* Stetler, 5 Kulp (Pa.) 11.

Landlord and tenant.—As to keep the premises insured (Reynolds *v.* Pitt, 19 Ves. Jr. 134, 2 Price 212 note, 34 Eng. Reprint 468), or to repair (Hill *v.* Barclay, 18 Ves. Jr. 56, 11 Rev. Rep. 147, 34 Eng. Reprint 238 [*disapproving* Hack *v.* Leonard, 9 Mod. 91]. Where the covenant is to pay out a certain sum in repairs it has been held that relief may be given. Sanders *v.* Pope, 12 Ves. Jr. 282, 33 Eng. Reprint 108. *Contra,* Bracebridge *v.* Buckley, 2 Price 200. Relief was given against the failure to perform a covenant to fit up the premises for occupation, where the term was long, the delay short, not wilful, and had produced no injury. Lundin *v.* Schoeffel, 167 Mass. 465, 45 N. E. 933. Relief will not be given against a forfeiture for failure to pay taxes. Baldwin *v.* Rees, 6 Ohio Dec. (Reprint) 869, 8 Am. L. Rec. 556; Townsend *v.* Stetler, 5 Kulp (Pa.) 11. See also Metropolitan Land Co. *v.* Manning, (Mo. Sup. 1903) 71 S. W. 696. *Aliter* where special equitable circumstances excuse the default. Tibbetts *v.* Cate, 66 N. H. 550, 22 Atl. 559; Noyes *v.* Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657 [*affirming* 14 Daly 526, 1 N. Y. Suppl. 5]. See, generally, Landlord and Tenant.

76. Heim *v.* Metropolitan L. Ins. Co., 7 Daly (N. Y.) 536; New York L. Ins. Co. *v.* Statham, 93 U. S. 24, 23 L. ed. 789. See, however, *dictum* to the contrary where the existence of the Civil war prevented payment. Bird *v.* Penn Mut. L. Ins. Co., 3 Fed. Cas. No. 1,430, 11 Phila. (Pa.) 485. See also Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93. And see, generally, Insurance.

77. Germantown Pass. R. Co. *v.* Fitler, 60 Pa. St. 124, 100 Am. Dec. 546; Raht *v.* Sevier Min., etc., Co., 18 Utah 290, 54 Pac. 889; Sparks *v.* Liverpool Water-Works Co., 13 Ves. Jr. 428, 33 Eng. Reprint 354. This exception seems to be based on public policy, and to prevent the use of equity in such cases for speculative purposes. Sparks *v.* Liverpool Water-Works Co., 13 Ves. Jr. 428, 33 Eng. Reprint 354. But the power of forfeiture will be strictly construed and must be strictly exercised. *In re* Alma Spinning Co., 16 Ch. D. 681, 50 L. J. Ch. 167, 43 L. T. Rep. N. S. 620, 29 Wkly. Rep. 133.

78. *Michigan.*— Cameron *v.* Adams, 31 Mich. 426.

New York.— Gorman *v.* Low, 2 Edw. 324.

Oregon.— Chapman *v.* State, 5 Oreg. 432.

Wisconsin.— Smith *v.* Mariner, 5 Wis. 551, 68 Am. Dec. 73.

England.— Keating *v.* Sparrow, 1 Ball & B. 367.

Contra.— Worthen *v.* Ratcliffe, 42 Ark. 330. See 19 Cent. Dig. tit. "Equity," § 73.

79. North Jersey St. R. Co. *v.* South Orange Tp., 58 N. J. Eq. 83, 43 Atl. 53; Pike's Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

Where the forfeiture is void and casts no cloud, relief will be refused. Graham *v.* Carondelet, 33 Mo. 262.

80. Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53; Davis *v.* Hone, 2 Sch. & Lef. 341, 9 Rev. Rep. 89. In the case of failure to per-

wilful;[81] but the existence of equitable circumstances, such as accident, mistake, or justifiable reliance on the conduct of the other party, may require the granting of relief when it would not be justified under the other circumstances alone.[82]

c. Enforcement of Penalties and Forfeitures. As already indicated, the jurisdiction exercised to relieve against penalties and forfeitures is but one manifestation of the attitude of equity on the subject. The rule is practically absolute that it will not lend its aid affirmatively to enforce either a penalty or a forfeiture.[83] The rule goes so far as to forbid discovery which would expose a party to either penalty or forfeiture.[84] The few apparent exceptions to the rule against enforcing penalties and forfeitures are cases either controlled by, or at least attributed to, other countervailing equities. Thus bills have been sustained which in effect have aided vendors in contracts for the sale of land to enforce provisions for forfeitures therein, on the ground that they were bills for fore-

form a condition precedent, relief will not be given where the failure arose from inattention or negligence. Barnet *v.* Passumpsic Turnpike Co., 15 Vt. 757.

81. Lundin *v.* Schoeffel, 167 Mass. 465, 45 N. E. 933; Reynolds *v.* Pitt, 19 Ves. Jr. 134, 2 Price 212 note, 34 Eng. Reprint 468.

82. *Colorado.*— Bliley *v.* Wheeler, 5 Colo. App. 287, 38 Pac. 603.

Kansas.— Shade *v.* Oldroyd, 39 Kan. 313, 18 Pac. 198.

Kentucky.— Chancellor *v.* Vanhook, 2 B. Mon. 447.

Massachusetts.— Hancock *v.* Carlton, 6 Gray 39.

West Virginia.—Hukill *v.* Myers, 36 W. Va. 639, 15 S. E. 151.

England.— Sweet *v.* Anderson, 2 Bro. P. C. 256, 1 Eng. Reprint 927.

See 19 Cent. Dig. tit. "Equity," §§ 69, 70.

Extension of time.— The existence of such circumstances has sometimes been required in order to induce equity to extend the time of performance. Wiswall *v.* McGown, 2 Barb. (N. Y.) 270 [*affirmed* in 10 N. Y. 465]; Baxter *v.* Lansing, 7 Paige (N. Y.) 350.

83. *Alaska.*— Ames *v.* Kruzner, 1 Alaska 598; Butler *v.* Good Enough Min. Co., 1 Alaska 246.

Arizona.— Henry *v.* Mayer, (1898) 53 Pac. 590.

California.— Keller *v.* Lewis, 53 Cal. 113.

Connecticut.— Beecher *v.* Beecher, 43 Conn. 556.

Indiana.— Lefforge *v.* West, 2 Ind. 514.

Iowa.— Rynear *v.* Neilin, 3 Greene 310.

Kentucky.— Beard *v.* Smith, 6 T. B. Mon. 430.

Maryland.— Lincoln *v.* Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446; Cross *v.* McClenahan, 54 Md. 21; McKim *v.* Mason, 2 Md. Ch. 510.

Michigan.— White *v.* Port Huron, etc., R. Co., 13 Mich. 356; Crane *v.* Dwyer, 9 Mich. 350, 80 Am. Dec. 87.

Nebraska.—Meredith *v.* Lyon, 3 Nebr. (Unoff.) 485, 92 N. W. 122, statutory penalty.

New Hampshire.— Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

New Jersey.— Worthington *v.* Moon, 53 N. J. Eq. 46, 30 Atl. 251.

New York.— Brooklyn, etc., R. Co. *v.* Long Island R. Co., 72 N. Y. App. Div. 496, 76 N. Y. Suppl. 777.

Ohio.— Adams *v.* Parnell, 11 Ohio Cir. Ct. 567, 5 Ohio Cir. Dec. 190.

Pennsylvania.— Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538; Oil Creek R. Co. *v.* Atlantic, etc., R. Co., 57 Pa. St. 65; Kennedy *v.* Klaw, 6 Pa. Dist. 243.

Vermont.— Vermont Copper Min. Co. *v.* Ormsby, 47 Vt. 709.

Wisconsin.— Lawe *v.* Hyde, 39 Wis. 345; Clark *v.* Drake, 3 Pinn. 228, 3 Chandl. 253.

United States.— Horsburg *v.* Baker, 1 Pet. 232, 7 L. ed. 125; Michigan Pipe Co. *v.* Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324; Fletcher *v.* New Orleans, etc., R. Co., 20 Fed. 345; U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125; Burr *v.* Duryee, 4 Fed. Cas. No. 2,190, 2 Fish. Pat. Cas. 275 [*affirmed* in 1 Wall. 531, 17 L. ed. 650, 660, 661]; Goesele *v.* Bimeler, 10 Fed. Cas. No. 5,503, 5 McLean 223 [*affirmed* in 14 How. 589, 14 L. ed. 554]; Morse *v.* O'Reilly, 17 Fed. Cas. No. 9,858.

See 19 Cent. Dig. tit. "Equity," § 70.

Objection may be taken at the hearing that the bill seeks to enforce a forfeiture. Lefforge *v.* West, 2 Ind. 514.

Vendor and vendee.— Where the vendor in a land contract declares it forfeited for nonpayment, equity will not restrain the vendee from removing improvements placed by him on the land pending proceedings to recover possession. Crane *v.* Dwyer, 9 Mich. 350, 80 Am. Dec. 87.

Chattel mortgagor and mortgagee.— In a suit to cancel a chattel mortgage the mortgagor was not permitted in order to show payments to set off against the mortgage debt penalties incurred by the mortgagee for failing to cancel previous mortgages, as to do so would enforce the penalty. Merideth *v.* Lyon, 3 Nebr. (Unoff.) 485, 92 N. W. 122.

84. Crandall *v.* Sorg, 99 Ill. App. 22; Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33; U. S. *v.* McRae, L. R. 3 Ch. 79, 37 L. J. Ch. 129, 17 L. T. Rep. N. S. 428, 16 Wkly. Rep. 377; Wrottesley *v.* Bendish, 3 P. Wms. 236, 24 Eng. Reprint 1042. For numerous other cases see DISCOVERY, 14 Cyc. 335, 336.

Waiver in bill.— Where the penalty or forfeiture is solely for the benefit of plaintiff he may have discovery by waiving in his bill

closure,[85] or bills filed after a forfeiture had been perfected, to restrain trespasses or other violation of the vendor's rights,[86] or to quiet title.[87] But the general rule is that not even under such a guise will equity lend its aid to divest an estate for breach of condition subsequent.[88] In other cases the provision invoked has been enforced as being for liquidated damages,[89] or a conditional limitation,[90] and neither a penalty nor a forfeiture. Perhaps the only real exception is one compelled by statute, as in the case of bills to redeem from usurious mortgages where the statute does not permit the requirement of a tender of lawful interest.[91]

4. Fraud[92] — a. Concurrent Jurisdiction — (i) *Where Remedy at Law Is Adequate.* With a single exception[93] courts of equity have jurisdiction to relieve in cases of fraud.[94] In so far as the law affords relief from fraud the jurisdiction is concurrent,[95] but equity will generally decline to exercise it where

the benefit of the penalty or forfeiture, and equity will then restrain any attempt he may make to enforce it at law. Uxbridge *v.* Staveland, 1 Ves. 56, 27 Eng. Reprint 888.

85. Superior Consol. Land Co. *v.* Nichols, 81 Wis. 656, 51 N. W. 878.

86. Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696; Verdolite Co. *v.* Richards, 7 Northam. Co. Rep. (Pa.) 113; Fletcher *v.* New Orleans, etc., R. Co., 20 Fed. 345.

87. Harper *v.* Tidholm, 155 Ill. 370, 40 N. E. 575; Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200. After judgment of dissolution of an eleemosynary corporation a bill may be maintained by the reversioners to declare the title to land held by the corporation to be in them, and for partition. Mott *v.* Danville Seminary, 129 Ill. 403, 21 N. E. 927.

88. *Connecticut.*— Warner *v.* Bennett, 31 Conn. 468.

Illinois.— Douglas *v.* Union Mut. L. Ins. Co., 127 Ill. 101, 20 N. E. 51; Crandall *v.* Sorg, 99 Ill. App. 22.

Iowa.— Brown *v.* Chicago, etc., R. Co., (1900) 82 N. W. 1003.

Maine.— Birmingham *v.* Lesan, 77 Me. 494, 1 Atl. 151.

Michigan.— Fitzhugh *v.* Maxwell, 34 Mich. 138; Michigan State Bank *v.* Hammond, 1 Dougl. 527.

Mississippi.— Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412.

New Hampshire.— Smith *v.* Jewett, 40 N. H. 530.

New York.— Livingston *v.* Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598.

West Virginia.—Craig *v.* Hukill, 37 W. Va. 520, 16 S. E. 363.

See 19 Cent. Dig. tit. "Equity," § 70.

89. Bucklen *v.* Hasterlik, 155 Ill. 423, 40 N. E. 561 [*affirming* 51 Ill. App. 132]; Robinson *v.* Board of Education, 98 Ill. App. 100; Ewing *v.* Litchfield, 91 Va. 575, 22 S. E. 362. See, generally, Damages, 13 Cyc. 89 *et seq.*

90. Mitchell *v.* Mitchell, 29 Md. 581; Gough *v.* Manning, 26 Md. 347.

91. Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700. But in the case of usury even, where the statute does not otherwise require, there must be such a tender. See *infra*, III, M.

Life-insurance policies, which may be canceled for breach of condition, may constitute another exception. Connecticut Mut. L. Ins. Co. *v.* Home Ins. Co., 6 Fed. Cas. No. 3,107, 17 Blatchf. 142.

92. This subject merely outlines the extent of equity jurisdiction in cases of fraud. For the nature of fraud and remedies generally see Fraud.

93. Fraud in obtaining a will. Bennet *v.* Bade, 2 Atk. 324, 26 Eng. Reprint 597; Andrews *v.* Powys, 2 Bro. P. C. 504, 1 Eng. Reprint 1094. See Johnson *v.* De Camp, 3 Luz. Leg. Obs. 38. The reason for the exception seems to be that through the ecclesiastical courts there has always been a remedy for fraud in obtaining a will of personalty, and that since wills of land have been permitted the common-law courts have afforded relief for fraud in obtaining them. See 1 Story Eq. Jur. § 184.

94. *Alabama.*— English *v.* Lane, 1 Port. 328.

Connecticut.— Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253.

District of Columbia.— Sunderland *v.* Kilbourn, 3 Mackey 506.

Georgia.— Wyche *v.* Greene, 11 Ga. 159.

Illinois.— Allen *v.* Henn, 197 Ill. 486, 64 N. E. 250 [*affirming* 97 Ill. App. 378].

Iowa.— Gregory *v.* Howell, 118 Iowa 26, 91 N. W. 778; Arnold *v.* Grimes, 2 Greene 77.

Kentucky.— Bradberry *v.* Keas, 5 J. J. Marsh. 446.

Maryland.— Watkins *v.* Stockett, 6 Harr. & J. 435; Wesley *v.* Thomas, 6 Harr. & J. 24.

New York.—Slayback *v.* Raymond, 40 Misc. 601, 83 N. Y. Suppl. 15.

Ohio.— Richards *v.* Fridley, Wright 167.

Pennsylvania.— Ressler *v.* Witmer, 1 Pears. 174; Plummer *v.* Reed, 7 Luz. Leg. Reg. 228.

United States.— Tyler *v.* Savage, 143 U. S. 79, 12 S. Ct. 340, 36 L. ed. 82; Oolagah Coal Co. *v.* McCaleb, 68 Fed. 86, 15 C. C. A. 270; Duff *v.* Wellsville First Nat. Bank, 13 Fed. 65; Singer Mfg. Co. *v.* Yarger, 12 Fed. 487, 2 McCrary 583; Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349; Foster *v.* Swasey, 9 Fed. Cas. No. 4,984, 2 Woodb. & M. 217.

See 19 Cent. Dig. tit. "Equity," § 21.

95. *Illinois.*— Montreal Bank *v.* Waite, 105 Ill. App. 373.

Maryland.— Singery *v.* Atty.-Gen., 2 Harr. & J. 487.

the legal remedy is in all respects adequate.[96] Accordingly plaintiff will ordinarily be relegated to an action at law if his bill seeks only damages or the payment of money which might be recovered in such action,[97] or if the bill shows no right to relief other than that obtainable at law.[98] But as this rule is merely a guide for the discretionary exercise of the jurisdiction, and does not limit the jurisdiction itself, equity may grant relief, although an adequate remedy might be found in an action at law.[99] This view has the support of by far the greater weight of

Michigan.—Wyckoff *v.* Victor Sewing Mach. Co., 43 Mich. 309, 5 N. W. 405; Wright *v.* Hake, 38 Mich. 525; Wheeler *v.* Clinton Canal Bank, Harr. 449.

Missouri.— Nelson *v.* Betts, 21 Mo. App. 219.

Virginia.— Haden *v.* Garden, 7 Leigh 157; White *v.* Jones, 4 Call 253, 2 Am. Dec. 564.

West Virginia.— Kelley *v.* Riley, 22 W. Va. 247.

United States.— Cady *v.* Whaling, 4 Fed. Cas. No. 2,285, 7 Biss. 430.

England.— Evans *v.* Bicknell, 6 Ves. Jr. 174, 5 Rev. Rep. 245, 31 Eng. Reprint 998.

See 19 Cent. Dig. tit. "Equity," §§ 21, 141.

96. *Alabama.*—Farmers', etc., Bank *v.* Hall, 120 Ala. 14, 24 So. 347; Dickinson *v.* Lewis, 34 Ala. 638; Williams *v.* Mitchell, 30 Ala. 299.

Connecticut.— Grant *v.* Halkins, 2 Root 479.

Georgia.— Boehm *v.* Nelson, 61 Ga. 441.

Illinois.— Shenehon *v.* Illinois L. Ins. Co., 100 Ill. App. 281; Schack *v.* McKay, 97 Ill. App. 460.

New Jersey.— Krueger *v.* Armitage, 58 N. J. Eq. 357, 44 Atl. 167; Rice *v.* Culver, 32 N. J. Eq. 601. The jurisdiction in cases of fraud is general, but when the remedy at law is plain, adequate, and complete equity will not exercise its jurisdiction unless the administration of justice will thereby evidently be facilitated. Eggers *v.* Anderson, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570 [*reversing* 61 N. J. Eq. 85, 47 Atl. 727].

New York.— Terry *v.* Horne, 59 Hun 492, 13 N. Y. Suppl. 353; Shepard *v.* Sanford, 3 Barb. Ch. 127; Souza *v.* Belcher, 3 Edw. 117.

North Carolina.— Fulton *v.* Loftis, 63 N. C. 393.

Oklahoma.—Trimble *v.* Minnesota Thresher Mfg. Co., 10 Okla. 578, 64 Pac. 8.

Pennsylvania.— Price *v.* Hurley, 201 Pa. St. 606, 51 Atl. 339; Suplee *v.* Callaghan, 200 Pa. St. 146, 49 Atl. 950; Kaul *v.* Henke, 2 Pa. Dist. 236.

Tennessee.— Shepard *v.* Akers, 3 Tenn. Ch. 215.

Virginia.— Kane *v.* Virginia Coal, etc., Co., 97 Va. 329, 33 S. E. 627.

United States.— Lacombe *v.* Forstall, 123 U. S. 562, 8 S. Ct. 247, 31 L. ed. 255; Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271; Sigua Iron Co. *v.* Clark, 77 Fed. 496; White *v.* Boyce, 21 Fed. 228; Ferson *v.* Sanger, 8 Fed. Cas. No. 4,751, 2 Ware 256; Garrison *v.* Markley, 10 Fed. Cas. No. 5,256.

England.— Newham *v.* May, McClel. 511, 13 Price 749.

See 19 Cent. Dig. tit. "Equity," §§ 21, 141–144.

97. *Florida.*—Montgomery *v.* Knox, 20 Fla. 372.

Kentucky.— Watts *v.* Hunn, 4 Litt. 267; Overstreet *v.* Philips, 1 Litt. 120; Hardwicke *v.* Forbes, 1 Bibb 212. A bill is bad which seeks relief other than the recovery of money where such other relief can be had at law. Monroe *v.* Cutter, 9 Dana 93.

Massachusetts.— Tuttle *v.* Batchelder, etc., Co., 170 Mass. 315, 49 N. E. 640; Andrews *v.* Moen, 162 Mass. 294, 38 N. E. 505; New Braintree *v.* Southworth, 4 Gray 304.

Michigan.— Mack *v.* Frankfort, 123 Mich. 421, 82 N. W. 209; Teft *v.* Stewart, 31 Mich. 367.

New Jersey.— Keen *v.* Maple Shade Land, etc., Co., 63 N. J. Eq. 321, 50 Atl. 467 [*reversing* 61 N. J. Eq. 497, 48 Atl. 596]; Polhemus *v.* Holland Trust Co., 59 N. J. Eq. 93, 47 Atl. 417 [*reversing* 59 N. J. Eq. 93, 45 Atl. 534]; Krueger *v.* Armitage, 58 N. J. Eq. 357, 44 Atl. 167; Reilly *v.* Roberts, 34 N. J. Eq. 299.

New York.— Gregory *v.* Reeve, 5 Johns. Ch. 232.

Pennsylvania.— Young's Appeal, 3 Pennyp. 463.

Vermont.— Downs *v.* Downs, 75 Vt. 383, 56 Atl. 9.

United States.— Security Sav., etc., Assoc. *v.* Buchannan, 66 Fed. 799, 14 C. C. A. 97; White *v.* Boyce, 21 Fed. 228.

See 19 Cent. Dig. tit. "Equity," §§ 21, 121.

Contra.— Blain *v.* Agar, 5 L. J. Ch. O. S. 1, 2 Sim. 289, 27 Rev. Rep. 150, 2 Eng. Ch. 289; Colt *v.* Woollaston, 2 P. Wms. 154, 24 Eng. Reprint 679.

98. Woodman *v.* Freeman, 25 Me. 531; Levering *v.* Schnell, 78 Mo. 167; Polhemus *v.* Holland Trust Co., 59 N. J. Eq. 93, 45 Atl. 534; Whitney *v.* Fairbanks, 54 Fed. 985, where the relief must be in the nature of damages for the ascertainment of which no rule exists plaintiff will be remitted to his legal action. Crislip *v.* Cain, 19 W. Va. 438.

99. *Alabama.*— Sheppard *v.* Iverson, 12 Ala. 97.

Kentucky.— Anderson *v.* Pursley, 4 J. J. Marsh. 258.

Maine.— Webb *v.* Fuller, 77 Me. 568, 1 Atl. 737.

Michigan.— Merrill *v.* Allen, 38 Mich. 487.

Mississippi.— Philips *v.* Hines, 33 Miss. 163.

Missouri.— West *v.* Wayne, 3 Mo. 16; Nelson *v.* Betts, 21 Mo. App. 219.

Nebraska.— Hargreaves *v.* Tennis, 63 Nebr. 356, 88 N. W. 486.

opinion and authority, notwithstanding a considerable number of cases treating the availability of a legal remedy as restricting the jurisdiction itself and not merely the propriety of its exercise.[1] In accordance with the general principles governing the exercise of concurrent jurisdiction,[2] where a cause has once been determined at law equity will not take cognizance of it in the absence of equitable circumstances not available at law,[3] and on the other hand where equity has first taken jurisdiction it may restrain the institution or prosecution of an action at law involving the same matters.[4]

(II) *Where Remedy at Law Is Inadequate.* Equity will always entertain jurisdiction to relieve from fraud, notwithstanding that the law would afford relief, either by action or defense, where such remedy would be doubtful, incomplete, or otherwise inadequate. This is true where the complete protection of plaintiff demands the setting aside of a conveyance,[5] the reëstablishment of a lien,[6] the restoration or establishment of title,[7] or other specific relief of an equitable character.[8] The concurrent jurisdiction is also invoked by the necessity of a discovery[9] or of an accounting.[10] Equity will also take jurisdiction where plaintiff has been fraudulently deprived of his legal remedy,[11] or it seems where by reason

New York.— Mayne *v.* Griswold, 3 Sandf. 463.

North Carolina.— Hales *v.* Harrison, 42 N. C. 298.

Oregon.— Smith *v.* Griswold, 6 Oreg. 440.

Pennsylvania.—Hubert Oil Co.'s Appeal, 61 Pa. St. 188 [*modifying* 6 Phila. 495].

Virginia.— Meek *v.* Spracher, 87 Va. 162, 12 S. E. 397.

See 19 Cent. Dig. tit. "Equity," §§ 21, 141–144.

1. *Alabama.*— Younghlood *v.* Youngblood, 54 Ala. 486.

Connecticut.— Story *v.* Norwich, etc., R. Co., 24 Conn. 94; Barkhamsted *v.* Case, 5 Conn. 528, 13 Am. Dec. 92.

Kentucky.— Blackwell *v.* Oldham, 4 Dana 195; Williams *v.* Dorsey, 4 Litt. 265.

Massachusetts.— Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418.

Mississippi.— Learned *v.* Holmes, 49 Miss. 290.

See 19 Cent. Dig. tit. "Equity," §§ 21, 141–144.

Basis of these cases.— Such cases are generally the result of the adoption of the rule that equity jurisdiction is ousted to the extent that legal remedies are enlarged. As has been seen (see *supra*, II, A, 2), this view does not generally prevail, and this is true where the jurisdiction is based on fraud. Couchman *v.* O'Bannon, 1 A. K. Marsh. (Ky.) 386; Noyes *v.* Willard, 18 Fed. Cas. No. 10,374, 1 Woods 187.

Statutes may compel a restriction of the jurisdiction to cases where there is no adequate legal remedy. Huff *v.* Ripley, 58 Ga. 11; Suter *v.* Matthews, 115 Mass. 253.

2. See *supra*, II, A, 1, c.

3. Birdsall *v.* Welch, 6 D. C. 316; Singery *v.* Atty.-Gen., 2 Harr. & J. (Md.) 487; Haden *v.* Garden, 7 Leigh (Va.) 157; White *v.* Jones, 4 Call (Va.) 253, 2 Am. Dec. 564; Glastenbury *v.* McDonald, 44 Vt. 450.

4. Berliner Gramophone Co. *v.* Seaman, 113 Fed. 750, 51 C. C. A. 440.

5. *Alabama.*— Mobile Land Imp. Co. *v.* Gass, 129 Ala. 214, 29 So. 920.

Georgia.— Vaughn *v.* Georgia Co-operative Loan Co., 98 Ga. 288, 25 S. E. 441.

New Jersey.— Kirkhuff *v.* Kerr, 57 N. J. Eq. 623, 42 Atl. 734.

Virginia.— Wampler *v.* Wampler, 30 Gratt. 454; Cocke *v.* Harrison, 6 Munf. 184.

United States.— Robb *v.* Vos, 155 U. S. 13, 15 S. Ct. 4, 39 L. ed. 52 [*affirming* 36 Fed. 132]; Kilgore *v.* Norman, 119 Fed. 1006.

See 19 Cent. Dig. tit. "Equity," §§ 21, 141. And see, generally, Fraudulent Conveyances.

6. Poore *v.* Price, 5 Leigh (Va.) 52, 27 Am. Dec. 582; Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387.

7. Nelson *v.* Ferdinand, 111 Mass. 300; Wallace *v.* Wallace, 63 Mich. 326, 29 N. W. 841.

8. As rescission (Gilpin *v.* Smith, 11 Sm. & M. (Miss.) 109), surrender of papers (Gaines *v.* Mausseaux, 9 Fed. Cas. No. 5,176, 1 Woods 118), the annulment of a continuing contract (Jones *v.* Bolles, 9 Wall. (U. S.) 364, 19 L. ed. 734), the transfer of a liability (Rothenburg *v.* Vierath, 87 Md. 634, 40 Atl. 655; McMullin *v.* Sanders, 79 Va. 356), or of a lien (Cheney *v.* Gleason, 117 Mass. 557), the issuing of a stock certificate (Blaisdell *v.* Bohr, 68 Ga. 56), the setting aside of the allowance of a claim against a decedent (Stewart *v.* Caldwell, 54 Mo. 536), or the annulment of the satisfaction of a judgment (Conner *v.* Ashley, 49 S. C. 478, 27 S. E. 473).

9. Dwinal *v.* Smith, 25 Me. 379; Morton *v.* Grenada Male, etc., Academies, 8 Sm. & M. (Miss.) 773.

10. Glover *v.* Hargadine-McKittrick Dry-Goods Co., 62 Nebr. 483, 87 N. W. 170; Eggers *v.* Anderson, 63 N. J. Eq. 264, 49 Atl. 578 [*reversing* 61 N. J. Eq. 85, 47 Atl. 727]. See also Hunter *v.* Robbins, 117 Fed. 920.

11. Shannon *v.* Simpson, 6 J. J. Marsh. (Ky.) 258; Poindexter *v.* Waddy, 6 Munf. (Va.) 418, 8 Am. Dec. 749.

of defendant's insolvency the judgment at law would be unavailing, and equitable relief is practicable.[12] The adequacy of the legal remedy is not presumed,[13] and equity will take jurisdiction where it is doubtful,[14] or where the court is not satisfied that plaintiff could be remitted to law without injustice.[15]

b. Exclusive Jurisdiction — (I) *In General.* Beyond the field where a remedy, although often inadequate, may be had at law, and where the jurisdiction of equity is concurrent, there lies a large region where a party is helpless at law and the jurisdiction of equity may properly be said to be exclusive. At law fraud must be reached if at all either through an action for deceit, involving the elements of actual and wilful deception,[16] or indirectly by one of two methods, each treating the fraudulent contract or transaction as rescinded. The first is by action to recover back property or money or the value of property obtained by fraud, and the second to interpose the fraud as a defense to an action brought to enforce a liability fraudulently imposed.[17] This paucity of resources at law leaves to equity, through its more direct and specific remedies, the exclusive administration of relief in cases where the fraud itself is of a character cognizable at law, but not remediable through its forms.[18] In addition equity will treat as fraudulent many transactions which would not be so regarded at law. The precise extent of this equitable domain it is impossible to delimit in terms.[19] Even a classification of fraud cognizable in equity is difficult and of doubtful utility.[20] The extent of the jurisdiction may perhaps best be understood by considering what transactions equity deems fraudulent aside from those where actual imposition is proved.

(II) *In What Sense Equity Presumes Fraud.* As well in equity as at law, fraud is not absolutely presumed, but must be proved.[21] Yet, while in either forum the proof may be circumstantial, in equity an inference of fraud sometimes conclusive may be drawn upon the proof of facts less potent or less direct than would be deemed sufficient at law for that purpose.[22] Such inferences rather than presumptions of fraud give the term its more extensive signification in equity, and account for all the classes mentioned by Lord Hardwicke, except that of actual imposition established by direct proof.[23]

(III) *Inequitable and Unconscionable Transactions.* According to the classification of Lord Hardwicke[24] fraud may be inferred from the intrinsic nature

12. Fox *v.* Hubbard, 79 Mo. 390.
13. Dwinal *v.* Smith, 25 Me. 379.
14. Ankrim *v.* Woodworth, Harr. (Mich.) 355.
15. Gregory *v.* Howell, (Iowa 1902) 91 N. W. 778; Henwood *v.* Jarvis, 27 N. J. Eq. 247.
16. See Fraud.
17. See Fraud.
18. Arnold *v.* Grymes, 2 Greene (Iowa) 77. Such relief is usually had through the cancellation of instruments, rescission of contracts, the setting aside of fraudulent conveyances, injunctions and analogous remedies, for which see the specific titles. See also Fraud.
19. "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the court should be found out." Lawley *v.* Hooper, 3 Atk. 278, 279, 26 Eng. Reprint 962. If such a thing were done, "the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." Parke Hist. Ch. 508. See also Mortlock *v.* Buller, 10 Ves. Jr. 292, 7 Rev. Rep. 417, 32 Eng. Reprint 857.
20. The classification usually followed is that of Lord Hardwicke in Chesterfield *v.* Janssen, 1 Atk. 301, 26 Eng. Reprint 191, 2 Ves. 125, 28 Eng. Reprint 182.
1. Actual fraud arising from facts and circumstances of imposition.
2. Fraud apparent from the intrinsic nature and subject of the bargain.
3. Fraud which may be presumed from the circumstances and conditions of the parties to the transaction.
4. Fraud which is so considered from circumstances of imposition on other persons not parties to the transaction.
5. Catching bargains with heirs, reversioners, and expectants.
21. Burton *v.* Willen, 6 Del. Ch. 403, 33 Atl. 675; People's Bank *v.* Spering, 13 Phila. (Pa.) 125; Jones *v.* White, Wythe (Va.) 111; Hager *v.* Thompson, 1 Black (U. S.) 80, 17 L. ed. 41.
22. Chesterfield *v.* Janssen, 1 Atk. 301, 26 Eng. Reprint 191, 2 Ves. 125, 28 Eng. Reprint 82; Fullagar *v.* Clark, 18 Ves. Jr. 481, 34 Eng. Reprint 399.
23. See *supra*, note 20.
24. See *supra*, note 20.

and subject of the bargain. Where the transaction is in its nature and circumstances such as to give one party an inequitable or unconscionable advantage over the other, equity, inferring fraud, will not only decline to lend its aid to the party seeking to enforce such claim,[25] but will often actively interfere to give relief to the other party.[26] To this class is properly attributable the cases dealing with "catching bargains" made with heirs or other expectants, where oppression or unconscionable advantage taken of the necessities of such persons was presumed from the nature of the transaction.[27]

(IV) *Fraud Presumed From Relation of Parties.* Equity will often deem fraudulent, because of the relations existing between the parties, conduct which would not be objectionable in the absence of such relations.[28] So too fraud may be inferred merely from relationship of trust and confidence between the parties

25. *Indiana.*— Reed *v.* Rudman, 5 Ind. 409.

Kentucky.— Greer *v.* Boone, 5 B. Mon. 554; Portwood *v.* Outton, 3 B. Mon. 247.

New Jersey.— Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283; Suffern *v.* Butler, 19 N. J. Eq. 202.

New York.— Cook *v.* Casler, 87 N. Y. App. Div. 8, 83 N. Y. Suppl. 1045.

Pennsylvania.— Davison *v.* Moore, 2 Am. L. Reg. 183.

United States.— Minneapolis Interstate Sav., etc., Assoc. *v.* Badgley, 115 Fed. 390; Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 12 S. Ct. 632, 36 L. ed. 414 [*affirming* 34 Fed. 877]; Pope Mfg. Co. *v.* Gormully, etc., Mfg. Co., 144 U. S. 238, 12 S. Ct. 637, 36 L. ed. 419.

Rates of interest.— A contract by a mortgagee in default to indemnify his mortgagor for interest paid by the latter on money borrowed by him in another state at a rate in excess of that allowed where the contract was made is oppressive and will not be enforced. Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266. A loan "so small as $25 for one month, even at so high a rate of interest as ten per cent." is not an unconscionable contract. Means *v.* Anderson, 19 R. I. 118, 32 Atl. 82. And a contract to pay lawful rate of interest, although one in excess of current rates, will not be relieved against in the absence of actual fraud. Boyce *v.* Fisk, 110 Cal. 107, 42 Pac. 473.

Infliction of loss not necessarily unconscionable.— The assertion by the real owner of a water-right of his title as against one who has made large expenditures for the purpose of using the water is not, in the absence of culpable acquiescence, so unconscionable as to call for denying him relief, but his rights will be enforced with the least possible injury to defendant. Corning *v.* Troy Iron, etc., Factory, 34 Barb. (N. Y.) 485, 22 How. Pr. (N. Y.) 217.

26. Brueggestradt *v.* Ludwig, 82 Ill. App. 435; Natchez *v.* Vandervelde, 31 Miss. 706, 66 Am. Dec. 581; Ayers *v.* Wright, 43 N. C. 229; Barnett *v.* Spratt, 39 N. C. 171; Neely *v.* Torian, 21 N. C. 410; Wilson *v.* Getty, 57 Pa. St. 266. See also Gargano *v.* Pope, 184 Mass. 571, 69 N. E. 343, relief against champertous contract for attorney's services.

Prudence of a bargain will not be inquired into except in search for fraud, gross mistake, or hardship. *In re* Stevens, 41 Leg. Int. (Pa.) 84.

Gross inadequacy of price, together with circumstances of oppression, may be sufficient evidence of fraud. Holmes *v.* Fresh, 9 Mo. 201; Nelson *v.* Betts, 21 Mo. App. 219. And inadequacy of consideration, if so "gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it," may be sufficient to justify an inference of fraud. Gwynne *v.* Heaton, 1 Bro. Ch. 1, 28 Eng. Reprint 949. See also Robinson *v.* Amateur Assoc., 14 S. Ct. 148.

Transactions not unconscionable.—A surety cannot restrain the enforcement of a judgment against him on the ground that the deceased creditor had bequeathed it to the principal debtor in trust for his children. Palmer *v.* Gardiner, 77 Ill. 143. A creditor obtained from his debtor abstracts of title for the purpose of considering an offer by the debtor to convey part of the land in payment of the debt, and thereupon levied attachments on the lands described. It was held that equity would not relieve on the ground of unconscionable use of the abstracts. Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246. Contracts of building and loan associations with their borrowing members on well known and usual terms, will not be relieved against as unconscionable. Johnson *v.* Potomac Bldg. Assoc., 13 Fed. Cas. No. 7,406.

Harsh procedure.— Choice by plaintiff of the harsher of two available methods of procedure is not unconscionable. Herbert *v.* Herbert, 50 N. J. Eq. 467, 25 Atl. 401.

The fact that the contract has been executed does not necessarily prevent relief. Watson *v.* Stucker, 5 Dana (Ky.) 581. *Contra,* Fulton *v.* Loftis, 63 N. C. 393. But equity sometimes refuses to interfere with an executed contract where if the contract were executory enforcement would be refused on the ground of its unconscionable character. Davison *v.* Moore, 2 Am. L. Reg. (Pa.) 183.

27. Curwyn *v.* Milner, 3 P. Wms. 292 note, 24 Eng. Reprint 1071; Gowland *v.* De Faria, 17 Ves. Jr. 20, 11 Rev. Rep. 9, 34 Eng. Reprint 8.

28. As where one of a number of persons having a common interest in a security pro-

to a bargain, although such relationship has no formal legal character.[29] Even where fraud is not presumed in the relationship alone, any circumstances of imposition in connection therewith will make a case for relief in equity.[30] To this class may also be ascribed cases where one party has been placed in a position of embarrassment or distress and is thereby deprived of real freedom of action, although not technically under duress,[31] and the other takes advantage of that fact to obtain his property or obligation.[32] Equity also raises the presumption of fraud in many cases of dealings between trustee and *cestui que trust*, guardian and ward, parent and child, and attorney and client; and permits proof of immaturity, imbecility, or even drunkenness on the part of one party to weigh heavily toward the establishment of fraud by the other.[33]

(v) *Frauds on Third Persons.* Equity affords relief against what may be termed indirect fraud, as misrepresentation, concealment, or the like, not practised in a transaction with plaintiff, but because of which he has been in fact misled to his prejudice.[34] On this principle relief is given against the exercise of a limited power to the prejudice of those who should be appointees.[35]

(vi) *Other Cases of Actual Fraud.* In many other cases not susceptible of accurate classification, equity seizes upon circumstances of imposition or artifice as sufficient to constitute fraud, which courts of law would generally deem insuf-

ceeded in such a manner as to impair the value of the security to the others. Jackson *v.* Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492. Or where a layman dealing with a lawyer is through ignorance of the law but without actual deception led into an arrangement contrary to his intent. Mellon *v.* Webster, 5 Mo. App. 449.

29. Cannon *v.* Gilmer, 135 Ala. 302, 33 So. 659. As between a widow and a clergyman acting as her adviser. Huguenin *v.* Baseley, 14 Ves. Jr. 273, 33 Eng. Reprint 526. But fraud will not be inferred merely because the parties, plaintiff a woman, were neighbors and friends. Miller *v.* Welles, 23 Conn. 21.

30. *Florida.*— Harkness *v.* Fraser, 12 Fla. 336.

Kentucky.— Ashley *v.* Denton, 1 Litt. 86; O'Daniel *v.* Baxter, 60 S. W. 637, 22 Ky. L. Rep. 1482.

Michigan.— Briggs *v.* Withey, 24 Mich. 136.

New York.— Morris *v.* Budlong, 16 Hun 570.

Pennsylvania.— Steinmeyer *v.* Siebert, 190 Pa. St. 471, 42 Atl. 880, 70 Am. St. Rep. 641; McElhenny's Appeal, 61 Pa. St. 188.

Wisconsin.— Keys *v.* McDermott, (1903) 93 N. W. 553.

31. There is no duress *per minas* in equity which does not exist at law. Miller *v.* Miller, 68 Pa. St. 486. See also Work's Appeal, 59 Pa. St. 444; Fisher *v.* Walter, 3 C. Pl. (Pa.) 161.

32. West *v.* Wayne, 3 Mo. 16; De Lavalette *v.* Shaw, 43 N. Y. Super. Ct. 13; Hyde *v.* Nick, 5 Leigh (Va.) 336. But it seems that plaintiff's embarrassment must be due to defendant's acts, for relief will not be given from a bargain into which plaintiff was forced by his business necessities, unaccompanied by actual fraud on the part of defendant. Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261 [*affirming* 53 Hun 632, 6 N. Y. Suppl. 955]; Carley *v.* Tod, 83 Hun (N. Y.) 53, 31 N. Y. Suppl. 635; Wann *v.* Coe, 31 Fed. 369.

33. See Fraud; Trusts; and specific titles importing fiduciary relations, such as Attorney and Client, 4 Cyc. 960 *et seq.*; Executors and Administrators; Guardian and Ward; Parent and Child; Principal and Agent.

34. As where one permits another to buy property from a third person without notifying him that the first was the real owner. Savage *v.* Foster, 9 Mod. 35. So where a stock-holder executed a blank assignment of his certificate and delivered it to one who pledged it as security for a loan. Herd *v.* Pittsburg Nat. Bank, 25 Pittsb. Leg. J. (Pa.) 298. The real owner was in neither case permitted to set up his title to the injury of the party misled. A bill may be maintained to compel a bank to account for funds of plaintiff which it has knowingly permitted plaintiff's agent to improperly withdraw, although the account was in the name of the agent. Hunter *v.* Robbins, 117 Fed. 920. A mortgage will be reinstated which was released in return for a new one, and the transaction induced by concealment of an intervening lien. Farmers', etc., Ins. Co. *v.* German Ins. Co., 79 Ky. 598.

Relief against a judgment improperly rendered was given where an appeal had been prevented by misrepresentations of the justice who rendered it (Austin *v.* Carpenter, 2 Greene (Iowa) 131), and also against a judgment resulting from an unauthorized appearance by an attorney (Powell *v.* Spaulding, 3 Greene (Iowa) 443; De Louis *v.* Meek, 2 Greene (Iowa) 55, 50 Am. Dec. 491).

Only in furtherance of justice.— But relief will not be given except where necessary to prevent injury to plaintiff. Chase *v.* Manhardt, 1 Bland (Md.) 333.

35. Aleyn *v.* Belchier, 1 Eden 132, 28 Eng. Reprint 634.

ficient. Thus equity may impose a higher duty than law with regard to the disclosure of matters of which one party is ignorant;[36] but there must nevertheless be at least an equitable duty to disclose facts in order to charge one with fraud through concealment.[37] Proof of collusion among other parties to the transaction to the injury of plaintiff is another basis of appeal to equity.[38] The equitable doctrine that time begins to run against the assertion of a demand, not from the commission of the fraud but from the time when it was or should have been discovered, opens a field for equitable relief where jurisdiction by lapse of time has become exclusive.[39] It has been said that a private statute obtained by fraud may be annulled in equity,[40] and that a surety may be discharged after his principal's insolvency, where he had relied on assurances by the creditor that he would not be called on for payment.[41] An innocent misrepresentation may be relieved against in equity where not at law.[42] Indeed it has been said that fraud in equity includes all acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust or confidence justly reposed.[43]

(VII) *CONSTRUCTIVE FRAUD.* In addition to the foregoing cases, where actual fraud either exists or is presumed from circumstances, there is a class of purely constructive frauds, where no actual imposition is shown or even inferred; but the circumstances are such that public policy demands that they should be treated in the same manner as fraudulent acts.[44] Such cases arise generally out of contracts contrary to public policy or positive law, such as marriage brokage contracts or provisions in restraint of marriage,[45] or contracts in general restraint of trade.[46] But they extend to the entire group of contracts invalid on the grounds of public policy.[47] Contracts contrary to the policy of a statute are in like manner treated as if fraudulent.[48] In the same category transactions have sometimes been placed which were not in their inception illegal and not technically fraudulent, but the

36. As upon the transferrer of a note who is cognizant of a partial failure of consideration. Winter *v.* Bullock, 6 Ga. 230. So in the case of a guardian securing an order without disclosing all the facts to the judge. Goodell *v.* Goodell, 173 Mass. 140, 53 N. E. 275.

37. Young *v.* Bumpass, Freem. (Miss.) 241. It has even been held that one discounting a note is not bound to disclose the fact that its maker was a minor. *In re* Peoples' Bank, 93 Pa. St. 107, 39 Am. Rep. 728. But see Winter *v.* Bullock, 6 Ga. 230, cited in the preceding note.

Concealment of matter of law.— A contract entered into without revealing a matter of law material thereto, of which it was known that the other party was ignorant, is fraudulently obtained. Cooke *v.* Nathan, 16 Barb. (N. Y.) 342. Concealment not resulting in inequity is not a ground for relief. Thus one will not be relieved from an obligation executed in ignorance of a decision known to the other party, determining that an obligation for which the present was a substitute and which was binding in conscience was void at law. Cornman *v.* Bowser, 1 Am. L. Reg. (Pa.) 120.

38. Story *v.* Norwich, etc., R. Co., 24 Conn. 94; Huxley *v.* Rice, 40 Mich. 73; Gray *v.* Simon, 1 Phila. (Pa.) 551; Singer Mfg. Co. *v.* Yarger, 12 Fed. 487, 2 McCrary 583.

39. Lincoln *v.* Judd, 49 N. J. Eq. 387, 24 Atl. 318. See also *infra*, IV, E. And see, generally, FRAUD and the cross references there given; LIMITATION OF ACTIONS.

40. Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636.

41. Teague *v.* Russell, 2 Stew. (Ala.) 420.

42. Phillips *v.* Hollister, 2 Coldw. (Tenn.) 269; Lewis *v.* McLemore, 10 Yerg. (Tenn.) 206; Kempner *v.* Wallis, 2 Tex. App. Civ. Cas. § 584.

43. Belcher *v.* Belcher, 10 Yerg. (Tenn.) 121.

44. Frauds are frequently classified as either actual or constructive, and then all cases except those involving actual misrepresentation or wrongful concealment, directly established, are usually treated as cases of constructive fraud. 1 Story Eq. Jur. § 259; 2 Pomeroy Eq. Jur. §§ 922, 923. For the purpose of considering the extent of equity jurisdiction it is deemed best to distinguish in the manner stated in the text the cases of fraud purely constructive, where the jurisdiction is based rather upon analogy than upon presumption or inference of actual fraud. As in such cases the transaction is usually forbidden by law as well as equity, the jurisdiction is in a sense concurrent, but the treatment of such cases on the basis of fraud is an exclusively equitable doctrine.

45. See CONTRACTS, 9 Cyc. 518 *et seq.*

46. See CONTRACTS, 9 Cyc. 523 *et seq.*

47. See, generally, CONTRACTS, 9 Cyc. 481 *et seq.*

48. Barnard *v.* Davis, 54 Ala. 565; Gnichtel *v.* Hightstown First Nat. Bank, (N. J. Ch. 1902) 53 Atl. 1041; Wilson *v.* Spencer, 1 Rand. 76, 10 Am. Dec. 491.

effect of which if not relieved against would be similar to that of a successful fraud.[49]

c. Fraud Must Be Material. In all cases a party seeking relief from fraud must show that it was of a character material to the transaction and such as to operate to the injury of his legal or equitable rights.[50]

5. Equitable Titles and Interests — a. Trusts. As already noted[51] equity recognizes and protects certain titles and rights formerly and sometimes still ignored at law. The most important of these is the right or title of one in whose favor a use or trust has been created or results. The protection of such rights in equity gives rise to the very important jurisdiction to regulate and enforce trusts.[52]

b. Mortgages. Acting upon the maxim that "equity regards substance rather than form,"[53] and exercising its jurisdiction to relieve against forfeitures,[54] equity looked upon mortgages from a point of view entirely different from that presented at law. Instead of treating a mortgage as a conveyance becoming absolute upon breach of the condition, equity looked upon it solely as a security, and so recognized and enforced continuing rights in the mortgagor, commonly called his equity of redemption, this involving also the recognition of correlative rights as well as duties on the part of the mortgagee. These purely equitable rights led to another large field of chancery jurisdiction.[55]

c. Assignments. Another right recognized and enforced in equity, but formerly not at law, was that of the assignee of most choses in action.[56] The practical exercise of this jurisdiction has been greatly restricted by the recognition in modern times of such assignments by the courts of law, and by the extension of legal remedies, equity generally refusing to take jurisdiction where the assignee may protect himself by suit in the name of the assignor,[57] or otherwise.[58] Where, however, the legal remedy is still absent or inadequate equity takes jurisdiction.[59]

d. Liens. While it is said that equity has general jurisdiction, concurrent

49. Thus, where a member of a voluntary society mortgaged his land to pay for erecting a church for the society on its promise to pay the debt, and the society became incorporated and failed to pay, and the mortgage was foreclosed, the mortgagor's devisees were allowed reimbursement against the corporation on the theory of constructive fraud. Wesley Church *v.* Moore, 10 Pa. St. 273. See also Wilson *v.* Straight, 46 W. Va. 651, 33 S. E. 758.

50. *Georgia.*— Bigby *v.* Powell, 25 Ga. 244, 71 Am. Dec. 168.

Mississippi.— Davidson *v.* Moss, 5 How. 673; Young *v.* Bumpass, Freem. 241.

Missouri.— Reel *v.* Ewing, 71 Mo. 17.

Nebraska.—Dunn *v.* Remington, 9 Nebr. 82, 2 N. W. 230.

South Carolina.— Turnbull *v.* Gadsden, 2 Strobh. Eq. 14.

Plaintiff must show an enforceable right at law or in equity in the subject-matter. Crawford *v.* Bertholf, 1 N. J. Eq. 458; Lea *v.* McKenzie, 56 N. C. 232; Durant *v.* Davis, 10 Heisk. (Tenn.) 522.

51. See *supra*, II, A, 6, b.

52. See Trusts, and specific titles there referred to.

53. See *infra*, III, E.

54. See *supra*, II, B, 3.

55. See Mortgages.

56. See Assignments, 4 Cyc. 7, 8.

57. McMillen *v.* Chicago, 67 Ill. App. 623; Haynes *v.* Thompson, 34 Miss. 17; and cases cited in 4 Cyc. 95. *Contra*, Townsend *v.* Carpenter, 11 Ohio 21.

Even where the assignor has died the rule is the same, because suit may be brought in the name of his executor or administrator, and if necessary one can be appointed for that purpose. Nash *v.* Hogan, 45 N. J. Eq. 108, 16 Atl. 433.

58. Jones *v.* Burtch, 5 Blackf. (Ind.) 372; Bryan *v.* Blythe, 4 Blackf. (Ind.) 249; Adair *v.* Winchester, 7 Gill & J. (Md.) 114.

59. *Illinois.*— Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801, on ground that a part of a debt is not assignable at law.

Massachusetts.—Lenz *v.* Prescott, 144 Mass. 505, 11 N. E. 923 (the assignment being of a legatee's interest and the probate court ignoring such assignments); Walker *v.* Brooks, 125 Mass. 241.

Mississippi.— Bacon *v.* Cohea, 12 Sm. & M. 516, the assignor being a corporation and having been dissolved.

New Jersey.— Harrison *v.* Patterson, (Ch. 1901) 50 Atl. 113; Hayes *v.* Berdan, 47 N. J. Eq. 567, 21 Atl. 339; Hayes *v.* Hayes, 45 N. J. Eq. 461, 17 Atl. 634.

New York.— Deering *v.* Schreyer, 171 N. Y. 451, 64 N. E. 179.

North Carolina.— Falkner *v.* Streator, 56 N. C. 33, 67 Am. Dec. 230.

Oregon.— Stott *v.* Franey, 20 Oreg. 410, 26 Pac. 271, 23 Am. St. Rep. 132, assignment of municipal warrants not yet issued. See also cases cited in 4 Cyc. 96 note 60.

with law, for the enforcement of liens,[60] equity nevertheless recognizes and enforces certain liens not recognized at law.[61] Of these the most frequent species are the lien of a vendor for unpaid purchase-money,[62] and the so-called equitable mortgages.[63] Besides enforcing liens created by express contract,[64] equity, while disclaiming the power to create a lien in the absence of contract,[65] has nevertheless protected equitable rights by impressing liens in the absence of express contract and contrary to the rules of law.[66]

e. Other Equitable Interests. In general it may be said that whoever *ex æquo et bono* is the owner of the subject-matter but has not the legal title may enforce his right in equity against him who has such title.[67] One who is equitably entitled to funds, the holder of which is legally obligated to pay to another, may maintain

60. Kreling *v.* Kreling, 118 Cal. 413, 50 Pac. 546; Ford *v.* Sproule, 2 A. K. Marsh. (Ky.) 528, 12 Am. Dec. 439; Pratt *v.* Clark, 57 Mo. 189. Equity will enforce all liens except common-law retaining liens, judgment liens enforceable directly by sale, and liens created by statutes which also provide a method of enforcement. Chatfield *v.* Campbell, 35 Misc. (N. Y.) 355, 71 N. Y. Suppl. 1004 [*affirmed* in 75 N. Y. App. Div. 631, 78 N. Y. Suppl. 1113]. And see, generally, LIENS.

61. Gladstone *v.* Birley, 2 Meriv. 401, 35 Eng. Reprint 993. See, generally, LIENS.

62. See VENDOR AND PURCHASER.

63. See MORTGAGES. Where the holder of a title bond assigns it to secure a debt, equity will enforce the lien by a sale of the interest of the assignor in the premises. Westcott *v.* Cole, 29 Fed. Cas. No. 17,417, 4 McLean 79.

64. *Maine.*— Boynton *v.* Payrow, 67 Me. 587.

Massachusetts.— Pinch *v.* Anthony, 8 Allen 536.

Virginia.— Morrison *v.* Wilkinson, (1893) 17 S. E. 787.

Wisconsin.— Boorman *v.* Wisconsin Rotary Engine Co., 36 Wis. 207.

United States.— Grand Trunk R. Co. *v.* Central Vermont R. Co., 85 Fed. 87; Good Templars' L. Assoc. *v.* United L. Ins. Assoc., 59 Fed. 220.

See 19 Cent. Dig. tit. "Equity," § 50.

65. Hannahan *v.* Nichols, 17 Ga. 77; Bennett *v.* Nichols, 12 Mich. 22; Strong *v.* Krebs, 63 Miss. 338; Walker *v.* Brown, 63 Fed. 204, 11 C. C. A. 135 [*affirming* 58 Fed. 23]. Where a lien might otherwise be impressed it will not be done except upon property specifically identified. Ellis *v.* Southwestern Land Co., 102 Wis. 409, 78 N. W. 583.

Mechanic's liens under contract with the vendee cannot be enforced against the vendor who rescinds because of vendee's breach of condition. Burlingim *v.* Warner, 39 Nebr. 493, 58 N. W. 132.

66. The owner of a lot agreed, in consideration of plaintiff's advancing money for and superintending the erection of a house, to convey to him a half interest. She thereafter encumbered the property and then died. Plaintiff having performed his contract, a lien in his favor was decreed for half the original value of the property. Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383. An agent who bought property at execution sale has a lien thereon for the money advanced. Hall *v.* Edrington, 9 Dana (Ky.) 364. Where all parties are relying on equities, unrecorded mortgages will be treated as creating valid liens, although they are invalid at law. Swigert *v.* Commonwealth Bank, 17 B. Mon. (Ky.) 268. A woman bought land for her children giving her note as guardian when she was not such. The land was charged with a lien for the purchase-money. Thomason *v.* Phillips, 73 Ga. 140. But one who buys from a married woman who has no capacity to sell has no lien for the purchase-money which he has paid. Mattox *v.* Hightshue, 39 Ind. 95.

On an exchange of lands induced by misrepresentations regarding one of the tracts, the party receiving that tract has an equitable lien on the tract conveyed by him for his damages. Bradley *v.* Bosley, 1 Barb. Ch. (N. Y.) 125.

A title may be reduced to a lien to meet the ends of equity. Thus, where a vendor of material rescinded the sale for fraud after attachments had been levied on the finished product, he was protected only to the extent of the value of the materials entering into the product. National Park Bank *v.* Goddard, 9 Misc. (N. Y.) 626, 30 N. Y. Suppl. 417.

Attachments which cannot be perfected because of the impossibility of pursuing the action to judgment will be enforced as equitable liens. Ohio Brass Co. *v.* Clark, 86 Md. 344, 37 Atl. 899; Montgomery *v.* McDermott, 83 Fed. 576.

Where property subject to a lien is sold, and the lien thereby rendered unenforceable, equity will impress it upon the proceeds of the sale. Lockett *v.* Robinson, 31 Fla. 134, 12 So. 649, 20 L. R. A. 67; Norton *v.* Hixon, 25 Ill. 439, 79 Am. Dec. 338; Stucker *v.* Yoder, 33 Iowa 177; Wells *v.* Canton Co., 3 Md. 234. But not where the lien can still be enforced against the purchaser. Sansbury *v.* Belt, 53 Md. 324.

Liens which would merge at law into the title may be continued in equity to prevent injustice. Bearden *v.* Cater Merchandise Co., 101 Ga. 169, 28 S. E. 678; Troost *v.* Davis, 31 Ind. 34. And see, generally, MORTGAGES.

67. *Alabama.*— Andrews *v.* Huckabee, 30 Ala. 143; Haden *v.* Ware, 15 Ala. 149.

Colorado.— Schiffer *v.* Adams, 13 Colo. 572, 22 Pac. 964.

Georgia.— Salter *v.* Salter, 80 Ga. 178, 4

a bill against the debtor and legal creditor to establish his right and recover.[68] But one cannot merely because his title is equitable assert it in a court of equity against a stranger,[69] especially when an action at law might be maintained.[70] But where the remedy at law is obstructed equity may for that reason take jurisdiction.[71] An equitable title is one derived through a valid contract or relation, and

S. E. 391, 12 Am. St. Rep. 249; Knight *v.* Knight, 75 Ga. 386.

Illinois.— Davis *v.* Hopkins, 15 Ill. 519.

Kentucky.— Ligget *v.* Wall, 2 A. K. Marsh. 149.

Louisiana.— Baca *v.* Ramos, 10 La. 417, 29 Am. Dec. 463; Hall *v.* Sprigg, 7 Mart. 243, 12 Am. Dec. 506.

Michigan.— Woodward *v.* Clark, 15 Mich. 104.

New Jersey.— Bindseil *v.* Smith, 61 N. J. Eq. 654, 47 Atl. 456; Somerville *v.* Johnson, 36 N. J. Eq. 211.

Texas.— Hunt *v.* Turner, 9 Tex. 385, 60 Am. Dec. 167.

Wisconsin.— Walker *v.* Daly, 80 Wis. 222, 49 N. W. 812; Jarvis *v.* Dutcher, 16 Wis. 307.

United States.— Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175.

See 19 Cent. Dig. tit. "Equity," §§ 46, 47.

Possession is not a condition to the jurisdiction of equity to enforce an equitable against a legal title. Branch *v.* Mitchell, 24 Ark. 431.

A principal may compel his agent to assign to him judgments which the latter has recovered in his own name. Burke *v.* Davis, 63 Fed. 456.

Use and occupation.— A vendor occupied lands before conveying them and while vendee was in default of payment of the purchase-money, and then recovered judgment for the purchase-money against the vendee. The latter was permitted to recover in equity for the occupation of the land. Fleming *v.* Chunn, 57 N. C. 422.

Title under an instrument void at law for want of a seal or other formal requisite may be asserted in equity. Teague *v.* Russell, 2 Stew. (Ala.) 420; Ortman *v.* Dixon, 13 Cal. 33; Bower *v.* Hadden Blue Stone Co., 30 N. J. Eq. 171.

Transfer of stocks.— The rightful owner of stocks may have relief in equity against one who has fraudulently procured the legal title and had them transferred to his name on the books. Bryson *v.* Rayner, 25 Md. 424, 90 Am. Dec. 69. In Pennsylvania this doctrine is restricted to stocks having no market value. Sank *v.* Union Steamship Co., 5 Phila. (Pa.) 499.

An equitable owner as defendant will be protected against a demand founded on the legal title. Lewis *v.* Lyons, 13 Ill. 117.

68. Smith *v.* Bates Mach. Co., 182 Ill. 166, 55 N. E. 69; Osenton *v.* Carter County, 5 Ky. L. Rep. 686; Sparks *v.* McDonald, (N. J. Ch. 1898) 41 Atl. 369; Essex County *v.* Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185; Coffin *v.* Indianapolis, 59 Fed. 221. But one taking with notice of the equity is subject thereto, and may be sued alone. Union Stock-Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 11 S. Ct. 118, 34 L. ed. 724 [*affirming* 41 Fed. 231].

69. The remedy being in such case to proceed to enforce the equity against the person subject thereto, and thus having perfected the title at law, to sue the stranger at law. Fussell *v.* Hughes, 113 U. S. 565, 5 S. Ct. 639, 28 L. ed. 998; Fussell *v.* Gregg, 113 U. S. 550, 5 S. Ct. 631, 28 L. ed. 993; Young *v.* Porter, 30 Fed. Cas. No. 18,171, 3 Woods 342. One who has commenced proceedings under the Homestead Law may in equity recover possession from one occupying the land with no title whatsoever. Kitcherside *v.* Myers, 10 Oreg. 21. But where plaintiff has failed to comply with the legal requirements for perfecting his claim he cannot in such case recover. Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. (Miss.) 234.

70. As where there is no impediment to a suit in the name of the legal owner. Rowland *v.* Logan, 11 Ala. 663; Murphy *v.* Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345; New York Guaranty, etc., Co. *v.* Memphis Water Co., 107 U. S. 205, 2 S. Ct. 279, 27 L. ed. 484. See also Ean Claire *v.* Payson, 109 Fed. 676, 48 C. C. A. 608 [*denying* rehearing in 107 Fed. 552, 46 C. C. A. 466]; International Trust Co. *v.* Cartersville Imp., etc., Co., 63 Fed. 341.

When relief granted.— An averment that the person entitled to recover at law refuses to proceed is sufficient to found jurisdiction in equity (Shearson *v.* Littleton, 105 Fed. 533), but only in furtherance of justice (Siegman *v.* Day, 63 N. J. Eq. 422, 51 Atl. 1003 [*affirmed* in (Err. & App. 1903) 54 Atl. 1125]. Where the titles of both parties are equitable only, equity has jurisdiction to determine them. New York, etc., Land Co. *v.* Gulf, etc., R. Co., 100 Fed. 830, 41 C. C. A. 87.

71. As where the legal owner would be defendant at law. Hodge *v.* Cole, 140 Mass. 116, 2 N. E. 774; Moore *v.* Durnam, 63 N. J. Eq. 96, 51 Atl. 449; Hudson *v.* Reeve, 1 Barb. (N. Y.) 89. So where there is no one in being, in whose name suit might be brought at law. Taylor *v.* Reese, 44 Miss. 89. Likewise it seems where such person has left the jurisdiction. Miller *v.* Trevilian, 2 Rob. (Va.) 1. The vendor of an undivided partnership interest may enforce in equity his lien for the purchase-money, whereas he would be relegated to replevin or other appropriate remedy had the sale been of specific chattels. Journey *v.* Priestly, 70 Miss. 584, 12 So. 799. The equitable owner of land may restrain an execution sale based on a judgment against the legal owner, where an innocent purchaser at such sale might obtain a good title. Parks *v.* People's Bank, 97 Mo. 130 11 S. W. 41, 10 Am. St. Rep. 295.

based on recognized equitable principles; it does not arise from a naked promise or purely moral obligation.[72]

6. Administration of Estates — a. Grounds and Scope of Ancient Equity Jurisdiction. It has been stated that "the whole jurisdiction of Courts of Equity in the administration of assets is founded on the principle, that it is the duty of the Court to enforce the execution of trusts, and that the executor or administrator who has the property in his hands is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the will, or, in case of intestacy, according to the statute of distributions. The sole ground on which Courts of Equity proceed in cases of this kind is the execution of a trust."[73] While it is true that the constructive trust relationship existing between the personal representative and those claiming an interest in the estate is ordinarily a sufficient ground for sustaining the jurisdiction of equity over administrations, nevertheless the origin of this jurisdiction can be more broadly rested on the general inability of the ancient common law and ecclesiastical courts to furnish legatees, distributees, and creditors full, adequate, and complete relief.[74] In particular the necessity in most instances of compelling a discovery of assets and the rendering of an account almost invariably drove legatees, distributees, and creditors into equity,[75] so that in the course of time in England the chancery court

72. *California.*— Doe *v.* Culverwell, 35 Cal. 291.

Connecticut.— Beers *v.* Kately, 73 Conn. 454, 47 Atl. 659.

Illinois.— Smith *v.* Hollenback, 51 Ill. 223.

Pennsylvania.— Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

United States.— French *v.* Hay, 22 Wall. 231, 22 L. ed. 799.

See 19 Cent. Dig. tit. "Equity," §§ 46, 47.

Invalidity of title.— Plaintiff must show that the one from whom he derives his right had himself a right to transfer. Cook *v.* Beacher, 1 Root (Conn.) 483; Griggs *v.* Daniel, 30 Ga. 500; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876.

Joint purchasers of land, where the title is taken in the name of one, have an interest which equity will enforce. Lieberman *v.* Sloman, 118 Mich. 355, 76 N. W. 757; Crosier *v.* McLaughlin, 1 Nev. 348; Leonard *v.* Leonard, 67 Vt. 318, 31 Atl. 783. But where the agreement is for a resale by the one holding the title and a division of the proceeds, the others have no interest in the land which equity will enforce. McCulloch *v.* Chatfield, 67 Fed. 877, 15 C. C. A. 48. See, however, Long *v.* Eisenbeis, 23 Wash. 556, 63 Pac. 249. And the vendor who takes the individual bond of the person receiving the conveyance has no equitable claim against the other purchasers for the purchase-money. Patterson *v.* Brewster, 4 Edw. (N. Y.) 352. The obligation of one who binds himself to purchase land and convey an interest to another when he shall pay his portion of the price is personal, and creates no interest in the land which prevents a rescission of the obligor's contract to purchase it. Willis *v.* Forney, 45 N. C. 256. A joint grantee who consents to surrender the deed in exchange for one to the other grantee alone cannot in equity impeach the transaction. Dinwiddie *v.* Bell, 95 Ill. 360.

73. Adair *v.* Shaw, 1 Sch. & Lef. 243, 262.

74. Thus a general legacy, whether pecuniary or residuary, could not be recovered at all at common law. "There are certainly decisions which establish that in the case of an express promise to pay a pecuniary legacy in consideration of assets, an action will lie at law for the recovery thereof. But these cases seem not to have been decided upon satisfactory principles; and though they have not been directly overturned in England, they have been doubted and disapproved by judges as well as by elementary writers." Story Eq. Jur. § 591. And a specific legacy could be recovered only when the executor had assented thereto. In the ecclesiastical court a legatee or next of kin could compel the executor or administrator to deliver an inventory on oath, and could disprove or object to the inventory, and could after assent recover his legacy or distributive share, but there were no means by which assent could be compelled. And while a creditor could establish his debt at law he could not of course compel a discovery or the rendering of an account. In the ecclesiastical court a creditor could compel the executor or administrator to deliver an inventory on oath, but could not dispute the truth of the inventory. For a more detailed account of the inadequacy of the common law and ecclesiastical remedies see Story Eq. Jur. cc. 9, 10; Adams Eq. c. 4. It must of course be remembered that where the claim against the estate was purely equitable, as where the testator had charged land with his debts or legacies, thus creating an equitable lien, or had devised property in trust for the payment of debts or legacies, and the like, a court of chancery had an original and exclusive jurisdiction. As to suits at law or in equity for recovery of legacies or distributive shares see Executors and Administrators.

75. Comyns Dig. Ch. II, A, 1. See also as to legatees and distributees suing in equity Frey *v.* Demarest, 16 N. J. Eq. 236, 238; Gibbons *v.* Dawley, 2 Ch. Cas. 198, 22 Eng.

became the ordinary tribunal for the administration of the estates of deceased persons, and in cases of any complication it acquired practically speaking an almost exclusive jurisdiction.[76]

b. Effect of Establishment of Probate Courts — (i) *Introductory Statement.* In this country, however, the general jurisdiction over the estates of deceased persons has been given, to a greater or less extent in the various states, by constitutional or legislative enactment: (1) In some states to entirely distinct courts, created for this express purpose and exercising substantially no other jurisdiction;[77] (2) in other states to some one court in their juridical system, which, however, exercises other powers as well.[78] The question arises as to the effect of the establishment of these probate courts[79] upon the jurisdiction of the courts of equity in this country. In general it may be said that in all the states having the complete equity system, the original jurisdiction of chancery must be considered as remaining in full force and effect, notwithstanding the jurisdiction given to the probate courts, unless the constitutional or statutory provisions creating these courts, by express, negative, prohibitory language, take away the former chancery jurisdiction, or unless the probate jurisdiction is by these statutes given in such affirmative and exclusive language as to raise the necessary implication that it was the intention to displace the former corresponding chancery powers.[80] Bearing this general principle in mind the states may be roughly divided into three groups.[81]

(ii) *States in Which Equity and Probate Jurisdiction Are Concurrent.* The first group includes those states in which it has been held that the statutes relative to the probate courts have not taken away the former equity jurisdiction, but that it remains and continues unimpaired; in other words that the jurisdiction of the equity courts and the probate courts to the extent that it overlaps is concurrent. In these states, however, the general principle of concurrent jurisdiction applies, namely, that when the jurisdiction of one court attaches in a proper case the jurisdiction of the other court is to that extent excluded and will not be exercised.[82] Furthermore it is necessary to bear in mind in this connection

Reprint 909; Pamplin *v.* Green, 2 Ch. Cas. 95, 22 Eng. Reprint 863; Howard *v.* Howard, 1 Vern. 134, 23 Eng. Reprint 368; Matthews *v.* Newby, 1 Vern. 133, 23 Eng. Reprint 368. And as to creditors suing in equity see Board of Public Works *v.* Columbia College, 17 Wall. (U. S.) 521, 531, 21 L. ed. 687.

76. Story Eq. Jur. § 543. As to jurisdiction in equity of suits by executors or administrators for settlement and distribution of decedents' estates see Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443; Zollickoffer *v.* Seth, 44 Md. 359, 371, 372; Pierce *v.* Allen, 12 R. I. 510, 512. And see, generally, Executors and Administrators.

77. These courts have been given various names, such as probate courts, orphans' courts, ordinaries or courts of ordinary, surrogates' courts, prerogative courts, etc. See Courts, 11 Cyc. 791.

78. Such as district courts in Nevada, circuit courts in Indiana and Iowa, the superior court in California, county courts in Colorado, Florida, Kentucky, Illinois, Nebraska, and South Dakota. See Courts, 11 Cyc. 791.

79. The term "probate court" will in this article be used to designate all courts of this class, whether of the kind referred to in note 77 or in note 78 *supra*, while they are exercising jurisdiction over the administration of estates.

80. *Alabama.*— Gould *v.* Hayes, 19 Ala. 438.

California.— Rosenberg *v.* Frank, 58 Cal. 387.

Florida.— Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163.

Iowa.— Waples *v.* Marsh, 19 Iowa 381.

Missouri.— Miller *v.* Woodward, 8 Mo. 169; Richardson *v.* Palmer, 24 Mo. App. 480.

New Jersey.— Frey *v.* Demarest, 16 N. J. Eq. 236; Salter *v.* Williamson, 2 N. J. Eq. 480, 35 Am. Dec. 513.

See 19 Cent. Dig. tit. "Equity," §§ 51, 62.

81. An attempt has been made in notes 84, 85, 90 *infra*, to group the states according to the view entertained in each as to the effect of the establishment of the probate courts upon the jurisdiction of their chancery courts. Owing, however, to the scarcity, and in some cases the absence, of decisions in some jurisdictions, it is difficult to determine with entire confidence into what group to place some of the states. The matter is further complicated by the fact that the question often depends upon a construction of the statutes conferring jurisdiction upon these courts. Moreover, some of the states have been in one group at one stage of their judicial history and in another group at another stage. Entire accuracy therefore cannot be hoped for.

82. See Courts, 11 Cyc. 985-987; and *supra*, II, A, 1, c.

the distinction between possessing jurisdiction and exercising it.[83] In some of the states of the first group the chancery court will, subject to the principle just referred to, exercise its concurrent jurisdiction whenever a complainant presents a case which comes within it; in other states of this group the chancery court, while admitting that it has jurisdiction, will refuse to exercise it unless some special reason is assigned indicating why in that particular case the probate court cannot do full, adequate, and complete justice in the premises.[84]

83. See *supra*, II, A, 2, a, (III).

84. The following states are in the first group:

Alabama.— It is well settled that devisees or heirs, legatees, or distributees, may resort to the chancery court at any time before the concurrent jurisdiction of the probate court has attached, without assigning any special reason therefor; but where the jurisdiction of the probate court has already attached, the concurrent jurisdiction of chancery is excluded unless some relief is required which the probate court for want of equitable jurisdiction cannot grant. On the other hand the executor or administrator is generally required to resort to the probate court in the first instance, and when he undertakes to transfer the administration into chancery, he must always assign a good equitable ground for asking that court to take jurisdiction of it. Noble *v.* Tate, 119 Ala. 399, 24 So. 438; Stovall *v.* Clay, 108 Ala. 105, 20 So. 387; Ligon *v.* Ligon, 105 Ala. 460, 17 So. 89; Hardin *v.* Pulley, 79 Ala. 381; Shackelford *v.* Bankhead, 72 Ala. 476; Irwin *v.* Bailey, 72 Ala. 467; Bragg *v.* Beers, 71 Ala. 151; Corr *v.* Shackelford, 68 Ala. 241; Newsom *v.* Thornton, 66 Ala. 311; Moore *v.* Winston, 66 Ala. 296; Clark *v.* Eubank, 65 Ala. 245; Malone *v.* Marriott, 64 Ala. 486; Weakley *v.* Gurley, 60 Ala. 399; Hill *v.* Armistead, 56 Ala. 118; Park *v.* Park, 36 Ala. 132; McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320; Pearson *v.* Darrington, 21 Ala. 169; Pharis *v.* Leachman, 20 Ala. 662; Gould *v.* Hayes, 19 Ala. 438; Pearson *v.* Darrington, 18 Ala. 348; Scott *v.* Abercrombie, 14 Ala. 270; Robinson *v.* Robinson, 11 Ala. 947; Gayle *v.* Singleton, 1 Stew. 566. The probate court is without jurisdiction to render a decree against the surety of a deceased administrator, and therefore an administrator *de bonis non* may resort to equity in the first instance to compel the deceased administrator's personal representatives and the sureties on his official bond to make a final settlement of his accounts. Woods *v.* Legg, 91 Ala. 511, 8 So. 342. The same rules apply with respect to matters of guardianship. Hailey *v.* Boyd, 64 Ala. 399; Lee *v.* Lee, 55 Ala. 590; Campbell *v.* Conner, 42 Ala. 131. A widow cannot have her allowance made her in equity without a sufficient excuse for her failure to claim it in the probate court. Arnett *v.* Arnett, 33 Ala. 273. The administration and settlement of a decedent's estate is a single continuous proceeding, and when removed into equity for any purpose that court will ordinarily retain jurisdiction and proceed to a final and complete settlement of all matters involved. Tygh *v.* Dolan, 95 Ala. 269, 10 So. 837; Key *v.* Jones, 52 Ala. 238; Stewart *v.* Stewart, 31 Ala. 207; Wilson *v.* Crook, 17 Ala. 59; Hunley *v.* Hunley, 15 Ala. 91; Blakey *v.* Blakey, 9 Ala. 391.

Florida.— Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163; Ritch *v.* Bellamy, 14 Fla. 537.

Iowa.— Harlin *v.* Stevenson, 30 Iowa 371; Waples *v.* Marsh, 19 Iowa 381. But while the administration is proceeding regularly in the probate court the chancery court will not ordinarily interfere to review and correct the acts of an administrator. Hutton *v.* Laws, 55 Iowa 710, 8 N. W. 642. The probate courts, however, are not vested with general chancery powers, and where the relief sought is purely equitable in character, such as the enforcement of a lien, the action should be in equity, there being no method of obtaining relief in probate proceedings. Goodnow *v.* Wells, 67 Iowa 654, 25 N. W. 864; Perry *v.* Drury, 56 Iowa 60, 8 N. W. 745.

Kansas.— Shoemaker *v.* Brown, 10 Kan. 383. "When certain facts exist, growing out of the liabilities of a deceased person, or it may be arising out of the settlement of the estate of a deceased person, wherein the probate court, by reason of its limited jurisdiction and restricted authority, cannot protect and enforce the rights of all persons involved in the controversy, the equitable power of the district court may be invoked in their behalf." *In re* Hyde, 47 Kan. 277, 281, 27 Pac. 1001.

Kentucky.— Saunders *v.* Saunders, 2 Litt. 314; Moore *v.* Waller, 1 A. K. Marsh. 488. In Speed *v.* Nelson, 8 B. Mon. 499, it was held that an accounting had in the probate court could be attacked in equity on the ground of fraud, or where a discovery of assets was sought; but by the act of May 5, 1880, appeals are allowed from settlements made by fiduciaries in the probate court to the circuit court, and while a settlement in the probate court is only *prima facie* evidence of its correctness, this is only so, since the act, when the parties in interest fail to appear and contest the validity of the settlement. But when the parties in interest do so appear and contest the validity of the settlement in the probate court, their remedy is by appeal, and they are precluded from surcharging the settlement in the chancery court. Bell *v.* Henshaw, 91 Ky. 430, 15 S. W. 3, 12 Ky. L. Rep. 674.

Michigan.— Prior to 1871 Michigan was in the second group. Holbrook *v.* Campau, 22 Mich. 288; People *v.* Wayne County Cir. Ct., 11 Mich. 393, 83 Am. Dec. 754; Wales *v.* Newbould, 9 Mich. 45. But by an amendment

(III) *States in Which Probate Jurisdiction Is Exclusive.* In the second group of states it is held that the jurisdiction of the probate courts is vii-

to the statute conferring jurisdiction upon the judge of probate, taking effect July 18, 1871, a proviso was added "that the jurisdiction hereby conferred shall not be construed to deprive the circuit court in chancery, in the proper county, of concurrent jurisdiction, as originally exercised over the same matters." Howell St. § 6760; Comp. Laws (1897), § 651. See Tudhope *v.* Potts, 91 Mich. 490, 493, 51 N. W. 1110. Notwithstanding this amendment, a demurrer was subsequently sustained to a bill filed by the sister of an intestate, claiming as a distributee of personalty, and not as heir, alleging fraud in the appointment of a guardian and administrator for the decedent, and asking the appointment of a receiver. Kellogg *v.* Aldrich, 39 Mich. 576. Assuming that the chancery court has concurrent jurisdiction, it will of course not interfere when the jurisdiction of the probate court has already properly attached. Shelden *v.* Walbridge, 44 Mich. 251, 6 N. W. 681.

Mississippi.— There have been two entirely distinct and different systems prevailing in this state, one founded upon the provisions of the constitution of 1832, and the other upon the provisions of the constitution of 1869, retained in the constitution of 1890. Under section 18, article 4, of the constitution of 1832, providing for the establishment in each county of a court of probate with jurisdiction in all matters testamentary and of administration, etc., it was held in Blanton *v.* King, 2 How. 856, that the court of probate had exclusive jurisdiction over such matters, and a bill in equity would not lie to review its proceedings. To the same effect see Neal *v.* Maxwell, 40 Miss. 726; Dease *v.* Cooper, 40 Miss. 114; Hart *v.* Hart, 39 Miss. 221, 77 Am. Dec. 668; Jones *v.* Irvine, 23 Miss. 361; Green *v.* Creighton, 10 Sm. & M. 159, 48 Am. Dec. 742; Gaines *v.* Smiley, 7 Sm. & M. 53, 45 Am. Dec. 295. But where the powers of the probate court were inadequate to do full and ample justice between the parties an appeal could be made to chancery. Anderson *v.* Duke, 28 Miss. 87; McRea *v.* Walker, 4 How. 455. The constitution of 1869, however, made no provision for separate probate courts, but by article 6, section 16, provided that "the chancery court shall have full jurisdiction," among other things, "in the following matters and cases, viz.: . . . Matters testamentary and of administration." By section 504 of the code of 1892 (formerly section 976 of the code of 1871), it is provided: "The court in which a will may have been admitted to probate . . . shall have jurisdiction to hear and determine all questions in relation to the execution of the trust of the executor, administrator, guardian, or other officer appointed for the administration and management of the estate, and of all demands against it by heirs at law, distributees, devisees, legatees, wards, creditors, or others; and shall have jurisdiction of all cases in which bonds or other obligations shall have been executed in any proceeding in relation to the estate, or other proceedings, had in said chancery court, to hear and determine upon proper proceedings and evidence, the liability of the obligors in such bond or obligation, whether as principal or surety, and by decree and process to enforce such liability." This statute enables a judgment creditor of an estate to sue in equity (Clopton *v.* Haughton, 57 Miss. 787; Whitfield *v.* Evans, 56 Miss. 488); also *ex contractu* creditors even without judgments (Brasfield *v.* French, 59 Miss. 632; Hunt *v.* Potter, 58 Miss. 96). The statute applies in favor of distributees, even after a formal settlement by the administrator. Brunini *v.* Pera, 54 Miss. 649.

New Jersey.— The authority conferred by statute upon the probate court is only a cumulative remedy afforded to parties and was never intended to deprive the chancery court of its jurisdiction. Frey *v.* Demarest, 16 N. J. Eq. 236; Salter *v.* Williamson, 2 N. J. Eq. 480, 35 Am. Dec. 513. While there are judicial intimations that where there are no special reasons for going into equity, the probate court is the proper tribunal, and should be selected by the parties, nevertheless as a practical matter the concurrent jurisdiction of the chancery court is very freely exercised. Culver *v.* Pierson, (Ch. 1888) 15 Atl. 269; Houston *v.* Levy, 44 N. J. Eq. 6, 13 Atl. 671; Frey *v.* Demarest, 16 N. J. Eq. 236; Salter *v.* Williamson, 2 N. J. Eq. 480, 35 Am. Dec. 513. And when a bill is filed in equity against executors or administrators by creditors or beneficiaries of the estate, touching the administration of the estate, the suit is for the benefit of all parties interested, and the chancery court will generally retain jurisdiction until a final accounting and a distribution of the assets is made. Coddingham *v.* Bispham, 36 N. J. Eq. 574. Nevertheless, when the concurrent jurisdiction of the probate court has first attached, and some progress has been made in the settlement of the estate, the chancery court will not ordinarily interfere with the administration of the estate, unless some good reason for its interposition is shown. Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085; Titus *v.* Hoagland, 39 N. J. Eq. 294; Frey *v.* Demarest, 16 N. J. Eq. 236; Clarke *v.* Johnston, 10 N. J. Eq. 287. In Chamberlain *v.* Chamberlain, (Ch. 1890) 20 Atl. 1085, the chancery court refused to take jurisdiction of a bill filed for the purpose of having the court order the executors to sell real estate of which the testator had died seized, to pay his debts and to direct them as to the manner in which they should proceed in so doing. The court did not deny that it had jurisdiction, but said that there was no necessity for its intervention, the orphans' court act having provided a remedy in that court both in cases of testacy and intestacy. Rev.

tually exclusive; that their powers as to those subjects over which they have jurisdiction are plenary, and often include the right to grant both legal and equitable remedies with respect thereto. In these states equity does not possess any jurisdiction over matters coming within the scope of the statutes conferring jurisdiction upon the probate courts, and can act only when the probate courts by reason of their not possessing full equity powers cannot afford relief.[85]

(1877) p. 766, § 70 *et seq.* (Gen. St. (1895) p. 2370, § 70 *et seq.*)

Rhode Island.— Dean *v.* Rounds, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; Blake *v.* Butler, 10 R. I. 133; Rathbone *v.* Lyman, 8 R. I. 155.

South Carolina.— Witte *v.* Clarke, 17 S. C. 313; Jordan *v.* Moses, 10 S. C. 431; Walker *v.* Russell, 10 S. C. 82. The probate court has no jurisdiction over a trustee where no testamentary matters are involved, such jurisdiction being solely in the chancery court. Poole *v.* Brown, 12 S. C. 556.

Tennessee.— The chancery court is given an extraordinary power in this state. It may concurrently with the probate court appoint an administrator of a decedent's estate six months after the decedent's death, where no person can be procured to administer in the usual way. A bill for this purpose can be filed only by a creditor or next of kin of the deceased. See Code (1884), §§ 3050–3060, 5047. The chancery court, however, is not a probate court, and has in this respect only the jurisdiction conferred by statute. Bruce *v.* Bruce, 11 Heisk. 729. But when such an administration is properly granted by the chancery court, it is intended to be general in its character and to effect a full and complete administration of the estate. Todd *v.* Wright, 12 Heisk. 442. In other respects it is not the intention of the statute to transfer the jurisdiction of the probate court to the chancery court, at the pleasure of the parties interested, nor to give the chancery court a concurrent general jurisdiction with the probate court in the administration and settlement of estates, but simply to provide a remedy in exceptional cases where the condition of the estate was so forbidding as to deter everyone from accepting the administration upon the ordinary terms of the law. Evans *v.* Evans, 2 Coldw. 143. The chancery court is also given concurrent jurisdiction by statute (Code (1884), § 5045), with the probate court to sell land to pay debts of decedents, whether the estate is solvent or insolvent. Burgner *v.* Burgner, 11 Heisk. 729. It also has concurrent jurisdiction (Code, §§ 3152–3155) with the probate court, within two years of the granting of letters testamentary or of administration, where the assets of the estate are in money, or in effects readily convertible into money, and upon satisfactory proof that there are no unpaid debts, to administer the estate, and distribute the assets among the legatees or next of kin, and in a proper case without requiring refunding bonds. Murgitroyde *v.* Cleary, 16 Lea 539.

Virginia.— Nelson *v.* Cornwell, 11 Gratt. 724. A creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate, may go into a court of equity for the purpose of having a division of the estate of the decedent, and of procuring payment of his debt out of the share of the absent debtor. Moores *v.* White, 3 Gratt. 139.

85. The following states are in the second group:

Connecticut.— Tweedy *v.* Bennett, 31 Conn. 276; Ashmead's Appeal, 27 Conn. 241; Beach *v.* Norton, 9 Conn. 182; Bailey *v.* Strong, 8 Conn. 278. But it has been held that the power of a court of equity to protect remainder-men by exacting security from life-tenants is independent of statute, and that the similar power conferred on the probate courts does not interfere with the general chancery powers of equity courts. Security Co. *v.* Hardenburgh, 53 Conn. 169, 2 Atl. 391.

Indiana.— Some early cases in Indiana involved the right of equity to interfere with accountings had in the probate court. In Allen *v.* Clark, 2 Blackf. 343, 344 [*followed* in Ray *v.* Doughty, 4 Blackf. 115; Murdock *v.* Holland, 3 Blackf. 114; Brackenridge *v.* Holland, 2 Blackf. 377, 20 Am. Dec. 123], the court said: "The settlement of accounts in the Probate Court is an *ex parte* proceeding, and ought not to preclude all future investigation of the subject. The Probate Court, however, is a Court of record, specially invested by the legislature with jurisdiction in these cases, and its decisions are entitled to great respect. An account, settled in that Court . . . is *prima facie* correct. The Court of chancery can only interfere in clear cases of mistake or fraud; and the complainant must be held to strict proof." Another line of early cases held that where a debtor is dead and a creditor has to proceed against his heirs, executors, or administrators, the chancery court has concurrent jurisdiction with the law court, and the creditor may elect into which court he will go. Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638; Bryer *v.* Chase, 8 Blackf. 508; Martin *v.* Densford, 3 Blackf. 295. By the act of assembly of Jan. 26, 1824, the equity side of the several circuit courts had full power in all probate matters. The act of Feb. 11, 1825, created a probate court, with power to determine all matters relating to decedents' estates, etc., except when the title to land should come in question. Under these two statutes there were two courts with concurrent, original probate powers. Mills *v.* Bradley, 1 Blackf. 541. By the act of May 14, 1852, the probate courts were superseded by the courts of common pleas which were given original and exclusive jurisdiction of (among other things) all matters relating to the

(iv) *States in Which Equity Jurisdiction Is Ancillary or Corrective.* In the third group of states the jurisdiction of equity is held not to be concurrent, but rather auxiliary or ancillary and corrective. In these states the probate courts have limited or no equitable powers, and by reason of this defect an appeal to equity is sometimes necessary. Thus, where an obstacle exists to the assumption of jurisdiction by the probate court, which only a court of equity can remove, equity will take jurisdiction to remove the obstacle, and although it might in many cases under these circumstances by the application of a well established equitable principle [86] retain jurisdiction for the purpose of giving complete relief, it nevertheless in this group of states, after removing the obstacle, generally remits the matter to the probate court, to be continued and completed in that court. Cases may be found, however, where even in these states equity has retained jurisdiction.[87] Again the probate court may have acted and rendered its decree, but there may be some equitable reason why its decree should not be allowed to operate. Under these circumstances the corrective powers of a court

settlement and distribution of decedents' estates, and all actions against executors and administrators. In all cases where executors, administrators, or guardians were plaintiffs, the common pleas were given concurrent jurisdiction with the circuit court. Finally by the act of March 6, 1873, the circuit courts, in addition to the jurisdiction theretofore exercised by them, were given the same jurisdiction that had theretofore been exercised by the court of common pleas. Thus was transferred to the circuit court exclusive jurisdiction in all matters in relation to the settlement and distribution of the estates of decedents, and in all actions in which executors or administrators were the only defendants. Hillenberg *v.* Bennett, 88 Ind. 540; Wheeler *v.* Calvert, 25 Ind. 365. It would seem that the effect of the statutes of 1852 and 1873 was to place Indiana in the second group.

Massachusetts.— Wilson *v.* Leishman, 12 Metc. 316; Jenison *v.* Hapgood, 7 Pick. 1, 19 Am. Dec. 258. Even where an account was settled in the probate court without notice to the parties interested, the chancery court did not have jurisdiction. Sever *v.* Russell, 4 Cush. 513, 50 Am. Dec. 811. See also Greene *v.* Brown, 180 Mass. 308, 62 N. E. 374; Green *v.* Gaskill, 175 Mass. 265, 56 N. E. 560; Ammidown *v.* Kinsey, 144 Mass. 587, 12 N. E. 365; Foster *v.* Foster, 134 Mass. 120; Morgan *v.* Rotch, 97 Mass. 396. But as to assignments of legacies, etc., see Lenz *v.* Prescott, 144 Mass. 505, 11 N. E. 923.

Minnesota.— State *v.* Ueland, 30 Minn. 277, 15 N. W. 245.

Nebraska.— Williams *v.* Miles, 63 Nebr. 859, 89 N. W. 451. In Loosemore *v.* Smith, 12 Nebr. 343, 11 N. W. 493, it was held that the county court has original jurisdiction in the probate of a will, and its order admitting a will to probate is conclusive, unless by a direct proceeding, by appeal or otherwise, it is reversed. Accordingly a petition in equity to set aside a will which had been admitted to probate in a county court was dismissed.

New Hampshire.— Joslin *v.* Wheeler, 62 N. H. 169; Walker *v.* Cheever, 35 N. H. 339. The courts of probate have general jurisdiction of the subject of the estates of persons deceased, and as incidental to that have authority to try questions of fraud, mistake, and the like, incidentally arising in the cases then pending. Tebbetts *v.* Tilton, 31 N. H. 273; Allen *v.* Hubbard, 8 N. H. 487. Where an executor is appointed trustee as well, after the estate has been administered and the executor's duties as such have ceased, the probate court does not have jurisdiction to determine conflicting claims to the income of the trust fund and compel the trustee to execute the trust according to the intent of the will, but resort must be had to equity for such relief. Hayes *v.* Hayes, 48 N. H. 219. The power conferred on courts of probate to make decrees as to the disposition of trust property does not affect the jurisdiction of courts of equity in aiding trustees in investments and change of securities. *In re* Baptist Church, 51 N. H. 424.

North Carolina.— While the decisions are not conclusive, their tendency seems to be to place the state in the second group. Baker *v.* Carter, 127 N. C. 92, 37 S. E. 81; Stancill *v.* Gay, 92 N. C. 455; Hendrick *v.* Mayfield, 74 N. C. 626; Heilig *v.* Foard, 64 N. C. 710; Hunt *v.* Sneed, 64 N. C. 176.

Oregon.— *In re* Herren, 40 Oreg. 90, 66 Pac. 688.

Pennsylvania.— Henderson *v.* Stryker, 164 Pa. St. 170, 30 Atl. 386; Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779; Miskimins' Appeal, 114 Pa. St. 530, 6 Atl. 743; Dundas' Appeal, 73 Pa. St. 474; Linsenbigler *v.* Gourley, 56 Pa. St. 166, 94 Am. Dec. 51; Loomis *v.* Loomis, 27 Pa. St. 233; Mackinson *v.* Mackinson, 2 Grant 286; Lowry *v.* Lowry, 10 Phila. 105; McNickle *v.* Henry, 8 Phila. 87. The probate court has exclusive jurisdiction where a testamentary trust is given to the executor *virtute officii*, but its jurisdiction is concurrent with the court of equity where the trustee is appointed *nominatim*. Wapples' Appeal, 74 Pa. St. 100; Brown's Appeal, 12 Pa. St. 333.

86. See *infra*, II, C.

87. Reinhardt *v.* Gartrell, 33 Ark. 727. See also Burton *v.* Burton, 79 Cal. 490, 21 Pac. 847.

of equity may be needed, in cases where the probate court by reason of its limited or lack of equitable powers is unable to prevent a miscarriage of its proceedings.[88] On the other hand the aid of the chancery court may be needed to carry into effect a decree of the probate court which that court by reason of its limited powers is unable to enforce.[89] Nevertheless the probate courts in these states are vested with ample powers to do complete justice in all ordinary cases, and the chancery court will decline to take jurisdiction unless special facts and circumstances are alleged showing that the case is one requiring relief of such a nature that the probate court is not competent to grant it, or some reason is assigned or facts stated to show that complete justice cannot be done in that court.[90]

88. Thus a claimant who had already had his claim allowed in part, which part had been paid, went before the probate judge in the absence of the administrator and without notice to him and by false representations induced the probate judge to allow the entire claim, of which fact the administrator had no notice until after the time to appeal had expired. There being a good defense against the excess of the claim so allowed, it was held that equity would enjoin the collection of that excess. Dundas *v.* Chrisman, 25 Nebr. 495, 41 N. W. 449.

89. Thus in Vermont it was held that the chancery court has jurisdiction to compel an executor to pay a legacy, where the probate court has decreed payment, since the order probably exhausted all the powers of the probate court to enforce payment. Bellows *v.* Sowles, 57 Vt. 411.

90. The following states are in the third group:

Arkansas.— Turner *v.* Rogers, 49 Ark. 51, 4 S. W. 193; Hankins *v.* Layne, 48 Ark. 544, 3 S. W. 821; McLeod *v.* Griffis, 45 Ark. 505; Mock *v.* Pleasants, 34 Ark. 63; Reinhardt *v.* Gartrell, 33 Ark. 727; West *v.* Waddill, 33 Ark. 575; Du Val *v.* Marshall, 30 Ark. 230; Haag *v.* Sparks, 27 Ark. 594; Freeman *v.* Reagan, 26 Ark. 373; Moren *v.* McCown, 23 Ark. 93. Gould Dig. c. 180, §§ 11, 12, authorizing the probate court to decree distribution of an estate under a will omitting names of children, etc., does not deprive the chancery court of its peculiar province "to afford relief, where contribution is to be made by different persons, or to different persons out of a common fund." Branton *v.* Branton, 23 Ark. 569. But a bill by judgment creditors to subject land of a deceased debtor which has been variously devised, the estate having been finally administered, is equitable, not being technically a proceeding to sell lands for the payment of the debts of the deceased, of which the probate court alone would have jurisdiction. Hall *v.* Brewer, 40 Ark. 433.

California.— The constitution of 1849 established county courts, and the duties of surrogate or probate judges were assigned to the county judges. Under the amendments to this constitution, ratified in 1862, distinct probate courts were established presided over by the county judges. Rosenberg *v.* Frank, 58 Cal. 387, decided under these latter provisions, placed California in the first group. See cases cited in the following opinion, especially Deck *v.* Gerke, 12 Cal. 433, 73 Am. Dec. 555. The constitution of 1879 established a superior court to which was given "original jurisdiction in all cases in equity" and also jurisdiction in "all matters of probate," doing away with the separate probate courts. The effect of the constitution of 1879 and the legislation thereunder has probably been to place the state in the third group, although there may be some justification for considering it in the second group. *In re* Davis, 136 Cal. 590, 69 Pac. 412; Sohler *v.* Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Toland *v.* Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100.

Colorado.— While the decisions are not conclusive, they seem to place the state in the third group. People *v.* Barton, 16 Colo. 75, 26 Pac. 149; Marshall *v.* Marshall, 11 Colo. App. 505, 53 Pac. 617; People *v.* Arapahoe County Ct., 3 Colo. App. 425, 34 Pac. 166; Mitchell *v.* Hughes, 3 Colo. App. 43, 32 Pac. 185.

Georgia.— This state cannot with entire propriety be placed either in the first or the third group, but it seems more properly to belong in the third. Code (1895), § 3999; Thompson *v.* Orser, 105 Ga. 482, 30 S. E. 626; Duggan *v.* Lamar, 101 Ga. 760, 29 S. E. 19; Johnson *v.* Holliday, 68 Ga. 81; Mayo *v.* Keaton, 54 Ga. 496; Bryan *v.* Hickson, 40 Ga. 405. But see McGowan *v.* Lufburrow, 82 Ga. 523, 7 S. E. 314, 14 Am. St. Rep. 178; Young *v.* Brown, 75 Ga. 1; Dean *v.* Central Cotton Press Co., 64 Ga. 670; Walker *v.* Morris, 14 Ga. 323. By Code (1895), § 3495, Code (1873), § 2600, equity was expressly given concurrent jurisdiction over the settlement of accounts of administrators. Ewing *v.* Moses, 50 Ga. 264.

Illinois.— The early decisions placed Illinois substantially in the first group. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Vansyckle *v.* Richardson, 13 Ill. 171. The practical effect of the later decisions is, however, to transfer it to the third group. For the decisions establishing this rule see Strauss *v.* Phillips, 189 Ill. 9, 59 N. E. 560 [*affirming* 91 Ill. App. 373]; Goodman *v.* Kopperl, 169 Ill. 136, 48 N. E. 172 [*affirming* 67 Ill. App. 42]; Duval *v.* Duval, 153 Ill. 49, 38 N. E. 944 [*affirming* 49 Ill. App. 469]; Shepard *v.* Speer, 140 Ill. 238, 29 N. E. 718 [*affirming* 41 Ill. App. 211]; Harding *v.* Shepard, 107 Ill. 264; Cowdrey *v.* Hitchcock, 103 Ill. 262; Heustis *v.* Johnson, 84 Ill. 61; Blanchard *v.* Williamson, 70 Ill. 647; Freeland *v.* Dazey, 25 Ill. 294; Bromwell *v.* Schu-

(v) *Practical Effects Summarized.* By reason of the establishment of these probate courts and in some instances the enlargement of the common-law jurisdiction, either by statute or judicial construction, full, adequate, and complete

bert, 54 Ill. App. 674; Wood *v.* Johnson, 13 Ill. App. 548. The court of chancery will have jurisdiction of a bill charging a conspiracy between the administrator and two other defendants to defraud the legal heirs of a sum alleged to be due from the two defendants to the estate, and alleging that complainants were in ignorance thereof until after the settlement of the estate involved. Seymour *v.* Edwards, 31 Ill. App. 50. Where it appears, in an action by judgment creditors of a person deceased to subject land of which he died seized to payment of the debts, upon a full consideration of a complicated series of transactions, that there is still an outstanding unpaid balance due on such judgment, equity will grant the relief prayed. De Clerq *v.* Jackson, 103 Ill. 653. Heirs seeking to recover property from persons claiming title, and to subject it to a trust in their favor, may do so appropriately by a proceeding in equity for partition. Breit *v.* Yeaton, 101 Ill. 242.

Maryland.— The early decisions placed Maryland in the first group. Fenby *v.* Johnson, 21 Md. 106; Barnes *v.* Crain, 8 Gill 391; Hays *v.* Miles, 9 Gill & J. 193, 31 Am. Dec. 70; Conway *v.* Green, 1 Harr. & J. 151. Nevertheless the later decisions establish the rule that the chancery court will not take jurisdiction of the administration of a decedent's estate, unless there be some special circumstances which prevent the powers of the probate court from being altogether adequate to afford complete protection and relief, as the latter court is the one organized for the purpose of administering estates. Baltimore Safe-Deposit, etc., Co. *v.* Baker, 91 Md. 297, 46 Atl. 1071; Macgill *v.* Hyatt, 80 Md. 253, 30 Atl. 710; Alexander *v.* Leakin, 72 Md. 199, 19 Atl. 532; Alexander *v.* Stewart, 8 Gill & J. 226; Hewitt's Case, 3 Bland 184.

Missouri.— Caldwell *v.* Hawkins, 73 Mo. 450; Pearce *v.* Calhoun, 59 Mo. 271; Mayberry *v.* McClurg, 51 Mo. 256; Cones *v.* Ward, 47 Mo. 289; Dodson *v.* Scroggs, 47 Mo. 285; Miller *v.* Woodward, 8 Mo. 169; Bauer *v.* Gray, 18 Mo. App. 173. But it is well settled that the probate judge possesses none of the powers of a chancellor, unless the right or jurisdiction is expressly conferred by statute, or is necessarily incident to the proper exercise of duties imposed. Butler *v.* Lawson, 72 Mo. 227; First Baptist Church *v.* Robberson, 71 Mo. 326; U. S. Presbyterian Church *v.* McElhinney, 61 Mo. 540; Ford *v.* Talmage, 36 Mo. App. 65. Where the personal assets are insufficient to pay the debts, and there is land belonging to the estate in possession of the heirs, and within the jurisdiction of the probate court, an adequate remedy at law is afforded by Rev. St. § 146, providing that land of the decedent may be subjected to sale to pay debts; and equity cannot grant the administrator relief by a bill for an accounting against the heirs for sums received from him, and for the rents and profits of the land. Priest *v.* Spier, 96 Mo. 111, 9 S. W. 12.

Nevada.— Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376; Corbett *v.* Rice, 2 Nev. 330.

New York.— Some of the early decisions placed New York in the first group. Christy *v.* Libby, 5 Abb. Pr. N. S. 192, 35 How. Pr. 119; Decouche *v.* Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478. The later decisions state the rule to be that the chancery court in the exercise of its discretion will decline to take jurisdiction unless special facts and circumstances are alleged showing that the case is one requiring relief of such a nature that the probate court is not competent to grant it, or some reason is assigned or facts stated, to show that complete justice cannot be done in that court. Sanders *v.* Soutter, 126 N. Y. 193, 27 N. E. 263; Hard *v.* Ashley, 117 N. Y. 606, 23 N. E. 177; Wager *v.* Wager, 89 N. Y. 161; Haddow *v.* Lundy, 59 N. Y. 320; Borrowe *v.* Corbin, 31 N. Y. App. Div. 172, 52 N. Y. Suppl. 741 [*affirmed* in 165 N. Y. 634, 59 N. E. 1119]; Strong *v.* Harris, 84 Hun 314, 32 N. Y. Suppl. 349; Blake *v.* Barnes, 18 N. Y. Suppl. 471, 28 Abb. N. Cas. 401; Whitney *v.* Monro, 4 Edw. 5. Although the courts often use the word "concurrent" to characterize the chancery jurisdiction, and seldom in express terms deny jurisdiction, but rather decline to exercise it, nevertheless the practical effect of the decisions just cited is undoubtedly to place New York in the third group, and in the leading case of Chipman *v.* Montgomery, 63 N. Y. 221, the court distinctly says that the chancery jurisdiction "should be regarded rather as auxiliary than concurrent." An action in equity to have a legacy declared to be a charge upon testator's real estate is not a suitable and appropriate proceeding for ascertaining who are creditors and the amount of their claims, or to close up the estate, without administration or a resort to the procedure prescribed by statute for the proof of debts and their payment, etc., the court saying that "a court of equity is not the tribunal appointed by law to administer upon the estates of deceased persons." Hogan *v.* Kavanaugh, 138 N. Y. 417, 423, 34 N. E. 292. Attention must be called, however, to a comparatively recent decision, holding that the surrogate's court and the supreme court have equal jurisdiction of an action requiring executors of personalty to account, and that the latter court cannot lawfully refuse to take or retain jurisdiction of such an action unless there is interposed in bar thereof a plea that a proceeding is pending in the former court involving the same subject-matter. Ludwig *v.* Bungart, 48 N. Y. App. Div. 613, 63 N. Y. Suppl. 91. Later cases have followed this decision. Steinway *v.* Von Bernuth, 59 N. Y. App. Div. 261, 69

relief in matters relative to the recovery of legacies, distributive shares, and debts [91] can ordinarily be had in the probate or common-law courts, and a resort to equity for these purposes is in this country rarely necessary or even possible,[92] except in the first group of states. In those states, however, the chancery courts theoretically at least retain the full original equity jurisdiction, and although even in those jurisdictions as a practical matter resort is ordinarily had to the probate or common-law courts, nevertheless instances of appeals to equity may still occasionally be found.[93]

c. Effect of Existence or Absence of Legal Remedy. The principles relative

N. Y. Suppl. 1146, 82 N. Y. App. Div. 596, 81 N. Y. Suppl. 883; Haughian *v.* Conlon, 39 Misc. 584, 80 N. Y. Suppl. 586; Meeks *v.* Meeks, 34 Misc. 465, 69 N. Y. Suppl. 737.

Ohio.— Early decisions recognized at least a limited concurrent jurisdiction of equity with the probate court. Taylor *v.* Huber, 13 Ohio St. 288; Stiver *v.* Stiver, 8 Ohio 217; Cram *v.* Green, 6 Ohio 429. The later decisions and statutes, however, seem to have the effect of placing Ohio in the third group. Cadiz First Nat. Bank *v.* Beebe, 62 Ohio St. 41, 56 N. E. 485; McDonald *v.* Aten, 1 Ohio St. 293; Guiou *v.* Guiou, 5 Ohio Dec. (Reprint) 205, 3 Am. L. Rec. 475; Rote *v.* Stratton, 3 Ohio S. & C. Pl. Dec. 156, 2 Ohio N. P. 27.

Texas.— The early cases showed a willingness on the part of the chancery court to assume quite a broad jurisdiction over the estates of decedents, although it was usually sustained on the ground that on account of some equitable right of the party the powers of the probate court were inadequate to grant full relief. Smith *v.* Smith, 11 Tex. 102; Newson *v.* Chrisman, 9 Tex. 113; Hall *v.* McCormick, 7 Tex. 269; Long *v.* Wortham, 4 Tex. 381; Chevallier *v.* Wilson, 1 Tex. 161. But the tendency of the later decisions has been to throw the state into the third group. Rogers *v.* Kennard, 54 Tex. 30; Cannon *v.* McDaniel, 46 Tex. 303; Atchison *v.* Smith, 25 Tex. 228; Giddings *v.* Crosby, 24 Tex. 295.

Utah.— Matter of Moulton, 9 Utah 159, 33 Pac. 694.

Vermont.— Bethel School Dist. No. 3 *v.* Sheldon, 71 Vt. 95, 41 Atl. 1041; Protestant Episcopal Church Domestic, etc., Missionary Soc. *v.* Eells, 68 Vt. 497, 35 Atl. 463, 54 Am. St. Rep. 888; Davis *v.* Eastman, 66 Vt. 651, 30 Atl. 1; Blair *v.* Johnson, 64 Vt. 598, 24 Atl. 764; Adams *v.* Adams, 22 Vt. 50; Morse *v.* Slason, 13 Vt. 296.

Wisconsin.— Gianella *v.* Bigelow, 96 Wis. 185, 71 N. W. 111; Meyer *v.* Garthwaite, 92 Wis. 571, 66 N. W. 704; Hawley *v.* Tesch, 72 Wis. 299, 39 N. W. 483. A creditor of a foreign testator who owned land in Wisconsin cannot sue in equity to compel the executor to prove the will in that state, since the creditor has the same right as the executor to produce an authenticated copy of the will and its probate in the foreign state, and to procure its allowance by the county court of the county in which testator's lands are situated. Wells *v.* Walsh, 87 Wis. 67, 57 N. W. 969.

91. For actions for legacies and for administration suits in general and proceedings for accounting and settlement see EXECUTORS AND ADMINISTRATORS.

92. Thus, in Wilkins *v.* Finch, 62 N. C. 355, 356, a demurrer was sustained to a bill by a single creditor against an administrator to enforce the payment of a debt of the deceased. The court said: "Such a jurisdiction is exercised in the court of Equity in England, but we see from the books that it is rarely resorted to. It is put on the ground of 'discovery and account,' and the doctrine that when the court has got hold of the case, it will go on and give relief and not send the parties to a court of law. This doctrine is very questionable and unsatisfactory, and there are many grave objections even in England to the exercise of the jurisdiction. . . Besides these objections to entertaining jurisdiction in this State, we have this additional consideration. There is a statute which empowers the courts of law to require the production of books and papers, and another statute which makes parties to actions at law competent and compellable to give evidence; so one of the grounds on which the jurisdiction in equity is based, to wit discovery, is entirely taken away by legislation in this State. Again, there is a statute which in most cases empowers the courts of law, in suits against executors, administrators, guardians, etc., where the matters pleaded may make it necessary that an account shall be taken," to provide for the taking of such account. "So the other ground on which the jurisdiction in equity is based, to wit 'account,' is almost entirely taken away by legislation in this State. . . . We feel well warranted . . . in holding that this jurisdiction of equity at the suit of a single creditor, has never obtained in this State, and will not now be entertained." See also Bernheimer *v.* Calhoun, 44 Miss. 426. The same general considerations have taken away this branch of equity jurisdiction in the other states in the second and third groups. Even in these states, however, in a case where some purely equitable ground for taking jurisdiction exists, as for instance where a legacy is a charge upon property, chancery is the proper forum in which to enforce the lien. Smith *v.* Jackman, 115 Mich. 192, 73 N. W. 228.

93. Bragg *v.* Beers, 71 Ala. 151; James *v.* Faulk, 54 Ala. 184; Pearson *v.* Darrington, 18 Ala. 348; Houston *v.* Levy, 44 N. J. Eq. 6, 13 Atl. 671; Coddington *v.* Bispham, 36 N. J. Eq. 574; Salter *v.* Williamson, 2 N. J. Eq. 480, 35 Am. Dec. 513; Brendel *v.* Church, 82 Fed. 262.

to the effect of the existence or absence of a legal remedy[94] apply as well to the jurisdiction of equity over administrations as to its jurisdiction over other matters of general equitable cognizance. While in administration matters a resort to equity may be justified on the ground of the lack of a remedy at law,[95] the mere fact that the subject of the suit involves the estate of a deceased person will not justify the interference of equity when a legal remedy exists.[96]

d. Matters of Exclusive Probate Jurisdiction. While the original jurisdiction of equity over the administration of estates, where uninterfered with, has always been very extensive, nevertheless there are some matters which have always fallen within the exclusive jurisdiction of the common-law or ecclesiastical (probate) courts. Thus a court of equity in the absence of statute has no jurisdiction to admit a will to probate; nor can it avoid a will or set aside the probate thereof even on the ground of fraud, mistake, or forgery.[97] Such jurisdiction is vested exclusively in the probate courts.[98] In this country in the absence of statute a court of equity has now no power, probably in any jurisdiction, to entertain a suit brought to establish a will,[99] other than lost, spoliated, or destroyed wills.[1] In England, however, a mere legal devisee in possession could maintain a suit to establish the will against the heirs, although no trusts were declared by the will, and although it was not necessary to administer the estate under the direction or decree of a court of equity,[2] and he could maintain a similar suit against those claiming under another will of the same testator.[3] Such suits are in the nature of bills to quiet title.[4] In the absence of statute equity has never had jurisdiction to appoint executors or administrators or their successors,[5] and a creditor, legatee, or distributee must if such course be open to him apply to the probate court for the appointment of an executor or administrator, and cannot resort to chancery in the first instance.[6]

94. See *supra*, II, A.

95. *Alabama.*— Little *v.* Knox, 96 Ala. 179, 11 So. 443; Griffin *v.* Pringle, 56 Ala. 486; Garrett *v.* Lynch, 45 Ala. 204.

Florida.— Benedict *v.* Wilmarth, (1903) 35 So. 84.

Georgia.— Bond *v.* Watson, 22 Ga. 637.

Illinois.— Doane *v.* Walker, 101 Ill. 628; Russell *v.* Madden, 95 Ill. 485; People *v.* Lott, 27 Ill. 215.

Iowa.— Burroughs *v.* McLain, 37 Iowa 189.

Minnesota.— Peterson *v.* Vanderburgh, 77 Minn. 218, 79 N. W. 828, 77 Am. St. Rep. 671.

New Hampshire.— Thomson *v.* Smith, 64 N. H. 412, 13 Atl. 639.

New York.— Onondaga Trust, etc., Co. *v.* Pratt, 25 Hun 23. See also Pfister *v.* Writer, 33 Misc. 701, 68 N. Y. Suppl. 976.

South Carolina.— Moore *v.* Caldwell, 8 Rich. Eq. 22.

See 19 Cent. Dig. tit. "Equity," §§ 51–62.

96. *Alabama.*— Seals *v.* Weldon, 121 Ala. 319, 25 So. 1021; Bell *v.* Bell, 36 Ala. 195. *Compare* Williams *v.* Maull, 20 Ala. 721.

Maine.— Boynton *v.* Ingalls, 70 Me. 461.

Mississippi.— Bernheimer *v.* Calhoun, 44 Miss. 426.

New Jersey.— Decker *v.* Decker, 27 N. J. Eq. 239.

New York.— Boughton *v.* Flint, 74 N. Y. 476; *In re* Stumpf, 4 N. Y. App. Div. 282, 39 N. Y. Suppl. 469.

North Carolina.—Wilkins *v.* Finch, 62 N. C. 355; Lyon *v.* Lyon, 43 N. C. 201; Jones *v.* Jones, 5 N. C. 96.

Ohio.— Mawhorter *v.* Armstrong, 16 Ohio 188.

Rhode Island.— Gavitt *v.* Berry, 23 R. I. 14, 49 Atl. 99.

South Carolina.— McCullough *v.* Daniel, Harp. Eq. 255.

See 19 Cent. Dig. tit. "Equity," § 51 *et seq.*

97. See WILLS.

98. Simmons *v.* Saul, 138 U. S. 439, 11 S. Ct. 369, 34 L. ed. 1054; Kieley *v.* McGlynn, 21 Wall. (U. S.) 503, 22 L. ed. 599; Allen *v.* McPherson, 1 H. L. Cas. 191, 11 Jur. 785, 9 Eng. Reprint 727. And see, generally, WILLS.

99. Anderson *v.* Anderson, 112 N. Y. 104, 19 N. E. 427, 2 L. R. A. 175. See also WILLS.

1. For the establishment of such wills see WILLS.

2. Colclough *v.* Boyse, 6 H. L. Cas. 1, 10 Eng. Reprint 1192 [*affirming* 3 De G. M. & G. 817, Kay 71, 52 Eng. Ch. 636, 43 Eng. Reprint 321].

3. Lovett *v.* Lovett, 3 Kay & J. 1, 2 Jur. N. S. 1130, 5 Wkly. Rep. 5.

4. For the ground of this jurisdiction and its present status see Smith Princ. Eq. (3d ed.) 810.

5. See Campbell *v.* Charleston Bank, 3 S. C. 384. In Tennessee by statute the chancery court has been given certain powers in this regard, concurrently with the probate court. Tenn. Code (1884), §§ 3050–3060, 5047.

6. Flash *v.* Gresham, 36 Ark. 529; Cochran *v.* Cochran, 2 Del. Ch. 17; Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599 [*reversing* 73 Ill. App. 203]; Goodman *v.* Kopperl, 169 Ill.

e. Equitable Aid to Trustees, Including Executors and Administrators. The existence of express trusts involving the estates of deceased persons, or the constructive trust relationship which equity has always deemed to exist between the personal representatives of an estate and those interested in it, still renders proper and occasionally necessary an application to equity, sometimes in matters of accounting and settlement,[7] and sometimes for the construction of wills, and for the direction of the executor and administrator.[8] In all cases of express trusts the trustee has always if in doubt the right to apply to the chancery court for a construction of the terms of the trust instrument, and to receive from the court aid and advice as to the proper manner of performing the duties incumbent upon him as trustee, and this rule is not varied because the trustee happens to be an executor and the trust instrument a will.[9] But in a case where there is no express trust, an executor or administrator will receive the aid and advice of the court only when the affairs of his testator or intestate are so much involved that he cannot safely administer the estate except under the direction of a court of equity.[10]

7. Equitable Relief as a Ground of Jurisdiction — a. In General. With reference to the subjects of the preceding sections,[11] the jurisdiction of equity is largely dependent upon or ascribed to the attitude of equity toward the substantive rights involved, although in dealing with such rights equity applies its own peculiar forms and remedies.[12] In very many cases, however, the jurisdiction depends chiefly or altogether upon the inadequacy of the relief obtainable at law, and the consequent necessity of invoking the more direct and specific remedies afforded by equity for the protection of rights in themselves sufficiently recognized at law.[13] For example the jurisdiction to compel specific performance can be invoked only to carry out the terms of a valid legal contract,[14] unless defendant has estopped

136, 48 N. E. 172 [*affirming* 67 Ill. App. 42]; Aldrich *v.* Annin, 54 Mich. 230, 19 N. W. 964. Some decisions, however, recognize the right of a creditor, legatee, or distributee, to resort to equity in the absence of an executor or administrator. Shannon *v.* Dillon, 8 B. Mon. (Ky.) 389, 48 Am. Dec. 394; Hefferman *v.* Forward, 6 B. Mon. (Ky.) 567; Wood *v.* Ford, 29 Miss. 57; Farve *v.* Graves, 4 Sm. & M. (Miss.) 707. See Slatter *v.* Carroll, 2 Sandf. Ch. (N. Y.) 573; and, generally, EXECUTORS AND ADMINISTRATORS.

7. See EXECUTORS AND ADMINISTRATORS.

8. See WILLS.

9. *Alabama.*— Jordan *v.* Hardie, 131 Ala. 72, 31 So. 504; Cowles *v.* Pollard, 51 Ala. 445.

Illinois.— Bridges *v.* Rice, 99 Ill. 414; Whitman *v.* Fisher, 74 Ill. 147.

Maryland.— Woods *v.* Fuller, 61 Md. 457.

New Hampshire.—*In re* Baptist Church, 51 N. H. 424.

West Virginia.— Pendleton *v.* Bower, 49 W. Va. 146, 38 S. E. 487.

See 19 Cent. Dig. tit. "Equity," § 53. See also WILLS.

10. McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320; Bryan *v.* Hickson, 40 Ga. 405; Adams *v.* Dixon, 19 Ga. 513, 65 Am. Dec. 608; Sanford *v.* Thompson, 18 Ga. 554; Thomson *v.* Palmer, 2 Rich. Eq. (S. C.) 32. See also Clay *v.* Gurley, 62 Ala. 14; Weakley *v.* Gurley, 60 Ala. 399; Muldoon *v.* Muldoon, 133 Mass. 111.

11. See the several subsections under II, B, *supra*.

12. For the nature of such rights and remedies see the specific subjects.

13. See *supra*, II, A, 6, c.

14. *Alabama.*— Bogan *v.* Camp, 30 Ala. 276.

California.— Martin *v.* Zellerbach, 38 Cal. 300, 49 Am. Dec. 365.

Delaware.— Ross *v.* Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86.

Kentucky.— Haly *v.* Frankfort Bldg., etc., Assoc., 4 Ky. L. Rep. 362.

Maryland.— Selby *v.* Case, 87 Md. 459, 39 Atl. 1041.

New York.— Minturn *v.* Seymour, 4 Johns. Ch. 497.

Pennsylvania.— Corbet *v.* Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80.

Virginia.— Stevenson *v.* Singleton, 1 Leigh 72.

See 19 Cent. Dig. tit. "Equity," § 67. And see, generally, SPECIFIC PERFORMANCE.

Exception in favor of partly performed contracts not complying with the statute of frauds may be traced to the jurisdiction of equity to relieve against fraud. Jervis *v.* Smith, 1 Hoffm. (N. Y.) 470; Cooper *v.* Cooper, 8 Ohio S. & C. Pl. Dec. 35, 6 Ohio N. P. 99.

Equitable defense.— An agreement may create such equities as to afford a defense to one claiming thereunder, whereas because of its legal insufficiency he could not have the aid of equity to enforce it affirmatively. Howard *v.* Currant, 9 B. Mon. (Ky.) 493; Woollam *v.* Hearn, 7 Ves. Jr. 211, 32 Eng. Reprint 86.

himself from denying plaintiff's right,[15] and not to change or add to its terms for the purpose of making a more equitable adjustment.[16] The remedy is granted when a judgment at law would be inadequate relief even where the contract relates to personal property,[17] and is denied where such legal remedy is adequate.[18] In like manner the jurisdiction of equity may be invoked in appropriate cases solely to procure the cancellation, surrender, or reformation of instruments,[19] the rescission of contracts,[20] or preventive relief by way of injunction.[21]

b. Preventive Relief, Quia Timet. A class of cases requiring special mention, where the jurisdiction depends chiefly or altogether upon the necessity for relief obtainable only in equity, is that of bills whose object it is to prevent anticipated mischiefs which could not after their occurrence be adequately redressed. Such bills are known by the generic term of "bills *quia timet*."[22] While equity will not interfere for the purpose of declaring rights to prevent a possible controversy which has not yet arisen,[23] or where no actual danger to plaintiff's rights is shown,[24] it will interfere to protect the subject-matter of a controversy where there is actual danger that it may be so dealt with as to prejudice plaintiff's rights.[25] Instances of the preventive jurisdiction are found in the protection afforded to those holding remainders and other rights *in futuro* against loss or injury at the hands of one in possession,[26] and to sureties whose rights are in

15. South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973.

16. Tucker *v.* Clark, 2 Sandf. Ch. (N. Y.) 96; Trevino *v.* Cantu, 61 Tex. 88. But equity may ascertain the terms of the contract, as by appointing commissioners to determine what land should be conveyed thereunder. Lynch *v.* Johnson, 2 Litt. (Ky.) 98.

17. *Illinois.*— Davenport *v.* Piano Implement Co., 70 Ill. App. 161.

Maine.— Draper *v.* Stone, 71 Me. 175.

Maryland.—Sullivan *v.* Tuck, 1 Md. Ch. 59.

Massachusetts.— Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733.

Pennsylvania.— Brown *v.* Alloy Smelting Co., 31 Pittsb. Leg. J. N. S. 265.

18. Canal Com'rs *v.* Chicago Sanitary Dist., 191 Ill. 326, 61 N. E. 71; Curtis *v.* Blair, 26 Miss. 309, 59 Am. Dec. 257; Madison Athletic Assoc. *v.* Brittin, 60 N. J. Eq. 160, 46 Atl. 652; Meehan *v.* Owens, 196 Pa. St. 69, 46 Atl. 263. And see, generally, SPECIFIC PERFORMANCE.

19. See CANCELLATION OF INSTRUMENTS, 6 Cyc. 286; REFORMATION OF INSTRUMENTS.

20. See CANCELLATION OF INSTRUMENTS, 6 Cyc. 286; CONTRACTS, 9 Cyc. 406, 407, 433.

21. See INJUNCTIONS.

22. 2 Story Eq. Jur. § 826.

23. Smith *v.* Birmingham Water-Works Co., 104 Ala. 315, 16 So. 123; Lake View Min., etc., Co. *v.* Hannon, 93 Ala. 87, 9 So. 539; Florence Sewing-Mach. Co. *v.* Singer Mfg. Co., 9 Fed. Cas. No. 4,884, 8 Blatchf. 113. See, however, where there were special circumstances of danger, Kennedy *v.* Babcock, 19 Misc. (N. Y.) 87, 43 N. Y. Suppl. 832; Southern R. Co. *v.* North Carolina R. Co., 81 Fed. 595.

24. Wood *v.* Asher Lumber Co., 39 S. W. 702, 19 Ky. L. Rep. 235; Saratoga County *v.* Deyoe, 15 Hun (N. Y.) 526; Randolph *v.* Kinney, 3 Rand. (Va.) 394. A bill *quia timet* will not be entertained where the threatened danger can be averted by pursuit of a statutory remedy (Buchanan *v.* Noel, 12 Phila. (Pa.) 431), or where plaintiff does not allege his purpose to perfect his legal right which would furnish protection if perfect (Watson *v.* Bothwell, 11 Ala. 650).

25. Twin City Power Co. *v.* Barrett, 126 Fed. 302, 61 C. C. A. 288 [*affirming* 118 Fed. 861]. As to prevent the sale of the property in controversy (Field *v.* Ashley, 79 Mich. 231, 44 N. W. 602; Baird *v.* Goodrich, 5 Heisk. (Tenn.) 20), or its removal from the state (Redd *v.* Wood, 2 Ga. Dec. 174, Pt. II); but not merely to impound the property of a defendant in order to hold it for the satisfaction of a personal judgment, even in the absence of a remedy by attachment (Union Bank *v.* Newman, 4 Humphr. (Tenn.) 330. See, however, Moore *v.* Kidder, 55 N. H. 488). Equity will, however, interfere to preserve specific property which is in dispute in a court of law. Schmidt *v.* Dietericht, 1 Edw. (N. Y.) 119.

26. *Alabama.*— Ramey *v.* Green, 18 Ala. 771; James *v.* Scott, 9 Ala. 579; Lewis *v.* Hudson, 6 Ala. 463.

Connecticut.— Terry *v.* Allen, 60 Conn. 530, 23 Atl. 150.

Georgia.— Collins *v.* Barksdale, 23 Ga. 602.

Illinois.— Gavin *v.* Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776.

Kentucky.— Bowling *v.* Bowling, 6 B. Mon. 31.

New York.— Champlin *v.* Champlin, 4 Edw. 228.

Tennessee.— Bonner *v.* Bonner, 7 Humphr. 436.

England.— Gifford *v.* Hart, 1 Sch. & Lef. 386; Rous *v.* Noble, 2 Vern. 249, 23 Eng. Reprint 761.

See 19 Cent. Dig. tit. "Equity," § 45. And see, generally, REMAINDERS.

Exacting security.— In the case of future interests in personal property the court may require security from the present possessor (Rous *v.* Noble, 2 Vern. 249, 23 Eng. Re-

danger from the creditor's delay in proceeding against the principal.[27] Bills against trustees, executors, and administrators to prevent diversion or waste of the property in their hands are also treated as bills *quia timet*,[28] but the jurisdiction in such cases rests rather upon the equitable character of plaintiff's interest than upon the relief demanded.[29] While interpleader is usually treated as a distinct subject of jurisdiction,[30] a bill of interpleader is essentially a bill *quia timet*, to prevent the danger of a double liability for the same demand.[31] The necessity for an injunction or a receiver to protect the subject-matter from threatened injury may be the ground of appealing to equity, and to that extent bills with these objects may properly be traced to the *quia timet* jurisdiction.[32] Bills to perpetuate testimony are clearly of this class.[33]

8. Equitable Procedure as a Ground of Jurisdiction — a. Introductory Statement. While it is never easy to establish the origin of any branch of equity jurisdiction with precision,[34] the task is especially difficult where a resort to equity seems to have resulted from the obstacles presented by legal procedure, and from the greater convenience and adaptability of equitable forms.[35] The following subjects seem to be within this class, and the right to discovery in equity to be in most cases at the foundation of the jurisdiction.

b. Accounts. Aside from the numerous cases where an accounting may be had in equity in the exercise of jurisdiction acquired on other grounds, chiefly the enforcement of fiduciary rights, a jurisdiction is exercised for the purpose of an accounting alone, without other ground than the necessity of discovery or the greater convenience of equitable procedure in such matters.[36]

c. Partnership Affairs. The practically exclusive jurisdiction of equity in the adjustment of affairs among partners[37] has been traced in part to the advantages of the equitable remedies of specific performance, injunction, and receivership, but is largely due to the necessity of discovery and the superior facility of procedure in equity for the adjustment of accounts.[38] This jurisdiction the courts are not disposed to extend by analogy beyond the affairs of true existing partnerships.[39]

d. Adjustment — (i) *In General.* To the superior facilities of equity in matters requiring an accounting,[40] as well as to the practicability in equity of bringing in all parties interested and obtaining a complete adjudication of all rights in one proceeding,[41] may be traced the jurisdiction over certain subjects involving the preliminary taking of an account and the distribution of rights and liabilities among several. This jurisdiction may for convenience be termed that of adjustment.[42]

print 761), or payment into court (Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089); but will not direct delivery to the remainder-man on his giving security to the person entitled to present enjoyment. Harrison *v.* Belden, 26 Conn. 67.

27. See Principal and Surety.

28. 2 Story Eq. Jur. §§ 827, 828.

29. See Executors and Administrators; Trusts.

30. See 3 Pomeroy Eq. Jur. § 1319; 2 Story Eq. Jur. § 807.

31. See Interpleader.

32. See Injunctions; Receivers.

33. See Depositions, 13 Cyc. 854.

34. 1 Fonblanque Eq. bk. 1, c. 1, § 3 note; 1 Story Eq. Jur. § 646.

35. See *supra*, II, A, 6, d.

36. See Accounts and Accounting, 1 Cyc. 416 *et seq.*

37. See Partnership.

38. Smith Princ. Eq. (3d ed.) 610; 1 Story Eq. Jur. § 659 *et seq.*

39. The remedy for breaches of agreement for future partnerships is at law (Thomason *v.* De Greayer, (Cal. 1892) 31 Pac. 567; Powell *v.* Maguire, 43 Cal. 11; Lane *v.* Roche, Riley Eq. (S. C.) 215), as is also the remedy on a contract made upon dissolution for the settlement of the partnership's affairs (Brown *v.* Burnum, 99 Ala. 114, 12 So. 606; Clark *v.* Clark, 4 Port. (Ala.) 9; Kellogg *v.* Moore, 97 Ill. 282. See also Pitkin *v.* Pitkin, 7 Conn. 207, 18 Am. Dec. 111). Where the action is in effect one for damages, not involving the partnership affairs, equity has no jurisdiction. Werden *v.* Graham, 107 Ill. 169; Maude *v.* Rodes, 4 Dana (Ky.) 144; Aldrich *v.* Lewis, 60 Miss. 229. But a member of an association may sue on a contract made with the association, as he could not sue it at law. Price *v.* Spencer, 9 Phila. (Pa.) 281.

40. See Accounts and Accounting, 1 Cyc. 416 *et seq.*; and *supra*, II, B, 8, b.

41. See *supra*, II, A, 4, f; *infra*, II, C.

42. The term is one of convenience rather than of accurate description, but its use is not without precedent. Bispham Eq. § 326.

(II) *Distribution of Funds.* Where a specific fund or property is appropriated to or charged with the payment of various claims, so that it must be administered for the benefit of all, equity has jurisdiction to take an account of the claims and distribute the fund or proceeds of the property among the several claimants.[43] This jurisdiction may in most cases be supported also upon the theory of administering a trust.[44] Such a suit may sometimes be maintained by a single claimant on his own behalf,[45] but only where the charge upon the property is in the nature of a trust.[46]

(III) *Set-Off.* The jurisdiction is well established to compel the balancing or setting off of reciprocal demands which ought to go one in satisfaction of the other,[47] but this is not and never was allowed merely because of the existence of reciprocal demands.[48] To authorize it some special equity must be shown;[49] and

43. *Alabama.*— Dimmick *v.* Register, 92 Ala. 458, 9 So. 79.

Georgia.— Macon Exch. Bank *v.* H. B. Claflin Co., 100 Ga. 640, 28 S. E. 439.

Illinois.— Queenan *v.* Palmer, 117 Ill. 619, 7 N. E. 470, 613; Soldiers' Orphans' Home *v.* Lyon, 42 Ill. App. 615.

Mississippi.—Gay *v.* Edwards, 30 Miss. 218.

New York.— Deering *v.* Schreyer, 171 N. Y. 451, 64 N. E. 179 [*modifying* 58 N. Y. App. Div. 322, 68 N. Y. Suppl. 1015]; Bauer *v.* Platt, 72 Hun 326, 25 N. Y. Suppl. 426.

Pennsylvania.— Dauler *v.* Hartley, 178 Pa. St. 23, 35 Atl. 857; Goodrich *v.* Odenheimer, 2 Phila. 63.

United States.— Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868 [*affirming* 8 Fed. Cas. No. 4,138, 3 Woods 567].

See 19 Cent. Dig. tit. "Equity," §§ 43, 44.

Between a life-tenant and a remainder-man, according to their interests in the land, equity will distribute the proceeds of a sale which they have united in making. Thompson *v.* Thompson, 107 Ala. 163, 18 So. 247; Foster *v.* Hilliard, 9 Fed. Cas. No. 4,972, 1 Story 77.

Holders of municipal bonds, where the issue is in excess of the constitutional limit, may maintain a suit to apportion such amount as is valid among them. Everett *v.* Rock Rapids Independent School Dist., 102 Fed. 529; Ætna L. Ins. Co. *v.* Lyon County, 95 Fed. 325, 82 Fed. 929.

Creditor and surety.— Where a mortgage was given both to secure a debt and to indemnify a surety for the same debt, and the surety took the land on foreclosure, a suit in equity was held proper to adjust the interests of creditor and surety. Root *v.* Bancroft, 10 Metc. (Mass.) 44.

Defeat of one of several claimants.— In a suit for the distribution of a fund among many claimants, if a single claimant successfully contests the validity of another's claim, such opposition inures to the benefit of all, unless others expressly waive objections thereto, and then such waiver admits the contested claim only to the extent of the proportion which the waiving claimants would have received if such claim were excluded. Duncan *v.* Mobile, etc., R. Co., 8 Fed. Cas. No. 4,138, 3 Woods 567 [*affirmed* in 96 U. S. 659, 24 L. ed. 868].

44. See Assignments For Benefit of Creditors, 4 Cyc. 259 *et seq.* 266; Corporations, 10 Cyc. 1305; Trusts.

45. One furnishing material for a contractor for a city improvement may sue in equity to subject to the payment of his claim a fund retained by the city to secure payment for materials, although he has the protection of a bond. Thorn, etc., Lime, etc., Co. *v.* Citizens' Bank, 158 Mo. 272, 59 S. W. 109. A holder of municipal bonds may maintain a suit to charge upon certain towns the payment of the bonds where the town issuing them had been abolished and defendant towns created out of the territory. Beckwith *v.* Racine, 100 U. S. 514, 25 L. ed. 699 [*affirming* 3 Fed. Cas. No. 1,213, 7 Biss. 142]. The grantor of land who took it charged with the payment of legacies may sue in equity to compel his grantee to perform his agreement to pay the legacies as a part of the purchase-price. Bird *v.* Stout, 40 W. Va. 43, 20 S. E. 852.

46. Marsh *v.* Kaye, 168 N. Y. 196, 61 N. E. 177 [*affirming* 44 N. Y. App. Div. 68, 60 N. Y. Suppl. 439]; Chase *v.* Vanderbilt, 37 N. Y. Super. Ct. 334; Neff *v.* Baker, 82 Va. 401, 4 S. E. 620; Farmers' L. & T. Co. *v.* Penn Plate-Glass Co., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710.

47. See Set-Off and Counter-Claim.

48. *Kentucky.*— Talbot *v.* Banks, 2 J. J. Marsh. 548; Hunt *v.* Martin, 2 Litt. 82; Bradley *v.* Morgan, 2 A. K. Marsh. 369; Pennebaker *v.* Wathan, 2 A. K. Marsh. 315.

Michigan.— Hendricks *v.* Toole, 29 Mich. 340.

New Jersey.— Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506 [*modifying* 61 N. J. Eq. 508, 48 Atl. 822].

New York.— Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350 [*affirming* 6 N. Y. St. 250 (*affirming* 3 N. Y. St. 272)]; Tone *v.* Brace, Clarke 503 [*affirmed* in 11 Paige 566].

North Carolina.— Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889.

United States.— Gordon *v.* Lewis, 10 Fed. Cas. No. 5,613, 2 Sumn. 143.

See 19 Cent. Dig. tit. "Equity," § 133.

49. Such as insolvency of the adverse party rendering the claim against him uncollectable at law (Hahn *v.* Gates, 102 Ill. App. 385; Hunt *v.* Martin, 2 Litt. (Ky.) 82; Field *v.* Oliver, 43 Mo. 200; Mitchell *v.* Holman, 30 Oreg. 280, 47 Pac. 616; Cohen *v.* Whitman,

moreover jurisdiction will be declined where the party had or has an adequate remedy at law in the premises.[50]

(iv) *Other Cases of Adjustment.* Other cases where the jurisdiction is in part traceable to the superior facilities of the procedure in equity for the adjustment of complicated rights, but in part doubtless to the peculiar view taken by equity toward the rights themselves, are cases to compel contribution by all liable, where one has discharged the liability,[51] to compel indemnity, or as it is more frequently called exoneration, from one primarily liable to one secondarily liable, who has paid the debt,[52] and suits to accomplish subrogation[53] or marshaling.[54]

e. Partition. The jurisdiction of equity to partition land,[55] while concurrent with that of law,[56] is based upon the difficulties and obstacles presented by the legal proceeding.[57] In equity partition will be made in accordance with the equitable interests of the parties.[58] Partition of personal property will be granted in the rare cases where plaintiff is without remedy at law to protect his interests therein.[59]

f. Dower. While dower is a strict legal right, equity has long exercised a jurisdiction concurrent with law for its assignment,[60] based upon the necessity of discovery, and the obstacles presented in pursuing a writ of dower.[61]

1 Tenn. Ch. 269; Dewey *v.* West Fairmont Gas Coal Co., 123 U. S. 329, 8 S. Ct. 148, 31 L. ed. 179), or an agreement that one demand should go in satisfaction of the other (Union Nat. Bank *v.* Hines, 177 Ill. 417, 53 N. E. 83 [*affirming* 69 Ill. App. 518]; Apperson *v.* Gogin, 3 Ill. App. 48; Van Buskirk *v.* Bayonne, (N. J. Ch. 1897) 38 Atl. 458).

50. Walker *v.* Wigginton, 50 Ala. 579; Nelms *v.* Prewitt, 37 Ala. 389; Tone *v.* Brace, 8 Paige 597; Ragsdale *v.* Buford, 3 Hayw. (Tenn.) 192.

The jurisdiction to set off judgments is not ousted by the exercise by law courts of a similar power. Gridley *v.* Garrison, 4 Paige (N. Y.) 647.

A federal court of equity may allow a set-off, although a state statute permits it to be pleaded at law. Sowles *v.* Plattsburg First Nat. Bank, 100 Fed. 552.

51. See Contribution, 9 Cyc. 801. The jurisdiction persists, although a remedy may now be had at law (Couch *v.* Terry, 12 Ala. 225; Shepherd *v.* Munroe, 4 N. C. 427; Lishey *v.* Smith, 1 Humphr. (Tenn.) 299), but not where there is an express contract of indemnity enforceable at law (Cortelyou *v.* Hoagland, 40 N. J. Eq. 1).

Charge on lands of adjoining owners.— A suit may be maintained between adjoining landowners to apportion a common charge against the land before payment of such charge. Lester *v.* Seilliere, 50 N. Y. App. Div. 239, 63 N. Y. Suppl. 748.

Between wrong-doers.— Even where contribution will not be enforced because the parties are wrong-doers, equity will not interfere to shield one from a portion of the burden. Selz *v.* Unna, 6 Wall. (U. S.) 327, 18 L. ed. 799 [*affirming* 21 Fed. Cas. No. 12,650, 1 Biss. 521].

Contribution in favor of a surety for one of two makers of a note will be enforced, notwithstanding an agreement between the payee and the other maker to discharge the latter. Pierson *v.* Catlin, 3 Vt. 272.

52. The equity is one existing between the parties liable, and will not be enforced against the creditor. Skinner *v.* Barney, 19 Ala. 698; Winham *v.* Crutcher, 2 Tenn. Ch. 535. A contract of reinsurance will be enforced in equity as one of indemnity. Fame Ins. Co.'s Appeal, 83 Pa. St. 396. Exoneration will be enforced in equity notwithstanding the existence of a bond of indemnity, if the remedy on the latter would be incomplete or imperfect. Reybold *v.* Herdman, 2 Del. Ch. 34.

53. See Subrogation.

54. See Marshaling Assets and Securities.

55. See Partition.

56. Wilkinson *v.* Stuart, 74 Ala. 198; Oldhams *v.* Jones, 5 B. Mon. (Ky.) 458; Mercur *v.* Jackson, 3 Pa. Co. Ct. 387.

In Georgia no jurisdiction exists where the remedy at law is adequate. Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655; Boggs *v.* Chambers, 9 Ga. 1.

In Massachusetts the statute providing for partition at law (Gen. St. c. 136) was held to exclude equity jurisdiction. Husband *v.* Aldrich, 135 Mass. 317.

57. Agar *v.* Fairfax, 17 Ves. Jr. 533, 34 Eng. Reprint 206; Mitford Pl. Ch. 110. But in many cases there was no right to partition at law. 1 Story Eq. Jur. § 646.

58. McDowell *v.* McDowell, 114 Ill. 255, 2 N. E. 56; Campbell *v.* Lowe, 9 Md. 500, 66 Am. Dec. 339; Goesele *v.* Bimeler, 14 How. (U. S.) 589, 14 L. ed. 554 [*affirming* 10 Fed. Cas. No. 5,503, 5 McLean 223]. A husband and wife conveyed property to a trustee on certain trusts during their several lives, with remainders over. After a divorce the court refused partition, but said that equity might in such case order the trustee to rent the property and divide the rent. Baggs *v.* Baggs, 54 Ga. 95.

59. Robinson *v.* Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417; Spaulding *v.* Warner, 59 Vt. 546, 11 Atl. 186.

60. See Dower, 14 Cyc. 979, 980.

61. Mitford Pl. Ch. 110.

g. Water-Rights. Because of the inadequate machinery and modes of relief at law a jurisdiction has been exercised to adjust, apportion, and regulate the relative rights and liabilities of the holders of the privilege of using water from the same stream.[62]

h. Creditors' Suits. In the numerous suits maintained by judgment creditors to subject property to the payment of their claims a sufficient basis for the jurisdiction is generally found in the existence of fraud.[63] In many cases, however, the jurisdiction must be sought in the inadequacy of an execution at law, to reach property which ought to go in satisfaction of the judgment, as where the debtor's interest is equitable only,[64] or where the peculiar character or situation of the property obstructs legal process,[65] or where, although an execution is available, title thereunder would be clouded.[66] In the absence of fraud equity will not interfere where there is no obstacle to the enforcement of the judgment by legal process.[67]

C. Retention of Jurisdiction — 1. Jurisdiction For One Purpose Retained to Afford Complete Relief. A court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter.[68] This doctrine seems to rest on the same principles which

62. *New Jersey.*— Lehigh Valley R. Co. *v.* Useful Manufactures Soc., 30 N. J. Eq. 145; Carlisle *v.* Cooper, 21 N. J. Eq. 576.

Rhode Island.— Dyer *v.* Cranston Print Works Co., 17 R. I. 774, 24 Atl. 827.

Vermont.— Sanborn *v.* Braley, 47 Vt. 170.

Virginia.— Hanna *v.* Clarke, 31 Gratt. 36.

Wisconsin.— Patten Paper Co. *v.* Kaukauna Water-Power Co., 70 Wis. 659, 35 N. W. 737.

See 19 Cent. Dig. tit. "Equity," §§ 43, 44. And see, generally, Waters and Watercourses.

Statutory remedy adequate and exclusive *pro tanto.* Alden *v.* Carleton, 81 Me. 358, 17 Atl. 299.

Disputed right.— Equity will not take jurisdiction where the dispute is as to the existence of the right itself, which must first be determined at law. Burnham *v.* Kempton, 44 N. H. 78.

63. See, generally, Creditors' Suits, 12 Cyc. 1; Fraudulent Conveyances.

64. Edmeston *v.* Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; Brush *v.* Kinsley, 14 Ohio 20.

65. Wren *v.* Dooley, 97 Ill. App. 88; Cassady *v.* Grimmelman, 108 Iowa 695, 77 N. W. 1067. Where the rents and profits of a bridge had been sold under execution, the same court in equity appointed a receiver to collect the tolls for the satisfaction of the judgment. Covington Drawbridge Co. *v.* Shepherd, 21 How. (U. S.) 112, 16 L. ed. 38.

66. Bank of Commerce *v.* Chambers, 96 Mo. 459, 10 S. W. 38.

67. Coogler *v.* Mayo, 21 Fla. 126; Armiger *v.* Reitz, 91 Md. 334, 46 Atl. 990; Mackey *v.* Michelstetter, 77 Wis. 210, 45 N. W. 1087; Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

68. *Alabama.*— Houston *v.* Faul, 86 Ala. 232, 5 So. 433.

Arkansas.— Vaughan *v.* Bowie, 30 Ark. 278; Stroud *v.* Vanzant, 30 Ark. 89.

California.— Belloc *v.* Rogers, 9 Cal. 123; Ord *v.* McKee, 5 Cal. 515.

Connecticut.— Beardsly *v.* Halls, 1 Root 366.

Florida.— Doggett *v.* Hart, 5 Fla. 215, 58 Am. Dec. 464.

Georgia.— Wardlaw *v.* Wardlaw, 50 Ga. 544; Martin *v.* Tidwell, 36 Ga. 332; Frith *v.* Roe, 23 Ga. 139.

Illinois.— Cook County *v.* Davis, 143 Ill. 151, 32 N. E. 176; Union School Dist. *v.* New Union School Dist., 135 Ill. 464, 28 N. E. 49; Roseboom *v.* Whittaker, 132 Ill. 81, 23 N. E. 339; Mitchell *v.* Shortt, 113 Ill. 251, 1 N. E. 909; Wade *v.* Bunn, 84 Ill. 117; Sherlock *v.* Winnetka, 59 Ill. 389; Peoria *v.* Johnston, 56 Ill. 45; Lloyd *v.* Karnes, 45 Ill. 62; Savage *v.* Berry, 3 Ill. 545; Bonney *v.* Sellers, 99 Ill. App. 444.

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

Kansas.— Seibert *v.* Thompson, 8 Kan. 65.

Maine.— Traip *v.* Gould, 15 Me. 82.

Maryland.— Keighler *v.* Ward, 8 Md. 254.

Michigan.— Snyder *v.* Snyder, 131 Mich. 658, 92 N. W. 353; Chase *v.* Boughton, 93 Mich. 285, 54 N. W. 44; Rickle *v.* Dow, 39 Mich. 91.

Missouri.— Curtis *v.* Moore, 162 Mo. 442, 63 S. W. 80; Real Estate Sav. Inst. *v.* Collonious, 63 Mo. 290; Corby *v.* Bean, 44 Mo. 379; Keeton *v.* Spradling, 13 Mo. 321; Nelson *v.* Betts, 21 Mo. App. 219.

Nebraska.— Stockham Bank *v.* Alter, 61 Nebr. 359, 85 N. W. 300; Disher *v.* Disher, 45 Nebr. 100, 63 N. W. 368; Sheppard *v.* Boggs, 9 Nebr. 257, 2 N. W. 370.

New Jersey.— Mosser *v.* Pequest Min. Co., 26 N. J. Eq. 200; Leddel *v.* Starr, 20 N. J. Eq. 274.

New York.— Ostrander *v.* Weber, 114 N. Y. 95, 21 N. E. 112; Steinway *v.* Von Bernuth, 82 N. Y. App. Div. 596, 81 N. Y. Suppl. 883; Adee *v.* Hallett, 3 N. Y. App. Div. 308, 38 N. Y. Suppl. 273; Conro *v.* Port Henry

permit a court of equity to take jurisdiction in the first instance, because the remedy is incomplete,[69] or to avoid multiplicity of suits.[70]

2. Application of Rule — a. Complete Equitable Relief. By virtue of the rule the court, when its jurisdiction has been invoked for any equitable purpose, will proceed to determine any other equities existing between the parties, connected with the main subject of the suit, and grant all relief requisite to an entire adjustment of such subject,[71] provided it be authorized by the plead-

Iron Co., 12 Barb. 27; Ricketts *v.* Wilson, 6 N. Y. St. 508; De Bemer *v.* Drew, 39 How. Pr. 466.

Ohio.— Oliver *v.* Pray, 4 Ohio 175, 19 Am. Dec. 595; Miami Exporting Co. *v.* U. S. Bank, Wright 249.

Oregon.—Haynes *v.* Whitsett, 18 Oreg. 454, 22 Pac. 1072; Phipps *v.* Kelly, 12 Oreg. 213, 6 Pac. 707.

Pennsylvania.— Williams' Appeal, (1889) 16 Atl. 810; Souder's Appeal, 57 Pa. St. 498; Ressler *v.* Witmer, 1 Pearson 184; Philadelphia *v.* Keyser, 10 Phila. 50; Gaylord *v.* Sterling, 3 L. T. N. S. 67; *In re* Schlesinger, I L. T. N. S. 15.

Tennessee.— Horton *v.* Cope, 6 Lea 155; Almony *v.* Hicks, 3 Head 39; Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430.

Virginia.— Rison *v.* Moon, 91 Va. 384, 22 S. E. 165.

West Virginia.— Watson *v.* Watson, 45 W. Va. 290, 31 S. E. 939; Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536; Mitchell *v.* Chancellor, 14 W. Va. 22; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; Sinnett *v.* Cralle, 4 W. Va. 600.

United States.— Twin City Power Co. *v.* Barrett, 126 Fed. 302, 61 C. C. A. 288 [*affirming* 118 Fed. 861]. See also cases cited in 11 Cyc. 847 note 13.

See 19 Cent. Dig. tit. "Equity," §§ 103–113.

Contracts.— In Day *v.* Cummings, 19 Vt. 496, it was said to be the general practice, subject to many exceptions, where relief is sought as to a portion of a contract which defendant is suing on at law, for the court, on granting the relief prayed, to proceed to adjudicate all rights under the contract.

Nominal or incidental equity.— A court of equity will not permit a controversy essentially legal in its nature to be drawn within its jurisdiction by setting up a nominal or purely incidental equity. Graeff *v.* Felix, 200 Pa. St. 137, 49 Atl. 758. Thus where the ostensible object of the bill was to cancel options on land for fraud, and incidentally to recover moneys paid therefor, but the options were about to expire and imposed no burdens, the court refused to interfere. Buck *v.* Ward, 97 Va. 209, 33 S. E. 513. See also Walters *v.* Farmer's Bank, 76 Va. 12; Burdell *v.* Comstock, 15 Fed. 395.

The provisions of the codes with reference to joinder of causes of action and counterclaims have not changed the rule with regard to retention of jurisdiction in equitable actions. Evans *v.* McConnell, 99 Iowa 326, 63 N. W. 570, 68 N. W. 790; Turner *v.* Pierce, 34 Wis. 658. And see the numerous citations from code states in this and subsequent notes under this head.

69. See *supra*, II, A, 4, f.

70. See *supra*, II, B, 1.

71. *Alabama.*— Vick *v.* Beverly, 112 Ala. 458, 21 So. 325; Kilgore *v.* Kilgore, 103 Ala. 614, 15 So. 897.

Colorado.— Packard *v.* King, 3 Colo. 211.

Georgia.— Gibson *v.* Thornton, 112 Ga. 328, 37 S. E. 406; Walker *v.* Morris, 14 Ga. 323; Andrews *v.* Murphy, 12 Ga. 431.

Illinois.— Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; People *v.* Chicago, 53 Ill. 424.

Kentucky.— Doty *v.* Deposit Bldg., etc., Assoc., 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. L. Rep. 625, 43 L. R. A. 551, 554; Whiting *v.* Taylor, 8 Dana 403.

Maine.— Nash *v.* Simpson, 78 Me. 142, 3 Atl. 53.

Mississippi.— Leflore County *v.* Allen, 80 Miss. 298, 31 So. 815.

Missouri.— Newton *v.* Rebenack, 90 Mo. App. 650.

New Jersey.— Ransom *v.* Geer, 30 N. J. Eq. 249.

Pennsylvania.— Gwinn *v.* Lee, 6 Pa. Super. Ct. 646, 42 Wkly. Notes Cas. 124.

Texas.— Hill *v.* Osborne, 60 Tex. 390; Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160.

Virginia.— Kirschbaum *v.* Coon, (1896) 25 S. E. 658.

Washington.— Jordan *v.* Coulter, 30 Wash. 116, 70 Pac. 257.

West Virginia.— Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288.

Wisconsin.— Hamilton *v.* Fond du Lac, 25 Wis. 490; Peck *v.* Beloit School Dist. No. 4, 21 Wis. 516.

United States.— Elk Fork Oil, etc., Co. *v.* Jennings, 84 Fed. 839.

See 19 Cent. Dig. tit. "Equity," §§ 103, 104.

Relief on cross bill is governed by the same principle. Litch *v.* Clinch, 35 Ill. App. 654.

After establishment of lost deed.— Equity having acquired jurisdiction to establish a lost deed the court proceeded to restrain the grantors from prosecuting ejectment against those claiming under it. Fries *v.* Griffin, 35 Fla. 212, 17 So. 66; Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351.

After cancellation of mortgage.— So where jurisdiction was taken to cancel a mortgage as a cloud on title, ejectment by the purchaser at a foreclosure sale was restrained. Richardson *v.* Stephens, 122 Ala. 301, 25 So. 39.

Application of surplus after foreclosure.— Where land was sold on foreclosure for failure

ings.[72] Relief of an equitable character may thus be incidentally obtained, when an original bill would not lie for such relief alone.[73]

to pay an instalment of a mortgage debt, the court will retain jurisdiction to apply the surplus on other instalments. McDowell *v.* Lloyd, 22 Iowa 448.

After reformation of contract.— A special act of congress gave the court of claims equity jurisdiction on a claim for labor where the formal contract failed to express the intention of the parties. It was held that the court could reform the contract and settle the entire account in the same proceeding. Harvey *v.* U. S., 105 U. S. 671, 26 L. ed. 1206.

Foreclosure of mortgage after reformation.—A bill to reform a mortgage may be retained for the purpose of foreclosing the mortgage as reformed. Houston *v.* Faul, 86 Ala. 232, 5 So. 433; McGehee *v.* Lehman, 65 Ala. 316.

Further orders to receiver.— After property in litigation had been transferred by a receiver in pursuance of a decree to a corporation not a party to the bill, which refused to secure the receiver's expenses and perform other obligations, it was held that the court retained jurisdiction to order the receiver to retake the property and to transfer it to another corporation. La Junta, etc., Canal Co. *v.* Hess, 31 Colo. 1, 71 Pac. 415.

Adjusting water-rights.— The court having, on a bill to restrain an action against plaintiff for overflowing lands by means of a dam, sustained plaintiff's right to maintain the dam, retained jurisdiction to settle the rights of the parties in relation to its height. Le Roy *v.* Platt, 4 Paige (N. Y.) 77. But where the court decreed that a dam should be lowered it refused to retain jurisdiction for the purpose of permitting plaintiff to afterward ask that it be further lowered. Mann *v.* Wilkinson, 16 Fed. Cas. No. 9,036, 2 Sumn. 273. And having determined, in a suit to restrain disturbance of a water-right, that there had been no encroachment or threatened encroachment, the court refused to retain the bill without special cause to ascertain the limits of plaintiff's right. Pratt *v.* Lamson, 6 Allen (Mass.) 457.

Account after redemption.— On a bill by a stock-holder of a building and loan association to redeem his mortgage, he desiring to terminate his relations with the association, the court took an account of the entire transaction, including the amount due on the stock, and adjusted all relations. Middle States Loan, etc., Co. *v.* Hagerstown Mattress Upholstery Co., 82 Md. 506, 33 Atl. 886.

Where main purpose of bill fails.— Even where plaintiff fails to sustain his bill for its principal purpose the court may on the proper pleadings retain it to adjust such equities as do appear. Thus where a widow filed a bill to set aside conveyances by heirs on the theory that she took a fee under her husband's will, and the court found that she took but a life-estate with power of sale if the rents were insufficient for her support, it retained the bill to ascertain whether the rents were so sufficient and if not to make a sale. Watson *v.* Watson, (Tenn. Ch. App. 1900) 57 S. W. 385. A lease providing for a renewal or a taking by the lessor of improvements, the lessee filed a bill for a specific performance mine the value of the improvements and to arbitrate the amount of rent. This relief was denied but the court proceeded to determine the value of the improvements and to restrain an action for the restitution of the premises until such value was paid. Hopkins *v.* Gilman, 22 Wis. 476. And see *infra*, note 83.

72. Relief must be within the scope of the pleadings. Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603. *A fortiori* is this true where the court undertakes to decree against a defendant, at the same time dismissing the bill. Scofield *v.* Peck, 182 Mass. 121, 65 N. E. 60.

73. Jurisdiction having been obtained on the ground of fraud, title was quieted, although plaintiff was not in possession. Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216. Jurisdiction attaching to set aside a sale fraudulently made under a power of attorney, the power of attorney was reformed without a prior request for a correction of the mistake. Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722. On a bill by a firm creditor to subject to the payment of his claims partnership property which had been mortgaged to secure debts of one partner, the court intimated, without deciding, that the claims must be reduced to judgment in order to sustain the bill, but some of plaintiff's claims having been reduced to judgment the court enforced others not so reduced on the theory that having obtained jurisdiction by reason of the judgment debts all others should be determined and enforced. Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Carpenter *v.* Osborn, 102 N. Y. 552, 7 N. E. 823. Jurisdiction having been obtained to set aside a deed recorded without delivery, it was retained to determine the title to the land and make a partition. Vreeland *v.* Vreeland, 49 N. J. Eq. 322, 24 Atl. 551. Suit having been brought by the United States to cancel contracts made by the Union Pacific Railroad Company with the Western Union Telegraph Company in violation of the former's charter, the court had power in that case to settle all matters in controversy between the United States and the two companies with regard to telegraphic business. U. S. *v.* Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. 190, 40 L. ed. 319.

Matters occurring after suit brought.— The court is not restricted to an adjustment of the rights of the parties as they existed when suit was brought, but will give relief appropriate to events occurring pending the suit. Franklin Ins. Co. *v.* McCrea, 4 Greene (Iowa) 229; Turner *v.* Thomas, 13 Bush (Ky.) 518; Gale *v.* Gale, 15 N. Y. St. 644.

b. Relief Obtainable at Law — (i) *Where There Is Equity in Bill.* When plaintiff has established a right to equitable relief the court will not only grant that relief but all other relief essential to a complete adjustment of the subject-matter among the parties, although it is thereby required to grant relief obtainable at law, and which if the object of an independent action could be obtained at law alone.[74] Notwithstanding the refusal of equity generally to decree the delivery of the possession of land,[75] such delivery will often be decreed for the purpose of affording complete relief, when a resort to equity has been necessary in order to establish plaintiff's title or right of possession.[76] The same rule prevails with regard to chattels.[77] Under a variety of circumstances the

74. *Alabama.*— Price *v.* Carney, 75 Ala. 546; Ware *v.* Russell, 70 Ala. 174, 45 Am. Rep. 82; Hause *v.* Hause, 57 Ala. 262. See also Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229.

Arkansas.— Dugan *v.* Cureton, 1 Ark. 31, 31 Am. Dec. 727, *obiter.*

Colorado.— Schilling *v.* Rominger, 4 Colo. 100; Packard *v.* King, 3 Colo. 211.

Georgia.— Mays *v.* Taylor, 7 Ga. 238.

Illinois.— Gleason, etc., Mfg. Co. *v.* Hoffman, 168 Ill. 25, 48 N. E. 143; Biegler *v.* Merchants' L. & T. Co., 164 Ill. 197, 45 N. E. 512 [*affirming* 62 Ill. App. 560]; Hawley *v.* Simons, (1887) 14 N. E. 7; Pool *v.* Docker, 92 Ill. 501; Mixer *v.* Sibley, 53 Ill. 61; Finch *v.* Martin, 19 Ill. 105; Whalen *v.* Billings, 104 Ill. App. 281; Bourke *v.* Hefter, 104 Ill. App. 126 [*affirmed* in 202 Ill. 321, 66 N. E. 1084]; Richardson *v.* Ranson, 99 Ill. App. 258. See also Devine *v.* Caldwell, 108 Ill. App. 214.

Iowa.— McMurray *v.* Van Gilder, 56 Iowa 605, 9 N. W. 903; Renkin *v.* Hill, 49 Iowa 270; Franklin Ins. Co. *v.* McCrea, 4 Greene 229.

Kansas.— Martin *v.* Martin, 44 Kan. 295, 24 Pac. 418.

Michigan.— Lothrop *v.* Duffield, (1903) 96 N. W. 577.

Missouri.— Paris *v.* Haley, 61 Mo. 453; McDaniel *v.* Lee, 37 Mo. 204; Quest *v.* Johnson, 58 Mo. App. 54; Purdy *v.* Gault, 19 Mo. App. 191.

Nebraska.— Olson *v.* Lamb, 61 Nebr. 484, 85 N. W. 397.

New Jersey.— Bullock *v.* Adams, 20 N. J. Eq. 367, *obiter.*

New York.—Van Rensselaer *v.* Van Rensselaer, 113 N. Y. 207, 21 N. E. 75; American Press Assoc. *v.* Brantingham, 37 Misc. 426, 75 N. Y. Suppl. 765; Gleason *v.* Bisby, Clarke 551; Trowbridge *v.* Christmas, Clarke 271.

North Carolina.— Hart *v.* Roper, 41 N. C. 349, 51 Am. Dec. 425.

Pennsylvania.— Socher's Appeal, 104 Pa. St. 609.

Tennessee.— Smith *v.* Harrison, 2 Heisk. 230.

Virginia.— Coons *v.* Coons, 95 Va. 434, 28 S. E. 885, 64 Am. St. Rep. 804.

West Virginia.— Hoge *v.* Vintroux, 21 W. Va. 1.

United States.— Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909; Cathcart *v.* Robinson, 5 Pet. 263, 8 L. ed. 120; Williamson *v.* Monroe, 101 Fed. 322; Sill *v.* Solberg, 6 Fed. 468, 10 Biss. 252; Brooks *v.* Stolley, 4 Fed. Cas. No. 1,962, 3 McLean 523, 2 Rob. Pat. Cas. 281; Gass *v.* Stinson, 10 Fed. Cas. No. 5,260, 2 Sumn. 453; McCalmont *v.* Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

See 19 Cent. Dig. tit. "Equity," §§ 103, 104.

Enforcing special or extraordinary legal remedies.— The court having jurisdiction for the purpose of construing a will retained it to make a valuation of the testator's real estate which as an independent remedy required a special proceeding. Balsley *v.* Balsley, 116 N. C. 472, 21 S. E. 954. Jurisdiction to remove a cloud from the title to land was held to extend to the setting aside of an execution connected therewith, without remitting plaintiff to an application to the court issuing the execution. Murphy *v.* Blair, 12 Ind. 184. Plaintiff, holding a claim against a town by equitable subrogation, was permitted in equity to try his claim and compel its allowance, without being remitted to mandamus, but there were reasons why a mandamus would be ineffective. Wells *v.* Salina, 71 Hun (N. Y.) 559, 25 N. Y. Suppl. 134.

75. See *supra*, II, A, 5, e.

76. *Georgia.*— McWilliams *v.* Walthall, 65 Ga. 109.

Illinois.— Mitchell *v.* Shortt, 113 Ill. 251, 1 N. E. 909; Wade *v.* Bunn, 84 Ill. 117; Aldrich *v.* Sharp, 4 Ill. 261.

Kansas.— Martin *v.* Martin, 44 Kan. 295, 24 Pac. 418.

Kentucky.— West *v.* West, 65 S. W. 813, 23 Ky. L. Rep. 1645.

Michigan.— Whipple *v.* Farrar, 3 Mich. 436, 64 Am. Dec. 99.

New Jersey.— Trotter *v.* Heckscher, 42 N. J. Eq. 254, 7 Atl. 650.

Pennsylvania.—Socher's Appeal, 104 Pa. St. 609.

Tennessee.— Hale *v.* Hord, 11 Heisk. 232.

United States.—Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 83 L. ed. 909.

See 19 Cent. Dig. tit. "Equity," § 107.

Recovery of the land must not be merely collateral, but incidental, to the equitable relief. Brush *v.* Maydwell, 14 Cal. 208; Danforth *v.* Roberts, 20 Me. 307; Nelson *v.* Trigg, 3 Tenn. Cas. 733.

77. Wales *v.* Newbould, 9 Mich. 45; McGowin *v.* Remington, 12 Pa. St. 56, 51 Am. Dec. 584.

court for the same reason and as incidental to equitable relief may order the payment of money, although a separate action at law would lie therefor.[78] Thus the jurisdiction of equity having been invoked to restrain the further commission of wrongful acts, damages already suffered will quite generally be awarded.[79]

78. **Incidental accounting.**— Griffin *v.* Griffin, 163 Ill. 216, 45 N. E. 241; Smith *v.* Everett, 126 Mass. 304; Freeman *v.* Stine, 43 Leg. Int. (Pa.) 96; Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046. Sometimes the court will go beyond an accounting consequent upon the determination of the main equities involved, and will award moneys accruing somewhat collaterally but connected with such equities. Thus on a bill for abatement of the purchase-price because of a deficiency in the quantity of land purchased an account was taken of payments and other items, and the entire contract was adjusted. Stow *v.* Bozeman, 29 Ala. 397. For other examples see Boyd *v.* Hunter, 44 Ala. 705; Whitsett *v.* Kershow, 4 Colo. 419; Carpenter *v.* Osborn, 102 N. Y. 552, 7 N. E. 823.

A deficiency judgment may be awarded after a sale directed by the court under a deed of trust. Beecher *v.* Lewis, 84 Va. 630, 6 S. E. 367. As to deficiency judgments in foreclosure suits see MORTGAGES.

Contracts for municipal water-supply.— Certain cases growing out of contracts between cities and water companies afford some interesting illustrations and limitations of the rule declared in the cases just cited. Jurisdiction to compel the levy and collection of taxes to pay hydrant rentals to accrue in the future does not give jurisdiction to recover rentals already accrued. Eau Claire *v.* Payson, 107 Fed. 552, 46 C. C. A. ,466, 109 Fed. 676, 48 C. C. A. 608. Where the object of the action was to restrain the diversion of funds collected to pay rentals, to enforce the contract, and to compel future levies, the threatened diversion was restrained but the other relief denied. Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 80 N. W. 1113. A federal court of equity may annul a city ordinance impairing the obligation of its contract with the water company, but cannot as incidental thereto enforce payment of rentals under the contract. American Water Works, etc., Co. *v.* Home Water Co., 115 Fed. 171. Where a city had purchased waterworks subject to a mortgage, and was therefore a necessary party to a bill filed to foreclose the mortgage, a contract to pay the rental for hydrants to the trustee on behalf of the bondholders could be enforced in the same suit. Centerville *v.* Fidelity Trust, etc., Co., 118 Fed. 332, 56 C. C. A. 348; Fidelity Trust, etc., Co. *v.* Fowler Water Co., 113 Fed. 560. But equity jurisdiction cannot, at least in a federal court, be independently invoked to enforce such a contract against the city. New York Guaranty, etc., Co. *v.* Memphis Water Co., 107 U. S. 205, 2 S. Ct. 279, 27 L. ed. 484; Eau Claire *v.* Payson, 109 Fed. 676, 48 C. C. A. 608, 107 Fed. 552, 46 C. C. A. 466.

Rents.— Although the recovery of rents is usually a matter solely of legal cognizance (see *supra*, II, A, 5, b), when a court of equity has taken jurisdiction to set aside a title, it may also take an account of rents received through such title and award them to the rightful owner. Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229; Conklin *v.* Foster, 57 Ill. 104; Holeton *v.* Thayer, 86 Ill. App. 526; Martin *v.* Martin, 44 Kan. 295, 24 Pac. 418; Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287.

Enforcing instruments after reformation, etc.— Courts of equity sometimes, having acquired jurisdiction to reform an instrument, retain it for the purpose of awarding such judgment as would be awarded in an action at law brought on the reformed instrument. Kelly *v.* Galbraith, 186 Ill. 593, 58 N. E. 431 [*affirming* 87 Ill. App. 63]; Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692; Savage *v.* Berry, 3 Ill. 545; Freeport German Ins. Co. *v.* Downman, 115 Fed. 481, 53 C. C. A. 213. In the last case there was a cross suit to cancel the instrument and another to enjoin an action at law thereon. See, generally, REFORMATION OF INSTRUMENTS. In the code states this question is determined more by the provisions as to joinder of actions than on general equitable principles. See JOINDER AND SPLITTING OF ACTIONS. In some cases, however, jurisdiction is retained on the principle stated in the text. Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263; Hammel *v.* Queens Ins. Co., 50 Wis. 240, 6 N. W. 805. But in New York the rule was otherwise before the code. Getman *v.* Beardsley, 2 Johns. Ch. (N. Y.) 274. Now a suit may be maintained against the party liable and an adverse claimant, to determine who is entitled to the proceeds reserving an action for such proceeds for a separate legal proceeding. Mahr *v.* Bartlett, 53 Hun (N. Y.) 388, 7 N. Y. Suppl. 143. But recovery has been permitted in the same suit. Convis *v.* Citizens' Mut. F. Ins. Co., 127 Mich. 616, 86 N. W. 994. In Missouri, under the code, in an action to reform an insurance policy, judgment may be given on the policy as reformed. Clem *v.* German Ins. Co., 29 Mo. App. 666. But in South Carolina, before the code, even on a bill to set aside a compromise on a policy, the court refused to try the rights under the policy where the question was one of fact. Alexander *v.* Muirhead, 2 Desauss. 162. On a bill, after loss, to compel delivery of a policy, recovery thereon was allowed. Union Cent. L. Ins. Co. *v.* Phillips, 102 Fed. 19, 41 C. C. A. 263 [*reversing* 101 Fed. 33].

In an action to establish a lost bond recovery on the bond was permitted. Howe *v.* Taylor, 6 Oreg. 284.

79. *Alabama.*— Farris *v.* Dudley, 78 Ala. 124, 56 Am. Rep. 24, nuisance.

Colorado.— Schilling *v.* Rominger, 4 Colo. 100, obstructing ditch.

(II) *Where Equitable Relief Is Denied.* Of course if the bill on its face discloses no ground of equitable jurisdiction no relief whatever can be granted where the courts or procedure in law and equity are distinct. Where the bill states matter within the equity jurisdiction, but plaintiff fails to establish such equity, the rule is that the bill must be dismissed, and cannot be retained for the purpose of allowing legal relief to which plaintiff has shown himself entitled.[80]

Delaware.— Fleming *v.* Collins, 2 Del. Ch. 230, waste.

Florida.— Brown *v.* Solary, 37 Fla. 102, 19 So. 161, trespass.

Georgia.— Mays *v.* Taylor, 7 Ga. 238, restraining execution.

Indiana.— Lefforge *v.* West, 2 Ind. 514, waste.

Massachusetts.— Winslow *v.* Nayson, 113 Mass. 411, trespass.

Michigan.— Brown *v.* Gardner, Harr. 291, opening highway.

New York.— Rosenheimer *v.* Standard Gaslight Co., 39 N. Y. App. Div. 482, 57 N. Y. Suppl. 330 (nuisance); Davis *v.* Lambertson, 56 Barb. 480 (nuisance).

Pennsylvania.— Allison's Appeal, 77 Pa. St. 221, trespass.

Texas.— Chambers *v.* Cannon, 62 Tex. 293, restraining execution.

Vermont.— Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533, nuisance.

United States.— U. S. *v.* Guglard, 79 Fed. 21 (trespass); Burdell *v.* Comstock, 15 Fed. 395 (infringement of patent. See also PATENTS); Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23 (infringement of copyright. See COPYRIGHT, 9 Cyc. 958).

See 19 Cent. Dig. tit. "Equity," § 110. And see, generally, INJUNCTIONS.

Rule not confined to injunctions.— The awarding of damages is not confined, however, to suits for injunctions, but may be decreed as incidental to equitable relief wherever the circumstances require it in order to effect a complete adjustment of rights.

Alabama.— Brock *v.* Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 914; Lide *v.* Hadley, 36 Ala. 627, 76 Am. Dec. 338.

Kansas.— Kansas City Northwestern R. Co. *v.* Caton, 9 Kan. App. 272, 60 Pac. 544.

Michigan.— Dodson *v.* McKelvey, 93 Mich. 263, 53 N. W. 517.

Mississippi.— Vicksburg, etc., Tel. Co. *v.* Citizens' Tel. Co., 79 Miss. 341, 30 So. 725, 89 Am. St. Rep. 656.

New York.— Stiefel *v.* New York Novelty Co., 14 N. Y. App. Div. 371, 43 N. Y. Suppl. 1012.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180; Kleppner *v.* Lemon, 29 Pittsb. Leg. J. N. S. 346.

Wisconsin.— Pinkum *v.* Eau Claire, 81 Wis. 301, 31 N. W. 550.

United States.— Almy *v.* Wilbur, 1 Fed. Cas. No. 256, 2 Woodb. & M. 371; Ferson *v.* Sanger, 8 Fed. Cas. No. 4,751, 2 Ware 256; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,950, 14 Blatchf. 109.

See 19 Cent. Dig. tit. "Equity," § 110.

Retention discretionary.— In some of the foregoing cases the rule is stated in absolute terms, that jurisdiction will be retained to award damages, but in nearly all the power of the court is alone asserted, and in some it is distinctly decided that in such case, as in others where relief obtainable at law is incidentally sought, the retention of jurisdiction rests in the discretion of the court. Brown *v.* Gardner, Harr. (Mich.) 291; Davis *v.* Lambertson, 56 Barb. (N. Y.) 480. Accordingly on a bill to establish a deed and contract fraudulently withheld from record the court relegated plaintiff to an action at law for damages. Pulezer *v.* Kucharzyk, 116 Mich. 92, 74 N. W. 304. And on a bill to construe a will, while an accounting was taken on some matters, the court relegated to law the question of damages on a resale because of the bidder at the first sale failing to comply with his bid, on the ground that the question was too uncertain for determination in equity. Anderson *v.* Arrington, 54 N. C. 215.

Damages incurred pending suit.— In Davis *v.* Lambertson, 56 Barb. (N. Y.) 480, it was said that the damages to be recovered might be those incurred down to the time of trial; but in Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533, it was held that damages could be recovered only to the commencement of the suit.

80. *Alabama.*— Bryan *v.* Cowart, 21 Ala. 92.

Arkansas.— Little Rock, etc., R. Co. *v.* Perry, 37 Ark. 164.

Indiana.— Clark *v.* Spears, 7 Blackf. 96.

Indian Territory.— Crowell *v.* Young, (1901) 64 S. W. 607.

Missouri.— Mansfield *v.* Monett Bank, 74 Mo. App. 200.

New York.— Clark *v.* Smith, 90 N. Y. App. Div. 477, 86 N. Y. Suppl. 472; Wright *v.* Taylor, 9 Wend. 538 [*affirming* 1 Edw. 226].

Oregon.— Denny *v.* McCown, 34 Oreg. 47, 54 Pac. 952; Dodd *v.* Home Mut. Ins. Co., 22 Oreg. 3, 28 Pac. 881, 29 Pac. 3.

Pennsylvania.— Russell's Appeal, 1 Walk. 131.

South Carolina.— Glover *v.* Farr, 23 S. C. 480.

Tennessee.— Marsh *v.* Haywood, 6 Humphr. 210.

United States.— Dowell *v.* Mitchell, 105 U. S. 430, 26 L. ed. 1142; Kessler *v.* Ensley Co., 123 Fed. 546; Alger *v.* Anderson, 92 Fed. 696; Zeringue *v.* Texas, etc., R. Co., 34 Fed. 239; Dakin *v.* Union Pac. R. Co., 5 Fed. 665. In Alger *v.* Anderson, *supra*, the special reason given is the guaranty of trial by jury in the seventh amendment to

Nevertheless there are circumstances under which the court will grant compensation in money, ordinarily obtainable at law, upon denying equitable relief.[81] One of these cases is where plaintiff establishes his equity, but equitable relief is found impracticable.[82] Another is where the remedy at law would be doubtful or inadequate.[83] Neither of these cases is a real exception to the rule, because in each the plaintiff has established an equity and has failed merely to establish his right to the particular relief sought. Certain other apparently exceptional cases are really within the rule.[83] There are, however, some cases which substantially depart from the rule.[84]

the constitution, and U. S. Rev. St. (1878) § 723 [U. S. Comp. St. (1901) p. 583], denying jurisdiction in equity where there is a plain, adequate, and complete remedy at law. But section 723 is merely declaratory of general principles and has no special restrictive force. See *supra*, II, A, 2, a, (I).

See 19 Cent. Dig. tit. "Equity," §§ 116, 117.

Sometimes, without denying its jurisdiction, the court states the rule less positively, as that the bill will not be retained, or that plaintiff is not entitled to its retention.

Alabama.— Harrison *v.* Deramus, 33 Ala. 463; Pond *v.* Lockwood, 8 Ala. 669.

Massachusetts.— Capen *v.* Leach, 182 Mass. 175, 65 N. E. 63.

Missouri.— Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85.

New Jersey.— Collier *v.* Collier, (Ch. 1895) 33 Atl. 193.

Ohio.— National Tube Co. *v.* Eastern Tube Co., 23 Ohio Cir. Ct. 468.

South Carolina.— Kinsey *v.* Bennett, 37 S. C. 319, 15 S. E. 965.

See 19 Cent. Dig. tit. "Equity," § 117.

Illegality or fraud.— A bill will be dismissed without legal relief where equitable relief is refused for illegality (Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35) or fraud in the transaction (Reinicker *v.* Smith, 2 Harr. & J. (Md.) 421. See also Robinson *v.* Brooks, (Wash. 1903) 71 Pac. 721).

As against defendants not subject to the equity.— Where one against whom plaintiff's demand is purely legal is unnecessarily made a party to a suit in equity the legal demand cannot be enforced in that suit. Bradford *v.* Long, 4 Bibb (Ky.) 225; Fultz *v.* Walters, 2 Mont. 165. But in Virginia it is held that in a suit to charge the real estate of a married woman an indorser on her note may be made a party and payment decreed against him. Walters *v.* Farmers Bank, 76 Va. 12.

81. The most frequent case is that of bills for specific performance, where it turns out that the title has passed to an innocent purchaser.

Iowa.— Renkin *v.* Hill, 49 Iowa 270.

Kentucky.— Warford *v.* Camron, 3 Bibb 434.

New York.— Dudley *v.* St. Francis Congregation, 138 N. Y. 451, 34 N. E. 281; Valentine *v.* Richardt, 126 N. Y. 272, 27 N. E. 255 [*affirming* 13 N. Y. Suppl. 417]; Van Rensselaer *v.* Van Rensselaer, 113 N. Y. 207, 21 N. E. 75; Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55. 4 Am. St. Rep. 436; Stiefel *v.* New York Novelty Co., 14 N. Y. App. Div. 371, 43 N. Y. Suppl. 1012; Kempshall *v.* Stone, 5 Johns. Ch. 193.

Pennsylvania.— Masson's Appeal, 70 Pa. St. 26; Hully *v.* Havens, 3 Luz. Leg. Reg. 185.

Virginia.— Walters *v.* Farmers Bank, 76 Va. 12.

See, generally, SPECIFIC PERFORMANCE.

The same principle is applied in other cases where the equitable relief sought is impracticable. Thus on bills for rescission on the ground of fraud if rescission cannot be decreed damages will be awarded. Carroll *v.* Rice, Walk. (Mich.) 373; Lower *v.* Wightman, 5 Leg. Gaz. (Pa.) 45; Cole *v.* Getzinger, 96 Wis. 559, 71 N. W. 75. So also where the bill sought to have a deed absolute in form declared a mortgage, and the land had passed to an innocent purchaser. Lane *v.* Beitz, 99 Ill. App. 342. A decree for the value of slaves was rendered where the bill sought an injunction to restrain their sale, but the injunction was dissolved and the slaves sold before decree. Cocke *v.* Trotter, 10 Yerg. (Tenn.) 213. See also Wolcott *v.* Sullivan, 1 Edw. (N. Y.) 399; Evans *v.* Roanoke Sav. Bank, 95 Va. 294, 28 S. E. 323.

82. *Alabama.*— Aday *v.* Echols, 18 Ala. 353, 52 Am. Dec. 225.

Florida.— Glinski *v.* Zawadski, 8 Fla. 405.

Massachusetts.— Nudd *v.* Powers, 136 Mass. 273.

Michigan.— Hawley *v.* Sheldon, Harr. 420.

United States.— Frelinghuysen *v.* Nugent, 36 Fed. 229; Hale *v.* Continental L. Ins. Co., 12 Fed. 359, 20 Blatchf. 515.

See 19 Cent. Dig. tit. "Equity," §§ 116, 117.

83. An agent who has converted bonds belonging to his principal may be held liable for either their value or what he received, and being accountable in equity on the latter theory, and the court thereby acquiring jurisdiction, he will in that suit be compelled to pay whichever sum is the larger, although liable at law therefor. Brewer *v.* Caldwell, 4 Fed. Cas. No. 1,849. Where a penalty was provided for failure to perform a contract, the payment of such penalty was decreed as a condition of refusing specific performance. Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 8 L. ed. 120.

84. Walters *v.* Farmers Bank, 76 Va. 12, declares that if the bill shows equity, jurisdiction to grant legal relief will be retained, although it afterward appears that plaintiff was not entitled to any equitable relief. This doctrine was followed in Evans *v.* Kel-

(III) *WHERE EQUITY FAILS AFTER SUIT BROUGHT.* The rule is almost absolute that the jurisdiction of equity is to be determined by the facts existing when the suit is commenced. If plaintiff is then entitled to the aid of equity the jurisdiction will not be defeated by subsequent events which render equitable relief unnecessary or improper.[85] Bills concerning the title or right of possession to

ley, 49 W. Va. 181, 38 S. E. 497 (*citing* also Hotchkiss *v.* Fitzgerald Patent Prepared Plaster Co., 41 W. Va. 357, 23 S. E. 576, which itself is based on Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536. But in both of these an equity was established). In Bullock *v.* Adams, 20 N. J. Eq. 367, plaintiff was denied specific performance because he had not tendered performance himself, and the court decreed restoration of payments made by him. In Green Bay Lumber Co. *v.* Miller, 98 Iowa 468, 62 N. W. 742, 67 N. W. 383, the court, holding that a mechanic's lien sought to be foreclosed was invalid, rendered judgment for plaintiff's debt. The same court had much earlier declared that jurisdiction ceased when the equity failed. Roberts *v.* Faliaferro, 7 Iowa 110; Cooper *v.* Armstrong, 3 Greene (Iowa) 120. In Waite *v.* O'Neil, 72 Fed. 348 [*affirmed* in 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550], specific performance was denied as unconscionable and a money decree rendered, because there was a showing of equitable cognizance and no objection was taken until final hearing. Legal relief has been granted where plaintiff made out a *prima facie* case for equitable relief which was denied because of the establishment of a defense thereto. Downes *v.* Bristol, 41 Conn. 274; Atkinson *v.* Felder, 78 Miss. 83, 29 So. 767. Where the statute of frauds prevents the specific enforcement of a contract, the cause has been retained to award plaintiff moneys to which he is entitled thereunder. Paris *v.* Haley, 61 Mo. 453; Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131. In the latter case the remedy at law was doubtful. Such relief was on the other hand refused in Horn *v.* Ludington, 32 Wis. 73.

In Tennessee jurisdiction is retained to award legal relief, where equitable relief is denied, by virtue of express statute. Shannon Code, § 6101; Gordonsville Milling Co. *v.* Jones, (Ch. App. 1900) 57 S. W. 630.

In code states.— While the rules stated in the text as to retention of jurisdiction are generally enforced in the code states, as shown by the citations in the preceding notes, no question of jurisdiction strictly speaking can there arise, because under the codes, except in two or three states, there is nominally at least no distinction in procedure between law and equity except in the mode of trial. It would seem therefore that where plaintiff makes out any right the action should be retained for its enforcement, the only question being as to the right of trial by jury. Nevertheless in New York the question has been frequently discussed from the jurisdictional point of view, and conclusions reached which it is difficult to reconcile. In some cases it is positively declared that where a plaintiff seeks only equitable relief and fails to establish his equity, the court will not retain the case to award legal relief. Rosenheimer *v.* Standard Gaslight Co., 39 N. Y. App. Div. 482, 57 N. Y. Suppl. 330; Vincent *v.* Moriarty, 31 N. Y. App. Div. 484, 52 N. Y. Suppl. 519; Toplitz *v.* Bauer, 26 N. Y. App. Div. 125, 49 N. Y. Suppl. 840; Green *v.* Stewart, 19 N. Y. App. Div. 201, 45 N. Y. Suppl. 982; Coit *v.* Fougera, 36 Barb. (N. Y.) 195; New York Ice Co. *v.* North Western Ins. Co., 31 Barb. (N. Y.) 72, 10 Abb. Pr. (N. Y.) 34, 20 How. Pr. (N. Y.) 424; Hawes *v.* Dobbs, 18 N. Y. Suppl. 123; Schroeder *v.* Ennis, 5 N. Y. St. 881; Von Beck *v.* Rondout, 15 Abb. Pr. (N. Y.) 48 [*affirmed* in 41 N. Y. 619]. In other cases it is said that the court is not bound to retain jurisdiction. Kornder *v.* Kings County El. R. Co., 61 N. Y. App. Div. 439, 70 N. Y. Suppl. 708; Whyte *v.* New York Builders' League, 35 N. Y. App. Div. 480, 54 N. Y. Suppl. 822 [*affirming* 23 Misc. 385, 52 N. Y. Suppl. 65]; Moore *v.* Moore, 32 Misc. (N. Y.) 68, 66 N. Y. Suppl. 167. In still others it is held that jurisdiction may be retained. Murtha *v.* Curley, 90 N. Y. 372; Herrington *v.* Robertson, 71 N. Y. 280; Morse *v.* Wheeler, 68 N. Y. App. Div. 428, 73 N. Y. Suppl. 930 [*affirming* 32 Misc. 304, 66 N. Y. Suppl. 714] (*obiter*); Matthews *v.* Delaware, etc., Canal Co., 20 Hun (N. Y.) 427; Cuff *v.* Dorland, 55 Barb. (N. Y.) 481; Genet *v.* Howland, 45 Barb. (N. Y.) 560, 30 How. Pr. (N. Y.) 360; Seeley *v.* New York Nat. Exch. Bank, 8 Daly (N. Y.) 400; Goddard *v.* The American Queen, Incorporated, 27 Misc. (N. Y.) 482, 59 N. Y. Suppl. 46. The true rule seems to be that if the complaint states a case for equitable relief alone, jurisdiction will not be retained where plaintiff fails to make out such case, although he proves a legal cause of action; but where the complaint states facts sufficient to ground a recovery at law such recovery can be had, although the equity fails. The matter is, however, one concerning code practice rather than equity jurisdiction.

85. *Illinois.*— Martin *v.* Jamison, 39 Ill. App. 248.

Kentucky.— Crawford *v.* Summers, 3 J. J. Marsh. 300. See also Ellison *v.* Dunlap, 78 S. W. 155, 25 Ky. L. Rep. 1495.

Massachusetts.— Case *v.* Minot, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536.

New York.—Moon *v.* National Wall-Plaster Co., 31 Misc. 631, 66 N. Y. Suppl. 33; Hawley *v.* Cramer, 4 Cow. 717; King *v.* Baldwin, 17 Johns. 384, 8 Am. Dec. 415 [*reversing* 2 Johns. Ch. 554].

North Carolina.— Hamlin *v.* Hamlin, 56 N. C. 191.

Pennsylvania.— Masson's Appeal, 70 Pa. St. 26.

land have, however, been dismissed where after suit brought ejectment became available as an adequate remedy.[86] And where a necessary party for the purposes of equitable relief dies pending the suit, and plaintiff fails to revive it against his representatives, legal relief will not be granted against the remaining defendant.[87]

(IV) *Incidental Determination of Legal Questions and Titles.* Related to but distinct from the subject of awarding legal relief in an equity suit is that of incidentally deciding questions of law and adjudicating legal rights for the purpose of awarding equitable relief consequent upon such determination. The English chancery, as a separate court, with a bar practically distinct from that of the law courts, was reluctant either to adjudicate a legal title or to determine any question purely of law, although such adjudication or determination was an essential prerequisite to the disposition of a cause properly before it. Accordingly, when the right to equitable relief was found to depend on a legal title, the practice was to retain the bill for a certain period with leave to plaintiff in the meantime to bring an action at law to establish his title, giving at the same time such directions and imposing upon the parties such restrictions as would secure an unimpeded and conclusive legal proceeding and judgment.[88] The law action proceeded to verdict, and a new trial might be moved for, but no further steps were taken at law, and the equity suit was then set down for further direction.[89] Where a question of law incidentally presented itself the practice was to direct a case to be stated to one of the law courts for its opinion.[90] Regularly the case was stated by the parties, and if they did not agree, was settled by a master. The judges of the court to which it was sent returned their opinion in the form of a certificate.[91] In the United States neither of these courses is customary. Instead the court will in the equity suit itself determine any legal questions incidentally arising, and, except where the jurisdiction of equity depends upon the prior establishment of a right at law, will try and establish legal rights or titles when equitable rights depend thereon.[92]

South Carolina.— Fraser *v.* McClenaghan, 2 Strobh. Eq. 227.

Virginia.— Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784.

Wisconsin.— Bigelow *v.* Washburn, 98 Wis. 553, 74 N. W. 362.

United States.— Busch *v.* Jones, 184 U. S. 598, 22 S. Ct. 511, 46 L. ed. 707 [*reversing* 16 App. Cas. (D. C.) 23]; Hohorst *v.* Howard, 37 Fed. 97; Kirk *v.* Du Bois, 28 Fed. 460.

See 19 Cent. Dig. tit. "Equity," §§ 115–117.

86. Daniel *v.* Green, 42 Ill. 471; Hickman *v.* Irvine, 3 Dana (Ky.) 121; Sanderlin *v.* Thompson, 17 N. C. 539; Blythe *v.* Hinckley, 84 Fed. 246.

87. Slaughter *v.* Nash, 1 Litt. (Ky.) 322.

88. Bootle *v.* Blundell, Coop. 136, 10 Eng. Ch. 136, 19 Ves. Jr. 494, 34 Eng. Reprint 600, 15 Rev. Rep. 93; 2 Daniell Ch. Pr. 762.

89. 2 Daniell Ch. Pr. 765.

90. Barton Suit Eq. c. 9 (Am. ed. 135); 2 Daniell Ch. Pr. 766.

91. 2 Daniell Ch. Pr. 768.

92. *Alabama.*— Evins *v.* Cawthon, 132 Ala. 184, 31 So. 441.

Illinois.— Leigh *v.* National Hollow Brake Beam Co., 104 Ill. App. 438; Herrick *v.* Lynch, 49 Ill. App. 657 [*affirmed* in 150 Ill. 283, 37 N. E. 221].

New Jersey.— National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219; Vreeland *v.* Vreeland, 49 N. J. Eq. 322, 24 Atl. 551. But "a court of equity in this state can deal with legal questions only so far as their decision is incidental or essential to the determination of some equitable question." Stout *v.* Phœnix Assur. Co., (Ch. 1904) 56 Atl. 691, 694, per Reed, V. C.

New York.— Dodge *v.* Pond, 23 N. Y. 69.

North Carolina.— Lindsay *v.* Roraback, 57 N. C. 124; Simmons *v.* Hendricks, 43 N. C. 84, 55 Am. Dec. 439.

Oregon.— Salem Imp. Co. *v.* McCourt, 26 Oreg. 93, 41 Pac. 1105.

Pennsylvania.— Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547.

See 19 Cent. Dig. tit. "Equity," §§ 103, 104, 106.

The legal title to land may be determined when so incidentally involved. Wilson *v.* Dresser, 152 Ill. 387, 38 N. E. 888; Killgore *v.* Carmichael, 42 Oreg. 618, 72 Pac. 637; Wilhelm's Appeal, 79 Pa. St. 120; Hanna *v.* Reeves, 22 Wash. 6, 60 Pac. 62; Douglas Co. *v.* Tennessee Lumber Mfg. Co., 118 Fed. 438, 55 C. C. A. 254; Peck *v.* Ayres, etc., Tie Co., 116 Fed. 273, 53 C. C. A. 551. In New Jersey it is held that, where plaintiff's right depends upon the legal title to an easement and the answer denies that title, the proper course is to retain the bill until plaintiff has had a reasonable opportunity to establish his title at law. Todd *v.* Staats, 60 N. J. Eq. 507, 46 Atl. 645. But where the propriety of instituting the suit depends upon the establishment of a right at law, and the action

e. Relief to Defendants. The doctrine of retaining jurisdiction to completely adjust the controversy extends to the granting of relief to a defendant or between co-defendants.[93] On this ground defendant may have equitable relief to which he shows himself entitled as a consequence to the relief granted plaintiff,[94] or even in some cases where plaintiff has failed to make out his own case.[95] Under some circumstances defendant may thus obtain relief in the absence of facts essential to the maintenance of an original bill for the purpose.[96] Where the original bill is sufficient to invoke the jurisdiction of equity, defendant has often been accorded relief of a legal character;[97] but where the original lacks equity the cross bill falls with it.[98] Rights of defendants among themselves and germane to the subject

at law will render further relief in equity unnecessary, the bill will not be retained. Outcalt *v.* Geo. W. Helme Co., 42 N. J. Eq. 665, 4 Atl. 669, 9 Atl. 683.

Title to office, etc.— While equity will not entertain a bill, the purpose of which is to try title to office (see *supra*, II, A, 5, f, (I)), it may on a bill having a proper equitable foundation, when necessary, incidentally determine such question. Garmire *v.* American Min. Co., 93 Ill. App. 331; Hurley *v.* Mississippi Levee Com'rs, 76 Miss. 141, 23 So. 580; Schwab *v.* Frisco Min., etc., Co., 21 Utah 258, 60 Pac. 940. Likewise the court may incidentally determine the location of a county-seat, although such determination requires an inquiry into the fairness of an election for the removal of the county-seat. Boren *v.* Smith, 47 Ill. 482.

93. Such relief, unless imposed purely as a condition to granting plaintiff's relief, must be sought by cross bill, and the special requisites thereto are treated under that head. See *infra*, X.

94. Thus where a court set aside execution sales of land made on dormant judgments, which, however, remained a lien, it also directed a sale of the land to satisfy the lien. Currie *v.* Clark, 101 N. C. 321, 7 S. E. 776. On a bill for partition defendant cotenant obtained specific performance of a contract between him and plaintiff relating to the land. Booten *v.* Scheffer, 21 Gratt. (Va.) 474.

95. *Connecticut.*— Alden *v.* Trubee, 44 Conn. 455.

Mississippi.— Leflore County *v.* Allen, 80 Miss. 298, 31 So. 815.

Nebraska.— Tulleys *v.* Keller, 45 Nebr. 220, 63 N. W. 388.

Vermont.— Hathaway *v.* Hagan, 64 Vt. 135, 24 Atl. 131, on bill to foreclose a mortgage the master found that the debt had been more than discharged by usurious payments, and the court then gave defendant leave to file a cross bill to obtain his remedy.

Virginia.— Kirschbaum *v.* Coon, (1896) 25 S. E. 658.

West Virginia.— Hotchkiss *v.* Fitzgerald Patent Prepared Plaster Co., 41 W. Va. 357, 23 S. E. 576.

United States.— Foley *v.* Grand Hotel Co., 121 Fed. 509, 57 C. C. A. 629.

See 19 Cent. Dig. tit. "Equity," §§ 112, 118.

96. A judgment creditor may subject land to the payment of his debt without showing that his legal remedy has been exhausted (Probert *v.* McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796), and a defendant's title may be quieted without showing that he was in possession (American Assoc. *v.* Innis, 109 Ky. 595, 60 S. W. 388, 22 Ky. L. Rep. 1196).

97. *Illinois.*— Biegler *v.* Merchants' L. & T. Co., 164 Ill. 197, 45 N. E. 512 [*affirming* 62 Ill. App. 560]; Lloyd *v.* Karnes, 45 Ill. 62.

Iowa.— Clark *v.* Lee, 21 Iowa 274.

Michigan.— Chase *v.* Boughton, 93 Mich. 285, 54 N. W. 44.

Missouri.— Quest *v.* Johnson, 58 Mo. App. 54.

New Jersey.— Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113.

Tennessee.— Ducktown Sulphur, etc., Co. *v.* Barnes, (Sup. 1900) 60 S. W. 593; Swingle *v.* Brown, (Ch. App. 1897) 48 S. W. 347.

Washington.— Installment Bldg., etc., Assoc. *v.* Wentworth, 1 Wash. 467, 25 Pac. 298.

See 19 Cent. Dig. tit. "Equity," §§ 112, 118.

On restraining enforcement of a void judgment, the practice in Texas is to proceed to try the original cause of action and render judgment for defendant thereon if he be found entitled thereto. Willis *v.* Gordon, 22 Tex. 241; Edrington *v.* Allsbrooks, 21 Tex. 186; Witt *v.* Kaufman, 25 Tex. Suppl. 384; Hickman *v.* White, (Tex. Civ. App. 1895) 29 S. W. 692; Gulf, etc., R. Co. *v.* Schneider, (Tex. Civ. App. 1894) 28 S. W. 260. Elsewhere it has been held that where the court in such a case denies the injunction it may decree payment of the money. Charleston *v.* Page, Speers Eq. (S. C.) 159; W. V. Davidson Lumber Co. *v.* Jones, (Tenn. Ch. App. 1901) 62 S. W. 386.

A defendant who might bring ejectment cannot in Illinois maintain a cross bill for possession it seems under any circumstances. Gage *v.* Mayer, 117 Ill. 632, 7 N. E. 97. And see *infra*, X.

98. Camp *v.* Elston, 48 Ala. 81; Hill *v.* Hill, 79 Ga. 367, 4 S. E. 751, 81 Ga. 516, 8 S. E. 879; McCarthy *v.* Neu, 93 Ill. 455; Metz *v.* McAvoy Brewing Co., 98 Ill. App. 584; Correll *v.* Freeman, 29 Ill. App. 39. See also Smith *v.* Little, 22 Fed. Cas. No. 13,072, 5 Biss. 490. But where an action at law has been restrained until barred by the statute of limitations, defendant may assert the demand by cross bill. North British, etc., Ins. Co. *v.* Lathrop, 63 Fed. 508.

of the bill are governed by the same principle as cross relief against plaintiff.[99] Where a defendant injects a controversy into the suit plaintiff may have appropriate relief relating thereto.[1]

d. Independent Controversies. The doctrine of retaining jurisdiction to settle the entire controversy is confined, however, to the determination of rights dependent upon or at most germane to the subject-matter and main purpose of the bill. Jurisdiction will not be retained to adjust independent controversies between the parties, or controversies beyond the scope of that raised by the bill.[2]

3 Special Applications of Rule — a. Bills of Discovery. Much controversy has arisen as to whether, when jurisdiction is assumed for the purpose of discovery, it will be retained to give consequent relief. The rule supported by far the greater number of American cases is that where discovery proves to be necessary a court of equity may proceed to give relief,[3] unless the bill is brought in aid

99. *Alabama.*— Davenport *v.* Bartleft, 9 Ala. 179.

Illinois.— Slack *v.* Hughes, 71 Ill. App. 91.

Kentucky.— Harris *v.* Smith, 2 Dana 10.

Maryland.— Kunkel *v.* Fitzhugh, 22 Md. 567.

Missouri.— Newton *v.* Rebenack, 90 Mo. App. 650.

Wisconsin.— Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

See 19 Cent. Dig. tit. "Equity," § 113. See also *infra*, X.

1. For instance where suit was brought to foreclose a trust deed and defendant by cross bill denied the execution of the deed and asked its cancellation as a cloud on her title, the court finding that she had not executed the deed but had rendered herself liable for the debt, decreed the payment of the debt as a condition of removing the cloud. Bourke *v.* Hefter, 104 Ill. App. 126. See also Ballard *v.* Scruggs, 90 Tenn. 585, 18 S. W. 259, 25 Am. St. Rep. 703; Hill *v.* Osborne, 60 Tex. 390; Jordan *v.* Coulter, 30 Wash. 116, 70 Pac. 257.

2. *Alabama.*— Hooe *v.* Harrison, 11 Ala. 499; Mobile Bank *v.* Planters', etc., Bank, 1 Ala. 109.

Georgia.— Roddy *v.* Cox, 29 Ga. 298, 74 Am. Dec. 64.

Illinois.— Dinwiddie *v.* Bell, 95 Ill. 360.

Kentucky.— Haggin *v.* Pack, 10 B. Mon. 210.

Massachusetts.—Scofield *v.* Peck, 182 Mass. 121, 65 N. E. 60.

New York.— Curtis *v.* Engle, 4 Edw. 117.

West Virginia.— Coombs *v.* Shisler, 47 W. Va. 373, 34 S. E. 763.

United States.—Broadis *v.* Broadis, 86 Fed. 951; Tilford *v.* Oakley, 23 Fed. Cas. No. 14,038*a*, Hempst. 197.

See 19 Cent. Dig. tit. "Equity," §§ 103, 116.

Application of rule.— A bill by an heir to cancel deeds of the decedent will not be retained for an accounting between plaintiff and defendants, her coheirs. Stager *v.* Crabtree, 177 Ill. 59, 52 N. E. 378. A bill to annul a contract dissolving a partnership will not, when annulment is refused, be retained to adjust equities under the contract. Bittenbender *v.* Kemmerer, 185 Pa. St. 135, 39 Atl. 838. A bill to contest a will being unsuccessful, jurisdiction cannot be retained to partition land not devised. Hollenbeck *v.* Cook, 180 Ill. 65, 54 N. E. 154.

Judicial bonds.— A bond given under order of court in a suit for maintenance cannot be enforced in that suit. Elliott *v.* Elliott, (N. J. Ch. 1897) 36 Atl. 951. So too of an injunction bond. Easton *v.* New York R. Co., 26 N. J. Eq. 359. See, generally, Injunctions. But jurisdiction will be retained to enforce a ne exeat bond given in the suit. Wauters *v.* Van Vorst, 28 N. J. Eq. 103; Musgrave *v.* Medex, 1 Meriv. 49, 35 Eng. Reprint 595.

3. *Alabama.*— Virginia, etc., Min., etc., Co. *v.* Hale, 93 Ala. 542, 9 So. 256.

Georgia.— Jordan *v.* Cameron, 12 Ga. 267.

Illinois.— Kendallville Refrigerator Co. *v.* Davis, 40 Ill. App. 616.

Kentucky.— Jenkins *v.* Green, 1 A. K. Marsh. 463; Handley *v.* Fitzhugh, 1 A. K. Marsh. 24.

Maine.— Traip *v.* Gould, 15 Me. 82.

Mississippi.— Huntingdon *v.* Grantland, 33 Miss. 453.

New Jersey.— Hoppock *v.* United New Jersey R., etc., Co., 27 N. J. Eq. 286.

New York.—Hawley *v.* Cramer, 4 Cow. 717; Armstrong *v.* Gilchrist, 2 Johns. Cas. 424; Miller *v.* McCan, 7 Paige 451. In Armstrong *v.* Gilchrist, 2 Johns. Cas. 424, there is a valuable note by the chancellor where the rule and its limitations are clearly stated.

Pennsylvania.— U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31; Philadelphia *v.* Keyser, 10 Phila. 50.

South Carolina.— Gadsden *v.* Lord, 1 Desauss. 208.

Vermont.— Holmes *v.* Holmes, 36 Vt. 525; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

Virginia.— Chichester *v.* Vass, 1 Munf. 98, 4 Am. Dec. 531; Love *v.* Braxton, Wythe 144.

United States.— Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90. "If certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine

of an action at law,[4] or the intervention of a jury is deemed necessary or more appropriate for the determination of the claim.[5] But the retention of a bill of discovery for the purpose of giving relief obtainable at law rests in the discretion of the court,[6] and the court will in no case permit a legal demand to be drawn within its jurisdiction by an ill-founded demand for discovery. Therefore when it appears that discovery is unnecessary, relief at law will not be given.[7] Where in addition to the right to discovery plaintiff shows some other right of equitable cognizance the bill will be retained, although as to such other matter plaintiff might also have a remedy at law,[8] and in a few cases it is held or intimated that such further equity, as for example account, accident, fraud, or trust, is essential to the granting of relief.[9]

b. After Preliminary Injunctions. Where the aid of a court of equity has been properly invoked to obtain an injunction for the preservation of plaintiff's rights, jurisdiction will be retained to completely enforce the right.[10] But where there was no right to the injunction in the first place it cannot be made the basis for further relief.[11]

c. As Against Actions at Law. Where circumstances exist justifying a court of equity which has properly acquired jurisdiction in retaining it to enforce legal

the whole matter in controversy." Russell *v.* Clark, 7 Cranch 69, 89, 3 L. ed. 271.

See 19 Cent. Dig. tit. "Equity," § 114.

4. Crane *v.* Bunnell, 10 Paige (N. Y.) 333; Lyons *v.* Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129. Pure bills for discovery are not brought to a hearing. See 14 Cyc. 336.

5. Lynch *v.* Sumrall, 1 A. K. Marsh. (Ky.) 468; Taylor *v.* Ferguson, 4 Harr. & J. (Md.) 46; Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 424 note; Bentley *v.* Kenyon, 2 Luz. Leg. Obs. (Pa.) 316.

6. Little *v.* Cooper, 10 N. J. Eq. 273; Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423; Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,950, 2 Ban. & A. 506, 14 Blatchf. 109. In Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 424, it was said that jurisdiction would be retained in most cases of account, without defining the exceptions, and intimating that it depended on the circumstances of the case. In nearly all the cases the language used indicates merely the power of the court to grant relief of a legal character after discovery, and not the right of the party to demand it.

7. *Illinois.*— U. S. Insurance Co. *v.* Central Nat. Bank, 7 Ill. App. 426.

Kentucky.— Bullock *v.* Boyd, 2 A. K. Marsh. 322.

South Carolina.— Farley *v.* Farley, 1 McCord Eq. 506.

Virginia.— Hall *v.* Smith, 25 Gratt. 70.

United States.— India Rubber Co. *v.* Consolidated Rubber Tire Co., 117 Fed. 354.

See 19 Cent. Dig. tit. "Equity," § 114.

8. *District of Columbia.*— McCormick *v.* District of Columbia, 4 Mackey 396, 54 Am. Rep. 284.

Georgia.— Martin *v.* Tidwell, 36 Ga. 332.

Mississippi.— Craig *v.* Doherty, 61 Miss. 96.

New York.—Rathbone *v.* Warren, 10 Johns. 587.

West Virginia.— Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423.

United States.— Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90.

See 19 Cent. Dig. tit. "Equity," § 114.

9. *Connecticut.*— Isham *v.* Gilbert, 3 Conn. 166; Middletown Bank *v.* Russ, 3 Conn. 135, 8 Am. Dec. 164.

New Jersey.— Brown *v.* Edsall, 9 N. J. Eq. 256.

Pennsylvania.— Philadelphia *v.* Keyser, 10 Phila. 50.

West Virginia.— Lafever *v.* Billmyer, 5 W. Va. 33.

United States.— Foster *v.* Swasey, 9 Fed. Cas. No. 4,984, 2 Woodb. & M. 217.

See 19 Cent. Dig. tit. "Equity," § 114.

10. A bill to restrain defendant from disposing of plaintiff's chattels in defendant's possession will be retained to compel delivery of the chattels. Davis *v.* Sullivan, 141 Mass. 76, 7 N. E. 32. An injunction restraining defendant from selling slaves to which plaintiff was entitled having been dissolved pending the hearing, and defendant then having sold the slaves, the court then rendered a decree for their value. Cocke *v.* Trotter, 10 Yerg. (Tenn.) 213. A bill to restrain execution of a judgment in ejectment was retained by a federal court to enforce a state statute securing to the tenant the value of his improvements. Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266. But where an injunction to restrain a sale under a deed of trust proved abortive, because not served in time to prevent the sale, and plaintiff neglected to defend an action for the debt secured, equity refused to retain jurisdiction to restrain the enforcement of the judgment for the debt. McRaven *v.* Forbes, 6 How. (Miss.) 569. See, generally, INJUNCTIONS.

11. Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Little *v.* Cooper, 11 N. J. Eq. 224; Allen *v.* Burke, 2 Md. Ch. 534. Where a plaintiff failed to make out a case for injunction, but showed a right to other relief of an equitable character, although not within the original purport of the bill, it was held

remedies, such course may be followed, although an action at law is pending where the rights might be determined; whether such legal action was instituted after[12] or before[13] the jurisdiction of equity attached.

D. Jurisdiction as Affected by Territorial Limits — 1. Court Must Have Power to Enforce Its Decree. Courts exist for the enforcement of rights, not the determination of academic questions. This principle denies to a court of equity cognizance of any suit where its decree would be ineffectual because of territorial limits to the reach of its process. On the other hand a court of equity may act wherever and to whatever extent its decree can be made effectual.[14] As the original jurisdiction of chancery was purely personal,[15] jurisdiction could not be based on control of the *res* alone, but depended solely on acquiring jurisdiction of the party. Jurisdiction purely *in rem* is the creature of statutes, which are strictly construed.[16] Sometimes, however, the presence of the *res* within the jurisdiction enables a court to render an effectual decree of a personal character, when otherwise it could not do so, and therefore it is said that the court has jurisdiction whenever the presence of the parties, of the *res*, or of a portion of the *res* within its jurisdiction renders it practicable to make and enforce a decree which will accomplish the ends of justice.[17] No jurisdiction whatever exists unless the parties to be affected are by service of process within the jurisdiction or by voluntary appearance subjected to the control of the court, or the *res* is within the jurisdiction.[18]

error to dismiss the bill. Gibson *v.* Thornton, 112 Ga. 328, 37 S. E. 406.

12. Lockett *v.* Hurt, 57 Ala. 198; Bivins *v.* Marvin, 96 Ga. 268, 22 S. E. 923; Keighler *v.* Ward, 8 Md. 254.

13. *Georgia.*— Wyley *v.* Whitely, 38 Ga. 605.

Missouri.— Purdy *v.* Gault, 19 Mo. App. 191.

New Jersey.— Collins *v.* Colley, (Ch. 1887) 11 Atl. 118.

Tennessee.— Cornelius *v.* Morrow, 12 Heisk. 630.

Virginia.— Billups *v.* Sears, 5 Gratt. 31, 50 Am. Dec. 105.

See 19 Cent. Dig. tit. "Equity," § 106.

14. Harris *v.* Pullman, 84 Ill. 20, 25 Am. Rep. 416; Ward *v.* Arredondo, Hopk. (N. Y.) 213, 14 Am. Dec. 543; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. (Pa.) 534; Morris *v.* Remington, 1 Pars. Eq. Cas. (Pa.) 387; Wicks *v.* Caruthers, 13 Lea (Tenn.) 353.

15. See *infra*, III, D.

16. *Alabama.*— Glover *v.* Glover, 16 Ala. 440.

Mississippi.— Zecharie *v.* Bowers, 3 Sm. & M. 641, re-reporting same case in 1 Sm. & M. 584, 40 Am. Dec. 111, because of gross errors in first report.

Pennsylvania.— Eby's Appeal, 70 Pa. St. 311.

Tennessee.— Jackson *v.* Tiernan, 10 Yerg. 172; Grace *v.* Hunt, Cooke 341; Grewar *v.* Henderson, 1 Tenn. Ch. 76.

Virginia.— Dunlop *v.* Keith, 1 Leigh 430, 19 Am. Dec. 755.

United States.— Boswell *v.* Otis, 9 How. 336, 13 L. ed. 164; Boswell *v.* Dickerson, 3 Fed. Cas. No. 1,683, 4 McLean 262.

See 19 Cent. Dig. tit. "Equity," §§ 93, 94.

17. Ward *v.* Arredondo, Hopk. (N. Y.) 213, 14 Am. Dec. 543, holding, where plaintiff, a citizen of New York, made a contract with a Spanish subject for lands in Alabama and the latter person sent a deed to his agent in New York to be delivered on the payment of a certain sum, that the presence of the deed within the court's jurisdiction enabled the court to restrain its withdrawal from the jurisdiction, take an account of the amount justly due, and so compel performance. See also Morrow *v.* Fossick, 3 Lea (Tenn.) 129. Such jurisdiction sometimes exists by virtue of statute. Wyatt *v.* Greer, 4 Stew. & P. (Ala.) 318; Golden *v.* Maupin, 2 J. J. Marsh. (Ky.) 236; Watts *v.* Griffin, Litt. Sel. Cas. (Ky.) 244; Boswell *v.* Otis, 9 How. (U. S.) 336, 13 L. ed. 164, Ohio statute. The mere absence from the jurisdiction of one who would be defendant at law does not give equity jurisdiction to lay hold of the *res* within the state and apply it to a purely legal demand. Reese *v.* Bradford, 13 Ala. 837; Meres *v.* Chrisman, 7 B. Mon. (Ky.) 422; Fletcher *v.* Hooper, 32 Md. 210; Beall *v.* Brown, 7 Md. 393; Birdsall *v.* Fischer, 17 Minn. 100. See Morgan *v.* Baxter, 113 Ga. 144, 38 S. E. 411.

An agent of a foreign government having money of his principal in his hands cannot be compelled to pay it over to a creditor of the principal. Leavitt *v.* Dabney, 7 Rob. (N. Y.) 350.

18. *Illinois.*—Harris *v.* Pullman, 84 Ill. 20, 25 Am. Rep. 416.

Maine.— Mudgett *v.* Gager, 52 Me. 541.

Maryland.— McGaw *v.* Gortner, 96 Md. 489, 54 Atl. 133, holding that a bill properly filed as one *in rem* could not be amended so as to affect land outside the jurisdiction.

New York.— Morley *v.* Green, 11 Paige 240, 42 Am. Dec. 112.

Pennsylvania.— Coleman's Appeal, 75 Pa. St. 441.

2. Personal Jurisdiction and Foreign Subject-Matter. The general rule is that where a court has jurisdiction of the person of defendant it may render any appropriate decree acting directly upon the person, although the subject-matter may be without the jurisdiction;[19] and it may in such case compel the performance of a contract outside the jurisdiction.[20]

3. Suits Affecting Land. A court of equity has no more power than a court of law to render a decree directly affecting the title of lands in another jurisdiction,[21] nor can such result be accomplished by directing a conveyance to be made by a commissioner.[22] But where the court has jurisdiction of the parties it may render a personal decree which indirectly by controlling personal conduct affects the title to land outside the jurisdiction.[23] By virtue of its control over

Virginia.— Miller *v.* Sharp, 3 Rand. 41.

United States.— Van Epps *v.* Walsh, 28 Fed. Cas. No. 16,850, 1 Woods 598, decree of a court of a Confederate state affecting the rights of a party at the time in a loyal state held void because he was prohibited by the laws of the United States from making a defense.

See 19 Cent. Dig. tit. "Equity," § 94.

19. *Alabama.*— Stapler *v.* Hurt, 16 Ala. 799.

Maryland.— Carroll *v.* Lee, 3 Gill & J. 504, 22 Am. Dec. 350.

Michigan.— Hewitt Iron Min. Co. *v.* Dessau Co., 129 Mich. 590, 89 N. W. 365.

New York.— Mitchell *v.* Bunch, 2 Paige 606, 22 Am. Dec. 669; De Klyn *v.* Watkins, 3 Sandf. Ch. 185.

Pennsylvania.— Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

Virginia.— Davis *v.* Morris, 76 Va. 21.

See 19 Cent. Dig. tit. "Equity," § 96.

What determines jurisdiction of person.— In Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, above cited, the jurisdiction was taken to depend on the citizenship of the parties, but in Dunn *v.* McMillen, 1 Bibb (Ky.) 409, it was held that service of process and not domicile within the jurisdiction was the requisite.

20. March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732. But in Pennsylvania it was held that there was no jurisdiction to compel officers of a foreign corporation to perform their duty or stock-holders thereof resident in Pennsylvania to pay their subscriptions. Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

21. *Illinois.*— Cooley *v.* Scarlett, 38 Ill. 316, 87 Am. Dec. 298. See also Harris *v.* Pullman, 84 Ill. 20, 25 Am. Rep. 416.

Kentucky.— Dunn *v.* McMillan, 1 Bibb 409.

Maryland.— White *v.* White, 7 Gill & J. 208.

North Carolina.— Proctor *v.* Ferebee, 36 N. C. 143, 36 Am. Dec. 34.

Pennsylvania.— Morris *v.* Remington, 1 Pars. Eq. Cas. 387.

See 19 Cent. Dig. tit. "Equity," §§ 95, 96.

22. King *v.* Tuscumbia, etc., R. Co., 14 Fed. Cas. No. 7,808; Watts *v.* Waddle, 29 Fed. Cas. No. 17,295, 1 McLean 200.

23. Parties before the court may thus be compelled to execute a conveyance of lands without the jurisdiction.

Illinois.— Baker *v.* Rockabrand, 118 Ill. 365, 8 N. E. 456; Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205; Enos *v.* Hunter, 9 Ill. 211.

Kansas.— Manley *v.* Carter, 7 Kan. App. 86, 52 Pac. 915.

Michigan.— Noble *v.* Grandin, 125 Mich. 383, 84 N. W. 465.

New Jersey.— Lindley *v.* O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79.

Ohio.— Burnley *v.* Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

See 19 Cent. Dig. tit. "Equity," § 96.

Decree ordering conveyance, although unexecuted, operates even extraterritorially, as in adjudication of the equitable rights of the parties in the land. Burnley *v.* Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

Non-resident.— In Tennessee it was held that a non-resident could not be compelled to convey land without the state, although he had been served with process, because the decree would be ineffectual. Wicks *v.* Caruthers, 13 Lea 353. But in Enos *v.* Hunter, 9 Ill. 211, it was said that control could be preserved by a ne exeat.

Cancellation of a mortgage or deed of trust on lands without the jurisdiction may be compelled. Moore *v.* Jaeger, 2 MacArthur (D. C.) 465; Williams *v.* Ayrault, 31 Barb. (N. Y.) 364.

A compromise of litigation concerning such lands may be confirmed. Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208.

Specific performance of contract concerning such lands may be enforced. Wood *v.* Warner, 15 N. J. Eq. 81; Shattuck *v.* Cassidy, 3 Edw. (N. Y.) 152; Burnley *v.* Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Penn *v.* Baltimore, 1 Ves. 444, 27 Eng. Reprint 1132.

Injunction.— Such indirect control has also been exercised by injunctions restraining parties before the court from interfering with the possession of land outside the jurisdiction (Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522; Kirtlin *v.* Atlas Sav., etc., Assoc., (Tenn. Ch. App. 1900) 60 S. W. 149), from conveying the same (Briggs *v.* French, 4 Fed. Cas. No. 1,870, 1 Sumn. 504), and from prosecuting ejectment therefor (Baker *v.* Rockabrand, 118 Ill. 365, 8 N. E. 456).

Charging legacy on land.— In a suit to compel the payment of a legacy power was as-

land within its boundaries a state may by statute authorize its courts after constructive service to directly adjudicate the title to such lands, although defendant is a non-resident and absent from the state.[24]

4. Suits Aiding or Attacking Other Proceedings. Where suit is brought to directly affect other proceedings, either to aid or attack them, it may be brought where such other proceedings were taken, although ordinarily no independent jurisdiction could there originate.[25]

5. Waiver of Objections. Where the court has jurisdiction over the subject-matter of the suit, the rule prevailing generally in judicial proceedings applies to suits in equity, and objections to jurisdiction over the person of defendant are waived by appearing to the merits.[26]

E. Restrictions Upon Exercise of Jurisdiction — 1. Introductory Statement. Notwithstanding the general object of equity to afford a remedy wherever a right exists and the law is inadequate to its protection,[27] jurisdiction is in some cases denied or declined, although plaintiff establishes a right and although the law is inadequate for its protection.[28]

2. Whether Jurisdiction Restricted to Property Rights. It is frequently asserted that equity concerns itself solely with the protection of property rights.[29]

serted to declare land outside the jurisdiction charged with its payment. Lewis *v.* Darling, 16 How. (U. S.) 1, 14 L. ed. 819.

24. Arndt *v.* Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. ed. 918; Parker *v.* Overman, 18 How. (U. S.) 137, 15 L. ed. 318; Ormsby *v.* Ottman, 85 Fed. 492, 29 C. C. A. 295. Arndt *v.* Griggs, *supra*, while attempting to distinguish in effect overrules Hart *v.* Sansom, 110 U. S. 151, 3 S. Ct. 586, 28 L. ed. 101, which, asserting the ancient doctrine that equity acts *in personam* only, holds that such a decree is void. See also Bowden *v.* Schatzell, Bailey Eq. (S. C.) 360, 23 Am. Dec. 170.

25. A bill of review must be brought where the original bill was filed. Whittle *v.* Tarver, 75 Ga. 818; Ferris *v.* Child, 1 D. Chipm. (Vt.) 336. So also a bill of revivor (Ferris *v.* Child, *supra*), or a bill to carry out and enforce a decree (*In re* Axtell, 95 Mich. 244, 54 N. W. 889; Ferris *v.* Child, *supra*). A bill in aid of a proceeding at law may be brought where the action at law is pending (Kendrick *v.* Whitfield, 20 Ga. 379), and a bill to restrain the action at law may be likewise brought in the jurisdiction of such action (Freeman *v.* Howe, 24 How. (U. S.) 450, 16 L. ed. 749). But where a court of chancery has first obtained possession of the controversy it may restrain proceedings at law in another jurisdiction. Home Ins. Co. *v.* Howell, 24 N. J. Eq. 238. Where one party commences proceedings in the courts of a particular county, the other may invoke the equity powers of such court with regard to the same subject-matter. Markham *v.* Huff, 72 Ga. 874; Bouldin *v.* Reynolds, 50 Md. 171. The principle stated gives to the federal courts jurisdiction regardless of citizenship in suits so directly affecting their own proceedings or judgments. Root *v.* Woolworth, 150 U. S. 401, 14 S. Ct. 136, 27 L. ed. 1123; Freeman *v.* Howe, 24 How. (U. S.) 450, 16 L. ed. 749; and cases cited 11 Cyc. 847 note 16.

26. Answering after a plea to the jurisdiction has been overruled waives the plea on appeal. Railway Passenger, etc., Mut. Aid, etc., Assoc. *v.* Robinson, 38 Ill. App. 111. An answer to the merits waives an objection contained in the same answer that defendant is a non-resident and the *res* without the state. Carroll *v.* Lee, 3 Gill & J. (Md.) 504, 22 Am. Dec. 350. A demurrer for want of equity waives a defect of jurisdiction of defendant. Merrill *v.* Houghton, 51 N. H. 61. But in Massachusetts an answer reserving the objection to jurisdiction and accompanied by a stipulation to abide the decree was held not to waive a defective service on a non-resident. Walling *v.* Beers, 120 Mass. 548.

27. See *infra*, III, B; and *supra*, II, A, 1.

28. See the following subsections.

29. *Connecticut.*— Mead *v.* Stirling, 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227.

Illinois.— Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143; Marshall *v.* Illinois State Reformatory, 201 Ill. 9, 66 N. E. 314 [*affirming* 103 Ill. App. 65]; Sheridan *v.* Colvin, 78 Ill. 237.

Kentucky.— Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 21 Ky. L. Rep. 1157, 50 L. R. A. 105.

Maryland.— Chappell *v.* Stewart, 82 Md. 323, 33 Atl. 542, 51 Am. St. Rep. 476, 37 L. R. A. 783.

New York.— Murray *v.* Gast Lithographic, etc., Co., 8 Misc. 36, 28 N. Y. Suppl. 271; Cruger *v.* Douglas, 4 Edw. 433.

Ohio.— *In re* Grear, 9 Ohio S. & C. Pl. Dec. 299.

Pennsylvania.— Eckman *v.* Eckman, 55 Pa. St. 269.

Texas.— State *v.* Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478.

United States.— Green *v.* Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90.

England.— Day *v.* Brownrigg, 10 Ch. D. 294, 48 L. J. Ch. 173, 39 L. T. Rep. N. S. 553, 27 Wkly. Rep. 217.

The soundness of this doctrine except in a general sense may well be questioned.[30] Most of the cases declaring it might well have been disposed of on other grounds. The declaration is often made in suits for relief, chiefly by injunction, from acts of a criminal nature. In this class of cases the rule is that equity is without jurisdiction over crimes,[31] but it is said that if plaintiff makes out a case where equity would otherwise interfere for the protection of his property aid will not be withheld because the act complained of is a crime as well as an invasion of his private right.[32] It is submitted that the correct reason of these cases is that the extraordinary jurisdiction of chancery grew out of the inadequacy of the civil and not of the criminal law, and the restriction is to civil rights, not merely to property rights. The fact that interference, where the same act is a crime and also a civil wrong, is found in cases where the wrong was to property has been because the criminal laws have usually been a safeguard to private rights not concerning property, and not because equity could not protect such rights. That equity concerns itself with property rights alone is also often given as a reason for refusing to adjudicate titles to office,[33] or to protect purely political rights.[34] In some of these cases there is an adequate remedy at law, in others the exercise of jurisdiction would be an interference with the legislative or judicial branches of the government, in nearly all the supreme necessity of an orderly conduct of public affairs overrides any private rights involved. In many of the cases these reasons are also given. Jurisdiction to determine title to offices is denied,

See 19 Cent. Dig. tit. "Equity," § 8.

30. The doctrine has received little discussion from commentators. One writer first states it absolutely and without qualification, and later, with regard to jurisdiction over infants, says: "The necessity therefore for the existence of property as a prerequisite to the jurisdiction of the court, would seem to be more of a legal fiction than a reality; and the idea would now seem to be wholly exploded." Bispham Princ. Eq. (6th ed.) §§ 51, 672.

31. *Alabama.*— Moses *v.* Mobile, 52 Ala. 198.

Georgia.— Gault *v.* Wallis, 53 Ga. 675.

Illinois.— Equity will not prevent the execution of a sentence to jail because the condition of the jail is dangerous to health. Stuart *v.* La Salle County, 83 Ill. 341, 25 Am. Rep. 397.

Missouri.— State *v.* Uhrig, 14 Mo. App. 413.

New York.— Hudson *v.* Thorne, 7 Paige 261; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. 371.

Pennsylvania.— Campbell *v.* Scholfield, 29 Leg. Int. 325.

See 19 Cent. Dig. tit. "Equity," § 88.

Neglect or refusal to prosecute offenders on the part of the proper officers does not authorize an injunction to restrain the commission of crime. People *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850; People *v.* Condon, 102 Ill. App. 449.

Injunctions restraining criminal prosecutions are excluded from equity jurisdiction as well as injunctions restraining the commission of crime. Coykendall *v.* Hood, 36 N. Y. App. Div. 558, 55 N. Y. Suppl. 718; Arbuckle *v.* Blackburn, 113 Fed. 616, 51 C. C. A. 122. See Davis, etc., Mfg. Co. *v.* Los Angeles, 115 Fed. 537. See, generally, INJUNCTIONS.

32. Christie St. Commission Co. *v.* Chicago Bd. of Trade, 92 Ill. App. 604; Shea *v.* Knoxville, etc., R. Co., 6 Baxt. (Tenn.) 277; Schandler Bottling Co. *v.* Welch, 42 Fed. 561; Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551, 37 L. J. Ch. 889, 19 L. T. Rep. N. S. 64, 16 Wkly. Rep. 1138; Macaulay *v.* Shackell, 1 Bligh N. S. 96, 4 Eng. Reprint 809; Gee *v.* Pritchard, 2 Swanst. 402, 19 Rev. Rep. 87, 36 Eng. Reprint 670. See also Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 370; Ocean Ins. Co. *v.* Fields, 18 Fed. Cas. No. 10,406, 2 Story 59.

33. Heffran *v.* Hutchins, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353; Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143; Marshall *v.* Illinois State Reformatory, 201 Ill. 9, 66 N. E. 314 [*affirming* 103 Ill. App. 65]; White *v.* Berry, 171 U. S. 366, 18 S. Ct. 917, 43 L. ed. 199; *In re* Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. ed. 402.

34. *Illinois.*— Sheridan *v.* Colvin, 78 Ill. 237.

Kentucky.— Weaver *v.* Toney, 107 Ky. 419, 21 Ky L. Rep. 1157, 54 S. W. 732, 50 L. R. A. 105.

Maryland.— Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

Ohio.— *In re* Grear, 9 Ohio S. & C. Pl. Dec. 299.

United States.— Georgia *v.* Stanton, 6 Wall. 50, 18 L. ed. 721; Green *v.* Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90.

Acts of public officers.— In People *v.* State Canal Bd., 55 N. Y. 390, the control of equity over the acts of public officers was restricted to matters affecting public property.

Boundaries between states.— The jurisdiction of the supreme court of the United States in equity to establish the boundaries between states is put upon the ground that the ques-

although the right of plaintiff to the emoluments of the office is clearly a property right, so that the rule under discussion cannot properly apply and account for these cases. The protection afforded to trade-marks is also put upon the ground that it is a property right of the owner which is protected, and unfair competition cases go upon the same ground.[35] There are on the other hand certain cases which it is difficult to account for on the theory that property rights alone are protected, even under the most liberal interpretation of the term.[36] Among such cases are those protecting the author of private letters against their publication.[37] The jurisdiction of chancery over infants was supported as a delegation of the royal prerogative, regardless of property rights.[38] In many cases relief has been given against nuisances merely because they endangered personal safety or disturbed the comfort of plaintiff.[39] Other cases where the property right must be either very remote or altogether fanciful are those where relief granted consists in restraining the publication of portraits,[40] the removal of a dead

tion is one of property and that sovereignty and jurisdiction are merely incidental. Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233. It is quite clear that in nearly all such cases the question of sovereignty is paramount, and that the property involved is that of citizens not of the state, and that such property is affected only by determining which state shall have sovereignty over it.

35. See TRADE-MARKS AND TRADE-NAMES.

36. "What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name), is, in my opinion, destroying property of a most valuable description." Dixon *v.* Holden, L. R. 7 Eq. 488, 492, 20 L. T. Rep. N. S. 357, 17 Wkly. Rep. 482, per Malins, V. C.

37. See, generally, LITERARY PROPERTY. The courts in order to square these cases with the general doctrine are required to recognize a dual property right in such letters. For some purposes they belong to the writer, for others to the person addressed. Some cases protect the author only where the letters possess a literary value. Hoyt *v.* Mackenzie, 3 Barb. Ch. (N. Y.) 320, 49 Am. Dec. 178; Wetmore *v.* Scovell, 3 Edw. (N. Y.) 515; Labouchere *v.* Hess, 77 L. T. Rep. N. S. 559. Other cases go much farther. Hoyt *v.* Mackenzie, *supra*, and Wetmore *v.* Scovell, *supra*, were in this respect disapproved in Woolsey *v.* Judd, 4 Duer (N. Y.) 379, and in Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100, where breach of private confidence was given as a ground of relief. Breach of trust or confidence regardless of property is, in Prince Albert *v.* Strange, 1 Hall & T. 1, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 19, 41 Eng. Reprint 1171, held to be a sufficient ground for interference.

38. Swift *v.* Swift, 34 Beav. 266; *In re* McGrath, [1892] 2 Ch. 496, 61 L. J. Ch. 549, 67 L. T. Rep. N. S. 636, 41 Wkly. Rep. 97; Johnstone *v.* Beattie, 10 Cl. & F. 42, 7 Jur. 1023, 8 Eng. Reprint 657; Wellesley *v.* Beaufort, 2 Russ. 1, 3 Eng. Ch. 1. The same independence of property interest in the protection of infants is recognized in certain American cases. Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708; Maguire *v.* Maguire, 7 Dana (Ky.) 181; McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15; Aymar *v.* Roff, 3 Johns. Ch. (N. Y.) 49. See also Note to Eyre *v.* Shaftsbury, 2 White & T. Lead. Cas. Eq. 693. And see, generally, INFANTS.

39. McKillopp *v.* Taylor, 25 N. J. Eq. 139; Davidson *v.* Isham, 9 N. J. Eq. 186; Catlin *v.* Valentine, 9 Paige (N. Y.) 575, 38 Am. Dec. 567; Dennis *v.* Eckhardt, 3 Grant (Pa.) 390; Walter *v.* Selfe, 4 De G. & Sm. 315, 15 Jur. 416, 20 L. J. Ch. 433, 4 Eng. L. & Eq. 15; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133. *Contra*, St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642. See also State *v.* Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478, holding that either property or civil rights must be involved. And see, generally, NUISANCES. It is probable that all such cases are connected with the occupancy of real estate, but they do not go upon the ground of injury thereto. In New York proceedings to dispossess a tenant were restrained because the tenant was ill and could not be removed without endangering her life. Weber *v.* Rogers, 41 Misc. 662, 85 N. Y. Suppl. 232.

Abatement of liquor nuisance.— In Iowa a statute authorizing any citizen to maintain a suit in equity to abate as a nuisance a place for the unlawful sale of intoxicants was sustained as conferring upon the court nothing beyond the proper domain of equity, the court saying: "The distinction sought to be made between nuisances where property rights are involved and where they are not, is very limited, narrow, and ill defined." Littleton *v.* Fritz, 65 Iowa 488, 493, 22 N. W. 641, 54 Am. Rep. 19.

40. Marks *v.* Jaffa, 6 Misc. (N. Y.) 290, 26 N. Y. Suppl. 908; Pollard *v.* Photographic Co., 40 Ch. D. 345, 58 L. J. Ch. 251, 60 L. T. Rep. N. S. 418, 37 Wkly. Rep. 266. See, however, Roberson *v.* Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442, denying injunctive relief in such cases, but on the broad ground that no right of any character recognized by the law supported plaintiff's case. See also Murray *v.* Gast Lithographic, etc.,

body,[41] and determining as a matter of public concern the location of a county-seat.[42]

3. Review of Proceedings at Law. While equity by acting on the parties often aids proceedings at law and as frequently restrains their prosecution or the enforcement of judgments,[43] it has no supervisory power over courts of law,[44] or tribunals of special jurisdiction,[45] and will act with reference to such proceedings only upon some distinct ground of equitable interposition.[46] It will not correct errors in legal proceedings,[47] even where there is no other method of review available.[48] The limitation is against the exercise of jurisdiction where the remedy at law fails because of improper administration and not because of extraneous circumstances.[49]

4. Abstract Rights and Trivial Matters — a. Only Substantial Rights Protected. Equity will not lend its aid for the protection of abstract rights.[50] To justify relief it must be sought in good faith to protect a substantial right and redress or prevent an appreciable wrong;[51] but if the right is substantial and the

Co., 8 Misc. (N. Y.) 36, 28 N. Y. Suppl. 271. See Right of Privacy, 4 Harv. L. Rev. 193.

41. Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667. See also cases cited in 13 Cyc. 269 note 8.

42. People *v.* Wiant, 48 Ill. 263.

43. See Discovery, 14 Cyc. 301; Injunctions; Judgments.

44. Richardson *v.* Baltimore, 8 Gill (Md.) 433.

45. East Baltimore Protestant Station Methodist Church *v.* Baltimore, 6 Gill (Md.) 391, 48 Am. Dec. 540; Ewing *v.* St. Louis, 5 Wall. (U. S.) 413, 18 L. ed. 657. And see *infra*, II, E, 7.

46. Thorne *v.* Williams, 4 N. C. 30; Smith *v.* McIver, 9 Wheat. (U. S.) 532, 6 L. ed. 152.

47. *Arkansas.*— Ford *v.* Judsonia Mercantile Co., 52 Ark. 426, 12 S. W. 876, 20 Am. St. Rep. 192, 6 L. R. A. 714; *Ex p.* Jackson, 45 Ark. 158.

California.— Julien *v.* Riley, 61 Cal. 242.

Georgia.— Irvin *v.* Sanders, 52 Ga. 350.

Illinois.— Cassidy *v.* Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116; Reid *v.* Stock Yards L. Coal, etc., Co., 88 Ill. App. 32; Taylor *v.* Weagley, 17 Ill. App. 485.

Kentucky.— Farmers' Bank *v.* Collins, 13 Bush 138; Morrison *v.* Hart, 2 Bibb 4, 4 Am. Dec. 663.

Maryland.— Powles *v.* Dilley, 2 Md. Ch. 119.

North Carolina.— Eborn *v.* Waldo, 59 N. C. 111; Smith *v.* Harkins, 39 N. C. 486; Thorne *v.* Williams, 4 N. C. 30.

South Carolina.— Atty.-Gen. *v.* Baker, 9 Rich. Eq. 521.

United States.— Ewing *v.* St. Louis, 5 Wall. 413, 18 L. ed. 657; Smith *v.* McIver, 9 Wheat. 532, 6 L. ed. 152.

See 19 Cent. Dig. tit. "Equity," §§ 34, 92.

48. Smith *v.* McIver, 9 Wheat. (U. S.) 532, 6 L. ed. 152.

49. The erroneous administration of a remedy must be distinguished from a case where the remedy fails through accident, fraud, or other matter of equitable cognizance. Where a statute gave to a writ of error bond the force of a judgment, equity relieved against it on grounds which would have been a defense to an action at law if such had been required. Gibbs *v.* Frost, 4 Ala. 720. Where judgment has been entered on a note given upon a consideration to be performed in the future, and the consideration fails after judgment, equity will relieve (Harper *v.* Coleman, 4 Litt. (Ky.) 156; Hunt *v.* Martin, 2 Litt. (Ky.) 82), but not where the defense could have been made in the action at law (Dugan *v.* Cureton, 1 Ark. 31, 31 Am. Dec. 727).

50. As in the case of a bill by a widow to obtain a decree declaring that under the will she took an estate in fee simple, no adverse claim appearing (Fahy *v.* Fahy, 58 N. J. Eq. 210, 42 Atl. 726), and a bill to determine whose duty it is to call a municipal election, no attempt being made to compel the election (Hurlbut *v.* Lookout Mountain, (Tenn. Ch. App. 1898) 49 S. W. 301 [*affirmed* orally by supreme court, Oct. 5, 1898]), and a bill to declare the relations of parties under a contract where no ground for relief is shown (McCormick *v.* McDonald, 110 Fed. 50), and a bill to declare the rights of plaintiff as a citizen of the United States to navigate its waters (Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337). See also Goodrich *v.* Moore, 2 Minn. 61, 72 Am. Dec. 74; Shackley *v.* Eastern R. Co., 98 Mass. 93. A bill cannot be maintained to establish an unacknowledged deed, where proof of execution can be made through a subscribing witness, as no judicial relief is in such case called for. Velie *v.* Breen, (Miss. 1900) 28 So. 25.

51. Hull *v.* Ely, 2 Abb. N. Cas. (N. Y.) 440. In a suit to restrain the obstruction of a right of way it turned out that the real question was who should be at the expense of one pound for a gate. The bill was dismissed. Ingram *v.* Morecraft, 33 Beav. 49. In a suit to set aside a tax-sale it appeared that the tax was void, but that it had been properly reassessed for an amount very slightly less. Relief was denied. Warden *v.* Fond du Lac County, 14 Wis. 618. The court refused to restrain the construction of a house encroaching on plaintiff's land, where only an occasional stone of the foundation projected a

wrong appreciable the motive of plaintiff in seeking protection of the right in a court of equity is immaterial.[52]

b. Controversies Not to Be Anticipated. Equity will not act in anticipation of possible future controversies. Plaintiff's right must have been actually invaded, or if the relief sought be preventive there must be a state of affairs which actually threatens such right and calls for present relief.[53]

c. Trivial Matters — Jurisdictional Amount. From very early times it was considered "beneath the dignity" of the court of chancery to entertain suits involving only small amounts. A sounder reason is stated to be the avoidance of litigation unprofitable to the suitors and wasteful of the court's time.[54] Accordingly bills were dismissed if involving less than £10 or land to the value of forty shillings per annum.[55] In the United States similar rules are in force,[56] unless a

short distance below the surface, and there was no appreciable damage, the encroachment being unintentional. Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298. But where a brick wall encroached three or four inches defendant was compelled to remove it. Mulrein *v.* Weisbecker, 37 N. Y. App. Div. 545, 56 N. Y. Suppl. 240.

52. Mazet *v.* Pittsburg, 6 Pa. Co. Ct. 599; Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50. See also Dinsmore *v.* New Jersey Cent. R. Co., 19 Fed. 153.

53. *Illinois.*— Gilbert *v.* Block, 51 Ill. App. 516.

Maryland.— Knighton *v.* Young, 22 Md. 359.

New Jersey.— Henry McShane Mfg. Co. *v.* Kolb, 59 N. J. Eq. 146, 45 Atl. 533.

Oregon.— Umatilla Irr. Co. *v.* Umatilla Imp. Co., 22 Oreg. 366, 30 Pac. 30.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Earle, 9 Pa. Dist. 198, 23 Pa. Co. Ct. 449.

Tennessee.— Black *v.* Shelby County, 2 Lea 566.

West Virginia.— McNeill *v.* McNeill, 43 W. Va. 765, 28 S. E. 717.

United States.— McCormick *v.* McDonald, 110 Fed. 50.

See 19 Cent. Dig. tit. "Equity," § 8.

Rights in futuro of parties not in being will not be adjudicated. Cross *v.* De Valle, 1 Wall. (U. S.) 1, 17 L. ed. 515.

Declaratory decrees.—Even a statute (R. I. Pub. St. c. 192, § 22) providing that no suit in equity shall be defeated because a merely declaratory decree is sought, and that the court may declare rights without granting consequential relief, does not authorize a declaratory decree unless a right to actual relief, immediate or prospective, is shown. Hanley *v.* Wetmore, 15 R. I. 386, 6 Atl. 777.

54. Story Eq. Pl. § 500. "Equity does not stoop to pick up pins." Woodbury *v.* Portland Maine Soc., 90 Me. 18, 37 Atl. 323, per Peters, C. J.

55. Bacon Ord. Rule 15 (given in Beames Orders Ch. 10); Almy *v.* Pycroft, Cary 103, 21 Eng. Reprint 55; Marbar *v.* Kempester, Cary 83, 21 Eng. Reprint 44; Whittingham *v.* Wooler, 2 Swanst. 428, 36 Eng. Reprint 679. See also Brace *v.* Taylor, 2 Atk. 253, 26 Eng. Reprint 556. In England General Orders of 1860, IX, Rule 1, provided that every suit the subject-matter of which is under the value of £10 shall be dismissed unless it be instituted to establish a general right, or unless there shall be some other special circumstance which in the opinion of the court shall make it reasonable that such suit shall be retained. These rules were repealed by the supreme court rules of 1883, but it has since been held that the same limitation as to value prevails. Westbury-on-Severn *v.* Meredith, 30 Ch. D. 387, 55 L. J. Ch. 744, 52 L. T. Rep. N. S. 839, 34 Wkly. Rep. 217.

56. *California.*— Mietsch *v.* Berkhaut, (1893) 35 Pac. 321, court refused to restrain tax-sale where owner could redeem for three dollars and ninety cents.

Illinois.— Tascher *v.* Timerman, 67 Ill. App. 568, no jurisdiction of suit to protect rights of stock-holder whose stock was worth less than five dollars.

Massachusetts.— Gale *v.* Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200 (bill for legacy of twenty dollars dismissed); Smith *v.* Williams, 116 Mass. 510 (bill concerning less than ten dollars in value dismissed); Cummings *v.* Barrett, 10 Cush. 186, 190 (amount in controversy extremely small. Bill dismissed). See Wilkinson *v.* Stitt, 175 Mass. 581, 56 N. E. 830, suit to recover a cup costing sixty dollars and having a special value as a prize won in a contest held not to be frivolous.

Mississippi.— Champenois *v.* Fort, 45 Miss. 355, Lord Bacon's ordinance seems to be in force. See Code (1892), § 482.

New Jersey.— General equity jurisdiction is still controlled by Lord Bacon's ordinance. Kelaher *v.* English, 62 N. J. Eq. 674, 50 Atl. 902 (although the court of chancery had exclusive jurisdiction to enforce mechanic's liens for public improvements, it refused to take jurisdiction to enforce a lien for twenty-five dollars); Ocean City R. Co. *v.* Bray, 55 N. J. Eq. 101, 35 Atl. 839 (court refused to restrain construction of railroad over land worth not more than five dollars); Allen *v.* Demarest, 41 N. J. Eq. 162, 2 Atl. 655.

New York.— Jurisdiction of the old chancery court being that possessed by the court of chancery in England July 4, 1776, the English rule was held binding. Mitchell *v.* Tighe, Hopk. 119; Fullerton *v.* Jackson, 5 Johns. Ch. 276 (suit for twenty-eight dollars, interest on legacy, dismissed); Moore *v.*

different jurisdictional amount is prescribed by statute,[57] fifty dollars being usually deemed the equivalent of £10 sterling.[58] But suits in aid of charities were exceptions to the rule, and were entertained regardless of amount;[59] and a suit is never trivial, however small may be the particular amount involved, if its object is to protect a valuable right which would be endangered by acquiescence.[60] Whether the suit is trivial is generally to be determined by the nature of plaintiff's demand as disclosed by the bill, and not by the relief which he finally shows himself entitled to.[61] Where it appears on the face of the bill that the amount in controversy is insufficient objection may be taken by demurrer[62] or by motion to dismiss;[63] or the court may of its own motion at the hearing order the bill to be dismissed upon this ground.[64]

5. Impracticable Relief. As equity is without jurisdiction where its decree

Lyttle, 4 Johns. Ch. 183. See New York cases cited in the next note.

Ohio.— The English rule "has always prevailed in Ohio, with this modification, that, as our statute allows an injunction bill to restrain proceedings at law where the matter in dispute is of the value of twenty dollars, . . . our courts of equity, by analogy, have generally entertained bills, though not for injunctions, if their subject matter was of that value." Carr *v.* Iglehart, 3 Ohio St. 457, 459.

See 19 Cent. Dig. tit. "Equity," §§ 97, 98.

57. *Alabama.*— Jurisdiction exists on demands above twenty dollars. Hall *v.* Cannte, 22 Ala. 650.

Georgia.— It was held that the judiciary act of 1799, § 53, conferring equity powers in all cases where the common-law remedy is inadequate, forbade the dismissal of a suit involving twenty-eight dollars. Smith *v.* Ashcraft, 25 Ga. 132, 71 Am. Dec. 163.

Maryland.— The jurisdictional minimum is twenty dollars. Kuenzel *v.* Baltimore, 93 Md. 750, 49 Atl. 649 (*quoting* Pub. Gen. Laws, art. 16, § 91); Reynolds *v.* Howard, 3 Md. Ch. 331.

Michigan.— The jurisdictional amount is one hundred dollars. Detroit *v.* Wayne Cir. Judge, 128 Mich. 438, 87 N. W. 376; Steinbach *v.* Hill, 25 Mich. 78.

New York.— Rev. St. c. 173, § 37, required the dismissal of bills concerning property of less than one hundred dollars in value. This was held not to apply to a bill of discovery in aid of a law action. Schroeppel *v.* Redfield, 5 Paige 245; Goldey *v.* Becker, 1 Edw. 271. It seems that this statute was impliedly repealed by the constitution of 1846 and the code of 1848. Cobine *v.* St. John, 12 How. Pr. 333. See also cases cited in the last note.

Tennessee.— Jurisdictional amount is fifty dollars. Code, § 4291; Laws (1801), c. 6, § 1; Malone *v.* Dean, 9 Lea 336; Wagstaff *v.* Braden, 1 Baxt. 304; Brimingham *v.* Tapscott, 4 Heisk. 382; McNew *v.* Toby, 6 Humphr. 27.

58. In most of the cases cited in the last note but one the jurisdictional amount, when controlled by Lord Bacon's ordinance, was spoken of as fifty dollars. But in one case where the amount was exactly fifty dollars the bill was retained, that amount exceeding £10 sterling. Vredenberg *v.* Johnson, Hopk. (N. Y.) 112, where, however, relief was sought on the ground of fraud.

59. Parrot *v.* Pawlet, Cary 103, 21 Eng. Reprint 55.

60. Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453 ("right of a permanent and valuable nature"); Barnes *v.* Sabron, 10 Nev. 217; Union Mill, etc., Co. *v.* Dangherg, 81 Fed. 73; Rochdale Canal Co. *v.* King, 2 Sim. N. S. 78, 42 Eng. Ch. 78; Cocks *v.* Foley, 1 Vern. 359, 23 Eng. Reprint 522. See also Allen *v.* Demarest, 41 N. J. Eq. 162, 164, 2 Atl. 655.

61. Stockbridge Iron Co. *v.* Cone Iron Works, 99 Mass. 468 (holding that the amount of plaintiff's demands gave jurisdiction without complying with a statute requiring an affidavit of amount in law actions); Champenois *v.* Fort, 45 Miss. 355; Wagstaff *v.* Braden, 1 Baxt. (Tenn.) 304; Brimingham *v.* Tapscott, 4 Heisk. (Tenn.) 382; McNew *v.* Toby, 6 Humphr. (Tenn.) 27.

In a suit to compel conveyance of the legal title to mortgaged premises jurisdiction is determined by the value of the premises. Griswold *v.* Mather, 5 Conn. 435.

In a creditor's suit plaintiff's judgment and defendant's property must each reach the jurisdictional amount. Smets *v.* Williams, 4 Paige (N. Y.) 364.

62. Gale *v.* Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; Smith *v.* Williams, 116 Mass. 510; Cummings *v.* Barrett, 10 Cush. (Mass.) 186; Smets *v.* Williams, 4 Paige (N. Y.) 364; Carr *v.* Iglehart, 3 Ohio St. 457. See also Wilkinson *v.* Stitt, 175 Mass. 581, 56 N. E. 830.

63. Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453; Smets *v.* Williams, 4 Paige (N. Y.) 364; Fullerton *v.* Jackson, 5 Johns. Ch. (N. Y.) 276; Moore *v.* Lyttle, 4 Johns. Ch. (N. Y.) 183, 186; Brace *v.* Taylor, 2 Atk. 253, 26 Eng. Reprint 556. See also Kelaher *v.* English, 62 N. J. Eq. 674, 50 Atl. 902 (bill struck out under rule 213 of the chancery court); Ocean City R. Co. *v.* Bray, 55 N. J. Eq. 101, 35 Atl. 839; Allen *v.* Demarest, 41 N. J. Eq. 162, 2 Atl. 655.

64. Tascher *v.* Timerman, 67 Ill. App. 568; Chapman *v.* Banker, etc., Pub. Co., 128 Mass. 478; Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453.

would through absence of the parties or subject-matter be ineffectual,[65] so where it has jurisdiction it will not render a decree which it is impracticable to carry out.[66]

6. LEGAL RIGHTS NOT ESTABLISHED AT LAW. Where the jurisdictions of law and equity are distinctly and separately exercised, a plaintiff who founds his right upon a legal title or claim which is controverted must before appealing to equity first establish such title or claim at law.[67] Where plaintiff's right is undisputed, or sanctioned by long enjoyment, such prior determination is unnecessary.[68]

7. NECESSITY OF JUDICIAL CHARACTER OF RELIEF. The powers exercised by a court of equity must be solely of course of a judicial character. Therefore a court of equity cannot perform an act which the law intrnsts to the discretion and control of municipal or other public officers, nor can it control them as to the manner of exercising such powers.[69] Neither can the court, from a sense of

65. See *supra*, II, D.

66. Where a defendant has parted with the possession of papers, equity will not order their delivery unless it be shown that defendant has the power to produce them or that he wilfully put them away. Pattison *v.* Skillman, 43 N. J. Eq. 392, 13 Atl. 808. A defendant will not be ordered to return property which he has sold to a non-resident before the action commenced, whatever his motive was. Straughan *v.* Hallwood, 30 W. Va. 274, 3 S. E. 394, 8 Am. St. Rep. 29. A defendant will not be compelled to convey when he has no title. Leffler *v.* Burlington, 18 Iowa 361. The court had no power to compel cohabitation or restore conjugal rights. People *v.* Mercein, 8 Paige (N. Y.) 47; Cruger *v.* Douglas, 4 Edw. (N. Y.) 433. Ordinarily the court because of impracticability will not undertake to specifically enforce a building contract. Armour *v.* Connolly, (N. J. Ch. 1901) 49 Atl. 1117. But it may require a carrier to furnish facilities for loading and unloading live stock. Butchers, etc., Stock-Yards Co. *v.* Louisville, etc., R. Co., 67 Fed. 35, 14 C. C. A. 290.

67. *Massachusetts.*— Ross *v.* Ross, 123 Mass. 212.

Michigan.— Devaux *v.* Detroit, Harr. 98.

Missouri.— See Thias *v.* Siener, 103 Mo. 314, 15 S. W. 772.

New Jersey.— Oppenheim *v.* Loftus, (Ch. 1901) 50 Atl. 795; Todd *v.* Staats, 60 N. J. Eq. 507, 46 Atl. 645; Waddell *v.* Beach, 9 N. J. Eq. 793.

North Carolina.— Lunsford *v.* Bostion, 16 N. C. 483.

Pennsylvania.— Keystone Electric Light, etc., Co. *v.* People's Electric Light, etc., Co., 200 Pa. St. 366, 49 Atl. 951; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530.

Vermont.— Prentiss *v.* Larnard, 11 Vt. 135.

Virginia.— Witz *v.* Mullin, 90 Va. 805, 20 S. E. 783.

See 19 Cent. Dig. tit. "Equity," § 40.

Where the legal right is not fundamental, but a distinct ground for equitable relief exists, no prior determination is necessary. Robinson *v.* Braiden, 44 W. Va. 183, 28 S. E. 798. Incidental determination of legal question see *supra*, II, C, 2, b, (IV).

Rule in other cases compared.— The cases where jurisdiction is based on the prevention of multiplicity of suits between the same parties (see *supra*, II, B, 1) are illustrations of the rule; those where the jurisdiction is founded upon preventing multiplicity of suits when the parties are numerous are exceptions, jurisdiction attaching because the establishment of rights at law is impracticable. The rule requiring a judgment at law and execution as prerequisites to a creditor's suit (see 12 Cyc. 9, 16) goes rather upon the necessity of exhausting the legal remedy.

68. Harrelson *v.* Kansas City, etc., R. Co., 151 Mo. 482, 52 S. W. 368; Lackland *v.* Smith, 5 Mo. App. 153; Corby *v.* Aldrich, 4 Mo. App. 575; Bitting's Appeal, 105 Pa. St. 517; Hunter *v.* Wilcox, 23 Pa. Co. Ct. 191.

69. As to compel the opening of a street (Bauman *v.* Detroit, 58 Mich. 444, 25 N. W. 391), or regulate the grade thereof (Harrisonburg *v.* Roller, 97 Va. 582, 34 S. E. 523); the power to determine such matters being vested in the municipal authorities. So also of regulating the use of streets by railroad companies (Cairo, etc., R. Co. *v.* People, 92 Ill. 170; Hamilton St. R., etc., Co. *v.* Hamilton, etc., Electric Transit Co., 5 Ohio Cir. Ct. 319, 3 Ohio Cir. Dec. 158; Raht *v.* Southern R. Co., (Tenn. Ch. App. 1897) 50 S. W. 72 [*affirmed* orally by supreme court, Oct. 26, 1898]), and of controlling officers charged with providing for the division of a county (Riverside County *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788). Equity cannot review a finding of fact by the secretary of the interior with regard to the selection of public lands under a donation act, at least in the absence of fraud or mistake. Sparks *v.* Brown, 2 Wash. Terr. 426, 7 Pac. 864. Nor can equity aid the imperfect execution of a sheriff's deed (Moreau *v.* Detchemendy, 18 Mo. 522), or compel him to execute a deed to a person other than the purchaser (Garner's Appeal, 1 Walk. (Pa.) 438). The inhibition by the eleventh amendment of the federal constitution of actions in the federal courts by individuals against a state cannot be evaded by an appeal to equity to control the action of state officers. McCauley *v.* Kellogg, 15 Fed. Cas. No. 8,688, 2 Woods 13. And see, generally, Thomas *v.* Cook

justice or public necessity, do that which properly belongs to the legislature,[70] nor can it remedy a wrong by making in effect a contract between the parties with reference to the subject-matter.[71]

F. Waiver of Objection to Jurisdiction[72] — **1. For Entire Want of Equity.** When the bill entirely lacks equity, that is, when it presents no matters within the domain of equitable jurisprudence, the objection is not waived by failure to interpose it at a particular time, but is available at any stage of the proceedings.[73] Although this rule has been restricted in statement to a want of equity apparent on the face of the bill,[74] it doubtless applies when on final hearing plaintiff wholly fails to make out any case of equitable cognizance.[75]

County, 56 Ill. 351; Guest *v.* Brooklyn, 69 N. Y. 506; Heywood *v.* Buffalo, 14 N. Y. 534; Woodruff *v.* Fisher, 17 Barb. (N. Y.) 224; Mace *v.* Newburgh, 15 How. Pr. (N. Y.) 161; Thatcher *v.* Dusenbury, 9 How. Pr. (N. Y.) 32; Van Doren *v.* New York, 9 Paige (N. Y.) 388; Messerole *v.* Brooklyn, 8 Paige (N. Y.) 198; Mooers *v.* Smedley, 6 Johns. Ch. (N. Y.) 28.

70. The court cannot relieve property lawfully subjected to taxation from the burden of such taxes, because after assessment the property had greatly depreciated in value. White Sulphur Springs Co. *v.* Robinson, 3 W. Va. 542. It cannot on the ground of public necessity effect a condemnation of a right of way for a public purpose not authorized by the legislature. Western Union Tel. Co. *v.* Ann Arbor R. Co., 90 Fed. 379, 33 C. C. A. 113. See also Buchner *v.* Chicago, etc., R. Co., 56 Wis. 403, 14 N. W. 273.

71. Defendant having constructed a sewer upon plaintiff's land, a referee directed judgment for the value of the land and that upon payment thereof plaintiff should convey the same. The court held this to be error, saying that in such case the court might as an act of grace withhold an injunction on condition that defendant pay the value, but it could not compel the transfer of title. Mitchell *v.* White Plains, 91 Hun (N. Y.) 189, 36 N. Y. Suppl. 935.

72. Want of jurisdiction of subject-matter waived by failure to object see *supra*, II, D, 5.

73. *Alabama.*— Henderson *v.* Hall, 134 Ala. 455, 32 So. 840; McGrew *v.* Tombeckbee Bank, 5 Port. 547.

Connecticut.— Niles *v.* Williams, 24 Conn. 279.

Florida.— McMillan *v.* Wiley, (1903) 33 So. 993.

Indiana.— Muir *v.* Clark, 7 Blackf. 423.

Iowa.— Cowles *v.* Shaw, 2 Iowa 496; Kriechbaum *v.* Bridges, 1 Iowa 14.

Maine.— Woodman *v.* Freeman, 25 Me. 531; Chase *v.* Palmer, 25 Me. 341.

Maryland.— Dunnock *v.* Dunnock, 3 Md. Ch. 140.

Michigan.— Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; Atty.-Gen. *v.* Moliter, 26 Mich. 444; Bennett *v.* Nichols, 12 Mich. 22.

New Jersey.— Miller *v.* U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509.

New York.— Debussierre *v.* Holladay, 4 Abb. N. Cas. 111; Travis *v.* Waters, 12 Johns. 500; New-York Dry Dock Co. *v.* American L. Ins., etc., Co., 11 Paige 384.

Pennsylvania.— Williams *v.* Fowler, 201 Pa. St. 336, 50 Atl. 969; Wiser's Appeal, 9 Wkly. Notes Cas. 508.

South Carolina.— Wilson *v.* Cheshire, 1 McCord Eq. 233.

Virginia.— Graveley *v.* Graveley, 84 Va. 145, 4 S. E. 218; Salamone *v.* Keiley, 80 Va. 86; Green *v.* Massie, 21 Gratt. 356; Beckley *v.* Palmer, 11 Gratt. 625; Hudson *v.* Kline, 9 Gratt. 379.

Wisconsin.— Buchner *v.* Chicago, etc., R. Co., 56 Wis. 403, 14 N. W. 273; Remington *v.* Foster, 42 Wis. 608.

United States.—Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 11 S. Ct. 682, 35 L. ed. 303; Lewis *v.* Cocks, 23 Wall. 466, 23 L. ed. 70; Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 18 L. ed. 765; Burdell *v.* Comstock, 15 Fed. 395; Gray *v.* Beck, 6 Fed. 595; Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394.

See 19 Cent. Dig. tit. "Equity," § 120.

A statutory provision that no exception for want of jurisdiction should be made after answer was filed was held not to apply where the objection is that the matter is not cognizable in equity at all. Jones *v.* Bradshaw, 16 Gratt. (Va.) 355; Pollard *v.* Patterson, 3 Hen. & M. (Va.) 67. Where a statute provided that no bill should be entertained unless certified by counsel to be in his opinion of such a nature that no adequate remedy could be had at law, it was held that the absence of such certificate can be raised at any stage. Everhart *v.* Everhart, 3 Luz. Leg. Reg. (Pa.) 55.

Adequate remedy at law.— In New York it has been held that where the want of an adequate remedy at law is an essential part of plaintiff's case, the rule that the existence of an adequate remedy at law must be pleaded by answer does not apply. Everett *v.* De Fontaine, 78 N. Y. App. Div. 219, 79 N. Y. Suppl. 692. See also White *v.* Fratt, 13 Cal. 521.

74. Compare Cowles *v.* Shaw, 2 Iowa 496, holding that want of equity in the bill may be taken advantage of for the first time on appeal, and McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548, holding that where the petition presents an equitable claim and the answer does not raise the objection it cannot be raised after the cause is set for hearing.

75. Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140; Graveley *v.* Graveley,

2. Objections Other Than Entire Want of Equity. Objections to proceedings in equity, other than an entire absence of matter of equitable cognizance, must be seasonably interposed or they are waived. Sometimes the rule is stated that the existence of an adequate remedy at law is waived by submitting to the jurisdiction or by not seasonably raising the objection.[76] In other cases it is said that the objection is waived, if not seasonably interposed, where it is competent for a court of equity to grant the relief sought and it has jurisdiction of the subject-matter.[77] The former statement would cover every jurisdictional defect unless construed, as it in fact is, to mean that in cases within the general domain of equity the objection that defendant in the particular matter has an adequate remedy at law may be waived. Both statements with their respective variants mean no more than that where a case is presented within the general field of equity jurisprudence, any feature which might lead the court to decline jurisdiction or to relegate the party to law in the particular case must be seasonably presented or the party will be deemed to have submitted to an equitable adjudi-

84 Va. 145, 4 S. E. 218; Green *v.* Massie, 21 Gratt. (Va.) 356. And see *supra*, II, C, 2, h, (II).

76. *Connecticut.*— Munson *v.* Munson, 30 Conn. 425; Hartford *v.* Chipman, 21 Conn. 488.

District of Columbia.— Tyler *v.* Moses, 13 App. Cas. 428.

Georgia.— Dixon *v.* Merchants', etc., Land Co., 103 Ga. 707, 30 S. E. 690; Brantley *v.* Mayo, 85 Ga. 606, 11 S. E. 864; Patterson *v.* Turner, 62 Ga. 674; Bell *v.* McGrady, 32 Ga. 257.

Illinois.— Harding *v.* Olson, 177 Ill. 298, 52 N. E. 482 [*affirming* 76 Ill. App. 475]; Kaufman *v.* Wiener, 169 Ill. 596, 48 N. E. 479 [*reversing* 68 Ill. App. 250]; Monson *v.* Bragdon, 159 Ill. 61, 42 N. E. 383; Matthewson *v.* Davis, 91 Ill. App. 153.

Massachusetts.— Crocker *v.* Dillon, 133 Mass. 91; Jones *v.* Keen, 115 Mass. 170; Massachusetts Gen. Hospital *v.* State Mut. L. Assur. Co., 4 Gray 227.

Michigan.— Bennett *v.* Nichols, 12 Mich. 22.

Missouri.— Parks *v.* People's Bank, 97 Mo. 130, 11 S. W. 41, 10 Am. St. Rep. 295 [*affirming* 31 Mo. App. 12]; Oldham *v.* Trimble, 15 Mo. 225.

Nebraska.— Sherwin *v.* Gaghagen, 39 Nebr. 238, 57 N. W. 1005.

New Jersey.— Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21.

New York.— Baron *v.* Korn, 127 N. Y. 224, 27 N. E. 804 [*affirming* 51 Hun 401, 4 N. Y. Suppl. 334]; Green *v.* Milbank, 3 Abb. N. Cas. 138; Pam *v.* Vilmar, 54 How. Pr. 235; Cumming *v.* Brooklyn, 11 Paige 596; Kohbi *v.* Underhill, 3 Sandf. Ch. 277.

Tennessee.— Bright *v.* Newland, 4 Sneed 440.

Vermont.— Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37.

Wisconsin.— Johnson *v.* Huber, 106 Wis. 282, 82 N. W. 137; Meyer *v.* Garthwaite, 92 Wis. 571, 66 N. W. 704; Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881.

United States.— Brown *v.* Lake Superior Iron Co., 134 U. S. 530, 10 S. Ct. 604, 33 L. ed. 1021; Kilbourn *v.* Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005; U. S. *v.* Southern Pac. R. Co., 117 Fed. 544; Williamson *v.* Monroe, 101 Fed. 322; Waite *v.* O'Neill, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550.

See 19 Cent. Dig. tit. "Equity," §§ 173–176.

77. *Arkansas.*— Mooney *v.* Brinkley, 17 Ark. 340; Cockrell *v.* Warner, 14 Ark. 345.

Connecticut.— Niles *v.* Williams, 24 Conn. 279.

Illinois.— Knox County *v.* Davis, 63 Ill. 405; Parker *v.* Parker, 61 Ill. 369; Magee *v.* Magee, 51 Ill. 500, 99 Am. Dec. 571.

Maine.— Chase *v.* Palmer, 25 Me. 341.

Massachusetts.— Raynham First Cong. Soc. *v.* Raynham, 23 Pick. 148; Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305; Bennett *v.* Nichols, 12 Mich. 22.

New York.— Grandin *v.* Le Roy, 2 Paige 509.

Pennsylvania.— Williams *v.* Fowler, 201 Pa. St. 336, 50 Atl. 969; People's Nat. Bank *v.* Loeffert, 184 Pa. St. 164, 38 Atl. 996; Magarge, etc., Co. *v.* Ziegler, 2 Pa. Super. Ct. 438, 43 Wkly. Notes Cas. 466; Wiser's Appeal, 9 Wkly. Notes Cas. 508.

South Carolina.— Wilson *v.* Cheshire, 1 McCord Eq. 233.

Virginia.— Graveley *v.* Graveley, 84 Va. 145, 4 S. E. 218; Salamone *v.* Keiley, 80 Va. 86; Green *v.* Massie, 21 Gratt. 356; Beckley *v.* Palmer, 11 Gratt. 625; Hudson *v.* Kline, 9 Gratt. 379.

Wisconsin.— Tenney *v.* State Bank, 20 Wis. 152.

United States.— Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 11 S. Ct. 682, 35 L. ed. 303; Kilbourn *v.* Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005; Williamson *v.* Monroe, 101 Fed. 322.

See 19 Cent. Dig. tit. "Equity," §§ 174, 176.

Jurisdiction doubtful.— Sometimes it is said that where the jurisdiction is doubtful the objection is waived unless seasonably presented. Schmohl *v.* Fiddick, 34 Ill. App. 190; Gough *v.* Crane, 3 Md. Ch. 119; Hughes *v.* Jones, 2 Md. Ch. 178; Searight *v.* Carlisle

cation.[78] A defendant submits to the jurisdiction by seeking affirmative equitable relief.[79]

G. Objections to Jurisdiction, When and How Taken — 1. At What Stage of Proceedings. Unless the matter is wholly beyond the domain of equitable cognizance,[80] no objection to the jurisdiction of equity can be made for the first time on appeal.[81] Nor can such an objection be made for the first time after a

Deposit Bank, 162 Pa. St. 504, 29 Atl. 783; McDonald *v.* Crockett, 2 McCord Eq. (S. C.) 130; Wilson *v.* Cheshire, 1 McCord Eq. (S. C.) 233.

78. This practically restricts the doctrine of waiver to cases of concurrent jurisdiction, and this seems to be the ground of some of the decisions.

Connecticut.— Niles *v.* Williams, 24 Conn. 279.

Michigan.— Williams *v.* Detroit, 2 Mich. 560.

Mississippi.— See Dollman *v.* Moore, 70 Miss. 267, 12 So. 23, 19 L. R. A. 222, holding that in an equitable garnishment suit, the matter being one of equitable cognizance, if the garnishee did not object to proceeding in equity the debtor might not do so.

New Jersey.— Eggers *v.* Anderson, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570 [*reversing* 61 N. J. Eq. 85, 47 Atl. 727].

New York.— Ketchum *v.* Depew, 81 Hun 278, 30 N. Y. Suppl. 794.

Pennsylvania.— Neel *v.* Neel, 1 T. & H. Pr. 75.

Tennessee.— Lishey *v.* Smith, 7 Humphr. 299.

See 19 Cent. Dig. tit. "Equity," § 174.

Federal cases.— That this is the test, and that there must be at least a matter of concurrent jurisdiction presented whereon to found a waiver of objection, appears from a comparison of the cases in the federal court. In the federal cases cited *supra*, note 73, the rule was laid down that a bill in equity will be dismissed at any stage when no matter of equitable cognizance is disclosed. In the following cases it was declared that where a matter of equitable cognizance is disclosed the court may in the absence of prompt objection proceed to an adjudication, although plaintiff might have availed himself of a remedy at law. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759; Tyler *v.* Savage, 143 U. S. 79, 12 S. Ct. 340, 36 L. ed. 82; Kilbourn *v.* Sunderland, 130 U. S. 504, 9 S. Ct. 594, 32 L. ed. 1005; Reynes *v.* Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. ed. 934; Wylie *v.* Coxe, 15 How. (U. S.) 415, 14 L. ed. 753; Williamson *v.* Monroe, 101 Fed. 322. In Amis *v.* Myers, 16 How. (U. S.) 492, 14 L. ed. 1029, equitable relief was given in a case said to be clearly beyond the limits of the equitable jurisdiction of the circuit court, but the court said that it should not serve as a precedent.

79. Conger *v.* Cotton, 37 Ark. 286; Killgore *v.* Carmichael, 42 Oreg. 618, 72 Pac. 637; Municipal Security Co. *v.* Baker County, 33 Oreg. 338, 54 Pac. 174; O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004; Kitcherside *v.* Myers, 10 Oreg. 21.

So also of an intervener invoking the aid of equity. Glenn *v.* Augusta Perpetual Bldg., etc., Co., 99 Va. 695, 40 S. E. 25.

80. See *supra*, II, F, 1.

81. *Alabama.*— Tubb *v.* Fort, 58 Ala. 277.

Arkansas.— Mooney *v.* Brinkley, 17 Ark. 340.

Colorado.— Frue *v.* Houghton, 6 Colo. 318.

Illinois.— Central Elevator Co. *v.* People, 174 Ill. 203, 51 N. E. 254, 43 L. R. A. 658; Street *v.* Chicago Wharfing, etc., Co., 157 Ill. 605, 41 N. E. 1108; Turpin *v.* Dennis, 139 Ill. 274, 28 N. E. 1065; Mix *v.* Ross, 57 Ill. 121; Magee *v.* Magee, 51 Ill. 500, 99 Am. Dec. 571; Hickey *v.* Forristal, 49 Ill. 255; Dodge *v.* Wright, 48 Ill. 382; Ohling *v.* Luitjens, 32 Ill. 23; Matthewson *v.* Davis, 91 Ill. App. 153; Pixley *v.* Gould, 13 Ill. App. 565.

Iowa.— Corey *v.* Sherman, (1894) 60 N. W. 232.

Massachusetts.— Creely *v.* Bay State Brick Co., 103 Mass. 514.

Michigan.— Wallace *v.* Harris, 32 Mich. 380.

Minnesota.— Newton *v.* Newton, 46 Minn. 33, 48 N. W. 450.

Missouri.— Parks *v.* People's Bank, 31 Mo. App. 12 [*affirmed* in 97 Mo. 130, 11 S. W. 41, 10 Am. St. Rep. 295]; Heman *v.* Skrainka, 14 Mo. App. 577.

Nebraska.— Dorsey *v.* Nichols, 43 Nebr. 241, 61 N. W. 584; Sherwin *v.* Gaghagen, 39 Nebr. 238, 57 N. W. 1005.

New York.— Wakeman *v.* Wilbur, 147 N. Y. 657, 42 N. E. 341; Clarke *v.* Sawyer, 2 N. Y. 498; Bruce *v.* Kelly, 39 N. Y. Super. Ct. 27; Beekman *v.* Frost, 18 Johns. 544, 9 Am. Dec. 246; Post *v.* Ketchum, 1 N. Y. Leg. Obs. 261.

Washington.— Washington Iron-Works *v.* Jensen, 3 Wash. 584, 28 Pac. 1019.

United States.— International Trust Co. *v.* Norwich Union F. Ins. Soc., 71 Fed. 81, 17 C. C. A. 608; Wylie *v.* Coxe, 15 How. 415, 14 L. ed. 753, unless the defect appears on the face of the bill.

See 19 Cent. Dig. tit. "Equity," §§ 173, 176.

Minor element of jurisdiction lacking.— When some one element necessary to the jurisdiction is lacking, as where on a bill for an accounting there is an insufficient number of credit items to present strictly a matter of mutual accounts, the objection cannot be made upon appeal. Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 80 Fed. 766, 26 C. C. A. 146.

When objection permitted.— Where a demurrer on the ground that plaintiff had a remedy at law was overruled, and defendant refused to answer, he was permitted to raise the question on appeal. Gage *v.* Griffen, 103 Ill. 41.

hearing,[82] or in a code state after trial.[83] It is equally well settled that the objection comes too late if made for the first time at the hearing or trial,[84] or where the party first presents it after the testimony has been taken,[85] or a large portion

82. Brewster *v.* Colegrove, 46 Conn. 105; Downes *v.* Bristol, 41 Conn. 274; Hartford *v.* Chipman, 21 Conn. 488; Page *v.* Young, 106 Mass. 313; Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540; Detroit Motor Co. *v.* Detroit Third Nat. Bank, 111 Mich. 407, 69 N. W. 726; Darby *v.* Powell, 8 Del. Co. (Pa.) 111.

After decree pro confesso and a receiver has taken possession of property and commenced its administration for the benefit of creditors it is too late to object to the jurisdiction. Brown *v.* Lake Superior Iron Co., 134 U. S. 530, 10 S. Ct. 604, 33 L. ed. 1021.

A consent decree ordering accounting precludes all objection to the jurisdiction, under Tenn. Code, § 4231. Dillard *v.* Harris, 2 Tenn. Ch. 196.

Hearing on interlocutory application may bar the objection, as where defendant appeared at the hearing appointing a receiver and also at one before a master, without objection (Jones *v.* Keen, 115 Mass. 170), and where no objection was made until after the granting of an injunction (State *v.* Green Lake County Cir. Ct., 98 Wis. 143, 73 N. W. 788), where an attempt was made to attack the injunction collaterally.

83. St. Paul, etc., R. Co. *v.* Robinson, 41 Minn. 394, 43 N. W. 75; Bagley *v.* Tyler, 43 Mo. App. 195; Culver *v.* Rodgers, 33 Ohio St. 537.

By submitting to trial without a jury it would seem that any objection except as to the nature of the judgment to be awarded should be deemed waived. But see Jacobson *v.* Brooklyn El. R. Co., 22 Misc. (N. Y.) 281, 48 N Y. Suppl. 1072.

84. *Connecticut.*— Niles *v.* Williams, 24 Conn. 279.

Georgia.— Coston *v.* Coston, 66 Ga. 382; Bell *v.* McGrady, 32 Ga. 257; Kendrick *v.* Whitfield, 20 Ga. 379.

Illinois.— Clemmer *v.* Drovers' Nat. Bank, 157 Ill. 206, 41 N. E. 728; Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510; Chicago *v.* Cameron, 22 Ill. App. 91.

Iowa.— McConn *v.* Root, 52 Iowa 727, 3 N. W. 143; Eddy *v.* Root, 52 Iowa 726, 3 N. W. 144; Whiting *v.* Root, 52 Iowa 292, 3 N. W. 134.

Kentucky.— Fowler *v.* Halbert, 3 Bibb 384.

Maryland.— Melvin *v.* Aldrich, 81 Md. 650, 32 Atl. 389; Gough *v.* Crane, 3 Md. Ch. 119.

Massachusetts.— Crocker *v.* Dillon, 133 Mass. 91; Creely *v.* Bay State Brick Co., 103 Mass. 514; Tarbell *v.* Bowman, 103 Mass. 341; Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540; Russell *v.* Loring, 3 Allen 121.

Mississippi.— Cable *v.* Martin, 1 How. 558; Head *v.* Grevais, Walk. 431, 12 Am. Dec. 577; McAulcy *v.* Mardis, Walk. 307; Osgood *v.* Brown, Freem. 392; Davis *v.* Roberts, Sm. & M. Ch. 543.

New Jersey.— Cutting *v.* Dana, 25 N. J. Eq. 265; Bates *v.* Conrow, 11 N. J Eq. 137.

New York.— Baron *v.* Korn, 127 N. Y. 224, 27 N. E. 804 [*affirming* 51 Hun 401, 4 N. Y. Suppl. 334]; Ostrander *v.* Weber, 114 N. Y. 95, 21 N. E. 112; Truscott *v.* King, 6 N. Y. 147; O'Brien *v.* McCarthy, 71 Hun 427, 24 N. Y. Suppl. 1108; Pam *v.* Vilmar, 54 How. Pr. 235; Hawley *v.* Crammer, 4 Cow. 717; Wolcott *v.* Sullivan, 6 Paige 117; Bradley *v.* Root, 5 Paige 632; Atty.-Gen. *v.* Purmort, 5 Paige 620; Utica Bank *v.* Utica, 4 Paige 399, 27 Am. Dec. 72; Fulton Bank *v.* New York, etc., Canal Co., 4 Paige 127; Le Roy *v.* Platt, 4 Paige 77; Wiswall *v.* Hall, 3 Paige 313; Grandin *v.* Le Roy, 2 Paige 509; Underhill *v.* Van Cortland, 2 Johns. Ch. 339; Ramsay *v.* Harris, Clarke 330; Holmes *v.* Dole, Clarke 71; Whitlock *v.* Duffield, Hoffm. 110; Kobbi *v.* Underhill, 3 Sandf. Ch. 277.

North Carolina.— Burroughs *v.* McNeill, 22 N. C. 297.

Ohio.— Nicholson *v.* Pim, 5 Ohio St. 25; Rees *v.* Smith, 1 Ohio 124, 13 Am. Dec. 599.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004; Kitcherside *v.* Myers, 10 Oreg. 21.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

South Carolina.— McTeer *v.* Moorer, Bailey Eq. 62; McDonald *v.* Crockett, 2 McCord Eq. 130.

Virginia.— Mayo *v.* Murchie, 3 Munf. 358.

Washington.— Wilkeson Coal, etc., Co. *v.* Driver, 9 Wash. 177, 37 Pac. 307.

Wisconsin.— Johnson *v.* Huber, 106 Wis. 282, 82 N. W. 137; Meyer *v.* Garthwaite, 92 Wis. 571, 66 N. W. 704; Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881; Deery *v.* McClintock, 31 Wis. 195.

United States.—Altoona Electrical, etc., Co. *v.* Kittanning, etc., St. R. Co., 126 Fed. 559; Waite *v.* O'Neil, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550 [*affirming* on this point 72 Fed. 348]; Dederick *v.* Fox, 56 Fed. 714; Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. 25; Post *v.* Corbin, 19 Fed. Cas. No. 11,299, 5 Nat. Bankr. Rep. 11.

See 19 Cent. Dig. tit. "Equity," §§ 173, 176.

But where a discovery is asked it has been held that the objection may be made on the hearing, as the case will not be sent to law until discovery is complete. Foster *v.* Swasey, 9 Fed. Cas. No. 4,984, 2 Woodb. & M. 217. See also Miller *v.* U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394.

An infant defendant may object at the hearing. Bowers *v.* Smith, 10 Paige (N. Y.) 193.

85. *Iowa.*— McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548.

New Jersey.— Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21.

New York.— Hirsh *v.* Manhattan R. Co., 84 N. Y. App. Div. 374, 82 N. Y. Suppl. 754; Cumming *v.* Brooklyn, 11 Paige 596.

thereof.[86] Objections to proceedings in equity are also waived by consenting to a reference and proceeding before the master.[87]

2. How Taken by Defendant. The appropriate method of objecting on the ground that plaintiff's remedy is at law is where the bill discloses the defect, by demurrer on that ground.[88] Where the defect is not apparent from the bill it should be presented by plea.[89] Accordingly it is said that an answer to the merits submits defendant to the jurisdiction,[90] but more frequently that an answer to the merits without objection to the jurisdiction waives such objection,[91] and in some

Pennsylvania.— Searight *v.* Carlisle Deposit Bank, 162 Pa. St. 504, 29 Atl. 783.

United States.— Kilbourn *v.* Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005.

See 19 Cent. Dig. tit. "Equity," §§ 173, 174.

86. *District of Columbia.*— Tyler *v.* Moses, 13 App. Cas. 428.

Georgia.— Dixon *v.* Merchants', etc., Land Co., 103 Ga. 707, 30 S. E. 690.

Illinois.— Kaufman *v.* Wiener, 169 Ill. 596, 48 N. E. 479 [*reversing* 68 Ill. App. 250]; Johnson *v.* Miller, 55 Ill. App. 168.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.

Pennsylvania.— Shillito *v.* Shillito, 160 Pa. St. 167, 28 Atl. 637.

See 19 Cent. Dig. tit. "Equity," §§ 173, 174.

87. Harding *v.* Olson, 177 Ill. 298, 52 N. E. 482 [*affirming* 76 Ill. App. 475]; Richmond *v.* Bennett, 205 Pa. St. 470, 55 Atl. 17; Harrington *v.* Florence Oil Co., 178 Pa. St. 444, 35 Atl. 855; Hazard *v.* Coyle, 22 R. I. 435, 48 Atl. 442; Burton *v.* Platter, 53 Fed. 901, 4 C. C. A. 95. So also where after replication defendant submitted the controversy to an arbitrator under an agreement that a decree should be based upon his report. Strong *v.* Willey, 104 U. S. 512, 26 L. ed. 642.

Unauthorized reference.— But proceeding under a reference waives nothing where the court had no power to order the reference. Garcie *v.* Sheldon, 3 Barb. (N. Y.) 232.

88. *Connecticut.*— Munson *v.* Munson, 30 Conn. 425; Hartford *v.* Chipman, 21 Conn. 488.

Georgia.— Brantley *v.* Mayo, 85 Ga. 606, 11 S. E. 864; Patterson *v.* Turner, 62 Ga. 674.

Illinois.— Knox County *v.* Davis, 63 Ill. 405; Monson *v.* Bragdon, 159 Ill. 61, 42 N. E. 383.

Michigan.— Williams *v.* Detroit, 2 Mich. 560.

Missouri.— Parks *v.* People's Bank, 31 Mo. App. 12 [*affirmed* in 97 Mo. 130, 11 S. W. 41, 10 Am. St. Rep. 295]; Oldham *v.* Trimble, 15 Mo. 225.

New York.— Kobbi *v.* Underhill, 3 Sandf. 277; Ketchum *v.* Hawks, 2 N. Y. Leg. Obs. 384.

South Carolina.— Wilson *v.* Cheshire, 1 McCord Eq. 233.

Tennessee.— Hale *v.* Hord, 11 Heisk. 232; Wiley *v.* Bridgman, 1 Head 68.

England.— Parry *v.* Owen, 3 Atk. 740, 26 Eng. Reprint 1224; Kemp *v.* Pryor, 7 Ves. Jr. 237, 32 Eng. Reprint 96.

See 19 Cent. Dig. tit. "Equity," §§ 173, 174.

Hearing on the demurrer must be brought on before the merits are gone into. Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37; Murphy *v.* Lincoln, 63 Vt. 278, 22 Atl. 418.

89. May *v.* Goodwin, 27 Ga. 352; Megarge, etc., Co. *v.* Ziegler, 9 Pa. Super. Ct. 438; 2 Daniell Ch. Pr. 138; Mitford Ch. Pl. 180.

90. *Massachusetts.*— United Shoe Machinery Co. *v.* Holt, 185 Mass. 97, 69 N. E. 1056; Massachusetts Gen. Hospital *v.* State Mut. L. Assur. Co., 4 Gray 227.

Mississippi.— Endicott *v.* Penny, 14 Sm. & M. 144.

New Jersey.— Polhemus *v.* Holland Trust Co., 61 N. J. Eq. 654, 47 Atl. 417.

Ohio.— Rees *v.* Smith, 1 Ohio 124, 13 Am. Dec. 599.

Pennsylvania.— People's Nat. Bank *v.* Loeffert, 184 Pa. St. 164, 38 Atl. 996; Darby *v.* Powell, 8 Del. Co. 111.

See 19 Cent. Dig. tit. "Equity," § 174. See also 2 Daniell Ch. Pr. 34, 140.

If the answer is withdrawn by leave of the court the objection is not waived. Hindman *v.* Aledo, 6 Ill. App. 436.

By Tenn. Code, § 4319, defendant may have all the benefit of a demurrer by relying thereon in his answer, but by section 4321, an answer waives objection to the jurisdiction; therefore an answer, although expressly reserving an objection to the jurisdiction, waives it. Vincent *v.* Vincent, 1 Heisk. 333; Bennett *v.* Wilkins, 5 Coldw. 240; Lowry *v.* Naff, 4 Coldw. 370. The same result was reached prior to the code under St. (1852) c. 365. Bright *v.* Newland, 4 Sneed 440.

A plaintiff who answers a cross bill waives the objection that defendant should have proceeded at law. Wollenberg *v.* Rose, 41 Oreg. 314, 68 Pac. 804; Stratton *v.* Cain, (Tenn. Ch. App. 1901) 62 S. W. 231.

91. *Alabama.*— Johnston *v.* Shaw, 31 Ala. 592.

Arkansas.— Mooney *v.* Brinkley, 17 Ark. 340; Cockrell *v.* Warner, 14 Ark. 345.

Colorado.— Derry *v.* Ross, 5 Colo. 295.

Illinois.— Crawford *v.* Schmitz, 139 Ill. 564, 29 N. E. 40 [*affirming* 41 Ill. App. 357]; Magee *v.* Magee, 51 Ill. 500, 99 Am. Dec. 571; Gleason, etc., Mfg. Co. *v.* Hoffman, 63 Ill. App. 294; Schmohl *v.* Fiddick, 34 Ill. App. 190. See also Van Vleet *v.* De Witt, 200 Ill. 153, 65 N. E. 677.

Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Brooks *v.* Delaplaine, 1 Md. Ch. 351.

Massachusetts.— Raynham First Cong. Soc. *v.* Raynham, 23 Pick. 148; Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733.

cases it is expressly held that the objection may be preserved by specially presenting it in the answer.[92] Under the codes pleas are not recognized, and while it would seem that the only questions presented relate to methods of trial and the nature of the relief to be given, it is nevertheless held that objections to the proceedings being in equitable form, if not appearing on the face of the complaint and availed of by demurrer, may and must be taken advantage of by answer.[93]

3. By Court of Its Own Motion. Although the parties within the limitations above stated may have waived objections to the assumption of jurisdiction by equity, the court may still for its own protection and of its own motion take notice of the objection and dismiss the bill;[94] but whether it will even under

Mississippi.—Brown *v.* State Bank, 31 Miss. 454.

Missouri.— Martin *v.* Greene, 10 Mo. 652.

New Jersey.— Seymour *v.* Long Dock Co., 20 N. J. Eq. 396.

New York.— Ludlow *v.* Simond, 2 Cai. Cas. 1, 2 Am. Dec. 291; Grandin *v.* Le Roy, 2 Paige 509.

Tennessee.— Stockley *v.* Rowley, 2 Head 493; Lishey *v.* Smith, 7 Humphr. 299; Marsh *v.* Haywood, 6 Humphr. 210.

Virginia.— Hickman *v.* Stout, 2 Leigh 6.

Washington.— Washington Iron-Works *v.* Jensen, 3 Wash. 584, 28 Pac. 1019.

West Virginia.— Cresap *v.* Kemble, 26 W. Va. 603.

See 19 Cent. Dig. tit. "Equity," §§ 174, 176.

Objection by co-defendant.— A defendant who answers without objecting to the jurisdiction cannot thereafter object, although a co-defendant by separate answer reserved the question. Miller *v.* Furse, 1 Bailey Eq. (S. C.) 187.

92. Kaufman *v.* Wiener, 169 Ill. 596, 48 N. E. 479 [*reversing* 68 Ill. App. 250]; Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88; Ryan *v.* Duncan, 88 Ill. 144; Wiswall *v.* Hall, 3 Paige (N. Y.) 313; White *v.* Carpenter, 2 Paige (N. Y.) 217. But see Herrick *v.* Lynch, 150 Ill. 283, 37 N. E. 221 [*affirming* 49 Ill. App. 657].

The defense must be affirmatively set out; denials of allegations in the bill do not raise it. Kaufman *v.* Wiener, 169 Ill. 596, 48 N. E. 479 [*reversing* 68 Ill. App. 250].

In the federal courts, by equity rule 39, defendant is entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar.

93. Converse *v.* Sickles, 161 N. Y. 666, 57 N. E. 1107 [*affirming* 16 N. Y. App. Div. 49, 44 N. Y. Suppl. 1080]; Lough *v.* Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674; Watts *v.* Adler, 130 N. Y. 646, 29 N. E. 131 [*reversing* 7 N. Y. Suppl. 564]; Schuetz *v.* German-American Real Estate Co., 21 N. Y. App. Div. 163, 47 N. Y. Suppl. 500; Rochester, etc., Land Co. *v.* Roe, 8 N. Y. App. Div. 360, 40 N. Y. Suppl. 799; Reilley *v.* Freeman, 1 N. Y. App. Div. 560, 37 N. Y. Suppl. 570; Tucker *v.* Manhattan R. Co., 78 Hun (N. Y.) 439, 29 N. Y. Suppl. 202; Thomas *v.* Grand View Beach R. Co., 76 Hun (N. Y.) 601, 28 N. Y. Suppl. 201; O'Brien *v.* McCarthy, 71 Hun (N. Y.) 427, 24 N. Y. Suppl. 1108 [*affirmed* in 145 N. Y. 602, 40 N. E. 164]; Center *v.* Weed, 63 Hun (N. Y.) 560, 18 N. Y. Suppl. 554; Cass *v.* Cass, 61 Hun (N. Y.) 460, 16 N. Y. Suppl. 229; Baron *v.* Korn, 51 Hun (N. Y.) 401, 4 N. Y. Suppl. 334 [*affirmed* in 127 N. Y. 224, 27 N. E. 804]; Jennings *v.* Whittemore, 2 Thomps. & C. (N. Y.) 377; Gage *v.* Lippman, 12 Misc. (N. Y.) 93, 33 N. Y. Suppl. 59; Culver *v.* Rodgers, 33 Ohio St. 537; Hoff *v.* Olson, 101 Wis. 118, 76 N. W. 1121, 70 Am. St. Rep. 903; Bigelow *v.* Washburn, 98 Wis. 553, 74 N. W. 362; Boorman *v.* Sunnuchs, 42 Wis. 233; Tenney *v.* State Bank, 20 Wis. 152; Tyler *v.* Magwire, 17 Wall. (U. S.) 253, 21 L. ed. 576, enforcing Mo. Rev. St. p. 1231, §§ 6, 10. See also Sweetser *v.* Silber, 87 Wis. 102, 58 N. W. 239.

In Arkansas and Iowa the objection must be taken by an application to transfer the cause to the law docket, and in Iowa this must be done at or before answer. Moss *v.* Adams, 32 Ark. 562; Bibbins *v.* Clark, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278.

In New York an answer to the merits, the complaint alleging lack of remedy at law supported by reasons, waives the objection, which is not preserved by objecting that the complaint does not state a cause of action. Mentz *v.* Cook, 108 N. Y. 504, 15 N. E. 541. The waiver is of the defense that plaintiff has a remedy at law, not that he has no remedy in equity. Skilton *v.* Payne, 18 Misc. (N. Y.) 332, 42 N. Y. Suppl. 111. See further New York cases cited *supra*, p. 105, end of note 73. Where an action was brought as in equity, but on demand of defendant the issues were tried to a jury and judgment was entered on the verdict, defendant cannot have the judgment vacated on the ground that the remedy is at law. Hammond *v.* Morgan, 51 N. Y. Super. Ct. 472.

Denial of facts essential to jurisdiction in equity preserves the objection. Union Light, etc., Co. *v.* Lichty, 42 Oreg. 563, 71 Pac. 1044; Love *v.* Morrill, 19 Oreg. 545, 24 Pac. 916.

94. *Alabama.*— Freeman *v.* McBroom, 11 Ala. 943; McGraw *v.* Tombeckbee Bank, 5 Port. 547.

Iowa.— Keokuk, etc., R. Co. *v.* Donnell, 77 Iowa 221, 42 N. W. 176.

such circumstances for its own protection and of its own motion dismiss the bill is entirely discretionary.[95]

III. MAXIMS OF EQUITY.

A. Nature of Maxims. Pervading the administration of equity in all its branches there appears a recognition of certain broad principles, so generally accepted and of such fundamental character, that they have become known as maxims. "They are not the practical and final doctrines or rules which determine the equitable rights and duties of individual persons, and which are constantly cited by the courts in their decisions of judicial controversies. They are rather the fruitful germs from which these doctrines and rules have grown by a process of natural evolution."[96] Having not anywhere been authoritatively declared as a code of rules, they have not been expressed in precisely the same form by different writers, and the treatises are not even in accord as to what precepts should be dignified as maxims. The following paragraphs state and explain all, it is believed, which have received general acceptance.[97]

B. Equity Will Not Suffer a Wrong to Be Without a Remedy.[98] This maxim includes the whole theory of equity jurisdiction, that it affords relief wherever a right exists and no adequate remedy at law is available.[99] All that has heretofore been said as to the jurisdiction of equity is therefore pertinent to this maxim, including the limitations upon the powers of equity as well as the scope of those powers.[1] In accordance with the maxim, where a statute creates a new right which cannot be adequately enforced at law, equity will contrive new remedies and orders to enforce it.[2]

Montana.— Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46 [*reversing* 19 Mont. 69, 47 Pac. 1101].

New Jersey.— Lehigh Zinc, etc., Co. *v.* Trotter, 43 N. J. Eq. 185, 7 Atl. 650, 10 Atl. 607.

Virginia.— Boston Blower Co. *v.* Carman Lumber Co., 94 Va. 94, 26 S. E. 390; Poindexter *v.* Burwell, 82 Va. 507.

United States.— Lewis *v.* Cocks, 23 Wall. 466, 23 L. ed. 70.

Contra.— Cornish *v.* Follis, 45 S. W. 1050, 20 Ky. L. Rep. 300.

See 19 Cent. Dig. tit. "Equity," § 175.

95. Tyler *v.* Savage, 143 U. S. 79, 12 S. Ct. 340, 36 L. ed. 82; Reynes *v.* Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. ed. 934; Western Electric Co. *v.* Reedy, 66 Fed. 163.

Exercise of discretion.— The bill will be dismissed where it shows on its face that plaintiff has an adequate remedy at law. Curry *v.* McCauley, 11 Fed. 365. As a rule the discretion will be exercised in favor of retaining the bill (Taylor *v.* Ainsworth, 49 Nebr. 696, 68 N. W. 1045), but costs may be denied (Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189).

96. Pomeroy Eq. Jur. § 360.

97. Perhaps the earliest collection is the "Maxims of Equity" by Richard Francis published in 1729. This includes fourteen maxims of which the following are not now usually recognized in the form of maxims:

"IV. It is equity that should make satisfaction, which received the benefit.

"V. It is equity that should have satisfaction which sustained the loss."

The cases under the foregoing heads are those where the liability is directly imposed upon the person ultimately chargeable (see *supra*, II, B, 1, b, (II)) and those sustaining bills by parties ultimately entitled to the avails (see *infra*, V).

"VII. Equity relieves against accidents.

"VIII. Equity prevents mischief.

"IX. Equity prevents multiplicity of suits.

"XII. Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made."

The last four above given relate to grounds of equitable jurisdiction, the eighth to the entire subject of preventive relief. See *supra*, II, B.

"X. Equity regards length of time."

This last covers the doctrines of laches and stale demands. See *infra*, IV. In the appendix to Lofft's Reports is found a large collection of maxims, very badly arranged. A number of these relate to equity. See also Cyc. *passim*.

98. "Equity suffers not a right to be without a remedy." Francis Max. VI. Story does not give this as a maxim.

99. See *supra*, II, A.

1. The supreme court of the United States in Rees *v.* Watertown, 19 Wall. 107, 22 L. ed. 72, held in effect that if the remedy at law was theoretically adequate equity could not afford relief because it was practically futile. As to this and kindred cases see *supra*, II, A, 4, g. See also Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292. The maxim is sometimes vindicated by denying that a wrong exists when no remedy can be afforded. Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 748, 29 Cinc. L. Bul. 52.

Limitations upon operation of maxim see *supra*, II, E.

2. Rhoten *v.* Baker, 104 Ill. App. 653; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395. See also Albany County

C. Equity Delights to Do Justice and Not by Halves.[3] The significance of this maxim lies in its last words. It means that it is the aim of equity to have all interested parties in court and to render a complete decree adjusting all rights and protecting the parties against future litigation.[4]

D. Equity Acts In Personam.[5] This maxim embodies the principle distinguishing the process and decrees of the court of chancery and originally limiting their sanctions. It was originally the pride of the chancellors and the terror of the law judges that chancery acted directly upon the person or, as the phrase went, upon his conscience. It dealt with property but indirectly, by compelling the parties to act with relation to it. As a modern author has pointed out, there is a special sense in which equity has always acted *in rem*, in that its decrees are specific, dealing through the parties with the particular subject-matter in controversy, and not frequently awarding a recovery out of the general assets of the parties.[6] Moreover the power of equity has been extended so as to permit it in some cases to act strictly *in rem*.[7] It is unsafe therefore to consider the maxim as excluding the power of equity to deal directly with the *res*; but it is nevertheless true that equity deals primarily with the person, and usually only through him with the *res*, and such is the meaning of the maxim.[8] While the influence of this principle affects the entire exercise of the chancery jurisdiction, its most important modern application is perhaps in permitting a court having jurisdiction of the person of defendant to adjudicate with reference to a subject-matter beyond the reach of its process, and by personal decree to require action concerning it.[9] A more special application is in sustaining the power of a court to order a foreclosure and sale of the entire mortgaged property, although a large portion thereof lies out of the court's territorial jurisdiction.[10]

E. Equity Regards Substance Rather Than Form.[11] By force of this

v. Durant, 9 Paige (N. Y.) 182; Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132.

A duty imposed upon a court by statute, without other qualification, is to be exercised at law or in equity according to its nature or character. Gephart *v.* Starrett, 47 Md. 396.

A statute which does not designate where a right conferred by it is to be enforced is to be administered by a remedy at law. So held in Helme *v.* Queenan, 18 Ill. App. 103.

Where a statute prescribes an inadequate remedy for a right conferred by it, a court of equity cannot supply the defect. Janney *v.* Buell, 55 Ala. 408.

3. This maxim does not appear in Francis, in Pomeroy, nor in Story Eq. Jur., but is given in Story Eq. Pl. § 72.

4. Tallman *v.* Varick, 5 Barb. (N. Y.) 277; Knight *v.* Knight, 3 P. Wms. 331, 24 Eng. Reprint 1088; Mitford Ch. Pl. 144. The effect of the maxim on equity jurisdiction has been already discussed. See *supra*, II, A, 4, f; II, C. As a remedy at law is not adequate unless it is complete the maxim is properly a corollary of that preceding (see *supra*, III, B), and is sometimes so treated (see Bispham Eq. § 37).

5. This maxim is very familiar and often repeated in the cases, but it is not found in either Francis or Story, although the latter of course discusses the principle embodied. It is often found in the form: "Equity acts *in personam*, not *in rem*." For reasons stated in the text this form is likely to mislead.

6. Pomeroy Eq. Jur. § 429.

7. See *supra*, II, D.

8. *Illinois.*— Harris *v.* Pullman, 84 Ill. 20, 25 Am. Rep. 416.

New Hampshire.— Great Falls Mfg. Co. *v.* Worster, 23 N. H. 462.

New Jersey.— Wood *v.* Warner, 15 N. J. Eq. 81.

Ohio.— Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 748, 29 Cinc. L. Bul. 52.

Pennsylvania.— Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

Tennessee.— Grewar *v.* Henderson, 1 Tenn. Ch. 76.

England.— Ewing *v.* Orr Ewing, 9 App. Cas. 34, 53 L. J. Ch. 435, 50 L. T. Rep. N. S. 401, 32 Wkly. Rep. 573; Toller *v.* Carteret, 2 Vern. Ch. 494, 23 Eng. Reprint 916; Penn *v.* Baltimore, 1 Ves. 444, 27 Eng. Reprint 1132.

See 19 Cent. Dig. tit. "Equity," § 184.

9. See *supra*, II, D.

10. Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207. The same power is sustained to foreclose a mortgage on a bridge across a stream forming an international boundary. International Bridge, etc., Co. *v.* Holland Trust Co., 81 Fed. 422, 26 C. C. A. 469. See, generally, MORTGAGES.

Tax-sale enjoined.— Jurisdiction was asserted to restrain a sale of personal property to pay taxes assessed upon land alleged to be in another state, the location of the boundary being involved. *In re* New Castle Circle Boundary Case, 6 Pa. Dist. 184.

11. "Equity regards not the circumstance, but the substance of the act." Francis Max. XIII.

principle equity goes behind the form of a transaction in order to give effect to the intention of the parties, either to aid an act abortive at law because formally defective, or to impose a liability as against an evasion by a formal concealment of its true character. By thus going behind the form to reach the substance there has been developed the jurisdiction to relieve against penalties and forfeitures,[12] and also the whole equitable doctrine relating to mortgages, treating them as intended as security for the debt, rather than as conveyances to become absolute on breach of condition.[13] Upon the same principle equity permitted an inquiry as to the existence of a consideration for instruments under seal and enforced parol discharges of sealed instruments.[14] It is also by this means that equity aids defective conveyances.[15] To the operation of the maxim has also been ascribed the specific performance of contracts[16] and the whole system of equitable estates and liens.[17] More immediate applications of the maxim are found in the disposition of equity to consider the whole of the transaction and give effect to each part thereof in the light of connected circumstances,[18] not only to sustain a just claim but to defeat an unlawful demand.[19] A more doubtful application has been made by disregarding an objection for misjoinder of plaintiffs, who sued in two distinct capacities to recover a legacy.[20]

F. Equity Regards as Done That Which Ought to Be Done. The broad meaning of this maxim is that where an obligation rests upon a person to perform an act equity will treat the person in whose favor the act should be performed as clothed with the same interest and entitled to the same rights as if the act were actually performed. It is closely connected with and probably derived from the principle of regarding intent and substance rather than form. Interpreted broadly it would account for the doctrine of trust, specific performance, relief against accident and mistakes, and many other equitable doctrines. Its most familiar application is in support of the doctrines of conversion and reconversion.[21] Another familiar application is to contracts for the sale of land, which the law regards, while executory, as purely personal, but which equity treats as creating an estate in the vendee, the vendor retaining the legal title as security for the purchase-money.[22] The principle also lends its force to the establishment of liens and charges which could not be sustained at law,[23] and to working out justice by

"Equity looks to the intent rather than to the form." Pomeroy Eq. Jur. § 363.

12. Peachy *v.* Somerset, 1 Str. 447, 2 White & T. Lead. Cas. Eq. 1245. And see *supra*, II, B, 3.

13. Casborne *v.* Scarfe, 1 Atk. 603, 26 Eng. Reprint 377. See, generally, MORTGAGES.

14. Jefferys *v.* Jefferys, Cr. & Ph. 138, 18 Eng. Ch. 138, 41 Eng. Reprint 443; Cross *v.* Sprigg, 6 Hare 552, 13 Jur. 785, 18 L. J. Ch. 204, 31 Eng. Ch. 552.

15. Francis Max. XIII.

Application of rule.— Any writing or even an act which plainly makes an appropriation to a person of funds or property will in equity be deemed an assignment. Bower *v.* Hadden Blue Stone Co., 30 N. J. Eq. 171. Equity will enforce the intention of a grantor to convey a fee, as gathered from the object of the instrument and the circumstances, although the instrument was formally insufficient to do so. Nixon *v.* Carco, 28 Miss. 414. A reconveyance was ordered where the parties had agreed to destroy a deed, supposing that the title would thereby be revested, the grantee having fraudulently secreted the deed instad of destroying it. Cannon *v.* Collins, 3 Del. Ch. 132.

16. Francis Max. XIII.

17. Pomeroy Eq. Jur. § 380. The propriety of ascribing such broad branches of equity jurisprudence to the operation of any one specific precept is more than doubtful.

18. Frink *v.* Cole, 10 Ill. 339.

19. Land having been purchased at execution sale by a trustee for creditors in the name of his clerk, who years afterward sought to redeem from a mortgage, relief was denied. Beach *v.* Shaw, 57 Ill. 17. A mortgage of all a debtor's realty to secure notes to all his creditors save one was held to be in effect an attempted assignment for the benefit of creditors and void under the statute. Livermore *v.* McNair, 34 N. J. Eq. 478.

Relief against usury.— It is on this principle that the court will give relief against usury detected from an examination of the whole transaction, although the instrument evidencing the debt appears on its face untainted. Lee *v.* Peckham, 17 Wis. 383. See, generally, USURY.

20. Crain *v.* Barnes, 1 Md. Ch. 151.

21. See CONVERSION, 9 Cyc. 825.

22. Marvin *v.* Stimpson, 23 Colo. 174, 46 Pac. 673; Farrar *v.* Winterton, 5 Beav. 1, 6 Jur. 204. And see, generally, VENDOR AND PURCHASER.

23. A contract was made for the sale of land, a portion of the purchase-price to be

fixing rights as of the time when the obligation first accrued, rather than according to circumstances subsequently arising.[24] The enforcement of conveyances defectively executed has also been based on this maxim,[25] and by virtue of it an act requiring for its validity an order of the court has been held valid where the order had not been made but might be had of course.[26] The maxim has been treated also as creating a presumption that parties to ancient deeds did what the deed contemplated.[27] The word "ought" in the maxim imports an equitable obligation, not one purely moral or something merely advantageous or desirable; equity will regard as done only such things as rest upon an obligation which equity would directly enforce.[28] The maxim operates in favor of such persons only as by being parties or privies have a right to demand performance,[29] and it will not be enforced to the injury of innocent third parties.[30] The purpose of the maxim is to secure to the parties that for which they have stipulated, and it will not be employed to confer upon them an advantage greater than they would have received had the obligation been performed.[31]

G. Equity Imputes an Intention to Fulfil an Obligation. This maxim, not found in Francis or in some modern works, expresses a somewhat circuitous theory whereby certain equitable obligations are enforced. It means that when an obligation rests upon one to perform an act and he attains the means of performing it he will be presumed to intend to perform it through such means, and usually will not be permitted to show the contrary. Equity will then give effect to the presumed intent.[32] Resulting and constructive trusts have been worked out on

secured by mortgage. The purchaser procured a conveyance to be made to his wife and she gave the mortgage. On foreclosure the defense was urged that by the conveyance to her the land became community property and was not liable for her contracts, and that the mortgage was therefore void. The court treated the agreement to give a mortgage as creating a lien. Remington *v.* Higgins, 54 Cal. 620. The holder of an agreement whereby the legal owner of land was to sell a portion and convey to her a portion of the remainder died, and thereafter the legal owner conveyed to her executor. She had before her death assigned the agreement to secure a creditor, but the assignment was unknown to the legal owner. The court impressed a lien upon the land, although an action for the debt was barred. Shipman *v.* Lord, 60 N. J. Eq. 484, 46 Atl. 1101 [*affirming* 58 N. J. Eq. 380, 44 Atl. 215]. A consignee of goods in bond borrowed money from a bank and gave a note reciting a pledge of the goods. He also delivered a receipt acknowledging a redelivery of the goods to be sold on account of the bank, and used the money borrowed to take the goods out of bond. The goods were not in fact delivered or redelivered, but the court impressed them with a lien to secure the note. New York City Nat. Deposit Bank *v.* Rogers, 166 N. Y. 380, 59 N. E. 922 [*affirming* 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155].

24. Randall *v.* White, 84 Ind. 509; Hasbrook *v.* Paddock, 1 Barb. (N. Y.) 635; Blount *v.* Robeson, 56 N. C. 73. An interesting and early case of this nature was where a man had contracted to become a citizen of London, but died before the agreement was carried into effect. The court held that he should be regarded as though he were a citizen and his personalty distributed according to the custom of London. Frederick *v.* Frederick, 1 P. Wms. 710, 24 Eng. Reprint 582.

25. Junction R. Co. *v.* Ruggles, 7 Ohio St. 1; Young *v.* Stampfler, 27 Wash. 350, 67 Pac. 721.

26. Where real estate was sold to pay a decedent's debts and the purchaser paid a portion of the purchase-money to a guardian without an order authorizing the latter to receive it, the purchaser was held entitled to credit for the payment. Lee *v.* Stone, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589.

27. Where deeds provided for laying out a road through the lands conveyed, and a road was constructed, the court held that the road should be deemed constructed in the manner provided by the deeds. Longendyck *v.* Anderson, 59 How. Pr. (N. Y.) 1.

28. Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 748, 29 Cinc. L. Bul. 52; Burgess *v.* Wheate, 1 W. Bl. 123, 1 Eden 177, 28 Eng. Reprint 652.

29. Burgess *v.* Wheate, 1 W. Bl. 123, 1 Eden 177, 28 Eng. Reprint 652.

30. Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779.

31. Gardiner *v.* Gerrish, 23 Me. 46.

32. In the leading case on the subject plaintiff's ancestor had covenanted to purchase lands and settle them on his wife for life and upon his eldest son in tail. He purchased lands but made no settlement, and the lands descended to plaintiff, his eldest son, who brought suit to compel a purchase and settlement out of the personal estate of the father. It was held that the settlement would be deemed to have been made out of the lands which had been purchased. Wilcocks *v.* Wilcocks, 2 Vern. Ch. 558, 23 Eng. Reprint 961.

this theory.[33] As the doctrine is seldom invoked to enforce an actual intent, but usually to thwart a contrary intent to take an unconscionable advantage, its actual utility is slight. Its purpose could generally but not always be accomplished by the more direct method of treating that as done which ought to be done.

H. Equality Is Equity.[34] The meaning of this maxim is that in the absence of relations or conditions requiring a different result, equity will treat all members of a class as upon an equal footing, and will distribute benefits or impose charges either equally or in proportion to the several interests, and without preferences.[35] The principal applications of the doctrine are in matters of contribution,[36] settlement of insolvent estates,[37] abatement of legacies,[38] and in the preference shown by equity in favor of tenancies in common as against joint tenancies.[39]

I. Equity Follows the Law. The language of this maxim is so broad and its proper application so narrow that its utility is doubtful and its tendency misleading. It is true only in certain special senses. Where no countervailing equity requires different treatment a court of equity in dealing with legal estates and rights will follow the rules of law in respect thereto.[40] Equity often by analogy, where the conditions are similar, applies the rules governing legal estates and rights to equitable estates and rights of analogous character.[41] The force of the maxim has sometimes been restricted to these principles,[42] but it has also received a broader application. Equity follows the law in the sense that it is bound generally at least by positive restrictions and rules of policy. Thus if an instrument is void at law for want of power to execute it, or as forbidden by statute, equity will not enforce it.[43] Again while equity, where equitable principles

Another example of the maxim is Blount *v.* Robeson, 56 N. C. 73, in which case B, plaintiff's ancestor, gave defendant's intestate a power of attorney to sell certain lands and to retain part of the proceeds. Defendant's intestate bought the land on an execution against B's grantor. B then died and thereafter defendant's intestate sold the land. Plaintiff brought suit to compel defendant to account for the proceeds. Relief was given, the court holding that the purchase at execution sale should be regarded merely as the removal of an encumbrance, and not the source of an independent title.

33. See, generally, TRUSTS.

34. Francis Max. III.

35. The presumption is in favor of equality of rights; a right to a preference must be established. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, (N. J. Ch. 1900) 45 Atl. 704; McCready *v.* Haslock, 3 Tenn. Ch. 13. But the maxim cannot prevail from a mere sense of moral right as against established rules. Savings Inst. *v.* Makin, 23 Me. 360.

36. See CONTRIBUTION, 9 Cyc. 792.

37. See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 4 Cyc. 113; BANKRUPTCY, 5 Cyc. 227; INSOLVENCY.

38. See WILLS.

39. See JOINT TENANCY; TENANCY IN COMMON.

40. Morrison *v.* Hart, 2 Bibb (Ky.) 4, 4 Am. Dec. 663; Mullany *v.* Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238; Elliott *v.* Thompson, 4 Humphr. (Tenn.) 99, 40 Am. Dec. 630; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

The limitation stated in the text is as important as the rule itself. In many cases legal rules of property are not observed, because of the intervening equity. Thus where plaintiff bought a lot which should have had a house on it, but the house had been removed to an adjoining lot which had been purchased after the house was placed there by one without notice of the facts, the court refused to apply the legal rule of continued title to stolen property as against the innocent purchaser. Fisher *v.* Patterson, 99 Ill. App. 70.

41. Newell *v.* Morgan, 2 Harr. (Del.) 225 [*reversing* 2 Del. Ch. 20] (holding a judgment entitled to priority of payment from the proceeds of land fraudulently conveyed, where it would have had priority of lien had the legal title been in the judgment debtor); Winans *v.* Latrobe, 89 Md. 636, 43 Atl. 829 (applying the legal rule of damages); Kip *v.* Kip, 33 N. J. Eq. 213 (conveyance of equitable title held inoperative where one of legal title would be so).

42. Snell Eq. 14.

43. *Illinois.*— Rogers *v.* Higgins, 48 Ill. 211, deed of *feme covert*.

Kentucky.— Reed *v.* Reeves, 13 Bush 447, note for gambling debt.

Maine.— Fisher *v.* Shaw, 42 Me. 32, statute of frauds.

Pennsylvania.— Lang's Estate, 33 Pittsb. Leg. J. 9, note of *feme covert*.

Virginia.— Kellam *v.* Kellam, 2 Patt. & H. 357, void condition in deed.

United States.— Hedges *v.* Dixon County, 150 U. S. 182, 14 S. Ct. 71, 37 L. ed. 1044, county bonds in excess of amount authorized.

See 19 Cent. Dig. tit. "Equity," § 183.

A forged deed is void in equity as well as at law. Whittington *v.* Summerall, 20 Ga. 345.

Other examples.— A vendor covenanted to

have justified it, has created many rights unknown to the law and even contrary thereto, the maxim has frequently been given as a reason for refusing to create rights unrecognized at law when not justified by equitable considerations.[44] Upon the same principle equity will follow legal rules of evidence, and except by way of discovery will not take jurisdiction because plaintiff cannot establish his case by legal evidence.[45]

J. Between Equal Equities the Law Will Prevail.[46] Unless one who seeks the aid of equity can establish an equity superior to that of the holder of the legal title to the subject-matter, he fails to overcome the legal right, which consequently prevails against him.[47] This rule is most frequently enforced by supporting the legal title to land as against an equitable right no stronger than that of the legal owner.[48] So the holder of a junior equity by acquiring the legal title before he has notice of a prior equity obtains the superior right,[49] and it has been held that one with an equal equity may purchase the legal estate for the purpose of obtaining the advantage.[50] The same rules apply to other species

buy in certain claims against the property. He could not do so because the vendee had wrongfully himself bought in one of them. The vendor recovered at law the whole purchase-money and the vendee applied to chancery for relief. Relief was refused on the ground that equity follows the law, but it was also held that the legal rule was consonant with equity. Marshall *v.* Craig, 1 Bibb (Ky.) 394, 4 Am. Dec. 647. Equity will not impose as a condition of the enforcement of a legal demand the performance of a disconnected act not required by law. Solenberger *v.* Herr, (Va. 1897) 27 S. E. 839.

44. As where an insolvent who had been discharged sought relief against a debt which at law had not been released by the insolvency proceedings (Foote *v.* Percy, 40 Conn. 85); where plaintiff sought to redeem land from execution sale where he had suffered the legal right of redemption to be lost (Stone *v.* Gardner, 20 Ill. 304, 71 Am. Dec. 268); and where an effort was made to subject to the payment of a debt a fund not legally liable (Buford *v.* Buford, 1 Bibb (Ky.) 305). So equity refused to enforce payment of a destroyed note when payment had not been demanded at the place where the note was payable (Streater *v.* Cape Fear Bank, 55 N. C. 31), to enforce a promise to emancipate a slave where the statutes had not been followed (Sawney *v.* Carter, 6 Rand (Va.) 173), and to charge a surety who had been discharged at law (Fielden *v.* Lahens, 9 Fed. Cas. No. 4,773, 6 Blatchf. 524).

45. Phillip *v.* Love, 54 Ill. App. 526; Reed *v.* Clarke, 4 T. B. Mon. (Ky.) 18; Newman *v.* Wilbourne, 1 Hill Eq. (S. C.) 10.

46. "Where equity is equal the law must prevail." Francis Max. XXIV.

"Where there is equal equity the law prevails." Story Eq. Jur. § 64*c*.

47. *Connecticut.*— Chamberlain *v.* Thompson, 10 Conn. 243, 26 Am. Dec. 390.

District of Columbia.— Jackson *v.* Blackwood, 1 Ky. L. Rep. 71.

Indiana.— Taylor *v.* Morgan, 86 Ind. 295.

Kentucky.— Vanmeter *v.* McFaddin, 8 B. Mon. 435.

Mississippi.— Perkins *v.* Swank, 43 Miss. 349.

New Jersey.— Foreman *v.* Brewers, 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. Rep. 475.

North Carolina.— Jones *v.* Zollicoffer, 4 N. C. 645, 7 Am. Dec. 708.

United States.— Philips *v.* Crammond, 19 Fed. Cas. No. 11,092, 2 Wash. 441.

England.— Thorndike *v.* Hunt, 3 De G. & J. 563, 5 Jur. N. S. 879, 28 L. J. Ch. 417, 7 Wkly. Rep. 246, 60 Eng. Ch. 437.

See 19 Cent. Dig. tit. "Equity," § 182.

Receivership.— Where the claim to relief is founded on a disputed equity the court will hesitate before taking the possession, by means of a receiver, from defendant having a legal title. Overton *v.* Memphis, etc., R. Co., 10 Fed. 866, 3 McCrary 436.

A dishonest step taken by the holder of the legal title to strengthen it deprives him of his advantage. Ellis *v.* Davis, 55 N. C. 465.

48. Faloon *v.* McIntyre, 17 Ill. App. 479 [*affirmed* in 118 Ill. 292, 8 N. E. 315]; Preston *v.* Turner, 36 Iowa 671; Gallager *v.* Hunter, 5 Mo. 507; Simmons *v.* Ogle, 105 U. S. 271, 26 L. ed. 1087.

Grantee for value by unrecorded conveyance will not be protected against a subsequent purchaser without notice (Crump *v.* Black, 41 N. C. 321, 51 Am. Dec. 422), nor against grantor's creditor as to whom such conveyance is void by statute (Flanary *v.* Kane, (Va. 1904) 46 S. E. 312 [rehearing *denied* in (1904) 46 S. E. 681].

49. *Kentucky.*— Carlisle *v.* Jumper, 81 Ky. 282; Floyd *v.* Adams, 1 A. K. Marsh. 72.

Mississippi.— Coleman *v.* Rives, 24 Miss. 634.

New York.—Rexford *v.* Rexford, 7 Lans. 6; Newton *v.* McLean, 41 Barb. 285.

Ohio.— Smith *v.* Worman, 19 Ohio St. 145; Bloom *v.* Noggle, 4 Ohio St. 45; Irvin *v.* Smith, 17 Ohio 226; Oviatt *v.* Brown, 14 Ohio 285, 45 Am. Dec. 539.

West Virginia.— Hoult *v.* Donahue, 21 W. Va. 294.

See 19 Cent. Dig. tit. "Equity," § 182.

50. McNary *v.* Southworth, 58 Ill. 473; Carroll *v.* Johnston, 55 N. C. 120; Fitzsim-

of property,[51] and superior legal rights short of actual title have the same advantage.[52]

K. Between Equal Equities the First in Order of Time Shall Prevail.[53] This is another instance of a maxim whose terms are broader than its application. A better statement is that as between persons having only equitable interests, if their interests are in all other respects equal, priority in time gives a better equity.[54] Where conflicting equities are otherwise equal in merit[55] that which first accrued will be given preference,[56] but this test is the last resorted to, and does not prevail when any other equitable ground for preference exists.[57]

mons *v.* Odgen, 7 Cranch (U. S.) 2, 3 L. ed. 249.

51. Taylor *v.* Gilbert, 4 Ky. L. Rep. 830 (promissory note); Copeland *v.* Manton, 22 Ohio St. 398 (lien on fund); Wright *v.* Randel, 8 Fed. 591, 19 Blatchf. 495 (patent for invention).

Legal rights as well as legal titles in such cases prevail. A revenue collector having failed to pay over the funds collected, his sureties sought to recover an amount paid to his creditor. They failed to prove that the payment was made from the public fund and relief was denied. Clore *v.* Bailey, 6 Bush (Ky.) 77. See also Galphin *v.* McKinney, 1 McCord Eq. (S. C.) 280.

52. Where equity is equal possession prevails. St. Johnsbury *v.* Morrill, 55 Vt. 165. Where two held preëmptive rights to the same land and one entered, received a certificate, and asserted his claim by suit, his right was held superior. Derrington *v.* Goodman, 8 Dana (Ky.) 174. A prior assignee of a claim against Mexico was defeated by a subsequent assignee who obtained an award from commissioners before the first gave notice of his claim. Judson *v.* Corcoran, 17 How. (U. S.) 612, 15 L. ed. 331.

53. 1 Fonblanque Eq. bk. 1, c. 4, § 25. Not in Francis.

54. Rice *v.* Rice, 2 Drew. 73, 2 Eq. Rep. 341, 23 L. J. Ch. 289, 2 Wkly. Rep. 139.

55. A stale equity, although elder, will not prevail against an equity in full vigor. Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478, 505.

56. *Iowa.*— Lucas *v.* Barrett, 1 Greene 510.

Kentucky.— Carlisle *v.* Jumper, 81 Ky. 282; Jackson *v.* Holloway, 14 B. Mon. 133; Vanmeter *v.* McFaddin, 8 B. Mon. 435; Smith *v.* Frost, 1 Bibb 375; Zaring *v.* Cox, 1 Ky. L. Rep. 161.

Mississippi.— Wailes *v.* Cooper, 24 Miss. 208.

New York.— Booth *v.* Bunce, 33 N. Y. 139, 88 Am. Dec. 372; Muir *v.* Schenck, 3 Hill 228, 38 Am. Dec. 633; Cherry *v.* Monro, 2 Barb. Ch. 618; Wilkes *v.* Harper, 2 Barb. Ch. 338 [*affirmed* in 1 N. Y. 586].

Ohio.— Elstner *v.* Fife, 32 Ohio St. 358, 373; Woods *v.* Dille, 11 Ohio 455; Burchard *v.* Hubbard, 11 Ohio 316, 333; Bell *v.* Duncan, 11 Ohio 192.

Virginia.— Briscoe *v.* Ashby, 24 Gratt. 454.

West Virginia.— Camden *v.* Harris, 15 W. Va. 554.

England.— Phillips *v.* Phillips, 4 De G. F. & J. 208, 8 Jur. N. S. 145, 31 L. J. Ch. 321, 5 L. T. Rep. N. S. 655, 10 Wkly. Rep. 236, 65 Eng. Ch. 162; Wilmot *v.* Pike, 5 Hare 14, 9 Jur. 839, 26 Eng. Ch. 14.

See 19 Cent. Dig. tit. "Equity," § 181.

Between two purchasers for value, the rule is enforced (Duvall *v.* Guthrie, 3 Bibb (Ky.) 532; Wailes *v.* Cooper, 24 Miss. 208; Wells *v.* Stratton, 1 Tenn. Ch. 328) to the extent of denying specific performance to one innocent purchaser upon its appearing that a prior contract had been made with another (Lucas *v.* Barrett, 1 Greene (Iowa) 510).

Between two lien-holders the rule is applied where neither is entitled to protection as being a purchaser without notice. Perkins *v.* Swank, 43 Miss. 349. See also Norris *v.* Showerman, Walk. (Mich.) 206.

On a principle analogous to the maxim, where the equities are in every respect equal, he who first sustained a loss must bear it, as equity will not transfer it to one equal in right. Holly *v.* Protestant Episcopal Church Domestic, etc., Missionary Soc., 180 U. S. 284, 21 S. Ct. 395, 45 L. ed. 531.

57. It will not be applied between a voluntary assignment and a subsequent assignment for value without notice (Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590), between a subsequent purchaser for value and one with a prior equity but by whose fault the opportunity was created whereby the other was misled (Hume *v.* Dixon, 37 Ohio St. 66), or between an equitable owner and one with equal equity having the legal title (Rexford *v.* Rexford, 7 Lans. (N. Y.) 6; Newton *v.* McLean, 41 Barb. (N. Y.) 285; Edmondson *v.* Hays, 1 Overt. (Tenn.) 509). But in such case the prior equity prevails unless the legal title was acquired without notice thereof and the purchase-money was paid. Hardin *v.* Harrington, 11 Bush (Ky.) 367. The rule will not be applied as against a preference given by a recording act. Neslin *v.* Wells, 104 U. S. 428, 26 L. ed. 802. Where a certificate of stock was issued by a corporation to qualify the holder as a director, under a secret agreement by him to surrender it when his office expired, and he pledged it to secure an indorser, the indorser having no notice of the terms under which he held the stock, the equity of the latter was held superior to that of the corporation. Dueber Watch Case Mfg. Co. *v.* Daugherty, 62 Ohio St. 589, 57 N. E. 455. But a trust arising from the purchase of lands with trust funds, in the name of the trustee, was enforced against a subsequent purchaser from the trustee without notice of

L. Equity Aids the Vigilant, Not Those Who Slumber on Their Rights.[58] It is by force of this principle that equity refuses to enforce demands which the party has unreasonably delayed in asserting.[59] Such is frequently treated as the extent of the maxim, but the courts have given it a wider application, as by protecting one who by superior diligence has obtained a legal advantage,[60] or by denying relief to one whose danger was created by his own neglect.[61]

M. He Who Seeks Equity Must Do Equity[62] — **1. General Scope of Maxim.** This is a general principle, applicable to all classes of cases whenever necessary to promote justice,[63] and requires that any person seeking the aid of equity shall have accorded, shall offer to accord, or will be compelled to accord to the other party all the equitable rights to which the other is entitled in respect to the subject-matter.[64] Relief inconsistent with the equities of the adverse party will be denied,[65] and where the granting of relief raises equitable rights in favor of defendant, the according of such rights will be imposed as a condition of granting

the trust. Briscoe *v.* Ashby, 24 Gratt. (Va.) 454.

58. This maxim is given by most of the authors. Francis most nearly approaches it in Maxim X, "Equity regards length of time."

59. See *infra*, IV.

60. Junior attaching creditors who pursued their remedy were preferred to those who abandoned their attachments by accepting confessions of judgment. Burnham *v.* Hickman, 150 Mo. 626, 51 S. W. 6[illegible]0. One who by his superior diligence acquires the legal title in support of his equity prevails as against one who has merely an equity. McNary *v.* Southwarth, 58 Ill. 473. These cases more properly rest upon the maxim that between equal equities the law will prevail. See *supra*, III, J.

61. As where he accepts property in exchange without inquiry as to its value (Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118), or buys land relying upon an abstract not purporting to be complete (Hayden *v.* Huff, 60 Nebr. 625, 83 N. W. 920 [*affirmed* on rehearing in 63 Nebr. 99, 88 N. W. 179]).

62. "He that will have equity done to him, must do it to the same person." Francis Max. I.

63. Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193.

64. *Colorado.*— Patterson *v.* De Long, 11 Colo. App. 103, 52 Pac. 687.

Connecticut.— Hartford First Nat. Bank *v.* Hartford L., etc., Ins. Co., 45 Conn. 22.

Illinois.— Weber *v.* Zacharias, 105 Ill. App. 640; Wenham *v.* Mallin, 103 Ill. App. 609; Angell *v.* Jewett, 58 Ill. App. 596.

Kentucky.— Richardson *v.* Linney, 7 B. Mon. 571; Nelson *v.* Clay, 5 Litt. 150; Hunter *v.* Simrall, 5 Litt. 62; Johnson *v.* Rowe, 1 Ky. L. Rep. 274.

Nebraska.— Walsh *v.* Walsh, (1901) 95 N. W. 1024.

New York.— McDonald *v.* Neilson, 2 Cow. 139, 14 Am. Dec. 431; Hartson *v.* Davenport, 2 Barb. Ch. 77.

Ohio.— Townsend *v.* Alexander, 2 Ohio 18; Cincinnati *v.* Covington, etc., Bridge Co., 20 Ohio Cir. Ct. 396, 10 Ohio Cir. Dec. 792.

South Carolina.— Secrest *v.* McKenna, 1 Strobh. Eq. 356.

United States.— Ridgway *v.* Hays, 20 Fed. Cas. No. 11,817, 5 Cranch C. C. 23.

England.— U. S. *v.* McRae, L. R. 3 Ch. 79, 37 L. J. Ch. 129, 17 L. T. Rep. N. S. 428, 16 Wkly. Rep. 377; Brown *v.* Jones, 1 Atk. 188, 26 Eng. Reprint 122; Hanson *v.* Keating, 4 Hare 1, 14 L. J. Ch. 13, 30 Eng. Ch. 1; Shish *v.* Foster, 1 Ves. 88, 27 Eng. Reprint 909.

Canada.— Coventry *v.* McLean, 22 Ont. 1.

See 19 Cent. Dig. tit. "Equity," §§ 188–190.

Limitation of rule.— The party seeking relief is not required to sacrifice his own rights. Thus one who has acquired title from a purchaser at an execution sale may set aside a prior void sale, and is not obliged to accept a redemption by payment of the amount of the judgment under which his grantor purchased. Worthington *v.* Miller, 134 Ala. 420, 32 So. 748. A trust deed provided for subdividing the property, and also releases of lots designated by the debtor upon payment of ascertained amounts. Immediately after the debt matured foreclosure was commenced and the debtor by cross bill sought to enforce the release of a portion of the property because of payments made. Although the whole debt was then due it was held that the stipulation for partial releases could be enforced without tender of the whole debt. Lane *v.* Allen, 162 Ill. 426, 44 N. E. 831 [*reversing* 60 Ill. App. 457].

65. Two persons running separate ferries became partners, and tenants in common of the landings. One dying, defendant purchased his interest from his administrator, but the surviving partner refused to accept him as a partner and sought to restrain him from running a separate ferry. Relief was denied, as the refusal to accept defendant as a partner revived the right to run independently. Spann *v.* Nance, 32 Ala. 527. Specific performance will be refused of a contract entered into by mistake because such relief would not consist with equity and good conscience (Mansfield *v.* Sherman, 81 Me. 365, 17 Atl. 300); and relief will not be given where it involves repudiation of a deed for a valuable consideration void only because not stamped (Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382).

the relief.[66] It is on this principle that one who has failed to perform his own obligations under a contract cannot compel the other to perform.[67] A tender of performance before commencing suit is not, however, necessary where defendant without any default of plaintiff has refused absolutely to perform.[68]

2. Offering to Do Equity in Bill.[69] In cases where the maxim applies the bill should contain an offer to do what the court shall deem equitable, and in some cases the bill is demurrable for want of such an offer. It has been said that the offer is necessary only where the right to be accorded could not be enforced in its absence; that is, where the consent of plaintiff is essential to the establishment of the right;[70] but it is certainly also necessary where the doing of the equity is essential to the constitution of plaintiff's right.[71] An offer is also required in a bill for specific performance, for relief against usury, and formerly in a bill for an accounting.[72]

3. Maxim Binds All Parties. The maxim binds, not plaintiffs alone, but any party who affirmatively seeks equitable relief.[73]

4. Not Restricted to Rights Independently Enforceable. Since the doing of equity is imposed as a condition of obtaining equitable relief, many things may be required which defendant could not compel if driven to an independent action.[74]

Obligations associated with benefits.— One seeking to avail himself of a portion of an agent's acts cannot avoid the obligations imposed by the same acts (German Nat. Bank *v.* Hasting First Nat. Bank, 59 Nebr. 7, 80 N. W. 48); and one claiming under a provision in a contract cannot repudiate obligations imposed on him by the same contract (New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562); and one claiming under a will must submit to its conditions (Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205).

66. Nutter *v.* O'Donnell, 6 Colo. 253; Palmer *v.* Palmer, 114 Mich. 509, 72 N. W. 322; Maffett *v.* Thompson, 32 Oreg. 546, 52 Pac. 565, 53 Pac. 854.

Equitable set-off.— In a suit to abate the purchase-price of land because of misrepresentation as to quantity, a corresponding demand by defendant as to land taken in part payment will be set off. Swope *v.* Missouri Trust Co., 26 Tex. Civ. App. 133, 62 S. W. 947.

67. *Illinois.*— Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568 [*reversing* 83 Ill. App. 377].

Maryland.— Baltimore *v.* Chesapeake, etc., Telephone Co., 92 Md. 692, 48 Atl. 465.

New Jersey.—Yard *v.* Pacific Mut. Ins. Co., 10 N. J. Eq. 480, 64 Am. Dec. 467, holding that one who had given bonds for stock in a corporation could not complain that the corporation began business contrary to charter before its stock was paid up, and that he must pay for his stock before his rights could be protected.

New York.— Wood *v.* Perry, 1 Barb. 114.

Pennsylvania.— Rogers *v.* Williams, 8 Phila. 123.

Texas.— Cook *v.* Robertson, (Civ. App. 1898) 46 S. W. 866.

See 19 Cent. Dig. tit. "Equity," § 188.

Strict construction of a contract will not be adopted against one party in favor of another who has not by his acts strictly construed his own obligations under it. Neal *v.* Briggs, 110 Fed. 477.

68. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. Rep. 726, 56 Am. St. Rep. 326, 36 L. R. A. 850; Scott *v.* Beach, 172 Ill. 273, 50 N. E. 196; Auxier *v.* Taylor, 102 Iowa 673, 72 N. W. 291; McPherson *v.* Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723. And see, generally, Specific Performance.

When answer absolutely denies plaintiff's right it seems that a tender before suit may be unnecessary. Butchers', etc., Stock-Yards Co. *v.* Louisville, etc., R. Co., 67 Fed. 35, 14 C. C. A. 290.

69. See *infra*, VII, C, 7.

70. Barnard *v.* Cushman, 35 Ill. 451.

71. A member of a debtor's family who seeks to restrain the sale of family relics on execution must exonerate them by offering to pay their value. Johnson *v.* Connecticut Bank, 21 Conn. 148. A creditor of an insolvent corporation cannot restrain a sale of its property and ask to have a plan of reorganization carried out, without offering to be bound by the plan. Paton *v.* Northern Pac. R. Co., 85 Fed. 838.

72. 1 Daniell Ch. Pr. 497. See, generally, Accounts and Accounting, 1 Cyc. 438 (offer to do equity not now necessary); Specific Performance; Usury.

73. As for example an intervener (Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17); but not a defendant, although seeking a relief by cross bill, when the relief prayed is only incidental to the defeat of plaintiff's claim (McIver *v.* Clarke, 69 Miss. 408, 10 So. 581).

Infants and persons non compos.— The peculiar character of these disabilities gives rise to certain exceptions. See, generally, Infants; Insane Persons.

74. **Debt barred by limitation.**— Thus relief cannot be had in a matter where an in-

5. No Equity Acquired Through Fraud. The maxim that he who seeks equity must do equity will not be applied in favor of one guilty of actual fraud, by requiring restoration to him in such manner as to enable him to obtain any advantage or security in the perpetration of the fraud.[75]

6. Equity Must Arise Out of Same Transaction. The maxim only requires that equity shall be done with regard to the subject-matter of plaintiff's demand; it does not extend to distinct transactions,[76] but the whole transaction will be considered, not merely the particular phase on which plaintiff bases his right.[77]

debtedness to defendant exists without paying the debt, although an action for the latter is barred by the statute of limitations. De Walsh *v.* Braman, 100 Ill. 415, 43 N. E. 597; San Antonio, etc., R. Co. *v.* Gurley, 92 Tex. 229, 47 S. W. 513. See also Mortgages.

Bills to redeem.—It has even been held that while a mortgagee may enforce his mortgage only to the extent of the particular debt secured, the mortgagor when he seeks to redeem must pay not only that but other debts subsequently arising. Jones *v.* Langhorne, 3 Bibb (Ky.) 453; Levi *v.* Blackwell, 35 S. C. 511, 15 S. E. 243; Secrest *v.* McKenna, 1 Strobh. Eq. (S. C.) 356; Walling *v.* Aiken, 1 McMull. Eq. (S. C.) 1; St. John *v.* Holford, 1 Ch. Cas. 97, 22 Eng. Reprint 712. This doctrine is certainly antiquated. The statutory rate of interest being seven per cent but twelve per cent being permitted by contract, a plaintiff seeking to redeem will not be required to comply with an unenforceable oral agreement to pay twelve per cent. Staughton *v.* Simpson, 72 Minn. 536, 75 N. W. 744. And see, generally, Mortgages.

Other examples.— Relief will not be given against a mortgage on the ground that the note secured has been altered, except upon payment of the debt. Goodenow *v.* Curtis, 33 Mich. 505. A bank and a construction company having the same officers, the construction company defaulted in payment of a note to the bank and the bank consequently had to borrow a large sum to meet its necessities. On a bill by the construction company for a surrender of securities it was charged with expenses incurred by the bank in making the loan. Ohio Nat. Bank *v.* Central Constr. Co., 17 App. Cas. (D. C.) 524. In a suit to cancel notes held by innocent purchasers, while plaintiff was entitled to the relief, he was required to pay certain benefits received by him from the original holder. Deppen *v.* German-American Title Co., 70 S. W. 868, 24 Ky. L. Rep. 1110. Where a father conveyed all his property to two sons, in an action to support the conveyance it was held that the land should be equitably charged with the support of the father and mother. Bunnell *v.* Bunnell, 64 S. W. 420, 23 Ky. L. Rep. 800. On a bill to compel the conveyance of a lot purchased and paid for by an insolvent decedent plaintiff was required to pay a balance due on another lot. Columbia Bank *v.* Dunlop, 2 Fed. Cas. No. 866, 3 Cranch C. C. 414. The carrying into effect of an oral gift of land has been held essential to equitable relief in favor of the donor. Park *v.* White, 4 Dana (Ky.) 552.

75. *Alabama.*— Worthington *v.* Miller, 134 Ala. 420, 32 So. 748; Mobile Land Imp. Co. *v.* Gass, 129 Ala. 214, 29 So. 920.

Iowa.— Kind *v.* Ordway, 73 Iowa 735, 36 N. W. 768.

Kentucky.— Nelson *v.* Clay, 5 Litt. 150.

Michigan.— Hanold *v.* Bacon, 36 Mich. 1; McCredie *v.* Buxton, 31 Mich. 383.

Nebraska.—Goble *v.* O'Connor, 43 Nebr. 49, 61 N. W. 131.

Pennsylvania.— Bleakley's Appeal, 66 Pa. St. 187; Gilbert *v.* Hoffman, 2 Watts 66, 26 Am. Dec. 103. See, generally, Fraud.

Where defendant's act is against public policy the same doctrine applies. Irons *v.* Reyburn, 11 Ark. 378.

Consideration illegal in part.— Where it appeared in a suit for the cancellation of notes that the consideration was in part to compound a felony and in part for *bona fide* debts, plaintiff was required to tender the amount of the *bona fide* debts. Frick *v.* Moore, 82 Ga. 159, 8 S. E. 80.

76. *Alabama.*— Bethea *v.* Bethea, 116 Ala. 265, 22 So. 561.

California.— Mahoney *v.* Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175.

Georgia.— Ansley *v.* Wilson, 50 Ga. 418.

Illinois.— Angell *v.* Jewett, 58 Ill. App. 596.

New York.— New York, etc., R. Co. *v.* Schuyler, 38 Barb. 534.

See 19 Cent. Dig. tit. "Equity," § 189.

77. Closely related equity.— The maxim applies where the adverse equity grows out of circumstances which the record shows to be a part of the history of the particular controversy before the court, or where it is so connected as to be presented in the pleadings and proofs with full opportunity to refute it. Comstock *v.* Johnson, 46 N. Y. 615.

Relief against an attachment for an admitted debt will not be given without payment of the debt. Reeves *v.* Cooper, 12 N. J. Eq. 223.

Relief against a defective foreclosure was conditioned on the repayment of taxes and expenditures for improvements made under the belief by defendants that they had acquired good title. Miner *v.* Beekman, 50 N. Y. 337.

One suing as administrator was required to perform an equity existing against him as heir. Haydon *v.* Goode, 4 Hen. & M. (Va.) 460.

An insolvent, pursuing a fund to which he had the equitable title, was required to discharge a debt he owed to defendant. Alexander *v.* Wallace, 10 Yerg. (Tenn.) 105. But

7. Principal Applications of Maxim. The principal applications of the maxim are in suits to rescind contracts or to avoid other transactions, where plaintiff is required to restore benefits received and place other parties *in statu quo*,[78] election,[79] marshaling,[80] in bills for relief against usury,[81] and before the married women's acts in enforcing the wife's equity to a settlement.[82] The adverse equity which must be satisfied is sometimes raised by estoppel.[83]

see Bethea *v.* Bethea, 116 Ala. 265, 22 So. 561.

Remote consequences of plaintiff's acts due to negligence of others will not be visited upon him so as to require him to answer for them. Peterson *v.* Grover, 20 Me. 363.

Equity to stranger.— It is a reciprocal equity between the parties which must be accorded; defendant cannot insist upon plaintiff's doing equity to a stranger. Springport *v.* Teutonia Sav. Bank, 84 N. Y. 403; Garland *v.* Rives, 4 Rand. (Va.) 282, 15 Am. Dec. 756.

Redemption of mortgage.— As to payment of other indebtedness in order to redeem from a mortgage see *supra*, note 74.

78. **Rescinding contracts.**—*Alabama.*—Taylor *v.* Dwyer, 131 Ala. 91, 32 So. 509.

Georgia.— Fears *v.* Lynch, 28 Ga. 249.

Illinois.— Winslow *v.* Noble, 101 Ill. 194; Starrett *v.* Keating, 61 Ill. App. 189.

Indiana.— Stewart *v.* Ludwick, 29 Ind. 230.

Kansas.—Elder *v.* Ottawa First Nat. Bank, 12 Kan. 238.

Kentucky.— Deppen *v.* German-American Title Co., 70 S. W. 868, 24 Ky. L. Rep. 1110 [rehearing *denied* in 72 S. W. 768, 24 Ky. L. Rep. 1876]; Wicks *v.* Dean, 44 S. W. 397, 19 Ky. L. Rep. 1708.

New York.— Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463.

United States.— U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125, applying the rule to the United States as plaintiff.

See 19 Cent. Dig. tit. "Equity," §§ 189, 190. See also Cancellation of Instruments, 6 Cyc. 329.

Restoration impossible.— One who has received the full benefit of a contract, where it is of such a nature that it cannot be restored, cannot have the aid of equity to avoid the contract obligations. Stowell *v.* Tucker, 7 Ida. 312, 62 Pac. 1033. But a widow may enforce her right of dower, contrary to an agreement with her husband which because of her coverture she was incompetent to fulfil, the contract being unenforceable in its inception under the statute of frauds, and her disposition of property received under it being deemed the act of the husband. Finch *v.* Finch, 10 Ohio St. 501.

Setting aside void judicial sales.— Card *v.* Quinebaug Bank, 23 Conn. 353; Byars *v.* Spencer, 101 Ill. 429, 40 Am. Rep. 212; Chambers *v.* Jones, 72 Ill. 275; Cravens *v.* Moore, 61 Mo. 178. And see, generally, Judicial Sales.

Annulling wrongful acts of officers of corporations.— Wilson *v.* Trenton Pass. R. Co., 56 N. J. Eq. 783, 40 Atl. 597 [*reversing* 55 N. J. Eq. 273, 37 Atl. 476]; Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21. See also San Antonio, etc., R. Co. *v.* San Antonio R. Co., 25 Tex. Civ. App. 167, 60 S. W. 338.

One seeking to set aside tax proceedings for irregularities must offer to pay such taxes as are fair and just. Russell *v.* Green, 10 Okla. 340, 62 Pac. 817; Halff *v.* Green, 10 Okla. 338, 62 Pac. 816; Lasater *v.* Green, 10 Okla. 335, 62 Pac. 816; Collins *v.* Green, 10 Okla. 244, 62 Pac. 813; Hart *v.* Smith, 44 Wis. 213. But it was held that an action under Cal. Code, § 738, to determine an adverse claim to land was not an equity suit to remove a cloud and when brought to annul a tax plaintiff was not required to offer to pay. Dranga *v.* Rowe, 127 Cal. 506, 59 Pac. 944. And one seeking to set aside a sale based on an illegal assessment will not be required to pay the assessment where its lien has expired by lapse of time. Field *v.* West Orange, 39 N. J. Eq. 60. See, generally, Taxation.

79. See Descent and Distribution, 14 Cyc. 1; Wills.

80. See Marshaling Assets and Securities.

81. In such cases, unless the statute forbids, plaintiff must offer to pay the debt and legal interest. McGehee *v.* George, 38 Ala. 323; Ruppel *v.* Missouri Guarantee, etc., Assoc., 158 Mo. 613, 59 S. W. 1000; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Mason *v.* Gardiner, 4 Bro. C. C. 436, 29 Eng. Reprint 976. And see, generally, Usury. A creditor who seeks relief against a mistake in a deed of trust to secure a usurious note must bring the note into court and have it reformed to purge it of usury. Corby *v.* Bean, 44 Mo. 379.

82. See Husband and Wife.

83. As where one entitled to land, or to enforce a claim against land, withholds the assertion of his right and permits innocent occupants to pay taxes or make improvements thereon; reimbursement is in such cases required as a condition of relief. Broumel *v.* White, 87 Md. 521, 39 Atl. 1047; Miner *v.* Beekman, 50 N. Y. 337; Powell *v.* Thomas, 6 Hare 300, 31 Eng. Ch. 300. See to the contrary under peculiar circumstances Winthrop *v.* Huntington, 3 Ohio 327, 17 Am. Dec. 601. A large portion of this field is now provided for at law by the various occupying claimant's acts.

Repudiation of authority.— Taxpayers, knowing the facts, who permit an attorney employed by the county to render his services, cannot thereafter require him to repay moneys which he fairly earned, on the ground that the employment was unauthorized.

N. He Who Comes Into Equity Must Come With Clean Hands[84]—**1. Meaning of Maxim.** This maxim expresses rather a principle of inaction than one of action. It means that equity refuses to lend its aid in any manner to one seeking its active interposition, who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief.[85]

2. Aid Not Given to Consummation of Inequitable Acts. The most direct application of the maxim is the uniform refusal of equity to assist one seeking its aid to enforce or to carry to fruition a contract or transaction in which he has been guilty of conduct wrongful toward his adversary, so as to obtain the benefit of a fraud perpetrated upon him.[86] Nor will equity assist one in obtaining the fruits of an act which is illegal[87] or even enable him to gain from an act which is

Frederick *v.* Douglas County, 96 Wis. 411, 71 N. W. 798.

84. "He that hath committed iniquity, shall not have equity." Francis Max. 11.

85. A court of equity may very properly refuse to aid a party by enforcing a demand where it would not aid the adverse party by annulling it. Williamson *v.* Morton, 2 Md. Ch. 94.

Cognate maxim distinguished.— This maxim is entirely distinct from and more comprehensive in its results than that requiring one who seeks equity to do equity. The latter presumes the actor's right to relief, and merely requires as a condition of obtaining it that he accord corresponding rights to his adversary. It does not presume that he has already committed iniquity. If he has the present maxim applies and forbids relief on any terms. Kinner *v.* Lake Shore, etc., R. Co., 69 Ohio St. 339, 69 N. E. 614.

86. *Connecticut.*— Brown *v.* Brown, 66 Conn. 493, 34 Atl. 490.

Illinois.— Commercial Nat. Bank *v.* Burch, 141 Ill. 510, 31 N. E. 420, 33 Am. St. Rep. 331; Fargo *v.* Goodspeed, 87 Ill. 290.

Kentucky.— Transylvania University *v.* Lexington, 3 B. Mon. 25, 38 Am. Dec. 173; Lucas *v.* Mitchell, 3 A. K. Marsh. 244.

Massachusetts.—Snow *v.* Blount, 182 Mass. 489, 65 N. E. 845.

Minnesota.— Evans *v.* Folsom, 5 Minn. 422.

Nevada.—O'Meara *v.* North American Min. Co., 2 Nev. 112.

New Jersey.— Wilson *v.* Bird, 28 N. J. Eq. 352.

New York.— Van Volkenburgh *v.* Bates, 14 Abb. Pr. N. S. 314 note.

North Carolina.— Falls *v.* Dickey, 59 N. C. 357.

Tennessee.— Cunningham *v.* Shields, 4 Hayw. 44.

Virginia.— Sims *v.* Lewis, 5 Munf. 29.

West Virginia.—Poling *v.* Williams, (1904) 46 S. E. 704; Craig *v.* Craig, 54 W. Va. 183, 46 S. E. 371.

United States.— Michigan Pipe Co. *v.* Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324; Hanley *v.* Sweeny, 109 Fed. 712, 48 C. C. A. 612.

See 19 Cent. Dig. tit. "Equity," §§ 185–187.

False notice of lien.— Equity will not enforce a statutory lien where the lienor has wilfully included in the notice filed non-lienable items or an amount largely in excess of what is due. Camden Iron Works *v.* Camden, 64 N. J. Eq. 723, 52 Atl. 477 [*reversing* 60 N. J. Eq. 211, 47 Atl. 220]; Robinson *v.* Brooks, 31 Wash. 60, 71 Pac. 721; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Fraudulent judgment.— And a creditor who has procured judgment to be taken for an amount greatly in excess of what was due was denied relief by creditor's bill founded on such judgment against a fraudulent conveyance of the debtor's property. Sargent *v.* Salmond, 27 Me. 539.

A breach of trust which the vendee of land induces the vendor's agent to commit deprives the former of remedy on account of the agent's misrepresentations, either by way of rescission (Pearce *v.* Ware, 94 Mich. 321, 53 N. W. 1106), or recovery of damages (Pineville Land, etc., Co. *v.* Hollingsworth, 53 S. W. 279, 21 Ky. L. Rep. 899).

Mutilation of instrument.—One who erased from bank-bills official stamps, characterizing them as spurious, was for that reason denied a standing in court to establish that the bills were genuine. Longinett *v.* Shelton, (Tenn. Ch. App. 1898) 52 S. W. 1078. One who took a usurious note to indemnify him as surety for the maker was, however, in an early case, permitted to recover what he was compelled to pay as surety, although he had altered the note by reducing the interest and could therefore not recover on it. Little *v.* Fowler, 1 Root (Conn.) 94.

Transaction fraudulent in part.— Where a part of a demand accrued through fraud and a part not, and the valid part could not well be separated from the invalid all relief was denied. Kitchen *v.* Rayburn, 19 Wall. (U. S.) 254, 22 L. ed. 64. But see Lewis *v.* Robards, 3 T. B. Mon. (Ky.) 406.

87. As by restraining a judgment in trespass for taking goods, which were taken tortiously to apply on rent (Dean *v.* Elyton Land Co., 113 Ala. 276, 21 So. 213), or to restrain ejectment, where plaintiff in equity obtained possession by force (David *v.* Levy, 119 Fed. 799).

Plaintiff maintaining a public nuisance cannot have the aid of equity to restrain defendant from abating it, although defendant has no authority to abate it. Pittsburgh, etc., R. Co. *v.* Crothersville, 159 Ind. 330, 64 N. E. 914. The proprietor of a gambling-house cannot have an injunction to prevent the

unconscionable.[88] One may be barred from relief by misconduct with reference to the suit itself.[89]

3. Relief Not Given Against Consequences of Misconduct. The principle of the maxim is that a court of equity will leave the guilty party seeking its aid where it finds him. Not only does it refuse, as has been seen, to carry to fruition a fraudulent, illegal, or otherwise unconscionable transaction, but where such transaction has been in whole or in part carried out it refuses to undo it, on the application of a guilty participant, and refuses to relieve him from legal liabilities or other consequences of his misconduct.[90]

4. Both Parties Participants in Fraud Against Third Persons. The rule not being for the benefit of defendant it is unnecessary for its operation that plaintiff's misconduct should be directed against him. Relief is refused where a stranger is the sufferer from the misconduct, and although defendant is himself a guilty participant therein and may indirectly profit by the refusal of the court to act. Thus where property has been transferred in fraud of creditors the court will not at the suit of the grantor or his privies enforce a secret trust by compelling the fraudulent grantee to reconvey[91] nor by requiring such grantee to

stationing of policemen on the premises. Weiss *v.* Herlihy, 23 N. Y. App. Div. 608, 49 N. Y. Suppl. 81.

88. *District of Columbia.*— May *v.* Schofield, 6 D. C. 235.

Illinois.— Williams *v.* Dutton, 184 Ill. 608, 56 N. E. 868.

Indiana.— Bunch *v.* Bunch, 26 Ind. 400.

Missouri.— Fehlig *v.* Busch, 165 Mo. 144, 65 S. W. 542.

New Jersey.— Thorne *v.* Mosher, 20 N. J. Eq. 257.

New York.— Seymour *v.* Seymour, 28 N. Y. App. Div. 495, 51 N. Y. Suppl. 130.

United States.— Michigan Pipe Co. *v.* Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324; Steam-Gauge, etc., Co. *v.* Ham Mfg. Co., 28 Fed. 618.

See 19 Cent. Dig. tit. "Equity," §§ 185–187.

Application of rule.— An adverse claimant of land who purchases a lease or procures a tenant to attorn to him gains no rights in equity by the possession so obtained. Stetson *v.* Cook, 39 Mich. 750; Latham *v.* Northern Pac. R. Co., 45 Fed. 721. See also Sandeford *v.* Lewis, 68 Ga. 482. A defendant in an attachment suit who procured a dissolution because plaintiff's bond was not signed by the principal, successfully resisting plaintiff's efforts to amend it, was held to have no standing thereafter to have it reformed in equity. Booker *v.* Smith, 38 S. C. 228, 16 S. E. 774. On this principle a court of equity will not lend its aid to set aside a transaction which gives to defendant the means legally to effect an adjustment between the parties which is in its nature equitable, but which could not otherwise be made, as to secure contribution among tort-feasors. Maxwell *v.* Louisville, etc., R. Co., 1 Tenn. Ch. 8.

89. Spoliation, fabrication, or suppression. —A plaintiff was denied relief because, for the purpose of making out his case, he had changed the dates of letters offered in evidence. Harton *v.* McKee, 73 Fed. 556. But a plaintiff who made out his case by other evidence was given relief, although he introduced forged receipts in evidence. Goodwin *v.* Hunt, 3 Yerg. (Tenn.) 124. And one seeking an equitable set-off was not denied all relief because he failed to show in his bill that he held partial security. Malone *v.* Carroll, 33 Ala. 191.

90. *District of Columbia.*— Jones *v.* Warden, 1 Mackey 476.

Georgia.— Carey *v.* Smith, 11 Ga. 539.

Illinois.— Neustadt *v.* Hall, 58 Ill. 172.

Iowa.— Bacon *v.* Early, 116 Iowa 532, 90 N. W. 353.

Maryland.— Dilly *v.* Barnard, 8 Gill & J. 170.

Massachusetts.—Lawton *v.* Estes, 167 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450.

Missouri.—Morrison *v.* Juden, 145 Mo. 282, 46 S. W. 994.

New Jersey.— Brindley *v.* Lawton, 53 N. J. Eq. 259, 31 Atl. 394.

Pennsylvania.— Smith *v.* Kammerer, 152 Pa. St. 98, 25 Atl. 165.

Tennessee.— Weakley *v.* Watkins, 7 Humphr. 356; Bearden *v.* Jones, (Ch. App. 1897) 48 S. W. 88.

Virginia.— Pope *v.* Towles, 3 Hen. & M. 47.

United States.— Richardson *v.* Walton, 49 Fed. 888; Farley *v.* St. Paul, etc., R. Co., 14 Fed. 114, 4 McCrary 138; Creath *v.* Sims, 5 How. 192, 12 L. ed. 110.

See 19 Cent. Dig. tit. "Equity," §§ 185–187.

91. *District of Columbia.*— Fletcher *v.* Fletcher, 2 MacArthur 38.

Georgia.— Bagwell *v.* Johnson, 116 Ga. 464, 42 S. E. 732; Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068; Flewellen *v.* Fontaine, 58 Ga. 471; Heineman *v.* Newman, 55 Ga. 262, 21 Am. Rep. 279.

Illinois.— Kassing *v.* Durand, 41 Ill. App. 93.

Kentucky.— Wright *v.* Wright, 2 Litt. 8.

Maryland.— Roman *v.* Mali, 42 Md. 513; Freeman *v.* Sedwick, 6 Gill 28, 46 Am. Dec. 650.

North Carolina.— Powell *v.* Ivey, 88 N. C. 256.

account.[92] The same rule applies in the case of other devices to defraud creditors.[93] Not only is the debtor denied relief, but also the fraudulent grantee, when he comes into equity to assert his claim.[94] In the same manner, under a great variety of circumstances, equity has refused to aid either party, where both are participants in a transaction in fraud of a third person, either to carry out their arrangement, to set it aside, or to relieve in any way with reference to it.[95]

5. Illegal Agreements, Etc. The maxim likewise excludes from a court of equity either party to an agreement tainted with any form of illegality, either to

Ohio.— O'Connor *v.* Ryan, 9 Ohio Dec. (Reprint) 575, 15 Cinc. L. Bul. 152.

Pennsylvania.— Hukill *v.* Yoder, 189 Pa. St. 233, 42 Atl. 122.

South Carolina.— Arnold *v.* Mattison, 3 Rich. Eq. 153.

Virginia.— James *v.* Bird, 8 Leigh 510, 31 Am. Dec. 668.

See 19 Cent. Dig. tit. "Equity," § 85. See also, generally, Fraudulent Conveyances.

92. Peacock *v.* Perry, 9 Ga. 137; Lill *v.* Brant, 6 Ill. App. 366; Sweet *v.* Tinslar, 52 Barb. (N. Y.) 271; Kelton *v.* Millikin, 2 Coldw. (Tenn.) 410. See also, generally, Fraudulent Conveyances.

93. As where plaintiff seeks relief against attachments or judgments procured with the connivance of plaintiff to defeat his other creditors. Moore *v.* Hemp, 68 S. W. 1, 24 Ky. L. Rep. 121; White *v.* Cuthbert, 10 N. Y. App. Div. 220, 41 N. Y. Suppl. 818; Wright *v.* Snell, 22 Ohio Cir. Ct. 86, 12 Ohio Cir. Dec. 308. So too where the attempt is to enforce a resulting trust the title to land purchased having been taken in the name of defendant in order to defeat creditors of the purchaser. Hill *v.* Scott, 15 S. W. 667, 12 Ky. L. Rep. 877; Wilson *v.* Watts, 9 Md. 356; Turner *v.* Eford, 58 N. C. 106; Almond *v.* Wilson, 75 Va. 613. The court refused to enforce in favor of a widow an equity she claimed to result from the investment by her father-in-law of funds in part hers, the investment having been made to defeat her husband's creditors and with her acquiescence. O'Neal *v.* Fenwick, 64 S. W. 952, 23 Ky. L. Rep. 1219.

94. He cannot recover the property if it is in possession of a third person. Swan *v.* Castleman, 4 Baxt. (Tenn.) 257.

Mortgage given to defraud mortgagor's creditors cannot be foreclosed in equity. Miller *v.* Marckle, 21 Ill. 152; Jones *v.* Jenkins, 83 Ky. 391. See also Huff *v.* Roane, 22 Ark. 184; Blasdel *v.* Fowle, 120 Mass. 447, 21 Am. Rep. 533. But a trust deed given to a clerk of a merchant to secure future credits from the latter is not fraudulent and may be foreclosed, although it does not disclose its full purpose. Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644.

Fraudulent judgment.— A bill cannot be maintained to confirm a judgment fraudulently confessed. Price *v.* Polluck, 37 N. J. L. 44.

A fraudulent assignee of a judgment cannot enforce it by creditor's bill. Winans *v.* Graves, 43 N. J. Eq. 263, 11 Atl. 25.

95. *Illinois.*— Northrup *v.* Phillips, 99 Ill. 449; Blackburn *v.* Bell, 91 Ill. 434; Arnold *v.* Gifford, 62 Ill. 249.

Kentucky.— McClure *v.* Purcel, 3 A. K. Marsh. 61.

Mississippi.— Watt *v.* Conger, 13 Sm. & M. 412.

New Jersey.— Ellicott *v.* Chamberlin, 37 N. J. Eq. 470 [*affirmed* in 38 N. J. Eq. 604, 48 Am. Rep. 327].

New York.— Farrow *v.* Holland Trust Co., 74 Hun 585, 26 N. Y. Suppl. 502; Bauer *v.* Betz, 4 N. Y. St. 92; Davenport *v.* City Bank, 9 Paige 12; Crosier *v.* Acer, 7 Paige 137; Bolt *v.* Rogers, 3 Paige 154.

North Carolina.— Shute *v.* Austin, 120 N. C. 440, 27 S. E. 90; Sherner *v.* Spear, 92 N. C. 148.

Pennsylvania.— Houston *v.* Graff, 24 Pa. Co. Ct. 477; Rhodes' Estate, 18 Phila. 18; Mathews' Appeal, 37 Leg. Int. 157; De Camp *v.* Johnson, 3 Luz. Leg. Obs. 42.

Tennessee.— Cunningham *v.* Shields, 4 Hayw. 44.

United States.— Randall *v.* Howard, 2 Black 585, 17 L. ed. 269; Schermerhorn *v.* De Chambrun, 64 Fed. 195, 12 C. C. A. 81; Lewis *v.* Meier, 14 Fed. 311, 4 McCrary 286; Bartle *v.* Coleman, 2 Fed. Cas. No. 1,072, 3 Cranch C. C. 283 [*affirmed* in 4 Pet. 184, 7 L. ed. 825]; Selz *v.* Unna, 21 Fed. Cas. No. 12,650, 1 Biss. 521 [*affirmed* in 6 Wall. 327, 18 L. ed. 799].

See 19 Cent. Dig. tit. "Equity," § 84.

Fraud on public land laws.— Many such cases have arisen out of attempts to enforce contracts made in fraud of laws relating to the disposition of public lands. Cothran *v.* McCoy, 33 Ala. 65; Dial *v.* Hair, 18 Ala. 798, 54 Am. Dec. 179; Corprew *v.* Arthur, 15 Ala. 525; American Assoc. *v.* Innis, 109 Ky. 595, 60 S. W. 388, 22 Ky. L. Rep. 1196; Anderson *v.* Phillips, 5 Litt. (Ky.) 301; Evans *v.* Folsom, 5 Minn. 422; Beck *v.* Flournoy Live-Stock, etc., Co., 65 Fed. 30, 12 C. C. A. 497.

Principal and bail.— Equity will not relieve a grantor who charged with a crime conveys property to his bail, in order that he may flee from justice. Baehr *v.* Wolf, 59 Ill. 470; Ratcliffe *v.* Smith, 13 Bush (Ky.) 172. Nor will a reconveyance be decreed of land conveyed in order to qualify the grantee to become bail. Sewell *v.* Lovett, 8 Ohio Dec. (Reprint) 157, 6 Cinc. L. Bul. 63.

One claiming under a deed secured by fraud cannot have relief against a title obtained on execution sale on a judgment based on a forged note, each party deriving title through fraud against the real owner. Dunning *v.* Bathrick, 41 Ill. 425.

enforce it or to obtain relief against it,[96] or one seeking to protect a right operating against public policy.[97] A court of equity in one state will not lend its aid to the consummation of a transaction in another state in violation of the laws thereof.[98]

96. *Illinois.*— Martin *v.* Ohio Stove Co., 78 Ill. App. 105.

Massachusetts.— Snell *v.* Dwight, 120 Mass. 9.

Michigan.— Cedar Springs *v.* Schlich, 81 Mich. 405, 45 N. W. 994, 8 L. R. A. 851.

New Jersey.— Brindley *v.* Lawton, 53 N. J. Eq. 259, 31 Atl. 394.

New York.— L. D. Garrett Co. *v.* Morton, 35 Misc. 10, 71 N. Y. Suppl. 17.

Tennessee.—Weakley *v.* Watkins, 7 Humphr. 356.

Wisconsin.— Swartzer *v.* Gillett, 2 Pinn. 238, 1 Chandl. 207.

See 19 Cent. Dig. tit. "Equity," §§ 77–79.

Gambling transactions.— No relief will be given as to matters growing out of transactions contrary to laws relating to gambling, lotteries, pool-selling, etc., except of course where the statute otherwise provides.

Missouri.— Kitchen *v.* Greenabaum, 61 Mo. 110.

New York.— Maxim, etc., Co. *v.* Sheehan, 37 Misc. 368, 75 N. Y. Suppl. 422.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Pennsylvania.— Smith *v.* Kammerer, 152 Pa. St. 98, 25 Atl. 165; Stewart *v.* Parnell, 147 Pa. St. 523, 23 Atl. 838; Lessig *v.* Lanton, Brightly 191.

Texas.— Beer *v.* Landman, 88 Tex. 450, 31 S. W. 805 [*reversing* (Civ. App. 1895) 30 S. W. 64].

Virginia.— Pope *v.* Towles, 3 Hen. & M. 47.

See 19 Cent. Dig. tit. "Equity," § 80. See also, generally, GAMING; LOTTERIES.

Monopolies and restraint of trade.— Equity will not enforce an agreement which has for its object the creation of a monopoly or stifling of competition (Wilmington City R. Co. *v.* Wilmington, etc., R. Co., (Del. 1900) 46 Atl. 12; Hedding *v.* Gallagher, 69 N. H. 650, 45 Atl. 96, 76 Am. St. Rep. 204, 70 N. H. 631, 47 Atl. 614; American Biscuit, etc., Co. *v.* Klotz, 44 Fed. 721), nor assist in distributing the profits of such an arrangement (Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662; Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Nester *v.* Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 41 Am. St. Rep. 894, 24 L. R. A. 247; Wiggins *v.* Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837; Read *v.* Smith, 60 Tex. 379), or protect one in his membership in an association formed for such purpose (Greer *v.* Payne, 4 Kan. App. 153, 46 Pac. 190; Unckles *v.* Colgate, 148 N. Y. 529, 43 N. E. 59 [*affirming* 72 Hun 119, 25 N. Y. Suppl. 672]; Phœnix Bridge Co. *v.* Keystone Bridge Co., 142 N. Y. 425, 37 N. E. 562 [*affirming* 23 N. Y. Suppl. 109]). Equity will not aid one concern attempting to accomplish a monopoly against the efforts of another to accomplish a similar purpose. Kuhn *v.* Woolson Spice Co., 10 Ohio S. & C. Pl. Dec. 292, 8 Ohio N. P. 686.

Compounding felonies and stifling prosecutions.— *Missouri.*— Malone *v.* New York Fidelity, etc., Co., 71 Mo. App. 1.

New York.— Harrington *v.* Bigelow, 11 Paige 349.

Ohio.— Moore *v.* Adams, 8 Ohio 372, 32 Am. Dec. 723.

West Virginia.—George *v.* Curtis, 45 W. Va. 1, 30 S. E. 69; Rock *v.* Mathews, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508.

Wisconsin.— Swartzer *v.* Gillett, 2 Pinn. 238, 1 Chandl. 207.

See 19 Cent. Dig. tit. "Equity," § 81.

Contracts in violation of liquor laws.—Hanson *v.* Power, 8 Dana (Ky.) 91; Upton *v.* Haines, 55 N. H. 283; Teoli *v.* Nardolillo, 23 R. I. 87, 49 Atl. 489.

Champertous agreements.— Gilbert *v.* Holmes, 64 Ill. 548; Thompson *v.* Warren, 8 B. Mon. (Ky.) 488; Gribbel *v.* Brown, 9 Pa. Dist. 524; Harris *v.* Brown, 9 Pa. Dist. 521. But see Gargano *v.* Pope, 184 Mass. 571, 69 N. E. 343.

Slave-trade contracts.— Sample *v.* Barnes, 14 How. (U. S.) 70, 14 L. ed. 330; Creath *v.* Sims, 5 How. (U. S.) 192, 12 L. ed. 110.

Other violations of law and public policy.— *Alabama.*—White *v.* Equitable Nuptial Ben. Union, 76 Ala. 251, 52 Am. Rep. 325.

Connecticut.— Simonds *v.* East Windsor El. R. Co., 73 Conn. 513, 48 Atl. 210.

Illinois.— St. Louis, etc., R. Co. *v.* Mathers, 104 Ill. 257; St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 22 Am. Rep. 122.

Missouri.— Morrison *v.* Juden, 145 Mo. 282, 46 S. W. 994.

Oregon.— Phillips *v.* Thorp, 10 Oreg. 494.

Tennessee.— Kirk *v.* Morrow, 6 Heisk. 445.

Virginia.— Helsley *v.* Fultz, 76 Va. 671.

West Virginia.— Brown *v.* Wylie, 2 W. Va. 502, 98 Am. Dec. 781.

Wisconsin.— Raasch *v.* Raasch, 100 Wis. 400, 76 N. W. 591.

See 19 Cent. Dig. tit. "Equity," §§ 77–79.

An entirely executory contract may be rescinded if the illegality does not appear on the face of the contract. Wilcox *v.* Buckner, 6 Ky. L. Rep. 655. See also CANCELLATION OF INSTRUMENTS, 6 Cyc. 287.

97. A trades-union cannot have protection in the use of a "union-made" label which on its face stigmatizes workers not members of the union. McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377. See also *infra*, p. 148, **note 3**; and, generally, TRADE-MARKS AND TRADE-NAMES.

98. Paine *v.* France, 26 Md. 46. A court will not enforce a contract valid where made if contrary to the policy of the laws of its own jurisdiction. Watson *v.* Murray, 23 N. J. Eq. 257. A lottery legal in Maryland was by mistake drawn in the District of Columbia where it was illegal. It was held that a court of equity would not enforce a judgment ob-

6. COURT APPLIES MAXIM OF ITS OWN MOTION. The unconscionable character of a transaction between the parties need not be pleaded by defendant. Whenever it is disclosed the court will of its own motion apply the maxim.[99]

7. LIMITATIONS AND EXCEPTIONS. Extensive as is the application of the principle expressed in the maxim, it has certain limitations. Of these the most important is that a party is not barred from relief because of misconduct not connected with the matter in controversy.[1] It has been held that the misconduct must be so connected with the subject-matter as to affect the equitable relations between the parties,[2] but such language is misleading if not erroneous. Where the attempt is to enforce or otherwise to compel recognition of a contract or transaction the iniquity of which rests upon both parties, as well as where defendant is the victim of plaintiff's iniquity, it may well be said that the equitable relations of the parties are affected by such iniquity. But we have already seen that relief has been refused in many cases where defendant was not concerned either as victim or participant in plaintiff's misconduct, but where the granting of relief would permit plaintiff, sometimes very indirectly, to gain an advantage through a wrong perpetrated against a third person or against the public. The maxim itself affects the equitable relations between the parties wherever plaintiff's misconduct is in any way involved in the subject-matter of litigation. The supposed necessity of finding that plaintiff's misconduct has operated upon the relations of the parties has led to some decisions which it is difficult to reconcile with many already cited applying the maxim.[3] Notwithstanding this supposed necessity, relief has often been denied because plaintiff, seeking relief against the misconduct of another, has been guilty himself of similar but disconnected acts.[4] A party may have relief as

tained for a prize. Smith *v.* Chesapeake, etc., Canal Co., 22 Fed. Cas. No. 13,024, 5 Cranch C. C. 563 [*affirmed* in 14 Pet. 45, 10 L. ed. 347]. But it was held to be no objection to a bill that the contract sought to be enforced was to evade the confiscation act of the Confederate government. Barrell *v.* Hanrick, 42 Ala. 60.

99. Dunham *v.* Presby, 120 Mass. 285; Teoli *v.* Nardoldillo, 23 R. I. 87, 49 Atl. 489. But where a defendant who is a guilty participant in the transaction by a legal slip loses his opportunity to disclose its turpitude he will not as a matter of favor be permitted to do so. Harrington *v.* Bigelow, 11 Paige (N. Y.) 349. See also McDonald *v.* Campbell, 3 Pittsb. (Pa.) 554.

1. *Delaware.*—Delaware Surety Co. *v.* Layton, (1901) 50 Atl. 378.

District of Columbia.— Mercantile Trust Co. *v* Hensey, 21 D. C. 38.

Illinois.— Chicago *v.* Union Stock-Yards, etc., Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281.

Maryland.— Equitable Gas-Light Co. *v.* Baltimore Coal-Tar, etc., Co., 65 Md. 73, 3 Atl. 108.

New Jersey.— Wright *v.* Wright, 51 N. J. Eq. 475, 26 Atl. 166; Woodward *v.* Woodward, 41 N. J. Eq. 224, 4 Atl. 424.

United States.— Trice *v.* Comstock, 121 Fed. 620, 57 C. C. A. 646 [*reversing* 115 Fed. 765]; Liverpool, etc., Ins. Co. *v.* Clunie, 88 Fed. 160; Bateman *v.* Fargason, 4 Fed. 32, 2 Flipp. 660.

See 19 Cent. Dig. tit. "Equity," § 186.

"A court of equity is not an avenger of wrongs committed at large by those who resort to it for relief." Kinner *v.* Lake Shore, etc., R. Co., 69 Ohio St. 339, 344, 69 N. E. 614, per Shauck, J.

2. Foster *v.* Winchester, 92 Ala. 497, 9 So. 83; Mossler *v.* Jacobs, 66 Ill. App. 571. See also Pomeroy Eq. Jur. § 399.

3. Trade-name.— One will not be deprived of protection of a trade-name because he has put out under such name untruthful advertisements. Mosser *v.* Jacobs, 66 Ill. App. 571.

Illegal combinations.— One whose patent has been sustained by a prior adjudication is entitled to an injunction against further infringement, although he has since entered into a combination for the purpose of acquiring a monopoly. Edison Electric Light Co. *v.* Sawyer-Man Electric Co., 53 Fed. 592, 3 C. C. A. 605. *Compare* cases cited *supra*, notes 18, 19. Other cases are more readily distinguishable from those cited in the notes last referred to. A railroad company, a member of a combination in violation of the anti-trust laws, may restrain dealing in its tickets contrary to the contract of purchase. Kinner *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 294. Membership in an illegal mining association does not prevent plaintiff from restraining labor unions from unlawfully interfering with plaintiff's mines and the operation thereof. Cœur D'Alene Consol., etc., Co. *v.* Wardner Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

Plaintiff using deceptive trade-mark may restrain an infringement of its other trademarks. Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48 [*affirming* 102 Fed. 882].

4. As to abate a nuisance on his neighbor's premises while he maintains one on his own (Cassady *v.* Cavenor, 37 Iowa 300), to pre-

to a transaction in itself untainted, although his title to the subject-matter may have originally grown out of his wrongful acts not connected with the present controversy.[5] So one does not always forfeit a right fairly acquired by subsequent misconduct connected therewith.[6] The maxim being one founded on public policy, public policy may require its relaxation.[7] Where parties to a fraudulent transaction are not *in pari delicto* relief is under some circumstances given to him who is less at fault, as against the more guilty party.[8] A party entirely innocent is of course not barred from relief because of the misconduct of others, although his rights may be associated with theirs.[9] Restitution has been compelled of property received under an illegal contract not involving moral turpitude,[10] and in some cases where plaintiff's misconduct has been directed against defendant relief has been given by imposing a condition of such a character as to eliminate the intended wrong.[11] Finally it has been said that the maxim refers only to wilful misconduct,[12] but this can mean no more than free and deliberate action with knowledge of the facts; it does not require consciousness of the illegal or immoral nature of the act.

vent a rival telephone company from making an unauthorized use of streets, while plaintiff's use of the streets is likewise unauthorized (Nebraska Telephone Co. *v.* Western Independent Long Distance Telephone Co., (Nebr. 1903) 95 N. W. 18), or to restrain a bucket-shop from using plaintiff's quotations, while plaintiff itself permitted the use of its exchange for bucket-shop deals (Chicago Bd. of Trade *v.* O'Dell Commission Co., 115 Fed. 574). But one maintaining obstructions over a sidewalk was held not to be thereby prevented from restraining another from erecting bay-windows over the walk, because, it was said, the transactions were different. Anisfield Co. *v.* Grossman, 98 Ill. App. 180.

Literary pirate.— One will not be heard to ask protection of the copyright of a publication which is itself the result of pirating a third person's copyright. Edward Thompson Co. *v.* American Law Book Co., 122 Fed. 922, 59 C. C. A. 148 [*reversing* 121 Fed. 907].

One maintaining a monopoly cannot restrain another from acquiring a similar monopoly. Kuhn *v.* Woolson Spice Co., 10 Ohio S. & C. Pl. Dec. 292, 8 Ohio N. P. 686; Scranton Electric Light, etc., Co.'s Appeal, 122 Pa. St. 154, 15 Atl. 446, 9 Am. St. Rep. 79, 1 L. R. A. 285.

5. Hamilton *v.* Wood, 55 Minn. 482, 57 N. W. 208; Young *v.* Beardsley, 11 Paige (N. Y.) 93; Shapira *v.* Paletz, (Tenn. Ch. App. 1900) 59 S. W. 774; Upchurch *v.* Anderson, (Tenn. Ch. App. 1898) 52 S. W. 917; Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 423, 1 McCrary 558.

6. A forcible entry upon a lot does not prevent equitable relief as to a portion thereof, founded upon a lawful prior possession. Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866. See Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032. But equity will not enforce a reservation of a rent fee in a deed, altered after delivery by the grantor's agent. Arrison *v.* Harmstead, 2 Pa. St. 191.

7. **Judgment in a bastardy proceeding** will be enforced in equity, although the parties were *in pari delicto*. Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881.

8. The cases are for the most part where the inequality of guilt arises from mental infirmity, youth, or circumstances of oppression or imposition operating to give defendant control or undue influence over plaintiff. The inequality of responsibility thus created may be so great as to entitle plaintiff to relief.

Illinois.— Baehr *v.* Wolf, 59 Ill. 470.

New York.— Freelove *v.* Cole, 41 Barb. 318 [*affirmed* in 41 N. Y. 619].

North Carolina.— Pinckston *v.* Brown, 56 N. C. 494.

Virginia.— Austin *v.* Winston, 1 Hen. & M. 33, 3 Am. Dec. 583.

Washington.— Melbye *v.* Melbye, 15 Wash. 648, 47 Pac. 16.

England.— Osborne *v.* Williams, 18 Ves. Jr. 379, 11 Rev. Rep. 218, 34 Eng. Reprint 360.

See 19 Cent. Dig. tit. "Equity," §§ 77, 84.

Client influenced by attorney.— It has been held that a client may have relief against his attorney based upon a fraudulent contract entered into by advice of the attorney. Herrick *v.* Lynch, 150 Ill. 283, 37 N. E. 221 [*affirming* 49 Ill. App. 657]. *Contra*, Roman *v.* Mali, 42 Md. 513.

Fraud versus carelessness.— Relief has been given, however, where the disparity was in the nature of the conduct itself, not in the situation of the parties; as where one was guilty of gross intentional fraud and the other of scarcely worse than careless conduct. Dismukes *v.* Terry, 1 Walk. (Miss.) 197; Green *v.* Veder, (Tenn. Ch. App. 1900) 57 S. W. 519.

9. Denison *v.* Gibson, 24 Mich. 187; Slocum *v.* Slocum, 37 Misc. (N. Y.) 143, 74 N. Y. Suppl. 447.

Misconduct of the government is not it seems to be imputed to it from the act of its officers. U. S. *v.* City Bank, 25 Fed. Cas. No. 14,796, 6 McLean 130.

10. Pullman's Palace-Car Co. *v.* Central Transp. Co., 65 Fed. 158.

11. Cassidy *v.* Metcalf, 66 Mo. 519 [*reversing* 1 Mo. App. 593]; Lewis *v.* Holdrege, 56 Nebr. 379, 76 N. W. 890, misconduct was not that of plaintiff, but of his assignor.

12. Lewis' Appeal, 67 Pa. St. 153; Snell Eq. 35.

IV. LACHES AND STALE DEMANDS.

A. General Principles — 1. Negligence Bars Relief in Equity. Courts of equity, while sometimes bound by and at other times following the analogy of statutes of limitation,[13] also act independently of such statutes, refusing relief to parties who have slept upon their rights or have been negligent in asserting them.[14] Negligence in the prosecution of the suit after its commencement may bar relief.[15] A party himself diligent may be precluded from relief by the negligence of others, as a grantee by the negligence of his grantor,[16] a personal representative by that of the decedent,[17] or joint tenants by that of one of their number.[18]

13. See *infra*, IV, E.

14. *Alabama.*— Johnson *v.* Johnson, 5 Ala. 90.

Arkansas.— Wilson *v.* Anthony, 19 Ark. 16.

Colorado.— Pipe *v.* Smith, 5 Colo. 146.

District of Columbia.— Gibbons *v.* Duley, 18 D. C. 320.

Georgia.— Williams *v.* Black, 69 Ga. 770; Akins *v.* Hill, 7 Ga. 573.

Illinois.— Carpenter *v.* Carpenter, 70 Ill. 457; Dickerman *v.* Burgess, 20 Ill. 266; Ulrich *v.* Cress, 85 Ill. App. 101; Kellogg *v.* Western Electric Co., 67 Ill. App. 53.

Kentucky.— Madox *v.* McQuean, 3 A. K. Marsh. 400.

Maryland.— Banks *v.* Haskie, 45 Md. 207; Beard *v.* Hubble, 9 Gill 420; Chew *v.* Farmers' Bank, 2 Md. Ch. 231; Hertie *v.* McDonald, 2 Md. Ch. 128.

Massachusetts.— Phillips *v.* Rogers, 12 Metc. 405.

Minnesota.— Ayer *v.* Stewart, 14 Minn. 97.

Missouri.— Smith *v.* Washington, 11 Mo. App. 519 [*affirmed* in 88 Mo. 475]; Miller *v.* Bernecker, 46 Mo. 194; Perry *v.* Craig, 3 Mo. 516.

New Jersey.— Dringer *v.* Jewett, 43 N. J. Eq. 701, 13 Atl. 664; Smith *v.* Duncan, 16 N. J. Eq. 240; Vanduyne *v.* Vanduyne, 16 N. J. Eq. 93.

New York.— Hawley *v.* Cramer, 4 Cow. 717.

Pennsylvania.— Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Halsey *v.* Tate, 52 Pa. St. 311; Ludwig *v.* St. Andrew's Church, 28 Leg. Int. 213; Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25.

Virginia.— Hill *v.* Bowyer, 18 Gratt. 364; Atkinson *v.* Robinson, 9 Leigh 393; Coleman *v.* Lyne, 4 Rand. 454.

West Virginia.— Phillips *v.* Piney Coal Co., 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040; Trader *v.* Jarvis, 23 W. Va. 100.

United States.— Abraham *v.* Ordway, 158 U. S. 416, 15 S. Ct. 894, 39 L. ed. 1036; Godden *v.* Kimmell, 99 U. S. 201, 25 L. ed. 431; Piatt *v.* Vattier, 9 Pet. 405, 9 L. ed. 173; Georgia Cent. R., etc., Co. *v.* Farmers' L. & T. Co., 112 Fed. 81; Van Vleet *v.* Sledge, 45 Fed. 743; Speidell *v.* Henrici, 15 Fed. 753; Taylor *v.* Holmes, 14 Fed. 498; Gould *v.* Gould, 10 Fed. Cas. No. 5,637, 3 Story 516; Hollingsworth *v.* Fry, 12 Fed. Cas. No. 6,619, 4 Dall. 345; Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56.

See 19 Cent. Dig. tit. "Equity," § 191.

15. Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139 [*affirming* on this point 5 Colo. App. 391, 38 Pac. 1100]; Consumers' Brewing Co. *v.* Bush, 19 App. Cas. (D. C.) 588; Bowers *v.* Cutler, 165 Mass. 441, 43 N. E. 188; Johnston *v.* Standard Min. Co., 148 U. S. 360, 13 S. Ct. 585, 37 L. ed. 480.

Delay in seeking appointment of a receiver, that being a discretionary remedy, is not a bar. McCaskill *v.* Warren, 58 Ga. 286.

Laches in prosecuting an action at law will not bar a suit in equity involving the same subject where the equitable right is not unreasonably delayed in its assertion and does not depend upon the proceedings at law. McClanahan *v.* Chambers, 1 T. B. Mon. (Ky.) 43.

A claim continually being prosecuted will not grow stale during that time. Hunt *v.* Smith, 3 Rich. Eq. (S. C.) 465.

Delays in prosecution may be accounted for by loss of papers, death, and substitution of parties and other circumstances. Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139; Mayo *v.* Carrington, 19 Gratt. (Va.) 74.

16. Hermanns *v.* Fanning, 151 Mass. 1, 23 N. E. 493; Trout *v.* Lucas, 54 N. J. Eq. 361, 35 Atl. 153; Kelly *v.* Green Bay, etc., R. Co., 80 Wis. 328, 50 N. W. 187; Sable *v.* Maloney, 48 Wis. 331, 4 N. W. 479.

Estoppel to assert laches.— But the adverse party, by acquiescing in the grantor's claim until after plaintiff purchased, may estop himself from asserting the laches. Stewart *v.* Stokes, 33 Ala. 494, 73 Am. Dec. 429.

Negligence of trustee.— Where parties who had been induced by fraud to execute a deed conveyed to a trustee that he might sue to recover the land, and the trustee delayed for three years bringing the suit, but defendant knew of the conveyance to him and of its purpose, it was held that the grantors, not having caused the delay, were not barred from maintaining the suit by laches of the trustee. Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 2 C. C. A. 252.

17. Gifford *v.* Thorn, 9 N. J. Eq. 702; Halsey *v.* Cheney, 68 Fed. 763, 15 C. C. A. 656.

Devisees cannot be charged, however, with laches of the executor. Woodruff *v.* Snowden, 10 Ohio S. & C. Pl. Dec. 123, 7 Ohio N. P. 520.

18. James *v.* James, 55 Ala. 525.

Where interests are not joint, as in the case of a remainder-man and a particular tenant,

2. Exceptions to Operation of Rule — a. Negligence Not Imputed to Government. An exemption similar to that which government enjoys from the operation of the statute of limitations[19] exists in equity against the defense of laches,[20] and the laches of officers or agents will not be imputed to the government.[21] The rule has been applied even in favor of subordinate political subdivisions or officers acting with reference to governmental matters.[22]

b. Other Cases Presenting Exceptional Features. It is sometimes said that lapse of time will not bar the enforcement of a direct or express trust.[23] This statement is too broad, and trusts form no true exception to the rule. As long as the trust is acknowledged the right continues, and negligence cannot be imputed under such circumstances. But from the time of the repudiation of the trust the ordinary rules prevail.[24] Suits for relief against fraud also occupy a peculiar position. It has been said that in such cases lapse of time ought not to bar relief,[25] but the modern doctrine is that negligence, and even lapse of time alone, may bar relief from fraud, the question being as to the time from which the delay should be computed.[26] But when fraud is clearly proved the court will look with much

laches of the latter will not be imputed to the former. Gibson *v.* Jayne, 37 Miss. 164.

19. See, generally, Limitations of Actions.

20. Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401; Louisville, etc., R. Co. *v.* Com., 85 Ky. 198, 3 S. W. 139, 8 Ky. L. Rep. 840; U. S. *v.* Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. ed. 199; U. S. *v.* Southern Pac. R. Co., 39 Fed. 132; U. S. *v.* Alexandria, 19 Fed. 614; U. S. *v.* Southern Colorado Coal, etc., Co., 18 Fed. 273, 5 McCrary 563. *Contra*, Corse *v.* Reg., 3 Can. Exch. 13. *Dictum* in Hepburn's Case, 3 Bland (Md.) 95. And see U. S. *v.* Beebee, 17 Fed. 36, 4 McCrary 12, holding that while generally laches will not be imputed to the government it will nevertheless be barred of relief when the delay is so great as to afford a presumption that witnesses are dead and proof lost.

Government nominal party or private litigant. — "Where the government is suing for the use and benefit of an individual, or for the prosecution of a private and proprietary instead of a public or governmental right, it is clear that it is not entitled to the exemption of *nullum tempus*, and that the ordinary rule of laches applies in full force." French Republic *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 438, 24 S. Ct. 145, 48 L. ed. 247, per Brown, J. To the same point see Miller *v.* State, 38 Ala. 600; Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; U. S. *v.* American Bell Telephone Co., 167 U. S. 224, 264, 17 S. Ct. 809, 42 L. ed. 144; Curtner *v.* U. S., 149 U. S. 662, 13 S. Ct. 1041, 37 L. ed. 890; U. S. *v.* Des Moines Nav., etc., Co., 142 U. S. 510, 538, 12 S. Ct. 308, 35 L. ed. 1099; U. S. *v.* Beebe, 127 U. S. 338, 8 S. Ct. 1083, 32 L. ed. 121; Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822; New Hampshire *v.* Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. ed. 656; U. S. *v.* McElroy, 25 Fed. 804. *Compare*, however, San Pedro, etc., Co. *v.* U. S., 146 U. S. 120, 13 S. Ct. 94, 36 L. ed. 911; U. S. *v.* Willamette Valley, etc., Wagon-Road Co., 54 Fed. 807.

As to a foreign government it has been said to be "at least open to doubt whether the maxim *nullum tempus*, applicable to our own government, can be invoked in behalf of a foreign government suing in our courts." French Republic *v.* Saratoga Vichy Spring Co., 191 U. S. 427, 437, 24 S. Ct. 145, 48 L. ed. 247, per Brown, J.

Creditors of a state seeking to enforce its claim for their own benefit cannot avail themselves of its privilege of sovereignty in respect of laches. Cressey *v.* Meyer, 138 U. S. 525, 11 S. Ct. 387, 34 L. ed. 1018.

21. Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009; Dox *v.* U. S. Postmaster-Gen., 1 Pet. (U. S.) 318, 7 L. ed. 160; U. S. *v.* Alexandria, 19 Fed. 609, 4 Hughes 545.

Delay due to the routine of business in the government offices will not bar a bill filed by the United States on behalf of a private party. U. S. *v.* Curtner, 26 Fed. 296.

22. Piatt County *v.* Goodell, 97 Ill. 84; Cheek *v.* Aurora, 92 Ind. 107; *In re* Hampshire County Com'rs, 143 Mass. 424, 9 N. E. 756; Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236; Johnston *v.* Irwin, 3 Serg. & R. (Pa.) 291.

23. Colbert *v.* Daniel, 32 Ala. 314; Cartmell *v.* Perkins, 2 Del. Ch. 102; Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296; U. S. Bank *v.* Beverley, 1 How. (U. S.) 134, 11 L. ed. 75. For this reason it has been held that ten years' delay in the proceedings after their partial prosecution is no bar to further proceedings. Talbott *v.* Bell, 5 B. Mon. (Ky.) 320, 43 Am. Dec. 126.

24. See, generally, Trusts.

25. McLean *v.* Barton, Harr. (Mich.) 279; Prevost *v.* Gratz, 6 Wheat. (U. S.) 481, 5 L. ed. 311. *Contra*, Hatfield *v.* Montgomery, 2 Port. (Ala.) 58; Starrett *v.* Keating, 61 Ill. App. 189; Dringer *v.* Jewett, 43 N. J. Eq. 701, 13 Atl. 664.

In New York it is held that the statute of limitations alone governs such cases, and that no question of laches is involved. Prindle *v.* Beveridge, 7 Lans. 225; Ilion Bank *v.* Carver, 31 Barb. 230; Slayback *v.* Raymond, 40 Misc. 601, 83 N. Y. Suppl. 15; Murray *v.* Coster, 20 Johns. 576, 11 Am. Dec. 333.

26. See *infra*, IV, C, 4.

more than usual indulgence on any disability under which plaintiff may labor as excusing his delay in asserting his rights.[27]

3. Terms Defined. The defenses presented arising out of negligence in the assertion of a right are generally discussed under the terms, "laches" or "stale demands." Laches in a general sense is the neglect to do what in law should have been done for an unreasonable and unexplained length of time under circumstances permitting diligence.[28] More specifically it is inexcusable delay in asserting a right.[29] Strictly speaking laches implies something more than mere lapse of time; it requires some actual or presumable change of circumstances rendering it inequitable to grant relief.[30] A stale demand or claim on the other hand is merely one which has for a very long time remained unasserted.[31]

B. What Constitutes Laches — 1. Depends on Circumstances of Each Case. No arbitrary rule exists for determining when a demand becomes stale[32] or what delay will be excused,[33] and the question of laches is to be decided upon the particular circumstances of each case.[34] No greater certainty of treatment is therefore practicable than to indicate the elements generally considered.

2. Lapse of Time — a. Mere Delay. While some delay in the assertion of a right is always an essential element of laches, unreasonable delay alone, independently of any statute of limitations, will often operate as a bar to relief.[35] It

27. McIntire *v.* Pryor, 173 U. S. 38, 19 S. Ct. 352, 43 L. ed. 606 [*affirming* 10 App. Cas. (D. C.) 432]. And see under very similar facts Carter *v.* Tice, 120 Ill. 277, 11 N. E. 529.

28. Babb *v.* Sullivan, 43 S. C. 436, 21 S. E. 277. Laches is a neglect to do something which by law a man is obliged or in duty bound to do. Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318; Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39, by Lord Ellenborough.

29. Anderson L. Dict. "Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time." Bouvier L. Dict.

30. Hahn *v.* Gates, 102 Ill. App. 385; O'Brien *v.* Wheelock, 184 U. S. 450, 22 S. Ct. 354, 46 L. ed. 636; Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640; Pennsylvania *v.* U. S., 36 Ct. Cl. 507; Old Colony Trust Co. *v.* Dubuque Light, etc., Co., 89 Fed. 794; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520. Relief will not be denied on the ground of laches where to do so would be inequitable. Wilson *v.* Equitable Trust Co., 98 Ill. App. 81.

31. Black L. Dict.; Bouvier L. Dict. See Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161.

The distinction stated in the text is by no means uniformly observed in the use of the terms. "Laches" is frequently used in cases where nothing appears except delay, and even where the court is applying a bar provided by the statute of limitations. It would be of doubtful utility to attempt closely to preserve in discussion a distinction in terminology which the courts have not found necessary to preserve in practice. Staleness of demand is therefore considered as an element sometimes alone sufficient to constitute laches (see *infra*, IV, B, 2, a), and also separately with reference to the effect of statutes of limitations (see *infra*, IV, E).

32. Wilson *v.* Anthony, 19 Ark. 16.

33. Mellish's Estate, 1 Pars. Eq. Cas. (Pa.) 482.

34. *Arkansas.*—Wilson *v.* Anthony, 19 Ark. 16.

Florida.— Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Illinois.— Wilcoxon *v.* Wilcoxon, 199 Ill. 244, 65 N. E. 229.

Maryland.— Syester *v.* Brewer, 27 Md. 288; Glenn *v.* Smith, 17 Md. 260.

Massachusetts.— Doane *v.* Preston, 183 Mass. 569, 67 N. E. 867.

Missouri.— Landrum *v.* Union Bank, 63 Mo. 48.

New Jersey.— Obert *v.* Obert, 12 N. J. Eq. 423; Dean *v.* Dean, 9 N. J. Eq. 425.

New York.— Hawley *v.* Cramer, 4 Cow. 717.

Pennsylvania.— *In re* Gautier Steel Co., 2 Pa. Co. Ct. 399, 18 Wkly. Notes Cas. 346.

Virginia.— Tidball *v.* Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Jackson *v.* King, 12 Gratt. 499.

United States.— Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76.

England.— *In re* Sharpe, [1892] 1 Ch. 154, 61 L. J. Ch. 193, 65 L. T. Rep. N. S. 806, 40 Wkly. Rep. 241.

See 19 Cent. Dig. tit. "Equity," § 192.

Clearness of plaintiff's right is, it seems, an important element for consideration. Kelly *v.* Hurt, 61 Mo. 463; Carlisle *v.* Cooper, 18 N. J. Eq. 241; Obert *v.* Obert, 12 N. J. Eq. 423.

35. *Alabama.*— Gunn *v.* Brantley, 21 Ala. 633.

Illinois.— Vermilion County Children's Home *v.* Varner, 192 Ill. 594, 61 N. E. 830. *Compare* Smith *v.* Ramsay, 6 Ill. 373.

Kansas.— Dunbar *v.* Green, 66 Kan. 557, 72 Pac. 243.

Maine.— Spaulding *v.* Farwell, 70 Me. 17.

Missouri.— Kelly *v.* Hurt, 74 Mo. 561.

Pennsylvania.— Barclay's Appeal, 38 Leg.

is held in some jurisdictions, however, that mere lapse of time unaffected by other circumstances will not bar an established equity.[36] Where a statute of limitations is applicable, it is quite generally held that lapse of time alone, short of the period of limitations, will not operate as a bar,[37] and the same rule obtains, but with less force, in the absence of direct statute, where a corresponding legal remedy exists, the analogy of the statute relating to which may be followed.[38]

b. Delay as Affected by Nature of Proceeding — (i) *INTRODUCTORY STATEMENT.* While the courts have thus discussed the effect of delay alone, unattended by other circumstances,[39] it is quite evident that there can be few if any cases where there has been considerable delay, which present absolutely no other circumstances that might affect the question. The general nature of the proceeding is in itself a circumstance to be considered, and there are numerous cases

Int. 440; Dunning *v.* Krotzer, 12 Lanc. Bar 64.

South Carolina.— Hunt *v.* Smith, 3 Rich. Eq. 465.

Texas.—Power *v.* State, 41 Tex. 102; Glasscock *v.* Nelson, 26 Tex. 150. But see Allen *v.* Urquhart, 19 Tex. 480.

West Virginia.— Ohio River R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407. See also Phillips *v.* Piney Coal, etc., Co., 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040.

United States.— Guarantee Trust, etc., Co. *v.* Delta, etc., Co., 104 Fed. 5, 43 C. C. A. 396; Jones *v.* Perkins, 76 Fed. 82; U. S. *v.* Beebee, 17 Fed. 36, 4 McCrary 12; U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142; Ferson *v.* Sanger, 8 Fed. Cas. No. 4,751, 2 Ware 256; Scott *v.* Evans, 21 Fed. Cas. No. 12,529, 1 McLean 486.

England.— Harcourt *v.* White, 28 Beav. 303, 30 L. J. Ch. 681; Roberts *v.* Tunstall, 4 Hare 257, 30 Eng. Ch. 257.

See 19 Cent. Dig. tit. "Equity," § 206.

Where the parties are still living and there has been no loss of evidence, it requires a longer delay than seven years to bar a suit. Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199.

Public policy and the peace and welfare of society are frequently given as reasons for rejecting demands because of staleness.

California.— Dominguez *v.* Dominguez, 7 Cal. 424.

Delaware.— Perkins *v.* Cartmell, 4 Harr. 270, 42 Am. Dec. 753.

Kentucky.—Cave *v.* Sanders, 2 A. K. Marsh. 64.

New Mexico.— Patterson *v.* Hewitt, (1901) 66 Pac. 552, 55 L. R. A. 658.

South Carolina.— Wiseman *v.* Hunter, 14 Rich. Eq. 167.

Virginia.— Morgan *v.* Fisher, 82 Va. 417. *Compare* Cresap *v.* Cresap, 54 W. Va. 581, 46 S. E. 582; Mulliday *v.* Machir, 4 Gratt. 1.

United States.— McKnight *v.* Taylor, 1 How. 161, 11 L. ed. 86; Speidell *v.* Henrici, 15 Fed. 753; Cleveland Ins. Co. *v.* Reed, 5 Fed. Cas. No. 2,889, 1 Biss. 180; Livingston *v.* Ore Bed, 15 Fed. Cas. No. 8,418, 16 Blatchf. 549. But see federal cases cited in the next note.

See 19 Cent. Dig. tit. "Equity," § 206.

36. *Minnesota.*— Sanborn *v.* Eads, 38 Minn. 211, 36 N. W. 338.

Nebraska.— Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899.

New Jersey.— Cawley *v.* Leonard, 28 N. J. Eq. 467; Obert *v.* Obert, 12 N. J. Eq. 423, where no serious doubt arises and the controversy is not seriously embarrassed by the claims of third parties.

Ohio.— Paschall *v.* Hinderer, 28 Ohio St. 568.

Tennessee.— Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706.

United States.— London, etc., Bank *v.* Dexter, 126 Fed. 593, 61 C. C. A. 515; Bartlett *v.* Ambrose, 78 Fed. 839, 24 C. C. A. 397. But see federal cases cited in last note.

See 19 Cent. Dig. tit. "Equity," § 206.

Injury to the public was held to be sufficient to prevent interference where plaintiff had permitted his lands for a long time to be used and improved as a street. Traphagen *v.* Jersey City, 29 N. J. Eq. 206 [*affirmed* in 29 N. J. Eq. 650].

37. *California.*— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674.

District of Columbia.— Sis *v.* Boarman, 11 App. Cas. 116.

Illinois.— Gibbons *v.* Hoag, 95 Ill. 45.

Iowa.— Luke *v.* Koenen, 120 Iowa 103, 94 N. W. 278.

Missouri.— Kelly *v.* Hurt, 61 Mo. 463, where the right is clear.

Nebraska.— Oliver *v.* Lansing, 48 Nebr. 338, 67 N. W. 195.

New York.— Platt *v.* Platt, 2 Thomps. & C. 25 [*affirmed* in 58 N. Y. 646].

Rhode Island.— Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001; Ball *v.* Ball, 20 R. I. 520, 40 Atl. 234; Chase *v.* Chase, 20 R. I. 202, 37 Atl. 804.

Tennessee.— Renshaw *v.* Tullahoma First Nat. Bank, (Ch. App. 1900) 63 S. W. 194.

Utah.— Hamilton *v.* Dooly, 15 Utah 280, 49 Pac. 769.

Wisconsin.— Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571.

United States.—Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640; Pacific R. Co. *v.* Atlantic, etc., R. Co., 20 Fed. 277; Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90, where fraud is charged.

See 19 Cent. Dig. tit. "Equity," § 206.

38. See *infra*, IV, E, 4.

39. See *supra*, IV, B, 2, a.

denying relief, or discussing the propriety of according it, where lapse of time and the general nature of the proceedings are treated as the controlling elements.[40]

(II) *Trusts.* Unreasonable delay will bar a proceeding to enforce an implied trust,[41] but mere lapse of time will not bar a subsisting, express trust.[42]

(III) *Controversies as to Land Titles.* While it is said that lapse of time, uninfluenced by a statute of limitations, will not bar the divestiture of a legal title in favor of the equitable owner,[43] long adverse possession operates as a bar to the assertion of title in equity as well as at law.[44] Generally, where the issue is

40. In such cases there may be no special circumstances, such as loss of evidence, intervening rights of third persons, etc., rendering it inequitable to grant relief, and the refusal of relief may therefore be said to depend upon lapse of time alone.

41. *Illinois.*— McLaflin *v.* Jones, 155 Ill. 539, 40 N. E. 330 [*affirming* 55 Ill. App. 518] (thirteen years); McDonald *v.* Stow, 109 Ill. 40 (thirteen years); Collier *v.* Beers, 106 Ill. 150 (thirty years); Pratt *v.* Stone, 80 Ill. 440 (nineteen years).

North Carolina.— Tate *v.* Conner, 17 N. C. 224, thirty-four years.

Oregon.— Clark *v.* Pratt, 15 Oreg. 304, 14 Pac. 418, thirteen years.

Pennsylvania.— Hassler *v.* Bitting, 40 Pa. St. 68, twenty-four years.

Texas.— Abernathy *v.* Stone, 81 Tex. 430, 16 S. W. 1102 (twenty-nine years); Norfleet *v.* McCall, 80 Tex. 236, 15 S. W. 785 (thirty-three years).

See 19 Cent. Dig. tit. "Equity," §§ 204, 206.

A lapse of thirty years will not prevent the establishment of a resulting trust if the proof is clear. Cooksey *v.* Bryan, 2 App. Cas. (D. C.) 557.

A suit brought within four years was held to be clearly in time. Boyd *v.* McLean, 1 Johns. Ch. (N. Y.) 582.

Nine years.— A legatee residing throughout with her brother, the administrator, was not barred nine years after he purchased land, from charging it as having been purchased with assets of the estate. Culver *v.* Pierson, (N. J. Ch. 1888) 15 Atl. 269.

42. *In re* McKinney, 15 Fed. 912; Oliver *v.* Piatt, 3 How. (U. S.) 333, 11 L. ed. 622. See also *supra*, IV, A, 2, b, and, generally, Trusts. A bill is in time when filed within twenty years after a written admission of the trust and within six years after the sale by the trustee of the property. Anstice *v.* Brown, 6 Paige (N. Y.) 448. See Sayles *v.* Tibbitts, 5 R. I. 79, where the delay was twenty years. Time runs from the repudiation of the trust. Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718 [*affirming* 15 Fed. 753]. And see, generally, Trusts.

43. Shorter *v.* Smith, 56 Ala. 208; Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599.

A title bond for lands made prior to the issuing of a patent is a mere executory contract, and must be proceeded upon within proper time. Wilson *v.* Simpson, 68 Tex. 306, 4 S. W. 839. But see Wichita, Land, etc., Co. *v.* Ward, 1 Tex. Civ. App. 307, 21 S. W. 128.

Five years' delay will not bar an equitable owner in possession from a suit to obtain the legal title. Boyce *v.* Danz, 29 Mich. 146.

One who holds the legal title, or the paramount lien upon the legal title, to real estate, is not guilty of laches which will prevent him from asserting his equities therein in defense of a suit in chancery to compel him to surrender his title or lien, by the fact that he did not institute any suit or commence any action to avoid or foreclose the equities of the complainant. It is time enough for him to present his equities to a court of chancery when his legal title is there assailed. Farmers' L. & T. Co. *v.* Denver, etc., R. Co., 126 Fed. 46, per Sanborn, C. J.

44. *Illinois.*— Happ *v.* Happ, 156 Ill. 183, 41 N. E. 39.

Kentucky.— Wickliffe *v.* Lexington, 11 B. Mon. 155.

Michigan.— Allen *v.* Allen, 47 Mich. 74, 10 N. W. 113.

West Virginia.— Troll *v.* Carter, 15 W. Va. 567.

United States.— Pindell *v.* Mullikin, 1 Black 585, 17 L. ed. 162.

See 19 Cent. Dig. tit. "Equity," § 204. See also Adverse Possession, 1 Cyc. 1137.

The legal period and characteristics of possession are not always essential to the bar. Where one brought suit and dismissed it by agreement he could not after ten years attack the title of those in possession. Hermanns *v.* Fanning, 151 Mass. 1, 23 N. E. 493.

Twenty-three years' possession was held to bar relief, although there may have been occasional interruptions. League *v.* Rogan, 59 Tex. 427.

The following periods of delay have been held insufficient to prevent relief: Four years after complainant reached her majority (Stansbury *v.* Inglehart, 20 D. C. 134), six years where the period of limitation was ten (Davis *v.* Williams, 121 Ala. 542, 25 So. 704), and fourteen years as against cotenants (McClaskey *v.* Barr, 47 Fed. 154).

A widow holding under right of quarantine does not hold adversely to a purchaser at administrator's sale, who is therefore not barred, although he permits her to remain in possession twenty years without seeking an assignment of her dower. Sherwood *v.* Baker, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399.

One in possession without title cannot set up the defense of stale demand. Baker *v.* McFarland, 77 Tex. 294, 13 S. W. 1042.

A bill to redeem from forfeiture cannot be maintained by a lessee for ninety years, forty-

as to the legal title, the statute of limitations controls, and the question of laches cannot arise.[45]

(iv) *Mortgages.* While the subject is now generally regulated by statute, independently thereof a court of equity will refuse to enforce a mortgage or trust deed which has long lain dormant.[46] It has been held that in the absence of adverse possession lapse of time does not bar a bill to redeem.[47]

(v) *Accounting.* Bills for an accounting have been dismissed because not presented within a reasonable time,[48] and where the attempt is by such a bill to dispute an account stated, or presented and held without objection, greater promptness must be exercised than in ordinary bills for an accounting.[49]

(vi) *Legacies, Distributive Shares, Etc.* While considerable indulgence

five years having elapsed after reëntry for non-payment of rent. Lansdale *v.* Smith, 106 U. S. 391, 1 S. Ct. 350, 27 L. ed. 219.

45. Hyde *v.* Redding, 74 Cal. 493, 16 Pac. 380; Satterwhite *v.* Rosser, 61 Tex. 166; Murphy *v.* Welder, 58 Tex. 235; Williams *v.* Conger, 49 Tex. 582; Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 51 C. C. A. 267. Long delay may bar a suit to quiet title. Hatch *v.* St. Joseph, 68 Mich. 220, 36 N. W. 36 (thirty years); Copen *v.* Flesher, 6 Fed. Cas. No. 3,211, 1 Bond 440 (forty-nine years). Twelve years' delay is not a bar. Thompson *v.* Dumas, 85 Fed. 517, 29 C. C. A. 312. Complainant four years after lending money secured by deed of trust learned of the existence of a cloud on the debtor's title, five years thereafter she acquired the legal title of the debtor, and one year after that sued to remove the cloud. The demand was held not to be stale. Coryell *v.* Klehm, 157 Ill. 462, 41 N. E. 864.

46. Rider *v.* White, 3 Mackey (D. C.) 305 (nineteen years, six months); Pitzer *v.* Burns, 7 W. Va. 63 (holding that twenty years is the period in the absence of statute).

Various periods.— Ten years' delay is not a bar (Tompkins *v.* Merriman, 6 Kulp (Pa.) 543), nor is twelve years (Kinna *v.* Smith, 3 N. J. Eq. 14). Mere delay for four years after learning of the fraudulent release of a trust deed does not bar the foreclosure thereof. Stiger *v.* Bent, 111 Ill. 328. Bonds secured by trust deed became due in 1845. Partial payment was made by the obligor's administrator in 1858. In 1877 the balance due was adjudged against the administrator. In 1853 the land had been sold to pay decedent's debts. A suit brought in 1883 to enforce the trust deed against purchasers at such sale was held to be within time. Bell *v.* Wood, 94 Va. 677, 27 S. E. 504.

47. Bollinger *v.* Chouteau, 20 Mo. 89 (suit brought thirty years after a defective foreclosure and fifteen years after mortgagee took possession); Procter *v.* Cowper, 2 Vern. Ch. 377, 23 Eng. Reprint 838 (fifty-eight years). *Contra,* Adams *v.* Holden, 111 Iowa 54, 82 N. W. 468, *dictum* that twenty years would bar in absence of a statute. See, generally, Mortgages.

48. Groenendyke *v.* Coffeen, 109 Ill. 325 (sixteen years); Ellison *v.* Moffatt, 1 Johns. Ch. (N. Y.) 46 (bill filed in 1809 where the transactions occurred prior to the Revolution); Atkinson *v.* Robinson, 9 Leigh (Va.) 393. See also Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360, where the delay was thirty years and there were additional circumstances of laches.

Bill for accounting against trustee is not stale when brought a few months after the repudiation of the trust. Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067.

Rents.— Eight years' delay after repudiation of the claim was held to bar a claim for rents arising under defendant's agreement to pay the debts of another. Bissell *v.* Lloyd, 100 Ill. 214. A widow who never had her dower assigned was barred, thirty-two years after her husband's death and two years after she has assigned her interest in the land, from an accounting of her proportion of the rents. Kiddall *v.* Trimble, 8 Gill (Md.) 207. Under somewhat similar circumstances after twenty-one years a widow's administrator was barred from a similar accounting. Steiger *v.* Hillen, 5 Gill & J. (Md.) 121. Fourteen years was held to bar the right of an heir to an accounting of rents received by the widow. Kyle *v.* Wills, 166 Ill. 501, 46 N. E. 1121. A lessee of oil land was permitted to maintain a bill for an accounting five years after defendant took, with notice of plaintiff's rights, a subsequent lease of the land. Stone *v.* Marshall Oil Co., 188 Pa. St. 614, 41 Atl. 748, 1119.

Receiver's fees.— Ten years' delay by a receiver in petitioning to have compensation allowed, after presenting his bill therefor, was held fatal. *In re* Whittemore, 157 Mass. 46, 35 N. E. 93; Daniell *v.* East Boston Ferry Co., (Mass. 1892) 31 N. E. 711. And see Accounts and Accounting, 1 Cyc. 430.

49. Syhert *v.* Robinson, 2 Pa. Dist. 403, 13 Pa. Co. Ct. 198, a delay of five years after receiving the account was held fatal. See also New Orleans Canal, etc., Co. *v.* Reynolds, 39 Fed. 373.

Petition to review an executor's account is too late, twelve years after the account was filed and eleven years after confirmation. Ellison's Estate, 2 Pa. Dist. 521, 13 Pa. Co. Ct. 410. And see Lupton *v.* Jauney, 15 Fed. Cas. No. 8,607, 5 Cranch C. C. 474.

Reformation for mistake in settlement of accounts will not be decreed twelve years after the settlement. Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327.

is shown in favor of suits to enforce the payment of legacies and distributive shares of a decedent's estate,[50] great lapse of time has nevertheless been held to bar such suits.[51] A suit by a devisee whose lands have been sold to pay debts, and who seeks indemnity out of other property which should have been first resorted to, has been held barred by a delay of thirty years,[52] but not thirteen years;[53] and heirs are precluded, twenty years after the sale of their land under probate decree, from maintaining a suit to charge such lands with a lien for the unpaid purchase-money.[54]

(VII) *RESCISSION.* Delay for a comparatively short period is held sufficient to prevent the rescission of sales and conveyances of land,[55] but relief has been granted after several years' delay.[56] A delay of eight years has been held fatal to an attempt to set aside the surrender of a mortgage,[57] and one year and a half to an effort to set aside a trust deed for undue influence.[58]

(VIII) *ATTACKING JUDICIAL SALES AND TAX-SALES.* Delay alone, but usually where it is very considerable, is held to bar a suit to set aside a sale under foreclosure,[59] and attacks on administrators' sales for either irregularities or fraud

50. Amos *v.* Campbell, 9 Fla. 187 (where the delay was fifteen years); Lindsay *v.* Lindsay, 1 Desauss. (S. C.) 150 (forty years); Aylett *v.* King, 11 Leigh (Va.) 486 (delay of eleven years after plaintiff reached his majority and until after the death of the executor and the executor's executor).

Validity of assignment of his share may be challenged by a distributee at the final settlement of the administrator and before payment to the assignee. State *v.* Jones, 53 Mo. App. 207.

51. Simpson's Estate, 1 Phila. (Pa.) 300 (twenty years and the administrator had died); Smiley *v.* Jones, 3 Tenn. Ch. 312 (fifty-three years); Anderson *v.* Burwell, 6 Gratt. (Va.) 405 (fifty-four years); Kemp *v.* Nickerson, 66 Fed. 682 (twenty-three years). See also Colburn *v.* Holland, 14 Rich. Eq. (S. C.) 176. Twenty years' delay precluded plaintiff from enforcing a claim due to her ancestor. Hadaway *v.* Hynson, 89 Md. 305, 43 Atl. 806.

Suits against heirs or legatees.— An unexplained delay of seven years will in Illinois bar an application by an administrator to sell land to pay debts. McKean *v.* Vick, 108 Ill. 273. Nineteen years after the payment of legacies a creditor cannot call upon legatees to refund. Smith *v.* Collins, Bailey Eq. (S. C.) 74.

52. Hayes *v.* Goode, 7 Leigh (Va.) 452.

53. Cranmer *v.* McSwords, 24 W. Va. 594.

54. Solomon *v.* Solomon, 83 Ala. 394, 3 So. 679.

55. *Alabama.*— Dean *v.* Oliver, 131 Ala. 634, 30 So. 865.

California.— Hammond *v.* Wallace, 85 Cal. 522, 24 Pac. 837, 20 Am. St. Rep. 239, delay of one and one-half years in seeking to set aside a sale at auction because of vendee's arrangement to chill bids.

Illinois.— Elmore *v.* Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L. R. A. 356 (delay of seven years in suing to set aside a deed to an attorney for services, known to convey more than he was entitled to); McCarty *v.* Marlette, 80 Ill. 526 (six years after discovery of insolvency of maker of notice taken in payment); Hall *v.* Fullerton, 69 Ill. 448 (five years after learning falsity of representations as to locality, etc.).

Pennsylvania.—Dundas' Estate, 136 Pa. St. 318, 20 Atl. 638, four years after refusing an offer to rescind.

Tennessee.—Haynes *v.* Swann, 6 Heisk. 560, after twelve years' sanity, seeking to avoid a deed on the ground of insanity.

West Virginia.—Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402; Hale *v.* Cole, 31 W. Va. 576, 8 S. E. 516, five years' delay by heir in seeking to set aside ancestor's deed for undue influence.

United States.— Carter *v.* Couch, 84 Fed. 735, 28 C. C. A. 520, ten years' delay in avoiding deed for duress.

See 19 Cent. Dig. tit. "Equity," § 204.

Longer periods of course produce the same result. Robinson *v.* Pierce, 118 Ala. 273, 24 So. 984, 72 Am. St. Rep. 160, 45 L. R. A. 66; Quinn *v.* Perkins, 159 Ill. 572, 43 N. E. 759.

In New York, before the code, it was held that no lapse of time short of twenty years would bar relief from fraud in a sale of land. Ward *v.* Van Bokkelen, 1 Paige 100. But twenty-nine years after a sale to an agent having charge of the land the court refused to disturb it in the absence of clear proof of gross inadequacy of price. Philips *v.* Belden, 2 Edw. 1.

56. Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67 (three years); Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350 (four years after plaintiff reached majority); Taylor *v.* Hopkins, 40 Ill. 442 (three years); Morse *v.* Hill, 136 Mass. 60 (eight years after conveyance by trustees to two of their number, five years after *cestui que trust* knew of transaction, and three years after a new trustee was appointed).

57. Coles *v.* Vanneman, 51 N. J. Eq. 323, 18 Atl. 468, 30 Atl. 422.

58. Burkle *v.* Levy, 70 Cal. 250, 11 Pac. 643. And see, generally, VENDOR AND PURCHASER.

59. Seventeen years' delay was held to bar an attack for irregularity (Fennyery *v.* Ran-

may be barred by delay.[60] A tax-sale was protected after fourteen years from attack because of fraudulent combination among debtors.[61]

(IX) *RELIEF FROM DECREES AND JUDGMENTS.* Long delay will bar a bill to impeach a decree,[62] and slight delay under some circumstances will bar a direct proceeding to vacate a decree.[63] Relief against a judgment will be denied unless seasonably sought.[64]

(X) *ATTACKING ACTS OF CORPORATE OFFICERS.* A general tendency is shown to require creditors and stock-holders of corporations to proceed with promptness if they wish to attack for fraud or want of authority the corporate acts of officers.[65]

(XI) *CREDITORS' SUITS.* Suits to enforce demands of creditors other than the ordinary creditors' suits[66] have been held barred by lapse of time varying in period according to the nature of the proceeding.[67]

som, 170 Mass. 303, 49 N. E. 620), but not a collateral attack on a void foreclosure (Burke *v.* Backus, 51 Minn. 174, 53 N. W. 458). Four years' delay was held to bar an attack for irregularity in a sale under a power in the mortgage. McHany *v.* Schenk, 88 Ill. 357. Eleven years was held to preclude an attack on the ground that the land was sold *en masse* (Wood *v.* Young, 38 Iowa 102), but in the same state six years bars the right to set aside an execution sale on the same ground (Cunningham *v.* Felker, 26 Iowa 117). See, generally, JUDICIAL SALES.

Fifteen years.— Holders of bills, issued against a bridge but not constituting a specific lien, cannot impeach the sale of the bridge for fraud after fifteen years. Kennedy *v.* Georgia Bank, 8 How. (U. S.) 586, 12 L. ed. 1209. Relief was refused fifteen years after a sale to satisfy a vendor's lien. Stehman *v.* Crull, 26 Ind. 436.

60. **Irregularities.**— Dorsey *v.* Kendall, 8 Bush (Ky.) 294; Goodwin *v.* Burns, 21 Mich. 211.

Fraud.— Kellogg *v.* Wilson, 89 Ill. 357 (eight years); Locke *v.* Armstrong, 22 N. C. 147 (fifty years); McCampbell *v.* Durst, 15 Tex. Civ. App. 522, 40 S. W. 315 (twelve years).

An administrator's sale to himself was held open to attack by heirs seventeen years after the eldest and five years after the youngest attained his majority. Smith *v.* Drake, 23 N. J. Eq. 302. See, generally, EXECUTORS AND ADMINISTRATORS.

61. Oakley *v.* Hurlbut, 100 Ill. 204. But a fraudulent sale for non-entry for taxation, where the purchasers had not taken possession, was held open to attack after four years. Sayers *v.* Burkhardt, 85 Fed. 246, 29 C. C. A. 137. See, generally, TAXATION.

62. Pendleton *v.* Galloway, 9 Ohio 178, 34 Am. Dec. 434 (twenty-five years); Coit *v.* Owen, 2 Desauss. (S. C.) 456 (twenty years); Boone County *v.* Burlington, etc., R. Co., 139 U. S. 684, 11 S. Ct. 687, 35 L. ed. 319 (five years); Bump *v.* Butler County, 93 Fed. 290 (thirty years).

63. A petition to vacate a decree comes too late three months after its entry and the service of an injunction, and a month after the commencement of proceedings for contempt for violating it. Comly *v.* Buchanan, 81 Fed. 58. See also Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405.

64. State Bank *v.* Campbell, 12 Ind. 42 (six years); Taylor *v.* McDaniel, 4 Heisk. (Tenn.) 545 (eight years); Babb *v.* Sullivan, 43 S. C. 436, 21 S. E. 277 (ten years). See, generally, JUDGMENTS.

Four years after discovering new evidence will bar a bill to set aside an award on that ground. Plymouth *v.* Russell Mills, 7 Allen (Mass.) 438.

65. Three years' delay was held to bar a suit to set aside a lease of a railroad to another company. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529. In another case six years was held sufficient. Hart *v.* Ogdensburg, etc., R. Co., 89 Hun (N. Y.) 316, 35 N. Y. Suppl. 566. Two years' delay will not bar a suit by a stockholder for the value of his interest, based on an illegal consolidation with another company. International, etc., R. Co. *v.* Bremond, 53 Tex. 96. One year's delay will not bar a suit against directors for selling stock to themselves at less than its value. Freeman *v.* Stine, 34 Leg. Int. (Pa.) 96. Six years' delay in objecting to a fraudulent issue of stock is fatal. Jutte *v.* Hutchinson, 29 Pittsb. Leg. J. N. S. 87. But forty days' delay is insufficient to prevent an injunction against the issue of additional stock under amended articles. McDermont *v.* Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779. Twelve years barred a suit for the profits of the sale of goods by directors to a firm of which they were members. Wiggin *v.* Swamscot Mach. Co., 68 N. H. 14, 38 Atl. 727. And see CORPORATIONS, 10 Cyc. 971.

66. As to these see CREDITORS' SUITS, 12 Cyc. 43, 44; and, generally, FRAUDULENT CONVEYANCES.

67. A creditor cannot nine years after a transfer of manufacturing property to a trustee to conduct the business for the benefit of creditors sue to set it aside, although he never assented thereto. Jencks *v.* Quidnick Co., 135 U. S. 457, 10 S. Ct. 655, 34 L. ed. 200. Fourteen years' delay was held to bar a suit to subject to plaintiff's claim lands which an assignee for creditors had conveyed to the debtor's widow. Martin *v.* Price, 2 Rich. Eq. (S. C.) 412. But eight years' delay in a somewhat similar case was held no bar. Ship-

(XII) *MISTAKE.* Where there has been no change in circumstances bills will lie to reform instruments because of mistake after very considerable lapse of time.[68] But relief has been denied in some such cases on the ground of staleness,[69] and the question has been raised but unsuccessfully where the delay was very slight.[70]

(XIII) *OTHER SUITS.* The effect of lapse of time, independent of the statute or circumstances of estoppel, has been discussed with varying results in cases of various characters[71] permitting no trustworthy generalization.[72]

3. ASSENT OR ACQUIESCENCE. The borderland between laches proper and mere staleness of demand[73] is found in those cases where to mere lapse of time is added an element of assent to or acquiescence in the adverse claim. Starting with the doctrine that one who has affirmatively by words or conduct indicated his assent to the claims of another is guilty of laches if he thereafter for a long time makes no assertion of his own conflicting claim,[74] the courts apply the same rule where

man *v.* Lord, 60 N. J. Eq. 484, 46 Atl. 1101 [*affirming* 58 N. J. Eq. 380, 44 Atl. 215]. And see Rosenthal *v.* Renick, 44 Ill. 202. For certain other demands held barred by lapse of time see Thomas *v.* Sypert, 61 Ark. 575, 33 S. W. 1059 (fifteen years); Whidden *v.* Whidden, 67 N. H. 303, 32 Atl. 152 (nine years); Wallace *v.* Campbell, 17 S. C. 596 (twenty-three years); Mobley *v.* Cureton, 2 S. C. 140 (fourteen years); Lant *v.* Manley, 71 Fed. 7 (fifteen years). And for claims not barred see Jackson *v.* McNabb, 39 Ark. 111; Green *v.* Griffin, (Va. 1894) 20 S. E. 775; Gunton *v.* Carroll, 101 U. S. 426, 25 L. ed. 985.

Delay by creditor of partnership may bar his claim against the estate of a deceased partner. Jackson *v.* King, 12 Gratt. (Va.) 499.

68. Essex *v.* Day, 52 Conn. 483, 1 Atl. 620 (twelve years); Lockwood *v.* White, 65 Vt. 466, 26 Atl. 639 (fifteen years). See, generally, REFORMATION OF INSTRUMENTS.

Purchasers with notice cannot complain of delay by the equitable owner in suing to reform a deed. Dennis *v.* Northern Pac. R. Co., 20 Wash. 320, 55 Pac. 210.

69. Perry *v.* Perry, 98 Ky. 242, 32 S. W. 755, 17 Ky. L. Rep. 868 (five years in suing to reform a note); Bates *v.* Sloan, 20 S. W. 1044, 14 Ky. L. Rep. 591 (ten years); Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953 (twenty-seven years).

70. Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259 (eleven months in reforming mortgage); Brunner *v.* Warner, (Tenn. Ch. App. 1899) 52 S. W. 668 (sixteen months in reforming partition deed).

71. See also the specific titles relating to the different equitable remedies.

72. Attacks on compromises may not be made after ten years (Scudder *v.* Scout, 10 N. J. Eq. 377; New Albany *v.* Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155), or after nearly twenty years (Brockington *v.* Camlin, 4 Strobh. Eq. (S. C.) 189). Three years was held not a bar. Cowan *v.* Sapp, 81 Ala. 525, 8 So. 212. See, generally, COMPROMISE AND SETTLEMENT, 8 Cyc. 533.

Establishing liens.— A claim twenty-one years old will not be established as a lien upon a fund received from the government for distribution among Indians. Hanks *v.* Hendricks, 3 Indian Terr. 415, 58 S. W. 669. After four years of litigation equity will not relieve a railroad contractor from his failure to comply with the mechanic's lien statute. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150. But seven years' delay will not bar a suit against a railroad company to enforce a lien for damages to abutting property. Wheeling Bridge, etc., R. Co. *v.* Reymann Brewing Co., 90 Fed. 189, 32 C. C. A. 571.

Intervention.—Stock-holders seeking to impeach a mortgage were not permitted to intervene five years after a foreclosure suit was brought, after decree, and shortly before the sale (Bell *v.* Pennsylvania, etc., R. Co., (N. J. Ch. 1887) 10 Atl. 741), or nine years after suit brought, and pending proceedings before a master to distribute the fund (Boston Safe-Deposit, etc., Co. *v.* American Rapid Tel. Co., 67 Fed. 165).

An equitable set-off arising from the failure of title of land purchased was denied because of staleness eight years after the purchase. Epping *v.* Aiken, 71 Ga. 682.

Infringement of a trade-mark will not be restrained after a delay of nine years (Amoskeag Mfg. Co. *v.* Garner, 6 Abb. Pr. N. S. (N. Y.) 265), nor the infringement of a patent after fourteen years (Leggett *v.* Standard Oil Co., 149 U. S. 287, 13 S. Ct. 902, 37 L. ed. 737). See, generally, PATENTS; TRADE-MARKS AND TRADE-NAMES.

73. See *supra*, IV, A, 3.

74. *Georgia.*— Bailey *v.* Ross, 71 Ga. 771.

Illinois.— McMillan *v.* McMillan, 184 Ill. 230, 56 N. E. 302 [*affirming* 84 Ill. App. 441]; Sanford *v.* Finkle, 112 Ill. 146.

Louisiana.— Tibben *v.* Gratia, 17 La. Ann. 72.

Maryland.— Anderson *v.* Anderson, 89 Md. 1, 42 Atl. 207.

Michigan.— Corby *v.* Trombley, 110 Mich. 292, 68 N. W. 139.

New Jersey.— Norfolk, etc., Hosiery Co. *v.* Arnold, 49 N. J. Eq. 390, 23 Atl. 514; Chetwood *v.* Berrian, 39 N. J. Eq. 203 [*affirmed* in 39 N. J. Eq. 517].

Pennsylvania.— New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557.

there has been acquiescence alone, and presume assent from lapse of time and failure to assert the right.[75] Particularly is this so where plaintiff attempts to assert an interest in land after long acquiescing in defendant's possession under claim of right,[76] or where he attempts to enforce a covenant or condition after considerable acquiescence in continuing breaches.[77] The doctrine of acquiescence also receives frequent application in suits by stock-holders attacking the acts of corporate officers, and in cases of a similar character,[78] and is enforced with good reason in attempts to impeach settlements and agreements in the nature of compromises.[79] But acquiescence of plaintiff in a conflicting claim cannot be inferred

South Carolina.— Phillips *v.* Yon, 61 S. C. 426, 39 S. E. 618.

Virginia.— Smith *v.* Henkel, 81 Va. 524.

West Virginia.— Whittaker *v.* Southwest Virginia Imp. Co., 34 W. Va. 217, 12 S. E. 507; Arnold *v.* Casner, 22 W. Va. 444.

United States.— Baker *v.* Cummings, 169 U. S. 189, 18 S. Ct. 367, 42 L. ed. 711; Goode *v.* Gaines, 145 U. S. 141, 12 S. Ct. 839, 36 L. ed. 654; Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585; Slicer *v.* Pittsburg Bank, 16 How. 571, 14 L. ed. 1063; American Stave, etc., Co. *v.* Butler County, 93 Fed. 301; Van Vleet *v.* Sledge, 45 Fed. 743.

See 19 Cent. Dig. tit. "Equity," § 208.

75. *Georgia.*— Brown *v.* Weaver, 28 Ga. 377, ten years.

Idaho.— Ryan *v.* Woodin, (1904) 75 Pac. 261.

Iowa.— Grand Lodge A. O. U. W. *v.* Graham, 96 Iowa 592, 65 N. W. 837, 31 L. R. A. 133, five years' acquiescence in the use of a name.

New Hampshire.— Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526.

New York.— Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281 (sixteen years' acquiescence in irregular sale); Mitchell *v.* Lenox, 1 Edw. 428 (eighteen years). Ten years' acquiescence in a deed with knowledge of a mistake therein was held no bar to relief. Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559 [*citing* East *v.* Thornbury, 3 P. Wms. 126, 24 Eng. Reprint 996].

Vermont.— Drake *v.* Wild, 70 Vt. 52, 39 Atl. 248, thirteen years' acquiescence in will.

West Virginia.— Bryant *v.* Groves, 42 W. Va. 10, 24 S. E. 605, thirteen years' acquiescence in tax deed.

Wisconsin.— Holden *v.* Meadows, 31 Wis. 284, five years' acquiescence in probate of will.

United States.— Dade *v.* Irwin, 2 How. 383, 11 L. ed. 308 (thirteen years); Piatt *v.* Vattier, 19 Fed. Cas. No. 11,117, 1 McLean 146 [*affirmed* in 9 Pet. 405, 9 L. ed. 173] (thirty years' delay, but plaintiff was protected by absence from state from operation of statute of limitations); Naddo *v.* Bardon, 51 Fed. 493, 2 C. C. A. 335 (ten years' acquiescence in purchase by agent of the principal's land).

England.— Sayers *v.* Collyer, 28 Ch. D. 103, 49 J. P. 244, 54 L. J. Ch. 1, 51 L. T. Rep. N. S. 723, 33 Wkly. Rep. 91.

See 19 Cent. Dig. tit. "Equity," § 208.

The doctrine of acquiescence is more generally adopted perhaps in England than in the United States, the entire subject of laches being sometimes attributed thereto (see Encycl. Laws Eng. tit. "Acquiescence") or to waiver, which is practically the same thing (see Mews Dig. Eng. Case L. tit. "Waiver").

76. *Delaware.*— Van Dyke *v.* Johns, 1 Del. Ch. 93, 12 Am. Dec. 76.

Illinois.— Bates *v.* Gillett, 132 Ill. 287, 24 N. E. 611, twenty years.

Michigan.— Birdsall *v.* Johnson, 44 Mich. 134, 6 N. W. 226, twenty-four years after knowledge of deed complained of, but only nineteen years after bringing ejectment and suffering a nonsuit.

North Carolina.— Wainwright *v.* Massenburg, 129 N. C. 46, 39 S. E. 725, fifty years.

Texas.— Parker *v.* Spencer, 61 Tex. 155, thirty-seven years.

United States.— Gildersleeve *v.* New Mexico Min. Co., 161 U. S. 573, 16 S. Ct. 663, 40 L. ed. 812, thirty-two years.

See 19 Cent. Dig. tit. "Equity," § 208.

77. Hand *v.* St. Louis, 158 Mo. 204, 59 S. W. 92; Trout *v.* Lucas, 54 N. J. Eq. 361, 35 Atl. 153; Sayers *v.* Collyer, 28 Ch. D. 103, 49 J. P. 244, 54 L. J. Ch. 1, 51 L. T. Rep. N. S. 723, 33 Wkly. Rep. 91.

Violation of contract.— In a bill for an injunction and an accounting based on the violation of a contract not to sell a proprietary article within a certain territory, it was held that the delay in bringing the suit merely restricted plaintiff's right to an accounting to transactions within the period of limitation. Fowle *v.* Park, 48 Fed. 789.

78. Brady *v.* Atlantic City, 53 N. J. Eq. 440, 32 Atl. 271; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171; Helms *v.* McFadden, 18 Wis. 191; Georgia Cent. R., etc., Co. *v.* Farmers' L. & T. Co., 112 Fed. 81; Streight *v.* Junk, 59 Fed. 321, 8 C. C. A. 137, here plaintiff had promptly protested against the acts complained of but permitted them to continue for two years thereafter.

79. Taylor *v.* Ladd, 53 Kan. 584, 36 Pac. 987 (ten years); Petty *v.* Harman, 16 N. C. 191 (twenty-two years' acquiescence in the settlement of an estate); Philadelphia Trust, etc., Co. *v.* Philadelphia, etc., Coal, etc., Co., 139 Pa. St. 534, 21 Atl. 70 (thirteen years); Iredell *v.* Klemm, 19 Wkly. Notes Cas. (Pa.) 539 (seven years); Eubank *v.* Barnes, 93 Va. 153, 24 S. E. 908 (ten years); Irvine *v.* Robertson, 3 Rand. (Va.) 549 (accounts rendered from year to year, balances paid, and ten years' acquiescence). See also Edwards *v.* Edwards, 32 Conn. 112; Cooke *v.* Barrett, 155 Mass. 413, 29 N. E. 625; Smith *v.* Worthington, 53 Fed. 977, 4 C. C. A. 130. And see,

by the court where no circumstances appear which call upon plaintiff for assertion of his rights.[80]

4. Abandonment. As a right may be abandoned, such loss of the right itself of course defeats an effort to enforce it.[81] This principle has been incorporated into the doctrine of laches by treating a failure for a great length of time to assert a right as evidence of its abandonment.[82] Indeed it has been said that lapse of time will prevent the enforcement of an acknowledged right only because of a presumption of abandonment.[83]

5. Adverse Presumptions From Delay. Long delay in asserting a demand may defeat the remedy by raising a presumption of payment or satisfaction.[84] Delay is always a suspicious circumstance and if prolonged may create a presumption against the validity of a right which might otherwise be deemed established.[85]

generally, Compromise and Settlement, 8 Cyc. 533.

Attacks on awards are governed by the same principle. Beeson *v.* Elliott, 1 Del. Ch. 368; Bispham *v.* Price, 15 How. (U. S.) 162, 14 L. ed. 644. And see, generally, Arbitration and Award, 3 Cyc. 755.

80. Oliver *v.* Lansing, 48 Nebr. 338, 67 N. W. 195; Caldwell *v.* Caldwell, 45 Ohio St. 512, 15 N. E. 297; Cole *v.* Ballard, 78 Va. 139; Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1 [*affirming* 52 Fed. 835].

81. See Abandonment, 1 Cyc. 3.

82. Walker *v.* Ray, 111 Ill. 315; Patrick *v.* Chenault, 6 B. Mon. (Ky.) 315; Bangs *v.* Stephenson, 63 Mich. 661, 30 N. W. 317; Kent County *v.* Grand Rapids, 61 Mich. 144, 27 N. W. 888. The foregoing are cases of the abandonment of property rights, but in England it has been said that a party who has a vested property right cannot abandon it except by acts equivalent to an agreement or amounting to an estoppel. Clarke *v.* Hart, 6 H. L. Cas. 633, 5 Jur. N. S. 447, 10 Eng. Reprint 1443.

Executory contracts.— The doctrine seems to be applied more readily, and certainly with greater force, in the case or attempts to enforce executory contracts which have long lain dormant. Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359; Hough *v.* Coughlan, 41 Ill. 130; Farrow *v.* Farrow, 6 B. Mon. (Ky.) 482; Nirdlinger *v.* Bernheimer, 11 N. Y. Suppl. 609. See also Smith *v.* Washington, 88 Mo. 475; Van Wagener *v.* Royce, 21 N. Y. Suppl. 191 [*denying* reargument in 19 N. Y. Suppl. 143].

83. Cottrell *v.* Watkins, 89 Va. 801, 17 S. E. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754; Nelson *v.* Carrington, 4 Munf. (Va.) 332, 6 Am. Dec. 519. See also Getchell *v.* Jewett, 4 Me. 350; Williams *v.* Boston, etc., R. Co., 29 Fed. Cas. No. 17,716, 4 Ban. & A. 441, 17 Blatchf. 21.

84. *Alabama.*— Solomon *v.* Solomon, 81 Ala. 505, 1 So. 82, twenty-three years.

Kentucky.— Baker *v.* Baker, 13 B. Mon. 406 (fifteen years' delay in suing to redeem a slave); Smith *v.* Kincaid, 4 J. J. Marsh. 239 (thirty years' delay); Barnett *v.* Emmerson, 6 T. B. Mon. 607 (twenty years' delay).

New York.—Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. 636.

North Carolina.— Wheeler *v.* Smith, 55 N. C. 408 (ten years); Hamlin *v.* Mebane, 54 N. C. 18 (twenty years' delay in suing for a legacy).

South Carolina.— Barnwell *v.* Barnwell, 2 Hill Eq. 228, nineteen years' delay in suing for a legacy, together with other circumstances.

Virginia.— Robertson *v.* Read, 17 Gratt. 544, thirty years. *Compare* Tazewell *v.* Saunders, 13 Gratt. 354, delay, to bar a claim, must be sufficient to raise a presumption of satisfaction or abandonment, or to prevent a proper defense.

See 19 Cent. Dig. tit. "Equity," § 211.

Period less than the statute of limitations may raise a presumptive bar. Badger *v.* Badger, 2 Wall. (U. S.) 87, 17 L. ed. 836 [*affirming* 2 Fed. Cas. No. 718, 2 Cliff. 137]. See also Neely's Appeal, 85 Pa. St. 387. But it is not error to grant relief within the period of limitation where no presumption of satisfaction arises. Montgomery *v.* Cloud, 27 S. C. 188, 3 S. E. 196.

In North Carolina it requires twenty years from the time appointed for settlement to raise the presumption of satisfaction in favor of an administrator against distributees. Bird *v.* Graham, 36 N. C. 196; Salter *v.* Blount, 22 N. C. 218; Falls *v.* Torrance, 11 N. C. 412.

85. *Alabama.*— Duncan *v.* Williams, 89 Ala. 341, 7 So. 416, after lapse of twenty years almost any fact essential to sustain foreclosure and sale, even facts contradictory to the record, will be presumed. See also Bogle *v.* Bogle, 23 Ala. 544, administrator's settlement.

Iowa.— Sunderland *v.* Sunderland, 19 Iowa 325, seventeen years.

Kentucky.— Long *v.* White, 5 J. J. Marsh. 226, twenty years.

Maryland.— Syester *v.* Brewer, 27 Md. 288, twenty years.

Minnesota.— Miller *v.* Smith, 44 Minn. 127, 46 N. W. 324, bill to declare a deed a mortgage filed twenty years after its date, and four years after grantee sold the land.

New York.— Plet *v.* Bouchard, 4 Edw. 30, eleven years.

North Carolina.— Graham *v.* Davidson, 22 N. C. 155, regularity of assignment to widow presumed after thirty years.

Pennsylvania.— Packer *v.* Vandevender, 13 Pa. Co. Ct. 31, delay of three years and until

These adverse presumptions are sometimes treated as conclusive,[86] and sometimes as rebuttable.[87]

6. Speculative Property and Speculative Conduct. The speculative character of the property involved is an important element in considering the effect of delay in asserting a right thereto, and more than ordinary promptness must be displayed to avoid the charge of laches in such case.[88] This is but one phase of a broader principle, that one may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place, assert or renounce his interest in accordance with the result.[89] Accordingly a marked appreciation or depreciation, according to circumstances, in the value of property involved, when the right might have been asserted before such change, will prevent the granting of relief.[90]

death of witnesses, in a suit for subrogation, raises presumption that the testimony of such witnesses would be unfavorable.

Texas.— Brackenridge *v.* Howth, 64 Tex. 190 (twenty-five years); Allen *v.* Urquhart, 19 Tex. 480.

Vermont.— Conner *v.* Chase, 15 Vt. 764, twelve years.

Virginia.— Dadisman *v.* Long, (1895) 22 S. E. 850; Castleman *v.* Dorsey, 78 Va. 342. But eighteen years' delay in enforcing a deed of trust was held insufficient to raise an adverse presumption where there were explanatory circumstances. Coffman *v.* Shafer, 29 Gratt. 173.

United States.— U. S. *v.* Moore, 12 How. 209, 13 L. ed. 958.

See 19 Cent. Dig. tit. "Equity," § 211.

86. Kribbs *v.* Downing, 25 Pa. St. 399 (twenty-one years' failure to investigate a fraud); Elliott *v.* Morris, 1 Harp. Eq. (S. C.) 281 (sixty years' delay in attacking possession under a secret trust); Hines *v.* Thorn, 57 Tex. 98 (forty-four years).

87. Long acquiescence in husband's sale of the wife's separate property warrants an unfavorable inference as to the justice of plaintiff's claim. Allen *v.* Urquhart, 19 Tex. 480. See also Brendel *v.* Strobel, 25 Md. 395. The presumption of satisfaction is barely a presumption of fact and may be repelled by incompatible facts. Reardon *v.* Searcy, 1 Litt. (Ky.) 53. A delay of sixty years in a suit for the recovery of land, while not absolutely conclusive, affords a strong presumption against plaintiff. Pope *v.* Alwell, 16 Lea (Tenn.) 99; Pope *v.* Harrison, 16 Lea (Tenn.) 82.

Presumption of payment created by statute may be rebutted it seems in North Carolina. Wheeler *v.* Smith, 55 N. C. 408.

88. Williams *v.* Rhodes, 81 Ill. 571 (five years' delay in setting aside an executor's sale); Byrd *v.* Rautman, 85 Md. 414, 36 Atl. 1099 (three years' delay in attacking for fraud a sale of corporate stock); Patterson *v.* Hewitt, (N. M. 1901) 66 Pac. 552, 55 L. R. A. 658 (eight years' delay in asserting mining claims); Curtis *v.* Lakin, 94 Fed. 251, 36 C. C. A. 222 (mining property); Sagadahoc Land Co. *v.* Ewing, 65 Fed. 702, 13 C. C. A. 83 (two years' delay in rescinding contract for purchase of lots of uncertain value); Pratt *v.* California Min. Co., 24 Fed. 869 (mining property); Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382 (mining property). See also Grymes *v.* Sanders, 93 U. S. 55, 23 L. ed. 798.

89. Catlin *v.* Green, 120 N. Y. 441, 24 N. E. 941; Hilliard *v.* Allegheny Geometrical Wood Carving Co., 173 Pa. St. 1, 34 Atl. 231; Germantown Pass. R. Co. *v.* Fitler, 60 Pa. St. 124, 100 Am. Dec. 546; Johnston *v.* Standard Min. Co., 148 U. S. 360, 13 S. Ct. 585, 37 L. ed. 480 [*affirming* 39 Fed. 304]; Coddington *v.* Pensacola, etc., R. Co., 103 U. S. 409, 26 L. ed. 400. See also De Witt *v.* Chicago, etc., R. Co., 41 Fed. 484. Especially is this true where plaintiff has thereby avoided the risks of the enterprise. Banks *v.* Judah, 8 Conn. 145.

90. *Alabama.*— Gilmer *v.* Morris, 80 Ala. 78, 60 Am. Rep. 85.

California.— Sayre *v.* Citizens' Gas-Light, etc., Co., 69 Cal. 207, 7 Pac. 437, 10 Pac. 408.

Illinois.— Miller *v.* Shaw, 103 Ill. 277.

Massachusetts.— Royal Bank *v.* Grand Junction R., etc., Co., 125 Mass. 490.

Missouri.— Bobb *v.* Wolff, 148 Mo. 335, 49 S. W. 996; Reel *v.* Ewing, 71 Mo. 17.

Ohio.— Sanderson *v.* Ætna Iron, etc., Co., 34 Ohio St. 442.

Virginia.— Godwin *v.* Whitehead, 88 Va. 600, 14 S. E. 344.

Washington.— Sackman *v.* Campbell, 15 Wash. 57, 45 Pac. 895.

United States.— Wetzel *v.* Minnesota R. Transfer Co., 169 U. S. 237, 18 S. Ct. 307, 42 L. ed. 430; Abraham *v.* Ordway, 158 U. S. 416, 15 S. Ct. 894, 39 L. ed. 1036; Felix *v.* Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. ed. 719 [*affirming* 36 Fed. 457]; Harkness *v.* Underhill, 1 Black 316, 17 L. ed. 208; Veazie *v.* Williams, 8 How. 134, 12 L. ed. 1018 [*reversing* 28 Fed. Cas. No. 16,907, 2 Story 611]; Curtis *v.* Lakin, 94 Fed. 251, 36 C. C. A. 222; Continental Nat. Bank *v.* Heilman, 81 Fed. 36.

See 19 Cent. Dig. tit. "Equity," §§ 204, 206–208.

Where rule inapplicable.— But where one takes land in trust for himself and another, the land being purchased in order to obtain the benefit of an anticipated rise in value, a delay of eighteen years in seeking a conveyance of plaintiff's interest is not laches. Ripley *v.* Seligman, 88 Mich. 177, 50 N. W. 143.

7. Delay Working Prejudice to Defendant — a. Change in Circumstances Generally. A plaintiff who sleeps on his rights until the progress of events and change of circumstances have rendered it impossible to grant relief with equal justice to defendant is guilty of laches.[91] Indeed in accordance with the doctrine sometimes asserted that mere lapse of time unaffected by other circumstances will not bar relief,[92] it is sometimes held that delay in asserting a demand will not prevent relief unless there has been prejudice to defendant by reason thereof.[93] Prejudice to defendant may prevent relief, whether the change in circumstances is due to the voluntary act of defendant,[94] or is the result of the delay itself.[95]

b. Expenditures and Improvements. The most frequent case of laches consisting of delay working prejudice to defendant through change in circumstances is where plaintiff has slept on his rights and permitted defendant to make valuable improvements on property in controversy, or to make large expenditures in reliance on his title thereto. This is usually sufficient to bar relief;[96] but the

91. *Massachusetts.*— Doane *v.* Preston, 183 Mass. 569, 67 N. E. 867.

Michigan.— Pittsburgh, etc., Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395.

Minnesota.— Dutton *v.* McReynolds, 31 Minn. 66, 16 N. W. 468.

Missouri.— Dunklin County *v.* Chouteau, 120 Mo. 577, 25 S. W. 553.

New Jersey.— Hendrickson *v.* Hendrickson, 42 N. J. Eq. 657, 9 Atl. 742; Miller *v.* Harrison, 34 N. J. Eq. 374; Dean *v.* Dean, 9 N. J. Eq. 425.

North Carolina.— Pettijohn *v.* Williams, 55 N. C. 356.

Oregon.— Wilson *v.* Wilson, 41 Oreg. 459, 69 Pac. 923.

Texas.— French *v.* Koenig, 8 Tex. Civ. App. 341, 27 S. W. 1079.

United States.— Weber *v.* Gratton, 85 Fed. 808; O'Brien *v.* Wheelock, 78 Fed. 673; Willard *v.* Wood, 164 U. S. 502, 17 S. Ct. 176, 41 L. ed. 531; Steines *v.* Manhattan L. Ins. Co., 34 Fed. 441; Ferson *v.* Sanger, 8 Fed. Cas. No. 4,751, 2 Ware 256.

See 19 Cent. Dig. tit. "Equity," §§ 212, 213.

92. See *supra*, IV, B, 2, a.

93. Turpin *v.* Dennis, 139 Ill. 274, 28 N. E. 1065; Stiger *v.* Bent, 111 Ill. 328; Hahn *v.* Gates, 102 Ill. App. 385; Tynan *v.* Warren, 53 N. J. Eq. 313, 31 Atl. 596; Le Gendre *v.* Byrnes, 44 N. J. Eq. 372, 14 Atl. 621; Daggers *v.* Van Dyck, 37 N. J. Eq. 130; Northrup *v.* Roe, 10 N. J. L. J. 334; Coleman *v.* Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517. See also Ex-Mission Land, etc., Co. *v.* Flash, 97 Cal. 610, 32 Pac. 600; Luke *v.* Koenen, 120 Iowa 103, 94 N. W. 278; Nudd *v.* Powers, 136 Mass. 273; Boston Rolling Mills *v.* Cambridge, 117 Mass. 396.

94. Parting with the property.— Mitchell *v.* Berry, 1 Metc. (Ky.) 602.

Disbursing a fund.— Wilson *v.* Smith, 117 Fed. 707; De Lane *v.* Moore, 14 How. (U. S.) 253, 14 L. ed. 409.

Embarking on an enterprise in reliance on plaintiff's acquiescence.

New Hampshire.— Chamberlain *v.* Lyndeborough, 64 N. H. 563, 14 Atl. 865.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1.

New York.— Brush *v.* Manhattan R. Co., 26 Abb. N. Cas. 73, 13 N. Y. Suppl. 908.

Texas.— Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Wisconsin.— Blanchard *v.* Doering, 23 Wis. 200.

United States.— Bowman *v.* Wathen, 1 How. 189, 11 L. ed. 97.

See 19 Cent. Dig. tit. "Equity," § 213.

95. As where the delay has deprived defendant of a remedy against plaintiff (Chapman *v.* State Bank, 97 Cal. 155, 31 Pac. 896; Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; Donhert's Appeal, 64 Pa. St. 311), or a remedy over against other persons (Miller *v.* Baxter, 34 S. W. 1073, 17 Ky. L. Rep. 1371; Becket First Cong. Soc. *v.* Snow, 55 Mass. 510; People *v.* Donohue, 70 Hun 317, 24 N. Y. Suppl. 437; Spoor *v.* Wells, 3 Barb. Ch. (N. Y.) 199; Niewind's Estate, 23 Pittsb. Leg. J. N. S. 385; Jackson *v.* King, 12 Gratt. (Va.) 499; Com. *v.* Banks, 4 Call (Va.) 338; Continental Nat. Bank *v.* Heilman, 86 Fed. 514, 30 C. C. A. 232 [*affirming* 81 Fed. 36]; Colchester *v.* Lowten, 1 Ves. & B. 226, 35 Eng. Reprint 89). One who surrendered a note and mortgage in order to permit a new loan to be made, wherewith to pay him, and neglected for two years to inquire why he did not receive the money, thereby enabling the lender's agent to embezzle it, was guilty of laches. Leonard *v.* Marshall, 82 Fed. 396.

96. *Arizona.*— Thompson *v.* Ferry, (1899) 56 Pac. 741.

Colorado.— Graff *v.* Portland Town, etc., Co., 12 Colo. App. 106, 54 Pac. 854.

Illinois.— Green *v.* Dietrich, 114 Ill. 636, 3 N. E. 800.

Iowa.— Long *v.* Olson, 115 Iowa 388, 88 N. W. 933; Horr *v.* French, 99 Iowa 73, 68 N. W. 581.

Kansas.—Leavenworth *v.* Douglass, 59 Kan. 416, 53 Pac. 123.

Kentucky.— Mitchell *v.* Berry, 1 Metc. 602.

Maryland.— Amey *v.* Cockey, 73 Md. 297, 20 Atl. 1071.

Michigan.— Harlow *v.* Lake Superior Iron Co., 41 Mich. 583, 2 N. W. 913.

Missouri.—Moreman *v.* Talbott, 55 Mo. 392.

New Jersey.— Paulison *v.* Van Iderstine, 28 N. J. Eq. 306. See also Lance *v.* Bonnell, 58 N. J. Eq. 259, 43 Atl. 288.

operation of this rule is largely a question of degree and circumstance.[97] The making of improvements by plaintiff himself will not estop plaintiff from seeking reformation of a mistake in his deed on the theory that he thereby acquiesced in the deed as it stood, at least in the absence of proof as to knowledge of the mistake.[98]

8. Delay Working Prejudice to Third Persons. Equity is equally careful to avoid injustice to third persons as to parties, and therefore will deny for laches the claim of one who has slept on his rights until third persons have acquired rights which would be affected by granting him relief.[99]

9. Loss of Evidence — a. Generally. Where a suitor before proceeding permits such a lapse of time that the evidence has become obscured or lost, relief will be denied because of the difficulty of doing justice.[1] While the rule requires

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

Pennsylvania.— Carr *v.* Wallace, 7 Watts 394.

Washington.— Chezum *v.* McBride, 21 Wash. 558, 58 Pac. 1067.

Wisconsin.— Sheldon *v.* Rockwell, 9 Wis. 166, 76 Am. Dec. 265.

United States.— Penn Mut. L. Ins. Co. *v.* Austin, 168 U. S. 685, 18 S. Ct. 223, 42 L. ed. 626; Richards *v.* Mackall, 124 U. S. 183, 8 S. Ct. 437, 31 L. ed. 316; Schlawig *v.* Purslow, 59 Fed. 848, 8 C. C. A. 315; Kinne *v.* Webb, 54 Fed. 34, 4 C. C. A. 170 [*affirming* 49 Fed. 512]; Johnston *v.* Standard Min. Co., 39 Fed. 304; Fraker *v.* Houck, 36 Fed. 403; Underwood *v.* Dugan, 24 Fed. 74.

England.— Russell *v.* Watts, 25 Ch. D. 559, 50 L. T. Rep. N. S. 673, 32 Wkly. Rep. 626; Great Western R. Co. *v.* Oxford, etc., R. Co., 3 De G. M. & G. 341, 52 Eng. Ch. 267, 43 Eng. Reprint 133.

See 19 Cent. Dig. tit. "Equity," § 220.

97. A riparian owner whose lands are being constantly injured by defendant's unlawfully lowering the level of a lake may have an injunction after suffering the injury for eighteen years, where his acquiescence did not induce the defendant to make any large expenditures in the operation. Cedar Lake Hotel Co. *v.* Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. 371. Acquiescence by the state of Missouri in the carrying out of a system of sewerage by the Chicago sanitary district was held no bar to relief against continuous pouring of sewage into the Mississippi river through the works so constructed. Missouri *v.* Illinois, 180 U. S. 208, 21 S. Ct. 331, 45 L. ed. 497. If improvements are made against the prompt and repeated protest of plaintiff, defendant cannot claim the benefit of the rule. Hansell *v.* Downing, 17 Pa. Super. Ct. 235. Where a grantee covenanted that in case of resale at any time the grantor should have the excess over a given amount, and resold after twenty-seven years and after making improvements, it was held that the grantor might still enforce the covenant but must allow the cost of the improvements. *In re* Hoerr, 31 Pittsb. Leg. J. N. S. 337.

98. Roszell *v.* Roszell, 109 Ind. 354, 10 N. E. 114.

99. *Iowa.*— Cedar Rapids Ins. Co. *v.* Butler, 83 Iowa 124, 48 N. W. 1026.

Kentucky.— Harrod *v.* Fountleroy, 3 J. J. Marsh. 548.

Louisiana.— Nachman *v.* Le Blanc, 28 La. Ann. 345.

Michigan.— Ford *v.* Loomis, 33 Mich. 121; Newberry *v.* Detroit, etc., Iron Mfg. Co., 17 Mich. 141.

New Jersey.— Rabe *v.* Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Smith *v.* Davis, (N. J. Ch. 1890) 19 Atl. 541.

New York.— Myrick *v.* Selden, 36 Barb. 15.

North Carolina.— Jones *v.* Person County, 107 N. C. 248, 12 S. E. 69.

Pennsylvania.— Insurance Co. of North America *v.* Union Canal Co., Brightly N. P. 48, 2 Pa. L. J. 65.

United States.— Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 6 S. Ct. 1009, 30 L. ed. 196; St. Paul, etc., R. Co. *v.* Sage, 49 Fed. 315, 1 C. C. A. 256 [*reversing* 32 Fed. 821, 44 Fed. 817]; Etting *v.* Marx, 4 Fed. 673, 4 Hughes 314.

See 19 Cent. Dig. tit. "Equity," § 214.

A bill to set aside a foreclosure will not lie after years of acquiescence and after the property has passed to a new corporation in or against which third persons have acquired rights. Johnson *v.* Atlantic, etc., Transit Co., 156 U. S. 618, 15 S. Ct. 520, 39 L. ed. 556; Graham *v.* Boston, etc., R. Co., 14 Fed. 753; Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806, 24 L. ed. 324 [*affirming* 23 Fed. Cas. No. 13,596, 4 Cliff. 212].

A creditor who delays proceedings against his debtor until another creditor obtains a higher legal right cannot have the aid of equity to restore the priority so lost. Lee *v.* Columbus Ins. Bank, 2 Ala. 21; Riggs *v.* Vandever, Wright (Ohio) 325.

1. *Arkansas.*— Brewer *v.* Keeler, 42 Ark. 289.

Georgia.— Harrison *v.* Rutherford, 57 Ga. 60.

Kansas.— Yeamans *v.* James, 29 Kan. 373.

Michigan.— Day *v.* Cole, 65 Mich. 154, 41 N. W. 505.

Mississippi.— Reddy *v.* Aldrich, (1892) 11 So. 828.

North Carolina.— Chesson *v.* Chesson, 43 N. C. 141; Graham *v.* Torrance, 36 N. C. 210.

Ohio.— Ludlow *v.* Cooper, 13 Ohio 552.

Tennessee.— Bolton *v.* Dickens, 4 Lea 569; French *v.* French, (Ch. App. 1898) 52 S. W. 517.

for its support no element of estoppel, but is founded on public policy,[2] the fact that the delay has tended to defeat defendant's power to prove his right is an additional reason for its application.[3] The doctrine operates as well against attempts, after the obscuration of evidence, to consummate a transaction long allowed to remain incomplete,[4] as in creating a presumption in favor of the validity of a completed transaction, when an effort is made to set it aside.[5] The loss or obscuration of evidence will be presumed from a considerable lapse of time.[6]

b. Death of Witnesses and Participants. A specific application of the general rule just stated is in the refusal of the courts to afford relief to one who has lain idly by until the important witnesses to the transactions involved have died.[7] Of course the result is the same where the testimony so lost is that of participants in the transaction, who would be parties to the suit had they lived;[8] but where such parties die there are usually difficulties presented in procuring evidence and conducting the case, other than those arising from the loss of their own testimony, and relief is denied for that reason.[9] Sometimes the rule is stated with less posi-

Virginia.— Garland *v.* Garland, (1896) 24 S. E. 505; Dismal Swamp Land Co. *v.* McCauley, 85 Va. 16, 6 S. E. 697; Turner *v.* Dilland, 82 Va. 536; Perkins *v.* Lane, 82 Va. 59; Hill *v.* Umberger, 77 Va. 653; Doggett *v.* Helm, 17 Gratt. 96; Smith *v.* Thompson, 7 Gratt. 112, 54 Am. Dec. 126.

United States.—Speidell *v.* Henrici, 15 Fed. 753; Veazie *v.* Williams, 8 How. 134, 12 L. ed. 1018 [*reversing* 28 Fed. Cas. No. 16,907, 3 Story 611].

See 19 Cent. Dig. tit. "Equity," § 222.

Partial relief.— Where in a bill for an accounting the lapse of twenty-seven years rendered the evidence too uncertain to require a general account, the court nevertheless decreed the payment of a specific sum proved to be due. Lafferty *v.* Turley, 3 Sneed (Tenn.) 157.

2. U. S. *v.* Beebee, 17 Fed. 36, 4 McCrary 12.

3. Akins *v.* Hill, 7 Ga. 573; Wilson *v.* Wilson, 41 Oreg. 459, 69 Pac. 923; Bond *v.* Brown, Harp. Eq. (S. C.) 270; Hillis *v.* Hamilton, 10 Gratt. (Va.) 300; Sage *v.* Winona, etc., R. Co., 58 Fed. 297, 7 C. C. A. 237.

4. Lemoine *v.* Dunklin County, 51 Fed. 487, 2 C. C. A. 343 [*affirming* 46 Fed. 219].

5. Gould *v.* Gould, 10 Fed. Cas. No. 5,637, 3 Story 516; Prevost *v.* Gratz, 6 Wheat. (U. S.) 481, 5 L. ed. 311 [*reversing* 19 Fed. Cas. No. 11,406, Pet. C. C. 364]. On the other hand lapse of time (in this case twenty-five years), will not prevent the correction of an error in description in foreclosure proceedings where the record itself preserves the evidence required. Merrifield *v.* Ingersoll, 61 Mich. 4, 27 N. W. 714.

6. Maher *v.* Farwell, 97 Ill. 56 (thirteen years); Loomis *v.* Brush, 36 Mich. 40 (twenty years); Bauer's Estate, 12 Pa. Co. Ct. 77 (eight years after plaintiff attained his majority); Bell *v.* Moon, 79 Va. 341 (thirty years).

7. *Alabama.*— Street *v.* Henry, 124 Ala. 153, 27 So. 411; Rives *v.* Morris, 108 Ala. 527, 18 So. 743.

California.— Burling *v.* Newlands, (1895) 39 Pac. 49.

Illinois.— Thomas *v.* Van Meter, 164 Ill. 304, 45 Pac. 405.

New Jersey.—Johnston *v.* Dunn, (Ch. 1894) 29 Atl. 361; Wilkinson *v.* Scudder, 47 N. J. Eq. 324, 21 Atl. 955; Wilkinson *v.* Sherman, 45 N. J. Eq. 413, 18 Atl. 228; Barnes *v.* Taylor, 27 N. J. Eq. 259 [*affirmed* in 28 N. J. Eq. 625].

New York.— McKechnie *v.* McKechnie, 3 N. Y. App. Div. 91, 39 N. Y. Suppl. 402; Oregon Pac. R. Co. *v.* Forrest, 11 N. Y. Suppl. 8.

South Carolina.— Bond *v.* Brown, Harp. Eq. 270.

Virginia.— Terry *v.* Fontaine, 83 Va. 451, 2 S. E. 743; Caruthers *v.* Lexington, 12 Leigh 610.

United States.— Foster *v.* Mansfield, etc., R. Co., 146 U. S. 88, 13 S. Ct. 28, 36 L. ed. 899 [*affirming* 36 Fed. 627]; Hinchman *v.* Kelley, 54 Fed. 63, 4 C. C. A. 189 [*affirming* 49 Fed. 492]; Percy *v.* Cockrill, 53 Fed. 872, 4 C. C. A. 73; Kenney *v.* Contner, 43 Fed. 705.

See 19 Cent. Dig. tit. "Equity," § 223.

8. *Alabama.*—Rives *v.* Morris, 108 Ala. 527, 18 So. 743.

Kentucky.— Helm *v.* Rogers, 81 Ky. 568; Eddy *v.* Northup, 23 S. W. 353, 15 Ky. L. Rep. 434.

Michigan.— German American Seminary *v.* Kiefer, 43 Mich. 105, 4 N. W. 636; Campau *v.* Van Dyke, 15 Mich. 371.

Pennsylvania.— *In re* Wehrle, 205 Pa. St. 62, 54 Atl. 511; Ebert's Appeal, 150 Pa. St. 261, 24 Atl. 685.

Virginia.— Robertson *v.* Read, 17 Gratt. 544; Winston *v.* Street, 2 Patt. & H. 169.

United States.— De Roux *v.* Girard, 112 Fed. 89, 50 C. C. A. 136 [*affirming* 105 Fed. 798].

See 19 Cent. Dig. tit. "Equity," §§ 223, 224.

9. *Illinois.*— Baird *v.* Chapman, 120 Ill. 537, 12 N. E. 73; Martin *v.* Clark, 116 Ill. 654, 7 N. E. 353.

Michigan.— Eames *v.* Manley, 121 Mich. 300, 80 N. W. 15; McLean *v.* Barton, Harr. 279.

tiveness that equity looks with disfavor on such suits,[10] or that such a demand must be established with more than reasonable certainty.[11]

10. PURCHASERS — a. Generally. A change in circumstances forming an important element for consideration is the accrual of rights in others pending plaintiff's delay in asserting his own, and the most frequent instance of such new rights is that acquired by a purchaser of the property in controversy, who will be protected as against the title or right of one who unreasonably neglected to assert it until after the purchase.[12] Accordingly the protection which equity affords to *bona fide* purchasers of land without notice of an adverse claim[13] is, where plaintiff is chargeable with unreasonable delay, often put upon the ground of laches.[14]

Missouri.— State *v.* West, 68 Mo. 229.

New Jersey.— McCartin *v.* Traphagen, 43 N. J. Eq. 323, 11 Atl. 156.

New York.— Phillips *v.* Prevost, 4 Johns. Ch. 205.

Pennsylvania.— Halsey *v.* Tate, 52 Pa. St. 311.

South Carolina.— Mobley *v.* Cureton, 2 S. C. 140.

Tennessee.—Kelly *v.* Kelly, (Ch. App. 1900) 58 S. W. 870.

Virginia.— West *v.* Thornton, 7 Gratt. 177, 54 Am. Dec. 134.

United States.— Alsop *v.* Riker, 155 U. S. 448, 15 S. Ct. 162, 39 L. ed. 218 [*reversing* 27 Fed. 251]; Hanner *v.* Moulton, 138 U. S. 486, 11 S. Ct. 408, 34 L. ed. 1032; Clarke *v.* Johnston, 18 Wall. 493, 21 L. ed. 904; Randolph *v.* Ware, 3 Cranch 503, 2 L. ed. 512; Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376 [*affirmed* in 1 How. 189, 11 L. ed. 97].

See 19 Cent. Dig. tit. "Equity," § 224.

Settlements of estates will not be disturbed, where there has been long delay, after the death of trustees or executors (*In re* Wehrle, 205 Pa. St. 62, 54 Atl. 511; Gibboney *v.* Kent, 82 Va. 383, 4 S. E. 610; Hiller *v.* Ladd, 85 Fed. 703, 29 C. C. A. 394; Dugan *v.* O'Donnell, 68 Fed. 983), nor settlements of accounts (Bell *v.* Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791).

Deeds will not be set aside after long delay and the death of the grantee. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928; Griffin *v.* Birkhead, 84 Va. 612, 5 S. E. 685; Curlett *v.* Newman, 30 W. Va. 182, 3 S. E. 578. See also Preston *v.* Horwitz, 85 Md. 164, 36 Atl. 710.

10. Wood *v.* Egan, 39 La. Ann. 684, 2 So. 191; Lenox *v.* Harrison, 88 Mo. 491. Equity is "slow to enforce" such claims. Moore *v.* Hemp, 68 S. W. 1, 24 Ky. L. Rep. 121. "Courts will hesitate long" in such cases. Larison *v.* Polhemus, (N. J. Ch. 1886) 5 Atl. 129.

11. Wood *v.* Egan, 39 La. Ann. 684, 2 So. 191.

12. *Illinois.*— Whipple *v.* Whipple, 109 Ill. 418; Lequatte *v.* Drury, 101 Ill. 77.

Iowa.— Williams *v.* Allison, 33 Iowa 278.

Kentucky.—Martin *v.* Royse, 52 S. W. 1062, 21 Ky. L. Rep. 775; Welch *v.* Cornett, 29 S. W. 312, 16 Ky. L. Rep. 589.

Maryland.—Buchanan *v.* Lloyd, 88 Md. 642, 41 Atl. 1075.

Minnesota.— Taylor *v.* Whitney, 56 Minn. 386, 57 N. W. 937.

South Carolina.— Craig *v.* Craig, Bailey Eq. 102.

West Virginia.— Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527.

Wisconsin.—Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755.

United States.— Holmes *v.* Cleveland, etc., R. Co., 93 Fed. 100.

See 19 Cent. Dig. tit. "Equity," § 216.

Where property has undergone several transfers the fact is sometimes adverted to as affording additional ground for denying relief. Howe *v.* South Park Com'rs, 119 Ill. 101, 7 N. E. 333; O'Brien *v.* Wheelock, 184 U. S. 450, 22 S. Ct. 354, 46 L. ed. 636 [*affirming* 95 Fed. 883, 37 C. C. A. 309]. See also Norton *v.* Kellogg, 41 Fed. 452.

13. See, generally, VENDOR AND PURCHASER.

14. *Arkansas.*— Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

Illinois.— Fisher *v.* Patterson, 197 Ill. 414, 64 N. E. 353 [*affirming* 99 Ill. App. 70]; McMillan *v.* McMillan, 184 Ill. 230, 56 N. E. 302 [*affirming* 84 Ill. App. 441]; King *v.* Wilder, 75 Ill. 275; School Trustees *v.* Wright, 11 Ill. 603.

Iowa.— Mathews *v.* Culbertson, 83 Iowa 434, 50 N. W. 201.

Kentucky.— Patrick *v.* Chenault, 6 B. Mon. 315.

Maryland.— Chew *v.* Farmers' Bank, 9 Gill 361 [*affirming* 2 Md. Ch. 231]; Buckingham *v.* Dorsey, 1 Md. Ch. 31.

Massachusetts.— Hathaway *v.* Thayer, 8 Allen 421.

New Jersey.— Trusdell *v.* Lehman, 47 N. J. Eq. 218, 20 Atl. 391.

New York.— Perrior *v.* Peck, 39 N. Y. App. Div. 390, 57 N. Y. Suppl. 377; Shaver *v.* Radley, 4 Johns. Ch. 310.

North Carolina.— Waters *v.* Crabtree, 105 N. C. 394, 11 S. E. 240.

Pennsylvania.— Stockwell *v.* Robinson, 1 Pa. St. 477.

Tennessee.— Whitby *v.* Armour, 4 Lea 683.

Texas.— Browning *v.* Pumphrey, 81 Tex. 163, 16 S. W. 870.

Virginia.— Nelson *v.* Triplett, 99 Va. 421, 39 S. E. 150; National Mut. Bldg., etc., Assoc. *v.* Blair, 98 Va. 490, 36 S. E. 513; Page *v.* Booth, 1 Rob. 161; Massie *v.* Greenhow, 2 Patt. & H. 255.

One who delays until the property has passed to subsequent innocent purchasers will not be heard to attack for irregularities a sale under a deed of trust,[15] or under foreclosure of mortgage.[16] Nor may redemption be had from a defective sale under such circumstances.[17] A similar protection is accorded against prior claims, which have lain dormant, to one who claims under a subsequent patent,[18] and even to an occupant under color of a tax title.[19] The rule applies not only in favor of purchasers of land but to purchasers of other interests, as to an assignee of a mortgage,[20] of municipal bonds,[21] or of corporate stock.[22]

b. Purchasers at Judicial, Execution, or Tax-Sales. Notwithstanding the rule of *caveat emptor* applied at law to judicial sales,[23] in equity a purchaser at such a sale is protected on the ground of laches against one who sleeps on his right before attacking such sale either for irregularities[24] or as being void.[25] The same is true with regard to sales on execution,[26] and likewise to sales by administrators.[27]

West Virginia.— Shields *v.* Tarleton, 48 W. Va. 343, 37 S. E. 589.

Wisconsin.— Millar *v.* Jacobson, 69 Wis. 363, 34 N. W. 400.

United States.— Evers *v.* Watson, 156 U. S. 527, 15 S. Ct. 430, 39 L. ed. 520; Halstead *v.* Grinnan, 152 U. S. 412, 14 S. Ct. 641, 38 L. ed. 495; Wagner *v.* Baird, 7 How. 234, 12 L. ed. 681; Nantahala Marble, etc., Co. *v.* Thomas, 76 Fed. 59; Church of Christ *v.* Reorganized Church of Jesus Christ, 70 Fed. 179, 17 C. C. A. 387; Helfenstein *v.* Reed, 62 Fed. 214, 10 C. C. A. 327; The Walter M. Fleming, 9 Fed. 474; *In re* Butler, 4 Fed. Cas. No. 2,235, 2 Hughes 247.

See 19 Cent. Dig. tit. "Equity," § 216.

A deed cannot be attacked for fraud after the rights of innocent purchasers have accrued. Piatt *v.* Sinton, 7 Ohio Dec. (Reprint) 381, 2 Cinc. L. Bul. 273; McMasters *v.* Mills, 30 Tex. 591; Underwood *v.* Dugan, 139 U. S. 380, 11 S. Ct. 618, 35 L. ed. 197 [*affirming* 24 Fed. 74]; Fuller *v.* Montague, 59 Fed. 212, 8 C. C. A. 100 [*affirming* 53 Fed. 204]; Henry *v.* Suttle, 42 Fed. 91. See also, generally, FRAUD.

15. Irish *v.* Antioch College, 126 Ill. 474, 18 N. E. 768, 9 Am. St. Rep. 638 (ten years); Cleaver *v.* Green, 107 Ill. 67 (five years); Cross *v.* Hedrick, 66 Miss. 61, 7 So. 496 (eight years).

16. Hunt *v.* Ellison, 32 Ala. 173 (thirteen years); Quinn *v.* Jenks, 88 Hun (N. Y.) 428, 34 N. Y. Suppl. 962 (four years).

17. Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512 (eight years); Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423 (seventeen years).

18. Severns *v.* Hill, 3 Bibb (Ky.) 240; Galliher *v.* Cadwell, 145 U. S. 368, 12 S. Ct. 873, 36 L. ed. 738 [*affirming* 3 Wash. Terr. 501, 18 Pac. 68]; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249; St. Paul, etc., R. Co. *v.* Sage, 49 Fed. 315, 1 C. C. A. 256 [*reversing* 32 Fed. 821, 44 Fed. 817].

19. Horsford *v.* Gudger, 136 U. S. 639, 10 S. Ct. 1069, 34 L. ed. 556 [*reversing* 35 Fed. 388], here the delay was for nearly one hundred years and defendant had nearly twenty-five years' adverse possession.

20. Head *v.* Newcomb, 89 Iowa 728, 53 N. W. 118, 57 N. W. 443; Wethrill's Appeal, 3 Grant (Pa.) 281. See also, generally, MORTGAGES.

21. Calhoun *v.* Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248.

22. McDowell *v.* Chicago Seal Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381 [*affirming* 22 Ill. App. 405]; Curtis *v.* Lakin, 94 Fed. 251, 36 C. C. A. 222.

23. See, generally, JUDICIAL SALES.

24. Abernathy *v.* Moses, 73 Ala. 381 (nine years); Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 86 Ill. 187 (two years); Bush *v.* Sherman, 80 Ill. 160 (four years); Baugher *v.* Woollen, 147 Ind. 308, 45 N. E. 94 (five years); Moss *v.* Geddes, 28 Misc. (N. Y.) 291, 59 N. Y. Suppl. 867 (four years).

Subrogation refused.—Plaintiff took a mortgage supposing it to be second and as part of the advancement paid the first mortgage. There was an intermediate mortgage which was foreclosed, the holder of that mortgage buying the property. Plaintiff was not permitted, three years after such sale and five years after he had paid the first mortgage, subrogation to the rights of the first mortgagee. Atkins *v.* Nordyke, etc., Co., 6 Kan. App. 145, 51 Pac. 304.

25. Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527, sixteen years.

26. Buck *v.* Davis, 64 Ark. 345, 42 S. W. 534 (nine years); Hansen's Empire Fur Factory *v.* Teabout, 104 Iowa 360, 73 N. W. 875 (ten years); Williams *v.* Allison, 33 Iowa 278 (six years); Hughes *v.* Jones, 2 Md. Ch. 178 (twenty-five years); Houck *v.* Cross, 67 Mo. 151 (fifty years).

A distinction has been taken in this respect between sales to the execution creditor and to third persons, denying relief against the latter but granting relief against the former. Williams *v.* Allison, 33 Iowa 278.

Ignorance of facts.— A defendant subjected to judgment under a false return of service is not guilty of laches even as to third persons purchasing at execution sale, where he did not know of the return, judgment, or sale and was diligent after learning thereof, and sued within eighteen months from the execution of the sheriff's deeds. Great West Min. Co. *v.* Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

27. *Colorado.*—Bateman *v.* Reitler, 19 Colo. 547, 36 Pac. 548, four years.

A purchaser at a tax-sale may defend on the ground of laches against the original owner seeking to divest his title.[28]

C. Excuses For Delay — 1. Introductory Statement. As the whole doctrine of laches and staleness of demand rests upon the neglect of a reasonable opportunity to assert the demand,[29] the lapse of time will not bar relief where circumstances exist excusing the delay and rendering it inequitable to interpose the bar.[30] While many excuses are presented with sufficient frequency to permit of categorical treatment,[31] no such analysis can be exclusive, and exceptional grounds may be successfully presented, such as the interruption of judicial proceedings by civil war.[32] As public policy may afford a reason for refusing relief after long delay,[33] a counter public policy may operate to excuse delay, as where the suit is brought to protect a public right.[34]

2. Right to Sue Imperfect. A party is not chargeable with any delay which may occur before his right to sue becomes complete,[35] nor can laches be predicated upon delay during a period when no one was authorized to sue,[36] or during a period allowed by law for defendant voluntarily to perform the duty.[37]

Iowa.— Horr *v.* French, 99 Iowa 73, 68 N. W. 581 (twenty-six years); Bacon *v.* Chase, 83 Iowa 521, 50 N. W. 23 (ten years).

Minnesota.— Berkey *v.* St. Paul Nat. Bank, 54 Minn. 448, 56 N. W. 53, seven years.

Oregon.— Loomis *v.* Rosenthal, 34 Oreg. 585, 57 Pac. 55, nineteen years.

United States.— Swift *v.* Smith, 79 Fed. 709, 25 C. C. A. 154 (twenty years); Newsom *v.* Wells, 18 Fed. Cas. No. 10,187, 5 McLean 21 (twenty-one years).

See 19 Cent. Dig. tit. "Equity," § 217.

Proceeds of sale.— An effort, not to attack the sale, but to compel payment by the administrator of the price, on the theory that the decedent had conveyed the land to plaintiff eighteen years before, was held to be barred. Prater *v.* Sears, 77 Ga. 28.

But the purchaser himself, at a referee's sale, who has been compelled to pay a lien may two years after such payment move to compel the referee to refund the amount paid, where the delay worked no injury. Weseman *v.* Wingrove, 85 N. Y. 353.

28. Naddo *v.* Bardon, 51 Fed. 493, 2 C. C. A. 335 [*affirming* 47 Fed. 782]; Keely *v.* Weir, 38 Fed. 291.

29. See *supra*, IV, A.

30. Harris *v.* McIntyre, 118 Ill. 275, 8 N. E. 182; Young *v.* Young, 51 N. J. Eq. 491, 27 Atl. 627; Foster *v.* Knowles, 42 N. J. Eq. 226, 7 Atl. 290; King *v.* Morford, 1 N. J. Eq. 274; Mellish's Estate, 1 Pars. Eq. Cas. (Pa.) 482; Baker *v.* Morris, 10 Leigh (Va.) 284; Nelson *v.* Carrington, 4 Munf. (Va.) 332, 6 Am. Dec. 519.

31. See the following subdivisions.

32. Byrne *v.* Edmonds, 23 Gratt. (Va.) 200. But the disorganized state of the country is no excuse where plaintiff permits a long time to elapse after the establishment of regular administration of the law. Carlisle *v.* Hart, 27 Tex. 350.

33. See cases cited *supra*, p. 153, note 35.

34. Greer *v.* New York, 1 Abb. Pr. N. S. (N. Y.) 206; Engstad *v.* Dinnie, 8 N. D. 1, 76 N. W. 292.

35. *Georgia.*— Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470.

Illinois.— Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881.

Kentucky.— Smith *v.* Field, 6 Dana 361.

Michigan.— Gamble *v.* Folsom, 49 Mich. 141, 13 N. W. 394.

Virginia.— Reynolds *v.* Pettyjohn, 79 Va. 327; Nelson *v.* Carrington, 4 Munf. 332, 6 Am. Dec. 519.

United States.— Illinois Grand Trunk R. Co. *v.* Wade, 140 U. S. 65, 11 S. Ct. 709, 35 L. ed. 342; Buchannon *v.* Upshaw, 1 How. 56, 11 L. ed. 46; Southern Pac. R. Co. *v.* Stanley, 49 Fed. 263.

Remainder-men, not bound to inquire into the fulfilment of duties by the life-tenant, are not guilty of negligence in deferring suit until their estate falls in. Walker *v.* Fraser, 7 Rich. Eq. (S. C.) 230.

Where rule does not apply.— One who conveys an estate in expectancy may sue to rescind the conveyance at any time and cannot defer suit until the estate falls in. Price's Appeal, 54 Pa. St. 472. Possession by defendant of a dower interest does not excuse delay in an attack upon another title claimed by her by purchase, where all the equities could have been adjusted in an earlier suit. Gibson *v.* Harriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17.

36. Blue *v.* Patterson, 21 N. C. 457. The same rule applies where defendant was the person who should have enforced the right (Breckinridge *v.* Floyd, 7 Dana (Ky.) 456), or where a party delayed until the death of an ancestor should determine who were the heirs that should be parties (Shackelford *v.* Bullock, 34 Ala. 418).

Interruption of right to sue.— Considerable delay may be excused where the right to sue has been several times interrupted, as by death. Hurt *v.* West, 87 Va. 78, 12 S. E. 141.

37. McKenzie *v.* Sifford, 52 S. C. 104, 29 S. E. 388.

Legatees and heirs.— Laches cannot be imputed to legatees suing an executor until a reasonable time has elapsed for the latter to discharge his duties. Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085. Heirs need not

3. Personal Disabilities — a. Generally. Equity will generally excuse a delay because of a personal disability of plaintiff which at law would prevent the bar of the statute of limitations,[38] and it will also consider disabilities as tending to excuse delay under circumstances which would not operate to prevent the bar of the statute.[39] Somewhat contrary, however, to the general principles governing the law of laches there are cases holding that when time begins to run it is not interrupted by a disability subsequently arising, as by the devolution of the estate to an infant or *feme covert*,[40] and that a voluntary disability, as coverture, will not be regarded although incurred during infancy.[41]

b. Infancy. Laches cannot be imputed to an infant,[42] and therefore a demand will not be rejected if asserted within a reasonable time after plaintiff attains his majority,[43] at least when there has been no change of circumstances preventing the doing of justice.[44] Unreasonable delay after attaining majority will be fatal.[45] Infancy, when a right accrued, may excuse ignorance of such right and consequently a failure to assert it promptly after attaining majority.[46]

c. Insanity. Laches cannot be imputed to one of unsound mind,[47] and mental affliction not wholly incapacitating plaintiff may excuse delay where defendant is not prejudiced.[48] A lunatic, being under the protection of the court, a suit on his behalf is in time if brought promptly after the appointment of a committee,[49] and is not barred by the laches of a next friend or others not legally chargeable with the protection of his rights.[50] One must proceed, however, with reasonable promptness after recovering his reason, provided he then learns the facts,[51] or has the means of ascertaining them.[52]

d. Coverture. Where coverture is a disability it excuses delay,[53] but not where statutes have removed the disability to sue.[54]

sue an administrator who has taken possession of property before the settlement of his account, and time does not begin to run until then. Misamore's Estate, 90 Cal. 169, 27 Pac. 68.

38. Cole *v.* Grigsby, (Tex. Civ. App. 1894) 35 S. W. 680; Wells *v.* Morse, 11 Vt. 9.

39. Wright *v.* Leclaire, 3 Iowa 221.

One who had been wrongfully kept in slavery until 1865 was not guilty of laches when he sued in 1878 for an annuity granted in 1856. Jones *v.* Jones, 92 Va. 590, 24 S. E. 255.

Indians, provided they are legally capable of suing, are not entitled to any special privileges. Pope *v.* Falk, 66 Kan. 793, 72 Pac. 246; Dunbar *v.* Green, 66 Kan. 557, 72 Pac. 243; Compo *v.* Jackson Iron Co., 50 Mich. 578, 16 N. W. 295; Felix *v.* Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. ed. 719 [*affirming* 36 Fed. 457].

40. Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478; Wichita Land, etc., Co. *v.* Ward, 1 Tex. Civ. App. 307, 21 S. W. 128.

41. Bedilian *v.* Seaton, 3 Fed. Cas. No. 1,218, 3 Wall. Jr. 279. *Contra*, Tate *v.* Greenlee, 9 N. C. 486. See *infra*, IV, C, 3, d.

42. Gibson *v.* Harriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17; Morgan *v.* Herrick, 21 Ill. 481; Smith *v.* Sackett, 10 Ill. 534; Walker *v.* Walker, 55 S. W. 726, 21 Ky. L. Rep. 1521.

Infancy of part of plaintiffs, including those left in charge of the estate, is a circumstance excusing the delay of all. Hart *v.* Hawkins, 3 Bibb (Ky.) 502, 6 Am. Dec. 666.

43. McMillan *v.* Rushing, 80 Ala. 402 (suit by several to set aside a sale two years after the eldest became of age); Carr *v.* Bob, 7 Dana (Ky.) 417; Israel *v.* Silsbee, 57 Wis. 222, 15 N. W. 144 (attack on a probate order four months after plaintiff became of age).

44. Robinson *v.* Kampmann, 5 Tex. Civ. App. 605, 24 S. W. 529; Robinett *v.* Robinett, (Va. 1894) 19 S. E. 845.

45. Wood *v.* Chetwood, 33 N. J. Eq. 9.

46. Carter *v.* Chattanooga, (Tenn. Ch. App. 1897) 48 S. W. 117; Copen *v.* Flesher, 6 Fed. Cas. No. 3,211, 1 Bond 440. See, generally, Infants.

47. Trowbridge *v.* Stone, 42 W. Va. 454, 26 S. E. 363; Knight *v.* Watts, 26 W. Va. 175; Heyl *v.* Goelz, 97 Wis. 327, 72 N. W. 626.

48. Lundy *v.* Seymour, 55 N. J. Eq. 1, 35 Atl. 893.

49. Knight *v.* Watts, 26 W. Va. 175.

50. Kidder *v.* Houston, (N. J. Ch. 1900) 47 Atl. 336; Heyl *v.* Goelz, 97 Wis. 327, 72 N. W. 626.

51. Doughty *v.* Doughty, 7 N. J. Eq. 643.

52. Norris *v.* Haggin, 136 U. S. 386, 10 S. Ct. 942, 34 L. ed. 424 [*affirming* 28 Fed. 275]. And see, generally, Insane Persons.

53. Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368; Griffin *v.* Towns, (Tex. Civ. App. 1894) 25 S. W. 968; Baker *v.* Morris, 10 Leigh (Va.) 284. See *supra*, IV, C, 3, a.

54. Gibson *v.* Herriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17; Steines *v.* Manhattan L. Ins. Co., 34 Fed. 441. *Contra*, Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368. Although by the law of

e. Poverty. The poverty of plaintiff is quite uniformly held to be no excuse for failing with reasonable promptness to assert his rights.[55]

f. Absence. Absence or non-residence, presenting no legal obstacle to a suit, is alone insufficient to excuse delay;[56] but it may excuse ignorance of the right and so indirectly operate to the same end;[57] and it may in itself account for slight delay which might be fatal under the circumstances to the claim of one present and in a situation to act immediately.[58]

4. Ignorance of Rights — a. Generally. Laches cannot be imputed to one who has been justifiably ignorant of the facts creating his right, and who therefore has failed to assert it.[59] Ignorance of the fact that defendants are invading or disputing plaintiff's rights is the same in effect as ignorance of the right itself.[60] Where the facts are known, ignorance of the law will not in general be a sufficient answer to the charge of laches.[61]

b. Fraud. While the rule just stated is general, it receives its most frequent

her domicile a woman is subject to the control of her husband, her coverture is no excuse for failing to sue for lands situated in a state where coverture forms no obstacle to the suit. De Mares *v.* Gilpin, 15 Colo. 76, 24 Pac. 568. See, generally, Husband and Wife.

Separate estate.— Being authorized to act as to her separate estate a *feme covert* is subject to the consequences of laches with relation thereto as if she were unmarried. Warner *v.* Jackson, 7 App. Cas. (D. C.) 211; Phillips *v.* Piney Coal, etc., Co., 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040.

55. *Missouri.*— Perry *v.* Craig, 3 Mo. 516.

North Carolina.— Locke *v.* Armstrong, 22 N. C. 147.

Oklahoma.— Mathews *v.* Young, 2 Okla. 616, 39 Pac. 387; Twine *v.* Carey, 2 Okla. 249, 37 Pac. 1096.

Tennessee.— Carter *v.* Chattanooga, (Ch. App. 1897) 48 S. W. 117.

United States.— Leggett *v.* Standard Oil Co., 149 U. S. 287, 13 S. Ct. 902, 37 L. ed. 737; Naddo *v.* Bardon, 51 Fed. 493, 2 C. C. A. 335 [*affirming* 47 Fed. 782]; De Estrada *v.* San Felipe Land, etc., Co., 46 Fed. 280.

See 19 Cent. Dig. tit. "Equity," § 238.

Poverty caused by the very fraud from which relief is sought is entitled to consideration. Mason *v.* Crosby, 16 Fed. Cas. No. 9,235, 2 Ware 306.

56. *North Carolina.*— England *v.* Garner, 90 N. C. 197.

Pennsylvania.— *In re* Thierfeld, 11 Pa. Co. Ct. 47.

Tennessee.— Carter *v.* Chattanooga, (Ch. App. 1897) 48 S. W. 117.

West Virginia.—Bill *v.* Schilling, 39 W. Va. 108, 19 S. E. 514.

United States.— Naddo *v.* Bardon, 51 Fed. 493, 2 C. C. A. 335 [*affirming* 47 Fed. 782].

See 19 Cent. Dig. tit. "Equity," § 235.

Unreasonable delay after return may be fatal even if absence was an excuse. De Martin *v.* Phelan, 51 Fed. 865, 2 C. C. A. 523 [*affirming* 47 Fed. 761].

Compulsory absence.— Where a religious body was driven from the state by military force and its members not permitted to return, a bill to enforce a trust in land in its favor was entertained forty years thereafter, but within ten years after its adverse occupancy. Reorganized Church of Jesus Christ *v.* Church of Christ, 60 Fed. 937.

57. See *infra*, note 71.

58. Robinson *v.* Reinhart, 137 Ind. 674, 36 N. E. 519.

59. *Alabama.*— Cowan *v.* Sapp, 74 Ala. 44.

Illinois.— Lurton *v.* Rodgers, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214.

Iowa.— Wright *v.* Leclaire, 3 Iowa 221.

Kentucky.— Spalding *v.* St. Joseph's Industrial School, 107 Ky. 382, 54 S. W. 200, 21 Ky. L. Rep. 1107.

Maryland.— Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99.

Michigan.— Chase *v.* Boughton, 93 Mich. 285, 54 N. W. 44; Hayward *v.* Kinney, 84 Mich. 591, 48 N. W. 170.

Minnesota.— Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

Missouri.— Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976.

New York.— Platt *v.* Platt, 58 N. Y. 646.

Texas.— Howe *v.* Rogers, 32 Tex. 218; Joy *v.* Ft. Worth Compress Co., (Civ. App. 1900) 58 S. W. 173.

Virginia.— Moorman *v.* Arthur, 90 Va. 455, 18 S. E. 869.

See 19 Cent. Dig. tit. "Equity," §§ 239, 240.

60. Moore *v.* Crawford, 130 U. S. 122, 9 S. Ct. 447, 32 L. ed. 878.

Ignorance of details of violation, where plaintiff knows that defendant is violating the contract, cannot justify delay, as plaintiff might charge violation in general terms and obtain discovery as to details. Fowle *v.* Park, 48 Fed. 789.

61. Breit *v.* Yeaton, 101 Ill. 242 (plaintiff relied on an attorney's opinion adverse to his claim); Chew *v.* Farmers' Bank, 9 Gill (Md.) 361; Hammond *v.* Hopkins, 143 U. S. 224, 12 S. Ct. 418, 36 L. ed. 134. On the other hand it was held that a delay of five years in a suit to impeach a mortgage was sufficiently explained by the fact that plaintiff did not have earlier the benefit of legal advice. Pairo *v.* Vickery, 37 Md. 467. And one who had not brought suit because of certain state decisions adverse to his right was

and familiar application in suits for relief on the ground of fraud, where time begins to run not from the perpetration but from the discovery of the fraud,[62] provided the discovery is made with reasonable diligence.[63] The remedy will be given in such cases, although the statutory period of limitations has expired.[64] Action must, however, be taken with reasonable promptness after the discovery.[65]

c. Concealment of Cause of Action. Whether the cause of action is itself based on fraud or not, if after it arises plaintiff is misled or lulled into security by the misrepresentations or other fraudulent conduct of defendant, he is not chargeable with laches for failure to proceed during such period.[66] Silence on the part of one under a duty to disclose the fact has the same effect as affirmative deception.[67]

d. Mistake. In suits for relief on the ground of mistake it is the rule that where the rights of innocent parties are not prejudiced[68] the court in determining

excused when he proceeded promptly after a federal decision pointing out his remedy. Lasher *v.* McCreery, 66 Fed. 834. And see Ode *v.* Manhattan R. Co., 56 Hun (N. Y.) 199, 9 N. Y. Suppl. 338.

Erroneous advice of an attorney has excused reliance on a supposed legal right. Dinwiddie *v.* Self, 145 Ill. 290, 33 N. E. 892. But such advice will not avail when based upon inadequate disclosure of facts. *In re* Holden, 37 Wis. 98.

62. *California.*— Hart *v.* Kimball, 72 Cal. 283, 13 Pac. 852; Marston *v.* Simpson, 54 Cal. 189.

Colorado.— Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599.

Florida.— Lee *v.* Patten, 34 Fla. 149, 15 So. 775.

Illinois.— Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* 77 Ill. App. 365]; Wilson *v.* Augur, 176 Ill. 561, 52 N. E. 289; Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 299.

Indiana.— Brake *v.* Payne, 137 Ind. 479, 37 N. E. 140.

Maine.— Frost *v.* Walls, 93 Me. 405, 45 Atl. 287.

Minnesota.— Holterhoff *v.* Mead, 36 Minn. 42, 29 N. W. 675.

Missouri.— Ramsey *v.* Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719.

New York.— Butler *v.* Prentiss, 158 N. Y. 49, 52 N. E. 652 [conditionally *reversing* 91 Hun 643, 36 N. Y. Suppl. 301]; Bosley *v.* National Mach. Co., 15 Daly 267, 6 N. Y. Suppl. 4; Collins *v.* Collins, 13 N. Y. Suppl. 28.

Virginia.— Virginia Land Co. *v.* Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939.

Wisconsin.— Willard *v.* Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657.

United States.— Horner *v.* Perry, 112 Fed. 906; Anthony *v.* Campbell, 112 Fed. 212, 50 C. C. A. 195; Ritchie *v.* Sayers, 100 Fed. 520; Veazie *v.* Williams, 8 How. 134, 12 L. ed. 1018 [*reversing* 28 Fed. Cas. No. 16,907, 3 Story 611].

England.— Brooksbank *v.* Smith, 2 Y. & C. Exch. 58, 6 L. J. Exch. Eq. 34.

See 19 Cent. Dig. tit. "Equity," § 239. And see, generally, FRAUD.

63. Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* 77 Ill. App. 365]; Baker *v.* Grundy, 1 Duv. (Ky.) 281; Frost *v.* Walls, 93 Me. 405, 45 Atl. 287. See also *infra*, IV, C, 4, e.

64. Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 299; Anthony *v.* Campbell, 112 Fed. 212, 50 C. C. A. 195.

65. McLean *v.* Barton, Harr. (Mich.) 279; Gale *v.* Southern Bldg., etc., Assoc., 117 Fed. 732. If a party to a contract learns before it is fully executed of the falsity of representations inducing it, and thereafter permits the other party to complete performance, he may not four years thereafter rescind the contract. Brown *v.* Brown, 142 Ill. 409, 32 N. E. 500.

66. *Alabama.*—Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212.

Arkansas.— McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953.

Connecticut.— Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253.

Illinois.— Middaugh *v.* Fox, 135 Ill. 344, 25 N. E. 584; Jones *v.* Lloyd, 117 Ill. 597, 7 N. E. 119; Berry *v.* Lovi, 107 Ill. 612.

Maryland.— Richardson *v.* Jones, 3 Gill & J. 163, 22 Am. Dec. 293.

Minnesota.— Lewis *v.* Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665.

Ohio.—Longworth *v.* Hunt, 11 Ohio St. 194.

Pennsylvania.— Wilson *v.* Keely, 5 Pa. Co. Ct. 106.

Tennessee.— Lowry *v.* Stapp, (Ch. App. 1899) 53 S. W. 194.

Vermont.— Fletcher *v.* Warren, 18 Vt. 45.

United States.—Loring *v.* Palmer, 118 U. S. 321, 6 S. Ct. 1073, 30 L. ed. 211; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; Forbes *v.* Overby, 9 Fed. Cas. No. 4,928*a*, 4 Hughes 44.

See 19 Cent. Dig. tit. "Equity," § 237.

If the facts are matter of public record ignorance cannot be excused except by showing some affirmative act of the party charged preventing inquiry. Lant *v.* Manley, 71 Fed. 7. But one may rely on the certificate of a county treasurer showing that no taxes are unpaid, although there be taxes charged against the land. Richards *v.* Hatfield, 40 Nebr. 879, 59 N. W. 777.

67. *In re* Ellison, 163 Pa. St. 315, 30 Atl. 199; Krohn *v.* Williamson, 62 Fed. 869.

68. Ellis *v.* Southwestern Land Co., 102 Wis. 400, 78 N. W. 747.

whether relief should be denied on account of laches will consider only the delay after the discovery of the mistake.[69]

e. Ignorance Must Not Be Due to Negligence — (i) *Generally.* Wherever ignorance of fact is urged as an excuse for delay the general doctrines on the subject of knowledge, actual and constructive, may be said to apply.[70] One must have been diligent and have made such inquiry and investigation as the circumstances reasonably permitted or suggested.[71] Means of knowledge are equivalent to knowledge,[72] and knowledge of facts sufficient to suggest inquiries which if made would lead to knowledge of the facts in question is sufficient to charge one with notice of the latter facts.[73] The known facts must, however, point with

69. *Alabama.*— Stone *v.* Hale, 17 Ala. 557, 52 Am. Dec. 185.

Connecticut.— Stedwell *v.* Anderson, 21 Conn. 139.

Indiana.— Smith *v.* Schweigerer, 129 Ind. 363, 28 N. E. 696.

Maryland.— Keedy *v.* Nally, 63 Md. 311.

Minnesota.— Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

Virginia.— Fore *v.* Foster, 86 Va. 104, 9 S. E. 497.

Wisconsin.— Ellis *v.* Southwestern Land Co., 102 Wis. 400, 78 N. W. 747.

See 19 Cent. Dig. tit. "Equity," § 239.

Twenty years after the death of an ancestor who had conveyed more land than required by his contract, his heirs, who had no previous knowledge of the mistake, were permitted to sue for the surplus. Whaley *v.* Eliot, 1 A. K. Marsh. (Ky.) 343, 10 Am. Dec. 737.

70. See, generally, Notice.

71. *Georgia.*— Edmonds *v.* Goodwyn, 28 Ga. 38.

Kentucky.— Kirby *v.* Jacobs, 13 B. Mon. 435.

Maryland.— McCoy *v.* Poor, 56 Md. 197.

New Hampshire.— Gregg *v.* Thurber, 69 N. H. 480, 45 Atl. 241.

New Jersey.— Hendrickson *v.* Hendrickson, 42 N. J. Eq. 657, 9 Atl. 742.

Pennsylvania.— *In re* Ridgway, 206 Pa. St. 587, 56 Atl. 25.

Texas.— Dean *v.* Crenshaw, 47 Tex. 10.

West Virginia.— Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660.

United States.— McQuiddy *v.* Ware, 20 Wall. 14, 22 L. ed. 311; Wetzel *v.* Minnesota R. Transfer Co., 65 Fed. 23, 12 C. C. A. 490; Norris *v.* Haggin, 28 Fed. 275; Leavenworth County *v.* Chicago, etc., R. Co., 18 Fed. 209, 5 McCrary 508.

See 19 Cent. Dig. tit. "Equity," §§ 227, 239.

The rule may operate in favor of plaintiff, as where he was given relief against foreclosure proceedings conducted on the theory that he was dead, defendant having purchased land on the faith of such proceedings when he might readily have learned of the plaintiff's existence. Demourelle *v.* Piazza, 77 Miss. 433, 27 So. 623.

Neglect to examine documents.— Although one is charged with the duty of examining papers to which he has access (Jarboe *v.* Kepler, 4 Ind. 177), it has been held that one induced to surrender an insurance policy and accept another on false representations as to the terms of the latter is not chargeable with negligence in failing to read the latter where it was so obscure in its terms that only insurance experts could understand it. Knauer *v.* Globe Mut. L. Ins. Co., 48 N. Y. Super. Ct. 454.

Extraordinary vigilance is not required. Chouteau *v.* Allen, 70 Mo. 290; Dice *v.* Brown, 98 Iowa 297, 67 N. W. 253.

Absence, while not in itself a disability excusing delay (see *supra*, IV, C, 3, f), is often a circumstance excusing or tending to excuse a failure to ascertain the facts. Sayre *v.* Elyton Land Co., 73 Ala. 85; Duff *v.* Duff, 87 Cal. 104, 23 Pac. 874, 25 Pac. 265; Phillips *v.* Wilmarth, 98 Iowa 32, 66 N. W. 1053; Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941; Wright *v.* Leclaire, 3 Iowa 221; Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113; Fellows *v.* Hyman, 33 Fed. 313. Especially will such absence excuse one for relying on the statements of others, and because of such reliance refraining from action. Holt *v.* Wilson, 75 Ala. 58; Reavis *v.* Reavis, 103 Fed. 813. But it will not excuse a failure to perform a plain duty to make inquiries. Naddo *v.* Bardon, 47 Fed. 782 [*affirmed* in 51 Fed. 493, 2 C. C. A. 335].

72. *Colorado.*— Pipe *v.* Smith, 5 Colo. 146.

Iowa.— German Sav. Bank *v.* Des Moines Nat. Bank, 122 Iowa 737, 98 N. W. 606.

Kentucky.— Kirby *v.* Jacobs, 13 B. Mon. 435; Hite *v.* Hite, 1 B. Mon. 177.

Michigan.—McEacheran *v.* Western Transp., etc., Co., 97 Mich. 479, 56 N. W. 860.

New Hampshire.— Gregg *v.* Thurber, 69 N. H. 480, 45 Atl. 241.

Virginia.— Wissler *v.* Craig, 80 Va. 22.

Wisconsin.— Melms *v.* Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

United States.— Norris *v.* Haggin, 28 Fed. 275.

See 19 Cent. Dig. tit. "Equity," §§ 237, 239, 240.

73. *Arkansas.*—McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953.

Minnesota.—Marcotte *v.* Hartman, 46 Minn. 202, 48 N. W. 767.

New Hampshire.— Hathaway *v.* Noble, 55 N. H. 508.

Oregon.— Weiss *v.* Bethel, 8 Oreg. 522.

Pennsylvania.— Morrell *v.* Trotter, 15 Phila. 201.

some directness toward the unknown,[74] although a mere suspicion of the crucial facts may raise a duty to inquire.[75]

(11) *Constructive Notice.* Equity as well as law charges a party with notice of public statutes,[76] with such knowledge as might be gained by an inspection of the records of land title, where such inspection is required by law or suggested by ordinary prudence,[77] and with knowledge of facts disclosed by the records of judicial proceedings to which he was party,[78] but not of proceedings to which he was not a party and which did not affect him.[79]

f. Imputed Knowledge. As a party is generally charged with the laches of his privies or agents,[80] it follows that knowledge of an ancestor will be imputed to an heir,[81] that of a plaintiff to his co-plaintiff,[82] and that of an attorney to his client.[83] The knowledge of others who might have sued but did not may raise the presumption of invalidity against plaintiff in spite of his own ignorance of the transaction.[84]

g. Burden of Proof. A plaintiff seeking to excuse delay by ignorance of

South Carolina.— Myers *v.* O'Hanlon, 12 Rich. Eq. 196.

United States.— McMonagle *v.* McGlinn, 85 Fed. 88; Swift *v.* Smith, 79 Fed. 709, 25 C. C. A. 154; Fuller *v.* Montague, 53 Fed. 204 [*affirmed* in 59 Fed. 212, 8 C. C. A. 100]; Norris *v.* Haggin, 28 Fed. 275.

See 19 Cent. Dig. tit. "Equity," §§ 227, 239.

Ratification of a contract will be implied where a party continues to accept its benefits after knowledge of facts sufficient to put him on inquiry as to its voidable character. Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

74. One selling mining property to his managing partner for a small price learned soon thereafter that it was very valuable, but was held not to be charged thereby with notice that the ore which enhanced its value had been discovered before the sale. Bowman *v.* Patrick, 36 Fed. 138. See also Simrall *v.* Williamson, 35 S. W. 632, 18 Ky. L. Rep. 135.

75. Beaver *v.* Trittipo, 24 Ind. 41; Amory *v.* Amory, 1 Fed. Cas. No. 335, 6 Biss. 174. But one will be excused, although he had suspicions, where they were lulled to sleep by explanations. Salsbury *v.* Ware, 183 Ill. 505, 56 N. E. 149 [*reversing* 80 Ill. App. 485]. One seeking relief from fraud is not justified in accepting the mere statement, explanatory of the matter, of another whom he must have known to be a party to the fraud if one were committed. *In re* Holden, 37 Wis. 98.

76. Barton *v.* Long, 45 N. J. Eq. 841, 14 Atl. 565, 566, 568, 19 Atl. 623; Johnson *v.* Florida Transit, etc., R. Co., 18 Fed. 821; Leavenworth County *v.* Chicago, etc., R. Co., 18 Fed. 209, 5 McCrary 508.

77. De Mares *v.* Gilpin, 15 Colo. 76, 24, Pac. 568; Barton *v.* Long, 45 N. J. Eq. 841, 14 Atl. 565, 566, 568, 19 Atl. 623; Bangs *v.* Loveridge, 60 Fed. 963; Eiffert *v.* Craps, 58 Fed. 470, 7 C. C. A. 319; Teall *v.* Slaven, 40 Fed. 774; Johnson *v.* Florida Transit, etc., R. Co., 18 Fed. 821; Leavenworth County *v.* Chicago, etc., R. Co., 18 Fed. 209, 5 McCrary 508.

Facts not disclosed by record.— A state is not charged with notice of an unlawful purchase of public lands by a land officer, where his successors knew nothing thereof and the land records did not disclose it. Massey *v.* Smith, 64 Mo. 347.

78. Vigoureux *v.* Murphy, 55 Cal. 346; Cline *v.* Richards, 68 Ill. App. 399; Myrick *v.* Edmundson, 2 Minn. 259.

Notice of mistake by referees in partition in the description of the land, where the mistake is not disclosed by the records, is not chargeable to a party. Sullivan *v.* Lumsden, 118 Cal. 664, 50 Pac. 777.

A party to a friendly partition suit may enforce twenty years thereafter a decree for owelty in his favor, when it appears that no obstacles exist and that he was also without actual knowledge of such decree. Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

79. Krug *v.* Keller, 8 Pa. Super. Ct. 78, 42 Wkly. Notes Cas. (Pa.) 431; Fletcher *v.* McArthur, 117 Fed. 393, 54 C. C. A. 567; Alger *v.* Anderson, 78 Fed. 729; Hodge *v.* Palms, 68 Fed. 61, 15 C. C. A. 220.

80. See *supra*, IV, A, 1.

81. Sanchez *v.* Dow, 23 Fla. 445, 2 So. 842; Gorman *v.* McAuliffe, 93 Ga. 295, 20 S. E. 330.

82. Wood *v.* Perkins, 64 Fed. 817.

83. Galbes *v.* Girard, 46 Fed. 500. See also Ware *v.* Galveston City Co., 146 U. S. 102, 13 S. Ct. 33, 36 L. ed. 904.

Where an attorney was careless in examining a docket and therefore did not find a pending case against his client, his negligence was imputed to the client, who was not permitted to avail himself of the excuse of his ignorance of the proceedings against him. Wallace *v.* Richmond, 26 Gratt. (Va.) 67. But a principal was not charged with notice of the terms of a guaranty fraudulently inserted, where it was delivered to his agent who was not familiar with his principal's agreement and therefore did not call the latter's attention to the terms of the guaranty. Simpkins *v.* Taylor, 81 Hun (N. Y.) 467, 31 N. Y. Suppl. 169.

84. Couch *v.* Couch, 9 B. Mon. (Ky.) 160; Taylor *v.* Holmes, 127 U. S. 489, 8 S. Ct. 1192, 32 L. ed. 179.

facts must allege such ignorance in his bill,[85] and it is generally held that he must disclose with particularity every element creating the excuse — that the facts could not have been discovered by the exercise of due diligence,[86] and just when [87] and how [88] the discovery was made. Often, however, the burden of proving knowledge is cast on defendant.[89]

5. Loss of Papers, Etc. Where records or papers essential to the prosecution of the suit have been lost or destroyed without the fault of the party requiring them, the delay in instituting or prosecuting the suit occasioned by such loss is thereby excused.[90] But a failure merely through lack of effort to collect the necessary evidence is no excuse for delay.[91]

6. Impossibility of Enforcing Decree. In some cases delay has been excused during a period when the situation of the parties was such that a decree if rendered could not have been enforced, as where defendant was insolvent,[92] where a lien on land was inferior to other claims absorbing its value,[93] and in a bill for specific performance where the vendor had been unable to convey.[94] But withholding the assertion of a right for the purpose of inducing one's adversary to make payments he might be willing to make only in reliance on plaintiff's acquiescence is rather a ground for refusing relief than for excusing delay.[95]

7. Efforts to Settle Without Suit. Delay will be excused when occasioned by efforts to obtain a settlement or satisfaction without litigation,[96] but such negotiations afford no excuse where the adverse party has in no way acknowledged the right or encouraged any hope of a settlement.[97] Repeated assertion of a right and of demands for redress may, however, rebut a presumption of

85. McLure *v.* Ashby, 7 Rich. Eq. (S. C.) 430.

86. Underhill *v.* Nelson, 1 Lea (Tenn.) 98; Foster *v.* Mansfield, etc., R. Co., 146 U. S. 88, 13 S. Ct. 28, 36 L. ed. 899.

Bill to surcharge and falsify an account nineteen years after its settlement must show why the mistake was not sooner discovered. Bruce *v.* Child, 11 N. C. 372.

87. Bliss *v.* Prichard, 67 Mo. 181. A less specific averment may be sufficient to take a case out of the operation of the statute of limitations. Matlock *v.* Todd, 25 Ind. 128.

88. Stettauer *v.* Dwight, 54 Ill. App. 194; Hardt *v.* Heidweyer, 152 U. S. 547, 14 S. Ct. 671, 38 L. ed. 548.

89. *Alabama.*— Martin *v.* Martin, 35 Ala. 560.

Michigan.— Corby *v.* Trombley, 110 Mich. 292, 68 N. W. 139.

Missouri.— Henrioid *v.* Neusbaumer, 69 Mo. 96.

New Jersey.— O'Mara *v.* Nugent, 37 N. J. Eq. 326.

South Carolina.— McLure *v.* Ashby, 7 Rich. Eq. 430.

Virginia.— Rowe *v.* Bentley, 29 Gratt. 756.

See 19 Cent. Dig. tit. "Equity," § 239.

Presumption of ignorance may arise from the age, sex, or absence of plaintiff. Miles *v.* Wheeler, 43 Ill. 123.

90. Johnson *v.* Diversey, 82 Ill. 446; Clark *v.* Hogle, 52 Ill. 427; Cherbonnier *v.* Goodwin, 79 Md. 55, 28 Atl. 894; Steuart *v.* Carr, 6 Gill (Md.) 430; Logan *v.* Simmons, 38 N. C. 487. But a delay in commencing a suit for dissolution of a partnership and to declare a purchaser of the partnership property a trustee was not excused by the loss of the partnership agreement. Curtis *v.* Lakin, 94 Fed. 251, 36 C. C. A. 222.

91. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

92. Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328; Carr *v.* Bob, 7 Dana (Ky.) 417; Magruder *v.* Peter, 11 Gill & J. (Md.) 217; Stephens *v.* Martin, 85 Tenn. 278, 2 S. W. 206.

A delay of forty-six years was held inexcusable, although plaintiff supposed the debtor insolvent, where for a considerable portion of the time he could have paid and the creditor by diligence might have discovered the fact. Maxwell *v.* Kennedy, 8 How. (U. S.) 210, 12 L. ed. 1051.

93. Tenk *v.* Lock, 26 Ill. App. 216; Hill *v.* Gordon, 45 Fed. 276.

94. Melton *v.* Smith, 65 Mo. 315.

95. Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205.

96. Springer *v.* Springer, 114 Ill. 550, 2 N. E. 527; Kline *v.* Cutter, 34 N. J. Eq. 329; Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*affirming* 63 Hun 413, 18 N. Y. Suppl. 685]. See also Duke *v.* State, 56 Ark. 485, 20 S. W. 600; Ischy's Estate, 5 Pa. Dist. 16, 17 Pa. Co. Ct. 316; Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570.

97. Mackall *v.* Casilear, 137 U. S. 556, 11 S. Ct. 178, 34 L. ed. 776. A promise by defendant to surrender the property in controversy will not excuse a delay for the full period of limitations after such promise. Waller *v.* Demint, 1 Dana (Ky.) 92, 25 Am. Dec. 134.

acquiescence in the act complained of, and indeed establish the contrary fact — that plaintiff has constantly clamored against it.[98]

8. Acknowledgment of Plaintiff's Right. The continued acknowledgment by defendant of plaintiff's right is generally sufficient to account for delay by plaintiff in instituting suit to enforce it.[99] Delay will thus be excused when occasioned not only by defendant's promises to do equity [1] or by actual payments,[2] but also by defendant's silence or other conduct indicating acquiescence in plaintiff's right.[3]

9. Plaintiff in Undisturbed Possession. On the same principle which controls where there is an acknowledgment of plaintiff's right,[4] and perhaps as a corollary of that rule, one in possession of land may rest in security until his title or possession is attacked, and a failure to appeal to equity during that period will not prejudice his right either to quiet his title,[5] or to assert an equity against the holder of the legal title.[6] Thus lapse of time alone, while plaintiff is in undisputed possession, will not preclude him from suing to compel a conveyance,[7] or to reform a

98. Young *v.* Chicago, etc., R. Co., 28 Wis. 171.

99. *California.*— Hovey *v.* Bradbury, 112 Cal. 620, 44 Pac. 1077.

Illinois.— Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362; Van Buskirk *v.* Van Buskirk, 148 Ill. 9, 35 N. E. 383.

Iowa.— Brayley *v.* Ross, 33 Iowa 505.

New York.— Marks *v.* Pell, 1 Johns. Ch. 594.

Texas.— Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300; Hodges *v.* Johnson, 15 Tex. 570; Southall *v.* Southall, 6 Tex. Civ. App. 694, 26 S. W. 150; Riggs *v.* Polk, 3 Tex. Civ. App. 179, 21 S. W. 1013.

Virginia.— Griffin *v.* Macaulay, 7 Gratt. 476.

Washington.—Rigney *v.* Tacoma Light, etc., Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.

See 19 Cent. Dig. tit. "Equity," § 231.

Yielding to defendant's appeals for time and by not pressing him when in embarrassed circumstances will not prejudice plaintiff. Hellams *v.* Prior, 64 S. C. 296, 42 S. E. 106.

1. Callender *v.* Colegrove, 17 Conn. 1; Linzee *v.* Mixer, 101 Mass. 512; Johnston *v.* Trask, 116 N. Y. 136, 22 N. E. 377, 15 Am. St. Rep. 394, 5 L. R. A. 630.

2. Koons *v.* Blanton, 129 Ind. 383, 27 N. E. 334; Beverley *v.* Rhodes, 86 Va. 415, 10 S. E. 572; Silsby *v.* Young, 3 Cranch (U. S.) 249, 2 L. ed. 429.

3. *Iowa.*— Citizens' Sav. Bank *v.* Stewart, 90 Iowa 467, 57 N. W. 957.

Missouri.— Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177.

North Carolina.— Hill *v.* Jones, 17 N. C. 101.

Tennessee.— Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706.

Texas.— McCampbell *v.* Durst, 73 Tex. 410, 11 S. W. 380.

Wisconsin.— Fawcett *v.* Fawcett, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844.

See 19 Cent. Dig. tit. "Equity," § 231.

Delay in enforcing a resulting trust, during a period when defendant was rightfully in possession as tenant by the curtesy and asserting no other right, is not a bar. Irick *v.* Clement, 49 N. J. Eq. 590, 27 Atl. 434.

4. See *supra*, IV, C, 8.

5. Shaw *v.* Allen, 184 Ill. 77, 56 N. E. 403 [*affirming* 85 Ill. App. 23]; Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Chase *v.* Kaynor, 78 Iowa 449, 43 N. W. 269; Rearden *v.* Searcy, 3 A. K. Marsh. (Ky.) 539; Mott *v.* Maris, (Tex. Civ. App. 1894) 29 S. W. 825. See also Nichols *v.* McIntosh, 19 Colo. 22, 34 Pac. 278.

One who defends his title as soon as it is assailed, and who has been guilty of no laches from which plaintiff is free, cannot be barred by lapse of time. Marshall *v.* Meyer, (Iowa 1902) 92 N. W. 693.

6. *California.*—Mallagh *v.* Mallagh, (1888) 16 Pac. 535; Barroilhet *v.* Anspacher, 68 Cal. 116, 8 Pac. 804.

Illinois.— Parker *v.* Shannon, 137 Ill. 376, 27 N. E. 525; Newell *v.* Montgomery, 129 Ill. 58, 21 N. E. 508.

Minnesota.— Hayes *v.* Carroll, 74 Minn. 134, 76 N. W. 1017.

New York.— Evertson *v.* Tappen, 5 Johns. Ch. 497.

North Carolina.— Mask *v.* Tiller, 89 N. C. 423.

Rhode Island.— Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

Texas.—Franklin *v.* Piper, 5 Tex. Civ. App. 253, 23 S. W. 942.

Wisconsin.— Grossbach *v.* Brown, 72 Wis. 458, 40 N. W. 494.

United States.— Massenburg *v.* Denison, 71 Fed. 618, 18 C. C. A. 280; Ruckman *v.* Cory, 129 U. S. 387, 9 S. Ct. 316, 32 L. ed. 728; Lemoine *v.* Dunklin County, 51 Fed. 487, 2 C. C. A. 343 [*affirming* 46 Fed. 219, 38 Fed. 567].

See 19 Cent. Dig. tit. "Equity," § 232.

Remainder-men will be given relief against a forfeiture suffered by the life-tenant fifteen years after the breach of condition, where the life-tenant has in the meantime been permitted to remain in possession by those entitled to the forfeiture. Carpenter *v.* Westcott, 4 R. I. 225.

7. Reardon *v.* Searcy, 1 Litt. (Ky.) 53; Calmes *v.* Buck, 4 Bibb (Ky.) 453; Buchannon *v.* Upshaw, 1 How. (U. S.) 56, 11 L. ed. 46.

deed for mistake,[8] provided at least that there was no unreasonable delay after the discovery of the mistake.[9] The rule applies not only in favor of those occupying land, but also in favor of one enjoying the undisturbed privileges of an easement,[10] or even of personal property.[11] The principle involved is recognized even where its application is indirect.[12]

10. Reliance on a Legal Right. One who has a good legal title may rely on it and is not chargeable with laches for so doing when he afterward brings a suit in equity to remove an adverse claim,[13] or sets up his title in defense.[14] This rule has in a few cases been extended in favor of a plaintiff who through mistake of law erroneously supposed his legal right to be perfect.[15]

11. Pendency of Other Proceedings. Delay pending other proceedings has frequently been held excusable, not only where the termination of such proceedings was necessary for the ascertainment of facts involved in the later suit,[16] but also where the former suit had a similar object but proved unavailing.[17] It has been held that there is no laches arising from delay while plaintiff is endeavoring to enforce his right at law,[18] but this rule is not uniform.[19] Delay has also been excused where plaintiff had lost some time by proceeding at law against another party whom he supposed to be primarily liable,[20] and where he had waited a reasonable time for decision of the question involved in a case pending between other parties.[21] Time which elapses after the filing of an original bill is not to be considered in testing an amended bill for laches, where the latter presents substantially the same demand,[22] and the time during which an appeal is pending should

8. Wilson *v.* Byers, 77 Ill. 76; Mills *v.* Lockwood, 42 Ill. 111; Farmers', etc., Bank *v.* Detroit, 12 Mich. 445.

A delay of forty years was held to be no bar to such a suit where relief was sought as soon as an adverse claim was asserted. Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063.

9. Harold *v.* Weaver, 72 Ala. 373.

10. Schautz *v.* Keener, 87 Ind. 258.

11. The equitable owner of shares of corporate stock is not chargeable with laches in neglecting to sue the legal holder to compel a transfer of the shares so long as he enjoys without hindrance all the rights of an owner thereof. Dunne *v.* Stotesbury, 16 Colo. 89, 26 Pac. 333.

12. Where two sets of heirs had been in common enjoyment of land for fifty years, after which partition proceedings were brought, one set might then for the first time assert a right to reimbursement for advances made for the property. Welder *v.* Lambert, 91 Tex. 510, 44 S. W. 281. A corporation is not precluded by delay from restraining the foreclosure of a mortgage to secure void bonds, where it has been in possession of the mortgaged property and no rights were asserted under the bonds until just before the foreclosure suit was brought. Gunnison Gas, etc., Co. *v.* Whitaker, 91 Fed. 191.

13. Chandler *v.* White, 84 Ill. 435; Cook *v.* Lasher, 73 Fed. 701, 19 C. C. A. 654.

14. Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604.

15. Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290; Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229. So held where plaintiff relied on the advice of a reputable attorney, which turned out to be erroneous. Dinwiddie *v.* Self, 145 Ill. 290, 33 N. E. 892.

16. Colwell *v.* Miles, 2 Del. Ch. 110.

17. Wilcoxon *v.* Wilcoxon, 199 Ill. 244, 65 N. E. 229; Johnson *v.* Diversey, 82 Ill. 446; Hart *v.* Hawkins, 3 Bibb (Ky.) 502, 6 Am. Dec. 666; Gilmer *v.* Morris, 43 Fed. 456. One cannot excuse his delay on the ground of the pendency of another suit in which he might have set up his present claim but failed to do so. Mackall *v.* Casilear, 137 U. S. 556, 11 S. Ct. 178, 34 L. ed. 776. See also Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001.

Delay of thirty-eight years cannot be excused by the interposition of a cross bill with the same object nineteen years before suit brought, the cross bill having fallen with the dismissal of the original. Farrow *v.* Farrow, 6 B. Mon. (Ky.) 482.

18. Graham *v.* Day, 9 Ill. 389; Comins *v.* Culver, 35 N. J. Eq. 94; Clark *v.* Crout, 34 S. C. 417, 13 S. E. 602; Hotchkiss *v.* Fortson, 7 Yerg. (Tenn.) 67.

19. Cockrill *v.* Hutchinson, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564; Varick *v.* Edwards, Hoffm. (N. Y.) 382.

20. Schaefer *v.* Fond du Lac, 104 Wis. 39, 80 N. W. 59.

21. Cox *v.* Montgomery, 43 Ill. 110. Seemingly to the contrary, but upon the ground that the other suit was not the real reason of the delay, is Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393, 23 Atl. 529.

Assurance of his adversary's counsel that a decision in another case involving similar facts would be respected justifies plaintiff in deferring suit in reliance upon it. State *v.* Bayonne, (N. J. Sup. 1886) 3 Atl. 123.

22. Pendery *v.* Carleton, 87 Fed. 41, 30 C. C. A. 510. It has even been intimated

not be counted against a bill to impeach the decree for fraud, filed promptly after its affirmance.[23]

12. Confidential Relationship of Parties. Considerable indulgence is shown to a plaintiff who has been lacking in vigilance because of intimate relations with his adversary and confidence reposed in him.[24] Therefore the fact that the parties are near relatives is entitled to great weight in determining the question of laches.[25]

13. Continuing Duties. Where a duty is continuing in its character time runs, not from the creation of the duty, but from its breach,[26] and continuing breaches create constantly fresh rights of suit,[27] at least where plaintiff's conduct has been such as to forbid an inference of acquiescence.[28]

D. How Defense Is Presented, and Waiver of Objection. A bill disclosing on its face the existence of laches is open to demurrer on that ground,[29] and it is generally held that unless presented by demurrer, plea, or answer, the defense of laches or stale demand is waived.[30] The withdrawal of a demurrer on the ground of laches does not waive the right to plead it by answer,[31] but the abandonment of a demurrer filed with an answer waives the defense when the answer does not present it.[32] After a plea presenting the defense has been overruled it cannot be reasserted by answer.[33] The reason for requiring the defense to be pleaded is to give plaintiff an opportunity by amending his bill to show an excuse for the delay;[34] therefore, where the bill attempts to account for the delay, defend-

that where the amendment presents a new demand the same rule might be applied. Stansbury *v.* Inglehart, 20 D. C. 134.

23. Pacific R. Co. *v.* Missouri Pac. R. Co., 111 U. S. 505, 4 S. Ct. 583, 28 L. ed. 498.

24. Butler *v.* Hyland, 89 Cal. 575, 26 Pac. 1108; Foster *v.* Knowles, 42 N. J. Eq. 226, 7 Atl. 290; Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383; Kilbourn *v.* Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005.

25. *Illinois.*— Yeaton *v.* Yeaton, 4 Ill. App. 579.

Michigan.— Wright *v.* Wright, 37 Mich. 55.

Nevada.— Wilson *v.* Wilson, 23 Nev. 267, 45 Pac. 1009.

North Carolina.— Tate *v.* Tate, 21 N. C. 22.

Tennessee.— Vaughn *v.* Tate, (Ch. App. 1896) 36 S. W. 748.

England.— Laver *v.* Fielder, 32 Beav. 1, 9 Jur. N. S. 190, 32 L. J. Ch. 365, 7 L. T. Rep. N. S. 602, 1 New Rep. 188, 11 Wkly. Rep. 245.

See 19 Cent. Dig. tit. "Equity," § 227.

Children are not chargeable with laches in refraining during their father's lifetime from enforcing against him a resulting trust. Ryder *v.* Emrich, 104 Ill. 470. See also Lewis *v.* McGrath, 191 Ill. 401, 61 N. E. 135.

A wife cannot be charged with laches in declining to sue her husband (Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318) or in neglecting to proceed in a matter involving a charge of misconduct against him (Connar *v.* Leach, 84 Md. 571, 36 Atl. 591). But where wife and husband have separated and a divorce has been granted the wife is not excused from promptly asserting her property rights because of reliance on statements of the husband. Champion *v.* Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 180.

26. Avery *v.* Moore, 133 Ill. 74, 24 N. E. 606 [*affirming* 34 Ill. App. 115]; Middletown *v.* Newton Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191. A covenant that the grantor shall have any excess over a given amount in case of resale "at any time" creates an equity not staled by time. *In re* Hoerr, 31 Pittsb. Leg. J. N. S. 337.

27. Ascension Roman Catholic Church *v.* Texas, etc., R. Co., 41 Fed. 564.

28. Lonsdale Co. *v.* Woonsocket, 21 R. I. 498, 44 Atl. 929. See also Metropolitan Lumber Co. *v.* Lake Superior Ship Canal, etc., Co., 101 Mich. 577, 60 N. W. 278.

29. See *infra*, VIII, C, 3, d.

30. *Arkansas.*— Humphreys *v.* Butler, 51 Ark. 351, 11 S. W. 479; Wilson *v.* Anthony, 19 Ark. 16.

California.— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674.

Illinois.— Dawson *v.* Vickery, 150 Ill. 398, 37 N. E. 910; Borders *v.* Murphy, 78 Ill. 81; School Trustees *v.* Wright, 12 Ill. 432.

Maryland.— Dixon *v.* Dixon, 1 Md. Ch. 271.

Mississippi.— Patterson *v.* Ingraham, 23 Miss. 87.

Nebraska.— German Nat. Bank *v.* Hastings First Nat. Bank, 55 Nebr. 86, 75 N. W. 531.

New Jersey.— Ruckman *v.* Decker, 23 N. J. Eq. 283.

New York.— Fellers *v.* Lee, 2 Barb. 488.

See 19 Cent. Dig. tit. "Equity," §§ 245, 395.

Long after answering the bill defendant may not by amendment raise the defense. Thornton *v.* Houtze, 91 Ill. 199.

31. Snow *v.* Boston Blank-Book Mfg. Co., 153 Mass. 456, 26 N. E. 1116.

32. Stephens *v.* Martin, 85 Tenn. 278, 2 S. W. 206.

33. Coster *v.* Murray, 7 Johns. Ch. (N. Y.) 167.

34. Hall *v.* Fullerton, 69 Ill. 448; Zeigler *v.* Hughes, 55 Ill. 288.

ant need not plead it in his answer.[35] Contrary to the foregoing statements it is sometimes held that the question may be first raised on the hearing,[36] even on the court's own motion.[37] It is generally too late, however, to raise the question after a reference to a master and the filing of his report.[38] The defense cannot be first interposed on a bill of review.[39] It has been held that a defendant may not set up laches where he interposes a cross bill in respect to the same matters,[40] or where by answer he admits plaintiff's demand.[41]

E. Application of Statute of Limitations to Equity — 1. Introductory Statement. The application of statutes of limitations to equity causes presents questions which must be distinguished from although they are related to the doctrines of laches and stale demand.[42] At present there are in many jurisdictions statutes expressly applicable to causes in equity and their effect is simply a question of statutory construction.[43] The early statutes were not in terms applicable to equity;[44] but under them, and still, where no statute is in terms applicable, courts of equity nevertheless apply the rules established by statutes governing law actions, to matters within the concurrent jurisdiction, and to matters where an analogous right or remedy would be affected at law by the statute.[45] For the taking of this course different theories have been announced.[46]

2. Theory That Equity Acts in Obedience to Statute. A doctrine very forcibly announced by Lord Redesdale is that, although courts of equity are not within the words of the statutes of limitations, they are within their spirit and meaning, and act as to legal titles and demands, not by analogy, but in obedience to them. Therefore, wherever the legislature has limited a period for law proceedings, equity will in analogous cases consider itself bound by the same limitation.[47] This theory has received support in the United States as to matters within the concurrent jurisdiction.[48]

35. Hall *v.* Fullerton, 69 Ill. 448; De Witt *v.* Miller, 9 Tex. 239.

36. Haskell *v.* Bailey, 22 Conn. 569; Meredith *v.* Kennedy, Litt. Sel. Cas. (Ky.) 516; Cowan *v.* Price, 1 Bibb (Ky.) 173, 4 Am. Dec. 627; Potts *v.* Alexander, 118 Fed. 885; Woodmanse, etc., Mfg. Co. *v.* Williams, 68 Fed. 489, 15 C. C. A. 520; Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231; Pratt *v.* California Min. Co., 24 Fed. 869; Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394; Fisher *v.* Boody, 9 Fed. Cas. No. 4,814, 1 Curt. 206. But see Green *v.* Terwilliger, 56 Fed. 384.

Laches may be pleaded orally before the master when it is developed on presenting the claim before him. Blackwell *v.* Ace, 3 C. Pl. (Pa.) 177; Smith *v.* Steen, 38 S. C. 361, 16 S. E. 1003.

Where the statute expressly bars relief, the question may be raised on hearing. Robinson *v.* Lewis, 45 N. C. 58.

37. Crutchfield *v.* Hewett, 2 App. Cas. (D. C.) 373; Mayse *v.* Gaddis, 2 App. Cas. (D. C.) 20; Syester *v.* Brewer, 27 Md. 288; Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001; Chase *v.* Chase, 20 R. I. 202, 37 Atl. 804; Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806, 24 L. ed. 324; Johnson *v.* Florida Transit, etc., R. Co., 18 Fed. 821; Leavenworth County *v.* Chicago, etc., R. Co., 18 Fed. 209, 5 McCrary 508; London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

Unless laches clearly appears from the evidence the court should not so act. Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139.

Leave to intervene may be refused for laches without waiting for a plea. Gunderson *v.* Illinois Trust, etc., Bank, 100 Ill. App. 461.

38. Webb *v.* Fuller, 83 Me. 405, 22 Atl. 384. Where laches was pleaded and the court, without noticing the defense, referred the case for an accounting, defendants were not permitted to interpose it against the entry of a final decree eight years after the reference. Pingree *v.* Coffin, 12 Gray (Mass.) 288.

39. Putnam *v.* Day, 22 Wall. (U. S.) 60, 22 L. ed. 764. See also Roemmich *v.* Wamsganz, 8 Mo. App. 576.

40. Adams *v.* Taylor, 14 Ark. 62.

41. Allender *v.* Trinity Church, 3 Gill (Md.) 166; Putnam *v.* Day, 22 Wall. (U. S.) 60, 22 L. ed. 764.

42. See Calhoun *v.* Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248, dismissing an action for staleness, although brought within the statutory period for equitable actions.

43. See, generally, Limitation of Actions.

44. Hovenden *v.* Annesley, 2 Sch. & Lef. 630, 9 Rev. Rep. 119; Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 32 Eng. Reprint 921.

45. See the following subdivisions of this section.

46. See *infra*, IV, E, 2, 3.

47. Hovenden *v.* Annesley, 2 Sch. & Lef. 630, 9 Rev. Rep. 119. See also Foley *v.* Hill, 8 Jur. 347, 1 Phil. 399, 19 Eng. Ch. 399, 41 Eng. Reprint 683 [*affirmed* on other grounds in 2 H. L. Cas. 28, 9 Eng. Reprint 1002].

48. Teackle *v.* Gibson, 8 Md. 70; Hertle

3. Theory That Equity Acts in Analogy to Law. A more general theory, applicable to equitable as well as legal titles and demands, is that a court of equity is not bound by a statute not in terms applicable thereto, but will follow the analogy of such statute with reference to corresponding rights and remedies.[49] The denial of relief because of delay alone irrespective of existing state statutes[50] may sometimes be accounted for by the adoption of the rules of the English chancery, founded on the analogy of the statute of James I and subsequent statutes.[51]

4. Principles Governing Application of Statute. In cases within the concurrent jurisdiction the statute will be applied generally with equal force as at law.[52]

v. Schwartze, 3 Md. 366; Sindall *v.* Campbell, 7 Gill (Md.) 66; Watkins *v.* Harwood, 2 Gill & J. (Md.) 307; Ferson *v.* Sanger, 8 Fed. Cas. No. 4,752, 1 Woodb. & M. 138; Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212.

49. *Alabama.*— Vanderveer *v.* Ware, 65 Ala. 606; Byrd *v.* McDaniel, 33 Ala. 18; Askew *v.* Hooper, 28 Ala. 634; Nimmo *v.* Stewart, 21 Ala. 682; Humphres *v.* Terrell, 1 Ala. 650.

Arkansas.— Ringo *v.* Woodruff, 43 Ark. 469; Wilson *v.* Anthony, 19 Ark. 16.

Connecticut.— Budington *v.* Munson, 33 Conn. 481.

Delaware.— Dodd *v.* Wilson, 4 Del. Ch. 399.

District of Columbia.— Stansbury *v.* Inglehart, 20 D. C. 134; Willard *v.* Wood, 1 App. Cas. 44.

Georgia.— Keaton *v.* McGwier, 24 Ga. 217; McDonald *v.* Sims, 3 Ga. 383.

Illinois.— Hancock *v.* Harper, 86 Ill. 445; Sloan *v.* Graham, 85 Ill. 26; Castner *v.* Walrod, 83 Ill. 171, 25 Am. Rep. 369; Blanchard *v.* Williamson, 70 Ill. 647; Kane County *v.* Herrington, 50 Ill. 232; Gilbert *v.* Guptill, 34 Ill. 112; Harris *v.* Mills, 28 Ill. 44, 81 Am. Dec. 259; Palmer *v.* Wood, 48 Ill. App. 630; Gardner *v.* Watson, 18 Ill. App. 386; Simpson *v.* McPhail, 17 Ill. App. 499.

Indiana.— Barnes *v.* Born, 133 Ind. 169, 30 N. E. 509, 32 N. E. 833.

Iowa.— Harbour *v.* Rhinebart, 39 Iowa 672; Johnson *v.* Hopkins, 19 Iowa 49; Wright *v.* Leclaire, 3 Iowa 221.

Kentucky.— Frame *v.* Kenny, 2 A. K. Marsh. 145, 12 Am. Dec. 367.

Maryland.— Syester *v.* Brewer, 27 Md. 288; Knight *v.* Brawner, 14 Md. 1; Crawford *v.* Severson, 5 Gill 443.

Michigan.— Smith *v.* Blindbury, 66 Mich. 319, 33 N. W. 391; Smith *v.* Davidson, 40 Mich. 632.

Mississippi.— Hill *v.* Boyland, 40 Miss. 618; Mitchell *v.* Woodson, 37 Miss. 567; Goff *v.* Robins, 33 Miss. 153; Wood *v.* Ford, 29 Miss. 57.

Missouri.— Perry *v.* Craig, 3 Mo. 516.

New Jersey.— Dean *v.* Dean, 9 N. J. Eq. 425.

New York.— Clute *v.* Potter, 37 Barb. 199; Didier *v.* Davison, 2 Barb. Ch. 477 [*affirming* 2 Sandf. Ch. 61]; McCartee *v.* Camel, 1 Barb. Ch. 455.

North Carolina.— Leggett *v.* Coffield, 58 N. C. 382; Taylor *v.* McMurray, 58 N. C. 357; Mardre *v.* Leigh, 16 N. C. 360; Bell *v.* Beeman, 7 N. C. 273, 9 Am. Dec. 604.

Oregon.— Anderson *v.* Baxter, 4 Oreg. 105.

Pennsylvania.— Church *v.* Winton, 196 Pa. St. 107, 46 Atl. 363; Bickel's Appeal, 86 Pa. St. 204; Neely's Appeal, 85 Pa. St. 387; Todd's Appeal, 24 Pa. St. 429; Gettysburg Bank *v.* Thompson, 3 Grant 114; Fricke *v.* Magee, 10 Wkly. Notes Cas. 50.

Rhode Island.— Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001.

South Carolina.—Mobley *v.* Cureton, 2 S. C. 140; Smith *v.* Smith, McMull. Eq. 126; Prescott *v.* Hubbell, 1 Hill Eq. 210; Miller *v.* Mitchell, Bailey Eq. 437.

Tennessee.— Lafferty *v.* Conn, 3 Sneed 221.

Texas.— Glasscock *v.* Nelson, 26 Tex. 150; Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109; Campbell *v.* Houchin, (Civ. App. 1896) 35 S. W. 753.

Vermont.— Martin *v.* Bowker, 19 Vt. 526.

United States.— Hickox *v.* Elliott, 22 Fed. 13, 10 Sawy. 415; Johnson *v.* Florida Transit, etc., R. Co., 18 Fed. 821; Hall *v.* Russell, 11 Fed. Cas. No. 5,943, 3 Sawy. 506; Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139; Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212.

England.— Brooksbank *v.* Smith, 6 L. J. Exch. Eq. 34, 2 Y. & C. Exch. 58; Hodle *v.* Healey, 1 Ves. & B. 536, 6 Madd. 181, 22 Rev. Rep. 270, 35 Eng. Reprint 209; Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 32 Eng. Reprint 921.

See 19 Cent. Dig. tit. "Equity," § 242.

All the conditions required by statute must exist in order to invoke the analogy of the statute. Varick *v.* Edwards, Hoffm. (N. Y.) 382.

Trust or fraudulent concealment.— It has been said that the analogy of the statute will be followed in all cases except those of direct trust and fraudulent concealment of the cause of action. McLain *v.* Ferrell, 1 Swan (Tenn.) 48.

Federal courts of equity, while not bound by state statutes of limitations (see Courts, 11 Cyc. 900) will consider them in determining the question of laches. Potts *v.* Alexander, 118 Fed. 885; Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231. The analogy of the statute will not be applied in the case of boundary line between states. Rhode Island *v.* Massachusetts, 15 Pet. (U. S.) 233, 10 L. ed. 721.

50. See *supra*, IV, B, 2, a.

51. Reed *v.* Bullock, Litt. Sel. Cas. (Ky.) 510, 12 Am. Dec. 345.

52. *Alabama.*— Underhill *v.* Mobile F. Dept. Ins. Co., 67 Ala. 45; Crocker *v.*

In other cases, if there be a corresponding legal right, the analogy of the statute applicable thereto will be adopted,[53] and relief will be denied after expiration of the legal period unless special circumstances exist rendering such course inequitable.[54] On the other hand lapse of time short of the legal period of limitation will not bar relief,[55] unless unusnal circumstances require a departure from the

Clements, 23 Ala. 296; Gunn *v.* Brantley, 21 Ala. 633.

Arkansas.—Sullivan *v.* Hadley, 16 Ark. 129.

Connecticut.— Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253.

Illinois.— Richardson *v.* Gregory, 126 Ill. 166, 18 N. E. 777; Manning *v.* Warren, 17 Ill. 267.

Kentucky.— Breckinridge *v.* Churchill, 3 J. J. Marsh. 11.

Maryland.—Wilhelm *v.* Caylor, 32 Md. 151; Teackle *v.* Gibson, 8 Md. 70; Hertle *v.* Schwartze, 3 Md. 366; Sindall *v.* Campbell, 7 Gill 66; Tiernan *v.* Rescaniere, 10 Gill & J. 217.

Missouri.— Kelly *v.* Hurt, 74 Mo. 561.

New Jersey.— Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881; Somerset Bank *v.* Veghte, 42 N. J. Eq. 39, 6 Atl. 278.

New York.— Mann *v.* Fairchild, 3 Abb. Dec. 152, 2 Keyes 106; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103; Humbert *v.* Trinity Church, 7 Paige 195.

Pennsylvania.— U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31.

Tennessee.—Lafferty *v.* Turley, 3 Sneed 157; Shelby *v.* Shelby, Cooke 179, 5 Am. Dec. 686.

United States.— Godden *v.* Kimmell, 99 U. S. 201, 25 L. ed. 431; Carroll *v.* Green, 92 U. S. 509, 23 L. ed. 738; Nash *v.* Ingalls, 101 Fed. 645, 41 C. C. A. 545; Hall *v.* Russell, 11 Fed. Cas. No. 5,943, 3 Sawy. 506; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95; Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139; Sherwood *v.* Sutton, 21 Fed. Cas. No. 12,782, 5 Mason 143; Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212.

See 19 Cent. Dig. tit. "Equity," § 242.

53. *Alabama.*— Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369; Askew *v.* Hooper, 28 Ala. 634; Nimmo *v.* Stewart, 21 Ala. 682; Humphres *v.* Terrell, 1 Ala. 650.

Arkansas.— Meyer *v.* Johnson, 60 Ark. 50, 28 S. W. 797; Ringo *v.* Woodruff, 43 Ark. 469; Conway *v.* Kinsworthy, 21 Ark. 9.

Illinois.— Sloan *v.* Graham, 85 Ill. 26; Castner *v.* Wolrad, 83 Ill. 171, 25 Am. Rep. 369; Blanchard *v.* Williamson, 70 Ill. 647; Mechanics' Nat. Bank *v.* Colehour, 44 Ill. App. 470.

Indiana.— Dumont *v.* Dufore, 27 Ind. 263.

Kentucky.— Ewin *v.* Ware, 2 B. Mon. 65; Cravenson *v.* Meriwither, 2 A. K. Marsh. 154.

Maryland.— Dickey *v.* Permanent Land Co., 63 Md. 170; Wilhelm *v.* Caylor, 32 Md. 151; *In re* Mitchell, 21 Md. 585; Lingan *v.* Henderson, 1 Bland 236.

Massachusetts.— Ela *v.* Ela, 158 Mass. 54, 32 N. E. 957.

Mississippi.— Mandevill *v.* Lane, 28 Miss. 312.

New Jersey.— Arnett *v.* Finney, 41 N. J. Eq. 147, 3 Atl. 696.

New York.— Clute *v.* Potter, 37 Barb. 199.

Pennsylvania.— *In re* Ridgway, 206 Pa. St. 587, 56 Atl. 25; Gettysburg Bank *v.* Thompson, 3 Grant 114; Buchanan's Estate, 2 Chest. Co. Rep. 74.

South Carolina.— Miller *v.* Mitchell, Bailey Eq. 437.

Tennessee.— Bedford *v.* Brady, 10 Yerg. 350; Burdine *v.* Shelton, 10 Yerg. 41.

Texas.— Watson *v.* Texas, etc., Ry. Co., (Civ. App. 1903) 73 S. W. 830.

Virginia.— Drumright *v.* Hite, (1897) 26 S. E. 583; Hutcheson *v.* Grubbs, 80 Va. 251.

West Virginia.— Graham *v.* Graham, 16 W. Va. 598.

United States.— Hall *v.* Law, 102 U. S. 461, 26 L. ed. 217; U. S. Bank *v.* Daniel, 12 Pet. 32, 9 L. ed. 989; Miller *v.* McIntyre, 6 Pet. 61, 8 L. ed. 320; Lewis *v.* Marshall, 5 Pet. 470, 8 L. ed. 195; Elmendorf *v.* Taylor, 10 Wheat. 152, 6 L. ed. 289; Southern Pac. R. Co. *v.* Groeck, 68 Fed. 609; Scheftel *v.* Hays, 58 Fed. 457, 7 C. C. A. 308; Kinne *v.* Webb, 54 Fed. 34, 4 C. C. A. 170; Felix *v.* Patrick, 36 Fed. 457; Young *v.* Clarendon Tp., 26 Fed. 805; Taylor *v.* Holmes, 14 Fed. 498; Ferson *v.* Sanger, 8 Fed. Cas. No. 4,751, 2 Ware 256.

See 19 Cent. Dig. tit. "Equity," § 242.

54. *Connecticut.*— Crittendon *v.* Brainard, 2 Root 485.

District of Columbia.— Stansbury *v.* Inglehart, 20 D. C. 134.

Illinois.— Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587.

Maine.— Chapman *v.* Butler, 22 Me. 191.

Michigan.— Sheridan Tp. *v.* Hayes Tp., 62 Mich. 140, 28 N. W. 749; Sheridan Tp. *v.* Frost Tp., 62 Mich. 136, 28 N. W. 747.

South Carolina.— Kirkpatrick *v.* Atkinson, 11 Rich. Eq. 27.

United States.— Meath *v.* Phillips County, 108 U. S. 553, 2 S. Ct. 869, 27 L. ed. 819; Preston *v.* Preston, 95 U. S. 200, 24 L. ed. 494; Fogg *v.* St. Louis, etc., R. Co., 17 Fed. 871, 5 McCrary 449.

See 19 Cent. Dig. tit. "Equity," § 242.

55. *Alabama.*—Gulf Red Cedar Co. *v.* Crenshaw, 138 Ala. 134, 35 So. 50; Montgomery First Nat. Bank *v.* Nelson, 106 Ala. 535, 18 So. 154; Chapman *v.* Lee, 64 Ala. 483.

Connecticut.— Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240.

District of Columbia.— Washington L. & T. Co. *v.* Darling, 21 App. Cas. 132.

Illinois.— Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 454.

Indiana.— Murphy *v.* Blair, 12 Ind. 184.

Iowa.— Cotton *v.* Wood, 25 Iowa 43.

Kentucky.— Weaver *v.* Froman, 6 J. J. Marsh. 213.

rule.[56] When suit is brought within the time fixed by the analogous statute the burden is on defendant to show the existence of circumstances amounting to laches; when the suit is brought after the statutory time plaintiff must plead and prove that laches does not exist,[57] and the facts must be specifically and precisely pleaded.[58] The general rule extends only to rights and remedies corresponding to those at law affected by the statute, and will not be extended to purely equitable demands presenting no analogy,[59] even where a legal remedy, but one entirely distinct in character, has been barred.[60] In adopting and applying the statute courts of equity recognize the same exceptions as courts of law,[61] but are not confined thereto, and may for equitable reasons add others.[62] The suing out of the subpœna to appear and answer and not the filing of the bill is

Maryland.— Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306.

Nebraska.— Michigan Trust Co. *v.* Red Cloud, 3 Nebr. (Unoff.) 722, 92 N. W. 900.

New Jersey.— Lilliendahl *v.* Stegmair, 45 N. J. Eq. 648, 18 Atl. 216.

New York.— Brush *v.* Manhattan R. Co., 13 N. Y. Suppl. 908.

Ohio.— Larrowe *v.* Beam, 10 Ohio 498; Fahs *v.* Taylor, 10 Ohio 104; Piatt *v.* St. Clair, Wright 526.

South Carolina.—Steinmeyer *v.* Steinmeyer, 55 S. C. 9, 33 S. E. 15.

Tennessee.— Bains *v.* Perry, 1 Lea 37.

Virginia.— Gibson *v.* Green, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888; Cole *v.* Ballard, 78 Va. 139.

Wyoming.— Bliler *v.* Boswell, 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867.

United States.— Florida Mortg., etc., Co. *v.* Finlayson, 91 Fed. 13, 33 C. C. A. 307; Jonathan Mills Mfg. Co. *v.* Whitehurst, 60 Fed. 81; Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

See 19 Cent. Dig. tit. "Equity," § 242.

Set-off.— Where an action for money had and received would lie free from statutory bar the demand may be interposed by cross bill as a set-off. Gordon *v.* Johnson, 186 Ill. 18, 57 N. E. 790 [*reversing* 79 Ill. App. 423].

56. *Iowa.*— Light *v.* West, 42 Iowa 138.

Maryland.— Hagerty *v.* Mann, 56 Md. 522.

New Jersey.— Herbert *v.* Herbert, 47 N. J. Eq. 11, 20 Atl. 290.

South Carolina.— McGee *v.* Hall, 26 S. C. 179, 1 S. E. 711; Gist *v.* Cattell, 2 Desauss. 53.

Virginia.— Houck *v.* Dunham, 92 Va. 211, 23 S. E. 238.

United States.— Wyman *v.* Bowman, 127 Fed. 257, 62 C. C. A. 189; Ide *v.* Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Williamson *v.* Monroe, 101 Fed. 322; Ritchie *v.* Sayers, 100 Fed. 520; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; Etting *v.* Marx, 4 Fed. 673, 4 Hughes 312.

See 19 Cent. Dig. tit. "Equity," § 242.

Each case is governed by its own circumstances, which may require the denial of relief when less time has run than would be required to bar an analogous legal remedy. Stansbury *v.* Inglehart, 20 D. C. 134; Patterson *v.* Hewitt, (N. M. 1901) 66 Pac. 552, 55 L. R. A. 658.

57. Wyman *v.* Bowman, 127 Fed. 257, 62 C. C. A. 189; Boynton *v.* Haggart, 120 Fed. 819, 57 C. C. A. 301; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14. See also Murto *v.* Lemon, (Colo. App. 1903) 75 Pac. 160.

58. Stearns *v.* Page, 7 How. (U. S.) 819, 12 L. ed. 928.

59. Kirksey *v.* Keith, 11 Rich. Eq. (S. C.) 33; Singleton *v.* Moore, Rice Eq. (S. C.) 110. A claim barred by statute will not be extended in favor of one seeking subrogation thereto. Darrow *v.* Summerhill, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833.

60. Equity may enforce a security for a debt, although an action at law for the recovery of such debt is barred. Hickox *v.* Elliott, 22 Fed. 13, 10 Sawy. 415. See also Belknap *v.* Gleason, 11 Conn. 160, 27 Am. Dec. 721.

61. *Alabama.*— Crocker *v.* Clements, 23 Ala. 296.

Delaware.— Perkins *v.* Cartmell, 4 Harr. 270, 42 Am. Dec. 753.

South Carolina.— Mobley *v.* Cureton, 2 S. C. 140.

Texas.— Reed *v.* West, 47 Tex. 240.

West Virginia.— Newberger *v.* Wells, 51 W. Va. 624, 42 S. E. 625.

See 19 Cent. Dig. tit. "Equity," § 242.

62. Ashley *v.* Denton, 1 Litt. (Ky.) 86.

Fraud and mistake.— The exclusion in computing delay of the time preceding the discovery of a fraud (see *supra*, IV, C, 4, b) is sometimes treated as an equitable exception to the operation of the statute of limitations, the analogy of which is followed, but time computed only from discovery. Gates *v.* Jacob, 1 B. Mon. 306; Thompson *v.* Blair, 7 N. C. 583; Longworth *v.* Hunt, 11 Ohio St. 194; Prescott *v.* Hubbell, 1 Hill Eq. 210; Moore *v.* Greene, 17 Fed. Cas. No. 9,763, 2 Curt. 202 [*affirmed* in 19 How. 69, 15 L. ed. 533]. But see Michoud *v.* Girod, 4 How. 503, 11 L. ed. 1076. The same doctrine has been applied in cases of mistake. Gates *v.* Jacob, 1 B. Mon. (Ky.) 306; Ormsby *v.* Longworth, 11 Ohio St. 653.

Ignorance of facts caused by plaintiff's living in a wild and remote region will not entitle him to sue in equity where ejectment would be barred by adverse possession (Rudland *v.* Mastic, 77 Fed. 688), nor will ignorance of legal right stay the running of the statute (Adams *v.* Guerard, 29 Ga. 651, 76 Am. Dec. 624).

regarded as the commencement of the suit and stays the further running of the statute of limitations.[63]

5. RELIEF AGAINST STATUTE. As equity itself recognizes and applies the statute of limitations, the fact that the statute would bar a remedy at law is no ground in itself for applying to equity for relief,[64] unless plaintiff was prevented from suing by the act of defendant himself.[65]

V. PARTIES.

A. Fundamental Rules — 1. ALL PERSONS INTERESTED SHOULD BE PARTIES. The fundamental rule as to parties to suits in equity is that however numerous they may be, all persons interested in the subject of the suit and its results should be made parties.[66] The reason for the rule is the aim of a court of equity to do

63. Pindell *v.* Maydwell, 7 B. Mon. (Ky.) 314. Where after limitations had expired, actions at law begun prior to that time were consolidated into one suit in equity, it was held that plaintiff's claim was barred only as to those defendants who were first made parties by the bill in equity. Smith *v.* Butler, 176 Mass. 38, 57 N. E. 322.

64. Hays *v.* Urquhart, 63 Ga. 323; Heath *v.* Jones, 12 Ill. App. 493; Pendleton *v.* Taylor, 77 Va. 580.

Where a statute expressly applies to equity, a defendant will not be enjoined from pleading it in a law action because of the existence of an impediment to the action, practical, but not legal, in character. Chemical Nat. Bank *v.* Kissane, 32 Fed. 429, 13 Sawy. 20; Norris *v.* Haggin, 28 Fed. 275.

65. Lamb *v.* Martin, 43 N. J. Eq. 34, 9 Atl. 747; Lyon *v.* Lyon, 43 N. C. 201.

Frequent promises to pay whereby plaintiff was induced to defer suit do not justify an appeal to equity after the statute has run. Nelson *v.* Hamner, 84 Va. 909, 6 S. E. 462.

Fraud, collateral merely to the cause of action, will not base jurisdiction in equity after the statute has run. Jaffrey *v.* Bear, 42 Fed. 569. Averments of fraud inserted in a bill to invoke an exception provided by the statute will not give jurisdiction on the ground of fraud over a legal cause of action. Gaines *v.* Miller, 111 U. S. 395, 4 S. Ct. 426, 28 L. ed. 466.

66. *California.*— Wilson *v.* Castro, 31 Cal. 420.

Delaware.— Farmers', etc., Bank *v.* Polk, 1 Del. Ch. 167.

Florida.— Robinson *v.* Howe, 35 Fla. 73, 17 So. 368.

Georgia.— Blaisdell *v.* Bohr, 68 Ga. 56; Elam *v.* Garrard, 25 Ga. 557; Gilmore *v.* Johnston, 14 Ga. 683; Carey *v.* Hoxey, 11 Ga. 645; Jackson *v.* Waters, 10 Ga. 546.

Illinois.—Atkins *v.* Billings, 72 Ill. 597; Hopkins *v.* Roseclare Lead Co., 72 Ill. 373; Sherlock *v.* Winnetka, 59 Ill. 389; Bonner *v.* Peterson, 44 Ill. 253; Prentice *v.* Kimball, 19 Ill. 320; Whitney *v.* Mayo, 15 Ill. 251; Bonham *v.* Galloway, 13 Ill. 68; Skiles *v.* Switzer, 11 Ill. 533; Bruff *v.* Leder, 10 Ill. 210; Gilham *v.* Cairns, 1 Ill. 164; Zelle *v.* Workingmen's Banking Co., 10 Ill. App. 335.

Indiana.— Park *v.* Ballentine, 6 Blackf. 223.

Kentucky.— Williams *v.* Hall, 7 B. Mon. 295; Duncan *v.* Mizner, 4 J. J. Marsh. 443; Oldham *v.* Rowan, 3 Bibb 534.

Maine.— Morse *v.* Machias Water Power, etc., Co., 42 Me. 119.

Massachusetts.— Cassidy *v.* Shimmin, 122 Mass. 406.

New Hampshire.— Busby *v.* Littlefield, 31 N. H. 193.

Pennsylvania.— Petitt *v.* Baird, 10 Phila. 57; Scholl *v.* Schoener, 1 Woodw. 200.

South Carolina.— Neely *v.* Anderson, 2 Strobh. Eq. 262.

Texas.— Hall *v.* Hall, 11 Tex. 526; Connell *v.* Chandler, 11 Tex. 249.

Vermont.— McConnell *v.* McConnell, 11 Vt. 290.

Virginia.— Meek *v.* Spracher, 83 Va. 162, 12 S. E. 397.

West Virginia.— Rexroad *v.* McQuain, 24 W. Va. 32; Hill *v.* Proctor, 10 W. Va. 59.

United States.— Bland *v.* Fleeman, 29 Fed. 669; Bunce *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 481; Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,990, 1 Sawy. 685; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

England.— Poore *v.* Clarke, 2 Atk. 515, 26 Eng. Reprint 710; Palk *v.* Clinton, 12 Ves. Jr. 48, 8 Rev. Rep. 283, 33 Eng. Reprint 19; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

See 19 Cent. Dig. tit. "Equity," § 247.

No more than a court of law can a court of equity dispense with proper parties (Davidson *v.* Potts, 42 N. C. 272), and an agreement by persons not parties for the carrying out of a decree and disposing of the subject-matter, while it might dispense with the necessity of pleadings, cannot dispense with making proper parties (Cowles *v.* Andrews, 39 Ala. 125).

All defendants should be before the court, in order to authorize the court to dispose of a case as to one defendant. Moseby *v.* Lewis, 4 Litt. (Ky.) 159; Payne *v.* Wallace, 2 A. K. Marsh. (Ky.) 244.

The codes have not substantially changed the rule stated in the text. Sherman *v.* Parish, 53 N. Y. 483; Hubbard *v.* Eames, 22

complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order perfectly safe to those who have to obey it, and to prevent further litigation.[67]

2. Interest Must Be Material. One should not be made a party who has no material, subsisting interest in the subject-matter or controversy.[68] Thus it is not necessary to make a party one whose interest is nominal only,[69] or one whose connection with the controversy is merely as agent of another, without personal interest, and against whom no relief is sought.[70] So too one should not be made a party because of past interests or connection with the transaction out of which the controversy arises, when he is without interest in the present subject-matter.[71] And although one may have an interest in the subject-matter, he should not be joined if his rights are entirely separate, distinct, and unrelated to those involved in the particular controversy.[72] The interest of each party must be made to

Barb. (N. Y.) 597; Turner *v.* Conant, 18 Abb. N. Cas. (N. Y.) 160.

67. Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 108 Ill. App. 54; Caldwell *v.* Taggart, 4 Pet. (U. S.) 190, 7 L. ed. 828; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181; 1 Daniel Ch. Pl. & Pr. 284; 1 Mitford Ch. Pl. 144; Story Eq. Pl. § 76. See also Montgomery *v.* Brown, 7 Ill. 581; Green *v.* Milbank, 3 Abb. N. Cas. (N. Y.) 138; Vanhorn *v.* Duckworth, 42 N. C. 261; Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200; Mandeville *v.* Riggs, 2 Pet. (U. S.) 482, 7 L. ed. 493 [*reversing* 20 Fed. Cas. No. 11,831, 3 Cranch C. C. 183], Story, J., delivering the opinion of the court.

68. *Alabama.*—Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604.

Arkansas.— Fry *v.* Street, 37 Ark. 39.

Connecticut.— Giddings *v.* Emerson, 24 Conn. 538.

Kentucky.— Neal *v.* Keele, 2 T. B. Mon. 31.

Maryland.— Wright *v.* Santa Clara Min. Assoc., 12 Md. 443; Peters *v.* Van Lear, 4 Gill 249.

New York.— Reid *v.* Vanderheyden, 5 Cow. 719.

North Carolina.— Reeves *v.* Adams, 17 N. C. 192.

Wisconsin.— Roller *v.* Spilmore, 13 Wis. 26.

United States.— Kerr *v.* Watts, 6 Wheat. 550, 5 L. ed. 328; Georgia Cent. R., etc., Co. *v.* Farmers' L. & T. Co., 112 Fed. 81 [*affirmed* without reference to parties in 114 Fed. 263, 52 C. C. A. 149].

See 19 Cent. Dig. tit. "Equity," § 248.

On bill to annul deeds to third persons which defendant had fraudulently induced plaintiff to deliver to him, the third persons, although grantees named in the deeds, are not necessary parties when they have not received the deeds and had no part in the transaction. Radcliff *v.* Noyes, 43 Ill. 318.

Party omitted in amended bill.— Where a defendant to the original bill was not made a party to an amended bill, it was held proper to proceed to decree without him where the court could see that he had no interest in the subject-matter of the litigation. La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420.

69. Baker *v.* Rowan, 2 Stew. & P. (Ala.) 361; Lang *v.* Brown, 29 Ga. 628.

70. Kenan *v.* Miller, 2 Ga. 325; Hopson *v.* Harrell, 56 Miss. 202; Garr *v.* Bright, 1 Barb. Ch. (N. Y.) 157; Donovan *v.* Campion, 85 Fed. 71, 29 C. C. A. 30. Such an agent should not be made a party unless charged with fraud in the transaction. Kenan *v.* Miller, *supra*; Lyon *v.* Tevis, 8 Iowa 79. Where plaintiff's agent deposited plaintiff's funds in a bank, and the bank applied them in payment of the agent's debt, it was held that the agent was a necessary party to a suit against the bank for the money, but that on decree, when no right or liability appeared in the agent, it was proper to dismiss him. Union Stock Yards Nat. Bank *v.* Moore, 79 Fed. 705, 25 C. C. A. 150.

71. To a bill to compel distribution of moneys collected by a sheriff in satisfaction of a judgment, the judgment debtor need not be a party. Claflin *v.* Doggett, 3 Colo. 413. The heirs of one from whom both parties derive title need not be parties to a suit to determine the rights of the parties. Hanly *v.* Blackford, 1 Dana (Ky.) 1, 25 Am. Dec. 114. But see Smith *v.* Shane, 22 Fed. Cas. No. 13,105, 1 McLean 22. A suit to set aside a deed, given in consideration of the grantee's supporting the grantor, having been settled, by a third person's taking a conveyance from the grantee and agreeing himself to support plaintiff, the original grantee was not a proper party to a suit brought against the third person to set aside the settlement, plaintiff offering to repay such third person what he had paid the grantor. Kinney *v.* Kinney, 94 Iowa 672, 63 N. W. 452.

72. *Alabama.*— Jones *v.* Caldwell, 116 Ala. 364, 22 So. 456.

Arkansas.— State *v.* Turner, 49 Ark. 311, 5 S. W. 302.

Georgia.— Gilbert *v.* Thomas, 3 Ga. 575.

Iowa.— Barnes *v.* Anderson, 19 Iowa 70.

Kentucky.— Lytle *v.* Breckenridge, 3 J. J. Marsh. 663.

United States.— Rothwell *v.* Dewees, 2 Black 613, 17 L. ed. 309.

See 19 Cent. Dig. tit. "Equity," §§ 260–264.

A bill is multifarious where persons are

appear from the bill,[73] and it is the right of each litigant to insist upon a dismissal of all who have no interest.[74]

3. Interest Must Be Such That It May Be Affected by the Decree. It has been said that the interest required to make one a party must be in the object rather than in the subject of the suit,[75] and that one is not a proper party to a suit, although he may be interested in the subject-matter, if the decree to be rendered cannot affect such interest.[76] While it is doubtless true that one not affected by the decree is not a necessary party,[77] it will be seen hereafter that one may often be joined with propriety whom the decree will affect very indirectly.[78]

B. Classification of Parties. It is obvious that the application of the fundamental rule requiring the joinder of all persons interested[79] depends upon the nature and extent of the controversy presented by the bill, the subject-matter, and the relief sought. As it is founded upon the aim of equity to determine the whole controversy in one suit,[80] and as this object is one of practical convenience and yields to considerations of superior weight,[81] it is equally obvious that by extending or narrowing the scope of the controversy or even the claim for relief, the application of the rule may be considerably varied. This feature leads to the generally adopted classification of parties as necessary and proper parties. It has, however, been pointed out that much confusion has arisen in the use of these terms.[82] It is submitted that this confusion arises from the fact that the principles just stated give rise to three rather than two classes of parties: (1) Those whose interest is of such a nature that no final decree can be made without affecting that interest; (2) those whose interest is such that they ought to be parties in order to a complete determination of the controversy presented by the bill, but still of such a character that an effective decree of some kind may be rendered without affecting that interest; (3) those not interested in the controversy between the immediate litigants, but having an interest in the subject-matter which may be conveniently settled in the suit.[83] Without all of those of the first class before it the court is powerless to proceed; without all of those of the second class it will refuse to proceed unless it is impracticable to bring them all in; the joinder or omission of those of the third class is optional with plaintiff.[84] The second class is made up therefore of parties generally necessary, and it seems that the usual terminology may be reconciled with the logic of the situation by considering necessary parties as embracing two subclasses: indispensable parties, being those of the

joined who have unrelated interests, and the subject is treated in detail *infra*, VII, G.

73. Beall *v.* Blake, 16 Ga. 119; Pease *v.* Sandusky Steamboat Co., 1 Ohio Dec. (Reprint) 150, 2 West. L. J. 550.

A demurrer for want of parties does not lie when all are parties whom the bill shows to have an interest. Shotwell *v.* Taliaferro, 25 Miss. 105.

74. Johnson *v.* Miller, 55 Ill. App. 168.

75. Michigan State Bank *v.* Gardner, 3 Gray (Mass.) 305.

76. Peay *v.* Wright, 22 Ark. 198; Hirsch *v.* Adler, 21 Ark. 338; Gossett *v.* Kent, 19 Ark. 602; Crocker *v.* Higgins, 7 Conn. 342.

Application of rule.— In a bill to set aside a deed and for an accounting, one conceded to be a *bona fide* purchaser is not a proper party. Linnell *v.* Lyford, 72 Me. 280. Where new defendants are brought in by bill in the nature of a supplemental bill, the original defendant should not be made a party, if the decree against the new defendants will not affect his interest. Chase *v.* Searles, 45 N. H. 511. In a suit for an accounting of rents, it is improper to join a tenant whose term must expire during a period in which it is conceded the defendant is entitled to the rents. Covenhoven *v.* Shuler, 2 Paige (N. Y.) 122, 21 Am. Dec. 73. Where one's interest arises out of a collateral liability only, he is not a proper party, even though the decree may be evidence against him in a future controversy. Austin *v.* Richardson, 1 Gratt. (Va.) 310. But see *infra*, V, C, 2, h.

77. See *infra*, V, C, 2, a.

78. See *infra*, V, D.

79. See *supra*, V, A, 1.

80. See *supra*, V, A, 1.

81. See *supra*, II, C; III, C.

82. Pomeroy Rem. & Rem. Rights, § 329.

83. Minnesota *v.* Northern Securities Co., 184 U. S. 199, 22 S. Ct. 308, 46 L. ed. 499; Kendig *v.* Dean, 97 U. S. 423, 24 L. ed. 1061; Williams *v.* Bankhead, 19 Wall. (U. S.) 563, 22 L. ed. 184; Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; Chadbourne *v.* Coe, 51 Fed. 479, 2 C. C. A. 327. See also Russell *v.* Clark, 7 Cranch (U. S.) 69, 3 L. ed. 271.

84. See cases cited in the last note.

first class, and dispensable parties, being those of the second class; and by applying the term "proper parties" to the third class.[85]

C. Necessary Parties — 1. Definition. Necessary parties, as the term is here used,[86] are those who have an interest in the controversy presented by the bill, and whose presence is requisite to a complete adjudication of that controversy, whether or not it is practicable to render a decree partly adjudicating the controversy, without affecting their interests.[87]

2. What Interests Render a Party Necessary — a. Those and Those Only to Be Affected by the Decree. No person is a necessary party to a suit in equity, although he may have an interest in the subject-matter, if such interest cannot be affected by the decree.[88] Therefore the object rather than the subject of the suit must be looked to, and only those are necessary parties whose rights are involved in the purpose of the bill.[89] Therefore also the prayer for relief is important in determining the requisite parties, as one need not be made a party against whom no relief is demanded, provided his rights will not necessarily be affected.[90] It follows that where others are not thereby affected, plaintiff may

85. The federal cases cited *supra*, note 83, use the terms "indispensable," "necessary," and "formal," as applied to the three classes respectively. This use of the term "necessary," as applied to a class styled by some writers "proper," as distinguished from "necessary" (Pomeroy Rem. & Rem. Rights, § 329), is manifestly confusing; while the term "formal" is likely to lead to a misconception of the relations of parties of the third class to the subject-matter. Hence the terminology adopted.

86. See *supra*, V, B.

87. Minnesota *v.* Northern Securities Co., 184 U. S. 199, 22 S. Ct. 308, 46 L. ed. 499; Kendig *v.* Dean, 97 U. S. 423, 24 L. ed. 1061; Williams *v.* Bankhead, 19 Wall. (U. S.) 563, 22 L. ed. 184; Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; Shields *v.* Barrow, 17 How. (U. S.) 130, 15 L. ed. 158.

88. *Alabama.*— Wilkinson *v.* May, 69 Ala. 33.

Kentucky.— Martin *v.* Letty, 18 B. Mon. 573; Wickliffe *v.* Lee, 4 Dana 30; Todd *v.* Sterrett, 6 J. J. Marsh. 425; Lee *v.* Colston, 5 T. B. Mon. 238.

Massachusetts.— Williams *v.* Russell, 19 Pick. 162.

Michigan.— Taylor *v.* Snyder, Walk. 490.

Missouri.— Mayberry *v.* McClurg, 51 Mo. 256.

New Jersey.— Fletcher *v.* Newark Telephone Co., 55 N. J. Eq. 47, 35 Atl. 903.

New York.— Lester *v.* Seilliere, 50 N. Y. App. Div. 239, 63 N. Y. Suppl. 748; Commercial Bank *v.* Meach, 7 Paige 448.

North Carolina.— Ferguson *v.* Hass, 62 N. C. 113.

Rhode Island.— Dennis *v.* Perry, 12 R. I. 540.

Tennessee.— Saunders *v.* Stallings, 5 Heisk. 65.

Virginia.— Wills *v.* Dunn, 5 Gratt. 384; McCandlish *v.* Edloe, 3 Gratt. 330.

West Virginia.— Hunter *v.* Robinson, 5 W. Va. 272.

United States.— Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73; Society for Propagation, etc. *v.* Hartland, 22 Fed. Cas. No. 13,155, 2 Paine 536; Van Bokkelen *v.* Cook, 28 Fed. Cas. No. 16,831, 5 Sawy. 587; Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,871, 1 Gall. 371.

England.— Smith *v.* Snow, 3 Madd. 10, 18 Rev. Rep. 186; Wych *v.* Meal, 3 P. Wms. 310, 24 Eng. Reprint 1078; Le Texier *v.* Anspach, 15 Ves. Jr. 159, 33 Eng. Reprint 714.

See 19 Cent. Dig. tit. "Equity," §§ 247–250.

89. *Kentucky.*—Talbot *v.* Darnall, 6 B. Mon. 486.

Massachusetts.— Pratt *v.* Boston, etc., R. Co., 126 Mass. 443.

Minnesota.— Smith *v.* Glover, 44 Minn. 260, 46 N. W. 406.

New Jersey.— Cubberly *v.* Cubberly, 33 N. J. Eq. 82 [*affirmed* in 33 N. J. Eq. 591].

Vermont.— Hall *v.* Dana, 2 Aik. 381.

United States.— McKee *v.* Lamon, 159 U. S. 317, 16 S. Ct. 11, 40 L. ed. 165. See also Cooley *v.* Scarlett, 38 Ill. 316, 87 Am. Dec. 298; Crosby *v.* Berger, 3 Edw. (N. Y.) 538; Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018 [*reversing* 28 Fed. Cas. No. 16,907, 3 Story 611]; Hamilton *v.* Savannah, etc., R. Co., 49 Fed. 412.

See 19 Cent. Dig. tit. "Equity," §§ 247–250.

Application of rule.— A bill to apportion between two landowners charges for water furnished to a common lessee need not make the lessee a party, where he is not liable for the charges. Lester *v.* Seilliere, 50 N. Y. App. Div. 239, 63 N. Y. Suppl. 748.

90. Mullins *v.* McCandless, 57 N. C. 425; Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73; Conery *v.* Sweeney, 81 Fed. 14, 26 C. C. A. 309; Society for Propagation, etc. *v.* Hartland, 22 Fed. Cas. No. 13,155, 2 Paine 536; Van Bokkelen *v.* Cook, 28 Fed. Cas. No. 16,831, 5 Sawy. 587. But there is a want of necessary parties where it appears that other persons have a direct interest which will be affected by the decree, although no relief is prayed against them. Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., St. R. Co., 7 Northam. Co. Rep. (Pa.) 194.

Amended bill.— Where parties are before

dispense with a party otherwise necessary, by waiving his claim against him.[91] As a consequence of the rule one who has already performed all that could be obtained by the decree and who will not be affected by the completion of the relief as against others need not be joined.[92] It has been held that a public officer, bound to obey the mandates of the court, is not a necessary party to a proceeding looking to an order directing his official acts, no personal relief being sought against him.[93] An exception has been indicated to the general rule in the case of persons brought in for the protection of other defendants;[94] but the exception is not a real one, as the very object in such a case is that the decree may bind and so affect them.[95] The converse of the rule of course holds, and all persons whose rights may be affected by the decree are necessary parties.[96]

b. Owners and Claimants of Property in Controversy. It is of course impossible to divest or destroy a title by suit in which the holder of the title attacked is not a party.[97] Therefore, where the decree is to affect a title, all holding or claiming such title must be brought in.[98] Where the object of the

the court on the original bill, they need not be made parties to an amended bill, if no relief is sought against them. Beckham *v.* Duncan, (Va. 1888) 5 S. E. 690.

91. Bull *v.* Bell, 4 Wis. 54; Pawlet *v.* Lincoln, 2 Atk. 296, 26 Eng. Reprint 581; Northey *v.* Northey, 2 Atk. 77, 26 Eng. Reprint 447; Williams *v.* Williams, 9 Mod. 299. But plaintiff cannot avoid the necessity of bringing in a party, by waiving his claim against him, where the presence of such party is necessary to avoid the necessity of future litigation between him and defendant. Dart *v.* Palmer, 1 Barb. Ch. (N. Y.) 92.

92. In a suit against one of several heirs to compel a conveyance, his coheirs who have already been compelled to convey by decree of another court are not necessary parties. Chiles *v.* Boon, 3 B. Mon. (Ky.) 82. Pending a proceeding to determine title to land, the United States condemned the land and paid the money into the registry of the court; to an amended complaint to obtain the money so paid in the United States was not a necessary party. Long *v.* Eisenbeis, 23 Wash. 556, 63 Pac. 249. See also Chesnut *v.* Fire & M. Ins. Co., 2 Hill Eq. (S. C.) 72.

93. Montgomery *v.* Whitworth, 1 Tenn. Ch. 174. See also Charron *v.* Boswell, 18 Gratt. (Va.) 216.

94. Williams *v.* Russell, 19 Pick. (Mass.) 162.

95. See *infra*, V, C, 2, h.

96. *Alabama.*— Mobile Land Imp. Co. *v.* Gass, 129 Ala. 214, 29 So. 920; Thompson *v.* Thompson, 107 Ala. 163, 18 So. 247; Mobile Branch Bank *v.* Tillman, 10 Ala. 149.

Illinois.— Bonner *v.* Peterson, 44 Ill. 253; McDowell *v.* Cochran, 11 Ill. 31; Gillett *v.* Hickling, 16 Ill. App. 392.

Kentucky.—Atterberry *v.* Knox, 8 Dana 282.

Missouri.— Judy *v.* Farmers, etc., Bank, 70 Mo. 407.

New Jersey.— Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505.

New York.— Cunningham *v.* Pell, 5 Paige 607; Warner *v.* Paine, 3 Barb. Ch. 630.

North Carolina.— Murphy *v.* Jackson, 58 N. C. 11.

Oregon.— Wheeler *v.* Lack, 37 Oreg. 238, 61 Pac. 849.

Pennsylvania.— Petitt *v.* Baird, 10 Phila. 57.

South Carolina.— Earle *v.* Groce, 37 S. C. 560, 16 S. E. 428.

Tennessee.— Williams *v.* Conrad, 11 Humphr. 412.

West Virginia.— Sommerville *v.* Sommerville, 26 W. Va. 484; Watson *v.* Pack, 3 W. Va. 154.

United States.— New Orleans Water-Works Co. *v.* New Orleans, 164 U. S. 471, 17 S. Ct. 161, 41 L. ed. 518; Ward *v.* San Diego Land, etc., Co., 79 Fed. 665; Consolidated Water Co. *v.* Babcock, 76 Fed. 243; Maynard *v.* Tilden, 28 Fed. 688.

See 19 Cent. Dig. tit. "Equity," §§ 247–250.

To a bill against a debtor's debtor, the former debtor should be made a party in order that an account may be taken. U. S. *v.* Howland, 4 Wheat. (U. S.) 108, 4 L. ed. 526.

97. See *infra*, V, C, 3.

98. *Arkansas.*— Theurer *v.* Brogan, 41 Ark. 88.

Florida.— Brown *v.* Solary, 37 Fla. 102, 19 So. 161.

Illinois.— Moore *v.* Munn, 69 Ill. 591; Seymour *v.* Edwards, 31 Ill. App. 50.

Iowa.— Palmer *v.* Blair, 25 Iowa 230.

Kentucky.— Triplett *v.* Gill, 7 J. J. Marsh. 432; Roberts *v.* Elliott, 3 T. B. Mon. 395; Steele *v.* Lewis, 1 T. B. Mon. 43.

Massachusetts.— Wall *v.* Mason, 102 Mass. 313.

Mississippi.— Phipps *v.* Tarpley, 24 Miss. 597.

New Hampshire.— Brooks *v.* Fowle, 14 N. H. 248.

New York.— Ostrander *v.* Livingston, 3 Barb. Ch. 416.

Pennsylvania.— Gloninger *v.* Hazard, 42 Pa. St. 389.

Texas.— Cotton *v.* Coit, 88 Tex. 414, 31 S. W. 1061.

See 19 Cent. Dig. tit. "Equity," §§ 249, 252.

All persons having a beneficial interest in the lands which are the subject-matter of the

suit is to procure a sale of land, it is equally necessary to make the holders of all interests parties in order to convey the complete title.[99] In suits, the object of which is a decree affecting the right or title to personal property, it is likewise necessary to have before the court all who claim an interest in such property.[1]

e. Claimants of Funds. Where the object of the bill is to distribute a fund or to recover a portion of a fund in which others are interested, all persons having an interest in the fund are necessary parties,[2] at least where the part of

suit should be made parties. McIlvoy *v.* Alsop, 45 Miss. 365; Cotton *v.* Coit, 88 Tex. 414, 31 S. W. 1061.

Cotenants.— All tenants in common must be parties to a suit to adjust the title (Bodley *v.* Ross, 3 A. K. Marsh. (Ky.) 622; Pope *v.* Melone, 2 A. K. Marsh. (Ky.) 239), and also joint tenants (Hoy *v.* McMurry, 1 Litt. (Ky.) 364).

Remainder-men, as well as the tenant for life, should be parties to suits affecting the fee (Stevens *v.* Terrel, 3 T. B. Mon. (Ky.) 131; McDaniel *v.* Self, 8 Humphr. (Tenn.) 58), but not where the remainder is contingent (Baylor *v.* Dejarnette, 13 Gratt. (Va.) 152).

One claiming under title prior to that sought to be enforced need not be made a party. Frye *v.* State Bank, 11 Ill. 367.

Party perhaps interested.— A bill alleging that the legal title sought to be subjected to plaintiff's equity was believed to be in A, but if not in him, then it was in B, must make B a party. Spears v. Cheatham, 44 Miss. 64.

99. *Illinois.*— Ridgeway *v.* Underwood, 67 Ill. 419.

Kentucky.— Riley *v.* Wiley, 3 Dana 75; Steel *v.* Steel, 4 J. J. Marsh. 231.

Mississippi.— Whitney *v.* Cotten, 53 Miss. 689.

New Jersey.— Wooster *v.* Cooper, 56 N. J. Eq. 759, 36 Atl. 281.

Pennsylvania.— Jenkins *v.* Jenkins, 7 Pa. St. 246.

Tennessee.—Alexander *v.* Perry, 4 Humphr. 391.

Virginia.— Taylor *v.* Forbes, 101 Va. 658, 44 S. E. 888.

West Virginia.— Morris *v.* Peyton, 10 W. Va. 1; Snider *v.* Brown, 3 W. Va. 143.

See 19 Cent. Dig. tit. "Equity," § 249.

One in possession under a contract must be made a party to a suit to establish a lien. Henley *v.* Henley, 93 Mo. 95, 5 S. W. 701.

Parties entitled to escheat.— A decree for the sale of lands of an intestate without heirs is void where school commissioners, entitled to lands by escheat, were not parties to the suit. Hinkle *v.* Shadden, 2 Swan (Tenn.) 46.

Execution creditor.— In a suit to enforce an equitable lien against land which had been sold on execution to defendant it was held that the execution creditor was a necessary party where defendant claimed that he bought as agent for such creditor. Clark *v.* Hunt, 7 J. J. Marsh. (Ky.) 243.

Bills to set aside sales.— Persons who have acquired liens under the purchaser at a sale are necessary parties to an attack on the sale. Markwell *v.* Markwell, 157 Mo. 326, 57 S. W. 1078; Probasco *v.* Probasco, 30 N. J. Eq. 63; Henry *v.* Brown, 8 N. J. Eq. 245.

Railroad foreclosure.— A receiver in a creditors' suit, operating a railroad, is not a proper party in a suit to foreclose a mortgage on the road. Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642. See, generally, MORTGAGES.

1. Richmond *v.* Adams Nat. Bank, 152 Mass. 359, 25 N. E. 731; Champollion *v.* Corbin, 71 N. H. 78, 51 Atl. 674; Osborne *v.* Taylor, 12 Gratt. (Va.) 117.

The assignee in insolvency of the purchaser of goods is a necessary party to a bill by the vendor to recover such goods. Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83. See also Beall *v.* Walker, 26 W. Va. 741.

Attorneys claiming an interest in a judgment must be made parties to a bill to set off another judgment against it. Caudle *v.* Rice, 78 Ga. 81, 3 S. E. 7.

The equitable owner of a chose in action must be a party to a bill in equity, either to enforce it (Toulmin *v.* Hamilton, 7 Ala. 362), or to obtain relief against it (Givens *v.* Briscoe, 3 J. J. Marsh. (Ky.) 529). See also Carter *v.* Jones, 40 N. C. 196, 49 Am. Dec. 425.

All coöwners of chattels or choses in action must be parties to a bill enforcing rights thereto (Beecher *v.* Foster, 51 W. Va. 605, 42 S. E. 647; Sahlgard *v.* Kennedy, 13 Fed. 242, 4 McCrary 133) or attacking their title (Gray *v.* Hays, 7 Humphr. (Tenn.) 588).

Remainder-men of personal property (slaves) must be parties to a suit relating to the general title (Ramey *v.* Green, 18 Ala. 771); but not to a suit affecting only the life-estate (Summers *v.* Bean, 13 Gratt. (Va.) 404).

2. *Alabama.*— Toulmin *v.* Hamilton, 7 Ala. 362.

California.— McPherson *v.* Parker, 30 Cal. 455, 89 Am. Dec. 129.

Maryland.— Oliver *v.* Palmer, 11 Gill & J. 426.

New Jersey.— Bradley, etc., Co. *v.* Berns, 51 N. J. Eq. 437, 26 Atl. 908.

New York.— De la Vergne *v.* Evertson, 1 Paige 181, 19 Am. Dec. 411.

North Carolina.— Howerton *v.* Wimbish, 55 N. C. 328.

See 19 Cent. Dig. tit. "Equity," §§ 247, 249.

Children of a deceased principal, having an interest in the proceeds of an insurance policy on the principal's life, must be parties to a suit by a surety against a cosurety to whom the principal had assigned the policy, brought to obtain indemnity therefrom. Scribner *v.* Adams, 73 Me. 541.

one cannot be determined without determining the parts of the others, as where the fund is insufficient to satisfy all claims.[3]

d. Assignor and Assignee. The assignee of the rights of another, being the equitable owner and real party in interest, is a necessary party to a suit affecting such right.[4] Where the legal title does not pass to the assignee,[5] or where the assignment is not absolute, or its validity or extent is in dispute,[6] the assignor must also be made a party. Otherwise the assignor is not a necessary party.[7]

e. Other Instances of Interests Affected. All parties to a contract must be parties to a suit where they have joint or common rights[8] or liabilities;[9] and all parties interested in a judicial proceeding must be parties to a suit to set it aside.[10] One who holds the subject-matter in his possession must be a party to a bill to obtain possession.[11]

f. Contingent Interests. One who has merely a contingent interest in the result of the suit is not a necessary party,[12] and it is even held that the fact that the decree may result in imposing upon one a collateral liability does not make him a necessary party.[13]

g. Past Interests. Although one had at the time of the occurrence of the events out of which the controversy arose such an interest in the subject-matter as would have rendered him a necessary party to a suit then brought, still, if before the bringing of the suit, he has parted absolutely with such interest and is not chargeable personally with any liability, he need not be made a party.[14] The

Where one member of a committee appointed by a parish to build a meeting-house sued another who had received the funds, for reimbursement of moneys paid out by plaintiff, the parish and other members of the committee were held necessary parties. Foster *v.* Bryant, 16 Gray (Mass.) 190.

All persons interested in the residuum must be parties to a proceeding to obtain distribution of the residuary estate. Clark *v.* Edney, 28 N. C. 50; Osborne *v.* Taylor, 12 Gratt. (Va.) 117; Richardson *v.* Hunt, 2 Munf. (Va.) 148.

3. Crowell *v.* Cape Cod Ship Canal Co., 164 Mass. 235, 41 N. E. 290; Hallett *v.* Hallett, 2 Paige (N. Y.) 15. See, generally, ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 260; DESCENT AND DISTRIBUTION, 14 Cyc. 150.

4. See *infra*, V, F, 2. And see, generally, ASSIGNMENTS, 4 Cyc. 103.

5. Broughton *v.* Mitchell, 64 Ala. 210; Eureka Marble Co. *v.* Windsor Mfg. Co., 47 Vt. 430. But see Brace *v.* Harrington, 2 Atk. 235, 26 Eng. Reprint 545.

6. Broughton *v.* Mitchell, 64 Ala. 210; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520. The assignor must be a party where the decree may affect him with an eventual responsibility upon his assignment. Curd *v.* Lewis, 1 Dana (Ky.) 351. See also Elderkin *v.* Shultz, 2 Blackf. (Ind.) 345; Jameson *v.* Myles, 7 W. Va. 311.

The distributee of an estate who gives an order to another person for his share must be a party to a proceeding by that other to obtain payment. Clark *v.* Edney, 28 N. C. 50.

7. Anderson *v.* Wells, 6 B. Mon. (Ky.) 540; Polk *v.* Gallant, 22 N. C. 395, 34 Am. Dec. 410. See also ASSIGNMENTS, 4 Cyc. 102.

8. Smith *v.* Hawkes, 33 Ill. App. 585; Burnham *v.* Kempton, 37 N. H. 485; Beggs *v.* Butler, 9 Paige (N. Y.) 226 [*reversing* Clarke 517]; Eldredge *v.* Putnam, 46 Wis. 205, 50 N. W. 595.

9. Madison *v.* Wallace, 2 Dana (Ky.) 61.

10. Jennings *v.* Jenkins, 9 Ala. 285; Harwood *v.* Cincinnati, etc., Airline R. Co., 17 Wall. (U. S.) 78, 21 L. ed. 558; Ribon *v.* Chicago, etc., R. Co., 16 Wall. (U. S.) 446, 21 L. ed. 367.

A bill by a surety to be relieved from liability on a replevin bond must make the principal a party. Craig *v.* Barbour, 2 J. J. Marsh. (Ky.) 220.

11. Ladd *v.* Harvey, 27 N. H. 372.

A naked bailee need not be a party to a bill to obtain an equitable attachment. Abraham *v.* Hall, 59 Ala. 386.

A sheriff holding moneys as mere depositary need not be a party. Smith *v.* Rogers, 1 Stew. & P. (Ala.) 317. See also cases cited *supra*, p. 185, note 93.

12. Barbour *v.* Whitlock, 4 T. B. Mon. (Ky.) 180; Reid *v.* Vanderheyden, 5 Cow. (N. Y.) 719. To a bill to restrain the leasing of Indian land, on the ground of want of authority to make such leases, a person to whom defendant officer proposes to make a lease is not a necessary party. Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 23 S. Ct. 115, 47 L. ed. 183.

13. Shotwell *v.* Taliaferro, 25 Miss. 105; Austin *v.* Richardson, 1 Gratt. (Va.) 310. But see Brooks *v.* Harrison, 2 Ala. 209; Spotswood *v.* Higgenbotham, 6 Munf. (Va.) 313.

14. *Florida.*— Bigelow *v.* Stringfellow, 25 Fla. 366, 5 So. 816.

Illinois.— Greenup *v.* Porter, 4 Ill. 64.

Maine.— Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655.

North Carolina.—Ashley *v.* Sumner, 57 N. C. 121; Sanderford *v.* Moore, 54 N. C. 206.

rule is the same whether such interest cease by voluntary transfer,[15] or involuntarily, as by the termination of a trust,[16] or by having been divested by judicial proceeding.[17] Even where there was a personal liability, the person subject thereto who has completely discharged it need not be a party to a suit to determine interests in the property to which such liability related.[18] One who has parted with his interest in the subject-matter must nevertheless be made a party where plaintiff's success in a controversy with his successor would require the adjustment of equities between such former owner and the successor.[19]

h. Parties Necessary For Protection of Principal Defendants. In order to accomplish the object of completely adjudicating the controversy and of rendering the performance of the decree perfectly safe to those compelled to obey it,[20] it is frequently necessary to bring in as a party one against whom or whose interest plaintiff seeks no relief, but against whom the principal defendant would have a demand in the event of plaintiff's success.[21] For the same reason one must be joined who otherwise, not being bound by the decree, might assert a demand against the principal defendant which would be inequitable after the latter's performance of a decree in favor of plaintiff.[22]

i. Parties by Representation. To the general rule requiring all persons having interests which would be affected by the decree to be made parties,[23] there is a class of exceptions where the persons beneficially interested are effectively represented by a party. This exception exists where the legal guardians of such interests are present, who with reference thereto are equally certain to bring forward the entire merits of the question, and the object for which the presence of the actual owner would be required is satisfied.[24] The exception applies only where the contest is between such represented interests, taken as a unit, and others, and cannot apply where there may be a conflict of interests between the party representative and the persons represented.[25] Persons so represented are

South Carolina.— Swan *v.* Ligan, 1 McCord Eq. 227.

Vermont.— Day *v.* Cummings, 19 Vt. 496.

Virginia.— Fore *v.* Foster, 86 Va. 104, 9 S. E. 497; Major *v.* Ficklin, 85 Va. 732, 8 S. E. 715; Edgar *v.* Donnally, 2 Munf. 387.

United States.— Kilbourn *v.* Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005; Fitch *v.* Creighton, 24 How. 159, 16 L. ed. 596; U. S. *v.* Hendy, 54 Fed. 447; Piatt *v.* Vattier, 19 Fed. Cas. No. 11,117, 1 McLean 146 [*affirmed* in 9 Pet. 405, 9 L. ed. 173].

See 19 Cent. Dig. tit. "Equity," § 251.

Heirs of a devisor are not necessary parties to a suit to establish adverse claims to lands devised to other persons. Meriwether *v.* Hite, 2 A. K. Marsh. (Ky.) 181.

15. See cases cited in the last note.

16. Briscoe *v.* Power, 85 Ill. 420; Williams *v.* Vantrese, (Tenn. Ch. App. 1897) 39 S. W. 741.

17. Powell *v.* Campbell, 20 Nev. 232, 20 Pac. 156, 19 Am. St. Rep. 350, 2 L. R. A. 615; *Ex p.* Foster, Rice Eq. (S. C.) 17; Gaines *v.* Hennen, 24 How. (U. S.) 553, 16 L. ed. 770.

18. Rodes *v.* Bush, 5 T. B. Mon. (Ky.) 467; Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388.

19. See *infra*, V, C, 2, h.

20. 1 Daniel Ch. Pr. 284; Mitford Ch. Pl. 144.

21. **Assumptions of mortgage.**— Several successive grantees having assumed payment of a mortgage debt, it was error to render a personal judgment against the first of these without bringing in the subsequent grantees for the adjustment of their equities. Skinner *v.* Harker, 23 Colo. 333, 48 Pac. 648.

Warrantors.— A bill alleging that plaintiff in a conveyance had by mistake included more land than was intended, and seeking to compel a release, averred that the land had been conveyed by warranty deed from his grantee to a third person and by the latter to defendant, who took with notice of the mistake. It was held that these warrantors were necessary parties for defendant's protection. Busby *v.* Littlefield, 31 N. H. 193.

Cosureties.— When one proceeds in equity against a surety, all cosureties are necessary parties. Clagett *v.* Worthington, 3 Gill (Md.) 83; Hedrick *v.* Hopkins, 8 W. Va. 167; Riddle *v.* Mandeville, 5 Cranch (U. S.) 322, 3 L. ed. 114. See, generally, PRINCIPAL AND SURETY.

A defendant cannot insist upon the bringing in of a party for his assistance unless he shows that he claims through or relies on that person's equitable title. Williams *v.* Russell, 19 Pick. (Mass.) 162.

22. Adair *v.* Caldwell, 1 A. K. Marsh. (Ky.) 55; Berry *v.* Pierson, 1 Gill (Md.) 234; Winans *v.* Graves, 43 N. J. Eq. 263, 11 Atl. 25; Burhop *v.* Roosevelt, 20 Wis. 338.

23. See *supra*, V, C, 2, a.

24. Sweet *v.* Parker, 22 N. J. Eq. 453.

25. Beecher *v.* Foster, 51 W. Va. 605, 42 S. E. 647.

regarded as quasi-parties and may be heard in the suit on petition or motion.[26] The broadest application of this exception is in the case of executors or administrators, who in contests affecting their trust represent creditors, legatees, and distributees.[27] Not infrequently a trustee sufficiently represents the *cestui que trust* in controversies with strangers to the trust,[28] and a receiver the parties in interest in the suit in which he is appointed.[29] Upon the principle of representation it is settled in England that there may be an adjudication with reference to the fee if the first tenant in tail be brought before the court,[30] and if there be no person in being entitled to the inheritance then the tenant for life alone.[31]

3. INDISPENSABLE PARTIES. A party is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience.[32] That is to say his presence as a party is indispensable where his rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights.[33] If the decree must be pursued against one, or if he must be active in its performance, his presence is indispensable.[34] The rules in regard to parties generally are founded in part on artificial reasoning, partly in considerations of convenience, and partly in the solicitude of courts of equity to suppress multifarious litigation;[35] but the rule as to indispensable parties is neither technical nor one of convenience; it goes absolutely to the jurisdiction,[36] and without their presence the court can grant no relief.[37] Thus, where the object of a bill is to divest a title to property, the presence of those holding or claiming such title is indispensable.[38] The rescission of an agreement requires the presence of all claiming

26. Anderson *v.* Jacksonville, etc., R. Co., 1 Fed. Cas. No. 358, 2 Woods 628.

27. Peacock *v.* Monk, 1 Ves. 127, 27 Eng. Reprint 934. See, generally, EXECUTORS AND ADMINISTRATORS.

28. See, generally, TRUSTS.

29. See, generally, RECEIVERS.

30. Reynoldson *v.* Perkins, Ambl. 564, 27 Eng. Reprint 362, Dick. 427, 21 Eng. Reprint 335.

31. Giffard *v.* Hort, 1 Sch. & Lef. 386. See also Hale *v.* Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; Faulkner *v.* Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698. But see *contra*, Downin *v.* Sprecher, 35 Md. 474.

Numerous parties.— The doctrine of representation underlies the principle dispensing with parties in interest where they are so numerous that it is impracticable to join them without confusion. Doggett *v.* Florida R. Co., 99 U. S. 72, 25 L. ed. 301. See *infra*, V, C, 4, b, (II). It is not, however, confined to that class of cases. For example an administrator represents the persons interested in the decedent's personal estate, whether they be numerous or few. Such persons are not parties generally necessary, but dispensed with from necessity; they are not necessary, and generally not proper, parties in any sense.

32. Minnesota *v.* Northern Securities Co., 184 U. S. 199, 22 S. Ct. 308, 46 L. ed. 499; Shields *v.* Barrow, 17 How. (U. S.) 130, 15 L. ed. 158; Donovan *v.* Campion, 85 Fed. 71, 29 C. C. A. 30.

33. Daugherty *v.* Curtis, (Iowa 1903) 97 N. W. 67; Hallett *v.* Hallett, 2 Paige (N. Y.) 15; Williams *v.* Bankhead, 19 Wall. (U. S.) 563, 22 L. ed. 184; Mallow *v.* Hinde, 12 Wheat. (U. S.) 193, 6 L. ed. 599. See also Porter *v.* Clements, 3 Ark. 364.

34. Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638.

35. Story Eq. Pl. § 76*c*.

36. Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,068, 1 McAll. 26.

37. Mallow *v.* Hinde, 12 Wheat. (U. S.) 193, 6 L. ed. 599; Stenchfield *v.* Robinson, 22 Fed. Cas. No. 13,359*a*, 2 Hask. 381.

Impossibility of bringing such parties in is no answer to an objection because of their absence. Litchfield *v.* Register, 15 Fed. Cas. No. 8,388, 1 Woolw. 299.

At any stage of the proceeding, when it becomes certain that no decree can be made without invasion of the rights of the absent, the hearing cannot ordinarily proceed. Lawrence *v.* Rokes, 53 Me. 110.

U. S. Eq. Rule 47, permitting the court to proceed without the presence of parties whom it is impossible to bring in, does not apply where indispensable parties are lacking. California *v.* Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. ed. 683; Gregory *v.* Stetson, 133 U. S. 579, 10 S. Ct. 422, 33 L. ed. 792; Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,068, 1 McAll. 26.

38. *Alabama.*— Smith *v.* Murphy, 58 Ala. 630; Cowles *v.* Andrews, 39 Ala. 125.

Kentucky.— Strother *v.* Cardwell, 2 J. J. Marsh. 354; Kenny *v.* Collins, 4 Litt. 289.

West Virginia.— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

Wisconsin.— Schettler *v.* Brunetts, 7 Wis. 197.

property through such agreement,[39] and the impeachment of a judgment the presence of plaintiff in such judgment.[40] Sometimes an interest less directly intervenes which the decree must necessarily affect, but in such case the holder of such interest is none the less indispensable.[41]

4. Dispensable Parties — a. Who Are Such. A dispensable party is one who, while ordinarily necessary to a complete adjudication of the entire controversy, has nothing to perform necessary to the perfection of the decree,[42] and whose interest is so far distinct that it is practicable to render a decree, doing justice between the parties before the court, without affecting such interest.[43] The court may proceed without such party in the exercise of the discretion reposed in it as to the extent of the matter which should be embraced within the adjudication;[44]

United States.— Gregory *v.* Stetson, 133 U. S. 579, 10 S. Ct. 422, 33 L. ed. 792; Williams *v.* Bankhead, 19 Wall. 563, 22 L. ed. 184.

See 19 Cent. Dig. tit. "Equity," § 252.

Where land is conveyed in trust, the nature and extent of the trust cannot be determined in a proceeding to which the trustee is not a party. Dudley *v.* Eastman, 70 N. H. 418, 50 Atl. 101.

Absolute deed or mortgage.— Where the question is whether a deed absolute on its face was intended to be a mortgage, it is essential that the parties to the deed be before the court. McNeel *v.* Auldridge, 25 W. Va. 113.

39. Constant *v.* Lehman, 52 Kan. 227, 34 Pac. 745; Vinal *v.* Continental Constr., etc., Co., 136 U. S. 653, 10 S. Ct. 1075, 34 L. ed. 557; Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 2 C. C. A. 252. Where an estate is partitioned by agreement, one claiming an interest in that portion allotted to one of the parties to the agreement may maintain a suit against him alone to determine his interest in that share, but he cannot have the agreement set aside without the presence of all the parties thereto. Davis *v.* Davis, 89 Fed. 532.

40. May *v.* Barnard, 20 Ala. 200. See also, generally, Judgments.

41. Where the order in which several persons shall use their water-rights is undetermined, a decree cannot be entered in favor of one of them without the presence of the others. Lytle Creek Water Co. *v.* Perdew, 65 Cal. 447, 2 Pac. 426. Creditors cannot have a receiver appointed for a debtor's property without bringing in the payees of purchase-money notes given for the property. Wheeler *v.* Biggs, (Miss. 1893) 12 So. 596. A bill charging defendant with having received the proceeds of drafts drawn by plaintiff's agent, through a conspiracy between defendant and the agent, and seeking an accounting, must fail unless the agent can be brought in. Shingleur *v.* Jenkins, 111 Fed. 452.

For specific rules as to indispensable parties see, generally, Parties, and the topics relating to specific equitable remedies.

42. Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638; Joy *v.* Wirtz, 13 Fed. Cas. No. 7,554, 1 Wash. 517.

43. *Alabama.*— Marr *v.* Southwick, 2 Port. 351.

Illinois.— Green *v.* Heddenberg, 59 Ill. 489, 42 N. E. 851, 50 Am. St. Rep. 178; Starne *v.* Farr, 17 Ill. App. 491.

Maine.— Lawrence *v.* Rokes, 53 Me. 110.

Michigan.— Graham *v.* Elmore, Harr. 265.

New York.— Wiser *v.* Blachly, 1 Johns. Ch. 437.

Oregon.— White *v.* Delschneider, 1 Oreg. 254.

Vermont.— Stimson *v.* Lewis, 36 Vt. 91.

Virginia.— Clayton *v.* Henley, 32 Gratt. 65.

United States.— Minnesota *v.* Northern Securities Co., 184 U. S. 199, 22 S. Ct. 308, 46 L. ed. 499; Williams *v.* Bankhead, 19 Wall. 563, 22 L. ed. 184; Shields *v.* Barrow, 17 How. 130, 15 L. ed. 158; Story *v.* Livingston, 13 Pet. 359, 10 L. ed. 200; Vattier *v.* Hinde, 7 Pet. 252, 8 L. ed. 675; Elmendorf *v.* Taylor, 10 Wheat. 152, 6 L. ed. 289; Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271; Mackay *v.* Gabel, 117 Fed. 873; Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73; Smith *v.* Lee, 77 Fed. 779; Hazard *v.* Durant, 19 Fed. 471; Van Bokkelen *v.* Cook, 28 Fed. Cas. No. 16,831, 5 Sawy. 587.

See 19 Cent. Dig. tit. "Equity," §§ 247, 256.

In the federal courts such persons are usually styled necessary parties, using the term in contradistinction to indispensable. See *supra*, V, B. The creation of this intermediate class has been ascribed to the federal courts. Chadbourne *v.* Coe, 51 Fed. 479, 2 C. C. A. 327. Its recognition as a distinct class is probably somewhat peculiar to those courts, but in England and in the state courts the principles giving rise to the class are fully recognized by treating the persons falling within it as exceptions to the general rule as to necessary parties. Smith *v.* Hibernian Mine Co., 1 Sch. & Lef. 240; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005; I Daniell Ch. Pr. 365. And see the state cases cited *supra*, this note.

A party to a joint demand may be dispensed with under authority of statute. Teague *v.* Corbitt, 57 Ala. 529.

44. *Alabama.*— Marr *v.* Southwick, 2 Port. 351.

Connecticut.— New London Bank *v.* Lee, 11 Conn. 112, 27 Am. Dec. 713.

Georgia.— Carey *v.* Hoxey, 11 Ga. 645.

Michigan.— Graham *v.* Elmore, Harr. 265.

New York.— Brasher *v.* Van Cortlandt, 2 Johns. Ch. 242; Wiser *v.* Blachly, 1 Johns. Ch. 437.

but as dispensing with such parties so rests in the discretion of the court and not in the election of plaintiff the bill must set forth reasons for omitting them.[45]

b. Grounds For Dispensing With Parties — (I) *In General.* A party not indispensable, but under ordinary circumstances necessary, may be omitted when it is impossible to bring him in,[46] or where the delay and inconvenience of joining all would obstruct and probably defeat the purposes of justice.[47]

(II) *Parties Numerous.* It is a well established rule in equity that where the parties interested are numerous, and have a common interest in the object of the suit, one or more may sue or defend on behalf of all.[48] Although the interest be not strictly a common one in the subject-matter, all interested in the controversy need not be parties if the number be so great that it is impracticable or extremely inconvenient to bring them in,[49] or if they are so widely scattered that their names and residences cannot be ascertained without great difficulty.[50] The interests of those omitted must, however, be such as to be fully and fairly represented by those who are parties.[51] It is always a question to be determined on the facts of each case whether the parties to the record do so fairly represent the interests involved.[52] While the decree in such a case necessarily affects to some

Tennessee.— Birdsong *v.* Birdsong, 2 Head 289.

United States.— Elmendorf *v.* Taylor, 10 Wheat. 152, 6 L. ed. 289; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181.

See 19 Cent. Dig. tit. "Equity," § 256.

45. See *infra*, VII, C, 9.

46. Webster *v.* French, 11 Ill. 254; Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 224, 41 Am. Dec. 549.

47. Porter *v.* Clements, 3 Ark. 364; Bouton *v.* Brooklyn, 15 Barb. (N. Y.) 375; Smith *v.* Lee, 77 Fed. 779.

48. New London Bank *v.* Lee, 11 Conn. 112, 27 Am. Dec. 713; Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337; Smith *v.* Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181; Leigh *v.* Thomas, 2 Ves. 312, 28 Eng. Reprint 201. One may not sue on his own behalf and that of others, owning separate lots, to avoid an assessment on such lots. Bouton *v.* Brooklyn, 15 Barb. (N. Y.) 375. Nor can one making street improvements sue on behalf of himself and others acting under distinct contracts. Baker *v.* Portland, 2 Fed. Cas. No. 777, 5 Sawy. 566. One whose interest was only one sixty-fourth and less than ten dollars in value was not permitted so to sue. Smith *v.* Williams, 116 Mass. 510. See also *supra*, II, B, 1.

49. *California.*— Von Schmidt *v.* Huntington, 1 Cal. 55.

Georgia.— Carey *v.* Hoxey, 11 Ga. 645.

Illinois.— Ryan *v.* Lynch, 68 Ill. 160.

Kentucky.— Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. 165.

Mississippi.— Boisgerard *v.* Wall, Sm. & M. Ch. 404.

New Hampshire.— Gates *v.* Hancock, 45 N. H. 528.

New York.— Robinson *v.* Smith, 3 Paige 222, 24 Am. Dec. 212.

Vermont.— Stimson *v.* Lewis, 36 Vt. 91.

Wisconsin.— Douglas County *v.* Walbridge, 38 Wis. 179.

England.— York *v.* Pilkington, 1 Atk. 282, 9 Mod. 273, 26 Eng. Reprint 180; Cullen *v.* Queensberry, 1 Bro. Ch. 101, 28 Eng. Reprint 1011.

See 19 Cent. Dig. tit. "Equity," § 253.

Vexatious delay obstructing the ends of justice may constitute the inconvenience. Eller *v.* Bergling, 3 MacArthur (D. C.) 189; Hendrix *v.* Money, 1 Bush (Ky.) 306.

A statute authorizing and requiring service by publication against non-residents does not impair the rule permitting the omission of numerous parties. McCaleb *v.* Crichfield, 5 Heisk. (Tenn.) 288.

Where there were one hundred and one in interest and all made affidavits as to their claims, thirty-four declining to contribute to the expense of the suit, a part were not permitted to sue for all on the ground of the impracticability of joining them. Tobin *v.* Portland Mills Co., 41 Oreg. 269, 68 Pac. 743.

In West Virginia by statute (Code, c. 9, § 127), where the number of parties exceeds thirty and one jointly interested with others dies, the court may in its discretion proceed to decree as if such deceased person was alive. Northwestern Bank *v.* Hays, 37 W. Va. 475, 16 S. E. 561.

50. Smith *v.* Rotan, 44 Ill. 506; Consolidated Stanley Min., etc., Co. *v.* Loeber, 96 Ill. App. 128.

51. Hills *v.* Putnam, 152 Mass. 123, 25 N. E. 40; Hill *v.* Kensington, 1 Pars. Eq. Cas. (Pa.) 501; U. S. *v.* Coal Dealers' Assoc., 85 Fed. 252.

52. American Steel, etc., Co. *v.* Wire Drawers', etc., Unions, 90 Fed. 598.

In a suit to distribute corporation assets, where all stock-holders belonged to the same class, it was sufficient to make the largest stock-holders defendants (Noble *v.* Gadsden, etc., Co., 133 Ala. 250, 31 So. 856); and where there were two classes of shares and the holders of each were very numerous, it was held sufficient for a few of one class of stock-holders to sue a few of the other class

degree the interests of the absent,[53] and is held binding on those properly represented,[54] it is sometimes required that the rights of the absent shall be reserved.[55]

(III) *Parties Without the Jurisdiction.* Where some persons, ordinarily necessary defendants, are without the jurisdiction of the court, that fact is sufficient, provided a decree can be made, complete as to the parties within the jurisdiction, to justify the court in proceeding without such absent parties;[56] and, although persons so situated are within the jurisdiction and amenable to process, they may be omitted where their presence would oust the court of jurisdiction.[57] Where the impossibility of bringing a defendant in arises from the fact that he is not subject to suit, the rule is the same as when he is absent from the jurisdiction.[58]

for a dissolution (Von Schmidt *v.* Huntington, 1 Cal. 55).

Officers of an unincorporated association may sufficiently represent the members. Eller *v.* Bergling, 3 MacArthur (D. C.) 189.

A few of two thousand policy-holders in an insurance company, all having similar interests, may sue to set aside assessments. Corey *v.* Sherman, (Iowa 1894) 60 N. W. 232.

Where a firm was composed of many persons, a bill for its benefit may be brought against a director and some of the partners by the remaining directors. Goldman *v.* Page, 59 Miss. 404.

Where creditors of an insolvent assignor were very numerous, it was sufficient to make the assignor and assignee parties to a bill concerning the assets. Stevenson *v.* Austin, 3 Metc. (Mass.) 474.

Where many persons claim a fund, if the fund be in court, or in control of the parties to the record, any one having a claim may sue on behalf of himself and all others. Hallett *v.* Hallett, 2 Paige (N. Y.) 15.

53. Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

54. Adair *v.* New River Co., 11 Ves. Jr. 429, 32 Eng. Reprint 1153.

55. U. S. Eq. Rule 48; Calhoun *v.* St. Louis, etc., R. Co., 14 Fed. 9, 9 Biss. 330; Coann *v.* Atlanta Cotton Factory Co., 14 Fed. 4, 4 Woods 503. See also Boisgerard *v.* Wall, Sm. & M. Ch. (Miss.) 404; Manning *v.* Klein, 11 Pa. Co. Ct. 525; Stimson *v.* Lewis, 36 Vt. 91. Under U. S. Eq. Rule 48, the absent parties may be brought in and bound by the decree after a hearing. American Steel, etc., Co. *v.* Wire Drawers', etc., Unions, 90 Fed. 608.

Conduct of cause.— Where suit is brought by one on his own behalf and all others similarly situated, such others have no control of the litigation and cannot interfere before decree. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

Where parties liable to a demand are very numerous, plaintiff may proceed against a part for their aliquot parts. Thornton *v.* Hightower, 17 Ga. 1; Anonymous, 2 Eq. Cas. Abr. 166, 22 Eng. Reprint 141.

56. *Alabama.*— Parkman *v.* Aicardi, 34 Ala. 393, 73 Am. Dec. 457; Holman *v.* Norfolk Bank, 12 Ala. 369.

Delaware.— Farmers', etc., Bank *v.* Polk, 1 Del. Ch. 167.

Georgia.— Moses *v.* Watson, 65 Ga. 196; Drummond *v.* Hardaway, 21 Ga. 433; Carey *v.* Hoxey, 11 Ga. 645.

Missouri.— Picot *v.* Bates, 39 Mo. 292.

North Carolina.— Spivey *v.* Jenkins, 36 N. C. 126.

Rhode Island.— De Wolf *v.* De Wolf, 4 R. I. 450.

South Carolina.— McKenna *v.* George, 2 Rich. Eq. 15.

United States.— Hagan *v.* Walker, 14 How. 29, 14 L. ed. 312; Vattier *v.* Hinde, 7 Pet. 252, 8 L. ed. 675; Edwards *v.* Mercantile Trust Co., 124 Fed. 381; Mackay *v.* Gabel, 117 Fed. 873; Anthony *v.* Campbell, 112 Fed. 212, 50 C. C. A. 195; Plume, etc., Mfg. Co. *v.* Baldwin, 87 Fed. 785; Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73; Gross *v.* George W. Scott Mfg. Co., 48 Fed. 35; Hazard *v.* Durant, 19 Fed. 471; Society for Propagation, etc. *v.* Hartland, 22 Fed. Cas. No. 13,155, 2 Paine 536; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, 1 McAll. 271; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181.

England.— Smith *v.* Hibernian Mine Co., 1 Sch. & Lef. 240; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

See 19 Cent. Dig. tit. "Equity," §§ 254–256.

Where a nuisance is maintained by several, a bill will lie for its abatement against those alone who are within the jurisdiction. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311.

Absentee with nominal interest.— Of course the absence from the jurisdiction of those having a merely nominal interest is no objection to the proceeding. New Orleans Canal, etc., Co. *v.* Stafford, 12 How. (U. S.) 343, 13 L. ed. 1015; Louisiana Union Bank *v.* Stafford, 12 How. (U. S.) 327, 13 L. ed. 1008.

Non-joinder of a proper plaintiff cannot be excused by his non-residence. Westcott *v.* Minnesota Min. Co., 23 Mich. 145.

57. This doctrine is peculiarly applicable to the federal courts where jurisdiction is founded on diverse citizenship and to bring in all the parties ordinarily requisite would make some parties defendants who do not possess the citizenship necessary to sustain the federal jurisdiction. The subject is now regulated by Equity Rule 47. See Courts, 11 Cyc. 866, 867.

58. Webster *v.* French, 11 Ill. 254; Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.)

(iv) *Unknown Parties.* Upon similar grounds if plaintiff is unable to ascertain the identity of the persons who by virtue of their interests should be made parties he may, if they are not indispensable, for that reason proceed without them.[59] But in such case, unless the parties, when discovered, would be dispensable on other grounds, it seems that the bill must pray a discovery of their identity.[60] There are now in many jurisdictions statutory provisions for proceeding by constructive service against such persons describing them as unknown.[61] It is generally held that the bill must disclose not only that the parties are unknown, but that plaintiff with diligence cannot ascertain them.[62]

(v) *Other Grounds.* Where one should be a party merely because of his interest in the subject-matter, and his presence is not necessary for the protection of others, the court will proceed without him upon its being made to appear that he disclaims all interest,[63] and even where a liability exists, one subject thereto may be omitted when he is insolvent and those before the court would not be benefited by having him brought in.[64] It is said that where one who if living should be a party has died and has no representative the court will if practicable proceed without such representative or if not so practicable will hold the bill until the proper parties can be made;[65] but it seems this rule does not obtain where plaintiff might have procured the appointment of a representative before suit.[66]

D. Proper or Formal Parties. A proper or formal party is one who is not interested in the controversy between the immediate litigants but has an interest in the subject-matter which can be conveniently settled in the suit, and thereby prevent further litigation.[67] Such persons plaintiff may make parties or omit at his option.[68] Subject to the rule against multifariousness,[69] plaintiff may bring in all participants in the acts out of which the controversy arises who may

224, 41 Am. Dec. 549; Sippile *v.* Albites, 5 Abb. Pr. N. S. (N. Y.) 76.

59. *Illinois.*— Ryan *v.* Lynch, 68 Ill. 160; Whitney *v.* Mayo, 15 Ill. 251.

Missouri.— Picot *v.* Bates, 39 Mo. 292.

North Carolina.— Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689.

Rhode Island.— De Wolf *v.* De Wolf, 4 R. I. 450.

United States.— Alger *v.* Anderson, 78 Fed. 729.

England.— Heath *v.* Percival, 1 P. Wms. 682, 1 Str. 403, 24 Eng. Reprint 570; Fenn *v.* Craig, 3 Y. & C. Exch. 216, 3 Jur. 22.

See 19 Cent. Dig. tit. "Equity," §§ 255, 256.

60. West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181; Heath *v.* Percival, 1 P. Wms. 682, 1 Str. 403, 24 Eng. Reprint 570.

61. See, generally, Process. Such a statute must be fairly and reasonably complied with and cannot be evaded by making a known person a party under such designation. Wellington *v.* Heermans, 110 Ill. 564.

62. Seymour *v.* Edwards, 31 Ill. App. 50; Taylor *v.* Bate, 4 T. B. Mon. (Ky.) 267; Westcott *v.* Minnesota Min. Co., 23 Mich. 145.

On the contrary it has been held that a suggestion in a bill that the persons interested are unknown is sufficient (Davis *v.* Hoopes, 33 Miss. 173; Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689), at least, in the absence of statements in the answer showing that the suggestion is untrue (Alger *v.* Anderson, 78 Fed. 729).

63. Johnson *v.* Rankin, 3 Bibb (Ky.) 86; McConnell *v.* McConnell, 11 Vt. 290.

64. Couch *v.* Terry, 12 Ala. 225; Van Cleef *v.* Sickles, 5 Paige (N. Y.) 505; Holsberry *v.* Poling, 38 W. Va. 186, 18 S. E. 485; Bruce *v.* Bickerton, 18 W. Va. 342. Where one proceeds against sureties of a deceased debtor, a mere allegation of insolvency will not excuse the omission of his representatives; it must appear that he was so destitute of property that nothing could be realized from his estate. Roane *v.* Pickett, 7 Ark. 510.

65. Humphreys *v.* Humphreys, 3 P. Wms. 349, 24 Eng. Reprint 1096; Story Eq. Pl. § 91. See 1 Daniell Ch. Pr. 343. See also Carey *v.* Hoxey, 11 Ga. 645; Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689.

66. Martin *v.* McBryde, 38 N. C. 531. See also Read *v.* Bennett, 55 N. J. Eq. 587, 37 Atl. 75.

67. Williams *v.* Bankhead, 19 Wall. (U. S.) 563, 22 L. ed. 184; Chadbourne *v.* Coe, 51 Fed. 479, 2 C. C. A. 327. See also Gefken *v.* Graef, 77 Ga. 340; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14. Whoever is affected by the demands of plaintiff, either immediately or consequentially, is a proper party. Thomas *v.* Boswell, 14 Phila. (Pa.) 197.

68. Kendig *v.* Dean, 97 U. S. 423, 24 L. ed. 1061; Williams *v.* Bankhead, 19 Wall. (U. S.) 563, 22 L. ed. 184; Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; Chadbourne *v.* Coe, 51 Fed. 479, 2 C. C. A. 327.

Where formal parties cannot be served, the cause may proceed against the necessary parties alone. Carter *v.* McDougald, 7 Ga. 93.

69. See *infra*, VII, G.

have interests either by way of rights or liabilities in the subject-matter, although not immediately concerned in the relief sought by plaintiff, in order that a decree may be rendered which will be an effectual determination of all such rights for the protection of all concerned.[70] Persons who have parted with their interests, although not necessary parties,[71] may sometimes on this ground be proper parties.[72] In bills to establish claims to property or funds, persons asserting conflicting claims may likewise be brought in.[73] Where the matter in litigation is entire in itself, one may be a proper defendant, although his interest extend only to a part of such matter,[74] and where the object of the suit is single, defendants may properly be joined, although their interests are distinct, provided they have a common connection with the matter in controversy.[75] So too where plaintiff's right is violated by the concurrent acts of several, it may be protected by a bill making all committing such acts defendants, and seeking appropriate relief against each, whether they have acted in combination[76] or whether they have acted

70. *Alabama.*—Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128; Kelly *v.* Browning, 113 Ala. 420, 21 So. 928; McHan *v.* Ordway, 82 Ala. 463, 2 So. 276.

Georgia.— Macon *v.* Harris, 73 Ga. 428; Turner *v.* Jones, 27 Ga. 22.

Iowa.— Gammel *v.* Young, 3 Iowa 297.

Kentucky.— Madison *v.* Wallace, 2 Dana 61; Forman *v.* Rodgers, 1 A. K. Marsh. 426; Wallace *v.* Arnold, 4 S. W. 340, 9 Ky. L. Rep. 201.

Massachusetts.— Nelson *v.* Ferdinand, 111 Mass. 300.

Utah.— Stevens *v.* South Ogden Land, etc., Co., 14 Utah 232, 47 Pac. 81.

United States.— Phelps *v.* Elliott, 29 Fed. 53.

See 19 Cent. Dig. tit. "Equity," §§ 263, 264.

Where a conveyance is attacked persons acquiring title under the conveyance are proper parties (Ritchie *v.* Sayers, 100 Fed. 520); and a mortgagee, even in good faith, is within the rule, in order that his equity may be protected (Whittemore *v.* Cowell, 89 Mass. 446).

A depositary who holds funds in controversy is a proper party where discovery and the protection of the fund are sought. Schmidt *v.* Dietericht, 1 Edw. (N. Y.) 119.

The attorney-general was held to be a proper party where the interests of the state were involved in water-rights, the subject of the controversy between plaintiff and the other defendants, although there was no authority to assert a direct claim against the state in that manner. Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417.

71. See *supra*, V, C, 2, g.

72. Carter *v.* Davis, 8 Fla. 183; Buchoz *v.* Lecour, 9 Mich. 234; Robinson *v.* Day, 5 Gratt. (Va.) 55.

Assignor of a legal chose in action is in all cases a proper party. Broughton *v.* Mitchell, 64 Ala. 210.

73. *Alabama.*— Howard *v.* Corey, 126 Ala. 283, 28 So. 682.

District of Columbia.— Washington, etc., R. Co. *v.* Martin, 7 D. C. 120.

Kentucky.— Tharp *v.* Cotton, 7 B. Mon. 636.

Illinois.— Finch *v.* Martin, 19 Ill. 105.

New York.— Chester *v.* Jumel, 2 Silv. Supreme 159, 5 N. Y. Suppl. 809 [*reversed* on other grounds in 125 N. Y. 537, 26 N. E. 297].

South Carolina.— Bowden *v.* Schatzell, 1 Bailey Eq. 360, 23 Am. Dec. 170.

Tennessee.— Myers Mfg. Co. *v.* Wetzel, (Ch. App. 1896) 35 S. W. 896.

Wisconsin.— Patten Paper Co. *v.* Kaukauna Water Power Co., 70 Wis. 659, 35 N. W. 737.

See 19 Cent. Dig. tit. "Equity," §§ 260–264.

To a petition to reach a fund in court any person may properly be made a party who ought to have been a party to the original bill. Hays *v.* Miles, 9 Gill & J. (Md.) 193, 31 Am. Dec. 70.

74. Hammond *v.* Perry, 38 Iowa 217; Ingersoll *v.* Kirby, Walk. (Mich.) 65; Walters *v.* Farmers' Bank, 76 Va. 12.

75. Randle *v.* Boyd, 73 Ala. 282; Kingsbury *v.* Flowers, 65 Ala. 479, 39 Am. Rep. 14; Rice *v.* Tarver, 4 Ga. 571; Pierson *v.* David, 1 Iowa 23; Fellows *v.* Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412. To justify a joinder defendants must have a community of interest in at least some one material subject-matter. White *v.* Delschneider, 1 Oreg. 254. Where an agent wrongfully disposed of securities by various transactions, to separate persons, there was no such community of interest among the transferees as to justify their joinder. Lexington, etc., R. Co. *v.* Goodman, 5 Abb. Pr. (N. Y.) 493, 15 How. Pr. (N. Y.) 85.

Two sets of sureties.— But where the same person was executor and guardian of a legatee, it was proper to join the sureties on both bonds in a suit for waste and devastavit, it being doubtful as to which were liable. Spottswood *v.* Dandridge, 4 Munf. (Va.) 289.

In a bill of peace there need be no privity or community of interest among defendants. Morgan *v.* Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; Bailey *v.* Tillinghast, 99 Fed. 801, 40 C. C. A. 93 [*affirming* 86 Fed. 46].

76. Andrews *v.* Pratt, 44 Cal. 309; Sweet *v.* Converse, 88 Mich. 1, 49 N. W. 899; New York, etc., R. Co. *v.* Schuyler, 1 Abb. Pr.

separately.[77] It is generally improper to make one a defendant solely for the purpose of discovery,[78] and while several exceptions to this rule have been noted,[79] the only settled exception is in the case of suits against corporations, where officers and sometimes members may be made defendants solely for that purpose.[80] Therefore where books and papers are in the possession of a third person and are desired as evidence, a subpœna duces tecum must be resorted to, but where plaintiff wishes to obtain their custody he must make the third person a defendant.[81]

E. Who Are Deemed Parties. Strictly the parties to a suit in equity are those only who are named in the bill as such; plaintiffs in the introduction,[82] and defendants, those described as such and against whom process is prayed.[83] The capacity in which one sues or is sued should also be stated,[84] but if the party be actually before the court, a misdescription as to the right under which he claims may be disregarded as surplusage.[85] While some persons not parties to the record may in the course of proceedings become parties *sub modo* so far that they may be heard on petition or motion,[86] the court will not look out of the record for the parties,[87] and one not named as a party cannot inject himself into a suit by pleading to the bill and thereby claim the rights of a party.[88] An ancillary bill must

(N. Y.) 417; U. S. *v.* Dastervignes, 118 Fed. 199. But where the bill charges separate and distinct grounds of action against each defendant, a general charge of fraud against them all, unaccompanied by averments of fact, is insufficient to justify the joinder. Shingleur *v.* Swift, 110 Ga. 891, 36 S. E. 222.

77. Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449; Putnam *v.* Sweet, 2 Pinn. (Wis.) 302, 1 Chandl. (Wis.) 286; Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73. A bill charging that plaintiff's trustee had transferred plaintiff's stock in a corporation, that the transferee had transferred it to another, and that his attorney held the certificate and had notified the corporation not to pay dividends to plaintiff, properly joined as defendants the corporation, the trustee, the transferee, and the attorney, to enjoin the corporation from paying dividends to the attorney, to compel a surrender of the certificate and to remove the trustee. Moses *v.* Watson, 65 Ga. 196.

78. Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291; Mitford Ch. Pl. 152. *Contra*, Cato *v.* Easley, 2 Stew. (Ala.) 214.

79. It was formerly deemed that one who had parted with his interest might be brought in solely to answer as to his acts before the assignment. Story Eq. Pl. § 233. The bringing in of a participant in fraudulent acts, against whom no direct relief is sought, cannot be deemed solely for the purpose of discovery. See, generally, FRAUD.

80. See CORPORATIONS, 10 Cyc. 1341.

81. Morley *v.* Green, 11 Paige (N. Y.) 240, 42 Am. Dec. 112.

82. 1 Daniell Ch. Pr. 463; Story Eq. Pl. 26. And see *infra*, VII, B, 3. Where in the introductory part plaintiff was stated to be the Fruit-Cleaning Co., a copartnership consisting of three persons named, and the stating part alleged the copartnership of such persons under that name, it was held that this sufficiently named plaintiffs, as against objection made after answer. Fruit-Cleaning Co. *v.* Fresno Home-Packing Co., 94 Fed. 845.

83. Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Carey *v.* Hillhouse, 5 Ga. 251; Talmage *v.* Pell, 9 Paige (N. Y.) 410; 1 Daniell Ch. Pr. 384, 500; Story Eq. Pl. § 44. See U. S. Eq. Rule 23.

Of course service of process or appearance is in addition necessary to charge one as defendant. Green *v.* McKinney, 6 J. J. Marsh. (Ky.) 193. It seems, however, that it may be sufficient to make one a defendant that he be described in the bill as such and process served, although the bill does not pray process against him. Jennes *v.* Landes, 84 Fed. 73. See also Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 438; U. S. *v.* Agler, 62 Fed. 824. But although process is served, one is not a party and bound by the decree unless charged as such in the bill. Letcher *v.* Shroeder, 5 J. J. Marsh. (Ky.) 513; Taylor *v.* Bate, 4 T. B. Mon. (Ky.) 267; Gatewood *v.* Rucker, 1 T. B. Mon. (Ky.) 21; Moseley *v.* Cocke, 7 Leigh (Va.) 224; Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184; McCoy *v.* Allen, 16 W. Va. 724. But see Bilmyer *v.* Sherman, 23 W. Va. 656.

84. 1 Daniell Ch. Pr. 464; Story Eq. Pl. § 26.

Party in double capacity.— Where one is interested as executor and also as devisee, he must be made a party in both capacities. Mayo *v.* Tomkies, 6 Munf. (Va.) 520.

In Alabama it was held that, although a bill alleged that a firm was composed of certain defendants named, there could be no decree against the firm as such when not made a party in the firm name. Cook *v.* Bolling, 99 Ala. 455, 13 So. 223.

85. Gulf Red Cedar Lumber Co. *v.* O'Neal, 131 Ala. 117, 30 So. 466, 90 Am. St. Rep. 22; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Chipman *v.* Thompson, Walk. (Mich.) 405.

86. Leake *v.* Cannon, 2 Humphr. (Tenn.) 169, purchasers of land sold under the decree.

87. Allin *v.* Hall, 1 A. K. Marsh. (Ky.) 525.

88. McGuffie *v.* Planters' Bank, Freem. (Miss.) 383; Gall *v.* Gall, 50 W. Va. 523,

have its own proper parties, and parties to the original bill, not made such in the ancillary, have no more rights in the latter suit than if it were independent.[89]

F. Position of Parties on Record — 1. In General. The position of the parties on the record or their grouping as plaintiffs or defendants is of less importance in equity than at law. Provided the requisite of a proper plaintiff exists,[90] it is sufficient that all persons interested be before the court, and if so, their rights will be determined regardless of their position as plaintiffs or defendants.[91] Accordingly the court will when occasion demands transpose a party from one side to the other,[92] or it may proceed to decree without making the formal change.[93]

2. Plaintiffs — a. Must Show an Interest. In order to sustain his suit plaintiff must show that he has an interest in the subject-matter and in obtaining the object of the suit,[94] and a bill is demurrable which fails to show such interest.[95] It matters not, however, whether his interest in the subject-matter be legal or equitable in character.[96] One who has parted with all his interest cannot bring

40 S. E. 380. He may, however, in that way subject himself to the liabilities of a party. See *infra*, V, I. If one not a party files a petition disclosing an interest in the subject-matter, plaintiff must amend his bill, making the petitioner a party, before such interest can be determined. Gall *v.* Gall, 50 W. Va. 523, 40 S. E. 380. An order in a suit by one distributee, requiring an administrator to account before a master, does not make all who are entitled to distribution parties. Hook *v.* Payne, 14 Wall. (U. S.) 252, 20 L. ed. 887. Still it has been held that one at whose instance and for whose benefit a suit is instigated will be deemed the real plaintiff in determining whether a right exists to maintain the suit (Nicrosi *v.* Calera Land Co., 115 Ala. 429, 22 So. 147), and that where a bill states that it is brought for the benefit of a certain person, that person thereby becomes virtually a party and may be made an actual party by amendment (Fenwick *v.* Phillips, 3 Metc. (Ky.) 87).

In contempt proceedings it was held that a statement in the bill that it was brought against defendants named, their confederates and associates, whose citizenship and residences were unknown, could refer only to such as could be made parties and that none became such under that designation until named in the bill. *Ex p.* Richards, 117 Fed. 658.

89. Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642.

90. See *infra*, V, F, 2.

91. Peterborough Sav. Bank *v.* Hartshorn, 67 N. H. 156, 33 Atl. 729; Sadler *v.* Taylor, 40 W. Va. 104, 38 S. E. 583; Armstrong *v.* Pratt, 2 Wis. 299; Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92. It is irregular for the same person to appear as plaintiff and defendant in the same suit. Henderson *v.* Sherman, 47 Mich. 267, 11 N. W. 153.

92. Thompson *v.* Fisler, 33 N. J. Eq. 480; Christian *v.* Christian, 6 Munf. (Va.) 534; McConaughey *v.* Bannett, 50 W. Va. 172, 40 S. E. 540; Lalance, etc., Mfg. Co. *v.* Haberman Mfg. Co., 93 Fed. 197. A defendant will not be permitted after replication and an order of reference to come in on mere motion as plaintiff and without notice to other defendants urge a ground of relief which the original plaintiff could not press. Gwinn *v.* Lee, 6 Pa. Super. Ct. 646.

If one of the plaintiffs refuses to prosecute further and is a necessary party the court should transpose him and make him defendant. McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

93. Farmers', etc., Bank *v.* Wayman, 5 Gill (Md.) 336. This course will be adopted unless the transposition of the party at an earlier period is necessary to prevent him from impeding the orderly progress of the case. Lalance, etc., Mfg. Co. *v.* Haberman Mfg. Co., 93 Fed. 197.

94. *Connecticut.*—Lester *v.* Kinne, 37 Conn. 9; Gaston *v.* Plum, 14 Conn. 344.

Kentucky.—Arnold *v.* Voorhies, 4 J. J. Marsh. 507.

New York.—Rogers *v.* Traders' Ins. Co., 6 Paige 583.

Pennsylvania.—Railroad Co. *v.* Ashton, 5 Leg. Gaz. 13.

Vermont.—Hadlock *v.* Williams, 10 Vt. 570.

Wisconsin.—Webster *v.* Tibbits, 19 Wis. 438.

United States.—Newcombe *v.* Murray, 77 Fed. 492.

See 19 Cent. Dig. tit. "Equity," §§ 266, 267.

A tax-payer's interest is sufficient to enable him to test in equity the validity of a law which proposes an assessment or expenditure. Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272. See, generally, Taxation.

An estate in futuro is a sufficient interest to satisfy the rule. Hitch *v.* Davis, 3 Md. Ch. 262.

95. Carter *v.* Carter, 82 Va. 624. A bill is of course demurrable if it shows that plaintiff has no interest. Pease *v.* Sandusky Steamboat Co., 1 Ohio Dec. (Reprint) 150, 2 West. L. J. 550.

96. Olds *v.* Cummings, 31 Ill. 188; Frye *v.* State Bank, 10 Ill. 332; Railroad Co. *v.* Ashton, 5 Leg. Gaz. (Pa.) 13; Barry *v.* Harris, 49 Vt. 392; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520.

the suit,[97] nor may one who after instituting the suit parts with his interest continue its prosecution.[98]

b. Must Be Real Party In Interest. A suit in equity cannot be brought in the name of one party for the use or benefit of another.[99] It not only may,[1] but must,[2] be prosecuted in the name of the real party in interest.

c. Joinder of Plaintiffs. All united in interest and entitled to the relief sought should be joined as plaintiffs,[3] unless a reason is shown for their not joining.[4] Parties cannot, however, join as plaintiffs, if they have conflicting

97. Haskell *v.* Hilton, 30 Me. 419; Keyser *v.* Renner, 87 Va. 249, 12 S. E. 406.

A debtor who transfers shares of stock to a creditor, who is "to account for the said shares or reconvey them" has no remaining interest in the shares which will entitle him to maintain a suit concerning them against a third person. Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364.

But a purchaser of land may rescind the sale, although he has since conveyed to a third person. Hadlock *v.* Williams, 10 Vt. 570; Mason *v.* Crosby, 16 Fed. Cas. No. 9,234, 1 Woodb. & M. 342.

98. Bailey *v.* Smith, 10 R. I. 29; Campbell *v.* Shipman, 87 Va. 655, 13 S. E. 114.

99. Elder *v.* Jones, 85 Ill. 384; Kitchins *v.* Harrall, 54 Miss. 474; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583; Field *v.* Maghee, 5 Paige (N. Y.) 539; Kellam *v.* Sayre, 30 W. Va. 198, 3 S. E. 589; McClaskey *v.* O'Brien, 16 W. Va. 791. *A fortiori*, where plaintiff has no authority from the beneficiary. Page *v.* Merchants' Exch. Bank, (Tenn. Ch. App. 1900) 59 S. W. 367.

Contra in Virginia by virtue of statute (Acts (1897–1898), p. 437). Preston *v.* National Exch. Bank, 97 Va. 222, 33 S. E. 546.

Agent or attorney.—A suit cannot be prosecuted in the name of an agent (Oakey *v.* Bend, 3 Edw. (N. Y.) 482), or of an attorney in fact (Jones *v.* Hart, 1 Hen. & M. (Va.) 470).

One who had religious scruples against being a party to litigation might, it was held, sue by next friend. Malin *v.* Malin, 2 Johns. Ch. (N. Y.) 238.

1. Dixon *v.* Buell, 21 Ill. 203; Carney *v.* Walden, 16 B. Mon. (Ky.) 388; Burlew *v.* Hillman, 16 N. J. Eq. 23; National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566 [*affirming* 62 Hun 31, 16 N. Y. Suppl. 343].

2. *Alabama.*— Kirk *v.* Morris, 40 Ala. 225; Toulmin *v.* Hamilton, 7 Ala. 362.

Illinois.— Elder *v.* Jones, 85 Ill. 384.

Missouri.— Holmes *v.* Shepard, 49 Mo. 600.

New York.— Rogers *v.* Traders' Ins. Co., 6 Paige 583; Field *v.* Maghee, 5 Paige 539; Oakey *v.* Bend, 3 Edw. 482.

United States.— Pagan *v.* Sparks, 18 Fed. Cas. No. 10,659. 2 Wash. 325.

See 19 Cent. Dig. tit. "Equity," § 267.

Sufficiency of averment.—An averment that a contract between others was made for the account and use of plaintiff shows sufficient interest in plaintiff. Railroad Co. *v.* Ashton, 5 Leg. Gaz. (Pa.) 13.

Each litigant has the right to insist that the real parties in interest be made parties to the suit. Johnson *v.* Miller, 55 Ill. App. 168.

The code provisions requiring actions to be prosecuted in the name of the party in interest adopt substantially the equity rule. Grinnell *v.* Schmidt, 2 Sandf. (N. Y.) 706. But see Moore *v.* Pope, 97 Ala. 462, 11 So. 840; Dawson *v.* Burrus, 73 Ala. 111.

3. **Joint-owners of the property** concerned. Newman *v.* Kendall, 2 A. K. Marsh. (Ky.) 234; Coster *v.* New York, etc., R. Co., 5 Duer (N. Y.) 677.

Widow and heirs in a suit relating to the fee of the decedent's land. Hill *v.* Smith, 32 N. J. Eq. 473.

All parties on one side of a contract in a bill for relief against it. Pollard *v.* Collier, 8 Ohio 43; Joy *v.* Wirtz, 13 Fed. Cas. No. 7,553, 1 Wash. 417.

A surety and principal should join in a suit for relief against the note. Breckenridge *v.* Bullitt, 3 Litt. (Ky.) 3. See also Batchelder *v.* Wendell, 36 N. H. 304; Perrine *v.* Striker, 7 Paige (N. Y.) 598.

Any heir or creditor without joining the others may apply for relief to prevent an administrator from wasting the assets. Du Val *v.* Marshall, 30 Ark. 230.

A surety on appeal who has paid part of the judgment, being subrogated to that extent to plaintiff's claim, should join plaintiff in an equitable suit to obtain satisfaction. Comins *v.* Culver, 35 N. J. Eq. 94.

Plaintiff suing as executor and as devisee for injuries to real estate does not constitute a misjoinder. McCrea *v.* New York El. R. Co., 13 Daly (N. Y.) 302.

Pledgor and pledgee.— It is not essential that the pledgor should join as plaintiff in a bill by the pledgee to recover possession where the bill alleges that the pledgee's claim is sufficient to cover the property. Michigan State Bank *v.* Gardner, 3 Gray (Mass.) 305.

Heir and administrator.— Where a lease contained a covenant to convey the fee to the lessee, her heirs or assigns, the heir could sue, without joining the administrator, for an account embracing rents accruing after the lessee's death, and for a conveyance. Prout *v.* Roby, 15 Wall. (U. S.) 471, 21 L. ed. 58.

4. See *infra*, V, F, 2, d. See also Coster *v.* New York, etc., R. Co., 5 Duer (N. Y.) 677. Where the parties so united in interest are very numerous some may sue on behalf of all. Lowry *v.* Francis, 2 Yerg. (Tenn.) 534. And see *supra*, V, C, 4, b, (II). But one cannot sue on his own behalf alone. Grew *v.* Breed, 10 Metc. (Mass.) 569; Crease *v.* Bab-

interests.[5] It has been frequently held that it is a fatal objection to a bill if any plaintiff therein be not entitled to relief,[6] but the more reasonable rule is that the objection may be cured by dismissing as to the improper plaintiff.[7] Several plaintiffs asserting similar rights, but having no common interest, may not generally join in the same bill;[8] but the joinder of plaintiffs is governed largely by considerations of convenience,[9] and therefore to prevent multiplicity of suits bills are sometimes entertained where there is no privity or connection among the plaintiffs, except a common interest in the subject-matter,[10] or even the object to be obtained.[11] Persons who hold distinct interests derived from the same source,

cock, 10 Metc. (Mass.) 525; Isaacs *v.* Clark, 13 Vt. 657.

5. *Alabama.*— Smith *v.* Smith, 102 Ala. 516, 14 So. 765; Massey *v.* Modawell, 73 Ala. 421.

Maryland.— Crook *v.* Brown, 11 Md. 158; Ellicott *v.* Ellicott, 2 Md. Ch. 468.

New York.— Alston *v.* Jones, 3 Barb. Ch. 397; Grant *v.* Van Schoonhoven, 9 Paige 255, 37 Am. Dec. 393.

Virginia.— Brown *v.* Bedford City Land, etc., Co., 91 Va. 31, 20 S. E. 968.

United States.— Bunce *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 481; Parsons *v.* Lyman, 18 Fed. Cas. No. 10,779, 4 Blatchf. 432.

See 19 Cent. Dig. tit. "Equity," § 269.

The bill will not be dismissed on such ground unless the interests of plaintiffs are so diverse that they cannot with propriety be included in one decree. Michan *v.* Wyatt, 21 Ala. 813.

Improper joinder.— Minor heirs cannot be plaintiffs in a bill to partition land, and also to vest in the widow a title to a portion of the land in lieu of dower. Simpson *v.* Alexander, 6 Coldw. (Tenn.) 619. General creditors should not join one seeking to enforce an assignment for the payment of particular debts. Dias *v.* Bouchaud, 10 Paige (N. Y.) 445.

6. *Alabama.*— Lovelace *v.* Hutchinson, 106 Ala. 417, 17 So. 623; Butler *v.* Gazzam, 81 Ala. 491, 1 So. 16; Larkin *v.* Mason, 71 Ala. 227; Taylor *v.* Robinson, 69 Ala. 269; Dunklin *v.* Wilson, 64 Ala. 162; Johnson *v.* Murphy, 60 Ala. 288; Hutton *v.* Williams, 60 Ala. 107; Vaughn *v.* Lovejoy, 34 Ala. 437; Plant *v.* Voegelin, 30 Ala. 160; Plunkett *v.* Kelly, 22 Ala. 655; Tucker *v.* Holley, 20 Ala. 426; Moore *v.* Moore, 17 Ala. 631; Wilkins *v.* Judge, 14 Ala. 135; Colburn *v.* Broughton, 9 Ala. 351.

Connecticut.— Jones *v.* Quinnipiack Bank, 29 Conn. 25.

Indiana.— Grimes *v.* Wilson, 4 Blackf. 331.

New York.— Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. 186.

Virginia.— Staude *v.* Keck, 92 Va. 544, 24 S. E. 227.

United States.— Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729.

See 19 Cent. Dig. tit. "Equity," § 266.

Application of rule.— If two persons join, one of whom is barred by the statute of limitations and the other not, neither can obtain relief. Keeton *v.* Keeton, 20 Mo. 530. Where two join in a bill to set aside a decree for fraud, consisting of want of notice, neither can have relief if one of them had notice or by appearance waived notice. Berdanatti *v.* Sexton, 2 Tenn. Ch. 699.

The rule does not apply to a joint bill filed by assignor and assignee of a chose in action. Broughton *v.* Mitchell, 64 Ala. 210.

7. Brown *v.* Lawton, 87 Me. 83, 32 Atl. 733; Dias *v.* Bouchaud, 10 Paige (N. Y.) 445.

8. *Kentucky.*—Barry *v.* Rogers, 2 Bibb 314.

Massachusetts.— Keith *v.* Keith, 143 Mass. 262, 9 N. E. 560.

Mississippi.— Scott *v.* Calvit, 3 How. 148.

New Jersey.— Hendrickson *v.* Wallace, 31 N. J. Eq. 604.

Ohio.— State *v.* Ellis, 10 Ohio 456; Armstrong *v.* Athens County, 10 Ohio 235.

See 19 Cent. Dig. tit. "Equity," § 269.

Complainants for distinct injuries cannot unite in the same bill. Plum *v.* Morris Canal, etc., Co., 10 N. J. Eq. 256.

Remedies different.— A plaintiff seeking a remedy in equity cannot join as a co-plaintiff one whose remedy is at law. Clark *v.* Holbrook, 146 Mass. 366, 16 N. E. 410.

9. Bradley *v.* Bradley, 53 N. Y. App. Div. 29, 65 N. Y. Suppl. 514; Murray *v.* Hay, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773.

10. *Alabama.*— Kennedy *v.* Kennedy, 2 Ala. 571.

Connecticut.— Bulkley *v.* Starr, 2 Day 552.

Massachusetts.— Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401.

Missouri.— Ulrici *v.* Papin, 11 Mo. 42.

Pennsylvania.— Fowler *v.* Jones, 9 Kulp 308.

South Carolina.— Edwards *v.* Sartor, 1 S. C. 266.

Tennessee.— Cartmell *v.* McClaren, 12 Heisk. 41.

United States.— Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259.

See 19 Cent. Dig. tit. "Equity," § 269.

One for interest, other for principal.— Two parties may unite, one to obtain the interest and the other the principal of a bond. Lanterman *v.* Lanterman, 42 N. J. Eq. 319, 5 Atl. 132.

Church controversy.— The elder and the pastor of a religious association may join with members in a suit to recover the church property, to restrain interference with the ecclesiastical rights of each, and to compel an accounting of moneys payable to elder and pastor as salary. Fuchs *v.* Meisel, 102 Mich. 257, 60 N. W. 773, 32 L. R. A. 92.

11. Powell *v.* Spaulding, 3 Greene (Iowa) 443; De Louis *v.* Meek, 2 Greene (Iowa) 55,

their validity depending upon the same question, may unite in a suit to determine and protect such interests.[12] Persons may likewise unite as plaintiffs, although their rights or titles be entirely distinct and unconnected, where they are invaded or threatened by the same act, calling for similar relief.[13]

d. Refusal to Become Plaintiff. One whose interest is with plaintiff and who should be a co-plaintiff but refuses to join as such should be made a defendant,[14] but the bill must show the refusal to join as plaintiff as a reason for adopting such course.[15] The refusal of such a person to participate actively as a complainant does not waive his right.[16] Where one who joined as plaintiff in instituting the suit declines to prosecute it further, and is a necessary party, the court should transpose him to the other side.[17]

3. DEFENDANTS. It follows from what has already been said[18] that defendants to a bill in equity should be all the necessary parties, who are not plaintiffs, except such dispensable parties as are omitted for reasons shown in the bill,[19] together with such proper parties as plaintiff sees fit to join.[20]

50 Am. Dec. 491. Unconnected parties, having a common interest centering in the point in issue, may unite. Comstock *v.* Rayford, 1 Sm. & M. (Miss.) 423, 40 Am. Dec. 102. The community of interest must be in the subject-matter and not in the question of law involved. Schulenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422; Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259.

12. *Alabama.*— Gannard *v.* Eslava, 20 Ala. 732.

Illinois.— Marsh *v.* Fairbury, 163 Ill. 401, 45 N. E. 236.

Kentucky.— Hutcheraft *v.* Shrout, 1 T. B. Mon. 206, 15 Am. Dec. 100; Scrimeger *v.* Bucchannon, 3 A. K. Marsh. 219; Tilford *v.* Emerson, 1 A. K. Marsh. 483.

New York.— Wood *v.* Perry, 2 Sandf. Ch. 7.

Wisconsin.—Wier *v.* Simmons, 55 Wis. 637, 13 N. W. 873.

United States.—Osborne *v.* Wisconsin Cent. R. Co., 43 Fed. 824.

See 19 Cent. Dig. tit. "Equity," § 270.

Compulsory joinder.— Such persons cannot on motion of defendant be compelled to unite. Bellows *v.* Sowles, 52 Fed. 528.

13. *California.*— Churchill *v.* Lauer, 84 Cal. 233, 24 Pac. 107.

Indiana.— Sullivan *v.* Phillips, 110 Ind. 320, 11 N. E. 300.

Iowa.— Brandirff *v.* Harrison County, 50 Iowa 164.

Massachusetts.— Monatiquot River Mills *v.* Braintree Water Supply Co., 149 Mass. 478, 21 N. E. 761, 4 L. R. A. 272; Ballou *v.* Hopkinton, 4 Gray 324.

Montana.— Beach *v.* Spokane Ranch, etc., Co., 25 Mont. 379, 65 Pac. 111.

New Jersey.— Atty.-Gen. *v.* New Jersey Cent. R. Co., 61 N. J. Eq. 259, 48 Atl. 347.

New York.— Hutchinson *v.* Reed, Hoffm. 316.

Rhode Island.—Lonsdale Co. *v.* Woonsocket, 21 R. I. 498, 44 Atl. 929.

United States.—Langdon *v.* Branch, 37 Fed. 449, 2 L. R. A. 120.

See 19 Cent. Dig. tit. "Equity," §§ 268, 269.

In a suit to restrain a nuisance two or more persons having distinct tenements, injured by the nuisance, may join. Murray *v.* Hay, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773. But see Mason *v.* Pittsburg Presby. Hospital, 30 Pittsb. Leg. J. N. S. 359. See, generally, NUISANCES.

Common frauds.— Where the same fraudulent representations have operated to deceive different persons, such persons may unite in a bill for relief. Bradley *v.* Bradley, 165 N. Y. 183, 58 N. E. 887 [*affirming* 53 N. Y. App. Div. 29, 65 N. Y. Suppl. 514]; Smith *v.* Schulting, 14 Hun (N. Y.) 52; Rader *v.* Bristol Land Co., 94 Va. 766, 27 S. E. 590; Bosher *v.* Richmond, etc., Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14. But see Chester *v.* Halliard, 36 N. J. Eq. 313.

14. *Arkansas.*— Porter *v.* Clements, 3 Ark. 364.

Illinois.— Whitney *v.* Mayo, 15 Ill. 251; Smith *v.* Sackett, 10 Ill. 534.

Kentucky.— Dozier *v.* Edwards, 3 Litt. 67.

Maryland.— Contee *v.* Dawson, 2 Bland 264.

Massachusetts.— Hurd *v.* Turner, 156 Mass. 205, 30 N. E. 1137; Billings *v.* Mann, 156 Mass. 203, 30 N. E. 1136.

New York.— Morse *v.* Hovey, 9 Paige 197; Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

South Carolina.— Pogson *v.* Owen, 3 Desauss. 31.

See 19 Cent. Dig. tit. "Equity," § 274.

15. Contee *v.* Dawson, 2 Bland (Md.) 264; Morse *v.* Hovey, 9 Paige (N. Y.) 197. But where such a defendant answered, making no objection to his position as such, it was held that his refusal to join as plaintiff might be inferred. Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513.

16. Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318. But where one sues on behalf of himself and others, defendant is entitled to an order that persons failing to appear after notice shall be barred from participating in the recovery. Smith *v.* New England Bank, 69 N. H. 254, 45 Atl. 1082.

17. McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

18. See *supra*, V, A, 1; V, F, 1, 2.

19. See *supra*, V, C, 4.

20. See *supra*, V, D.

G. Changes in Parties Pending Suit — 1. Bringing in New Parties. When in the progress of a suit it appears that a necessary party is not before the court he must be brought in,[21] and merely proper parties may be brought in.[22] Plaintiff may bring in such new parties, according to circumstances, either by amendment[23] or by supplemental bill.[24] A new party cannot, however, be brought in for the purpose of litigating a matter beyond the scope of the original bill,[25] and leave may be denied on the ground of laches,[26] or because amendment is unnecessary.[27] A defendant cannot object to an order of the court, making new parties, with plaintiff's assent.[28] It has been held that plaintiff cannot be compelled to add new parties if he chooses to take the responsibility of proceeding without them.[29] Defendant may bring in new parties by a cross bill for relief, but not by one which is merely defensive.[30] Under the code new parties may be brought in on motion of defendant,[31] or even of the court's own motion.[32]

2. Substitution. As a plaintiff may not continue to prosecute a suit after he parts with his interest,[33] or prosecute for the use of another,[34] it follows that wherever plaintiff's interest passes to another pending the suit the cause cannot proceed until the person acquiring that interest is substituted as plaintiff.[35] It seems also that a substitution of plaintiffs may be permitted to correct an error in the

21. Herrington *v.* Hubbard, 2 Ill. 569, 33 Am. Dec. 426; Carman *v.* Watson, 1 How. (Miss.) 333; Perham *v.* Haverhill Fibre Co., 64 N. H. 2, 3 Atl. 312; Brown *v.* Knapp, 7 W. Va. 678.

Representatives of a decedent may be brought in as new parties in the same manner as the deeedent might have been if living. Hungerford *v.* Cushing, 8 Wis. 332. See *infra*, V, I.

22. Barnes *v.* Alexander, 107 Ga. 373, 33 S. E. 396; Camp *v.* McGillicuddy, 10 Iowa 201; Moore *v.* Hammell, (N. J. Ch. 1888) 14 Atl. 743.

23. Rowzee *v.* Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L. R. A. 402 (holding it error to refuse an amendment, in a suit to restrain the unauthorized use of lands given for a park, in order to bring in the original donors of the land); Hungerford *v.* Cushing, 8 Wis. 332. See also *infra*, XI, A, 1, b.

Where a co-plaintiff is brought in by amendment, a lien on land by virtue of the suit attaches as to him only from the time of his becoming a party. Stout *v.* Vause, 1 Rob. (Va.) 169.

24. Hoppock *v.* Cray, (N. J. Ch. 1891) 21 Atl. 624; Jenkins *v.* Freyer, 4 Paige (N. Y.) 47; Robertson *v.* Winchester, 85 Tenn. 171, 1 S. W. 781. See also *infra*, XII, A, 3.

Joinder of original defendants.— Whether the original defendants should be defendants to the supplemental bill depends upon whether their interests would be affected by the decree against the new defendant. Chase *v.* Searles, 45 N. H. 511. Where new parties are made after decree by supplemental bill, the parties to the original need not be joined as the new parties are not bound by the decree. Stewart *v.* Duvall, 7 Gill & J. (Md.) 179.

25. Franklin Bank-Note Co. *v.* Augusta, etc., R. Co., 102 Ga. 547, 30 S. E. 419; Dadirrian *v.* Gullian, 80 Fed. 986. See also Roberts *v.* Atlanta Real Estate Co., 118 Ga. 502, 45 S. E. 308.

26. Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131.

After final hearing on the merits new parties will not be brought in where justice can be done between the parties before the court without prejudice to the absent. Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680.

27. As where the defect of parties had been waived. Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 369. See also Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680.

28. Exchange, etc., Bank *v.* Bradley, 15 Lea (Tenn.) 279.

29. Leiter *v.* Field, 24 Ill. App. 123; Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621. See also Doke *v.* Williams, (Fla. 1903) 34 So. 569. A bill will not lie to compel defendant to make plaintiff a co-plaintiff with him in another suit. Carter *v.* Smith, 35 Fla. 169, 17 So. 411.

When necessary to make title to land in controversy, either party should be allowed time to bring new parties before the court. Gates *v.* McWilliams, 6 Dana (Ky.) 42.

30. Kanawha Lodge No. 25 *v.* Swann, 37 W. Va. 176, 16 S. E. 462; Brandon Mfg. Co. *v.* Prime, 4 Fed. Cas. No. 1,810, 3 Ban. & A. 191, 14 Blatchf. 371. See also Ladner *v.* Ogden, 31 Miss. 332, construing statutory provisions in this regard.

31. Camp *v.* McGillicuddy, 10 Iowa 201; Hopkins *v.* Gilman, 47 Wis. 581, 3 N. W. 382. See also Kempner *v.* Wallis, 2 Tex. App. Civ. Cas. 585.

32. McGregor *v.* McGregor, 21 Iowa 441.

33. See *supra*, V, F, 2, a.

34. See *supra*, V, F, 2, b.

35. Smith *v.* Brittenham, 109 Ill. 540; Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; Laird *v.* Boyle, 2 Wis. 431. See also Powell *v.* Spaulding, 3 Greene (Iowa) 443.

bringing of the suit.[36] Where a defendant's interest ceases, the necessity of a substitution depends generally upon whether the transfer is voluntary or by operation of law.[37] Where a necessary defendant dies, it is necessary to substitute, according to the nature of his interest, his heirs or personal representatives,[38] except where the parties are so numerous that the probable frequency of deaths would lead to successive delays if such substitution were required.[39] The assignee of an insolvent or bankrupt defendant must likewise be substituted.[40] Where, however, the transfer is voluntary and occurs after the suit was instituted, it is not essential to bring in the transferee.[41] Where new parties are substituted they succeed to the rights of their predecessor and are bound by the record as it was in his lifetime.[42] The court has power to substitute another person for the purchaser of lands sold under its decree and to cause the deed to issue to such person.[43] The appropriate method of making the substitution in the case of the death of a party is by a bill of revivor or by a bill in the nature of a bill of revivor,[44] and in the case of other transfers by a supplemental bill or by a bill in the nature thereof.[45]

3. INTERVENTION — a. Right to Intervene. The general rule in equity is that a stranger will not be permitted on his own application to become a party.[46]

36. As by substituting the name of the ward for that of the guardian. Lombard *v.* Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273. But where a receiver of a corporation filed a bill to enforce the liability of stock-holders and the supreme court held that the right lay in the creditors and not in the receiver, it was not an abuse of discretion to refuse to substitute the creditors as plaintiffs, even with the consent of the receiver. Fairbanks *v.* Farwell, 141 Ill. 354, 30 N. E. 1056.

37. Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287.

38. *Georgia.*— Davis *v.* Singleton, 36 Ga. 330; Rodgers *v.* Rushin, 30 Ga. 934.

Kentucky.— Hackwith *v.* Damron, 1 T. B. Mon. 235.

New Jersey.— Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505.

Pennsylvania.— U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31.

Virginia.— Taylor *v.* Spindle, 2 Gratt. 44.

See 19 Cent. Dig. tit. "Equity," § 284.

Until the personal representative is made a party the court will not proceed to decree, although the person entitled to administration is already before the court. Hopkins *v.* Mazyck, 1 Rich. Eq. (S. C.) 263.

Where the heirs are already co-defendants, they succeed to the deceased defendant's rights of remedy and defense without prejudice to their former standing. Harper *v.* Drake, 14 Iowa 533.

39. Carey *v.* Hoxey, 11 Ga. 645.

40. Deas *v.* Thorne, 3 Johns. (N. Y.) 543; Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287. But where an assignee was removed and a new one appointed after decree, and pending appeal, the new assignee need not be made a party. Sands *v.* Codwise, 2 Johns. (N. Y.) 486.

41. Lawrence *v.* Lane, 9 Ill. 354; Scouten *v.* Bender, 1 Barb. Ch. (N. Y.) 647; Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287; Hill *v.* Maury, 21 W. Va. 162.

By force of a statute, requiring the recording of a notice of *lis pendens*, the failure so to record such notice may require the bringing in of a purchaser *pendente lite*. Barrett *v.* McAllister, 32 W. Va. 738, 11 S. E. 220. See, generally, LIS PENDENS.

Under Ala. Code, § 3790, authorizing amendments by adding or striking out names of parties, the introduction of new parties who have purchased pending the suit is not a matter of right. Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590. But see Vandeford *v.* Stovall, 117 Ala. 344, 23 So. 30.

42. Cook *v.* Moulton, 64 Ill. App. 419.

A cross bill may be filed by a substituted defendant for relief as to matters charged in the original. Barnard *v.* Hartford, etc., R. Co., 2 Fed. Cas. No. 1,003.

43. Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421.

44. Mitford Ch. Pl. 63 *et seq.*; Story Eq. Pl. 354. See *infra*, XIII, A.

45. Mitford Ch. Pl. 60; Story Eq. Pl. 340, 342. See *infra*, XII, A, 3.

46. Buford *v.* Rucker, 4 J. J. Marsh. (Ky.) 551; Davis *v.* Harrison, 2 J. J. Marsh. (Ky.) 189; Smith *v.* Evans, 3 A. K. Marsh. (Ky.) 217; Whitney *v.* Hanover Nat. Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531; Comfort *v.* McTeer, 7 Lea (Tenn.) 652; Anderson *v.* Jacksonville, etc., R. Co., 1 Fed. Cas. No. 358, 2 Woods 628; Drake *v.* Goodridge, 7 Fed. Cas. No. 4,062, 6 Blatchf. 151.

A stranger, claiming moneys in court, to satisfy a foreign judgment, by him obtained, has no standing to petition therefor. Esterbrook Steel Pen Mfg. Co. *v.* Ahern, 31 N. J. Eq. 3. See also DEPOSITS IN COURT, 13 Cyc. 1039, 1040 note 60.

As co-plaintiff or sole plaintiff.— One not a party will not be allowed to come in as a co-plaintiff (Drake *v.* Goodridge, 7 Fed. Cas. No. 4,062, 6 Blatchf. 151), or to prosecute a suit which the plaintiff therein has abandoned (Hyman *v.* Cameron, 46 Miss. 725).

Statutes have in many cases granted or extended the right.[47] And the general rule is departed from where the ends of justice require it,[48] as where the rights of such stranger would be affected by the decree and the court would be compelled to take notice of his absence; in such case he may be permitted to intervene instead of ordering the cause to stand over until he is brought in.[49] In order to intervene one must, however, show the existence of such an interest,[50] and the intervention must be for the protection of that interest.[51] A *cestui que trust* may be permitted to intervene where his right is not adequately protected by the trustee,[52] and stock-holders on similar grounds may in the discretion of the court be let into a suit against the corporation.[53] One may also become a party to a suit instituted for his benefit,[54] or to assert a right to share in the distribution of a fund realized for creditors.[55] So one may come in on the hearing and consent to be bound by the decree, thereby obviating error in not making him a party to the bill.[56] A limited intervention may sometimes be permitted, as to file testimony and be heard on the argument, without leave otherwise to interfere.[57]

b. Time to Intervene. One may by laches lose a right to intervene, and where the application is made after the cause has proceeded for a long time, the granting of leave is discretionary.[58] The court may in such a case restrict the intervention to such matters as may at that time properly be litigated.[59] Intervention is generally denied after decree,[60] and applications for leave to intervene after entry of

Interloper defendant.— It seems, however, that an interloper who turns out to be the real person in interest and to have actually defended the suit for the nominal defendant may be subjected to the decree. Schmidt *v.* Louisville, etc., R. Co., 44 S. W. 130, 19 Ky. L. Rep. 1625.

47. See, generally, PARTIES.

N. J. Ch. Act, § 41, permits parties acquiring interests after the inception of the suit to intervene and binds them by previous proceedings. See Davis *v.* Sullivan, 33 N. J. Eq. 569; Guest *v.* Hewitt, 27 N. J. Eq. 479.

48. Phillips *v.* Wesson, 16 Ga. 137.

49. Carter *v.* New Orleans, 19 Fed. 659. See also Kunkel *v.* Fitzhugh, 22 Md. 567; Birdsong *v.* Birdsong, 2 Head (Tenn.) 289; Byers *v.* Sugg, (Tenn. Ch. App. 1900) 57 S. W. 397; Georgia Cent. R., etc., Co. *v.* Macon, etc., R. Co., 115 Fed. 926; Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 2 C. C. A. 252.

If one's interest is likely to be affected he may make himself a party by petition. Morriss *v.* Barclay, 2 J. J. Marsh. (Ky.) 374; Miller *v.* Whittier, 33 Me. 521.

Any person claiming an interest may intervene under the modern practice. Marsh *v.* Green, 79 Ill. 385.

50. Black *v.* Percifield, 1 Ark. 472; Westfall *v.* Scott, 20 Ga. 233; Marsh *v.* Green, 79 Ill. 385.

An attorney entitled to a proportion of the claim for collecting it has no such interest as to entitle him to intervene personally. Kelley *v.* Newman, 79 Ill. App. 285.

A simple contract creditor of a party cannot intervene on that ground in a suit concerning title to property claimed by the debtor. Postal Tel. Cable Co. *v.* Snowdon, 68 Md. 118, 12 Atl. 549. See Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755.

51. In a suit to obtain possession of private papers the prosecuting officer cannot be made a party for the purpose of obtaining the papers to lay before the grand jury. He must obtain a subpœna duces tecum and then make summary application to the court which has impounded the papers. Potter *v.* Beal, 50 Fed. 860, 2 C. C. A. 60. See also for absence of adequate interest Coffin *v.* Chattanooga Water, etc., Co., 44 Fed. 533.

Before interveners can attack proceedings of other parties they must show their interest. Smith *v.* Hunt, 2 Rob. (Va.) 206.

52. *In re* Printup, 87 Ala. 148, 6 So. 418; Winslow *v.* Minnesota, etc., R. Co., 4 Minn. 313, 77 Am. Dec. 519. See also Doke *v.* Williams, (Fla. 1903) 34 So. 569. And see, generally, TRUSTS.

53. Gunderson *v.* Illinois Trust, etc., Bank, 100 Ill. App. 461. See also CORPORATIONS, 10 Cyc. 964.

54. Saylors *v.* Saylors, 3 Heisk. (Tenn.) 525. But not until after decree. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

55. *In re* Printup, 87 Ala. 148, 6 So. 418; Central R., etc., Co. *v.* Farmers' L. & T. Co., 116 Fed. 700. In order to become a party by proving one's claim before the master in such case, the claim must have existed at the commencement of the suit, so as to have been represented by the original parties. Terry *v.* Cape Fear Bank, 20 Fed. 777.

56. Hannas *v.* Hannas, 110 Ill. 53.

57. Florida *v.* Georgia, 17 How. (U. S.) 478, 15 L. ed. 181.

58. Gunderson *v.* Illinois Trust, etc., Bank, 100 Ill. App. 461.

59. Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642.

60. *Ex p.* Branch, 53 Ala. 140; Carey *v.* Brown, 58 Cal. 180; Ward *v.* Clark, 6 Wis 509. "Applications for leave to intervene in a case after the entry of a final decree

a final decree are unusual. Frequently too at earlier stages intervention is denied because of the delay.[61]

c. Petition and Procedure on Intervention. A petition of intervention should exhibit all the material facts relied on, embodying by recital or reference so much of the record in the original suit as is essential,[62] and, where the purpose is to intervene as a defendant, should be accompanied by the proposed answer, but may be allowed to stand for an answer.[63] The proceedings on intervention are much affected by statute.[64] In the federal courts the parties to the original bill are bound to take notice of an intervening petition filed in the suit;[65] but as intervention is generally not a matter of right, leave to file or an equivalent order must be obtained before an intervener will be recognized as a party.[66] A plaintiff by replying to a petition in intervention and proceeding to a hearing waives objection to the sufficiency of the petition and to the absence of an order granting leave to intervene.[67] An intervener by leave of court becomes a party for all purposes of the suit as though originally a party,[68] and has the benefit of proof already

are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise." U. S. *v.* Northern Securities Co., 128 Fed. 808, 810, per Thayer, C. J.

Mortgagees of real estate were permitted to intervene as parties defendant after decree the enforcement of which would diminish the value of their security. Everett *v.* Edwards, 149 Mass. 588, 22 N. E. 52, 14 Am. St. Rep. 462, 5 L. R. A. 110.

61. Central Trust Co. *v.* Texas, etc., R. Co., 24 Fed. 153.

Where intervener was also plaintiff's solicitor, he was refused leave to intervene after issue joined and a master's report filed. Magnusson *v.* Charlson, 32 Ill. App. 580.

One whose rights could be saved was refused leave after hearing. Gartman *v.* Pouns, 12 Sm. & M. (Miss.) 290.

After testimony closed.— One coming in under general leave, only a few days before the closing of evidence, may not enlarge the grounds of relief. Continental Trust Co. *v.* Toledo, etc., R. Co., 86 Fed. 929. One who has been a party by intervention a long time without taking any part in the proceedings will not, after the testimony has been closed, be given charge of the suit on allegation of collusion between the original parties, of which other interveners do not complain, and based on testimony already in the record. Edwards *v.* Bay State Gas Co., 120 Fed. 585.

Party having beneficial interest in the decree sought may intervene at any stage. Robertson *v.* Baker, 11 Fla. 192.

62. Empire Distilling Co. *v.* McNulta, 77 Fed. 700, 23 C. C. A. 415.

If nature of the suit is not disclosed by the petition it should be denied. Ransom *v.* Winn, 18 How. (U. S.) 295, 15 L. ed. 388.

Averments on information and belief are permissible where they are of a character not presumably within intervener's knowledge. Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623.

The petition is to be construed in connection with the averments of the original bill. Georgia Cent. R., etc., Co. *v.* Macon, etc., R. Co., 115 Fed. 926.

63. Toler *v.* East Tennessee, etc., R. Co., 67 Fed. 168.

64. See, generally, PARTIES.

65. McLeod *v.* New Albany, 66 Fed. 378, 13 C. C. A. 525.

66. See the federal cases cited in the foregoing notes under this subsection.

Intervention as co-plaintiff should be upon the intervener's petition, not upon original plaintiff's petition. State *v.* Sunapee Dam Co., 72 N. H. 114, 55 Atl. 899.

Leave alone not enough.— A person of his own motion does not become a party complainant to a sworn bill, on which an injunction has been issued *ex parte*, by merely obtaining leave to become a party. He must file some writing in the cause binding him to the allegations and responsibilities of a litigant. Laughlin *v.* Leigh, 107 Ill. App. 476; East St. Louis *v.* Board of Trustees, 6 Ill. App. 130, 135.

In Kentucky the correct practice is to ask orally that the petition be considered forthwith, but if it be filed it will be considered on the hearing without such previous application. Williams *v.* Hall, 7 B. Mon. 295. A defendant affected by the relief sought by the intervener must have an opportunity to answer the petition. Meek *v.* McCall, 80 Ky. 371.

In Virginia interveners who filed their petitions without leave or notice to defendants, which were not brought to the attention of the court nor recognized in the decree, were held not to have become parties. Walter *v.* Chichester, 84 Va. 723, 6 S. E. 1.

In West Virginia one does not become a party until the bill has been amended so as to charge him. Gall *v.* Gall, 50 W. Va. 523, 40 S. E. 380; Shinn *v.* Board of Education, 39 W. Va. 497, 20 S. E. 604.

67. Perry *v.* Godbe, 82 Fed. 141.

68. Rice *v.* Durham Water Co., 91 Fed. 433.

taken.[69] Even though the intervention be to assert a legal demand, the pleadings must, where law and equity are administered in separate proceedings, conform to the practice in equity.[70]

H. Objections as to Parties — 1. INTRODUCTORY STATEMENT. The mode of raising objections because of the misjoinder or non-joinder of parties depends upon the character of such parties, and the situation of the party objecting.[71] Where the proper parties are before the court, an objection based merely on their position on the record or description of their capacity will often be disregarded.[72]

2. PLAINTIFFS. Objection that a plaintiff has no interest in the suit, if the defect appears on the face of the bill, should regularly be taken by demurrer,[73] which may be general or for want of equity.[74] If the objection does not appear on the face of the bill it may be raised by answer.[75] The objection may, however, be taken at the hearing.[76] A mere misjoinder of plaintiffs is waived unless asserted by pleading.[77] Objection for non-joinder should be made by demurrer or answer.[78] An irregularity by bringing suit directly in the names of public officers instead of in the name of the attorney-general on their relation is waived by answering to the merits,[79] and an objection that the suit was by the legal owner of the demand instead of by the real party in interest was held bad on appeal.[80] A defendant cannot after answer object that a plaintiff's name was used without his authority.[81] The remedy for a plaintiff who has been joined without his consent is to move to strike out his name.[82]

69. Birdsong *v.* Birdsong, 2 Head (Tenn.) 289.

70. Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 115 Fed. 475, 53 C. C. A. 207.

71. See *infra*, V, H, 2, 3, 4.

72. Taylor *v.* Brown, 32 Fla. 334, 13 So. 957 (objection on appeal); Chipman *v.* Thompson, Walk. (Mich.) 405 (objection at hearing); West *v.* Rutland Bank, 19 Vt. 403; Billmyer *v.* Sherman, 23 W. Va. 656 (objection on appeal). See also *supra*, V, F, 1.

73. Talmage *v.* Pell, 9 Paige (N. Y.) 410. It is a good ground of demurrer to the whole bill that one plaintiff has no interest. Barstow *v.* Smith, Walk. (Mich.) 394. See *supra*, V, F, 2, c.

74. Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520; Hodge *v.* North Missouri R. Co., 12 Fed. Cas. No. 6,561, 1 Dill. 104.

75. Talmage *v.* Pell, 9 Paige (N. Y.) 410; Barr *v.* Clayton, 29 W. Va. 256, 11 S. E. 899.

76. Haskell *v.* Hilton, 30 Me. 419; Harrison *v.* McMennomy, 2 Edw. (N. Y.) 251.

Objection on appeal.— Where one who has no interest is joined as plaintiff with a person entitled, an objection first made on appeal will have no other effect than to induce the court to treat the right as vested solely in the person entitled. Dickenson *v.* Davis, 2 Leigh (Va.) 401.

That plaintiff had assigned his interest before suit may be presented by objection on the hearing. Crooker *v.* Rogers, 58 Me. 339. Where plaintiff assigned *pendente lite*, but it did not appear whether the assignment was absolute, and the cause proceeded until after a report had been made, an objection made thereafter was denied. Pond *v.* Clark, 24 Conn. 370.

77. Hendrickson *v.* Wallace, 31 N. J. Eq. 604.

Any defendant may demur for misjoinder. Christian *v.* Crocker, 25 Ark. 327, 99 Am. Dec. 223.

Objection at the hearing is too late. Newhouse *v.* Miles, 9 Ala. 460; Turner *v.* Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243; Reed *v.* Wessel, 7 Mich. 139; Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200.

78. Buda Foundry, etc., Co. *v.* Columbian Celebration Co., 55 Ill. App. 381; Featherston *v.* Norris, 7 S. C. 472. It is necessary that the defect be clearly shown by the bill or defendant must aver it in his answer. Crane *v.* Deming, 7 Conn. 387.

Special demurrer.— Where a committee of a drunkard sued for partition and also for rents and profits without joining the drunkard, it was held that so far as the bill concerned rents and profits, it was matter of form only and must be raised by special and not general demurrer. Gorham *v.* Gorham, 3 Barb. Ch. (N. Y.) 24.

Objection not appearing on face of bill must be taken advantage of by plea and answer. Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200.

79. Charleston Dist. *v.* Andrews, 10 Rich. Eq. (S. C.) 4.

80. Hale *v.* Horne, 21 Gratt. (Va.) 112.

Objection first made at final hearing that a holder of an equitable title was not a party to a suit brought by the legal holder was held bad. California Electrical Works *v.* Finck, 47 Fed. 583.

81. Johnson *v.* Thompson, 28 Ill. 352. The court will not inquire, at the objection of a defendant, whether plaintiff has consented to the prosecution of the bill by the solicitor. Doolittle *v.* Gookin, 10 Vt. 265.

82. Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

3. Defendants — a. Misjoinder. A misjoinder of defendants is a personal defense which can be taken advantage of only by defendant improperly joined,[83] at least where his joinder will not affect the decree against the proper defendant.[84] The objection should where possible be raised by demurrer,[85] and cannot be raised for the first time at the hearing.[86]

b. Non-Joinder — (i) *Nature of Objection.* It is unnecessary to discriminate between objections based specifically on the non-joinder of proper defendants and objections for want of necessary parties to the bill. As the ranging of parties is of secondary importance,[87] and the essential thing is that all persons interested should be before the court, either as plaintiff or defendant,[88] any objection for want of parties, not going to the non-joinder of one whose absence as a plaintiff is not accounted for,[89] must be in effect to the non-joinder of a necessary defendant, because the joinder of merely proper parties is at the option of plaintiff, and their non-joinder not a matter of objection.[90]

(ii) *Indispensable Parties.* As the want of indispensable parties goes to the jurisdiction to render any decree,[91] an objection on that ground may be raised at any stage of the proceedings,[92] as on the hearing,[93] or on an appeal.[94] For the

83. *Alabama.*— Norwood *v.* Memphis, etc., R. Co., 72 Ala. 563; Ware *v.* Curry, 67 Ala. 274; Robison *v.* Robison, 44 Ala. 227; Toulmin *v.* Hamilton, 7 Ala. 362.

Illinois.— Peoria, etc., R. Co. *v.* Pixley, 15 Ill. App. 283.

Indiana.— English *v.* Roche, 6 Ind. 62.

Kentucky.— Johnson *v.* Rankin, 3 Bibb 86.

New York.— Cherry *v.* Monro, 2 Barb. Ch. 618.

North Carolina.— Alexander *v.* Taylor, 62 N. C. 36.

See 19 Cent. Dig. tit. "Equity," § 290.

Objection by plaintiff.— Plaintiff who improperly joined a defendant but sought no decree against him could not object to proceeding to decree against the proper defendant on the ground that the case had not matured as to the one improperly joined. Warren *v.* Syme, 7 W. Va. 474.

84. Norwood *v.* Memphis, etc., R. Co., 72 Ala. 563; Hunley *v.* Hunley, 15 Ala. 91; Johnson *v.* Rankin, 3 Bibb (Ky.) 86.

85. Toulmin *v.* Hamilton, 7 Ala. 362; Erwin *v.* Fergson, 5 Ala. 158; Moore *v.* Armstrong, 9 Port. (Ala.) 697; Stookey *v.* Carter, 92 Ill. 129; Burger *v.* Potter, 32 Ill. 66; Alexander *v.* Taylor, 62 N. C. 36. If the bill shows that a defendant has had an interest a demurrer will not lie unless the bill also shows clearly that he has parted with such interest absolutely. Crane *v.* Deming, 7 Conn. 387.

A motion to strike out the name of a defendant improperly joined will not lie. Lyne *v.* Marcus, 1 Mo. 410, 13 Am. Dec. 509.

86. Erwin *v.* Fergson, 5 Ala. 158; Pixley *v.* Gould, 13 Ill. App. 565. See also United Shoe Machinery Co. *v.* Holt, 185 Mass. 97, 69 N. E. 1056. The objection is too late after a reference and investigation of the merits. Hartford *v.* Chipman, 21 Conn. 488.

87. See *supra*, V, F, 1.

88. See *supra*, V, F, 2, 3.

89. See *supra*, V, F, 2; V, H, 2.

90. See *supra*, V, D.

91. See *supra*, V, C, 3.

92. Winnipissiogee Lake Co. *v.* Worster, 29 N. H. 433.

93. *Alabama.*— Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Boyle *v.* Williams, 72 Ala. 351; Sawyers *v.* Baker, 66 Ala. 292; Prout *v.* Hoge, 57 Ala. 28; McMaken *v.* McMaken, 18 Ala. 576.

Arkansas.— Porter *v.* Clements, 3 Ark. 364.

Florida.— Robinson *v.* Howe, 35 Fla. 73, 17 So. 368.

Georgia.— Smith *v.* Mitchell, 6 Ga. 458.

Illinois.— Farmers' Nat. Bank *v.* Sperling, 113 Ill. 273; Prentice *v.* Kimball, 19 Ill. 320.

Maine.— Laughton *v.* Harden, 68 Me. 208.

New Jersey.— Winans *v.* Graves, 43 N. J. Eq. 263, 11 Atl. 25; Van Doren *v.* Robinson, 16 N. J. Eq. 256.

Vermont.— Cannon *v.* Norton, 14 Vt. 178.

Virginia.—Vaiden *v.* Stubblefield, 28 Gratt. 153; Clark *v.* Long, 4 Rand. 451.

West Virginia.— Hill *v.* Proctor, 10 W. Va. 59.

United States.— Coiron *v.* Millaudon, 19 How. 113, 15 L. ed. 575; Adams *v.* Howard, 22 Fed. 656, 23 Blatchf. 27; Alexander *v.* Horner, 1 Fed. Cas. No. 169, 1 McCrary 634; Baker *v.* Biddle, 1 Fed. Cas. No. 764, Baldw. 394.

See 19 Cent. Dig. tit. "Equity," § 287.

94. *Alabama.*— Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Boyle *v.* Williams, 72 Ala. 351; Bibb *v.* Hawley, 59 Ala. 403; McMaken *v.* McMaken, 18 Ala. 576.

Arkansas.— Simms *v.* Richardson, 32 Ark. 297.

Florida.— Robinson *v.* Howe, 35 Fla. 73, 17 So. 368.

Illinois.— Farmers' Nat. Bank *v.* Sperling, 113 Ill. 273; Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 109 Ill. 71, 673; Conwell *v.* Watkins, 71 Ill. 488; Lynch *v.* Rotan, 39 Ill. 14; Prentice *v.* Kimball, 19 Ill. 320; Scott *v.* Bennett, 6 Ill. 646.

Missouri.— O'Fallon *v.* Clopton, 89 Mo. 284, 1 S. W. 302.

same reason the court will of its own motion raise and act upon the objection.[95] Where the nature of the bill requires a particular class of persons to be parties, it will not be presumed that defendants named in the bill are the persons and all the persons constituting such class, but such fact must be pleaded.[96]

(III) *Dispensable Parties.* Where a party is dispensable, that is, where a decree can be made doing justice as to the parties before the court without affecting his right,[97] a failure to bring him before the court must be pleaded.[98] Where the defect appears on the face of the bill, the appropriate remedy is by demurrer,[99] which must be special.[1] A demurrer will not lie unless it affirmatively appears on the face of the bill that there are persons not parties whose interests are involved in the controversy.[2] If the defect does not so appear the proper remedy is by plea,[3] but it is sometimes held or intimated that the objection may be raised

Virginia.— Clayton *v.* Henley, 32 Gratt. 65; Taylor *v.* Spindle, 2 Gratt. 44.

West Virginia.— Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

United States.— Coiron *v.* Millaudon, 19 How. 113, 15 L. ed. 575; Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394.

See 19 Cent. Dig. tit. "Equity," § 287.

The appellate court will reverse the decree where the lack of necessary parties appears on the face of the bill, although the objection was not made below. Hitchcox *v.* Hitchcox, 39 W. Va. 607, 20 S. E. 595.

Except in a very strong case the objection ought not to prevail on appeal. Mechanics Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

95. *Alabama.*— Sawyers *v.* Baker, 66 Ala. 292; Prout *v.* Hoge, 57 Ala. 28; Goodman *v.* Benham, 16 Ala. 625.

Arkansas.— Banks *v.* Green, 35 Ark. 84; Simms *v.* Richardson, 32 Ark. 297.

Illinois.— Prentice *v.* Kimball, 19 Ill. 320; Herrington *v.* Hubbard, 2 Ill. 569, 33 Am. Dec. 426.

Maine.— Laughton *v.* Harden, 68 Me. 208; Morse *v.* Machias Water Power, etc., Co., 42 Me. 119.

New York.— Shaver *v.* Brainard, 29 Barb. 25.

Virginia.— Clayton *v.* Henley, 32 Gratt. 65.

West Virginia.— Morgan *v.* Blatchley, 33 W. Va. 155, 10 S. E. 282.

United States.— Alexander *v.* Horner, 1 Fed. Cas. No. 169, 1 McCrary 634.

See 19 Cent. Dig. tit. "Equity," §§ 287, 292.

Want of jurisdiction.— The court may not of its own motion interpose the objection of want of jurisdiction over the parties. Gage *v.* Schmidt, 104 Ill. 106. But see Stephenson *v.* Davis, 56 Me. 73.

96. Young *v.* Pate, 3 Dana (Ky.) 306.

97. See *supra*, V, C, 4.

98. Florence Sewing-Mach. Co. *v.* Singer Mfg. Co., 9 Fed. Cas. No. 4,884, 8 Blatchf. 113. See also McGuire *v.* Stewart, 1 T. B. Mon. (Ky.) 189; Clayton *v.* Henley, 32 Gratt. (Va.) 65.

If objection is not made early it is not the duty of the court to delay the cause because of the absence of such a party. Brooks *v.* Fowle, 14 N. H. 248.

Before cross bill.— The objection should precede the filing of a cross bill. Plum *v.* Smith, 56 N. J. Eq. 468, 39 Atl. 1070.

Omission of cosurety.— A principal and surety cannot by bill to open a decree against them object that another surety had not been brought in. Hill *v.* Bowyer, 18 Gratt. (Va.) 364.

99. *Alabama.*— McMaken *v.* McMaken, 18 Ala. 576.

Arkansas.— Simms *v.* Richardson, 32 Ark. 297.

Illinois.— Spear *v.* Campbell, 5 Ill. 424. Advantage may be taken of the defect by demurrer or motion to dismiss. Conwell *v.* Watkins, 71 Ill. 488.

Kentucky.— Johnson *v.* Rankin, 2 Bibb 184.

Missouri.— Farmers', etc., Bank *v.* Robinson, 96 Mo. App. 385, 70 S. W. 372.

New Jersey.— Melick *v.* Melick, 17 N. J. Eq. 156.

New York.— General Mut. Ins. Co. *v.* Benson, 5 Duer 168.

South Carolina.— Neely *v.* Anderson, 2 Strobh. Eq. 262; Shubrick *v.* Russell, 1 Desauss. 315.

Vermont.— Cannon *v.* Norton, 14 Vt. 178.

See 19 Cent. Dig. tit. "Equity," § 288.

1. Hand *v.* Dexter, 41 Ga. 454; Laughton *v.* Harden, 68 Me. 208. See also 1 Daniell Ch. Pr. 385. The court will be indisposed to listen to the objection at the hearing of a general demurrer. Kean *v.* Johnson, 9 N. J. Eq. 401.

Where the party is indispensable a general demurrer will lie. Laughton *v.* Harden, 68 Me. 208. But see Wiswell *v.* Starr, 50 Me. 381.

2. Walling *v.* Thomas, 133 Ala. 426, 31 So. 982; Beach *v.* Spokane Ranch, etc., Co., 25 Mont. 379, 65 Pac. 111; Farson *v.* Sioux City, 106 Fed. 278.

3. *Alabama.*— Prout *v.* Hoge, 57 Ala. 28.

Mississippi.— Griffin *v.* Lovell, 42 Miss. 402.

Missouri.— Gamble *v.* Johnson, 9 Mo. 605.

South Carolina.— Neely *v.* Anderson, 2 Strobh. Eq. 262; Lainhart *v.* Reilly, 3 Desauss. 590; Shubrick *v.* Russell, 1 Desauss. 315.

Vermont.— Cannon *v.* Norton, 14 Vt. 178.

United States.— Kittredge *v.* Claremont Bank, 14 Fed. Cas. No. 7,858, 3 Story 590. And see 1 Daniell Ch. Pr. 386.

See 19 Cent. Dig. tit. "Equity," § 288.

by answer.[4] The pleading, whatever its class, must point out the proper parties,[5] not necessarily by name, for that might be impossible, but in such a manner as to indicate the precise objection and enable plaintiff to amend.[6] As a general rule objections of the class under consideration cannot be first made on the hearing,[7] or of course on appeal.[8]

4. Waiver of Objections. The party whose duty it is to cure a defect by bringing in new parties cannot object to the court's proceeding without them.[9]

4. *Alabama.*— McMaken *v.* McMaken, 18 Ala. 576.

Illinois.— Conwell *v.* Watkins, 71 Ill. 488; Spear *v.* Campbell, 5 Ill. 424.

Kentucky.— McGuire *v.* Stewart, 1 T. B. Mon. 189; McKinley *v.* Combs, 1 T. B. Mon. 105.

New York.—Mitchell *v.* Lenox, 2 Paige 280.

United States.— Carey *v.* Brown, 92 U. S. 171, 23 L. ed. 469; Florence Sewing-Mach. Co. *v.* Singer Mfg. Co., 9 Fed. Cas. No. 4,884, 8 Blatchf. 113. See U. S. Eq. Rules, 39, 52.

See 19 Cent. Dig. tit. "Equity," § 288.

If the defect is fatal it may be relied on in the answer. Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,068, McAll. 26.

In Massachusetts a failure to join all stockholders in a bill to charge them with corporate debts must, by St. (1862) c. 218, be objected to by plea or answer. Essex County *v.* Lawrence Mach. Shop, 10 Allen 352.

Under the codes a defect of parties must be suggested according to circumstances, either by demurrer or answer. Simms *v.* Richardson, 32 Ark. 297; Farmers', etc., Bank *v.* Robinson, 96 Mo. App. 385, 70 S. W. 372; Durand *v.* Hankerson, 39 N. Y. 287.

5. McKinley *v.* Combs, 1 T. B. Mon. (Ky.) 105; Neely *v.* Anderson, 2 Strobh. Eq. (S. C.) 262; Houghton *v.* Kneeland, 7 Wis. 244; Greenleaf *v.* Queen, 1 Pet. (U. S.) 138, 7 L. ed. 85.

6. So held with regard to demurrers. Atty.-Gen. *v.* Jackson, 11 Ves. Jr. 365, 32 Eng. Reprint 1128; D'Aranda *v.* Whittingham, Mosely 84, 25 Eng. Reprint 285.

7. *Alabama.*—Lehman *v.* Greenhut, 88 Ala. 478, 7 So. 299; Woodward *v.* Wood, 19 Ala. 213; Alderson *v.* Harris, 12 Ala. 580.

Connecticut.— Ferguson *v.* Fisk, 28 Conn. 501.

Iowa.— De Louis *v.* Meek, 2 Greene 55, 50 Am. Dec. 491.

Maine.— Evans *v.* Chism, 18 Me. 220.

Mississippi.— Harding *v.* Cobb, 47 Miss. 599.

New Jersey.— Lyman *v.* Place, 26 N. J. Eq. 30; Voorhees *v.* Melick, 25 N. J. Eq. 523; Annin *v.* Annin, 24 N. J. Eq. 184.

New York.— Lorillard *v.* Coster, 5 Paige 172; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80; Child *v.* Brace, 4 Paige 309; Harder *v.* Harder, 2 Sandf. Ch. 17.

Vermont.— Smith *v.* Bartholomew, 42 Vt. 356; Page *v.* Olcott, 28 Vt. 465.

Virginia.—Vaiden *v.* Stubblefield, 28 Gratt. 153.

United States.— Adams *v.* Howard, 22 Fed. 656, 23 Blatchf. 27; Wallace *v.* Holmes, 29 Fed. Cas. No. 17,100, 9 Blatchf. 65.

See 19 Cent. Dig. tit. "Equity," § 287.

Where defendant objects at the hearing, on the ground of non-joinder of a party in interest, he must show clearly that such interest existed at the commencement of the suit. Cook *v.* Mancius, 5 Johns. Ch. (N. Y.) 89.

In New Jersey it is said that the objection may be made at the hearing (Melick *v.* Melick, 17 N. J. Eq. 156), but only when the absent parties are essential to the final determination (Van Doren *v.* Robinson, 16 N. J. Eq. 256); and where the detriment to the omitted party will be serious or the decree of no avail to plaintiff (Wood *v.* Stover, 28 N. J. Eq. 248). The court may in its discretion refuse to entertain at the hearing an objection based on the absence of one whose presence is required merely for the protection of defendant (Cutler *v.* Tuttle, 19 N. J. Eq. 549), and the objection will not be then entertained where the interest of the absent person is represented by defendant (Swallow *v.* Swallow, 27 N. J. Eq. 278).

In Pennsylvania the objection may be taken at the hearing but not thereafter. Brown *v.* Gray, 2 Kulp 136.

The English chancery permitted an objection to be noted at the hearing (1 Daniell Ch. Pr. 387), but generally not after the merits were discussed (Jones *v.* Jones, 3 Atk. 111, 26 Eng. Reprint 867).

8. *Alabama.*— Andrews *v.* Hobson, 23 Ala. 219. See also Brandon *v.* Cabiness, 10 Ala. 155.

Connecticut.— Chambers *v.* Robbins, 28 Conn. 552; Bunnell *v.* Read, 21 Conn. 586; Baldwin *v.* Norton, 2 Conn. 161.

Georgia.— Clark *v.* Beall, 39 Ga. 533.

Illinois.— Burger *v.* Potter, 32 Ill. 66; Webb *v.* Hollenbeck, 48 Ill. App. 514. See also Battenhausen *v.* Bullock, 8 Ill. App. 312.

Kentucky.— West *v.* Sanders, 1 A. K. Marsh. 108.

Maryland.— Bridges *v.* McKenna, 14 Md. 258.

Michigan.—Snook *v.* Pearsall, 95 Mich. 534, 55 N. W. 459.

Mississippi.— Truly *v.* Lane, 7 Sm. & M. 325, 45 Am. Dec. 305.

Tennessee.— Reeves *v.* Dougherty, 7 Yerg. 222, 27 Am. Dec. 496.

Virginia.— Moore *v.* George, 10 Leigh 228.

United States.— McBurney *v.* Carson, 99 U. S. 567, 25 L. ed. 378.

See 19 Cent. Dig. tit. "Equity," § 287.

9. Lowry *v.* Armstrong, 3 Stew. & P. (Ala.) 297; Clough *v.* Clough, 3 B. Mon. (Ky.) 64. Especially where the cause has been standing a long time. Thompson *v.* Peebles, 6 Dana (Ky.) 387; Wickliffe *v.* Lee, 4 Dana (Ky.) 30.

A defendant may waive his right to object, where there is no defect of indispensable parties, not only by failing to object at a proper time and in a proper manner, but also by consenting to a decree,[10] by answering in such a way as to show that a party necessary under the averments of the bill is not so,[11] or it seems even by objecting to the bill on other grounds.[12] Heirs do not waive a failure to revive a suit against them by consenting that such suit be heard together with one to which they are parties.[13]

I. Curing Defects as to Parties. As already seen [14] plaintiff may sometimes avoid the necessity of bringing in a party by waiving his claim against him. So one who should be a defendant may bind himself by the decree and so authorize the court to proceed without making him a formal party by stipulating to that effect,[15] or by appearing voluntarily and answering the bill.[16] While the court may dismiss a bill without prejudice for want of necessary parties,[17] this course will not be adopted except in the case of omission of indispensable parties who cannot be brought in,[18] or in case parties have been omitted wilfully and in bad faith,[19] or perhaps where a weak case is presented on the merits.[20] The proper course in case of misjoinder is to amend by dismissing as to the one improperly joined.[21] Where the defect is a non-joinder of necessary parties, the suit is merely suspended.[22] The court should not proceed until the absent parties are before it,[23] but the proper order is for the cause to stand over with liberty to amend by adding new parties,[24] and if that be not done within the time fixed that

If plaintiff brings his cause to hearing without proper parties, he cannot put it off without the consent of defendant, unless he was not aware of the existence of the unrepresented interest. Innes *v.* Jackson, 16 Ves. Jr. 356, 33 Eng. Reprint 1019.

10. Livingston *v.* Woodworth, 15 How. (U. S.) 546, 14 L. ed. 809.

11. Daughbrill *v.* Helms, 53 Ala. 62.

12. Brown *v.* Gray, 2 Kulp (Pa.) 136.

13. Callaghan *v.* Circle, 12 W. Va. 562.

14. See *supra*, V, C, 2, a.

15. Edinger *v.* Heiser, 62 Mich. 598, 29 N. W. 367; Cowing *v.* Greene, 45 Barb. (N. Y.) 585.

16. Moore *v.* Bruce, 85 Va. 139, 7 S. E. 195; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380. One who so appears cannot thereafter object that he was not made a party. Moyer *v.* McCullough, Smith (Ind.) 211.

If plaintiff replies to such an answer and the cause is heard without objection he cannot thereafter object. McMullen *v.* Eagan, 21 W. Va. 233.

17. Goodman *v.* Benham, 16 Ala. 625; Smith *v.* Mitchell, 6 Ga. 458; Westcott *v.* Minnesota Min. Co., 23 Mich. 145; Goodman *v.* Niblack, 102 U. S. 556, 26 L. ed. 229; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

In England it seems this may not be done. 1 Daniell Ch. Pr. 388.

A suggestion or affidavit showing that other parties should be brought in may justify an order for that purpose, but not a dismissal of the bill. Peterson *v.* Poignard, 6 B. Mon. (Ky.) 570; Williams *v.* Carter, 3 Dana (Ky.) 198.

Under the Georgia practice want of parties does not justify a judge in withholding his sanction from a bill. Wyche *v.* Greene, 11 Ga. 159.

18. Bence *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 81. See also Smith *v.* Mitchell, 6 Ga. 458. Where such parties were named in the bill but were without the jurisdiction, it was held that the court might before proceeding require evidence that they had actual knowledge of the suit and an opportunity to appear. Lawrence *v.* Rokes, 53 Me. 110.

19. Rugely *v.* Robinson, 10 Ala. 702; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516.

20. Westcott *v.* Minnesota Min. Co., 23 Mich. 145.

On the other hand the fact that relief is sought against a contract contrary to public policy may be a reason for retaining the cause and proceeding where practicable, without the absent party. Belsterling *v.* Prowattan, 6 Phila. (Pa.) 40.

21. Lillard *v.* Mitchell, (Tenn. Ch. App. 1896) 37 S. W. 702; Victor Talking Mach. Co. *v.* American Graphophone Co., 118 Fed. 50; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520.

22. Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173.

23. Banks *v.* Green, 35 Ark. 84; Brown *v.* Johnson, 53 Me. 246.

24. *Illinois.*— Stelzick *v.* Weidel, 27 Ill. App. 177.

Maine.— Hussey *v.* Dole, 24 Me. 20; Felch *v.* Hooper, 20 Me. 159.

New Jersey.— Kempton *v.* Bartine, 60 N. J. Eq. 411, 45 Atl. 966 [*affirming* 59 N. J. Eq. 149, 44 Atl. 461].

New York.— Shaver *v.* Brainard, 29 Barb. 25.

United States.— Hunt *v.* Wickliffe, 2 Pet. 201, 7 L. ed. 397; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, Smith (Ind.) 173.

See 19 Cent. Dig. tit. "Equity," §§ 286, 287. See also *supra*, V, G, 1.

the bill be then dismissed.[25] An appellate court will not reverse a decree for want of parties who ought properly to have been joined, provided sufficient parties were before the court to sustain the decree as rendered,[26] and where the decree cannot be sustained the court will generally instead of dismissing the bill remand it to the court below that the omitted parties may be brought in.[27]

VI. PROCESS AND APPEARANCE.

A. Process — 1. Nature of Process in Equity Suits — a. The Subpœna. In the English chancery the fundamental writ for subjecting defendant to the jurisdiction of the court was the subpœna ad respondendum, a writ issued out of the court, after the filing of the bill, running in the name of the king, addressed to defendant in person and commanding him to personally appear on a day therein specified, to answer such things as shall then and there be alleged against him and to do and receive what the court shall consider in that behalf and this not to omit under penalty of one hundred pounds.[28] The object of the writ was to compel an answer, and it was accordingly followed, if defendant did not appear, by other writs and proceedings by way of attachment, sequestration, etc., to the same end.[29] As at the common law, so in chancery, actual appearance was long deemed necessary to the exercise of jurisdiction, but there arose the practice, when process failed to secure an appearance, of treating defendant's contumacy as an admission, and allowing the bill to be taken *pro confesso*,[30] a practice leading to a simplification in modern times of the compulsory process following the subpœna.

b. In the United States. The nature, form, and mode of service of process in equity suits in the United States are very largely regulated by statute and rule, and in many jurisdictions made to conform to process at law.[31] In some jurisdictions,[32] including the federal courts, the subpœna is retained in name and in substance.[33] In the absence of statute or established local practice it is generally safe to follow the practice of the English chancery as it stood at the time of the separation.[34] Where the form of subpœna is not prescribed, it has been held sufficient if it informs defendant that a suit has been instituted against him and a

In sustaining a demurrer to a cross bill for want of necessary parties, it is error to dismiss without leave to amend. Price *v.* Stratton, (Fla. 1903) 33 So. 644.

25. Stelzick *v.* Weidel, 27 Ill. App. 177; Kempton *v.* Bartine, 59 N. J. Eq. 149, 44 Atl. 461 [*affirmed* in 60 N. J. Eq. 411, 45 Atl. 966]; Victor Talking Mach. Co. *v.* American Graphophone Co., 118 Fed. 50.

Dismissal for want of equity is not the proper form. Stelzick *v.* Weidel, 27 Ill. App. 177.

26. Haley *v.* Bennett, 5 Port. (Ala.) 452; Jennings *v.* Davis, 5 Dana (Ky.) 127.

27. O'Fallon *v.* Clopton, 89 Mo. 284, 1 S. W. 302; Roundtree *v.* McKay, 59 N. C. 87; King *v.* Throckmorton County Com'rs Ct., 10 Tex. Civ. App. 114, 30 S. W. 257; Morgan *v.* Blatchley, 33 W. Va. 155, 10 S. E. 282.

28. 1 Daniell Ch. Pr. 554, 556.

The penalty, which gives its name to the writ, is merely nominal and not enforceable, the true sanction lying in the subsequent compulsory process mentioned in the text. 1 Spence Eq. 370 note A.

29. For a full discussion of the subpœna and its service and of subsequent process see 1 Daniell Ch. Pr. cc. 7, 8.

30. 1 Daniell Ch. Pr. 679.

31. See, generally, PROCESS.

A Massachusetts statute authorizing the insertion of a bill in equity in a writ of attachment was held not applicable to a suit brought under a later statute, the court announcing an unwillingness to liberally construe a statute extending arrest to equity cases. Com. *v.* Sumner, 5 Pick. 360.

32. No compilation of the laws of the various states is practicable within the limits of this article.

33. U. S. Eq. Rules 7, 11, 12, 13, 14, 15.

Fictitious names.— The effect of rules 20 and 23 is to require the real names of defendants to appear in the writ. Service upon persons designated by fictitious names is void. Kentucky Silver Min. Co. *v.* Day, 14 Fed. Cas. No. 7,719, 2 Sawy. 468.

34. See *supra*, I, C, 1.

U. S. Eq. Rule 90 adopts for cases not covered by supreme court or circuit court rules the "present practice" of the English chancery, which speaks from the adoption of that rule in 1842. For discussion of this rule see Thomson *v.* Wooster, 114 U. S. 104, 112 note, 5 S. Ct. 788, 29 L. ed. 105.

Where the statute prescribes the requisites of process a subpœna cannot be substituted for the statutory writ. McKee *v.* Harris, 1 Iowa 364; Black *v.* Clendenin, 3 Mont. 44.

copy of the bill is furnished;[35] but it would seem that a time and place for appearance should also be fixed,[36] and a copy served with the return-day blank is not a good service.[37] A subpœna which has already been used cannot be altered and used in another suit.[38] A mere clerical error may be corrected,[39] and technical defects are sometimes disregarded.[40] The writ has performed its function when it has brought defendant into court, and if lost thereafter the court may perfect the record by supplying a copy.[41]

2. NECESSITY FOR PROCESS — a. In General. The issuing and service of formal process is, except where there is a voluntary general appearance,[42] essential to constitute one effectively a party defendant,[43] and the fact of service should appear on the record.[44] A failure to issue process of subpœna until after the service of another writ is, however, a mere irregularity.[45] After the court has lost jurisdiction by the dismissal of a cause and adjournment of the term the parties cannot again be brought in except by process.[46] Although a suit relates to or is ancillary to another suit in the same court between the same parties, if it be technically a new suit process must be issued,[47] and where the proceeding should have been by petition in the original suit but was taken by original bill instead it may be treated

In New Hampshire it seems that a suit in equity may be instituted as to process either by subpœna or in analogy to law actions. Haverhill Iron Works *v.* Hale, 64 N. H. 406, 14 Atl. 78.

35. Levert *v.* Redwood, 9 Port. (Ala.) 79.

36. See, generally, PROCESS.

37. Arden *v.* Walden, 1 Edw. (N. Y.) 631. Where the statute requires the process to name the term at which defendant was required to appear, a writ notifying him to appear at the "next term" was held sufficient. Farmers' Ins. Co. *v.* Highsmith, 44 Iowa 330.

38. Saxton *v.* Stowell, 11 Paige (N. Y.) 526.

39. Dinsmore *v.* Westcott, 25 N. J. Eq. 302.

40. That the name of the county to the sheriff of which the subpœna was issued was inserted after its issuance is not ground for motion to quash. Owings *v.* Beall, 3 Litt. (Ky.) 103.

Style of party.— It is not a good objection that one properly charged in the bill as assignee for creditors is not so styled in the subpœna. White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187.

Miscellaneous defects.— A year after decree *pro confesso* advantage cannot be taken of such defects as that the subpœna was signed by a deputy in his own name, that the copy served was not subscribed by the complainant's solicitor or the officer making the service, or that it omitted the word "guardian" after defendant's name. Creveling *v.* Moore, 39 Mich. 563.

41. York, etc., R. Co. *v.* Myers, 18 How. (U. S.) 246, 15 L. ed. 380.

42. See *infra*, VI, B.

43. Stout *v.* Fortner, 7 Iowa 183; Shields *v.* Craig, 1 T. B. Mon. (Ky.) 72; Huston *v.* McClarty, 3 Litt. (Ky.) 274; Estill *v.* Clay, 2 A. K. Marsh. (Ky.) 497; Pouns *v.* Gartman, 29 Miss. 133; Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,989, 1 Sawy. 470.

Commencement of suit dating from issuance of process see Geiser Mfg. Co. *v.* Chewning, 52 W. Va. 523, 44 S. E. 193; and ACTIONS, 1 Cyc. 750.

Where several are named as defendants, but are not served with process and only one answers, the others are not concluded by a compromise made between plaintiff and the answering defendant. Oldhams *v.* Jones, 5 B. Mon. (Ky.) 458.

Legal process.— Equity jurisdiction cannot be exercised over a defendant brought in only by legal process. Norton *v.* Preston, 15 Me. 14, 32 Am. Dec. 128.

Order to show cause.— But where an order was made to bring in a new defendant and directing the service of the order upon her, requiring her to show cause against the relief demanded by plaintiff, it was held that she could not object on the ground that she had not been brought in by formal process. Berryman *v.* Haden, 112 Ga. 752, 38 S. E. 53.

Failure to serve unnecessary defendants does not prejudice proceedings against co-defendants properly served. Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465.

44. Shipley *v.* Mitchell, 7 Blackf. (Ind.) 472; Reed *v.* Glover, 6 Blackf. (Ind.) 345; Henderson *v.* Dennison, 1 Ind. 152, Smith (Ind.) 70; White *v.* Park, 5 J. J. Marsh. (Ky.) 603.

45. Calwell *v.* Boyer, 8 Gill & J. (Md.) 136, commission to take the answer of infants without first issuing the subpœna.

Service of injunction.— The court refused to dismiss where a subpœna was not taken out for more than three months after the bill was filed, but an injunction had been served on defendant. Stone *v.* Stone, 163 Mass. 474, 40 N. E. 897.

46. Coleman *v.* Harrison Cir. Ct., Hard. (Ky.) 171.

Amendment of the record as to service of process cannot be made without notice after the term at which the decree is rendered. Thrifts *v.* Fritz, 101 Ill. 457 [*reversing* 7 Ill. App. 55].

47. Gregory *v.* Pike, 79 Fed. 520, 25 C. C. A. 48. And see Ross *v.* Buchanan, 13 Ill. 55.

as dependent and proceeded with on mere notice without a subpœna to appear and amend.[48]

b. Amended Bills. Process issued and served on an original bill operates as notice of the claim and rights asserted therein,[49] and it is unnecessary generally to issue or serve a subpœna to answer an amended bill upon defendants already before the court on the original.[50] Where process to answer an amended bill is required it may be issued before the amended bill is filed.[51]

c. Supplemental Bills. In England a subpœna is necessary on a supplemental bill,[52] but in the United States it is usually unnecessary as to defendants already before the court.[53] A subpœna is necessary on a supplemental bill filed after the dismissal of the original.[54] Subpœnas on the original bill should be served before a supplemental bill is filed.[55]

d. Cross Bills. In the absence of statute subpœnas must be issued and served on cross bills.[56] It has been held that liens may be convened and determined

48. Maitland *v.* Gibson, 79 Fed. 136.

49. Watford *v.* Oates, 57 Ala. 290.

50. U. S. Equitable L. Assur. Soc. *v.* Laird, 24 N. J. Eq. 319; Lawrence *v.* Bolton, 3 Paige (N. Y.) 294; Longworth *v.* Taylor, 15 Fed. Cas. No. 8,491, 1 McLean 514 [*affirmed* in 14 Pet. 172, 10 L. ed. 405].

Where defendants who have not answered are called upon to answer both the amended and original bill, new subpœnas are not required. Fitzhugh *v.* McPherson, 9 Gill & J. (Md.) 51.

An amendment which does not affect his right does not require that a defendant already before the court shall be summoned to answer. Albright *v.* Flowers, 52 Miss. 246.

Stipulation to answer.— Where a defendant has appeared generally and his counsel stipulates to answer an amended bill containing a new cause of action no subpœna need issue thereon. Seattle, etc., R. Co. *v.* Union Trust Co., 79 Fed. 179, 24 C. C. A. 512.

Where non-residents appeared and answered the bill and an amended bill contained new matter, their status as non-residents in respect to the amended bill was not affected by their appearance to the original. Conrad *v.* Buck, 21 W. Va. 396.

In England a subpœna to answer an amended bill was required. Bramston *v.* Carter, 2 Sim. 458, 2 Eng. Ch. 458; Cooke *v.* Davies, Turn. & R. 309, 12 Eng. Ch. 309. But a waiver of a subpœna was readily implied. Kendall *v.* Beckett, 1 Russ. 152, 46 Eng. Ch. 134.

51. Long *v.* Willis, 50 W. Va. 341, 40 S. E. 340.

52. 3 Daniell Ch. Pr. 182.

53. Mix *v.* Beach, 46 Ill. 311; McGrath *v.* Balser, 6 B. Mon. (Ky.) 141; McKay *v.* Mayes, 29 S. W. 327, 16 Ky. L. Rep. 862; Shaw *v.* Bill, 95 U. S. 10, 24 L. ed. 333. But see French *v.* Hay, 22 Wall. (U. S.) 238, 22 L. ed. 854.

U. S. Eq. Rule 57 requires defendant to plead to the supplemental bill on the next succeeding rule day after it is filed.

In the New York court of chancery a subpœna was necessary. Lawrence *v.* Bolton, 3 Paige 294.

54. McGrath *v.* Balser, 6 B. Mon. (Ky.) 141.

55. Outwater *v.* Berry, 6 N. J. Eq. 63.

56. Miles *v.* Bacon, 4 J. J. Marsh. (Ky.) 457; Pracht *v.* Lange, 81 Va. 711; Woods *v.* Douglas, 46 W. Va. 657, 33 S. E. 771; Washington, etc., R. Co. *v.* Washington, 10 Wall. (U. S.) 299, 19 L. ed. 894; Lowenstein *v.* Glidewell, 15 Fed. Cas. No. 8,575, 5 Dill. 325. If an answer be in the nature of a cross bill (Garner *v.* Beaty, 7 J. J. Marsh. (Ky.) 223), or if it be made a cross bill (Ward *v.* Davidson, 2 J. J. Marsh. (Ky.) 443), a subpœna must be issued. In an action by a creditor to enforce a covenant by the principal defendant to pay the debts of another, other creditors, although parties, are not entitled to judgment unless they serve the debtor with process on their pleadings. Francis *v.* Smith, 1 Duv. (Ky.) 121.

In Kentucky it seems that process on a cross bill, while necessary as against co-defendants, was unnecessary against plaintiff in the original. Peak *v.* Perciful, 3 Bush 218; Horine *v.* Moore, 14 B. Mon. 311; Anderson *v.* Ward, 6 T. B. Mon. 419; Shelby *v.* Smith, 2 A. K. Marsh. 504.

In Illinois no process is necessary on a cross bill (Fleece *v.* Russell, 13 Ill. 31), even against an infant plaintiff in the original (Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047).

In Texas a copy of the cross bill must also be served. Simon *v.* Day, 84 Tex. 520, 19 S. W. 691.

Under the codes the counter-claim in the answer usually serves the purpose of a cross bill against plaintiff, and while often a copy must be served formal process is unnecessary. See for example N. Y. Code Civ. Proc. § 501. Where relief is sought against a co-defendant, provisions vary. In New York the facts are stated and relief prayed in the answer, which must be served on the co-defendant. See N. Y. Code Civ. Proc. § 521.

In Indiana the parties must take notice of a cross complaint, the nature of which is disclosed by the original (Bevier *v.* Kahn, 111 Ind. 200, 12 N. E. 169), but process must be issued on one setting up a cause of action not so disclosed (Shaul *v.* Rinker, 139 Ind. 163, 38 N. E. 593. See also Joyce *v.* Whitney, 57 Ind. 550).

In Ohio process must be issued on a cross

without process on the pleading setting them up,[57] but where the lien is not pre-existing, but is acquired by the cross bill itself, a subpœna must be served.[58]

3. Service of Process — a. By Whom Made. A subpœna or other original process should generally be served by the sheriff or corresponding officer, but the matter is largely regulated by statute.[59]

b. How Made — (1) *In General.* In England the ordinary method of service was by serving the original subpœna on defendant personally or by leaving it at his dwelling-house with some one of the family,[60] but since the orders of 1833,[61] it has been sufficient to deliver a copy instead, and in case of personal service to exhibit the original. Extraordinary service was permitted where ordinary service was impossible, according to circumstances; but an order of court was usually requisite to authorize and determine the manner of such service.[62] In the United States the method of service is determined by statute or rule.[63] When service other than personal is authorized the prescribed method must be strictly pursued.[64] Mere verbal differences between the original and the

petition filed after answer day based on matters not set up in the petition. Southward *v.* Jamison, 66 Ohio St. 290, 64 N. E. 135.

57. Crigler *v.* Lyle, 1 Ohio Dec. (Reprint) 485, 10 West. L. J. 162; Dunfee *v.* Child, 45 W. Va. 155, 30 S. E. 102.

58. Crigler *v.* Lyle, 1 Ohio Dec. (Reprint) 485, 10 West. L. J. 162.

59. See, generally, Process.

U. S. Eq. Rule 15 requires service of process to be by the marshal or his deputy or by some other person specially appointed by the court for that purpose, and not otherwise. A service by a private person not specially appointed is bad. Deacon *v.* Sewing Mach. Co., 7 Fed. Cas. No. 3,694*a*.

Service on the sheriff by his deputy is void under a law requiring service by the coroner where the sheriff is interested. Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425.

In Vermont a subpœna directed for service to "any indifferent person," without naming some person designated by order, is bad. Allyn *v.* Davis, 10 Vt. 547.

In Georgia and Pennsylvania it was held that any person might serve a subpœna. Carey *v.* Hillhouse, 5 Ga. 251; Megarge *v.* Bate, 1 Troub. & H. Pr. (Pa.) 95.

60. 1 Daniell Ch. Pr. 563, 564.

61. Order 4 (1833).

62. 1 Daniell Ch. Pr. 565.

63. See, generally, Process.

U. S. Eq. Rule 13 provides for service by delivering a copy of the subpœna to defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

For service on particular classes of persons see the specific titles, such as Husband and Wife; Infants; Insane Persons. For service on corporations see Process.

64. **In Florida** a statute providing for service of a subpœna by delivering a copy to a member of the family, and another statute providing especially for service of process on appeals against non-residents, it was held that the citation on appeal could not be served according to the former statute, where the appellee was out of the state. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

In Illinois the service must be by copy. Sconce *v.* Whitney, 12 Ill. 150. The statute providing that service should be personal or by leaving a copy at defendant's usual place of abode with some white person of the family of the age of ten years and upward and informing such person of the contents, it was held that the return must show a compliance in each particular, and that it is bad if it does not show that it was left at his usual place of abode (Piggott *v.* Snell, 59 Ill. 106; Miller *v.* Mills, 29 Ill. 431), that it was left with a member of his family (Wells *v.* Stumph, 88 Ill. 56; Mack *v.* Brown, 73 Ill. 295; Fischer *v.* Fischer, 54 Ill. 231; Cost *v.* Rose, 17 Ill. 276; Montgomery *v.* Brown, 7 Ill. 581; Townsend *v.* Griggs, 3 Ill. 365), who must be named (Montgomery *v.* Brown, 7 Ill. 581), or if it does not show that such person was white (Miller *v.* Mills, 29 Ill. 431; Cost *v.* Rose, 17 Ill. 276), or that such person was informed of the contents of the copy (Mack *v.* Brown, 73 Ill. 295; Fischer *v.* Fischer, 54 Ill. 231; Cost *v.* Rose, 17 Ill. 276). A return that the copy was left with defendant's husband does not show that it was left with a person of the family, for he may have been living apart from her. Wells *v.* Stumph, 88 Ill. 56. See also as to the strict construction of this statute Divilbiss *v.* Whitmire, 20 Ill. 425.

In Mississippi a return of service by leaving at the residence is bad unless it shows that defendant could not be found. Foster *v.* Simmons, 40 Miss. 585. But where there is no proper person at the place of residence and defendant cannot be found, fastening the process to his door is leaving it at a public place, within the meaning of the statute. Ramsey *v.* Barbaro, 20 Miss. 293.

In New Jersey leaving at the residence of defendant's mother while he was residing there for the summer was held to be good, although defendant's own house was open and in charge of a servant (Harrison *v.* Farrington, 35 N. J. Eq. 4); and leaving a copy with defendant's father, while at work in a field

copy served may not be fatal.[65] Service has been held sufficient where there was a variance between subpœna and return in the middle initial of defendant,[66] and where a copy of the bill containing prayer for process against defendant was served with the subpœna, service was held sufficient, although the subpœna omitted the name altogether.[67]

(II) *Service on Attorneys.* One of the occasions for extraordinary service by leave of the court which was recognized by the English chancery was in the case of a bill for an injunction against a person out of the jurisdiction to restrain proceedings at law. Here the court permitted service upon the attorney or agent carrying on the law proceedings.[68] The federal courts recognize the same practice,[69] and have extended it so as to permit service of subpœnas on cross bills on the solicitors of non-resident plaintiffs,[70] and also to a bill to reform a contract in order to maintain thereon a pending law action.[71] Such substituted service is, however, void in the absence of allegations of record or an order of court justifying it.[72]

c. Proof of Service — (I) *The Return.* In order to confer jurisdiction the

near the house where both resided, was held sufficient (Wagner *v.* Blanchet, 27 N. J. Eq. 356).

In New York service on the head of the family with which defendant boarded was held sufficient. People *v.* Craft, 7 Paige 325.

In Pennsylvania leaving a copy of the bill at defendant's dwelling in the presence of an adult member of the family was held good. Gouldey *v.* Gillespie, 3 Pa. L. J. Rep. 125, 4 Pa. L. J. 510.

In South Carolina it seems that stress is laid on defendant's receiving actual notice of the subpœna, where the service is other than personal. Southern Steam Packet Co. *v.* Roger, Cheves Eq. 48.

In the federal courts, under rule 13 (see *supra,* note 78) leaving a copy at defendant's residence but not with any person there is bad (Day *v.* Phelps, 7 Fed. Cas. No. 3,689); and the return must also show that the person to whom it was delivered not only resided at defendant's domicile but was a member of defendant's family (Von Roy *v.* Blackman, 28 Fed. Cas. No. 16,997, 3 Woods 98). Service at a dwelling-house which defendant has not occupied for over two years will be set aside without a showing as to where he has since resided (Hyslop *v.* Hoppock, 12 Fed. Cas. No. 6,988, 5 Ben. 447); but service at the door outside defendant's dwelling satisfies the rule (Phœnix Ins. Co. *v.* Wulf, 1 Fed. 775, 9 Biss. 285). Service on a state must be upon both the governor and the attorney-general. New Jersey *v.* New York, 3 Pet. (U. S.) 461, 7 L. ed. 741. The service must be sixty days before the return-day. New Jersey *v.* New York, 3 Pet. (U. S.) 461, 7 L. ed. 741; New York *v.* Connecticut, 4 Dall. (U. S.) 1, 1 L. ed. 715. See Supreme Ct. Rule 5.

The awarding of alias process on the ground that the original had been insufficient *ipso facto* vacates proceedings under the original. Hardy *v.* Moore, 4 Fed. 843.

65. Lyon *v.* Lyon, 21 Conn. 185. But the service will be set aside where the copy served is tested in a different year from the original. Gould *v.* Tryon, Walk. (Mich.) 339.

66. Cleveland *v.* Pollard, 37 Ala. 556, in this case the bill was amended after service by substituting the initial found in the return.

67. Carey *v.* Hillhouse, 5 Ga. 251.

68. Anderson *v.* Lewis, 3 Bro. Ch. 429, 29 Eng. Reprint 625; 1 Daniell Ch. Pr. 568.

69. Crellin *v.* Ely, 13 Fed. 420, 7 Sawy. 532; Eckert *v.* Bauert, 8 Fed. Cas. No. 4,266, 4 Wash. 370; Hitner *v.* Suckley, 12 Fed. Cas. No. 6,543, 2 Wash. 465; Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547; Lowenstein *v.* Glidewell, 15 Fed. Cas. No. 8,575, 5 Dill. 325; Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11; Ward *v.* Seabry, 29 Fed. Cas. Nos. 17,160, 17,161, 4 Wash. 426, 472.

The rule is founded on presumed authority of the attorney and will therefore not be resorted to where the judgment attacked has been satisfied (Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547), or where the law action is not connected with the injunction sought (Hitner *v.* Suckley, 12 Fed. Cas. No. 6,543, 2 Wash. 465). But the authority is presumed from retainer in the law action. Crellin *v.* Ely, 13 Fed. 420, 7 Sawy. 532.

Where no meritorious defense to the law action is shown by the bill an order allowing such substituted service will not be made. Muhlenburg County *v.* Citizens' Nat. Bank, 65 Fed. 537.

70. Eckert *v.* Bauert, 8 Fed. Cas. No. 4,266, 4 Wash. 370; Lowenstein *v.* Glidewell, 15 Fed. Cas. No. 8,575, 5 Dill. 325; Ward *v.* Seabry, 29 Fed. Cas. Nos. 17,160, 17,161, 4 Wash. 426, 472.

The validity of such practice in the case of cross bills was distinctly denied by Lord Thurlow (Bond *v.* Newcastle, 3 Bro. Ch. 386, 29 Eng. Reprint 599), but the object was in part accomplished by allowing service on the clerk in court of plaintiff and suspending proceedings on the original bill until the cross bill was answered. Anderson *v.* Lewis, 3 Bro. Ch. 429, 29 Eng. Reprint 625.

71. Abraham *v.* North German Ins. Co., 37 Fed. 731, 3 L. R. A. 188.

72. Gregory *v.* Pike, 79 Fed. 520, 25 C. C. A. 48.

return must state, not in general terms the fact of service, but specifically in what manner service was made, showing in all respects a compliance with the law.[73] The return must with certainty identify the persons served with those named in the writ.[74] There exists the usual conflict of opinion as to the conclusiveness of the return.[75] Where service is by a private individual proof must be made by affidavit.[76]

(II) *ACKNOWLEDGMENT OF SERVICE.* Defendant's formal acknowledgment of service may take the place of the return or even of formal service itself,[77] but the acknowledgment must be in writing and its genuineness must be proved.[78]

(III) *RECITALS IN DECREE.* A recital in the decree of service on defendant is at least *prima facie* evidence of the fact,[79] and is sometimes treated as conclusive.[80] Where treated as *prima facie* evidence it is rebutted if the return in the record shows defective service.[81]

4. CONSTRUCTIVE PROCESS. Of course no jurisdiction can be acquired over the person of non-residents not served with process within the state and who do not appear, nor can any personal decree be rendered against them.[82] As equity acts

73. Standley *v.* Arnow, 13 Fla. 361; Hochlander *v.* Hochlander, 73 Ill. 618; Tompkins *v.* Wiltberger, 56 Ill. 385; Ayers *v.* Scott, Ky. Dec. 162; Foster *v.* Simmons, 40 Miss. 585; Robertson *v.* Johnson, 40 Miss. 500. And see cases cited *supra*, VI, A, 3, b, (I). See, however, to the contrary Bell *v.* Gilmore, 25 N. J. Eq. 104.

Service on minors.— A return that a writ was served on a certain person as executrix and on certain minors by handing each a copy shows good service on the minors where it appears from the bill that such executrix was their guardian. Smith *v.* Pattison, 45 Miss. 619.

Where there are two returns, one showing service generally and the other specifying the manner of service, showing it to be defective, they will be read together and show defective service. Pillow *v.* Sentelle, 39 Ark. 61.

74. Milward *v.* Lair, 13 B. Mon. (Ky.) 207; Grider *v.* Payne, 9 Dana (Ky.) 188. A subpœna directed to all defendants by name and returned as executed on the parties is sufficient. Florence *v.* Paschal, 50 Ala. 28. But see Homer *v.* Abbe, 16 Gray (Mass.) 543.

75. See, generally, PROCESS.

In New Jersey the return is conclusive except on showing of collusion between officer and plaintiff. Corey *v.* Voorhies, 2 N. J. Eq. 5.

In Tennessee the return of chancery process is not conclusive while that of legal process is so. Leftwick *v.* Hamilton, 9 Heisk. 310.

76. See, generally, PROCESS. The affidavit should be taken before the court or by some officer expressly authorized to take such an affidavit. Barnett *v.* Montgomery, 6 T. B. Mon. (Ky.) 327; Trahue *v.* Holt, 2 Bibb (Ky.) 393.

Where service is by a special deputy, a return in the usual form in the name of the sheriff is sufficient. Johnson *v.* Johnson, 23 Fla. 413, 2 So. 834.

77. Banks *v.* Banks, 31 Ill. 162.

Acceptance out of state.— While a subpœna cannot be served out of the jurisdiction, one who accepts service out of the state as regular will not be heard to object to the sufficiency thereof. Dunn *v.* Dunn, 4 Paige (N. Y.) 425.

78. O'Neal *v.* Garrett, 3 Ala. 276; Norwood *v.* Riddle, 1 Ala. 195; Lytle *v.* Breckenridge, 3 J. J. Marsh. (Ky.) 663.

79. Freeman *v.* Karr, 34 Ill. App. 646. Such recitals have been given effect even as establishing the requisites of constructive service. Connely *v.* Rue, 148 Ill. 207, 35 N. E. 824; Wenner *v.* Thornton, 98 Ill. 156. *Contra*, Brodie *v.* Skelton, 11 Ark. 120.

80. Moore *v.* Green, 90 Va. 181, 17 S. E. 872. As to the effect of such a recital where the attack on the decree is direct see Wohlford *v.* Trinkle, 90 Va. 227, 17 S. E. 873.

81. Hemmer *v.* Wolfer, 124 Ill. 435, 16 N. E. 652, 11 N. E. 885.

82. *District of Columbia.*— Fraser *v.* Prather, 1 MacArthur 206.

Illinois.— Cloyd *v.* Trotter, 118 Ill. 391, 9 N. E. 507; Smith *v.* Trimble, 27 Ill. 152.

Maine.— Stephenson *v.* Davis, 56 Me. 73.

Michigan.— Pratt *v.* Windsor Bank, Harr. 254.

New Hampshire.— Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, *obiter*.

Ohio.— Daniels *v.* Stevens, 19 Ohio 222 [*affirming* 1 Ohio Dec. (Reprint) 280, 7 West. L. J. 37].

See 19 Cent. Dig. tit. "Equity," §§ 297, 300.

Disputed territory.— Where two states claim certain territory, but only one exercises actual jurisdiction thereover, the courts of the other state obtain no jurisdiction by service of process within the disputed strip. Daniels *v.* Stevens, 19 Ohio 222.

A non-resident temporarily within the state may properly be served (Hart *v.* Granger, 1 Conn. 154), unless he has come under circumstances of privilege (Martin *v.* Ramsey, 7 Humphr. (Tenn.) 260).

Statutory restrictions.— While a state may not extend the process of its courts beyond the territorial limits of its sovereignty, it may restrict such process to counties or districts within such limits, and thus give

primarily *in personam*,[83] the non-residence and absence of indispensable parties thus often defeats the jurisdiction.[84] Therefore, in order to enable the court to adjudicate where the subject-matter is within the jurisdiction and necessary parties are not, statutes have in certain cases created a jurisdiction, usually in form personal but actually *in rem*, and have provided for constructive service in such cases.[85] There can be no such constructive service without the direct authority of statute,[86] and in order to obtain jurisdiction the statute must be strictly pursued,[87] and such compliance must affirmatively appear of record.[88] It seems, however, that if the proceedings are regular they are not absolutely void, although defendant be in fact a resident,[89] and irregularities which might have been fatal before decree have sometimes been disregarded on appeal.[90] It has also been held that defendants personally served cannot object upon the ground that the notice published against another is insufficient.[91] Where jurisdiction is acquired for a particular purpose it cannot be extended to an amended bill for another purpose.[92] The service provided for is usually by publication in a

rise to questions as to the effect of such extraterritorial service which must be determined by a construction of the statutes involved. As to such restrictions see Huntzinger *v.* Philadelphia Coal Co., 11 Phila. (Pa.) 609; Preston *v.* Lacey, 2 Del. Co. (Pa.) 463; Stack *v.* O'Hara, 5 Leg. Gaz. (Pa.) 97; Tierney's Appeal, 3 L. T. N. S. (Pa.) 233; University *v.* Cambreling, 6 Yerg. (Tenn.) 79.

83. See *supra*, III, D.

84. See *supra*, V, C, 3.

85. See *supra*, III, D.

Non-residents may be made parties by publication where the contract out of which the suit arises is made in the state, or where any act is done by the non-resident in the state justifying the interference of chancery, or when he asserts title to property in virtue of some act or transaction which took place within the state. Holman *v.* Norfolk Bank, 12 Ala. 369. In Tennessee it was held that where process is served on one material defendant the court may by publication obtain jurisdiction over all others, although the rights of the non-residents are wholly distinct from the parties before the court. Jackson *v.* Tiernan, 10 Yerg. 172. A defendant may be proceeded against by publication, although he has been absent and unheard of for fifty years. Cruger *v.* Daniel, McMull. Eq. (S. C.) 157. As to the extent to which jurisdiction may thus be created see COURTS, 11 Cyc. 633.

86. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156; Jones *v.* Mason, 4 N. C. 561; Hyslop *v.* Hoppock, 12 Fed. Cas. No. 6,989, 5 Ben. 533.

Such statutes are not extended by construction, and one providing for service on absent defendants refers to residents temporarily absent. Wash *v.* Heard, 27 Miss. 400.

In the federal courts constructive service under state laws is not allowed in equity suits. Hyslop *v.* Hoppock, 12 Fed. Cas. No. 6,989, 5 Ben. 533.

87. *Alabama.*— Curry *v.* Falkner, 51 Ala. 564; Beavers *v.* Davis, 19 Ala. 82.

Arkansas.— Pillow *v.* Sentelle, 39 Ark. 61; Gray *v.* Trapnall, 23 Ark. 510; Brodie *v.* Skelton, 11 Ark. 120.

District of Columbia.— Plumb *v.* Bateman, 2 App. Cas. 156.

Indiana.— Shipley *v.* Mitchell, 7 Blackf. 472.

Iowa.— Marshall *v.* Marshall, 2 Greene 241.

Kentucky.—Berryman *v.* Mullins, 8 B. Mon. 152; Lawlin *v.* Clay, 4 Litt. 283.

New Jersey.— Barker *v.* Barker, 63 N. J. Eq. 593, 53 Atl. 4; Karr *v.* Karr, 19 N. J. Eq. 427.

Ohio.— Trimble *v.* Longworth, 13 Ohio St. 431.

Tennessee.— McGavock *v.* Young, 3 Tenn. Ch. 529.

United States.— Hunt *v.* Wickliffe, 2 Pet. 201, 7 L. ed. 397.

See 19 Cent. Dig. tit. "Equity," § 300.

Essential ultimate facts may be supplied as necessary inferences from other facts which appear. Gilmore *v.* Sapp, 100 Ill. 297; Pile *v.* McBratney, 15 Ill. 314.

As to time, notice to appear on the first day of the next term is sufficiently certain. Thomas *v.* Bailey, 7 Blackf. (Ind.) 149.

The validity of a subpœna issued and returned not served is immaterial, when the affidavit and order for publication are regular. Torrans *v.* Hicks, 32 Mich. 307.

Recital at the commencement of the affidavit of a name other than that of the person actually verifying may be disregarded as surplusage. Torrans *v.* Hicks, 32 Mich. 307.

88. Beavers *v.* Davis, 19 Ala. 82; Berryman *v.* Mullins, 8 B. Mon. (Ky.) 152; Young *v.* Pate, 3 Dana (Ky.) 306. See also Kay *v.* Watson, 17 Ohio 27.

A recital in the notice that an affidavit of non-residence was filed and a finding in the decree that publication was duly made is sufficient, although the record does not show the affidavit. Tompkins *v.* Wiltberger, 56 Ill. 385.

89. U. S. Equitable L. Assur. Soc. *v.* Laird, 24 N. J. Eq. 319; Jermain *v.* Langdon, 8 Paige (N. Y.) 41.

90. Gannard *v.* Eslava, 20 Ala. 732; Cowart *v.* Harrod, 12 Ala. 265; McGowan *v.* Mobile Branch Bank, 7 Ala. 823.

91. Fergus *v.* Tinkham, 38 Ill. 407.

92. McGaw *v.* Gortner, 96 Md. 489, 54 Atl. 133.

manner dependent upon the statute,[93] but it is sometimes required that it should be by mail,[94] or personally, without the state.[95]

B. Appearance. As before indicated an actual appearance was formerly deemed essential to the exercise of jurisdiction,[96] but now unless plaintiff for the purpose of discovery or otherwise has reason to compel an appearance the only effect of defendant's failure to appear is that it is taken to confess the bill and permit plaintiff to proceed *ex parte*.[97] The mode and effect of appearances in equity are in general the same as at law.[98] An appearance waives defects in process or the service thereof.[99] To have this effect the appearance need not be formal.[1] An order giving leave to appear and answer by a day named is complied with by demurring within the time fixed.[2]

VII. THE ORIGINAL BILL.

A. Function and Classification of Bills — 1. Methods of Instituting Proceedings. In the English chancery and in those American jurisdictions where the chancery system of administering equity is in its essence preserved,[3] a suit in

93. See, generally, Process.

In Alabama the place of publication is discretionary with the chancellor. Mobley *v.* Leophart, 51 Ala. 587.

In New Jersey where all the defendants reside out of the state, foreign publication is required; when any is served within the state, the notice to others may be published within the state. Wetmore *v.* Dyer, 2 N. J. Eq. 386.

In Arkansas where the chancellor believes that the publication has not been equivalent to actual notice, he may require a copy of the bill to be served if defendant's residence may be ascertained. Clarke *v.* Strong, 13 Ark. 491.

94. See, generally, Process. Here too the statute must be strictly followed. Barker *v.* Barker, 63 N. J. Eq. 593, 53 Atl. 4; Corning *v.* Gillman, 1 Barb. Ch. (N. Y.) 649.

Defects in the proof of mailing may be supplied by amendment. Dinsmore *v.* Westcott, 25 N. J. Eq. 302.

95. See, generally, Process.

In New Hampshire such service may be by a private individual and proved by his oath. Stone *v.* Anderson, 25 N. H. 221.

In Vermont the subpœna must be addressed to the person authorized to deliver it. Burlington Bank *v.* Catlin, 11 Vt. 106.

In New York both under the old chancery practice and under the code, a defendant so served is entitled to the same time to appear as if the service had been by publication. Cornell *v.* Watson, 1 Edw. 82; N. Y. Code Civ. Proc. § 441.

96. See *supra*, VI, A, 1, a.

97. See *infra*, XXIII, D.

98. See Appearances, 3 Cyc. 500.

99. Cullum *v.* Batre, 2 Ala. 415; Thebaut *v.* Canova, 11 Fla. 143; Crowell *v.* Botsford, 16 N. J. Eq. 458; Hughes *v.* Antill, 23 Pa. Super. Ct. 290. See also Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187. Service cannot be objected to after the lapse of five years and the filing of an answer. Dixon *v.* Rutherford, 26 Ga. 153.

Answering a cross bill waives a subpœna thereon and service of a copy. Byers *v.* Sugg, (Tenn. Ch. App. 1900) 57 S. W. 397.

Demurring for want of equity waives a demurrer for want of jurisdiction of the parties. Merrill *v.* Houghton, 51 N. H. 61.

Objection in answer.— But it has been held that where a defendant answers, setting up his non-residence and want of jurisdiction over him, he does not waive this objection by also answering to the merits. Price *v.* Pinnell, 4 W. Va. 296.

1. **Appearance to appeal.**—Appearing for the purpose of prosecuting an appeal has been held to cure defects in the service. Standley *v.* Arnow, 13 Fla. 361; Lawlins *v.* Lackey, 6 T. B. Mon. (Ky.) 70.

Agreed submission of case.— A defendant who had not been served with a copy of the bill was subjected to a decree when the record showed that he was in court when counsel agreed to submit the case. Miller *v.* Wilkins, 79 Ga. 675, 4 S. E. 261.

Cross bill seeking same relief.— Where a sale of real estate was set aside on the cross bill of an infant and a new sale decreed, it was held that defects in the service in the original case were of no avail, but here the cross bill prayed for a division or sale. Rankin *v.* Black, 1 Head (Tenn.) 650.

Waiving right to answer.— Where a petition in the nature of an original bill was filed, praying to be made a party plaintiff, and defendants therein named demurred and, the demurrer being overruled, waived their right to answer, it was held that relief could be given on the petition without process. Root-Tea-Na-Herb Co. *v.* Rightmire, 48 W. Va. 222, 36 S. E. 359. An agreement by a defendant not served that the answer of another defendant might be taken as his was held in one case, however, insufficient to authorize a decree. Sanders *v.* Jennings, 2 Dana (Ky.) 37.

A recital in the record that "the parties came by their solicitors" was held to apply only to such parties as had answered, and not to show an appearance by those not served. McCall *v.* Lesher, 7 Ill. 47.

2. New Jersey *v.* New York, 6 Pet. (U. S.) 523, 8 L. ed. 414.

3. See *supra*, I, B.

equity is instituted by filing[4] a bill[5] in the form of a petition invoking the aid of the chancellor,[6] stating plaintiff's case, and praying for the relief to which he considers himself entitled.[7] When the suit is by the attorney-general to enforce a public right it is instituted not by bill but by information.[8] A person may sometimes also invoke the action of the court by a technical petition, which may be presented in a matter over which the court has jurisdiction either under some special statute or authority, or as being involved in a cause already pending.[9] Whether a matter is proper for a petition or is so far independent that it should be presented by bill rests largely in the discretion of the chancellor.[10]

2. **Classification of Bills.** Not only must the jurisdiction of the chancellor in suits concerning private rights be originally invoked by bill, but, except in merely incidental matters affecting the progress of the suit,[11] and in cases where a petition will lie,[12] all applications for the extension of the exercise of jurisdiction, as for cross relief, the introduction of new matter, and the granting of relief founded upon proceedings already had, must likewise be by bill; and this leads to the primary classification of bills as original bills and bills not original.[13] An original bill relates to some matter not before litigated in the court by the same persons, standing in the same interests.[14] Bills not original are usually defined as being either an addition to or a continuance of an original bill or both.[15] What

4. 1 Daniell Ch. Pr. 507.

Extent of the jurisdiction is determined by the contents of the pleadings filed. Kerfoot *v.* People, 51 Ill. App. 409.

5. Formerly called an English bill because from very early times framed in the English language, to distinguish it from proceedings within the ordinary jurisdiction (see *supra*, I, A) which were until recently (4 Geo. II) conducted in Norman French or Latin. Mitford Eq. Pl. 7.

6. 1 Mitford Eq. Pl. 6.

7. 1 Daniell Ch. Pr. 1; Story Eq. Pl. 7.

8. 1 Daniell Ch. Pr. 1, 402.

Converting into bill.— A pleading filed as an information, when it fails as such, cannot be transformed into a bill by dropping out the attorney-general and treating the relator as a plaintiff. Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462, 477. where Cooley, C. J., said: "When the information is dismissed there is nothing to support a decree in favor of anyone. A reference to cases like Shepherd *v.* Bristol, 3 Madd. 319, 22 Rev. Rep. 136; Atty.-Gen. *v.* Vivian, 1 Russ. 226, 46 Eng. Ch. 199; Atty.-Gen. *v.* Heelis, 2 Sim. & St. 67, 2 L. J. Ch. O. S. 189, 25 Rev. Rep. 153, 1 Eng. Ch. 67, and Atty.-Gen. *v.* Catharine Hall, Jac. 381, 23 Rev. Rep. 92, 4 Eng. Ch. 381, in which the pleading was treated as both an information and a bill, will make plain the difference between those cases and the present in that regard."

9. 1 Daniell Ch. Pr. 264. And see *infra*, V, G, 3, c.

10. Codwise *v.* Gelston, 10 Johns. (N. Y.) 507. See also *In re* Foster, 15 Hun (N. Y.) 387.

When bill improper.— An application to stay proceedings under a decree should be by petition and not a bill for an injunction. Dyckman *v.* Kernochan, 2 Paige (N. Y.) 26; Watson *v.* Sutherland, 1 Tenn. Ch. 208. One who seeks protection for acts done under process which has been set aside should make summary application and not proceed by bill. Mackay *v.* Blackett, 9 Paige (N. Y.) 437.

Proceeding treated as petition.—A proceeding which should be by petition will sometimes be treated as such, although in form resembling an original bill (Atty.-Gen. *v.* Turpin, 3 Hen. & M. (Va.) 548), or merely an affidavit (March *v.* Thomas, 63 N. C. 87).

In Pennsylvania after the conferring of chancery powers on the supreme court proceedings were required to be by bill and not by petition. *Ex p.* Hussey, 2 Whart. 330.

11. See *infra*, V, G, 3, c.

12. See *supra*, VII, A, 1.

13. 1 Daniell Ch. Pr. 402; Story Eq. Pl. 16. Lord Redesdale recognized three distinct classes — original bills, bills not original, and bills in the nature of original bills — the third class being comprised of those which are occasioned by or seek the benefit of a former bill or decree, but are not considered as a continuance of the former bill. Mitford Eq. Pl. 31. Daniell more specifically indicates the nature of such bills as being brought by one not a party to the original suit, to obtain the benefit of it or to procure the reversal of the decision made upon it. 1 Daniell Ch. Pr. 402. Such bills, as they are always dependent upon prior proceedings, may best be considered with bills not original, and in connection with the analogous regular bill, such as bills of review, bills of revivor, etc., or with the topics to which they relate.

14. 1 Daniell Ch. Pr. 402; Mitford Eq. Pl. 31; Story Eq. Pl. 16.

15. Mitford Eq. Pl. 31. They are preferred when it becomes necessary to supply any defects which may exist either in the form of the original bill, or which may have been produced by events subsequent to the filing of it. 1 Daniell Ch. Pr. 402.

is immediately discussed in the following subdivisions of this article relates to original bills and also to features common to all bills.[16]

3. WHAT CONSTITUTES AN ORIGINAL BILL. When a bill does not introduce an entirely new subject-matter to the consideration of the court, it is sometimes a doubtful question whether it should be original in character or in some form not original. Thus the subject-matter may be closely related to that of a former bill and yet so far distinct and the purpose of the bill so different that an original bill is required.[17] So too a want of privity between the parties to a bill and those to a former suit to which the bill relates requires resort to an original proceeding.[18] While a bill of review is not an original bill,[19] and avoids the objection of *res adjudicata* which prevents the retrial by original bill of issues once determined,[20] still an original bill rather than a bill of review must in general be resorted to where a decree is to be attacked for matters outside the record of the original suit.[21] While the character of a bill as original or otherwise must to a certain extent depend upon the form which has been given to it,[22] the courts do not confine themselves in the United States to technicalities of form, but will, where possible, determine the character of bills and give them effect according to their essence

16. For bills not original see their special titles in this article, such as "Bills of Review," *infra*, XX; "Bills of Revivor," *infra*, XIII; "Cross Bills," *infra*, XV; "Supplemental Bills," *infra*, XII.

17. **Original instead of cross bill.**— One of the defendants in a suit to enforce a judgment, having become the owner of the judgment debt and of a mortgage, given to secure it, must proceed by original and not cross bill, to foreclose the mortgage. Andrews *v.* Kibbee, 12 Mich. 94, 83 Am. Dec. 766. Where a bill was pending to enforce a contract for the exclusive use of defendant's name in the sale of patent medicines, defendant must proceed by original and not by cross bill, to restrain an unauthorized use of his name. Chattanooga Medicine Co. *v.* Thedford, 58 Fed. 347. Where affirmative relief is sought by a cross bill it to that extent partakes of the nature of an original bill. Crisman *v.* Heidrer, 5 Colo. 589. Where a judgment creditor filed a bill to reach property fraudulently conveyed, and other judgment creditors, who were made defendants, by answer, which they asked to be taken as a cross bill, sought to reach the same property to satisfy their own claims, a demurrer was sustained on the ground that such answer was in effect an original bill. Hergel *v.* Laitenberger, 2 Tenn. Ch. 251. A bill to enforce an equitable set-off against damages awarded by a decree growing out of another matter cannot be regarded as a cross bill. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 807, 19 L. ed. 587. See also *infra*, X, A, 2.

Original instead of supplemental bill.— A bill by a surviving partner to subject real estate of a deceased partner to the payment of debts cannot be regarded as supplemental to a bill to settle partnership affairs. White *v.* Miller, 158 U. S. 128, 15 S. Ct. 788, 39 L. ed. 921.

Original instead of bill or revivor.— A bill filed fifteen years after a decree for the sale of property, praying that the original bill and all the proceedings thereunder be reinstated to the extent of the interest of the party, is not a bill of revivor, but an original bill for the objects set forth in its prayer. Kennedy *v.* Georgia Bank, 8 How. (U. S.) 586, 12 L. ed. 1209.

Under the Pennsylvania practice of foreclosing mortgages by scire facias, a bill for an account of payments made on the mortgage should be filed in the scire facias proceedings, and not as an original suit. Black *v.* Bohlen, 175 Pa. St. 491, 34 Atl. 804.

18. Curry *v.* Peebles, 83 Ala. 225, 3 So. 622; McDonald *v.* Asay, 139 Ill. 123, 27 N. E. 929 [*affirming* 37 Ill. App. 469]; U. S. Bank *v.* Cockran, 9 Dana (Ky.) 395. Where the death of a party to a contract so changes the relations that his representatives may maintain a bill which he could not have maintained in his lifetime, they must proceed by original and not supplementary bill. Heffron *v.* Knickerbocker, 57 Ill. App. 339.

19. Longworth *v.* Sturges, 4 Ohio St. 690.

20. Rodgers *v.* Dibrell, 6 Lea (Tenn.) 69; Berdanatti *v.* Sexton, 2 Tenn. Ch. 699; Montgomery *v.* Olwell, 1 Tenn. Ch. 169.

21. Bent *v.* Maxwell Land Grant, etc., Co., 3 N. M. 158, 3 Pac. 721; Haskins *v.* Rose, 2 Lea (Tenn.) 708; Carter *v.* Allan, 21 Gratt. (Va.) 241; Carver *v.* Jarvis-Conklin Mortg. Trust Co., 73 Fed. 9.

Impeaching decree for fraud.— Where a petition for leave to file a bill of review has been denied, a bill afterward filed to set aside the decree for fraud is an original bill. Wickliffe *v.* Eve, 17 How. (U. S.) 468, 15 L. ed. 163.

22. Where a bill contains no prayer that it be regarded as a cross bill and heard with the original, the court may properly refuse to consider it as a cross bill. Kirkman *v.* Vanlier, 7 Ala. 217. On the other hand it has been held that a bill filed in one federal circuit court, reciting a bill to foreclose a railroad mortgage pending in another, but containing no description of the property or averments showing plaintiff's right to foreclose, cannot be regarded as an original bill. Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 39 Fed. 337.

and their evident purpose rather than the form or title which the pleader has seen fit to give them.[23]

B. Form of the Bill — 1. In General. The bill in chancery was at first a very informal petition to the king or the chancellor.[24] It finally developed a highly complex and artificial form which has not inaptly been characterized as fantastic.[25] It consisted of nine parts, which will be considered in their order.[26] It has been said that while some of these are purely formal and some adapted only to occasional use,[27] the stating part and prayer for relief are alone essential to the validity of the bill.[28] Matters of form have never been regarded so much as at law,[29] but special rules regulating the form must of course be followed.[30]

2. Address. In the English chancery the bill opened with an address to the person having custody of the great seal[31] by name.[32] In the United States the address is usually to the court, but varies according to rule or usage in different jurisdictions.[33] Under the codes the pleadings in equity usually follow the same form as at law,[34] but where a distinction is preserved an address to the wrong side of the court is not a fatal error.[35] In the absence of rules to the contrary, there should be no caption or title to the bill, as is customary in pleadings at law,[36] and if such caption appears, it will be disregarded as surplusage, forming no part of the bill.[37]

3. Introduction. After the address comes a clause, commonly called the introduction, which states the names of plaintiffs and their places of abode.[38] As

23. *Alabama.*— *Ex p.* Smith, 34 Ala. 455; Goodwin *v.* McGehee, 15 Ala. 232.
Illinois.— McConnel *v.* Gibson, 12 Ill. 128.
Maryland.— Ridgely *v.* Bond, 18 Md. 433; Brooks *v.* Brooke, 12 Gill & J. 306, 38 Am. Dec. 310.
Massachusetts.— Belknap *v.* Stone, 1 Allen 572.
Tennessee.— Moses *v.* Brodie, 1 Tenn. Ch. 397; Northman *v.* Liverpool, etc., Ins. Co., 1 Tenn. Ch. 312.
Virginia.— Anderson *v.* De Soer, 6 Gratt. 363.
West Virginia.— Sturm *v.* Fleming, 22 W. Va. 404.
United States.— Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175.
See 19 Cent. Dig. tit. "Equity," §§ 308, 387.
After decree disposing of a cause, a new bill, by other parties and involving other issues, is an original bill, although it is styled supplementary and is connected with the subject-matter of the former litigation. Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986; Smith *v.* Woolfolk, 115 U. S. 143, 5 S. Ct. 1177, 29 L. ed. 357.
A petition, where the parties are brought before the court, may be treated as an original bill. Cleavenger *v.* Felton, 46 W. Va. 249, 33 S. E. 117; Skaggs *v.* Mann, 46 W. Va. 209, 33 S. E. 110.

24. See *supra*, I, A, 2. See the early forms in the chancery calendar and in Selden Cas. Ch. published by the Selden Society.

25. Langdell Eq. Pl. (2d ed.) 55.

26. See *infra*, VII, B, 2–10; 1 Daniell Ch. Pr. 461 *et seq.*; Mitford Eq. Pl. 41.

27. See Mitford Eq. Pl. 46.

28. Comstock *v.* Herron, 45 Fed. 660; Langdell Eq. Pl. 55.

29. Tiernan *v.* Poor, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225.

30. Sunday *v.* Hagenbuch, 5 Pa. Dist. 542, 18 Pa. Co. Ct. 540, holding that a typewritten bill does not satisfy a rule requiring that it be printed; Cook *v.* Central Dist., etc., Tel. Co., 21 Pa. Super. Ct. 43.

31. 1 Daniell Ch. Pr. 462; Mitford Eq. Pl. 41. When the seals were in the hands of the king, the bill was addressed to the king himself. 1 Daniell Ch. Pr. 462.

32. As "to the Right Honorable Frederic, Baron Chelmsford, of Chelmsford, in the County of Essex, Lord High Chancellor of Great Britain." 3 Daniell Ch. Pr. (6th Am. ed.) 1878. Notice of the form of address was posted in the six clerks' office, with each change in the custody of the seal or title of the chancellor. 1 Daniell Ch. Pr. 464.

33. In the federal courts the address should be "to the Judges of the Circuit Court of the United States of the District of ——." U. S. Eq. Rule 20. A bill addressed to the circuit court of the district named "in chancery sitting" is sufficient. Sterrick *v.* Pugsley, 22 Fed. Cas. No. 13,379, 1 Flipp. 350. In the New York chancery the address was to the chancellor by name. Blake Ch. Pr. 27.

34. See *supra*, I, B.

35. McDole *v.* Purdy, 23 Iowa 277; Cadwallader *v.* Evans, 1 Disn. (Ohio) 585, 12 Ohio Dec. (Reprint) 811.

36. Sterrick *v.* Pugsley, 22 Fed. Cas. No. 13,379, 1 Flipp. 350.

37. Spalding *v.* Dodge, 6 Mackey (D. C.) 289; Edney *v.* King, 39 N. C. 465; Sterrick *v.* Pugsley, 22 Fed. Cas. No. 13,379, 1 Flipp. 350. Where a caption failed to state the representative capacity in which defendant was sued, the error was held immaterial, the body of the bill stating it. Spencer *v.* Goodlett, 104 Tenn. 648, 58 N. W. 322.

38. Barton Suit Eq. 27; 1 Daniell Ch. Pr. 463; Mitford Eq. Pl. 41. The English form

already shown,[39] only those are deemed parties who are named as such in the bill. Therefore the full names of all the parties should be stated.[40] The requirement of stating plaintiff's place of abode is said to be in order that the court and defendant may know where to resort to compel obedience to any order of the court, and particularly for the payment of costs or to punish improper conduct in the course of the suit.[41] While it has been held that a demurrer will lie for failure to state plaintiff's residence,[42] the English practice is merely to require plaintiff in such case to give security for costs.[43] The introduction should also state plaintiff's description,[44] and the capacity in which he sues.[45] In some jurisdictions the introduction must contain the names of defendants as well as plaintiffs.[46]

4. STATING PART OR PREMISES. This is an essential part of every bill in equity.[47] Its office is to state plaintiff's case,[48] and it must aver every fact necessary to show his title and right to relief.[49] Such facts must appear from the stating part and

of introduction was: "Humbly complaining, showeth unto your Lordship, your orator, Samuel Dickinson, of Babington, in the County of Essex." Barton Suit Eq. 29. Such form is substantially followed in framing bills in equity under the chancery practice in the courts of the United States, but is often controlled by rule. See U. S. Eq. Rule 20.

39. See *supra*, V, E.

40. Huston *v.* McClarty, 3 Litt. (Ky.) 274; Moore *v.* Anderson, 36 N. C. 411; Kanawha Valley Bank *v.* Wilson, 35 W. Va. 36, 13 S. E. 58; McKay *v.* McKay, 28 W. Va. 514; Houston *v.* McCluney, 8 W. Va. 135; Barth *v.* Makeever, 2 Fed. Cas. No. 1,069, 4 Biss. 206.

Persons described as "confederates, associates," etc., but not named, are not parties to the bill. *Ex p.* Richards, 117 Fed. 658.

A bill is demurrable which does not so show plaintiffs' names (Houston *v.* McCluney, 8 W. Va. 135), but not because the caption contains a blank where it should set out plaintiffs' names, if their names appear in the body of the bill (McKissack *v.* Voorhees, 119 Ala. 101, 24 So. 523).

In West Virginia, the bill must either pursue the chancery practice or the form prescribed by Code, c. 125, § 37. Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

41. Mitford Eq. Pl. 41.

42. Liddell *v.* Carson, 122 Ala. 518, 26 So. 133.

Residence in caption.— Although a statute (Code, § 4313) expressly required plaintiff's residence to be stated in the introduction, the bill was held good where it appeared in the caption. Grubbs *v.* Colter, 7 Baxt. (Tenn.) 432.

U. S. Eq. Rule 20 requires the introduction to state the places of abode and citizenship of all parties, and as these averments are essential in the federal court to show jurisdiction, a failure to make them renders the bill fatally defective, so that the court may dismiss it on its own motion. Carlsbad *v.* Tibbetts, 51 Fed. 852. See also U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708. The omission may be cured by amendment. Harvey *v.* Richmond, etc., R. Co., 64 Fed. 19. For averments of abode of the parties which were held sufficient see Tonopah Fraction Min. Co. *v.* Douglass, 123 Fed. 936.

43. 1 Daniell Ch. Pr. 463.

44. Mitford Eq. Pl. 41.

Plaintiff's age need not be stated except where his infancy appears on the face of the bill (Liddell *v.* Carson, 122 Ala. 518, 26 So. 133. See also McKissack *v.* Voorhees, 119 Ala. 101, 24 So. 523), and not even then if he is properly suing by guardian (Stewart *v.* Chadwick, 8 Iowa 463). But it is said to be undoubtedly the better practice to state plaintiff's age is all cases. Liddell *v.* Carson, 122 Ala. 518, 26 So. 133.

Failure to state plaintiff's occupation does not open a bill for demurrer. Gove *v.* Pettis, 4 Sandf. Ch. (N. Y.) 403.

A bill by a woman need not show whether she is married or single. Paige *v.* Broadfoot, 100 Ala. 610, 13 So. 426.

45. **One suing on behalf of himself and others** must so state in the introduction. 1 Daniell Ch. Pr. 464.

A bill by "next friend" is demurrable if it does not show the party to be under disability. West *v.* Reynolds, 35 Fla. 317, 17 So. 740.

A bill by an executor must describe him as such, and a description as "personal representative" is insufficient. Capehart *v.* Hale, 6 W. Va. 547. But it was unnecessary in England for an executor or an administrator to describe himself as such in the introduction when his right in that capacity appeared in the stating part (1 Daniell Ch. Pr. 464), and such is the rule in New Jersey (Ransom *v.* Geer, 30 N. J. Eq. 249). See, generally, EXECUTORS AND ADMINISTRATORS.

Former partners are usually styled as "lately doing business" under a certain name, but it is not necessary to do so. Vance *v.* Kirk, 29 W. Va. 344, 1 S. E. 717.

Mere descriptio personæ.— A bill describing a party as "major and commissary" is sufficient to charge him individually, rejecting the description as surplusage. Yulee *v.* Canova, 11 Fla. 9.

46. U. S. Eq. Rule 20 so requires. U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708; Barth *v.* Makeever, 2 Fed. Cas. No. 1,069, 4 Biss. 206.

47. See *supra*, VII, B, 1.

48. 1 Daniell Ch. Pr. 465; Mitford Eq. Pl. 42.

49. *Alabama.*— Flanagan *v.* State Bank, 32 Ala. 508; Cameron *v.* Abbott, 30 Ala. 416;

cannot be supplied by reference to other parts of the bill.[50] The facts should be stated so distinctly and completely that the chancellor may from the face of the bill see that he has jurisdiction and tell precisely what decree should be rendered supposing the bill to be true.[51] The averments should be positive, certain, and unambiguous.[52] Properly the stating part is confined to a concise, positive statement of the facts essential to the relief sought,[53] leaving to the charging part statements of evidentiary facts, as a foundation for interrogatories, and matters in rebuttal of anticipated defenses;[54] but in modern practice it is often unnecessary sharply to separate these portions of the bill, and the stating part is made to include the matters which should more properly be charged.[55]

5. Confederacy Clause. The stating part of the bill regularly concluded with purely formal averments of a request to defendant to do that equity which the bill sought, and that plaintiff hoped that defendants would comply with that request.[56] Then followed a clause alleging a confederacy to injure plaintiff by defendants and other persons unknown, whose names plaintiff asked might, when discovered, be inserted in the bill, and a refusal by defendants to do as requested.[57] While it seems to have been once thought that this clause was necessary in order to lay the foundation for bringing in new parties by amendment,[58] it never seems to have been really essential for any purpose,[59] and statutes or rules often expressly provide for its omission.[60]

6. Charging Part. As in a bill framed with technical precision the stating part is confined to the essential allegations of ultimate facts constituting plaintiff's case;[61] all other facts which it is advisable to plead appear following the charge of confederacy and constitute what is known as the charges or charging part of the

Spoor *v.* Phillips, 27 Ala. 193; Land *v.* Cowan, 19 Ala. 297.

California.— Mercier *v.* Lewis, 39 Cal. 532.

Georgia.— Davenport *v.* Alston, 14 Ga. 271.

Illinois.— Barnard *v.* Cushman, 35 Ill. 451.

Maryland.— Berry *v.* Pierson, 1 Gill 234; Hayward *v.* Carroll, 4 Harr. & J. 518.

New Jersey.— Rorback *v.* Dorsheimer, 25 N. J. Eq. 516.

North Carolina.— Herron *v.* Cunningham, 36 N. C. 376.

Ohio.— Matoon *v.* Clapp, 8 Ohio 248.

Vermont.— Sanborn *v.* Kittridge, 20 Vt. 632, 50 Am. Dec. 58.

United States.— Pelham *v.* Edelmeyer, 15 Fed. 262, 21 Blatchf. 188.

See 19 Cent. Dig. tit. "Equity," § 313.

Facts not stated in the bill cannot constitute a basis for relief. U. S. Bank *v.* Schultz, 3 Ohio 61.

To sustain the bill the facts stated must be such as to entitle plaintiff to the relief sought (Barnard *v.* Cushman, 35 Ill. 451) or to some relief consistent with such facts (Goodwin *v.* McGehee, 15 Ala. 232), even where the bill is taken *pro confesso* (Strother *v.* Lovejoy, 8 B. Mon. (Ky.) 135. And see *infra*, XXIII, D, 4, a.

A bill on behalf of plaintiff and others will fail unless it shows that plaintiff himself is entitled to relief. Hubbell *v.* Warren, 8 Allen (Mass.) 173.

Under the codes plaintiff's pleading must state the same facts as would have been required in a bill in chancery. Jones *v.* Brinker, 20 Mo. 87.

50. Wright *v.* Dame, 22 Pick. (Mass.) 55; Cowles *v.* Buchanan, 38 N. C. 374; Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

51. Pennebaker *v.* Wathan, 2 A. K. Marsh. (Ky.) 315; 1 Daniell Ch. Pr. 466.

52. Seals *v.* Robinson, 75 Ala. 363; Shepard *v.* Shepard, 6 Conn. 37; Brokaw *v.* Brokaw, (N. J. Ch. 1886) 4 Atl. 66; Edney *v.* King, 39 N. C. 465. The bill should be drawn as if one were making verbally a short but very accurate statement to a very precise and particular person. Heard Eq. Pl. 29.

Ultimate facts, and not evidentiary facts, should be stated. Winebrenner *v.* Colder, 43 Pa. St. 244.

Rules of common-law pleading it is well to adhere to as closely as possible whenever they are applicable. 1 Daniell Ch. Pr. 466.

53. 1 Daniell Ch. Pr. 484.

54. See *infra*, VII, B, 6.

55. Story Eq. Pl. 33.

U. S. Eq. Rule 21 authorizes the omission of the charging part and permits plaintiff in the stating part to avoid anticipated defenses.

In Maine the charging part may be omitted (Ch. Rule IV, 82 Me. 595, 20 Atl. XIII), but the bill must be drawn in paragraphs numbered *seriatim* (Cobb *v.* Baker, 95 Me. 89, 49 Atl. 425).

Under the codes see *infra*, p. 222, note 67.

56. See form in Barton Suit Eq. 32.

57. Barton Suit Eq. 30.

58. 1 Daniell Ch. Pr. 483.

59. 1 Daniell Ch. Pr. 483; Mitford Eq. Pl. 42. It has been said *obiter* that the clause is unnecessary, except where it is intended to charge fraud and combination specifically. Stone *v.* Anderson, 26 N. H. 506.

60. Ala. Code (1896), § 677; Me. Ch. Rule IV, 82 Me. 595. 20 Atl. XIII; N. H. Ch. Rule 111, 38 N. H. 605; U. S. Eq. Rule 21.

61. See *supra*, VII, B, 4.

bill.[62] These facts are of two classes. The first consists of matters in avoidance of defenses interposed.[63] For this purpose the charges should be only of matters in avoidance of the defense, and should not state facts put in issue by the general replication.[64] The other class of charges are those inserted for the purpose of discovery.[65] As interrogatories cannot extend beyond the matters alleged in the bill, all facts in regard to which it is desired to propound interrogatories should be aptly charged.[66] As before stated the charging part is now frequently omitted or inserted in the stating part.[67]

7. Jurisdiction Clause. The jurisdiction clause followed the charges and consisted of a general averment that the acts complained of were contrary to equity and that plaintiff was without adequate remedy except in equity.[68] As the case must appear by the specific averments of the bill to be one of equitable cognizance,[69] without such specific averments the general averment of jurisdiction is unsupported;[70] and with such specific averments it is unnecessary.[71] While

62. 1 Daniell Ch. Pr. 484.

63. 1 Daniell Ch. Pr. 484; Mitford Eq. Pl. 42.

Formerly, such defenses were met by special replication, the pleadings continuing somewhat as at law to definite issues. 1 Daniell Ch. Pr. 484. Either the practice of anticipating defenses in the bill led to the abandonment of the special replication, or the abandonment of the special replication led to the necessity of anticipating and rebutting defenses in the bill itself. See sustaining the former view 1 Daniell Ch. Pr. 484.

64. Stevenson *v.* Morgan, 64 N. J. Eq. 219, 53 Atl. 677.

65. Mitford Eq. Pl. 42.

Other purpose.— It is also said that the charging part may be advantageously employed for obtaining directions in the decree not necessarily arising out of the case, as mainly insisted upon, but which may become necessary collaterally. Holloway *v.* Millard, 1 Madd. 414.

66. Beall *v.* Blake, 10 Ga. 449; Mechanics' Bank *v.* Levy, 3 Paige (N. Y.) 606; Summer *v.* Caldwell, 2 Strobh. Eq. (S. C.) 155. See *infra*, VII, B, 8.

In a bill alleging fraud plaintiff may charge and compel answer to charges of contemporaneous frauds in which he has no interest. Bruen *v.* Bruen, 4 Edw. (N. Y.) 640.

Plaintiff may limit his charges so as to confine the responsive part of the answer and deprive defendant of matters of avoidance which he might use, were the charges not so limited. Beech *v.* Haynes, 1 Tenn. Ch. 569.

67. See *supra*, p. 221, note 55.

Under the code a complaint must not contain the charges contained in a bill in chancery. Clark *v.* Harwood, 8 How. Pr. (N. Y.) 470.

68. The form was as follows: "All which actings, pretences and doings of the said confederates are contrary to equity and good conscience and tend to the manifest injury and oppression of your orator. In tender consideration whereof, and for that your orator is remediless in the premises, by the strict rules of the Common Law and relievable only in a court of equity, where matters of this nature are properly cognizable," etc. Barton Suit Eq. 36.

69. *Alabama.*— Cary *v.* Simmons, 87 Ala. 524, 6 So. 416.

Connecticut.— Griswold *v.* Mather, 5 Conn. 435.

District of Columbia.— Naudain *v.* Ormes, 3 MacArthur 1.

Illinois.— Sanger *v.* Fincher, 27 Ill. 346.

Iowa.— Claussen *v.* Lafrenz, 4 Greene 224.

Maine.— Hayford *v.* Dyer, 40 Me. 245.

Maryland.— Townsend *v.* Duncan, 2 Bland 45; Iglehart *v.* Armiger, 1 Bland 519; Estep *v.* Watkins, 1 Bland 486; Watson *v.* Godwin, 4 Md. Ch. 25.

New York.— Wilson *v.* Forsyth, 24 Barb. 105; Folsom *v.* Blake, 3 Edw. 442.

North Carolina.— Falls *v.* Dickey, 59 N. C. 357.

Pennsylvania.— Cooke *v.* Central Dist., etc., Tel. Co., 21 Pa. Super. Ct. 43.

Tennessee.— Bruce *v.* Bruce, 11 Heisk. 760.

Virginia.— Washington City Sav. Bank *v.* Thornton, 83 Va. 157, 2 S. E. 193; Childress *v.* Morris, 23 Gratt. 802; Taliaferro *v.* Foote, 3 Leigh 58.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

United States.— Koehler *v.* Black River Falls Iron Co., 2 Black 715, 17 L. ed. 339; Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black 545, 17 L. ed. 333; Blakeley *v.* Biscoe, 30 Fed. Cas. No. 18,239, Hempst. 114.

See 19 Cent. Dig. tit. "Equity," § 316.

The decree will be void if the bill does not show jurisdiction. Burkle *v.* Eckart, 3 Den. (N. Y.) 279.

The amount in controversy, where jurisdiction depends upon it, need not be stated by formal averment, provided jurisdiction in that regard is inferable from other facts pleaded. Abbott *v.* Gregory, 39 Mich. 68; Palmer *v.* Rich, 12 Mich. 414. See also Courts, 11 Cyc. 881.

Jurisdiction of the particular court in which the suit is brought must be shown by proper averment of the necessary facts. Uhlfelder *v.* Levy, 9 Cal. 607; Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691; Domestic Sewing Mach. Co. *v.* Watters, 50 Ga. 573.

70. Mitford Eq. Pl. 43.

71. *Alabama.*— Walker *v.* Miller, 11 Ala. 1067.

therefore the jurisdiction clause in bills in equity is commonly inserted it is therefore never essential.[72]

8. Interrogating Part. Following the jurisdiction clause there appears in the regular bill a prayer that defendants may answer the matters therein contained, according to their knowledge, information, and belief.[73] This general interrogatory in itself entitles plaintiff to a full disclosure as to the whole subject-matter of the bill,[74] but as specific and complete discovery was evaded in answering the general interrogatory, it became customary to insert in addition thereto specific questions covering those matters as to which plaintiff particularly desired discovery.[75] As the interrogatories merely serve to enforce a full answer to the bill, they must be confined to the case disclosed by the bill and to matters covered by statements or charges therein,[76] and defendant is not bound to answer an inter-

Colorado.— Schilling *v.* Rominger, 4 Colo. 100.

Connecticut.— Botsford *v.* Beers, 11 Conn. 369.

Maine.— Goodwin *v.* Smith, 89 Me. 506, 36 Atl. 997, construing rule 4 of the supreme judicial court.

New York.— Storm *v.* Bennett, 91 Hun 302, 36 N. Y. Suppl. 290.

Pennsylvania.— Borie *v.* Satterthwaite, 180 Pa. St. 542, 37 Atl. 102 [*affirming* 12 Montg. Co. Rep. 194].

Wisconsin.— Carmen *v.* Hurd, 1 Pinn. 619.

See 19 Cent. Dig. tit. "Equity," § 316.

72. 1 Daniell Ch. Pr. 486.

Under the codes the clause is of course unnecessary. Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, 9 S. Ct. 293, 32 L. ed. 688.

73. The form in chancery was "to the end, therefore, that the said confederates may, respectively, full, true, direct and perfect answer make, upon their respective corporal oaths, according to the best of their respective knowledge, information and belief, to all and singular the charges and matters aforesaid, as fully in every respect as if the same were again repeated and they, thereunto, particularly interrogated." Barton Suit Eq. 37. The phrase, "to the end, therefore," preceding the interrogating part (which part is coupled with the prayer for relief by the conjunction "and") depends in its grammatical construction upon the prayer for process with which the sentence closes. This long sentence, embracing the interrogating part, the prayer for relief, and the prayer for process, is in skeleton form as follows: To the end therefore that defendants may answer the bill, and that they may be compelled to do as prayed, may it please your lordship, to grant a writ of subpœna, etc. See form in Barton Suit Eq. 29.

74. Ames *v.* King, 9 Allen (Mass.) 258; Miles *v.* Miles, 27 N. H. 440; New York M. E. Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 65.

In the federal courts U. S. Eq. Rule 40, as originally adopted, required defendants to answer no statement or charge unless specially interrogated thereto but in 1850 (10 How. v.) this was repealed and it was provided that it shall not be necessary to interrogate a defendant specially upon any statement in the bill, unless plaintiff desires to do so to obtain a discovery. Rules 41 and 42 require the interrogatories to be numbered and a note to be attached at the foot of the bill, specifying by number the interrogatories which each defendant is required to answer. Rule 43 substitutes for the general interrogatory a form similar thereto but requiring answer only "to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer." A failure to specifically refer to the interrogatories in accordance with the form prescribed does not excuse defendant from answering. Federal Mfg., etc., Co. *v.* International Bank Note Co., 119 Fed. 385.

In Alabama similar rules exist and it is held that a failure to indicate at the foot of the bill the particular statements or interrogatories which each defendant is required to answer precludes plaintiff from taking advantage of a failure to answer the allegations of the bill. Martin *v.* Hewitt, 44 Ala. 418; Sprague *v.* Tyson, 44 Ala. 338. The rule is sufficiently complied with by dividing the bill into numbered sections and by a foot note requiring an answer to paragraphs numbered from one to five inclusive (Paige *v.* Broadfoot, 100 Ala. 610, 13 So. 426), or to answer "all the statements of the above bill" (McKenzie *v.* Baldridge, 49 Ala. 564).

75. Miles *v.* Miles, 27 N. H. 440; 1 Daniell Ch. Pr. 487; Mitford Eq. Pl. 44.

The form of inserting the special interrogatories is to add to the general interrogatory (see *supra*, note 92) the following: "And more especially, that they may respectively set forth and discover, according to the best of their knowledge whether," etc. Barton Suit Eq. 37.

Where interrogatories are appended to the bill and there is a prayer for a responsive answer thereto they may be regarded as incorporated in the bill. Romaine *v.* Hendrickson, 24 N. J. Eq. 231.

76. *New York.*— James *v.* McKernon, 6 Johns. 543.

North Carolina.— Cowles *v.* Buchanan, 38 N. C. 374.

Ohio.— Kisor *v.* Stancifer, Wright 323.

Virginia.— Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513.

United States.— Gormully, etc., Mfg. Co. *v.* Bretz, 64 Fed. 612.

See 19 Cent. Dig. tit. "Equity," §§ 317, 318. See also *supra*, VII, B, 6.

rogatory without such foundation.[77] An interrogatory may not be based on a mere suggestion or hypothetical statement,[78] but it may call for particulars and circumstances embraced within a general charge, but not charged with particularity.[79] Interrogatories should be precise and full, but defendant will be required to answer without evasion their plain import.[80] It has been said that a bill which wholly omits the interrogating part is defective,[81] but in modern practice discovery is not always sought, and plaintiff is often permitted to waive the oath to the answer, thus reducing its effect to that of a pleading alone, and rendering special interrogatories consequently useless.[82]

9. Prayer For Relief. Following the interrogating part comes the prayer for relief, which is an essential part of every bill,[83] except perhaps in the case of suits by infants and suits concerning charities.[84] The practice is to ask the specific relief desired and to follow this with a prayer for general relief.[85] The English chancery was quite strict on a prayer for special relief in confining plaintiff to the relief prayed,[86] although it was conceded that a prayer for general relief was alone sufficient to entitle plaintiff to any decree required by the statements of the

On a commission of rebellion the interrogatories should be confined to the service of process and the acts constituting the violation thereof. Brown *v.* Andrews, 1 Barb. (N. Y.) 227.

77. Miller *v.* Saunders, 17 Ga. 92; Davis *v.* Collier, 13 Ga. 485; White *v.* White, 3 Dana (Ky.) 374; Mechanics' Bank *v.* Levy, 3 Paige (N. Y.) 606; Gormully, etc., Mfg. Co. *v.* Bretz, 64 Fed. 612.

Defendant may move to strike out interrogatories not warranted by charges. Chardavoyne *v.* Galbraith, 81 Ala. 521, 1 So. 771.

If **defendant voluntarily answers** interrogatories relating to facts not charged the defect is waived and the matter put in issue. Atty.-Gen. *v.* Whorwood, 1 Ves. 534, 27 Eng. Reprint 1188.

78. Grim *v.* Wheeler, 3 Edw. (N. Y.) 334.

79. Kisor *v.* Stancifer, Wright (Ohio) 323; Gormully, etc., Mfg. Co. *v.* Bretz, 64 Fed. 612; Faulder *v.* Stuart, 11 Ves. Jr. 296, 32 Eng. Reprint 1102. Interrogatories are not to be limited on the theory that everything stated in the bill is precisely and in detail true. Chicago, etc., R. Co. *v.* Macomb, 2 Fed. 18.

80. Langdon *v.* Goddard, 14 Fed. Cas. No. 8,061, 3 Story 13.

81. Shed *v.* Garfield, 5 Vt. 39. But see Story Eq. Pl. 38. A prayer for discovery may be disregarded where there are no interrogatories, and an oath to the answer is waived. Excelsior Wooden Pipe Co. *v.* Seattle, 117 Fed. 140, 55 C. C. A. 156.

82. U. S. Eq. Rule 41 permits plaintiff to waive an answer under oath, or require an answer under oath with regard to certain specified interrogatories alone, and provides that so far as the oath is waived to the answer the latter shall not be evidence in defendant's favor, although he answers under oath.

Ala. Code, § 3424, permits a waiver of a sworn answer, "when a bill is filed for any other purpose than discovery only." See Bromberg *v.* Bates, 98 Ala. 621, 13 So. 557; Russell *v.* Garrett, 75 Ala. 348. Ch. Rule 13 prescribes a form to precede the interrogating part of the bill, but it does not apply to bills not seeking discovery. Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337.

Illinois has a similar statute, but it requires an answer to all allegations and interrogatories whether the oath is waived or not. Act March 15, 1872. See James T. Hair Co. *v.* Daily, 161 Ill. 379, 43 N. E. 1096 [*reversing* 58 Ill. App. 647].

In Massachusetts the oath may be waived, but the bill cannot then be maintained as one for discovery. Ward *v.* Peck, 114 Mass. 121.

In the New York chancery discovery might be waived. Mayne *v.* Griswold, 3 Sandf. 463; Morse *v.* Hovey, 1 Sandf. Ch. 187.

In Rhode Island where the bill presents a case for equitable relief, a prayer for incidental discovery is proper, although the oath is waived. Congdon *v.* Aylsworth, 16 R. I. 281, 18 Atl. 247.

In the **English chancery** plaintiff might dispense with the oath by obtaining an order of court permitting such course. Mitford Eq. Pl. 10.

83. Driver *v.* Fortner, 5 Port. (Ala.) 9; Comstock *v.* Herron, 45 Fed. 660.

Relief not asked for will not be granted.

California.— Morrison *v.* Bowman, 29 Cal. 337.

Illinois.— Ashmore *v.* Hawkins, 145 Ill. 447, 34 N. E. 523.

Indiana.— Eastman *v.* Ramsey, 3 Ind. 419.

Pennsylvania.—Horton's Appeal, 13 Pa. St. 67.

Texas.— Edgar *v.* Galveston City Co., 21 Tex. 302.

See 19 Cent. Dig. tit. "Equity," § 319.

84. 1 Daniell Ch. Pr. 496.

In a bill to perpetuate testimony there can be no prayer for relief. Miller *v.* Sharp, 3 Rand. (Va.) 41; and cases cited 13 Cyc. 856 note 7.

85. See form in Barton Suit Eq. 40. U. S. Eq. Rule 21 so requires.

86. See 1 Daniell Ch. Pr. 489 *et seq.*

bill.[87] A special prayer must, to be available, be supported by the averments of the bill,[88] but if there be a proper prayer the bill will not be vitiated by the addition thereto of one that cannot be granted.[89] A special prayer will be held sufficient, although lacking formality and precision, if substantially it demands the appropriate relief,[90] and a prayer expressing the principal object is at least in connection with the general prayer sufficient without asking for all details essential to accomplishing the object.[91] The prayer for general relief should always be added in order that if plaintiff has mistaken the particular relief to which he is entitled the court may yet afford him that to which he has a right.[92] Errors in the special prayer are in most cases thereby cured,[93] but the court will not suffer a defendant to be taken by surprise, by granting under the general prayer relief inconsistent with that specially prayed or with the allegations of the bill.[94] It is not essential that the prayer for general relief shall closely follow the customary form,[95] and prayers of a very informal character have been held equivalent to

87. Cook *v.* Martyn, 2 Atk. 3, 26 Eng. Reprint 399.

88. Staton *v.* Rising, 103 Ala. 454, 15 So. 848; Thoms *v.* Thoms, 45 Miss. 263.

Construction of prayer.— A bill praying for relief against "said defendants hereinafter named" can only refer to defendants mentioned in the foregoing part of the bill and not to one named merely in the prayer for process. Wheeler, etc., Mfg. Co. *v.* Filer, 52 N. J. Eq. 164, 28 Atl. 13.

Under the codes demurrers have been sustained on the ground of failure to pray for the specific relief which the facts stated authorize. Copeland *v.* Cheney, 116 Ga. 685, 43 S. E. 59; Edson *v.* Girvan, 29 Hun (N. Y.) 422. But the current of decision is otherwise. Metzner *v.* Baldwin, 11 Minn. 150; Connor *v.* Board of Education, 10 Minn. 439; Smith *v.* Rowe, 49 N. Y. App. Div. 582, 64 N. Y. Suppl. 389; Hemson *v.* Decker, 29 How. Pr. (N. Y.) 385; Stewart *v.* Hutchinson, 29 How. Pr. (N. Y.) 181.

89. White *v.* Curtis, 2 Gray (Mass.) 467; Citizens' L. & T. Co. *v.* Witte, 110 Wis. 545, 86 N. W. 173; Woodfin *v.* Phœbus, 30 Fed. 289; *In re* Cincinnati Enquirer, 5 Fed. Cas. No. 2,719.

90. McDaniel *v.* Baskervill, 13 Gratt. (Va.) 228; Coville *v.* Gilman, 13 W. Va. 314.

91. Webster *v.* Harris, 16 Ohio 490; Rocke *v.* Morgell, 2 Sch. & Lef. 721.

92. Mitford Eq. Pl. 38.

Mass. St. (1883) c. 223, § 10, provides that the bill need not contain any prayer for general relief. Under this act every bill is interpreted as though it contained such a prayer. Allen *v.* French, 180 Mass. 487, 62 N. E. 987.

93. *Illinois.*— Holden *v.* Holden, 24 Ill. App. 106.

Kentucky.— Estill *v.* Hart, Hard. 567.

Louisiana.—Espinola *v.* Blasco, 15 La. Ann. 426.

New Jersey.— Annin *v.* Annin, 24 N. J. Eq. 184.

Vermont.— Eureka Marble Co. *v.* Windsor Mfg. Co., 47 Vt. 430.

United States.— Jones *v.* Van Doren, 130 U. S. 684, 9 S. Ct. 685, 32 L. ed. 1077.

See 19 Cent. Dig. tit. "Equity," § 320.

Under the prayer for general relief plaintiff may have such relief as the facts stated and proved entitle him to. McMillan *v.* James, 105 Ill. 194; Lane *v.* Union Nat. Bank, 75 Ill. App. 299 [*affirmed* in 177 Ill. 171, 52 N. E. 361, 69 Am. St. Rep. 216]. Where there was a prayer for special relief against only one defendant, it was held that relief could be given of a similar character against the other under the general prayer. Tyler *v.* Savage, 143 U. S. 79, 12 S. Ct. 340, 36 L. ed. 82. XXIII, C, 4, b, (II).

Under the codes the same rules substantially prevail. Kilpatrick *v.* Haley, 14 Colo. App. 399, 60 Pac. 361; Thomas *v.* Farley Mfg. Co., 76 Iowa 735, 39 N. W. 874; Hemson *v.* Decker, 29 How. Pr. (N. Y.) 385.

94. Hiern *v.* Mill, 13 Ves. Jr. 114, 9 Rev. Rep. 149, 33 Eng. Reprint 237. No relief can be granted under the general prayer distinct from and independent of the special relief prayed. Franklin *v.* Osgood, 14 Johns. (N. Y.) 527; Bebee *v.* New York Bank, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353. If the averments of a bill and the proof adduced show no right to relief apart from that specially prayed the prayer for general relief is inoperative. McIntyre *v.* Philadelphia, 9 Pa. Dist. 714, 24 Pa. Co. Ct. 439. See also Mann *v.* German-American Invest. Co., (Nebr. 1903) 97 N. W. 600; Vila *v.* Grand Island Electric Light, etc., Co., (Nebr. 1903) 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791.

Interest upon a balance will not be decreed unless specifically prayed. Weymouth *v.* Boyer, 1 Ves. Jr. 416, 30 Eng. Reprint 414. But see Vincent *v.* Phillips, 47 La. Ann. 1216, 17 So. 786.

On a bill to set aside a sale an account of rents and profits will not be decreed if there is no prayer therefor. Hall *v.* Towne, 45 Ill. 493.

Production of books and papers on motion must be supported by a prayer for discovery. Campbell *v.* Knowles, 13 Phila. (Pa.) 163.

95. "That your orator may have such other and further relief in the premises, as the nature of his case shall require and as to your Lordship shall seem meet." Barton Suit Eq. 40. The form varies slightly by usage in different jurisdictions.

one for general relief.[96] The court will determine the character of a bill from its entire substance and plaintiff cannot by the frame of his prayer give it a different character.[97] If plaintiff be in doubt as to the precise relief to which he is entitled, he may pray in the alternative for one species of relief and if that be denied then for another.[98]

10. Prayer For Process. The bill concludes with a prayer that a subpœna issue requiring defendants named to appear and answer the bill and abide the determination of the court.[99] No one is deemed a defendant unless he is named as such in the bill and process prayed against him,[1] and a prayer for process is usually held essential for the purpose of so indicating defendants.[2] There are, however, cases to the effect that it is sufficient if the bill elsewhere clearly designates those intended to be made defendants and process is actually issued and served upon them.[3] In order to accomplish the object of the prayer

96. In a bill between partners for an account of moneys received, the clause "of all other matters relating to said concern." Miller *v.* Lord, 11 Pick. (Mass.) 11. "That the defendants stand to, abide by, and perform such order and decree as to the court shall seem agreeable to equity and good conscience." French *v.* Commercial Nat. Bank, 79 Ill. App. 110.

97. Wright *v.* Roethlisberger, 116 Mich. 241, 74 N. W. 474; Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751; Drexel *v.* Berney, 16 Fed. 522, 21 Blatchf. 348. But the nature of the prayer is an element for consideration in determining the scheme of the bill. Oden *v.* Lockwood, 136 Ala. 514, 33 So. 895.

98. *Alabama.*— Strange *v.* Watson, 11 Ala. 324.

Maryland.— Lingan *v.* Henderson, 1 Bland 236.

New York.—Lloyd *v.* Brewster, 4 Paige 537, 27 Am. Dec. 88.

North Carolina.— Ward *v.* Ward, 54 N. C. 334.

Pennsylvania.— Ingles *v.* Beemer, 5 L. T. N. S. 63.

Tennessee.— Tennessee Ice Co. *v.* Raine, 107 Tenn. 151, 64 S. W. 29.

West Virginia.— Brown *v.* Wylie, 2 W. Va. 502, 98 Am. Dec. 781.

England.— Bennet *v.* Vade, 2 Atk. 324, 9 Mod. 212, 26 Eng. Reprint 597.

See 19 Cent. Dig. tit. "Equity," § 321. See also *infra*, VII, F.

The prayer should be in the alternative where the case made by plaintiff may entitle plaintiff to one of two kinds of relief, but not to both. Colton *v.* Ross, 2 Paige (N. Y.) 396, 22 Am. Dec. 648.

Relief of one defendant or the other may be demanded according as facts charging the one or the other may be discovered. Thomason *v.* Smithson, 7 Port. (Ala.) 144.

Rescission or damages may be asked in the alternative. Gatling *v.* Newell, 12 Ind. 118; Hubbard *v.* Urton, 67 Fed. 419. See also Hardin *v.* Boyd, 113 U. S. 756, 5 S. Ct. 771, 28 L. ed. 1141.

It is error to sustain a demurrer where plaintiff is entitled to either of the modes of relief prayed for. Florida Southern R. Co. *v.* Hill, 40 Fla. 1, 23 So. 566, 74 Am. St. Rep. 124; Gaunt *v.* Froelich, 24 Ill. App. 303; Western Ins. Co. *v.* Eagle F. Ins. Co., 1 Paige (N. Y.) 284.

Such a prayer must be consistent; it cannot ask to set aside a decree for fraud or to correct errors therein. Watts *v.* Frazer, 80 Ala. 186; Gordon *v.* Ross, 63 Ala. 363.

99. 1 Daniell Ch. Pr. 499; Mitford Eq. Pl. 45.

The form in the English chancery was as follows: "May it please your Lordship to grant unto your orator His Majesty's most gracious writ of subpœna, to be directed to (naming the defendants) and the rest of confederates, when discovered, thereby commanding them and every of them, at a certain day and under a certain pain, therein to be specified, personally to be and appear before your Lordship in this honorable court and then and there to answer all and singular the premises aforesaid and to stand to perform and abide such order, direction and decree therein, as to your Lordship shall seem meet, and your orator shall ever pray." Barton Suit Eq. 41.

1. See *supra*, V, E.

2. *Florida.*— Keen *v.* Jordan, 13 Fla. 327.

Georgia.—J. K. Orr Shoe Co. *v.* Kimbrough, 99 Ga. 143, 25 S. E. 204.

New Jersey.— Wright *v.* Wright, 8 N. J. Eq. 143.

North Carolina.— Archibald *v.* Means, 40 N. C. 230; Hoyle *v.* Moore, 39 N. C. 175.

United States.— Goebel *v.* American R. Supply Co., 55 Fed. 825; Carlsbad *v.* Tibbetts, 51 Fed. 852.

England.— Windsor *v.* Windsor, 2 Dick. 707, 21 Eng. Reprint 446; Fawkes *v.* Pratt, 1 P. Wms. 593, 24 Eng. Reprint 531.

See 19 Cent. Dig. tit. "Equity," § 322.

3. Alley *v.* Quinter, MacArthur & M. (D. C.) 390; Elmendorf *v.* Delancey, Hopk. (N. Y.) 555; Kanawha Valley Bank *v.* Wilson, 35 W. Va. 36, 13 S. E. 58 (defendants should be named either in caption or body of the bill); Jennes *v.* Landes, 84 Fed. 73.

Where defendants answer a bill containing no prayer for process they thereby waive objection on account of the defect and the bill may be amended. Belknap *v.* Stone, 1 Allen (Mass.) 572.

defendants should be actually named therein by their proper names,[4] and it is insufficient to describe them as the heirs of a named person,[5] or as "the defendants."[6] Any variation from this rule, as by describing defendants as persons unknown, belonging to a certain class, depends upon statute and the statute must be strictly pursued.[7] If a person is to be made defendant in two capacities, as in his own right and as a representative, process must be prayed against him in both capacities.[8] While courts have sometimes been strict in requiring the prayer to be precise,[9] certainty to a common intent is usually held sufficient.[10] The prayer for process is also the proper place to ask for a provisional writ, such as an injunction *pendente lite* or a writ of ne exeat.[11]

11. Signature and Verification. Regularly a bill must be signed by counsel and for some purposes must be verified by affidavit.[12]

C. Substance of the Bill — 1. All Facts Essential to Relief Must Be Averred. In general it may be stated that the bill must allege every fact necessary to entitle plaintiff to relief.[13] The existence of facts thus essential to relief will not be

4. Keen *v.* Jordan, 13 Fla. 327; Goebel *v.* American R. Supply Co., 55 Fed. 825; Carlsbad *v.* Tibbetts, 51 Fed. 852.

U. S. Eq. Rule 23 requires that the prayer for process shall contain the names of all the defendants named in the introductory part of the bill. Under this rule the omission from the prayer of the name of any defendant named in the introduction is fatal. Goebel *v.* American R. Supply Co., 55 Fed. 825.

The true names must be given, and service by a fictitious name is void. Kentucky Silver Min. Co. *v.* Day, 14 Fed. Cas. No. 7,719, 2 Sawy. 468.

5. Huston *v.* McClarty, 3 Litt. (Ky.) 274; Moore *v.* Anderson, 36 N. C. 411.

6. Archibald *v.* Means, 40 N. C. 230; Hoyle *v.* Moore, 39 N. C. 175.

Against "said defendants" is a defective prayer unless it appears from the rest of the bill who are referred to. Howe *v.* Robins, 36 N. J. Eq. 19. And see Jennes *v.* Landes, 84 Fed. 73.

7. Kirkham *v.* Justice, 17 Ill. 107; Pile *v.* McBratney, 15 Ill. 314; Pyle *v.* Cravens, 4 Litt. (Ky.) 17.

Suit against Shakers.— Under a statute, authorizing a suit against a community, commonly called Shakers, living together and holding their property in common, the bill must describe them as a people who hold their property in common. Merrifield *v.* The Shakers, 7 J. J. Marsh. (Ky.) 496.

8. Carter *v.* Ingraham, 43 Ala. 78.

9. The constitution requiring all writs to run in the name of the state, it is improper to ask that "the people's" writ of subpœna should issue. Daughtry *v.* Reddick, 40 N. C. 261.

10. It is sufficient to ask that defendant named be made a party defendant without asking for a subpœna, where the law requires the register to issue a subpœna on the filing of the bill. McKenzie *v.* Baldridge, 49 Ala. 564. And on the other hand a prayer for a subpœna is sufficient without asking formally that the person named be made defendant. Tourville *v.* Pierson, 39 Ill. 446.

A prayer that a corporation named be made a party by serving a copy on N, the president thereof, is sufficient to make the corporation a party. Walker *v.* Hallett, 1 Ala. 379. But a mere recital in a bill against a corporation that N is its president does not make him a party. Peters *v.* Neely, 16 Lea (Tenn.) 275.

A mistake in the prayer as to the initial of defendant's middle name is immaterial where the subpœna is served by the proper name. Cleveland *v.* Pollard, 37 Ala. 556.

11. 1 Daniell Ch. Pr. 502; Mitford Eq. Pl. 46.

The usual form is to ask that there be granted "not only the writ of injunction, restraining, etc., but also the writ of subpœna, etc." Barton Suit Eq. 41; 1 Daniell Ch. Pr. 502.

U. S. Eq. Rule 23 provides that if such a writ is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

12. See *infra*, XIV, A, 1; XIV, B, 1.

13. *Alabama.*— Danforth *v.* Herbert, 33 Ala. 497.

Arkansas.— Brodie *v.* Skelton, 11 Ark. 120.

Florida.— Johnson *v.* McKinnon, (1903) 34 So. 272.

Illinois.— Quinn *v.* McMahan, 40 Ill. App. 593.

Massachusetts.— Wright *v.* Dame, 22 Pick. 55.

Mississippi.— Warner *v.* Warner, 33 Miss. 547.

New Jersey.— Kip *v.* Kip, 33 N. J. Eq. 213; Ter Knile *v.* Reddick, (Ch. 1898) 39 Atl. 1062.

North Carolina.— Netherton *v.* Candler, 78 N. C. 88.

Tennessee.— Ramsay *v.* Temple, 3 Lea 252.

Wisconsin.— Bracken *v.* Preston, 1 Pinn. 584, 44 Am. Dec. 412.

United States.— Central Trust Co. *v.* Louisville Trust Co., 87 Fed. 23.

See 19 Cent. Dig. tit. "Equity," § 323.

Reference to proof.— Failure to allege sufficient facts is not obviated by the statement that the facts will appear more fully by the proof. Briant *v.* Corpening, 62 N. C. 325.

A bill for relief and discovery is open to general demurrer unless it shows that plain-

presumed.[14] What is essential to be alleged in particular cases is a question depending upon the nature and object of the case.[15]

2. Facts Must Be Averred With Certainty — a. In General. The allegations of a bill should be certain and specific.[16] As to the degree of certainty required,[17] two general rules have been announced, leading in most cases at least to the same result. The one is that the facts must be stated with such certainty that defendant may be distinctly informed of the nature of the claim made against him and of what he is called on to answer;[18] the other that they must be stated with such certainty that the court may ascertain plaintiff's rights and render a proper decree, if the bill should be adjudged true.[19]

b. Pleading Evidence. While the second of the rules above stated[20] requires sufficient detail to fix the terms of the decree, yet it is sufficient to state the ulti-

tiff is entitled to some relief independent of the discovery. Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35; Meyers *v.* Schuman, (N. J. Ch. 1895) 31 Atl. 460.

Inartificial statement of facts otherwise sufficiently alleged does not make the bill demurrable. Miller *v.* Thatcher, 9 Tex. 482, 60 Am. Dec. 172.

Conclusions of law need not be pleaded; it is essential only to state the facts. Kelly *v.* McGuire, 15 Ark. 555.

Right to all the relief prayed need not be shown; if the bill states facts sufficient to raise any equity it is good. Hammett *v.* Christie, 21 Ga. 251; Van Orden *v.* Van Orden, (N. J. Ch. 1898) 41 Atl. 671; Jenkins *v.* Thomason, 32 S. C. 254, 10 S. E. 961.

While it is proper in the charging part to rebut anticipated defenses (see *infra*, VII, B, 6), it is not essential to the validity of the bill in the first instance that this be done. Chapman *v.* Hamilton, 19 Ala. 121; Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805; Makepeace *v.* Davis, 27 Ind. 352. But a plaintiff claiming as a *bona fide* purchaser without notice of an equity must deny notice in the bill. Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288.

14. Reel *v.* Overall, 39 Ala. 138; Brewster *v.* Cahill, 199 Ill. 309, 65 N. E. 233. But on a bill by a widow to recover on a life-insurance policy, assigned to her by her husband, it was held that a motion to dismiss could not prevail, although the bill admitted a formal prior assignment to defendant, as such assignment did not necessarily carry with it the right to the proceeds of the policy. Meyers *v.* Schuman, (N. J. Ch. 1895) 31 Atl. 460.

15. See the specific titles relating to the different suits and remedies.

16. *Alabama.*— Hartwell *v.* Blocker, 6 Ala. 581.

Arkansas.— Nolley *v.* Rogers, 22 Ark. 227.

Illinois.— Fitzpatrick *v.* Beatty, 6 Ill. 454.

Mississippi.— Warner *v.* Warner, 33 Miss. 547; Prestidge *v.* Pendleton, 24 Miss. 80.

United States.— Socola *v.* Grant, 15 Fed. 487.

See 19 Cent. Dig. tit. "Equity," § 365.

Want of certainty may be sufficient ground for dismissing a bill. Brooks *v.* Turner, 62 Ga. 164; Taylor *v.* Holmes, 14 Fed. 498.

The whole bill will be considered in testing the certainty of a particular allegation therein. Coggill *v.* Botsford, 29 Conn. 439.

17. "There are some cases in which the same decisive and categorical certainty is required in a bill in equity as in a declaration at common law. Cooper Eq. Pl. 5. But, in most cases, general certainty is sufficient in pleadings in equity." St. Louis *v.* Knapp, 104 U. S. 658, 661, 26 L. ed. 883, per Harlan, J. "The same precision of statement that is required in pleadings at law has never been attained in bills in equity." New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328, 336, per Dixon, J.

18. *Georgia.*— Black *v.* Black, 15 Ga. 445.

Maryland.— Meshaw *v.* Meshaw, 2 Md. Ch. 12.

Mississippi.— Smith *v.* Gill, 52 Miss. 607.

New Hampshire.— Rice *v.* Merrimack Hosiery Co., 56 N. H. 114.

New Jersey.— New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328; Search *v.* Search, 27 N. J. Eq. 137.

See 19 Cent. Dig. tit. "Equity," § 335.

Disjunctive averment.— A bill charging that defendants "are discharging or have discharged" polluted water into a stream is bad for uncertainty, as each defendant is entitled to know whether he is charged with a past offense or one still continuing. Mengel *v.* Lehigh Coal, etc., Co., 24 Pa. Co. Ct. 152.

19. *Illinois.*— Becklenberg *v.* Becklenberg, 102 Ill. App. 504.

Kentucky.— Pennebaker *v.* Wathan, 2 A. K. Marsh. 315.

Mississippi.— Perkins *v.* Sanders, 56 Miss. 733.

Pennsylvania.— Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131.

Virginia.— Fowler *v.* Saunders, 4 Call 361.

United States.— Savage *v.* Worsham, 104 Fed. 18.

See 19 Cent. Dig. tit. "Equity," §§ 332–335.

Prevention of multiplicity of suits and irreparable injury thereby, when asserted as a ground of jurisdiction, must be supported by facts so pleaded that the court can reasonably infer that the allegations are true. Corbus *v.* Alaska Treadwell Gold Min. Co., 99 Fed. 334.

20. See *supra*, VII, C, 2, a.

mate fact, without the details and circumstances comprised within it or which go to prove it.[21] Mere evidentiary facts need not be pleaded,[22] and if they alone be pleaded without the ultimate fact which they tend to prove the bill is defective.[23] It is, however, often necessary to charge facts of an evidentiary character in order to lay the foundation for an interrogatory.[24]

c. Pleading Conclusions. On the other hand it is insufficient to plead merely conclusions; the facts should be pleaded from which the court rather than the pleader shall draw the conclusions.[25] It may not, however, be improper to allege a conclusion of law, in order to show the relations of the various facts to one another, and the end sought,[26] or where law and fact are so blended as to render separation impracticable.[27]

d. Pleading Positively. Facts should in general be pleaded positively[28] and in traversable form,[29] not hypothetically,[30] or by way of recital.[31] It is unimportant, however, what verb of assertion is used if the intention appears of making a positive allegation.[32] Merely inferential or argumentative statements are generally insufficient,[33] but such averments are sometimes tolerated when the implication

21. *Alabama.*— Caple *v.* McCollum, 27 Ala. 461.

Illinois.— Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* 77 Ill. App. 365].

Iowa.— Harrison *v.* Kramer, 3 Iowa 543.

Maryland.— Dennis *v.* Dennis, 15 Md. 73; Meshaw *v.* Meshaw, 2 Md. Ch. 12.

New York.— John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475.

Pennsylvania.— Bright *v.* McCullough, 1 Leg. Rec. 281.

United States.— Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 23 S. Ct. 115, 47 L. ed. 183; Dunham *v.* Eaton, etc., R. Co., 8 Fed. Cas. No. 4,150, 1 Bond 492; Nesmith *v.* Calvert, 14 Fed. Cas. No. 10,123, 1 Woodb. & M. 34.

See 19 Cent. Dig. tit. "Equity," § 332.

22. Bishop *v.* Bishop, 13 Ala. 475; Lovell *v.* Farrington, 50 Me. 239; Wilcox *v.* Davis, 4 Minn. 197.

23. Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687; Wilson *v.* Eggleston, 27 Mich. 257.

24. See *supra*, VII, B, 6.

25. A party seeking to excuse his failure to seasonably perform an act must not allege merely that he was unable sooner to perform, but must set out the facts occasioning the delay. Wingo *v.* Hardy, 94 Ala. 184, 10 So. 659; Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059. A bill alleging in general terms the assignment of dower in another state and that the statutes of that state thereby conferred a life-estate was held bad, because it did not set out the proceeding whereby dower was assigned and the terms of the statute. Cockrell *v.* Gurley, 26 Ala. 405. But an allegation that an instrument had been duly acknowledged before a commissioner of deeds according to the laws of the state where it was executed was held sufficient on demurrer. Livingston *v.* Jones, Harr. (Mich.) 165.

26. John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475. It is sometimes necessary to make deductions from facts stated, which are more or less conclusions of law. Allen *v.* O'Donald, 23 Fed. 573.

27. Kelly *v.* McGuire, 15 Ark. 555.

28. *Alabama.*— Duckworth *v.* Duckworth, 35 Ala. 70.

Maryland.— Chambers *v.* Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572.

New York.— McIntyre *v.* Union College, 6 Paige 239.

West Virginia.—Hood *v.* Morgan, 47 W. Va. 817, 35 S. E. 911.

United States.— Post *v.* Beacon Vacuum Pump, etc., Co., 84 Fed. 371, 28 C. C. A. 431.

See 19 Cent. Dig. tit. "Equity," §§ 332, 335.

29. Stow *v.* Russell, 36 Ill. 18; Harding *v.* Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429.

30. Le Baron *v.* Shepherd, 21 Mich. 263.

31. McIntyre *v.* Union College, 6 Paige (N. Y.) 239; Gram *v.* Stebbins, 6 Paige (N. Y.) 124.

The phrase "inasmuch as" is more direct than "whereas" and is sufficiently positive. Paterson, etc., R. Co. *v.* Jersey City, 9 N. J. Eq. 434.

A recital may be sufficient if in such form that the existence of the fact appears by necessary implication. Massachusetts Investor Pub. Co. *v.* Dobinson, 72 Fed. 603.

32. It was held sufficient where the bill "charged" facts in the stating part, instead of using a more direct verb. Halsey *v.* Ball, 36 N. J. Eq. 161. An allegation that plaintiff "can prove" certain things is insufficient. Lemaster *v.* Burckhart, 2 Bibb (Ky.) 25.

33. *Alabama.*— Richards *v.* Richards, 98 Ala. 599, 12 So. 817; Duckworth *v.* Duckworth, 35 Ala. 70.

Florida.— Marye *v.* Root, 27 Fla. 453, 8 So. 636.

Maryland.— Chambers *v.* Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572.

New Jersey.— Search *v.* Search, 27 N. J. Eq. 137.

New York.— Hood *v.* Inman, 4 Johns. Ch. 437.

North Carolina.— Weisman *v.* Heron Min. Co., 57 N. C. 112.

of the existence of the ultimate fact which should have been pleaded follows necessarily from the facts averred.[34]

e. Pleading According to Legal Effect. It is in general sufficient, in equity as at law, to plead a contract according to its legal effect;[35] therefore no variance arises because of a difference in language between the bill and an instrument described therein, where the legal significance is the same.[36] A general averment of the legal effect of an instrument has been held sufficient when the bill was accompanied by a copy, from which the details fully appeared.[37] In pleading breach of covenant, however, the words of the covenant should be alleged or words coextensive with it in effect,[38] but if this be done it is immaterial whether the pleader styles it a condition or a covenant.[39] Where written instruments are ambiguous, it is proper to set them out in full, together with the construction which plaintiff claims for them.[40]

f. Pleading on Information and Belief. The rule requiring positiveness of statement[41] applies to facts essential to plaintiff's case and necessarily within his knowledge,[42] but is relaxed so as to permit an allegation on information and belief where the fact is not presumably within the knowledge of plaintiff, but is within that of defendant.[43] Considerable nicety has been indulged in as to the form of such an allegation. The proper form is to state the fact on information and belief and therefore charge it to be true.[44] An averment that plaintiff has been informed and believes and therefore avers is of doubtful sufficiency.[45] The pleader must allege the fact on information and belief and not that he is informed and believes that the fact exists.[46] *A fortiori* it is bad to allege merely that plaintiff is informed of the existence of the fact,[47] or to resort to any less positive form of statement.[48]

g. Facts Peculiarly Within Defendant's Knowledge. Aside from the relaxation of the rule requiring positiveness of statement and permitting allegations on information and belief of facts peculiarly within the knowledge of defendant,[49]

See 19 Cent. Dig. tit. "Equity," §§ 335, 336.

34. Bondurant *v.* Sibley, 29 Ala. 570; Daniel *v.* Townsend, 21 Ga. 155; Bolgiano *v.* Cooke, 19 Md. 375; Massachusetts Investor Pub. Co. *v.* Dobinson, 72 Fed. 603.

Allegation of conveyance by deed imports delivery of the deed. Whitten *v.* Whitten, 36 N. H. 326.

35. Meers *v.* Stevens, 106 Ill. 549; Goodrich *v.* Parker, 1 Minn. 195; McAllister *v.* Plant, 54 Miss. 106. Where a bill does not state a contract to be in writing it will be assumed not to be so. Bradley *v.* Lamb, Hard. (Ky.) 527.

36. McWhorter *v.* McMahan, 10 Paige (N. Y.) 386; Lee *v.* Foard, 54 N. C. 125. A pleader brings himself within the terms of a statute by using different words having the same sense. Bondurant *v.* Sibley, 29 Ala. 570.

37. Van Cortlandt *v.* Beekman, 6 Paige (N. Y.) 492; Hungerford *v.* Cushing, 8 Wis. 332. See also *infra*, VII, D.

38. King *v.* Rochester, 3 A. K. Marsh. (Ky.) 227.

39. Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145.

40. Einstein *v.* Schnebly, 89 Fed. 540.

41. See *supra*, VII, C, 2, d.

42. Jones *v.* Cowles, 26 Ala. 612; Rice *v.* Merrimack Hosiery Co., 56 N. H. 114.

43. Campbell *v.* Paris, etc., R. Co., 71 Ill. 611; Cole *v.* Savage, 1 Clarke (N. Y.) 361; Leavenworth *v.* Pepper, 32 Fed. 718, where the allegations in question were in the charging part alone.

44. Campbell *v.* Paris, etc., R. Co., 71 Ill. 611.

A positive statement followed by "as your orator is informed and believes" is an averment of the fact, and not merely an averment of the pleader's confidence in the source of his information and is therefore sufficient. Coryell *v.* Klehm, 157 Ill. 462, 41 N. E. 864.

45. Held sufficient in Wells *v.* Bridgeport Hydraulic Co., 30 Conn. 316, 70 Am. Dec. 250, and insufficient in *Ex p.* Reid, 50 Ala. 439.

46. Nix *v.* Winter, 35 Ala. 309; Messer *v.* Storer, 79 Me. 512, 11 Atl. 275.

47. Lucas *v.* Oliver, 34 Ala. 626; Cameron *v.* Abbott, 30 Ala. 416; Uxbridge *v.* Staveland, 1 Ves. 56, 27 Eng. Reprint 868.

48. It is insufficient to allege that plaintiffs are of opinion that a fact exists (Carter *v.* Lyman, 33 Miss. 171), or that they fear and believe such a fact (Hause *v.* Judson, 4 Dana (Ky.) 7, 29 Am. Dec. 377). An averment that defendant has no means of satisfying plaintiff's demand "except a claim for one hundred dollars, which your orator understands and believes he has on A for work which your orator is informed has been done" is no averment of an indebtedness from A to defendant. McDowell *v.* Graham, 3 Dana (Ky.) 73.

49. See *supra*, VII, C, 2, f.

it is also permitted under such circumstances to make the statement less certain and precise in substance than the general rules require.[50]

h. Rules as to Pleading Certain Classes of Facts — (i) *Fraud.* A bill seeking relief on the ground of fraud must distinctly and specifically charge the fraud.[51] It must state the specific facts and circumstances constituting the fraud,[52] and the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent.[53] General charges of fraud or that acts were fraudulently committed are of no avail, unaccompanied by statements of specific facts amounting to fraud;[54] and on the other hand if there be sufficient facts stated to disclose fraud it is unnecessary to charge in express terms that the acts complained of were fraudulent.[55] Where the title of a purchaser is attacked for fraud the averment of notice to him must be distinct and direct.[56] While the

50. Pennebaker *v.* Wathan, 2 A. K. Marsh. (Ky.) 315; Towle *v.* Pierce, 53 Mass. 329, 46 Am. Dec. 679; Watson *v.* Murray, 23 N. J. Eq. 257; Aikin *v.* Ballard, Rice Eq. (S. C.) 13.

51. Martin *v.* Lutkewitte, 50 Mo. 58; Mickles *v.* Colvin, 4 Barb. (N. Y.) 304; Lyon *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 184; Chapman *v.* Chapman, 13 R. I. 680; Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278.

Finding of committee that fraud existed is of no avail where fraud is not charged in the bill. Brainerd *v.* Arnold, 27 Conn. 617.

Insinuation of fraud is not sufficient, but it must be directly charged (Witherspoon *v.* Carmichael, 41 N. C. 143), and the charge must not be indefinite as to persons, or means, or evasive in statement (Leberman *v.* Leberman, 18 Phila. (Pa.) 254).

52. *California.*— Thomason *v.* De Greayer, (1892) 31 Pac. 567; Castle *v.* Bader, 23 Cal. 75.

Connecticut.— Bull *v.* Bull, 2 Root 476.

Georgia.— Miller *v.* Cotten, 5 Ga. 341.

Illinois.— Newell *v.* Bureau County, 37 Ill. 253.

Kansas.— State *v.* Williams, 39 Kan. 517, 18 Pac. 727.

Kentucky.— Jasper *v.* Hamilton, 3 Dana 280.

Maine.— Merrill *v.* Washburn, 83 Me. 189, 22 Atl. 118.

Missouri.— Stucker *v.* Duncan, 37 Mo. 160; Hill *v.* Miller, 36 Mo. 182.

New Jersey.— Small *v.* Boudinot, 9 N. J. Eq. 381.

Ohio.— Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478; Rote *v.* Stratton, 3 Ohio S. & C. Pl. Dec. 156, 2 Ohio N. P. 27.

Pennsylvania.— Johnson's Appeal, 9 Pa. St. 416; McAndrew *v.* McAndrew, 3 C. Pl. 174; Fisher *v.* Walter, 3 C. Pl. 161.

South Carolina.— Fraser *v.* Hext, 2 Strobh. Eq. 250.

Virginia.— Steed *v.* Baker, 13 Gratt. 380.

United States.— Voorhees *v.* Bonesteel, 16 Wall. 16, 21 L. ed. 268; Moore *v.* Greene, 19 How. 69, 15 L. ed. 533 [*affirming* 17 Fed. Cas. No. 9,763, 2 Curt. 202]; Langdon *v.* Goddard, 14 Fed. Cas. No. 8,060, 2 Story 267.

See 19 Cent. Dig. tit. "Equity," §§ 326, 334.

Duress.— An allegation that an obligation was executed while defendant was under arrest is insufficient without alleging facts showing the imprisonment to be illegal. Fisher *v.* Walter, 3 C. Pl. (Pa.) 161.

Illegality.— Where it is charged that a contract is illegal the bill must state the specific facts showing it to be so. State *v.* Williams, 39 Kan. 517, 18 Pac. 727.

Bribery.— A bill alleging that the passage of an ordinance was procured by bribery must name the officers bribed and the sums paid or promised. Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740.

False representations constituting fraud must set out definitely (Hays *v.* Ahrichs, 115 Ala. 239, 22 So. 465), with facts showing that they were false (Arnold *v.* Baker, 6 Nebr. 134), as well as defendant's knowledge of their falsity, where a *scienter* is essential (Vanbibber *v.* Beirne, 6 W. Va. 168).

53. Chapman *v.* Chapman, 13 R. I. 680; Lafayette Co. *v.* Neely, 21 Fed. 738.

A demurrer does not admit that the facts charged amount to fraud, although the bill styles them fraudulent. Carter *v.* Anderson, 4 Ga. 516.

54. *Alabama.*— McHan *v.* Ordway, 76 Ala. 347; Lake *v.* Security Loan Assoc., 72 Ala. 207.

Arkansas.— Twombly *v.* Kimbrough, 24 Ark. 459; Ringgold *v.* Stone, 20 Ark. 526.

Illinois.— Toles *v.* Johnson, 72 Ill. App. 182.

Tennessee.— Winham *v.* Crutcher, 2 Tenn. Ch. 535.

United States.— Magniac *v.* Thomson, 16 Fed. Cas. No. 8,957, 2 Wall. Jr. 209.

See 19 Cent. Dig. tit. "Equity," §§ 326, 334.

A common confederacy clause in a bill (see *supra*, VII, B, 5) is entirely insufficient to constitute a charge of fraud. Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540; Lyerly *v.* Wheeler, 45 N. C. 267, 59 Am. Dec. 596.

55. Wood *v.* Grayson, 16 App. Cas. (D. C.) 174; Skrine *v.* Simmons, 11 Ga. 401; Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Wessell *v.* Sharp, (Tenn. Ch. App. 1897) 39 S. W. 543.

Where illegality is relied upon the same rule holds good. Denison *v.* Gibson, 24 Mich. 187.

56. "Well knowing the premises" does not charge notice with sufficient directness. Wood

specific facts constituting the fraud must be stated, it is not necessary to plead all the *minutiæ* which may be offered in evidence in proof of such facts,[57] and all that the rule requires is that the particular character of the fraud be made known, which may sometimes be done in quite general terms.[58] Where the fraudulent transaction was between third persons and not within plaintiff's knowledge, he may charge it as definitely as possible, averring his ignorance as an excuse for not making the charge more specific.[59] In determining whether the charges of fraud are sufficiently certain the whole bill must be looked to.[60]

(II) *Accident and Mistake.* Accident or mistake must also be distinctly charged in order to invoke jurisdiction on those grounds,[61] and with sufficient particularity to indicate its precise nature.[62]

(III) *Usury.* A charge of usury must not be left to inference,[63] but the facts, including time, amount, and manner, showing the contract to be usurious, must be distinctly stated.[64]

(IV) *Other Facts.* While the technical rules of the common law as to pleading time, place, and quantity do not prevail in equity, it may be said generally that where these facts are material they must be pleaded with all convenient certainty.[65] A bill to rescind a sale for a defect in title must set out the facts disclosing the defect.[66] A bill to establish an equitable set-off must state facts from

v. Mann, 30 Fed. Cas. No. 17,951, 1 Sumn. 506.

Notice to all intermediate grantees must be charged. Brace *v.* Reid, 3 Greene (Iowa) 422.

As to necessity of charging notice see also Molony *v.* Rourke, 100 Mass. 190; Dias *v.* Bouchaud, 10 Paige (N. Y.) 445.

57. Singleton *v.* Scott, 11 Iowa 589; Tong *v.* Marvin, 15 Mich. 60.

58. Grand Tower Min., etc., Co. *v.* Cady, 96 Ill. 430; De Louis *v.* Meek, 2 Greene (Iowa) 55, 50 Am. Dec. 491; Henley *v.* Perkins, 6 Gratt. (Va.) 615. A bill is sufficient which substantially charges a series of fraudulent practices whereby plaintiff is ultimately deprived of his property. Brainerd *v.* Brainerd, 15 Conn. 575.

59. Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 299.

In a bill against an agent specifying certain frauds plaintiff may allege other frauds generally, and concealment by defendant of their nature. Northern Pac. R. Co. *v.* Kindred, 14 Fed. 77, 3 McCrary 627.

60. West *v.* Rouse, 14 Ga. 715. See, generally, Fraud.

61. White *v.* Denman, 1 Ohio St. 110.

62. Stover *v.* Poole, 67 Me. 217; Caton *v.* Willis, 40 N. C. 335; Fraser *v.* Hext, 2 Strobh. Eq. (S. C.) 250.

How the mistake occurred must be shown by circumstances alleged. Wright *v.* Shafter, 48 Cal. 275; Merrill *v.* Washburn, 83 Me. 189, 22 Atl. 118.

Mistake in a written contract must be alleged by stating the specific terms of the actual agreement; and the mistake in reducing it to writing must be set out. Wemple *v.* Stewart, 22 Barb. (N. Y.) 154. And see, generally, Reformation of Instruments.

63. Cole *v.* Savage, Clarke (N. Y.) 361.

64. Newell *v.* Bureau County, 37 Ill. 253; Cole *v.* Savage, Clarke (N. Y.) 361; Dowdall *v.* Lenox, 2 Edw. (N. Y.) 267. See, generally, Usury.

It is sufficient to allege a borrowing and lending and a stipulation for payment beyond the legal rate. Freeman *v.* Brown, 7 T. B. Mon. (Ky.) 263.

65. Warner *v.* Warner, 33 Miss. 547; 1 Daniell Ch. Pr. 473; Mitford Eq. Pl. 40.

Time.— Gammel *v.* Young, 3 Iowa 297; Price *v.* Coleman, 21 Fed. 357. In a suit to declare a mortgage a general assignment, the bill should show that the property mortgaged was substantially all the mortgagor's property at the time of the mortgage, and an averment that it is so speaks from the filing of the bill and is insufficient. Espy *v.* Comer, 76 Ala. 501.

Amounts.— Caldwell *v.* Dulin, 22 Ga. 4; Gammel *v.* Young, 3 Iowa 297; Wolcott *v.* Jones, 4 Allen (Mass.) 367; Tallman *v.* Green, 3 Sandf. (N. Y.) 437. The value of land in controversy must be stated when jurisdiction depends upon the amount. Stewart *v.* Croes, 10 Ill. 442.

An allegation of a tender of an amount stated, together with interest for a stated period at a stated rate, is sufficiently certain. Prescott *v.* Everts, 4 Wis. 314.

Insolvency of an estate is sufficiently shown by alleging the allowance of claims to the amount of six thousand dollars and over, and the filing of an inventory, amounting to only one hundred and fifteen dollars. Bay *v.* Cook, 31 Ill. 336.

A bill for an accounting and for the surrender of security given to indemnify an indorser must show that a balance is due. Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

A bill to surcharge and falsify an account must set forth the items objected to. Seabright *v.* Seabright, 28 W. Va. 412.

A bill for abatement of purchase-price for the non-conveyance of lands, pointed out as embraced in the tract, must show that the quantity falls short. Kelly *v.* Allen, 34 Ala. 663.

66. Arnold *v.* Baker, 6 Nebr. 134; Edwards *v.* Chilton, 4 W. Va. 352.

which the court can determine whether plaintiff will probably be able to establish his claim;[67] and where the ground of such set-off is that one debt was contracted on faith of the other, a general averment to that effect is insufficient, but the specific facts showing it to be so must be stated.[68] An averment of tender should state the amount, the time, the manner, and show that no more was due.[69] A party claiming the benefit of a statute must state facts bringing himself within its provisions,[70] and in so doing an exception contained in the enacting clause must be negatived, while one not so contained, but found in a proviso or subsequent section, is a matter of defense.[71]

3. DESCRIPTION OF SUBJECT-MATTER. The bill must with convenient certainty set forth and describe the property or rights to which it relates.[72]

4. PLAINTIFF'S TITLE. The bill must show plaintiff's right or title in or to the subject-matter of the suit upon which he bases his claim for relief.[73] The averment must be express and not left to inference from an exhibit,[74] and must also show an interest existing at the time the suit is brought.[75] Such title must be stated with sufficient certainty to enable the court to see that plaintiff has such a right as warrants its interference,[76] and to this end it is sometimes necessary to negative facts which would defeat the title claimed.[77] Everything must be stated

67. Hewitt *v.* Kuhl, 25 N. J. Eq. 24.

68. Tate *v.* Evans, 54 Ala. 16.

69. Rains *v.* Scott, 13 Ohio 107. See, generally, TENDER.

70. Eberhart *v.* Gilchrist, 11 N. J. Eq. 167.

A bill to enforce a statutory lien need not aver a complication of accounts or other matters usually essential to the jurisdiction. Lott *v.* Mobile County, 79 Ala. 69.

71. Atty.-Gen. *v.* Oakland County Bank, Walk. (Mich.) 90.

72. Jones *v.* Minogue, 29 Ark. 637. A bill specifying the denomination of part of the bank-notes to which it relates and describing the rest as "bank-bills current in the Commonwealth, amounting to five hundred dollars," and also describing checks as "two checks on Boston banks, amounting to two hundred and fifty dollars," is wholly insufficient. Babcock *v.* Thompson, 3 Pick. (Mass.) 446, 15 Am. Dec. 235. A bill for a receiver of rents and profits may refer to a deed attached for a description of the land, especially for the purposes of an interlocutory hearing. Whyte *v.* Spransy, 19 App. Cas. (D. C.) 450.

In a bill for foreclosure "the same certainty of description ought to be observed . . . as in a complaint in a real action at law, and in the judgment rendered thereon." Hurt *v.* Freeman, 63 Ala. 335, 336, per Brickell, C. J. See, generally, MORTGAGES.

73. *Arkansas.*— Stillwell *v.* Adams, 29 Ark. 346.

Florida.— West *v.* Reynolds, 35 Fla. 317, 17 So. 740.

Kentucky.— Bowman *v.* Elston, 2 T. B. Mon. 133.

Michigan.— Stille *v.* Hess, 112 Mich. 678, 71 N. W. 513.

North Carolina.— Humphreys *v.* Tate, 39 N. C. 220.

Pennsylvania.— Kase *v.* Burnham, 206 Pa. St. 330, 55 Atl. 1028; Barry *v.* McAvoy, 10 Phila. 99.

Rhode Island.— Wilson *v.* Wilson, 25 R. I. 446, 56 Atl. 773.

United States.— Bishop *v.* York, 124 Fed. 959; Bent *v.* Hall, 119 Fed. 342, 56 C. C. A. 246.

See 19 Cent. Dig. tit. "Equity," § 324.

Joint interest of joint plaintiffs.— Where a railroad company and an express company joined in a bill to compel other express companies to extend equal facilities of forwarding express matter, it was held essential to show a joint interest of plaintiffs in the express business. Baltimore, etc., R. Co. *v.* Adams Express Co., 22 Fed. 404.

A misnomer may under this rule defeat the bill, as where a bill was filed in the name of Valentine R. to restrain the collection of a judgment alleged to be against Frederick R. Rabberman *v.* Hause, 89 Ill. 209.

74. Seitz *v.* Lafayette Traction Co., 5 Pa. Co. Ct. 469.

75. Wiggin *v.* New York, 9 Paige (N. Y.) 16.

76. Cockrell *v.* Gurley, 26 Ala. 405. A bill alleging that land is held under a restriction against building must show such a relation in plaintiff's title as to enable him to enforce the restriction. Seabury *v.* Metropolitan R. Co., 115 Mass. 53.

77. A bill claiming a preëmption right and seeking to hold a subsequent patentee as trustee must show that plaintiff's statutory time of entry had not expired when defendant entered the land. Martin *v.* Tenison, 26 Ala. 738.

A bill claiming adverse possession to land condemned as a street without compensation must show that it had not been dedicated to public use before the possession began. Baltimore *v.* Coates, 85 Md. 531, 37 Atl. 18.

Terms of instrument.— But where a bill sets forth the terms of an instrument so as to show title in plaintiff, it will not be presumed that there were other provisions in the instrument defeating such title. Brewster *v.* Cahill, 199 Ill. 309, 65 N. E. 233; Cavender

essential to show a vested right,[78] and this by averment of facts and not of mere conclusion.[79] The title shown may be either legal or equitable,[80] but the nature of the title must appear.[81] In bills to enforce a chose in action a consideration must be stated.[82] A general allegation of title is sufficient against one having himself no right,[83] but otherwise it is necessary to show the derivation of the title with certainty.[84] Plaintiffs claiming as heirs must not merely allege that they are such, but must show the relationship.[85] Where probate is not necessary to vest title under a will it is not essential to allege probate,[86] but in claiming under a bequest the domicile of the testator must be stated, as the law of the domicile determines the sense of the will.[87] Where plaintiff claims as a substituted trustee

v. Cavender, 114 U. S. 464, 5 S. Ct. 955, 29 L. ed. 212.

78. A bill, reciting the soliciting of plans for a state capitol under the assurance that a board of experts would select eight designs, from which the commissioners would choose the architect of the building, and asking that the commissioners be compelled to make the choice, was bad because it did not allege that the plaintiff's design was one of the eight selected. Cope *v.* Hastings, 183 Pa. St. 300, 38 Atl. 717.

A right to particular bonds, under a subscription entitling the subscriber merely to bonds of one of several companies, may be shown by alleging a supplementary agreement for the bonds specified. Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520.

A bill claiming title under judicial sale need not set out the proceedings, as the maxim "*Omnia rite præsumuntur*" is applicable. Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773.

Where preëmption right is claimed, every fact must be averred essential to the perfection of the right. Martin *v.* Tenison, 26 Ala. 738; Dunn *v.* Schneider, 20 Wis. 509.

79. Smith *v.* Gauby, 43 Fla. 142, 30 So. 683. But where the bills state the facts and also the pleader's conclusions, the latter will not vitiate the bill, although they are incorrect. Brady *v.* McCosker, 1 N. Y. 214.

80. Carver Cotton Gin Co. *v.* Barrett, 66 Ga. 526; Railroad Co. *v.* Ashton, 5 Leg. Gaz. (Pa.) 13. Unless where jurisdiction depends on the character of the title, when it must be equitable. Walker *v.* Williams, 30 Miss. 165.

81. Clark *v.* Bell, 2 B. Mon. (Ky.) 1.

Title need not be explicitly set out, if its nature can be fairly inferred from the facts stated. Webber *v.* Gage, 39 N. H. 182.

It is sufficient to state the legal effect of plaintiff's claim. Riley *v.* Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099.

Assertion of title to an entire estate is sufficient to maintain the claim to a homestead, embraced in it. Eustache *v.* Rodaquest, 11 Bush (Ky.) 42.

Reasonable certainty under the circumstances of the case is all that is required. Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449. When plaintiff alleges a definite estate in property held under the laws of another state, he need not show how those laws vested in him such title. Cason *v.* Hubbard, 38 Miss. 35; Archer *v.* Jones, 26 Miss. 583. But see Cockrell *v.* Gurley, 26 Ala. 405. An averment that a contract was made for the account and use of plaintiff sufficiently show plaintiff's right. Railroad Co. *v.* Ashton, 5 Leg. Gaz. (Pa.) 13.

82. Woodall *v.* Prevatt, 45 N. C. 199; Anonymous, 3 N. C. 352. But an allegation that plaintiff is a *bona fide* holder and transferee of a note is sufficient (Owen *v.* Moore, 14 Ala. 640), as is also an allegation that plaintiff is the purchaser of the property claimed (Dunlap *v.* Gibbs, 4 Yerg. (Tenn.) 94).

83. Tudor *v.* Cambridge Water Works, 1 Allen (Mass.) 164; Strickland *v.* Fitzgerald, 7 Cush. (Mass.) 530; Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420. It is generally sufficient to make out a good title as against defendant, although not against all the world. Salisbury *v.* Miller, 14 Mich. 160.

84. Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79; Phillips *v.* Schooley, 27 N. J. Eq. 410; Wood *v.* Genet, 8 Paige (N. Y.) 137.

Sufficient averments.— A bill to restrain a probate judge from selling a lot under an act to carry out a trust relating to a town site sufficiently shows title by alleging a conveyance to plaintiff by a former probate judge and that plaintiff is the owner of the legal estate. Logan *v.* Clough, 2 Colo. 323. A bill alleging an assignment of a mortgage in writing and sealed, conveying all the mortgagee's right and referring to the assignment, is sufficient without showing that the assignment was acknowledged or recorded. Lovell *v.* Farrington, 50 Me. 239.

85. Norris *v.* Lemen, 28 W. Va. 336; Bishop *v.* York, 118 Fed. 352. A bill alleging that plaintiff is widow and heir must show her election to take a child's part and her claim accordingly, where the bill also shows that there is living issue. Sanderson *v.* Sanderson, 17 Fla. 820. If the bill alleges that plaintiffs are heirs of one person, they cannot have relief on proof that they are heirs of another, although title was in the other. Maulding *v.* Scott, 13 Ark. 88, 56 Am. Dec. 298. As to what are sufficient allegations of heirship see Arline *v.* Miller, 22 Ga. 330, and cases cited in DESCENT AND DISTRIBUTION, 14 Cyc. 153 notes 38, 39.

86. Norris *v.* Norris, 63 How. Pr. (N. Y.) 319; Champlin *v.* Parish, 3 Edw. (N. Y.) 581.

87. Harrison *v.* Nixon, 9 Pet. (U. S.) 483, 9 L. ed. 201.

under a will, he must state facts showing how the vacancy occurred and that he was legally appointed, and it is not sufficient to allege that he was duly appointed.[88]

5. Relation of Defendants to Subject-Matter. The bill must show such a relation of defendants to the subject-matter as to charge them with the liability,[89] or some interest in the subject-matter which will be affected by the decree.[90] It is not, however, essential to state with particularity the nature of defendant's claim, as that may not be known.[91]

6. Injury to Plaintiff. The bill must show that plaintiff has sustained or will sustain some substantial injury by reason of the facts complained of,[92] and not by general averment, but by specific facts.[93] An injury slight in amount is, however, sufficient to sustain a suit for fraud,[94] and the court will interpose for the protection of property against wrongful acts which will in any way injuriously and irreparably affect its use.[95] The want of an adequate remedy at law must also appear from specific averments.[96]

7. Doing and Offering to Do Equity. The bill must allege that plaintiff has done, offered to do, or is ready to do, according to circumstances, everything necessary to entitle him to the relief he seeks,[97] or sufficiently excuse his failure to do so.[98] Where a tender of performance before suit is alleged the bill must show a continuing ability and readiness to perform.[99] Where the suit is to obtain relief against an inequitable demand, but there is or may be something justly due, the bill must offer to pay what may be found to be so justly due.[1]

88. Cruger *v.* Halliday, 11 Paige (N. Y.) 314 [*reversing* 3 Edw. 565].

89. Buntyne *v.* Stone, 19 Ga. 78; Porter *v.* Rutland Bank, 19 Vt. 410; Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,871, 1 Gall. 371.

90. *Arkansas.*— Stillwell *v.* Adams, 29 Ark. 346.

Michigan.— Emerson *v.* Walker Tp., 63 Mich. 483, 30 N. W. 92.

New York.— Muir *v.* Leake, etc., Orphan House, 3 Barb. Ch. 477.

North Carolina.— Humphreys *v.* Tate, 39 N. C. 220.

United States.— McClanahan *v.* Davis, 8 How. 170, 12 L. ed. 1033.

See 19 Cent. Dig. tit. "Equity," § 324.

A bill to recover possession of property must show that it is in defendant's possession. Swanson *v.* Jordan, (Tenn. Ch. App. 1898) 52 S. W. 1102.

A bill against two defendants which shows a right against one of them, but does not show which one has the interest against which the right exists is defective. Whitaker *v.* De Graffenreid, 6 Ala. 303.

91. Lytle *v.* Breckenridge, 3 J. J. Marsh. (Ky.) 663. See also Sharp *v.* Fields, 1 Heisk. (Tenn.) 571. The pleader may state defendants' interests so far as he knows them, and allege that he does not know the definite interests of the others. Hungerford *v.* Cushing, 8 Wis. 332.

92. *California.*—Logan *v.* Hillegass, 16 Cal. 200.

Indiana.— Jones *v.* Myers, 7 Blackf. 340.

Massachusetts.— Hartshorn *v.* South Reading, 3 Allen 501.

Michigan.— Stille *v.* Hess, 112 Mich. 678, 71 N. W. 513.

Mississippi.— George *v.* Solomon, 71 Miss. 168, 14 So. 531; Green *v.* Hankinson, Walk. 487.

New York.— Saratoga County *v.* Seabury, 11 Abb. N. Cas. 461.

West Virginia.— Merchants' Bank *v.* Jeffries, 21 W. Va. 504.

United States.— Williams *v.* Hagood, 98 U. S. 72, 25 L. ed. 51.

See 19 Cent. Dig. tit. "Equity," § 327.

93. Willingham *v.* King, 23 Fla. 478, 2 So. 851; Kearney *v.* Andrews, 10 N. J. Eq. 70.

94. Linn *v.* Green, 17 Fed. 407, 5 McCrary 380. Delivery of papers will not be decreed on an allegation that defendant will injure the credit of plaintiff, unless the credit is shown to be mercantile. Wilkes *v.* Wilkes, 4 Edw. (N. Y.) 630.

95. Griffing *v.* Gibb, 2 Black (U. S.) 519, 17 L. ed. 353.

96. Willingham *v.* King, 23 Fla. 478, 2 So. 851; Griffin *v.* Henderson, 116 Ga. 310, 42 S. E. 482; Dinwiddie *v.* Roberts, 1 Greene (Iowa) 363; Cooke *v.* Central Dist., etc., Tel. Co., 21 Pa. Super. Ct. 43. See also *supra*, VII, B, 7.

97. Oliver *v.* Palmer, 11 Gill & J. (Md.) 426.

98. Watkins *v.* Tuskaloosa, etc., Mfg. Co., 33 Ala. 518; Oliver *v.* Palmer, 11 Gill & J. (Md.) 426. An allegation that no debts were incurred dispenses with an offer to pay debts incurred, as a condition of a reconveyance of property. Hungerford *v.* Cushing, 8 Wis. 332. But see Peacock *v.* Terry, 9 Ga. 137.

99. McRae *v.* Atlantic, etc., R. Co., 58 N. C. 395. Plaintiff may avail himself of an offer made to the decedent in a subsequent suit against his personal representatives. Page *v.* Hughes, 2 B. Mon. (Ky.) 439.

1. Peacock *v.* Terry, 9 Ga. 137; Overton *v.* Stevens, 8 Mo. 622; Post *v.* Utica Bank, 7 Hill (N. Y.) 391; Sheets *v.* Selden, 7 Wall. (U. S.) 416, 19 L. ed. 166. See also *supra*, III, M, 2.

8. **Excusing Laches.** Where on the face of the bill it appears that there has been long delay in instituting the suit, the bill must proceed by specific averment to account for and excuse the delay.[2] A general averment of plaintiff's ignorance of his rights is insufficient; he must show how he came to be so long ignorant and when and how he discovered them.[3] Where under such circumstances the bill charges fraud the time of its discovery must be stated,[4] with all circumstances requisite to bring plaintiff within the rules excusing his delay.[5] No excuse need be alleged, where the bill does not on its face and without resorting to inference show unreasonable delay.[6]

9. **Excusing Non-Joinder of Parties.** Where the court is called upon to dispense with a party ordinarily necessary,[7] the reason for so doing must be stated in the bill.[8] If, however, the facts excusing the non-joinder appear in the bill, it is not essential that they be formally alleged as an excuse.[9]

D. Exhibits. A bill must set forth a copy or aver the terms of an instrument vital to plaintiff's demand.[10] The method of so doing in the English chancery was to state in the bill the legal effect of the instrument,[11] and then refer to it in some such words as the following: "As in and by the said indenture, reference being thereunto had, when produced, will more fully appear." The effect of

When offer unnecessary.— A bill to annul a sale under execution, under a judgment subsequently reversed, need not offer to pay such judgment as may be rendered on a new trial. Winterson *v.* Hitchings, 9 Misc. (N. Y.) 322, 30 N. Y. Suppl. 260.

Offer presumed.— In a suit for an accounting between partners, the offer of plaintiff and the willingness of defendant to do equity will be presumed. Craig *v.* Chandler, 6 Colo. 543. See also Accounts and Accounting, 1 Cyc. 438.

2. *Illinois.*— Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 299.

Michigan.— Campau *v.* Chene, 1 Mich. 400.

New York.— Bertine *v.* Varian, 1 Edw. 343.

South Carolina.—Kirksey *v.* Keith, 11 Rich. Eq. 33.

West Virginia.— Jarvis *v.* Martin, 45 W. Va. 347, 31 S. E. 957.

United States.— Harwood *v.* Cincinnati, etc., Air-Line R. Co., 17 Wall. 78, 21 L. ed. 558; Badger *v.* Badger, 2 Wall. 87, 17 L. ed. 836 [*affirming* 2 Fed. Cas. No. 718, 2 Cliff. 137]; Boyd *v.* Wyley, 18 Fed. 355; Stearns *v.* Page, 22 Fed. Cas. No. 13,339, 1 Story 204.

See 19 Cent. Dig. tit. "Equity," § 329. See also *supra*, IV, C, 4, g.

Contra, where laches is chargeable for other reasons than mere lapse of time. Pratt Land, etc., Co. *v.* McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. Rep. 35.

Laches to bar a defense cannot be relied upon unless it is alleged in the bill. Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 524, 41 N. E. 919.

3. Badger *v.* Badger, 2 Wall. (U. S.) 87, 17 L. ed. 836 [*affirming* 2 Fed. Cas. No. 718, 2 Cliff. 137]; London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

4. Field *v.* Wilson, 6 B. Mon. (Ky.) 479; Harwood *v.* Cincinnati, etc., Air-Line R. Co., 17 Wall. (U. S.) 78, 21 L. ed. 558; Moore *v.* Greene, 19 How. (U. S.) 69, 15 L. ed. 533 [*affirming* 17 Fed. Cas. No. 9,763, 2 Curt. 202]. *Contra,* Radcliff *v.* Rowley, 2 Barb. Ch. (N. Y.) 23; Van Bokkelen *v.* Cook, 28 Fed. Cas. No. 16,831, 5 Sawy. 587. See, generally, Fraud.

5. He must set forth by what means the fraud was discovered (Marsh *v.* Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482 [*affirming* 16 Fed. Cas. No. 9,122, 1 Hask. 391]; Badger *v.* Badger, 2 Wall. (U. S.) 87, 17 L. ed. 836 [*affirming* 2 Fed. Cas. No. 718, 2 Cliff. 137]), and circumstances showing diligence on the part of plaintiff (Robertson *v.* Burrell, 110 Cal. 568, 42 Pac. 1086; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520). General allegations are insufficient. Johnson *v.* Johnson, 5 Ala. 90; Walton *v.* Talbot, 1 Tex. Unrep. Cas. 511. But a bill seeking discovery by an assignee in bankruptcy, and alleging a fraudulent concealment of assets, was held sufficient, where it merely alleged that the facts known came to plaintiff's knowledge "within the past year." Forbes *v.* Oberby, 9 Fed. Cas. No. 4,928*a*, 4 Hughes 441. As to what are sufficient circumstances of excuse see, generally, *supra*, IV, C.

6. Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470.

7. See *supra*, V, C, 4.

8. Porter *v.* Clements, 3 Ark. 364; Gilham *v.* Cairns, 1 Ill. 164; Dart *v.* Palmer, 1 Barb. Ch. (N. Y.) 92; Martin *v.* McBryde, 38 N. C. 531.

Parties numerous.— Where the ground is that the parties are too numerous to join such fact must specifically appear (Lamar Ins. Co. *v.* Hildreth, 55 Iowa 248, 7 N. W. 573), and if plaintiff belongs to the numerous class he must allege that he sues on behalf of himself and others in like interest (Winsor *v.* Bailey, 55 N. H. 218). As members of a voluntary association may sue on this ground, it is unnecessary to allege that the members suing are officers. Wilkinson *v.* Stitt, 175 Mass. 581, 56 N. E. 830.

9. Janes *v.* Williams, 31 Ark. 175; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

10. Marshall *v.* Turnbull, 34 Fed. 827.

11. See *supra*, VII, C, 2, e.

such a reference was to give the pleader the benefit of the entire instrument, as if pleaded, but not as evidence.[12] In this country it is usually required that the instrument referred to or a copy thereof be annexed to the bill as an exhibit.[13] This does not, however, dispense with proper averments in the bill itself as to the substance of such instruments.[14] The rule does not apply to instruments pleaded incidentally and not as the foundation of the suit,[15] nor to instruments not in plaintiff's control; but in the latter case the bill must set forth the excuse for not producing them.[16] It is sometimes required that copies of a record in another suit shall be attached.[17] The general rule is that instruments properly referred to and exhibited become for all purposes of pleading a part of the bill,[18] and consequently on demurrer may aid a defective statement in the bill itself.[19] The exhibit prevails as against an inconsistent averment in the bill.[20]

E. Construction and Conclusiveness of Allegations. While it is said that pleadings are not construed in equity with so high a degree of technicality as at law,[21] and that the court looks to the entire substance of the bill to determine its nature and effect,[22] the legal rule nevertheless prevails that where the allegations

12. 1 Daniell Ch. Pr. 475.

In Illinois such practice is recognized. Loewenstein *v.* Rapp, 67 Ill. App. 678.

13. Brodie *v.* Skelton, 11 Ark. 120; Flax Pond Water Co. *v.* Lynn, (Mass. 1887) 9 N. E. 836; King *v.* Trice, 38 N. C. 568; Martin *v.* McBryde, 38 N. C. 531; Levy *v.* Arredondo, 12 Pet. (U. S.) 218, 9 L. ed. 1062.

In Maryland such exhibits must be filed with the bill. Nagengast *v.* Alz, 93 Md. 522, 49 Atl. 333; Baltimore *v.* Coates, 85 Md. 531, 37 Atl. 18.

In Tennessee the same rule exists but they may be thereafter filed on order of the chancellor, and a bill is not demurrable because exhibits are not filed therewith. Carter *v.* Chattanooga, (Ch. App. 1897) 48 S. W. 117.

14. Harvey *v.* Kelly, 41 Miss. 490, 93 Am. Dec. 267.

15. Trapnall *v.* Byrd, 22 Ark. 10; Walkup *v.* Zehring, 13 Iowa 306; Baltimore *v.* Coates, 85 Md. 531, 37 Atl. 18.

16. Haight *v.* Burr, 19 Md. 130.

17. Holliday *v.* Riordon, 12 Ga. 417; Demere *v.* Scranton, 8 Ga. 43; Norwood *v.* Norwood, 4 Harr. & J. (Md.) 112; Moses *v.* Brodie, 1 Tenn. Ch. 397.

In Kentucky it seems that the record of a pending suit may be incorporated by reference alone (Daniel *v.* Smythe, 5 B. Mon. 347), but that of a former suit must be attached as an exhibit (Carr *v.* Bob, 7 Dana 417).

In the federal courts the record of another case may be embodied in a bill by asking that it be made a part thereof. Mason *v.* Jones, 16 Fed. Cas. No. 9,240, 1 Hayw. & H. 329.

Where a bill stated the effect of the record in another suit and was accompanied merely by the decree therein, it was held that on demurrer the decree could not be taken as qualifying the statement, the bill referring to and offering to produce the entire record. Fartee *v.* Thomas, 11 Fed. 769.

18. *Alabama.*— Minter *v.* Mobile Branch Bank, 23 Ala. 762, 58 Am. Dec. 315.

Georgia.— Bolton *v.* Flournoy, R. M. Charlt. 125.

Illinois.— Loewenstein *v.* Rapp, 67 Ill. App. 678.

Michigan.— Swetland *v.* Swetland, 3 Mich. 482.

West Virginia.— Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583; Kester *v.* Lyon, 40 W. Va. 161, 20 S. E. 933; Bias *v.* Vickers, 27 W. Va. 456.

United States.— Byers *v.* Surget, 19 How. 303, 15 L. ed. 670 [*affirming* 23 Fed. Cas. No. 13,629, Hempst. 715].

See 19 Cent. Dig. tit. "Equity," § 385.

By demurring to an amended bill defendant is estopped from claiming that certain letters referred to and attached as exhibits were not included in the amendments. Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414.

19. Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805; Rogers *v.* Rogers, 78 Ga. 688, 3 S. E. 451; Harper *v.* Hill, 35 Miss. 63. *Contra,* Eggleston *v.* Watson, 53 Miss. 339; McGowan *v.* McGowan, 48 Miss. 553; Byrne *v.* Taylor, 46 Miss. 95; Statham *v.* New York L. Ins. Co., 45 Miss. 581, 7 Am. Rep. 737; Terry *v.* Jones, 44 Miss. 540; Caton *v.* Willis, 40 N. C. 335. Under Mo. Rev. Code, p. 843, § 38, it was held that the court will not look into the exhibit. Tesson *v.* Tesson, 11 Mo. 274.

20. Wagner *v.* Maynard, 64 Ill. App. 239; New York Nat. Park Bank *v.* Halle, 30 Ill. App. 17; Ridgely *v.* Wilmer, 97 Md. 725, 55 Atl. 488; Harper *v.* Hill, 35 Miss. 63; Lockhead *v.* Berkeley Springs Waterworks, etc., Co., 40 W. Va. 553, 21 S. E. 1031. See also Willard *v.* Davis, 122 Fed. 363. *Compare* Holman *v.* Patterson, 29 Ark. 357.

21. Bierly *v.* Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303.

22. Bierly *v.* Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303; Consolidated Oil-Well Packer Co. *v.* Jarecki Mfg. Co., 128 Pa. St. 421, 18 Atl. 348; Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199.

In a bill for specific performance, a statement that defendant took possession under the contract is equivalent to a statement that plaintiff gave possession. Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638.

are equivocal they will be construed most strongly against the pleader.[23] In general plaintiff is bound and concluded by his averments,[24] and as a consequence of this rule and that requiring the bill to be construed most strongly against him facts not stated will be assumed not to exist.[25] Plaintiff is not, however, bound by the statement of a fact with which he is presumably unacquainted, if defendant does not rely on such fact in his answer,[26] or by an incorrect conclusion drawn by him from facts which are stated.[27]

F. Repugnancy and Pleading With Double Aspect. A bill where the facts are not doubtful must not be repugnant or inconsistent within itself, either in its allegations,[28] or in the objects sought to be attained thereby.[29] The proper

23. *Alabama.*— Tate *v.* Evans, 54 Ala. 16; Winter *v.* Quarles, 43 Ala. 692; Stubbs *v.* Leavitt, 30 Ala. 352; Lockard *v.* Lockard, 16 Ala. 423.

Florida.— Pinney *v.* Pinney, (1903) 35 So. 95; Stockton *v.* Jacksonville Nat. Bank, (1903) 34 So. 897.

Illinois.— Brewster *v.* Cahill, 199 Ill. 309, 65 N. E. 233; Peipho *v.* Peipho, 88 Ill. 438; Dunham *v.* Hyde Park, 75 Ill. 371.

Maryland.— Maenner *v.* Carroll, 46 Md. 193.

Ohio.— Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478.

Contra.— Condon *v.* Knoxville, etc., R. Co., (Tenn. Ch. App. 1895) 35 S. W. 781; Moore *v.* Harper, 27 W. Va. 362.

See 19 Cent. Dig. tit. "Equity," § 386.

If a bill states an amount as from a sum stated to another sum stated, the amount least favorable to the pleader will be adopted. Miller *v.* Bates, 35 Ala. 580. *Compare* Royal *v.* Thompson, (Tenn. Ch. App. 1897) 46 S. W. 1022.

Positive averments of fraud were not counteracted by a statement in another part of the bill excusing laches that plaintiff's information was derived from rumors. Curran *v.* Campion, 85 Fed. 67, 29 C. C. A. 26; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14.

Provisions in most of the codes require a liberal construction of all pleadings, but are generally held not to apply to matters of substance. See, generally, PLEADING.

24. Winn *v.* Strickland, 34 Fla. 610, 16 So. 606; Townsend *v.* McIntosh, 14 Ind. 57; Dickson *v.* Chorn, 6 Iowa 19, 71 Am. Dec. 382.

If a plaintiff alleges a parol contract within the statute of frauds it must have the same effect against him as if it had been written. Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79.

Where an averment is made by mistake which plaintiff wishes to escape, he must amend before hearing. Prevost *v.* Gratz, 19 Fed. Cas. No. 11,407, 3 Wash. 434.

Date of deed.— A plaintiff who alleged that a deed was executed the day of its date was permitted to show that it was executed on a different day. Cloud *v.* Calhoun, 10 Rich. Eq. (S. C.) 358.

25. Holman *v.* Patterson, 29 Ark. 357; Mathewson *v.* Clarke, 6 How. (U. S.) 122, 12 L. ed. 370.

One admission will not be inferred from another unless the inference is necessary. Schwarz *v.* Sears, Walk. (Mich.) 19.

26. Wright *v.* Miller, 1 Sandf. Ch. (N. Y.) 103; Wiley *v.* Mahood, 10 W. Va. 206.

27. McMillan *v.* James, 105 Ill. 194.

28. *Alabama.*— Friedman *v.* Fennell, 94 Ala. 570, 10 So. 649.

Florida.— Bridger *v.* Thrasher, 22 Fla. 383.

Georgia.— Howell *v.* Rome Grocery Co., 102 Ga. 174, 29 S. E. 178.

Illinois.— Hill *v.* Spencer, 196 Ill. 65, 63 N. E. 614.

Michigan.— Mundy *v.* Foster, 31 Mich. 313.

New Jersey.— Leonard *v.* Cook, (Ch. 1890) 20 Atl. 1085.

Tennessee.— Masson *v.* Anderson, 3 Baxt. 290.

Texas.— Rowe *v.* Horton, 65 Tex. 89.

See 19 Cent. Dig. tit. "Equity," § 338.

Repugnancy between bill and exhibit, as in a description of an instrument in a bill and the instrument attached, vitiates the bill. Barrett *v.* Central Bldg., etc., Assoc., 130 Ala. 294, 30 So. 347. But see *supra*, p. 237, note 20.

Alternative averment.— A decree *pro confesso* cannot be rendered on a creditor's bill, alleging on belief that the title to lands sought to be subjected is in A, but if not in him, then that it is in B. Spears *v.* Cheatham, 44 Miss. 64.

29. Emans *v.* Emans, 14 N. J. Eq. 114; Williams *v.* Jackson, 107 U. S. 478, 2 S. Ct. 814, 27 L. ed. 529. See also McComb *v.* Lobdell, 32 Gratt. (Va.) 185.

Inconsistent alternative relief.— One cannot seek to enforce an equity under an instrument, and as an alternative ask to have it annulled (Walthall *v.* Rives, 34 Ala. 91; Rankin *v.* Jones, 55 N. C. 169; Bynum *v.* Ewart, 90 Tenn. 655, 18 S. W. 394), nor can he ask for the execution of a trust, and in the alternative for partition (Pensenneau *v.* Pensenneau, 22 Mo. 27). Neither can he ask to have a mortgage declared void and in the alternative to redeem (Tatum *v.* Walker, 77 Ala. 563); but he may allege full payment and offer to pay any balance that may be found due (Fields *v.* Helms, 70 Ala. 460). In Alabama one may not ask in the alternative that a conveyance be set aside or treated as a general assignment. Brooks *v.* Lowenstein, 124 Ala. 158, 27 So. 520; Heyer *v.* Bromberg, 74 Ala. 524; Moog *v.* Talcott, 72 Ala. 210;

remedy for repugnancy is by demurrer,[30] and a failure to demur waives the objection to the entire bill.[31] But, although objection be not made, the court will see that the litigation is put in form to be intelligently disposed of, and where defendants have accepted the bill in one aspect the court will treat it in that light alone.[32] Inconsistent charges may be made in order to obtain discovery, as they are merely ancillary and not the basis of relief.[33] So where the object of a bill is merely to prevent disturbance of an established possession different and inconsistent sources of title may be alleged.[34] The rule against repugnancy does not prevent the framing of a bill with a double aspect,[35] where the pleader is ignorant of the precise state of facts upon which his rights depend,[36] so that if one ground fail the other may be relied on.[37] Thus an infant complainant may seek to establish as the facts may warrant, either a partnership or a resulting trust, because of the investment of his money in an enterprise by his guardian.[38] So too one may allege that a deed was never delivered or if it was that the delivery was procured by fraud,[39] or, where it was doubtful whether a mortgage had been converted into a complete title, that title be quieted or that the mortgage be foreclosed,[40] or where the character of an instrument was doubtful, as to being a mortgage or a contract to sell, that it be enforced as that question should be determined.[41] A bill may be framed in a double aspect, if under either phase plaintiff is entitled to the same relief;[42] but it is bad if only one phase shows a right to relief,[43] or if the claims are so inconsistent as to destroy one another.[44] A bill cannot be framed in a double aspect where the two aspects require different parties.[45]

G. Multifariousness — 1. Definition. Multifariousness consists in improperly joining in one bill several distinct and independent matters and thereby confounding them.[46]

Lehman *v.* Meyer, 67 Ala. 396 [*overruling* Crawford *v.* Kirksey, 50 Ala. 590].

Statutory and common-law right of a judgment creditor to redeem cannot be joined. Cramer *v.* Watson. 73 Ala. 127.

30. Friedman *v.* Fennell, 94 Ala. 570, 10 So. 649; Bridger *v.* Thrasher, 22 Fla. 383; Howell *v.* Rome Grocery Co., 102 Ga. 174, 29 S. E. 178. But a bill will not be held bad for repugnancy, unless the allegations are so inconsistent as to exclude evidence that both are true. Howell *v.* Merrill, 30 Mich. 282. Where on demurrer for repugnancy it was found that a single clause in the bill was objectionable and that clause was unnecessary, the court ordered it to be stricken out and overruled the demurrer. Socola *v.* Grant, 15 Fed. 487.

31. Allen *v.* Caylor, 120 Ala. 251, 24 So. 512, 74 Am. St. Rep. 31.

32. American Box Mach. Co. *v.* Crosman, 57 Fed. 1021. The facts stated will prevail as against an inconsistent averment by way of inference therefrom. Connors *v.* Connors, 4 Wis. 112.

33. Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611.

34. Lewen *v.* Stone, 3 Ala. 485.

35. See *supra*, VII, B, 9.

36. Acome *v.* American Mineral Co., 11 How. Pr. (N. Y.) 24; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329. A complainant cannot with full knowledge of the fact seek alternative relief on inconsistent grounds. Collins *v.* Knight, 3 Tenn. Ch. 183.

37. Foster *v.* Cook, 8 N. C. 509; McConnell *v.* McConnell, 11 Vt. 290.

38. Stein *v.* Robertson, 30 Ala. 286.

39. Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528. See also Yarwood *v.* Johnson, 29 Wash. 643, 70 Pac. 123.

40. Comstock *v.* Michael, 17 Nebr. 288, 22 N. W. 549.

41. Avery *v.* Kellogg, 11 Conn. 562.

42. Caldwell *v.* King, 76 Ala. 149; Rapier *v.* Gulf City Paper Co., 69 Ala. 476; McRae *v.* Singleton, 35 Ala. 297; Brown *v.* Bedford City Land, etc., Co., 91 Va. 31, 20 S. E. 968; Bradley *v.* Converse, 3 Fed. Cas. No. 1,775, 4 Cliff. 366.

43. David *v.* Shepard, 40 Ala. 587; Lucas *v.* Oliver, 34 Ala. 626; Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669.

44. Hart *v.* McKeen, Walk. (Mich.) 417.

45. American Box Mach. Co. *v.* Crosman, 57 Fed. 1021. A plaintiff may not ask for relief to himself alone, or if that cannot be had, to himself and all other taxpayers. Warwick *v.* New York, 28 Barb. (N. Y.) 210, 7 Abb. Pr. (N. Y.) 265, 16 How. Pr. (N. Y.) 357.

46. Story Eq. Pl. § 271. See also Ziegler *v.* Lake St. El. R. Co., 76 Fed. 662, 22 C. C. A. 465. It consists in uniting several claims, distinct from and having no dependence on each other. Ryan *v.* Shawneetown, 14 Ill. 20. Multifariousness consists in joining several perfectly distinct matters against the same defendant, or several matters of an independent nature against several defendants. Fiery *v.* Emmert, 36 Md. 464; Clark *v.* Covenant Mut. L. Ins. Co., 52 Mo. 272; Bedsole *v.* Monroe, 40 N. C. 313. A bill is not multifarious merely because it embraces a subject-

2. NOT DETERMINED BY FIXED RULES. The question as to what demands may properly be asserted in the same suit, or in other words, what constitutes multifariousness, rests largely in the discretion of the court,[47] to be exercised according to the requirements of convenience,[48] and in such a way as to avoid hardship or injustice to the parties,[49] and is therefore said to rest upon the circumstances of each particular case and to be subject to no general rule.[50] While it is true that the question is not governed by well defined technical rules, as is the joinder of law actions,[51] or as is generally the joinder of actions under the codes,[52] it will be found that certain well defined principles are recognized by the courts, not perhaps as universally controlling, but as guides toward a correct decision.[53]

3. DETERMINED FROM BILL ALONE. It is said that in determining the question of multifariousness the court will not look beyond the bill,[54] and by the statement therein of plaintiff's case, multifariousness not being caused by matters inserted by way of charge,[55] or by averments merely incidental or by way of inducement, not forming the basis of an independent demand.[56] Questions of very similar

matter which at law would be the basis of several suits. Freeman *v.* Stine, 34 Leg. Int. (Pa.) 96; Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751.

47. Carroll *v.* Roosevelt, 4 Edw. (N. Y.) 211; Benson *v.* Keller, 37 Oreg. 120, 60 Pac. 918; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Weir *v.* Bay State Gas Co., 91 Fed. 940; California Fig-Syrup Co. *v.* Worden, 86 Fed. 212.

48. *California.*— People *v.* Morrill, 26 Cal. 336.

Iowa.— Bowers *v.* Keesecher, 9 Iowa 422.

Maryland.— Dunn *v.* Cooper, 3 Md. Ch. 46.

Virginia.— Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751.

United States.—Animarium Co. *v.* Neiman, 98 Fed. 14; Weir *v.* Bay State Gas Co., 91 Fed. 940; Pacific R. Co. *v.* Atlantic, etc., R. Co., 20 Fed. 277.

See 19 Cent. Dig. tit. "Equity," § 340.

Between several rights declared on there must be such repugnancy and inconsistency as to cause confusion and embarrassment to the court in administering the relief which would be appropriate, were separate suits brought. Henshaw *v.* Salt River Valley Canal Co., (Ariz. 1898) 54 Pac. 577.

49. Kingsbury *v.* Flowers, 65 Ala. 479, 39 Am. Rep. 14; Page *v.* Whidden, 59 N. H. 507; Johnson *v.* Sanger, 49 W. Va. 405, 38 S. E. 645; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470; Horman Patent Mfg. Co. *v.* Brooklyn City R. Co., 12 Fed. Cas. No. 6,703, 4 Ban. & A. 86, 15 Blatchf. 444; Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344.

50. *Georgia.*— Marshall *v.* Means, 12 Ga. 61, 56 Am. Dec. 444.

Illinois.—Sherlock *v.* Winnetka, 59 Ill. 389.

Indiana.— Carter *v.* Kerr, 8 Blackf. 373.

Maine.— Warren *v.* Warren, 56 Me. 360.

Maryland.— Chew *v.* Glenn, 82 Md. 370, 33 Atl. 722.

New Hampshire.— Eastman *v.* Savings Bank, 58 N. H. 421.

Pennsylvania.— Quin *v.* Power, 18 Wkly. Notes Cas. 285.

South Carolina.— Edwards *v.* Sartor, 1 S. C. 266.

Texas.— Clegg *v.* Varnell, 18 Tex. 294.

Virginia.— Washington City Sav. Bank *v.* Thornton, 83 Va. 157, 2 S. E. 193.

United States.— Oliver *v.* Piatt, 3 How. 333, 11 L. ed. 622; Gaines *v.* Chew, 2 How. 619, 11 L. ed. 402; Singer Mfg. Co. *v.* Springfield Foundry Co., 34 Fed. 393; McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,886, 3 McLean 415.

See 19 Cent. Dig. tit. "Equity," § 340.

51. See JOINDER AND SPLITTING OF ACTIONS.

52. See JOINDER AND SPLITTING OF ACTIONS. The joinder of causes under the codes, whether they be legal or equitable, is governed by specific statutes, and consequently the question in code states is one of statutory construction and not of multifariousness, as understood in the chancery practice. As nearly all the codes, however, provide that causes may be joined if they arise out of the same transaction, or transactions connected with the same subject of action, and as it has been pertinently hinted that this loose expression was to preserve the former equity jurisdiction and to justify the interpretation which should be found most convenient and best calculated to promote the ends of justice. New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592; Heggie *v.* Hill, 95 N. C. 303. See also many code cases cited in the subjoined sections.

53. In the subjoined subdivisions under this head the attempt is made to state these principles and cite the cases recognizing them, but not to enter into the consideration of their detailed application. To do the latter, with a view to harmonizing conclusions, would involve a minute examination of the circumstances of each case and transcend all reasonable limits.

54. Halstead *v.* Shepard, 23 Ala. 558; Edwards *v.* Sartor, 1 S. C. 266.

55. Ware *v.* Curry, 67 Ala. 274; Pyles *v.* Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909.

56. Carter *v.* Kerr, 8 Blackf. (Ind.) 373; Brewer *v.* Boston Theatre, 104 Mass. 378.

character arise, however, with reference to the propriety of supplemental bills and cross bills, but the objection to foreign matter in these is not technically based on multifariousness.[57]

4. GENERAL CAUSES OF MULTIFARIOUSNESS. Multifariousness may arise either from the misjoinder of distinct demands or causes, or from the misjoinder of parties plaintiff or defendant, whose demands or liabilities are distinct and independent, and such is the usual classification adopted in discussing the subject.[58]

5. MISJOINDER OF CAUSES — a. Joinder of Entirely Distinct Causes. The general rule is that there cannot be joined in one suit entirely distinct matters, each of which would be sufficient to ground a bill.[59] Where the parties are the same an objection for multifariousness will not be good unless the matters are wholly distinct,[60] and a similarity in the natures of the different demands without other connection is often held sufficient to permit their joinder.[61]

b. Statement of More Than One Good Ground of Suit. Mere surplusage will not render a bill multifarious,[62] and therefore a bill is not rendered multifarious if in addition to stating a case for equitable relief it contains allegations with reference to another matter, but insufficient to entitle plaintiff to relief with reference thereto.[63] The addition of a prayer for relief not warranted by the allegations

57. See *infra*, X; XII.

58. See 1 Daniell Ch. Pr. 437 *et seq.*; Story Eq. Pl. §§ 271, 279, 280. Strictly speaking multifariousness always relates to subject-matter, but as the propriety of joining several subjects in one suit depends sometimes chiefly or solely on their relations to one another, and again on the relations of the parties to the various subjects, the classification is convenient if not entirely logical.

59. *Alabama.*—American Refrigerating, etc., Co. *v.* Linn, 93 Ala. 610, 7 So. 191; Colburn *v.* Broughton, 9 Ala. 351.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203.

Georgia.— Marshall *v.* Means, 12 Ga. 61, 56 Am. Dec. 444.

Massachusetts.— Keith *v.* Keith, 143 Mass. 262, 9 N. E. 560.

Missouri.— McGlothlin *v.* Hemery, 44 Mo. 350.

New Jersey.— Emans *v.* Emans, 14 N. J. Eq. 114.

Pennsylvania.—Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218; Purcell *v.* Purcell, 9 Pa. Dist. 188, 23 Pa. Co. Ct. 330; Luzier *v.* Naylor Line, etc., Co., 8 Pa. Dist. 632; Wray *v.* Hazlett, 6 Phila. 155; Bright *v.* McCullough, 1 Leg. Rec. 281.

Tennessee.— Tilman *v.* Searcy, 5 Humphr. 487; Johnson *v.* Brown, 2 Humphr. 327, 37 Am. Dec. 556.

Virginia.— Porter *v.* Robinson, (1895) 22 S. E. 843.

West Virginia.— Day *v.* National Mut. Bldg., etc., Assoc., 53 W. Va. 550, 44 S. E. 779; Bailey *v.* Calfee, 49 W. Va. 630, 39 S. E. 642; Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727.

Wisconsin.— Hungerford *v.* Cushing, 8 Wis. 332.

United States.— Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729; Moody *v.* Flagg, 125 Fed. 819; McDonnell *v.* Eaton, 18 Fed. 710; Haines *v.* Carpenter, 11 Fed. Cas. No. 5,905, 1 Woods 262 [*affirmed* in 91 U. S. 254, 23 L. ed. 345].

See 19 Cent. Dig. tit. "Equity," §§ 341, 342.

60. Chapmans *v.* Chunn, 5 Ala. 397; Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173. Where one matter is the natural outgrowth of the other, or the outgrowth of the same subject-matter, the bill is not multifarious. Ferry *v.* Laible, 27 N. J. Eq. 146.

Under statutory provisions that several distinct and unconnected matters against the same defendant may be united (Miss. Code, § 1886; Tenn. Code, § 4327) there can be no multifariousness except for misjoinder of defendants. Doherty *v.* Stevenson, 1 Tenn. Ch. 518. See also Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583, 6 So. 467.

61. *Massachusetts.*— Robinson *v.* Guild, 12 Metc. 323, specific performance of distinct contracts, relating to different parcels.

New York.—Newland *v.* Rogers, 3 Barb. Ch. 432.

Pennsylvania.— Blankenburg *v.* Black, 200 Pa. St. 629, 50 Atl. 198.

Vermont.— Farrar *v.* Powell, 71 Vt. 247, 44 Atl. 344.

West Virginia.— Anderson *v.* Piercy, 20 W. Va. 282.

United States.— Burlington Sav. Bank *v.* Clinton, 106 Fed. 269, enforcement of two series of bonds for same improvement, one to be paid by general tax, the other by special assessment.

See 19 Cent. Dig. tit. "Equity," §§ 341, 342.

Accounting of several partnerships consisting of the same members may be sought in one bill. Miller *v.* Harris, 9 Baxt. (Tenn.) 101; Lewis *v.* Loper, 47 Fed. 259.

Infringement of several patents see PATENTS.

Plaintiff having thirty different copyrights, all constituting a single index system, was permitted to assert them all in one bill. Amberg File, etc., Co. *v.* Smith, 78 Fed. 479.

62. Sturgeon *v.* Burrall, 1 Ill. App. 537.

63. *Alabama.*— Boutwell *v.* Vandiver, 123 Ala. 634, 26 So. 222, 82 Am. St. Rep. 149.

of the bill does not therefore render the bill multifarious.[64] To have that effect the bill must state two or more good grounds of suit,[65] and each ground must be sufficient as stated to support an independent bill in equity.[66] Therefore a bill is not multifarious for adding to an equitable cause of action matter in which there is no equity,[67] or matters over which a court of equity has no independent jurisdiction.[68] For this reason the insertion in a bill of an exclusively legal demand will not make it multifarious.[69] Although the bill contains averments which might make it multifarious, the objection is obviated if no relief is prayed concerning such matters.[70]

c. Double, Alternative, and Inconsistent Grounds of Relief. A bill is not rendered multifarious by alleging two or more grounds, each of which would

Kentucky.— Coppage *v.* Griffith, 40 S. W. 908, 19 Ky. L. Rep. 459.

New York.— Brady *v.* McCosker, 1 N. Y. 214.

North Carolina.— Bedsole *v.* Monroe, 40 N. C. 313.

Wisconsin.— Patten Paper Co. *v.* Kaukauna Water-Power Co., 70 Wis. 659, 35 N. W. 737.

See 19 Cent. Dig. tit. "Equity," § 343.

64. *Alabama.*— Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128; McCarthy *v.* McCarthy, 74 Ala. 546.

Georgia.— Burchard *v.* Boyce, 21 Ga. 6.

Michigan.— Hammond *v.* Michigan State Bank, Walk. 214.

New Jersey.— Miller *v.* Jamison, 24 N. J. Eq. 41; Durling *v.* Hammar, 20 N. J. Eq. 220.

New York.— Mayne *v.* Griswold, 3 Sandf. 463; McCosker *v.* Brady, 1 Barb. Ch. 329.

United States.— De Neufville *v.* New York, etc., R. Co., 81 Fed. 10, 26 C. C. A. 306.

See 19 Cent. Dig. tit. "Equity," § 367.

Frame of bill will prevail where it is single and the prayer would make it multifarious. Gammel *v.* Young, 3 Iowa 297.

Construction to avoid multifariousness.— In a suit to remove clouds a prayer for possession will be construed as one for general relief in order to avoid an objection for misjoinder of causes. Two Rivers Mfg. Co. *v.* Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131.

65. Ritch *v.* Eichelberger, 13 Fla. 169; Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188; Willard *v.* Reas, 26 Wis. 540; Truesdell *v.* Rhodes, 26 Wis. 215; Bassett *v.* Warner, 23 Wis. 673.

66. *Maryland.*— Union Bank *v.* Kerr, 2 Md. Ch. 460, relief as to one cause barred by laches.

Massachusetts.— McCabe *v.* Bellows, 1 Allen 269.

Mississippi.— Champenois *v.* Fort, 45 Miss. 355; Pleasants *v.* Glasscock, Sm. & M. Ch. 17.

New York.— Varick *v.* Smith, 5 Paige 137, 28 Am. Dec. 417.

Virginia.— Huff *v.* Thrash, 75 Va. 546.

United States.— Brown *v.* Guarantee Trust, etc., Co., 128 U. S. 403, 9 S. Ct. 127, 32 L. ed. 468.

See 19 Cent. Dig. tit. "Equity," § 343.

Want of jurisdiction as to one cause.— But where plaintiff joined to a cause arising on a patent a suit for unfair competition over which the federal court had no jurisdiction, an order was made sustaining a demurrer unless plaintiff dismissed as to the latter cause. Keasby, etc., Co. *v.* Philip Cary Mfg. Co., 113 Fed. 432.

67. McGriff *v.* Alford, 111 Ala. 634, 20 So. 497; Morris *v.* Morris, 58 Ala. 443.

68. *Illinois.*— Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172.

Massachusetts.— McCabe *v.* Bellows, 1 Allen 269.

Mississippi.— Neylans *v.* Burge, 14 Sm. & M. 201.

Virginia.— Snavely *v.* Hardrader, 29 Gratt. 112.

West Virginia.— Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455; Smith *v.* McLain, 11 W. Va. 645. See Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682, where disregarding the phase outside of the court's jurisdiction the bill became multifarious on other grounds.

See 19 Cent. Dig. tit. "Equity," § 343.

69. Letohatchie Baptist Church *v.* Bullock, 133 Ala. 548, 32 So. 58; Yarborough *v.* Avant, 66 Ala. 526; Baines *v.* Barnes, 64 Ala. 375; Wilkinson *v.* Bradley, 54 Ala. 677; Smith *v.* Patton, 12 W. Va. 541; Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455. But see Mitchell *v.* Williams, (Tenn. Ch. App. 1897) 46 S. W. 325; Hudson *v.* Wood, 119 Fed. 764.

70. *Alabama.*— Burford *v.* Steele, 80 Ala. 147; Carpenter *v.* Hall, 18 Ala. 439; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

Maryland.— Reese *v.* Wright, (1904) 56 Atl. 976.

Mississippi.— Pleasants *v.* Glasscock, Sm. & M. Ch. 17.

New Jersey.— Wells *v.* Partridge, 31 N. J. Eq. 362.

Pennsylvania.— Blankenburg *v.* Black, 200 Pa. St. 629, 50 Atl. 198.

Rhode Island.— Arnold *v.* Arnold, 9 R. I. 397.

See 19 Cent. Dig. tit. "Equity," § 367.

The prayer being single may be taken to show that averments of a second right were inserted for a collateral purpose and not as a basis of relief. Sayles *v.* Tibbitts, 5 R. I. 79.

Discrepancies between statement and prayer will not render the bill multifarious if they can be otherwise accounted for. Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383.

entitle plaintiff to the same relief,[71] or by being properly framed in a double aspect,[72] or by praying for relief in the alternative.[73] A bill is, however, multifarious which seeks an adjudication of discordant interests,[74] or which sets up different claims which are inconsistent and repugnant.[75]

d. Multiplicity of Suits. The avoidance of a multiplicity of suits being in itself a ground of equitable jurisdiction,[76] a bill will not be held multifarious if the matters therein contained can be conveniently disposed of together and a multiplicity of suits thereby avoided.[77] But a bill will not be sustained on such ground when it seeks to litigate entirely distinct controversies between different parties.[78]

71. *Alabama.*— Kelly *v.* Browning, 113 Ala. 420, 21 So. 928; Dickerson *v.* Winslow, 97 Ala. 491, 11 So. 918; Tipton *v.* Wortham, 93 Ala. 321, 9 So. 596; Adams *v.* Sayre, 70 Ala. 318.

Georgia.— Allred *v.* Tate, 113 Ga. 441, 39 S. E. 101.

Massachusetts.—Pope *v.* Leonard, 115 Mass. 286.

New York.— Young *v.* Edwards, 11 How. Pr. 201.

North Carolina.— Cauley *v.* Lawson, 58 N. C. 132; Barnett *v.* Woods, 55 N. C. 198.

Pennsylvania.—Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

United States.— Davis *v.* Berry, 106 Fed. 761; Cutter *v.* Iowa Water Co., 96 Fed. 777; Halsey *v.* Goddard, 86 Fed. 25; Harper *v.* Holman, 84 Fed. 222; Rosenstein *v.* Burns, 41 Fed. 841.

See 19 Cent. Dig. tit. "Equity," §§ 341, 345.

Different sources from which a plaintiff derives different portions of his right may all be alleged in support of his entire right. Rincon Water, etc., Co. *v.* Anaheim Union Water Co., 115 Fed. 543.

72. *Alabama.*— Lebeck *v.* Ft. Payne Bank, 115 Ala. 447, 22 So. 75, 67 Am. St. Rep. 51; Lewen *v.* Stone, 3 Ala. 485.

Mississippi.— Murphy *v.* Clark, 1 Sm. & M. 221; Baines *v.* McGee, 1 Sm. & M. 208.

New Jersey.— Rockwell *v.* Morgan, 13 N. J. Eq. 384.

New York.— New York Ice Co. *v.* North Western Ins. Co., 23 N. Y. 357, 12 Abb. Pr. 414, 21 How. Pr. 296.

Pennsylvania.— Abrahams *v.* Baugh, 9 Leg. & Ins. Rep. 59.

Tennessee.— Neal *v.* Read, 7 Baxt. 333.

Virginia.— Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863; Nunnally *v.* Strauss, 94 Va. 255, 26 S. E. 580.

Washington.— Yarwood *v.* Johnson, 29 Wash. 643, 70 Pac. 123.

United States.—De Hierapolis *v.* Lawrence, 115 Fed. 761; McGraw *v.* Woods, 96 Fed. 56.

See 19 Cent. Dig. tit. "Equity," §§ 341, 367; *supra*, VII, F.

73. *Alabama.*— Simonson *v.* Cain, 138 Ala. 221, 34 So. 1019; Faulk *v.* Calloway, 123 Ala. 325, 26 So. 504; Hall *v.* Henderson, 114 Ala. 601, 21 So. 1020, 62 Am. St. Rep. 141; Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343; Lyons *v.* McCurdy, 90 Ala. 497, 8 So. 52.

Connecticut.— Avery *v.* Kellogg, 11 Conn. 562.

Massachusetts.— Downey *v.* Lancy, 178 Mass. 465, 59 N. E. 1015.

Mississippi.— Troup *v.* Rice, 55 Miss. 278.

New Jersey.—Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921.

West Virginia.—Korne *v.* Korne, 30 W. Va. 1, 3 S. E. 17.

United States.—Ritchie *v.* Sayers, 100 Fed. 520; Chaffin *v.* Hull, 39 Fed. 887; Kilgour *v.* New Orleans Gaslight Co., 14 Fed. Cas. No. 7,764, 2 Woods 144.

See 19 Cent. Dig. tit. "Equity," § 367.

74. Taylor *v.* King, 32 Mich. 42.

75. The cases clearly establish the principles stated in the text, although they are sometimes in conflict in determining what demands are inconsistent.

Alabama.— Williams *v.* Cooper, 107 Ala. 246, 18 So. 170; Heinz *v.* White, 105 Ala. 670, 17 So. 185.

Massachusetts.— Davis *v.* Peabody, 170 Mass. 397, 49 N. E. 750.

Mississippi.— Thoms *v.* Thoms, 45 Miss. 263.

Missouri.—Jones *v.* Paul, 9 Mo. 293; Wilkson *v.* Blackwell, 4 Mo. 428.

New Jersey.— Emans *v.* Emans, 14 N. J. Eq. 114; Swayze *v.* Swayze, 9 N. J. Eq. 273.

New York.— Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Swift *v.* Eckford, 6 Paige 22.

Virginia.— Universal L. Ins. Co. *v.* Devore, 83 Va. 267, 2 S. E. 433.

United States.— Cutter *v.* Iowa Water Co., 96 Fed. 777; Leslie *v.* Leslie, 84 Fed. 70; Merriman *v.* Chicago, etc., R. Co., 64 Fed. 535, 12 C. C. A. 275; Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 43 Fed. 545; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 33 Fed. 440; Wilkinson *v.* Dobbie, 29 Fed. Cas. No. 17,670, 12 Blatchf. 298.

76. See *supra*, II, B, 1.

77. People *v.* Morrill, 26 Cal. 336; Smith *v.* McLain, 11 W. Va. 654; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905; Dastervignes *v.* U. S., 122 Fed. 30, 58 C. C. A. 346; Western Land, etc., Co. *v.* Guinault, 37 Fed. 523; Stafford Nat. Bank *v.* Sprague, 8 Fed. 377, 19 Blatchf. 529.

78. A multifarious bill will not be allowed as a remedy for a multiplicity of suits. Haines *v.* Carpenter, 11 Fed. Cas. No. 5,905, 1 Woods 262 [*affirmed* in 91 U. S. 254, 23

e. Singleness or Duplicity in General Object. In accordance with the aim of equity to administer complete relief in one suit,[79] a bill is not multifarious so long as it seeks to enforce a single right, although that enforcement demands an investigation of several matters, and relief of a complex character and consisting of different elements.[80] The court will in a single suit investigate and determine all questions incidental to the determination of the main controversy,[81] and will grant all relief incidental to the accomplishment of the main object of the bill.[82]

L. ed. 345]. See also Douglass *v.* Boardman, 113 Mich. 618, 71 N. W. 1100.

79. See *supra*, II, C; III, C.

80. *Alabama.*—Christian, etc., Grocery Co. *v.* Kling, 121 Ala. 292, 25 So. 629; Lyon *v.* Dees, 101 Ala. 700, 14 So. 564; Monroe *v.* Hamilton, 47 Ala. 217; Whitman *v.* Abernathy, 33 Ala. 154; Savage *v.* Benham, 17 Ala. 119.

California.— Whitehead *v.* Sweet, 126 Cal. 67, 58 Pac. 376.

Connecticut.— Wells *v.* Bridgeport Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250; Mix *v.* Hotchkiss, 14 Conn. 32.

Georgia.— Dixon *v.* Merchants', etc., Land Co., 103 Ga. 707, 30 S. E. 690; Parker *v.* Cochran, 97 Ga. 249, 22 S. E. 961; Wells *v.* Strange, 5 Ga. 22; Butler *v.* Durham, 2 Ga. 413.

Kentucky.— Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358.

Maryland.— See Wilson *v.* Wilson, 23 Md. 162.

Massachusetts.— Price *v.* Minot, 107 Mass. 49.

Michigan.— Wales *v.* Newbould, 9 Mich. 45.

Minnesota.— Palmer *v.* Tyler, 15 Minn. 106.

Mississippi.— Henry *v.* Henderson, 79 Miss. 452, 30 So. 754; Miller *v.* Helm, 2 Sm. & M. 687.

Missouri.— Rubey *v.* Barnett, 12 Mo. 3, 49 Am. Dec. 112; Goodwin *v.* Goodwin, 69 Mo. 617.

New Jersey.— Woodbridge *v.* Carlstadt, 60 N. J. Eq. 1, 46 Atl. 540; See *v.* Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966 [*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1116]; Stevens *v.* Bosch, 54 N. J. Eq. 59, 33 Atl. 293; Danner *v.* Danner, 30 N. J. Eq. 67; Durling *v.* Hammar, 20 N. J. Eq. 220.

New York.— Standart *v.* Burtis, 46 Hun 82; Day *v.* Stone, 15 Abb. Pr. N. S. 137; Geery *v.* New York, etc., Steamship Co., 12 Abb. Pr. 268.

North Carolina.— McCaskill *v.* McBryde, 17 N. C. 265.

South Carolina.— Barkley *v.* Barkley, 14 Rich. Eq. 12.

Tennessee.— Hinton *v.* Cole, 3 Humphr. 656.

Texas.— Dobbin *v.* Bryan, 5 Tex. 276.

Utah.— Stevens *v.* South Ogden Land, etc., Co., 14 Utah 232, 47 Pac. 81.

Virginia.— Haskin Wood-Vulcanizing Co. *v.* Cleveland Ship-Building Co., 94 Va. 439, 26 S. E. 878; Hill *v.* Hill, 79 Va. 592.

West Virginia.— Oney *v.* Ferguson, 41 W. Va. 568, 23 S. E. 710.

Wisconsin.— South Bend Chilled Plow Co. *v.* George C. Cribb Co., 105 Wis. 443, 81 N. W. 675; Moon *v.* McKnight, 54 Wis. 551, 11 N. W. 800.

United States.—Brown *v.* Guarantee Trust, etc., Co., 128 U. S. 403, 9 S. Ct. 127, 32 L. ed. 468; Beatty *v.* Hinckley, 1 Fed. 385, 17 Blatchf. 398; Equitable L. Assur. Soc. *v.* Patterson, 1 Fed. 126.

See 19 Cent. Dig. tit. "Equity," §§ 347, 348, 350–352, 354, 355.

An amendment asking additional relief for the enforcement of the same right asserted in the original bill does not render it multifarious (Eberle *v.* Heaton, 124 Mich. 205, 82 N. W. 820), nor does an amendment which seeks to take advantage of a new remedy, provided by statute after the original bill was filed (Irons *v.* Manufacturers' Nat. Bank, 17 Fed. 308). But an amendment asserting a new and distinct right renders the bill demurrable, as where the original bill sought foreclosure of a mortgage and, after the filing of a cross bill attacking the validity of the mortgage plaintiff amended, asserting a judgment lien for a different debt. Mobile Sav. Bank *v.* Burke, 94 Ala. 125, 10 So. 328.

81. Rann *v.* Rann, 95 Ill. 433; Wilhelm's Appeal, 79 Pa. St. 120; Greene *v.* Harris, 10 R. I. 382; Yates *v.* Law, 86 Va. 117, 9 S. E. 508.

82. *Alabama.*— Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475; Cox *v.* Johnson, 80 Ala. 22; Alexander *v.* Rea, 50 Ala. 450; Holman *v.* Norfolk Bank, 12 Ala. 369.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282.

Georgia.— Burchard *v.* Boyce, 21 Ga. 6; Wells *v.* Strange, 5 Ga. 22.

Massachusetts.— Jaynes *v.* Goepper, 147 Mass. 309, 17 N. E. 831; Dunphy *v.* Travelers' Newspaper Assoc., 146 Mass. 495, 16 N. E. 426.

Missouri.— Kelly *v.* Hurt, 61 Mo. 463.

New Jersey.— Couse *v.* Columbia Powder Mfg. Co., (Ch. 1895) 33 Atl. 297; Bolles *v.* Bolles, 44 N. J. Eq. 385, 14 Atl. 593; Obert *v.* Obert, 10 N. J. Eq. 98.

New York.— Turner *v.* Conant, 18 Abb. N. Cas. 160; Wade *v.* Rusher, 4 Bosw. 537; Bank of British North America *v.* Suydam, 6 How. Pr. 379, Code Rep. N. S. 325.

Pennsylvania.— Hayes' Appeal, 123 Pa. St. 110, 16 Atl. 600.

Tennessee.— Pulliam *v.* Wilkerson, 7 Baxt. 611.

Virginia.— Withers *v.* Sims, 80 Va. 651; Ballow *v.* Hudson, 13 Gratt. 672.

United States.— Ingersoll *v.* Coram, 127 Fed. 418; Mills *v.* Hurd, 32 Fed. 127.

As instances of the granting of all relief essential to the enforcement of plaintiff's fundamental right may be mentioned bills for the reformation and foreclosure of a mortgage,[83] to reform and enforce other instruments,[84] to foreclose a mortgage and cancel a prior mortgage,[85] to establish a title and for partition,[86] to prevent future injuries and to recover for injuries already sustained from the same cause,[87] and the many cases where injunctions are granted as incidental to other relief.[88] So while it is not proper in one bill to seek at the same time relief and discovery in aid of an action at law,[89] or the perpetuation of testimony,[90] still, either discovery [91] or a commission for the examination of witnesses [92] may be had where incidental to the relief sought. A creditor's bill having for its single general object the obtaining of satisfaction of the debt may include as embraced therein several specific demands.[93] A single right may be enforced against different

See 19 Cent. Dig. tit. "Equity," §§ 342, 347, 352–357.

83. District Grand Lodge No. 7 I. O. B. B. *v.* Marx, 131 Ala. 308, 30 So. 870; Hendon *v.* Morris, 110 Ala. 106, 20 So. 27; Hutchinson *v.* Ainsworth, 63 Cal. 286; Hunter *v.* McCoy, 14 Ind. 528; Cummings *v.* Freer, 26 Mich. 128. Bondholders were permitted in one suit to foreclose a railroad mortgage and recover bonds wrongfully held by one of the defendants. Hale *v.* Nashua, etc., R. Co., 60 N. H. 333.

84. Hall *v.* Hall, 43 Ala. 488, 94 Am. Dec. 703; Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080; Gooding *v.* McAlister, 9 How. Pr. (N. Y.) 123.

85. Whitbeck *v.* Edgar, 4 Sandf. (N. Y.) 427.

86. Vreeland *v.* Vreeland, 49 N. J. Eq. 322, 24 Atl. 551; Durling *v.* Hammar, 20 N. J. Eq. 220; Buchanan *v.* Buchanan, 38 S. C. 410, 17 S. E. 218. A bill was sustained to foreclose a mortgage on an undivided interest and for partition, where the owner of the remaining interest was also a junior mortgagee. Conover *v.* Sealey, 45 N. J. Eq. 589, 19 Atl. 616.

87. Wells *v.* Bridgeport Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250; Brown *v.* Solary, 37 Fla. 102, 19 So. 161; Shepard *v.* Manhattan R. Co., 117 N. Y. 442, 23 N. E. 30; Poole *v.* Winton, 16 N. Y. Suppl. 308; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540. Plaintiff may in one suit have fraudulent title papers canceled and recover damages for acts done under color of the fraudulent title. Swihart *v.* Harless, 93 Wis. 211, 67 N. W. 413.

88. Bridges *v.* Phillipps, 25 Ala. 136, 60 Am. Dec. 495; Chamberlain *v.* People's Bridge Co., 2 Dauph. Co. Rep. (Pa.) 344; Matteson *v.* Whaley, 19 R. I. 648, 35 Atl. 962. See, generally, INJUNCTIONS.

89. Markey *v.* Mutual Ben. L. Ins. Co., 16 Fed. Cas. No. 9,091.

90. Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318. A bill may ask for perpetuation of testimony in regard to a title and for the removal of a cloud. Cleland *v.* Casgrain, 92 Mich. 139, 52 N. W. 460.

91. Chappell *v.* Funk, 57 Md. 465; Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.

92. Commercial Mut. Ins. Co. *v.* McLoon, 14 Allen (Mass.) 351.

93. Such a bill may seek to set aside fraudulent conveyances and also to reach equitable interests (Randolph *v.* Daly, 16 N. J. Eq. 313; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147), to set aside such deeds and to subject the land to the payment of a particular debt (Guyton *v.* Terrell, 132 Ala. 66, 31 So. 82; Wedgeworth *v.* Wedgeworth, 84 Ala. 274, 4 So. 149; Hutchinson *v.* Maxwell, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944), or to set aside several different fraudulent transfers (Thomas *v.* Sellman, 87 Va. 683, 13 S. E. 146. See also Warwick *v.* Perrine, (N. J. Err. & App. 1903) 55 Atl. 738), or to subject land attached and remove the lien of a judgment fraudulent against the attachment (Stewart *v.* Stewart, 27 W. Va. 167). So a bill has been sustained after the return of an execution to aid a second execution and for a discovery of equitable assets (Clark *v.* Davis, Harr. (Mich.) 227), and where the debtor and grantee were partners, for an account of the partnership in order to disclose a want of consideration for the conveyance (Nulton *v.* Isaacs, 30 Gratt. (Va.) 726). Where the judgment debtor is deceased, the bill may charge against the representatives a devastavit and fraudulent conveyance of the debtor's property. Handley *v.* Heflin, 84 Ala. 600, 4 So. 725; Ragsdale *v.* Holmes, 1 S. C. 91. But see Jackson *v.* Forrest, 2 Barb. Ch. (N. Y.) 576. It was held that it is not multifarious for a creditor of an insolvent corporation to seek to set aside a fraudulent conveyance and to enforce the sole stock-holder's personal liability (Swepson *v.* Exchange, etc., Bank, 9 Lea (Tenn.) 713), but that it is multifarious to seek to set aside a fraudulent assignment by the corporation to enforce the individual liability of the corporators, and also to hold them personally liable as members of an unincorporated association (Ohio L. Ins., etc., Co. *v.* Merchants Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742. *Compare* also O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205, 17 So. 525, 74 Am. St. Rep. 31, 28 L. R. A. 707; Allen *v.* Montgomery R. Co., 11 Ala. 437). It is multifarious to seek satisfaction out of property assigned by the debtor without consideration, and also damages for waste committed on land purchased by plaintiff under an execution on his judgment. Boyd *v.* Hoyt, 5 Paige (N. Y.) 65. Creditors were not per-

defendants by awarding against each the appropriate relief.[94] Where on the other hand the bill asserts claims arising out of distinct rights and injuries, and therefore pursues not one main object but several distinct objects, it is generally multifarious.[95]

f. Identity of Subject-Matter. Frequently the fact that demands which are otherwise entirely distinct relate to the same subject-matter affords a sufficient connection to justify their union in one bill, and avoids an objection for multifariousness.[96] Indeed for the purpose of affording complete relief such joinder is

mitted to set aside a fraudulent conveyance and at the same time to compel a settlement of an assignment for the benefit of creditors to remove the trustee and have a receiver appointed. Seals *v.* Pheiffer, 77 Ala. 278. See further as to multifariousness in creditors' bills CREDITORS' SUITS, 12 Cyc. 41, 42.

94. *Alabama.*— Stone *v.* Knickerbocker L. Ins. Co., 52 Ala. 589; Fleming *v.* Gilmer, 35 Ala. 62.

California.— De Leon *v.* Higuera, 15 Cal. 483.

Connecticut.— Robinson *v.* Cross, 22 Conn. 171.

Indiana.— Chamberlin *v.* Jones, 114 Ind. 458, 16 N. E. 178.

Missouri.— Temple *v.* Price, 24 Mo. 288.

New Jersey.— Oliva *v.* Bunaforza, 31 N. J. Eq. 395; Rennie *v.* Deshon, 31 N. J. Eq. 378.

New York.— Hayes *v.* Hayer, 4 Sandf. 485.

North Carolina.— Tomlinson *v.* Claywell, 57 N. C. 317.

South Carolina.— Matthews *v.* Allendale Bank, 60 S. C. 183, 38 S. E. 437.

Texas.— Jefferson Nat. Bank *v.* Texas Invest. Co., 74 Tex. 421, 12 S. W. 101; Waddell *v.* Williams, 37 Tex. 351.

Vermont.— Lewis *v.* St. Albans Iron, etc., Works, 50 Vt. 477.

Virginia.— Hutchison *v.* Mershon, 89 Va. 624, 16 S. E. 874; Brown *v.* Buckner, 86 Va. 612, 10 S. E. 882.

West Virginia.— Turk *v.* Hevener, 49 W. Va. 204, 38 S. E. 476.

See 19 Cent. Dig. tit. "Equity," §§ 352, 354–357.

95. *Alabama.*— Banks *v.* Speers, 103 Ala. 436, 16 So. 25; Page *v.* Bartlett, 101 Ala. 193, 13 So. 768; McEvoy *v.* Leonard, 89 Ala. 455, 8 So. 40; Kinsey *v.* Howard, 47 Ala. 236.

Georgia.— Silcox *v.* Nelson, Ga. Dec. 24.

Illinois.— Burnett *v.* Lester, 53 Ill. 325; Schubart *v.* Chicago Gas Light, etc., Co., 41 Ill. App. 181.

Massachusetts.— Kelly *v.* Morrison, 176 Mass. 531, 57 N. E. 1018; Dimmock *v.* Bixby, 20 Pick. 368.

Michigan.— Woodruff *v.* Young, 43 Mich. 548, 6 N. W. 85.

Mississippi.— Carmichael *v.* Browder, 3 How. 252.

New Hampshire.— Winsor *v.* Bailey, 55 N. H. 218.

New Jersey.— Cocks *v.* Varney, 42 N. J. Eq. 514, 8 Atl. 722; Crane *v.* Fairchild, 14 N. J. Eq. 76; Harrison *v.* Righter, 11 N. J. Eq. 389. See also Reed *v.* Reed, 16 N. J. Eq. 248.

Pennsylvania.— Whetham *v.* Pennsylvania, etc., Canal, etc., Co., 8 Phila. 92.

Tennessee.— Stuart *v.* Bair, 8 Baxt. 141; Bruton *v.* Rutland, 3 Humphr. 435.

Virginia.— Sadler *v.* Whitehurst, 83 Va. 46, 1 S. E. 410.

United States.— Von Auw *v.* Chicago Toy, etc., Co., 70 Fed. 939 [*reversing* 69 Fed. 448]; Security Sav., etc., Assoc. *v.* Buchanan, 66 Fed. 799, 14 C. C. A. 97; Holton *v.* Wallace, 66 Fed. 409; Price *v.* Coleman, 21 Fed. 357; Chapin *v.* Sears, 18 Fed. 814; Copen *v.* Flesher, 6 Fed. Cas. No. 3,211, 1 Bond 440.

See 19 Cent. Dig. tit. "Equity," §§ 350–366.

Partnership matters.— Accounts of two different partnerships, the membership of which is not identical, cannot be settled in one suit. Griffin *v.* Merrill, 10 Md. 364; White *v.* White, 5 Gill (Md.) 359; Dunn *v.* Dunn, 26 Gratt. (Va.) 291. A bill by an executor of a deceased partner for a settlement of partnership accounts and for partition of land held by the partners is multifarious. Baldes *v.* Henniges, 7 Kulp (Pa.) 143. A bill is multifarious which seeks a dissolution, and a rescission of a sale of one partner's interest (Behlow *v.* Fischer, 102 Cal. 208, 36 Pac. 509), or a settlement of partnership affairs and rescission of a sale of the firm's property (Sawyer *v.* Noble, 55 Me. 227). But a partner may ask an accounting and a conveyance to him of his interest in the property where the business is carried on. Sims *v.* Adams, 78 Ala. 395.

96. *Alabama.*— Bamberger *v.* Voorhees, 99 Ala. 292, 13 So. 305; Seals *v.* Pheiffer, 81 Ala. 518, 1 So. 267; Johnston *v.* Smith, 70 Ala. 108; Barclay *v.* Plant, 50 Ala. 509.

Arkansas.— Gartland *v.* Nunn, 11 Ark. 720.

Georgia.— Williams *v.* Wheaton, 86 Ga. 223, 12 S. E. 634; Blaisdell *v.* Bohr, 68 Ga. 56; Lavender *v.* Thomas, 18 Ga. 668.

Illinois.— Sapp *v.* Phelps, 92 Ill. 588.

Kentucky.— Lynch *v.* Johnson, 2 Litt. 98.

Louisiana.— Atkinson *v.* Atkinson, 15 La. Ann. 491.

Maryland.— Chew *v.* Glenn, 82 Md. 370, 33 Atl. 722.

Massachusetts.— Bliss *v.* Parks, 175 Mass. 539, 56 N. E. 566.

Michigan.— Page *v.* Webster, 8 Mich. 263, 77 Am. Dec. 446.

Mississippi.— Hardie *v.* Bulger, 66 Miss. 577, 6 So. 186; Barry *v.* Barry, 64 Miss. 709, 3 So. 532; Taylor *v.* Smith, 54 Miss. 50; Richardson *v.* Brooks, 52 Miss. 118; Comstock *v.* Rayford, 1 Sm. & M. 423, 40 Am. Dec. 102.

often necessary.[97] A complete identity of subject-matter is not essential, it sometimes being convenient and even necessary to adjust at once rights concerning property which is only in part the same.[98]

g. Matters Arising Out of Same Transaction. The fact that different matters and demands arose out of the same transaction or series of transactions may render it convenient to dispose of them together, and therefore a bill uniting them all will be proper.[99] The particular requisites to a joinder on this ground are stated variously. A frequent statement is that different causes arising out of the same transaction may be joined when all the defendants are interested in the same claim of right and the relief sought is of the same general character.[1] Again it is said that causes may be joined if they arise out of the same transaction or series of transactions, forming one course of dealing and all tending to one end and if one connected story can be told of the whole.[2] Where such common origin leads to a commingling of controversies, their joinder in a suit to which

Missouri.— Perkins *v.* Baer, 95 Mo. App. 70, 68 S. W. 939.

Nebraska.— Keens *v.* Gaslin, 24 Nebr. 310, 38 N. W. 797.

New Jersey.— Hicks *v.* Campbell, 19 N. J. Eq. 183.

New York.— Cahoon *v.* Utica Bank, 7 N. Y. 486.

North Carolina.—Ely *v.* Early, 94 N. C. 1.

Ohio.— Muskingum Bank *v.* Carpenter, Wright 729.

Pennsylvania.— Persch *v.* Quiggle, 57 Pa. St. 247.

Wisconsin.—Hungerford *v.* Cushing, 8 Wis. 332.

United States.— Patton *v.* Glatz, 56 Fed. 367; Norris *v.* Haggin, 28 Fed. 275; Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135.

See 19 Cent. Dig. tit. "Equity," §§ 340–342, 348, 350, 355, 358, 362.

A creditor may set up several judgments as a basis for an attack on a fraudulent deed. Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611.

One bill may attack two executions levied on the same property. Clary *v.* Haines, 61 Ga. 520, here the grounds of relief were the same against both.

Foreclosure of two mortgages on the same property, covering different interests, may be had in one proceeding. Bolman *v.* Lohman, 74 Ala. 507.

Redemption and cancellation.— The purchaser of an equity of redemption may in one bill seek to redeem and to cancel a second mortgage. Richards *v.* Pierce, 52 Me. 560.

A bill to cancel several mortgages on the same property is good. Springer *v.* Sheets, 115 N. C. 370, 20 S. E. 469.

97. See *supra*, II, C.

98. Foreclosure of two mortgages of chattels where some of the property was included in both mortgages may be had in one suit. Chapman *v.* Hunt, 14 N. J. Eq. 149. A mortgage on an entire tract and a subsequent mortgage by a purchaser of a part thereof may be foreclosed together. Waters *v.* Hubbard, 44 Conn. 340, where, however, the mortgage debts were connected.

Foreclosure and redemption.— A bill is not multifarious which seeks to foreclose a mortgage and to redeem a prior mortgage on part of the land. Bell *v.* Woodward, 42 N. H. 181.

99. *Kentucky.*— Whitney *v.* Whitney, 5 Dana 327.

Maryland.— Doub *v.* Barnes, 1 Md. Ch. 127.

Pennsylvania.—Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

West Virginia.— Carskadon *v.* Minke, 26 W. Va. 729.

United States.— U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708.

See 19 Cent. Dig. tit. "Equity," §§ 341, 347, 350.

Liens for assessments on different lots belonging to one defendant and to pay for a single improvement may be joined. Fitch *v.* Creighton, 24 How. (U. S.) 159, 16 L. ed. 596.

Two mortgages given by different persons and covering different land, but to secure the same debt, may be foreclosed together. Wilcox *v.* Mills, Sm. & M. Ch. (Miss.) 85.

Adjustment of water-rights.— Where a defendant, claiming an entire water-right, overflowed plaintiff's land and confused the boundary, these injuries were properly charged in a suit to apportion the water-rights. Dyer *v.* Cranston Print Works Co., 17 R. I. 774, 24 Atl. 827.

1. *Iowa.*—Walkup *v.* Zehring, 13 Iowa 306; Bowers *v.* Keesecher, 9 Iowa 422.

Maine.— Foss *v.* Haynes, 31 Me. 81.

Maryland.— Thomas *v.* Mason, 8 Gill 1.

New York.— Varick *v.* Smith, 5 Paige 137, 28 Am. Dec. 417.

Pennsylvania.—Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

United States.— Barcus *v.* Gates, 89 Fed. 783, 32 C. C. A. 337.

See 19 Cent. Dig. tit. "Equity," §§ 341, 342, 344, 346, 347.

2. Bedsole *v.* Monroe, 40 N. C. 313; Douglas County *v.* Walbridge, 38 Wis. 179. Matters may be joined where they arise out of the same series of transactions and are all essential to a proper understanding of the case. Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173.

all concerned are parties becomes necessary.[3] Perhaps no more definite test can be safely proposed than that of convenience in adjudicating the whole matter, arising from its common origin.[4] The most familiar application of the rule is doubtless in the case of bills embracing different injuries and demanding varied relief, all growing out of a single fraudulent scheme, such bills being sustained, whether directed against one defendant, or against several participating in the fraud.[5] A joinder may be justified by the fact that all the rights involved arise out of and depend upon the same contract,[6] or depend upon construction of the same instrument.[7]

h. Matters Requiring Different Decrees. It has been held that a bill is necessarily multifarious which presents matters so dissimilar as to require different decrees for their adjustment,[8] but this is not undisputed.[9]

6. Misjoinder of Plaintiffs — a. Plaintiffs With Distinct Claims. Several plaintiffs without community of interest and whose demands are distinct cannot unite in one bill to enforce such demands.[10] The rule extends so far as to prohibit the joinder with a demand in which all the plaintiffs are interested, of another in which only a part have an interest.[11]

b. What Community of Interest Essential to Joinder. In order to permit a joinder of plaintiffs, it is not essential that their demands should be joint; it is sufficient if they are all interested, although distinctly, in the subject-matter and the object to be attained.[12] Indeed a common interest in the object to be

3. Ayers *v.* Wright, 43 N. C. 229.

Where there was a succession of partnerships, with members changing, and one continuing partner managed the entire business and commingled the affairs of the two firms, an accounting of both was properly demanded in one bill. Warthen *v.* Brantley, 5 Ga. 571. Such a bill would not under other circumstances be permitted. See *supra*, p. 246, note 95.

4. See Pacific R. Co. *v.* Atlantic, etc., R. Co., 20 Fed. 277. Matters arising out of the same transaction, in order to be joined, must be homogeneous in their character. 1 Daniell Ch. Pr. 449.

5. *Alabama.*— Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524; Wilkinson *v.* Bradley, 54 Ala. 677.

Connecticut.— Ashmead *v.* Colby, 26 Conn. 287.

Georgia.— Burns *v.* Beck, 83 Ga. 471, 10 S. E. 121.

Massachusetts.— Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401.

Minnesota.— Mitchell *v.* St. Paul Bank, 7 Minn. 252.

Pennsylvania.— Freeman *v.* Stine, 34 Leg. Int. 96.

Wisconsin.— McLachlan *v.* Staples, 13 Wis. 448.

United States.— Barcus *v.* Gates, 89 Fed. 783, 32 C. C. A. 337; Pullman *v.* Stebbins, 51 Fed. 10; Duff *v.* Wellsville First Nat. Bank, 13 Fed. 65.

See 19 Cent. Dig. tit. "Equity," §§ 344, 346, 348, 354, 357.

Several fraudulent mortgages.— A bill will not lie to set aside, as violations of the insolvent laws, mortgages of different property made at different times and separately. Metcalf *v.* Cady, 8 Allen (Mass.) 587. And see *infra*, VII, G, 7, e.

6. Maddox *v.* Rowe, 28 Ga. 61; Brady *v.* Shissler, 8 Phila. (Pa.) 333.

7. Dillard *v.* Dillard, 97 Va. 434, 34 S. E. 60.

8. Hart *v.* McKeen, Walk. (Mich.) 417; Ash *v.* Cousty, 5 Leg. & Ins. Rep. (Pa.) 4; Washington City Sav. Bank *v.* Thornton, 83 Va. 157, 2 S. E. 193.

9. Neal *v.* Rathell, 70 Md. 592, 17 Atl. 566. The fact that different kinds of specific relief are required is no objection. Densmore *v.* Savage, 110 Mich. 27, 67 N. W. 1103.

10. *Alabama.*— Bean *v.* Bean, 37 Ala. 17.

Colorado.— Denver *v.* Kent, 1 Colo. 336.

Connecticut.— Mix *v.* Hotchkiss, 14 Conn. 32.

Florida.— Bauknight *v.* Sloan, 17 Fla. 284.

Illinois.— Whiteside County *v.* Burchell, 31 Ill. 68; Crawford-Adsit Co. *v.* Fordyce, 100 Ill. App. 362.

Kentucky.— Richardson *v.* McKinson, Litt. Sel. Cas. 320, 12 Am. Dec. 308.

North Carolina.— Ayers *v.* Wright, 43 N. C. 229.

Pennsylvania.— Coatesville etc., St. R. Co. *v.* West Chester R. Co., 206 Pa. St. 40, 55 Atl. 844; Bright *v.* McCullough, 1 Leg. Rec. 281.

Tennessee.— Tilman *v.* Searcy, 5 Humphr. 487.

United States.— Stebbins *v.* St. Anne, 116 U. S. 386, 6 S. Ct. 418, 29 L. ed. 667; Yeaton *v.* Lenox, 8 Pet. 123, 8 L. ed. 889; Baker *v.* Portland, 2 Fed. Cas. No. 777, 5 Sawy. 566.

See 19 Cent. Dig. tit. "Equity," § 368.

11. White *v.* Curtis, 2 Gray (Mass.) 467; Murray *v.* Stevens, Rich. Eq. Cas. (S. C.) 205.

Two mortgagees may join where one has a mortgage on the entire tract and the other on a part thereof. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472.

12. *Alabama.*— Owens *v.* Grimsley, 44 Ala. 359.

Arkansas.— Howell *v.* Howell, 20 Ark. 25.

attained may in itself be sufficient to sustain the joinder,[13] as where several property-owners unite to prevent the collection of an illegal tax,[14] or the unlawful use of the street on which their property abuts.[15] Plaintiffs having distinct interests, but whose titles are derived from a common source, may unite in a bill to protect against an attack reaching that common source.[16] The fact that the injury to each is caused by the same act has been held to afford a sufficient connection to maintain a joint suit.[17] It is also held that plaintiffs may join, although their interests be separate, where the relief sought by each involves the same question, requires the same evidence, and leads to the same decree.[18] A mere similarity in

Connecticut.— Cornwell *v.* Lee, 14 Conn. 524.

Georgia.— Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40.

New Hampshire.— Smith *v.* New England Bank, 69 N. H. 254, 45 Atl. 1082.

New Jersey.— Bolles *v.* Bolles, 44 N. J. Eq. 385, 14 Atl. 593.

New York.— Pfohl *v.* Simpson, 74 N. Y. 137.

Virginia.— Segar *v.* Parrish, 20 Gratt. 672.

See 19 Cent. Dig. tit. "Equity," §§ 357, 368.

Contra.— Reybold *v.* Herdman, 2 Del. Ch. 34.

Demands on common fund.— Where different persons have demands of equal standing on a common fund, the proper course is for them to unite or for one to sue on behalf of all. Petree *v.* Lansing, 66 Barb. (N. Y.) 357.

Joint bill for legacies.— Where property was bequeathed to two persons and a division made, but before one of them accepted his share they filed a joint bill against the executor for an account of the legacies the bill was sustained. Wood *v.* Barringer, 16 N. C. 67.

13. *Georgia.*— Richardson *v.* Adams, 99 Ga. 81, 24 S. E. 849.

Maryland.— Kunkel *v.* Markell, 26 Md. 390; Young *v.* Lyons, 8 Gill 162. See also Charles Simon's Sons Co. *v.* Maryland Telephone, etc., Co., (1904) 57 Atl. 193, 63 L. R. A. 727.

North Carolina.— Davis *v.* Miller, 57 N. C. 447.

Pennsylvania.— Brady *v.* Shissler, 8 Phila. 333.

Texas.— Clegg *v.* Varnell, 18 Tex. 294.

See 19 Cent. Dig. tit. "Equity," § 368.

Creditors may join to set aside a group of fraudulent conveyances of the debtor's property. Bartee *v.* Tompkins, 4 Sneed (Tenn.) 623. A bill by judgment creditors of A and judgment creditors of A and B, brought against both A and B, is not multifarious. Blackett *v.* Laimbeer, 1 Sandf. Ch. (N. Y.) 366.

Injunction sought on different grounds.— Taxpayers of a town cannot join with stockholders in a water company to restrain on different grounds the purchase by the town of the waterworks. Peabody *v.* Westerly Water Works. 20 R. I. 176, 37 Atl. 807.

14. Mt. Carbon Coal, etc., Co. *v.* Blanchard, 54 Ill. 240; Scofield *v.* Lansing, 17 Mich. 437; Griffith *v.* Crawford County, 1 Ohio Dec. (Reprint) 457, 10 West. L. J. 97. Where, however, the grievances of plaintiffs are not in all respects alike they cannot join. Kerr *v.* Lansing, 17 Mich. 34. Under Wis. St. c. 125, §§ 29, 30, owners of separate lots cannot join to restrain their sale for non-payment of the tax. Barnes *v.* Beloit, 19 Wis. 93. See, generally, TAXATION.

15. Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763.

16. Dart *v.* Orme, 41 Ga. 376; Peters *v.* Van Lear, 4 Gill (Md.) 249; Powell *v.* Powis, 1 Y. & J. 159.

Joint bill for partition.— But where plaintiffs held lots separately conveyed after a void partition, a joint bill by them for partition was said to be multifarious. Dawson *v.* Lawrence, 13 Ohio 543, 42 Am. Dec. 210.

Joinder of awards for account, etc.— Letters of guardianship of several distributees of the same estate having been granted to the sheriff by the same order all may join in a suit for an account and settlement. Adams *v.* Jones, 68 Ala. 117.

17. Independent mill-owners may unite to restrain the operation of a dam obstructing their right of flowage. Cornwell Mfg. Co. *v.* Swift, 89 Mich. 503, 50 N. W. 1001. See also Baumgartner *v.* Bradt, 207 Ill. 345, 69 N. E. 912.

Where a single award was made against a number of insurance companies regarding a loss all properly joined in a suit to set it aside. Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

Plaintiffs injured by a common fraud may join in seeking redress. Smith *v.* Schulting, 14 Hun (N. Y.) 52. Where goods were acquired from different persons by separate fraudulent acts, and then pledged in bulk, the owners may unite in a bill to recover the goods from the pledgee on payment of his advances. Coleman *v.* Barnes, 5 Allen (Mass.) 374. But although the fraud related to a common enterprise, if the circumstances differed and there is a legal measure of damage applicable to each plaintiff they may not join. Lungren *v.* Pennell, 10 Wkly. Notes Cas. (Pa.) 297.

18. Chicago Telephone Co. *v.* Illinois Manufacturers' Assoc., 106 Ill. App. 54; New York Home Ins. Co. *v.* Virginia-Carolina Chemical Co., 109 Fed. 681. See also Gulf Red Cedar Co. *v.* Crenshaw, 138 Ala. 134, 35 So. 50; Whipple *v.* Guile, 22 R. I. 576, 48 Atl. 935, 84 Am. St. Rep. 855; Liverpool, etc., Ins. Co. *v.* Clunie, 88 Fed. 160.

distinct wrongs committed is not alone sufficient.[19] A similarity in the injuries sustained by different plaintiffs does not authorize a joinder.[20] Where the requisite community of interest exists it is immaterial that the plaintiffs are interested in different degrees and to unequal extents,[21] but persons holding antagonistic interests cannot join as plaintiffs.[22]

c. One Plaintiff Suing in Two Capacities. A single plaintiff may not unite in one bill distinct demands accruing to him in different capacities.[23] A stock-holder in a corporation cannot assert an individual right as stock-holder and a right of the corporation itself,[24] nor can one assert a single right of his own and one on behalf of himself and others.[25] The rule relates, however, to distinct demands and does not forbid the assertion of title or right to the same demand in two capacities,[26] unless the two claims are inconsistent;[27] nor does it forbid suing in two rights where the subject-matter is so interdependent as to demand a joint adjudication.[28]

7. Misjoinder of Defendants — a. Necessity of Connection in Interest as Against Plaintiff. A bill is multifarious which contains the demand of several matters of distinct and independent natures against several defendants.[29] There

A guardian and ward may join in a bill for an account against another guardian who has exclusively received the estate. Camp *v.* Mills, 59 N. C. 274.

Different evidence and different decrees.— There can be no joinder where, as to a portion of the subject-matter, distinct questions, requiring different evidence and leading to different decrees, are involved. Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729. And see Smith *v.* Smith, 102 Ala. 516, 14 So. 765.

19. Marselis *v.* Morris Canal, etc., Co., 1 N. J. Eq. 31. Parties seeking similar relief from different acts by different persons cannot join. Marsh *v.* Richardson, 49 Ala. 430.

20. Jenness *v.* Smith, 64 Mich. 91, 30 N. W. 909; Winslow *v.* Jenness, 64 Mich. 84, 30 N. W. 905; Young's Appeal, 3 Pennyp. (Pa.) 463.

21. Macon City Bank *v.* Bartlett, 71 Ga. 797; Bright *v.* McCullough, 1 Leg. Rec. (Pa.) 281; Catlin *v.* Wheeler, 49 Wis. 507, 5 N. W. 935; Shields *v.* Thomas, 18 How. (U. S.) 253, 15 L. ed. 368.

22. See *supra*, V, F, 2, c.

23. **As individually and as a representative.** — May *v.* Smith, 45 N. C. 196, 59 Am. Dec. 594; Taylor *v.* Cochran, 16 Montg. Co. Rep. (Pa.) 166; Carter *v.* Treadwell, 5 Fed. Cas. No. 2,480, 3 Story 25; Cassels *v.* Vernon, 5 Fed. Cas. No. 2,503, 5 Mason 332.

As guardian and as administrator.— Jones *v.* Foster, 50 Miss. 47.

As next of kin and as heir at law see Van Mater *v.* Sickler, 9 N. J. Eq. 483; Allen *v.* Miller, 57 N. C. 146.

As taxpayer and as asserting a private right see Ft. Smith *v.* Brogan, 49 Ark. 306, 5 S. W. 337. Where taxpayers may sue, their joining also as officeholders, although unnecessary, is harmless. Blankenburg *v.* Black, 200 Pa. St. 629, 50 Atl. 198.

A defendant cannot object when the issue as to him is the same in either capacity. Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 93 Fed. 689.

24. Huston *v.* Sellers, 12 Phila. (Pa.) 520; Church *v.* Citizens' St. R. Co., 78 Fed. 526; Le Warne *v.* Mexican International Imp. Co., 38 Fed. 629.

25. Darcey *v.* Lake, 46 Miss. 109.

26. Keyser *v.* Simmons, 16 Fla. 268; Phillips *v.* Allen, 5 Allen (Mass.) 85; Robinson *v.* Guild, 12 Metc. (Mass.) 323; Fairly *v.* Priest, 56 N. C. 21; Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751.

27. Bosley *v.* Phillips, 3 Tenn. Ch. 649.

28. Carter *v.* Balfour, 19 Ala. 814.

29. *Alabama.*— Sumter County *v.* Mitchell, 85 Ala. 313, 4 So. 705.

Connecticut.— Coe *v.* Turner, 5 Conn. 86.

Georgia.— Shingleur *v.* Swift, 110 Ga. 891, 36 S. E. 222; Stephens *v.* Whitehead, 75 Ga. 294; Morgan *v.* Shepherd, 69 Ga. 308; Marshall *v.* Means, 12 Ga. 61, 56 Am. Dec. 444.

Kentucky.— Richardson *v.* McKinson, Litt. Sel. Cas. 320, 12 Am. Dec. 308.

Maryland.— Koontz *v.* Koontz, 79 Md. 357, 32 Atl. 1054; Fiery *v.* Emmert, 36 Md. 464.

Massachusetts.— Sanborn *v.* Dwinell, 135 Mass. 236.

Michigan.— Ingersoll *v.* Kirby, Walk. 65.

Mississippi.— Boyd *v.* Swing, 38 Miss. 182.

New Jersey.— Emans *v.* Emans, 13 N. J. Eq. 205.

New York.— House *v.* Cooper, 30 Barb. 157; Childs *v.* Clark, 3 Barb. Ch. 52, 49 Am. Dec. 164.

North Carolina.— Simpson *v.* Wallace, 83 N. C. 477; Drew *v.* Clemmons, 55 N. C. 312; Ayers *v.* Wright, 43 N. C. 229.

Pennsylvania.— Proprietors' School Fund *v.* Heermans, 1 Kulp 469; Wray *v.* Hazlett, 6 Phila. 155.

Rhode Island.— Aylesworth *v.* Crocker, 21 R. I. 436, 44 Atl. 308.

United States.—New Hampshire Sav. Bank *v.* Richey, 121 Fed. 956, 58 C. C. A. 294; Watson *v.* U. S. Sugar Refinery, 68 Fed. 769, 15 C. C. A. 662.

See 19 Cent. Dig. tit. "Equity," § 371.

A bill by creditors against stock-holders of an insolvent corporation is multifarious when it joins defendants, some of whom are liable to one plaintiff, some to another, and some for

must be some connection in interest among the defendants against the plaintiff.[30] The joinder of defendants who have no connection with the controversy creates multifariousness.[31]

b. Interests of Some Defendants Not Extending to Entire Bill. A bill is multifarious which unites distinct matters, if any defendant is unconnected in interest or liability with any one of such matters,[32] as where a joint claim against all the defendants is combined with a separate claim against one of them alone.[33] This rule must, however, be confined to bills presenting several distinct objects, for it is not necessary that each defendant's interest should extend to all the matters of a bill with a single general object; it is sufficient if each defendant is interested in some matter involved which is connected with the others.[34] So a defendant

independent violations of the statute. Sheriff *v.* Globe Oil Co., 1 Brewst. (Pa.) 489.

30. *Connecticut.*— Mix *v.* Hotchkiss, 14 Conn. 32.

Georgia.— Farmer *v.* Rogers, 88 Ga. 162, 14 S. E. 188.

Kansas.— Fry *v.* Rush, 63 Kan. 429, 65 Pac. 701.

Maryland.— Wilson *v.* Wilson, 23 Md. 162.

Massachusetts.— Cambridge Water Works *v.* Somerville Dyeing, etc., Co., 80 Mass. 193.

Michigan.— Hunton *v.* Platt, 11 Mich. 264.

Mississippi.— Columbus Banking, etc., Co. *v.* Humphries, 64 Miss. 258, 1 So. 232; Roberts *v.* Starke, 47 Miss. 257; McNiell *v.* Burton, 1 How. 510.

Missouri.— Clamorgan *v.* Guisse, 1 Mo. 141.

Virginia.— Wells *v.* Sewell's Point Guano Co., 89 Va. 708, 17 S. E. 2; Buffalo *v.* Pocahontas, 85 Va. 222, 7 S. E. 238; Washington City Sav. Bank *v.* Thornton, 83 Va. 157, 2 S. E. 193; Stuart *v.* Coalter, 4 Rand. 74, 15 Am. Dec. 731.

Wisconsin.—Seaman *v.* Goodnow, 20 Wis. 27.

United States.— U. S. *v.* Alexander, 24 Fed. Cas. No. 14,428, 4 Cranch C. C. 311; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181.

See 19 Cent. Dig. tit. "Equity," § 371.

Amendment creating multifariousness.— Where a bill shows that complainants can have complete relief on the bill as framed, an amendment introducing new defendants and another cause of relief will render the bill multifarious. Dewberry *v.* Shannon, 59 Ga. 311.

A statute permitting union of unconnected matters (Miss. Rev. Code, § 1886), against the same defendants, does not permit the union of such matters against different defendants. Columbus Banking, etc., Co. *v.* Humphries, 64 Miss. 258, 1 So. 232.

31. Johnson *v.* Parkinson, 62 Ala. 456; Colored American Protestant Assoc. *v.* Ladies' American Protestant Beneficial Assoc., 9 Pa. Dist. 698; Allison *v.* Davidson, (Tenn. Ch. App. 1896) 39 S. W. 905.

32. *California.*—Mesmer *v.* Jenkins, 61 Cal. 151.

District of Columbia.— Fields *v.* Gwynn, 19 App. Cas. 99.

Georgia.— Stuck *v.* Southern Steel, etc., Co., 96 Ga. 95, 22 S. E. 592.

Maryland.— Reckefus *v.* Lyon, 69 Md. 589, 16 Atl. 233, 530.

Massachusetts.— Sylvester *v.* Boyd, 166 Mass. 445, 44 N. E. 343.

Mississippi.— Morris *v.* Dillard, 4 Sm. & M. 636.

Missouri.— Montserratt Coal Co. *v.* Johnson County Coal Min. Co., 141 Mo. 149, 42 S. W. 822; Stalcup *v.* Garner, 26 Mo. 72; McLaughlin *v.* McLaughlin, 16 Mo. 242; Berry *v.* Robinson, 9 Mo. 276.

New Hampshire.— Whitten *v.* Whitten, 36 N. H. 326.

New Jersey.— Van Hise *v.* Van Hise, 61 N. J. Eq. 37, 47 Atl. 803; Van Houten *v.* Van Winkle, 46 N. J. Eq. 380, 20 Atl. 34.

New York.— Viall *v.* Mott, 37 Barb. 208.

Pennsylvania.— Sheriff *v.* Globe Oil Co., 1 Brewst. 489, 7 Phila. 4.

West Virginia.—Shaffer *v.* Fetty, 30 W. Va. 248, 4 S. E. 278; Petty *v.* Fogle, 16 W. Va. 497.

United States.— Central Nat. Bank *v.* Fitzgerald, 94 Fed. 16; Sioux City First Nat. Bank *v.* Peavey, 75 Fed. 154.

See 19 Cent. Dig. tit. "Equity," §§ 371, 372, 375, 376.

Slight connection.— A bill is multifarious when a person is made defendant who has no connection with a large portion of the matter alleged. Waller *v.* Taylor, 42 Ala. 297.

Bill for directions.— The fact that a bill is filed to obtain the direction of the court does not change the rule. Clay *v.* Gurley, 62 Ala. 14.

Where defendants became part owners of a vessel at different times, a failure to limit the prayer of a bill for an accounting to the time during which they were all owners renders the bill multifarious. McLellan *v.* Osborne, 51 Me. 118.

33. McIntosh *v.* Alexander, 16 Ala. 87; Robinson *v.* Robinson, 73 Me. 170; Emans *v.* Emans, 13 N. J. Eq. 205; Boyd *v.* Hoyt, 5 Paige (N. Y.) 65.

34. Truss *v.* Miller, 116 Ala. 494, 22 So. 863; Booth *v.* Stamper, 10 Ga. 109; Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399; Lenz *v.* Prescott, 144 Mass. 505, 11 N. E. 923; Curran *v.* Campion, 85 Fed. 67, 29 C. C. A. 26; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14. And see Salvidge *v.* Hyde, 5 Madd. 138.

A fortuitous connection not affecting the matter in litigation is insufficient to permit a joinder. One cannot in a single bill enforce performance against the vendor of land used by plaintiff and a third person for partner-

may be brought in for the purpose of determining an ancillary matter, the determination of which is incident to the adjudication of the main controversy, although such defendant's interest extends only to such ancillary matter.[35] Where demands against different defendants are so connected that one cannot well be investigated without the other the two may be joined.[36]

c. Bills Presenting a Single Right. Since a bill is single and does not misjoin different causes so long as its object is the complete enforcement of one general right,[37] the fact that different defendants have distinct interests or liabilities with reference to that right does not render a bill multifarious.[38] Thus where the object of the action is to enforce a right to property under an entire claim of title the bill is not multifarious in joining defendants asserting distinct interests or interests in distinct portions,[39] although they claim under separate convey-

ship purposes and also settle the partnership affairs. Bayzor *v.* Adams, 80 Ala. 239.

35. Mock *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826; O'Brien *v.* Champlain Constr. Co., 107 Fed. 338; Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397. Where the case of one defendant is so entire that it cannot be prosecuted in separate suits, other defendants may be brought in whose interests extend to only a portion of the case. Kennedy *v.* Kennedy, 2 Ala. 571; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

36. Horton *v.* Sledge, 29 Ala. 478; Demarest *v.* Holdeman, 157 Ind. 467, 62 N. E. 17; Nelson *v.* Hill, 5 How. (U. S.) 127, 12 L. ed. 81.

Suits against sureties on two bonds.— On this ground a bill may often be maintained against an officer, guardian, or administrator, and sureties on different bonds by him given, for an accounting and apportionment of liabilities between the different sets of sureties.

Alabama.— Lott *v.* Mobile County, 79 Ala. 69; Lee *v.* Lee, 55 Ala. 590.

Arkansas.— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Georgia.— McDougald *v.* Maddox, 17 Ga. 52.

Mississippi.— State *v.* Brown, 58 Miss. 835.

Texas.— Love *v.* Keowne, 58 Tex. 191.

Virginia.— Albemarle County School Bd. *v.* Farish, 92 Va. 156, 23 S. E. 221.

See 19 Cent. Dig. tit. "Equity," § 373.

37. See *supra*, VII, G, 5, e.

38. *Alabama.*— Henderson *v.* Hall, 134 Ala. 455, 32 So. 840, 63 L. R. A. 673; Schuessler *v.* Dudley, 80 Ala. 547, 2 So. 526, 60 Am. Rep. 124; Burford *v.* Steele, 80 Ala. 147; Dallas County *v.* Timberlake, 54 Ala. 403; Larkins *v.* Biddle, 21 Ala. 252.

Arkansas.— Winter *v.* Smith, 45 Ark. 549.

California.— Wilson *v.* Castro, 31 Cal. 420.

Connecticut.— Middletown Sav. Bank *v.* Bacharach, 46 Conn. 513; Mix *v.* Hotchkiss, 14 Conn. 32.

Florida.— Sanderson *v.* Sanderson, 17 Fla. 820.

Georgia.— Nail *v.* Mobley, 9 Ga. 278.

Maine.— Bugbee *v.* Sargent, 23 Me. 269.

Maryland.— Gardner *v.* Baltimore, 96 Md. 361, 54 Atl. 85. See also Reese *v.* Wright, (1904) 56 Atl. 976.

See also Reese, Wright, (1904) 56 Atl. 976.

Massachusetts.— Dimmock *v.* Bixby, 20 Pick. 368.

Michigan.— Miller *v.* McLaughlin, (1903) 93 N. W. 435; Proctor *v.* Plumer, 112 Mich. 393, 70 N. W. 1028.

New York.— Morton *v.* Weil, 33 Barb. 30, 11 Abb. Pr. 421; Bank of America *v.* Pollock, 4 Edw. 215.

North Carolina.— Parish *v.* Sloan, 38 N. C. 607; Watson *v.* Cox, 36 N. C. 389; Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689.

Rhode Island.— Ball *v.* Ball, 20 R. I. 520, 40 Atl. 234.

Tennessee.— Woodward *v.* Hall, 2 Tenn. Ch. 164.

Texas.— Clegg *v.* Varnell, 18 Tex. 294.

Vermont.— Smith *v.* Scribner, 59 Vt. 96, 7 Atl. 711.

Virginia.— Porter *v.* Young, 85 Va. 49, 6 S. E. 803.

United States.— Pacific Live-Stock Co. *v.* Hanley, 98 Fed. 327; U. S. *v.* Guglard, 79 Fed. 21; Chase *v.* Cannon, 47 Fed. 674; Gaines *v.* Mausseaux, 9 Fed. Cas. No. 5,176, 1 Woods 118.

See 19 Cent. Dig. tit. "Equity," § 371.

Four mortgages made by the same person were foreclosed in one suit, although containing different exceptions in favor of a number of different persons who were made defendants. Torrant *v.* Hamilton, 95 Mich. 159, 54 N. W. 634.

A deed and a will may be set aside in one suit, although different defendants claim interests in different portions of the property. Williams *v.* Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425.

The assignee of two mortgages, one of them secured by the bond of a third person, and both guaranteed by the assignors, may in one suit enforce all the rights so obtained for the satisfaction of the debt. Curtis *v.* Tyler, 9 Paige (N. Y.) 432.

39. *Illinois.*— Baird *v.* Jackson, 98 Ill. 78.

Iowa.— Bowers *v.* Keesecher, 9 Iowa 422.

Mississippi.— Garrett *v.* Mississippi, etc., R. Co., Freem. 70.

Oregon.— Benson *v.* Keller, 37 Oreg. 120, 60 Pac. 918.

Tennessee.— Walker *v.* Day, 8 Baxt. 77.

United States.— Gaines *v.* Chew, 2 How. 619, 11 L. ed. 402.

But see Felder *v.* Davis, 17 Ala. 418.

ances,[40] or under different sources of title.[41] One may always join as defendants, in order to obtain a complete adjudication, all persons having or claiming an interest in the subject-matter in controversy which can be conveniently settled in the suit,[42] and the introduction of such parties does not render the bill multifarious.[43]

d. Common Interest in Question Involved. If a bill presents a common point of litigation, decisive of the entire matter, it is not multifarious, although the interests or liabilities of defendants are unconnected, except by such common question.[44]

See 19 Cent. Dig. tit. "Equity," §§ 372, 375, 376.

Suit to compel transfer of stock.— Where there was an agreement to transfer to plaintiff stock in different corporations and the stock was thereafter sold on execution against the vendor to different persons, the vendee was not permitted to maintain a single bill against the different corporations and the purchaser to compel a transfer of the stock. Ferguson *v.* Paschall, 11 Mo. 267.

40. Burke *v.* Morris, 121 Ala. 126, 25 So. 759; Hinds *v.* Hinds, 80 Ala. 225; Halstead *v.* Shepard, 23 Ala. 558; McGowan *v.* McGowan, 48 Miss. 553; U. S. *v.* Curtner, 26 Fed. 296.

An executor cannot compel two defendants to account in a single suit for property of the estate in their possession which they do not hold in common and did not acquire in the same way. Griffin *v.* Henderson, 116 Ga. 310, 42 S. E. 482.

41. Alterauge *v.* Christiansen, 48 Mich. 60, 11 N. W. 806; Hammontree *v.* Lott, 40 Mich. 190; Kilgore *v.* Norman, 119 Fed. 1006; U. S. *v.* Flournoy Live-Stock, etc., Co., 69 Fed. 886.

42. See *supra*, V, D.

43. *Alabama.*— Adams *v.* Wilson, 137 Ala. 632, 34 So. 831; Christian, etc., Grocery Co. *v.* Kling, 121 Ala. 292, 25 So. 629; Larkin *v.* Mead, 77 Ala. 485; Millsap *v.* Stanley, 50 Ala. 319; Ansley *v.* Pearson, 8 Ala. 431.

Connecticut.— Cornwell *v.* Lee, 14 Conn. 524.

Florida.— Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163; Wylly Academy *v.* Sanford, 17 Fla. 162.

Indiana.— Demarest *v.* Holdeman, 157 Ind. 467, 62 N. E. 17.

Iowa.— Greither *v.* Alexander, 15 Iowa 470.

Maryland.— Brian *v.* Thomas, 63 Md. 476.

Mississippi.—Wright *v.* Lauderdale County, 71 Miss. 800, 15 So. 116.

Missouri.— Lindley *v.* Russell, 16 Mo. App. 217.

New Jersey.— Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449.

New York.— Kent *v.* Lee, 2 Sandf. Ch. 105.

South Carolina.— Melton *v.* Withers, 2 S. C. 561.

Tennessee.— Fogg *v.* Rogers, 2 Coldw. 290.

See 19 Cent. Dig. tit. "Equity," §§ 371, 373–375, 378.

A bill for partition may bring in purchasers at a tax-sale to cancel their deeds. Ulman *v.* Iaeger, 67 Fed. 980. But see Roller *v.* Clarke, 19 App. Cas. (D. C.) 539.

Cases of multifariousness.— A bill cannot be maintained for partition and also to settle the legal claim of the owner against one in possession without right. Bullock *v.* Knox, 96 Ala. 195, 11 So. 339. In a bill to enforce an equitable title against the legal owner an adjoining proprietor cannot be brought in to settle a disputed boundary. Hickman *v.* Cooke, 3 Humphr. (Tenn.) 640. A bill is multifarious which seeks from a city an accounting of a trust fund and to hold the treasurer and his sureties liable for its misappropriation. Farson *v.* Sioux City, 106 Fed. 278. In a bill for foreclosure of a mortgage a third party claiming adversely to both mortgagor and mortgagee cannot be brought in to litigate his right. Banks *v.* Walker, 2 Sandf. Ch. (N. Y.) 344; Dial *v.* Reynolds, 96 U. S. 340, 24 L. ed. 644. And see, generally, MORTGAGES.

44. *Alabama.*— McCartney *v.* Calhoun, 11 Ala. 110.

California.— Wilson *v.* Castro, 31 Cal. 420.

Florida.— Brown *v.* Solary, 37 Fla. 102, 19 So. 161.

Michigan.— Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512.

Mississippi.— Forniquet *v.* Forstall, 34 Miss. 87.

Missouri.— Martin *v.* Martin, 13 Mo. 36.

New York.— New York, etc., R. Co. *v.* Schuyler, 1 Abb. Pr. 417.

North Carolina.— Heggie *v.* Hill, 95 N. C. 303; Robertson *v.* Stevens, 36 N. C. 247.

Pennsylvania.— Bright *v.* McCullough, 1 Leg. Rec. 281.

Texas.— Yellow Pine Lumber Co. *v.* Carroll, 76 Tex. 135, 13 S. W. 261; Hammer *v.* Woods, 6 Tex. Civ. App. 179, 24 S. W. 942.

United States.— Union Pac. R. Co. *v.* McShane, 22 Wall. 444, 22 L. ed. 747 [*affirming* 24 Fed. Cas. No. 14,382, 3 Dill. 303]; Hayden *v.* Thompson, 71 Fed. 60, 17 C. C. A. 592; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681; Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 10 Fed. 596, 3 McCrary 368.

See 19 Cent. Dig. tit. "Equity," §§ 371, 375.

Where each party has an interest in some matter which is common to all the bill is not multifarious. Blaisdell *v.* Bohr, 68 Ga. 56.

A bill to enforce separate contracts is multifarious, although the contracts are similar. Cheney *v.* Goodwin, 88 Me. 563, 34 Atl. 420.

A promiscuous struggle between parties without community of interest in the one point in controversy will not be permitted, and a bill which will produce it is multifarious. Portwood *v.* Huntress, 113 Ga. 815, 39 S. E. 299.

It is sufficient to avoid the objection also that all the defendants are alike interested in defeating plaintiff's claim.[45]

e. Defendants Acting in Concert. A plaintiff may proceed against several different defendants for appropriate relief against each, and because of acts separately committed, where he alleges that all was done in pursuance of a combination or conspiracy among such defendants.[46] The various acts resorted to are then but the details of a single scheme in which all are participants.[47] The charge of conspiracy must, however, be specific; the common confederacy charge in a bill not supporting a joinder of defendants charged with distinct, wrongful acts.[48] The rule has its most familiar application in bills charging defendants with acting in pursuance of a common scheme to defraud plaintiff,[49] but applies as well to all cases where defendants participate in a common injury to plaintiff,[50] and extends to cases where such common injury results from the combined independent acts of defendants without actual collusion among them.[51]

45. Howard *v.* Corey, 126 Ala. 283, 28 So. 682; Donelson *v.* Posey, 13 Ala. 752; Austin *v.* Raiford, 61 Ga. 125; Delafield *v.* Anderson, 7 Sm. & M. (Miss.) 630; Virginia-Carolina Chemical Co. *v.* New York Home Ins. Co., 113 Fed. 1, 51 C. C. A. 21; Central Pac. R. Co. *v.* Dyer, 5 Fed. Cas. No. 2,552, 1 Sawy. 641.

46. Brown *v.* Haven, 12 Me. 164; Baldes *v.* Henniges, 7 Kulp (Pa.) 143; New England Phonograph Co. *v.* Edison, 110 Fed. 26; Johnson *v.* Powers, 13 Fed. 315. Where an executor misapplied the funds and resigned and he and his successor prevented the widow from learning the condition of the estate, the widow was permitted to maintain a bill against both for an accounting between themselves and with her. Johnston *v.* Duncan, 67 Ga. 61.

47. Bates *v.* Plonsky, 62 How. Pr. (N. Y.) 429.

48. Meacham *v.* Williams, 9 Ala. 842.

49. *Alabama.*— Northwestern Land Assoc. *v.* Grady, 137 Ala. 219, 33 So. 874.

Connecticut.— Bissell *v.* Beckwith, 33 Conn. 357.

Georgia.— Vaughn *v.* Georgia Co-operative Loan Co., 98 Ga. 288, 25 S. E. 441; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254.

Maine.— Brown *v.* Haven, 12 Me. 164.

Mississippi.— Butler *v.* Spann, 27 Miss. 234.

Missouri.— Tucker *v.* Tucker, 29 Mo. 350.

Rhode Island.— Winsor *v.* Pettis, 11 R. I. 506.

West Virginia.—Arnold *v.* Arnold, 11 W. Va 449.

United States.— Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; Alma First Nat. Bank *v.* Moore, 48 Fed. 799.

See 19 Cent. Dig. tit. "Equity," §§ 371, 372.

Distinct frauds cannot be so united. Woodruff *v.* Young, 43 Mich. 548, 6 N. W. 85. And see Price *v.* Hurley, 201 Pa. St. 606, 51 Atl. 339; Quin *v.* Power, 18 Wkly. Notes Cas. (Pa.) 285.

An attorney cannot be brought in on the charge of participating in the fraud, where such participation by him has no connection with the case made by plaintiff for relief, but he is joined solely as a foundation for disbarment proceedings. Smith *v.* Quarles, (Tenn. Ch. App. 1897) 46 S. W. 1035.

Relief as to a single fraud may on other grounds be had against defendants not originally parties thereto and who have acquired separate interests. Blake *v.* Van Tilborg, 21 Wis. 672.

Creditors' bills may be maintained to set aside separate transfers made in pursuance of the same fraudulent scheme (Russell *v.* Garrett, 75 Ala. 348; Planters', etc., Bank *v.* Walker, 7 Ala. 926; Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169; Bobb *v.* Bobb, 76 Mo. 419 [*reversing* 8 Mo. App. 257]; Com. *v.* Drake, 81 Va. 305; Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470); and it is sometimes held that where the transfers are distinct, such different fraudulent transfers cannot be pursued in the same bill (Hardin *v.* Swoope, 47 Ala. 273; Young *v.* Wells, 33 Mo. 106; McElwee *v.* Massey, 10 Rich. Eq. (S. C.) 377). But the singleness of plaintiff's right and of the general object of the bill is generally sufficient to justify the joinder of different fraudulent grantees without any charge of confederacy.

Alabama.— Hill *v.* Moone, 104 Ala. 353, 16 So. 67; Collins *v.* Stix, 96 Ala. 338, 11 So. 380.

Florida.— Bauknight *v.* Sloan, 17 Fla. 284.

Mississippi.— Waller *v.* Shannon, 53 Miss. 500.

Missouri.— Bobb *v.* Bobb, 76 Mo. 419; Donovan *v.* Dunning, 69 Mo. 436.

New Jersey.— Importers', etc., Nat. Bank *v.* Littell, 41 N. J. Eq. 29, 2 Atl. 785; Randolph *v.* Daly, 16 N. J. Eq. 313.

South Carolina.— Williams *v.* Neel, 10 Rich. Eq. 338, 75 Am. Dec. 94.

Virginia.— Batchelder *v.* White, 80 Va. 103; Almond *v.* Wilson, 75 Va. 613.

See 19 Cent. Dig. tit. "Equity," §§ 372, 377, 378. See also CREDITORS' SUITS, 12 Cyc. 41, 42.

50. Graham *v.* Dahlonega Gold Min. Co., 71 Ga. 296; Bray *v.* Thatcher, 28 Mo. 129; Adams *v.* Manning, 10 Wkly. Notes Cas. (Pa.) 448.

51. Draper *v.* Brown, 115 Wis. 361, 91 N. W. 1001.

Pollution of stream.— Where several persons independently discharge waste matter into a stream to the injury of an inferior propri-

f. Seeking Different Relief Against Different Defendants. From what has already been said,[52] it follows that if circumstances exist justifying on other grounds a joinder of demands against different defendants, the mere fact that different forms of relief may be required as to each does not render the bill multifarious;[53] but the administering of different forms of relief affects the question of convenience in disposing of the matter in one suit, and in connection with other features it is sometimes mentioned as a reason for holding the bill to be bad.[54]

g. Same Defendant Sued in Different Capacities. A bill cannot unite distinct demands against the same defendant, where his liability upon one is individual and upon the other is in a representative capacity;[55] but the rule is confined to the presentation of distinct demands and does not extend to cases where defendant is otherwise a proper party in both capacities.[56]

8. Remedies. The proper remedy for multifariousness is by demurrer on that ground.[57] If defendant does not demur, he waives the objection.[58] Such waiver

etor, a bill against all so contributing to the injury is not multifarious. Woodruff *v.* North Bloomfield Gravel Min. Co., 16 Fed. 25, 8 Sawy. 628. In Pennsylvania it seems that the propriety of a joinder in such a case depends upon whether a proper case is made out for the prevention of multiplicity of suits. *Compare* Anderson *v.* Lehigh Coal, etc., Co., 9 Pa. Dist. 278, 23 Pa. Co. Ct. 343; Mengel *v.* Lehigh Coal, etc., Co., 24 Pa. Co. Ct. 152; Keppel *v.* Lehigh Coal, etc., Co., 21 Pa. Co. Ct. 101; Graver *v.* Dodson Coal Co., 20 Pa. Co. Ct. 529.

52. See *supra*, VII, G, 7, b, c, d, e.

53. Ashley *v.* Little Rock, 56 Ark. 391, 19 S. W. 1058; Wynne *v.* Lumpkin, 35 Ga. 208; Richards *v.* Pierce, 52 Me. 560; Cock *v.* Evans, 9 Yerg. (Tenn.) 287. And see *supra*, VII, G, 5, e, note 94. In Georgia (Civ. Code, § 4833) a legal remedy may be sought against one defendant and an equitable remedy against another, with reference to the same subject-matter. Brumby *v.* Harris, 107 Ga. 257, 33 S. E. 49.

54. Hawkins *v.* Georgia, etc., R. Co., 108 Ga. 784, 33 S. E. 682; Mackall *v.* West, 67 Ga. 278; Shafer *v.* O'Brien, 31 W. Va. 601, 8 S. E. 298.

55. *Indiana.*— Bryan *v.* Blythe, 4 Blackf. 249.

Massachusetts.— Green *v.* Gaskill, 175 Mass. 265, 56 N. E. 560.

Mississippi.— Wren *v.* Gayden, 1 How. 365.

New York.— Davoue *v.* Fanning, 4 Johns. Ch. 199; Latting *v.* Latting, 4 Sandf. Ch. 31.

Pennsylvania.— Bovaird *v.* Seyfang, 200 Pa. St. 261, 49 Atl. 958.

Tennessee.— Mitchell *v.* Williams, (Ch. App. 1897) 46 S. W. 325.

Virginia.— Hill *v.* Hill, 79 Va. 592.

See 19 Cent. Dig. tit. "Equity," § 379.

Misappropriation of two different funds may be charged in one bill for account against an officer. Self *v.* Blount County, 124 Ala. 191, 27 So. 554.

Relief claimed in only one capacity exempts the bill from multifariousness where defendant is liable in two capacities. Russell *v.* Garrett, 75 Ala. 348.

56. Hunley *v.* Hunley, 15 Ala. 91. Where one acted as agent for trustees in executing a trust and on the death of the trustees was appointed trustee to close the trust, a bill was proper for an account of all his doings. Williams *v.* West, 2 Md. 174. To the same effect see Moody *v.* Flagg, 125 Fed. 819.

57. *Connecticut.*— Bissell *v.* Beckwith, 33 Conn. 357.

Illinois.— Whiteside County *v.* Burchell, 31 Ill. 68.

Maryland.— Luckett *v.* White, 10 Gill & J. 480; Grove *v.* Fresh, 9 Gill & J. 280.

Michigan.— Miner *v.* Wilson, 107 Mich. 57, 64 N. W. 874.

New Jersey.— Rockwell *v.* Morgan, 13 N. J. Eq. 384.

New York.— Abraham *v.* Plestoro, 3 Wend. 538, 20 Am. Dec. 738.

Oregon.— White *v.* Delschneider, 1 Oreg. 254.

Pennsylvania.— Klein *v.* Commercial Nat. Bank, 44 Leg. Int. 144.

Tennessee.— Fay *v.* Jones, 1 Head 442; Thurman *v.* Shelton, 10 Yerg. 383.

See 19 Cent. Dig. tit. "Equity," § 663.

A motion to dismiss the bill is improper as the defect may be remedied by amendment. Harland *v.* Persons, 93 Ala. 273, 9 So. 379.

Objection in interlocutory proceedings.— The objection cannot be taken on a motion to dissolve an injunction (Shirley *v.* Long, 6 Rand. (Va.) 764), or on a hearing before a master several years after the bill was filed and when a new suit would be barred (Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534). It may not be taken after an interlocutory decree. Hinton *v.* Cole, 3 Humphr. (Tenn.) 656.

In Arkansas (Code, §§ 103, 104) the remedy is by motion to strike out a cause of action improperly joined. Riley *v.* Norman, 39 Ark. 158; Clements *v.* Lampkin, 34 Ark. 598; Terry *v.* Rosell, 32 Ark. 478.

58. *Connecticut.*— Bissell *v.* Beckwith, 33 Conn. 357.

Illinois.— Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881; Gilmore *v.* Sapp, 100 Ill. 297; Henderson *v.* Cummings, 44 Ill. 325.

Indiana.— Bryan *v.* Blythe, 4 Blackf. 249.

Maryland.— Luckett *v.* White, 10 Gill & J.

is, however, only binding on defendant who might have demurred. The court may on final hearing on suggestion or its own motion act upon the defect,[59] but will not do so if justice can be done without great inconvenience and confusion.[60] The defect will not be considered on appeal if not raised in the lower court.[61] Plaintiff may be put to his election as between matters improperly joined,[62] and

480; Grove *v.* Fresh, 9 Gill & J. 280; Gibbs *v.* Clagett, 2 Gill & J. 14.

Massachusetts.— Crocker *v.* Dillon, 133 Mass. 91.

Michigan.— Miner *v.* Wilson, 107 Mich. 57, 64 N. W. 874; Snook *v.* Pearsall, 95 Mich. 534, 55 N. W. 459; Wales *v.* Newbould, 9 Mich. 45.

New Jersey.— Sanborn *v.* Adair, 27 N. J. Eq. 425 [*affirmed* in 29 N. J. Eq. 338]; Annin *v.* Annin, 24 N. J. Eq. 184; Rockwell *v.* Morgan, 13 N. J. Eq. 384.

North Carolina.— Buffalow *v.* Buffalow, 37 N. C. 113.

Pennsylvania.— Persch *v.* Quiggle, 57 Pa. St. 247.

Tennessee.— Fay *v.* Jones, 1 Head 442; Moreau *v.* Saffarans, 3 Sneed 595, 67 Am. Dec. 582; Thurman *v.* Shelton, 10 Yerg. 383.

Vermont.— Wade *v.* Pulsifer, 54 Vt. 45.

United States.— Nelson *v.* Hill, 5 How. 127, 12 L. ed. 81; Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135.

See 19 Cent. Dig. tit. "Equity," § 663.

Misjoinder of causes under the codes is subject to the same rules. Snowden *v.* Tyler, 21 Nebr. 199, 31 N. W. 661; Wilson *v.* Lynt, 30 Barb. (N. Y.) 124; Redmond *v.* Dana, 3 Bosw. (N. Y.) 615.

Objecting by plea or answer.— There are *dicta* to the effect that defendant may raise the objection by a plea or answer (Labadie *v.* Hewitt, 85 Ill. 341; Swayze *v.* Swayze, 9 N. J. Eq. 273; Cuyler *v.* Moreland, 6 Paige (N. Y.) 273; Sims *v.* Aughtery, 4 Strobh. Eq. (S. C.) 103; Oliver *v.* Piatt, 3 How. (U. S.) 333, 11 L. ed. 622; Ranger *v.* Champion Cotton-Press Co., 52 Fed. 611), but it is explained that these refer to answers for that purpose alone and do not extend to answers going to the merits (Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142. See also Annin *v.* Annin, 24 N. J. Eq. 184). There are also *dicta* that the objection may be presented by answer when it does not appear on the face of the bill (Bell *v.* Woodward, 42 N. H. 181; Abbot *v.* Johnson, 32 N. H. 9); but these are in conflict with the rule that the question must be determined from the bill alone (see *supra*, VII, G, 3). For the same reason a plea should be held improper. See *infra*, VIII, D, 1. The objection cannot be made by amended answer on the first day of the hearing. Thornton *v.* Houtze, 91 Ill. 199.

Suffering judgment pro confesso waives the defect. Moreau *v.* Saffarans, 3 Sneed (Tenn.) 595, 67 Am. Dec. 582.

Plaintiff may not of course object to the court's determining the case as he presents it. Wakefield *v.* Ballard, 49 Iowa 344.

59. *Alabama.*— Bean *v.* Bean, 37 Ala. 17.

Florida.— Mattair *v.* Payne, 15 Fla. 682.

Illinois.— Hollenbeck *v.* Cook, 180 Ill. 65, 54 N. E. 154.

New Jersey.— Droste *v.* Hall, (Ch. 1894) 29 Atl. 437; Emans *v.* Emans, 14 N. J. Eq. 114.

Ohio.— State *v.* Ellis, 10 Ohio 456.

Tennessee.— Hickman *v.* Cooke, 3 Humphr. 640.

United States.— Chisholm *v.* Johnson, 106 Fed. 191.

See 19 Cent. Dig. tit. "Equity," § 654.

Even after overruling a demurrer the court may dismiss for multifariousness. Wells *v.* Sewell's Point Guano Co., 89 Va. 708, 17 S. E. 2.

60. *Florida.*— Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Georgia.— Warthen *v.* Brantley, 5 Ga. 571.

Illinois.— Heffron *v.* Gore, 40 Ill. App. 257.

Maryland.— Hamilton *v.* Whitridge, 11 Md. 128, 69 Am. Dec. 184.

Michigan.— Burnham *v.* Dillon, 100 Mich. 352, 59 N. W. 176; Payne *v.* Avery, 21 Mich. 524.

New Jersey.— Brown *v.* Grandin, (Ch. 1888) 13 Atl. 266; Green *v.* Richards, 23 N. J. Eq. 32; Emans *v.* Emans, 14 N. J. Eq. 114; Hays *v.* Doane, 11 N. J. Eq. 84; Swayze *v.* Swayze, 9 N. J. Eq. 273.

Vermont.— Tullar *v.* Baxter, 59 Vt. 467, 8 Atl. 493.

United States.— Oliver *v.* Piatt, 3 How. 333, 11 L. ed. 622; Chisholm *v.* Johnson, 106 Fed. 191; Converse *v.* Michigan Dairy Co., 45 Fed. 18.

See 19 Cent. Dig. tit. "Equity," §§ 654, 663.

61. *Alabama.*— Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Wellborn *v.* Tiller, 10 Ala. 305.

Illinois.— Henderson *v.* Cummings, 44 Ill. 325.

Maryland.— Ashton *v.* Ashton, 35 Md. 496; Luckett *v.* White, 10 Gill & J. 480; Grove *v.* Fresh, 9 Gill & J. 280.

Michigan.— Richardson *v.* Richardson, 100 Mich. 364, 59 N. W. 178.

New York.— Abraham *v.* Plestoro, 3 Wend. 538, 20 Am. Dec. 738.

Vermont.— Day *v.* Cummings, 19 Vt. 496.

United States.— Oliver *v.* Piatt, 3 How. 333, 11 L. ed. 622.

See 19 Cent. Dig. tit. "Equity," § 663.

The objection must be very clear to justify a reversal under such circumstances. Whitney *v.* Whitney, 5 Dana (Ky.) 327.

62. Junkins *v.* Lovelace, 72 Ala. 303; Belt *v.* Bowie, 65 Md. 350, 4 Atl. 295.

In Maryland under rule 33 the court may dismiss a bill as to matter improperly joined. Reckefus *v.* Lyon, 69 Md. 589, 16 Atl. 233,

the objection may frequently be obviated by abandonment of the objectionable matter.[63]

H. Impertinence and Scandal — 1. What Constitutes Impertinence. Impertinence has been said to consist in the introduction of unnecessary matter of every description,[64] but this definition is misleading. A better statement is that it consists of any allegation that is irrelevant to the material issues made or tendered.[65] The fact that an allegation is not strictly necessary does not render it impertinent; to have that effect it must have no bearing on the issue.[66] Allegations in the way of inducement, explanatory of essential averments, are not impertinent;[67] nor are matters of evidence or collateral facts, the admission of which by defendant would be material in establishing the general allegations of the bill or in determining the nature or extent of the relief to be granted.[68] The pleader may properly, after stating facts sufficient to entitle plaintiff to relief, add cumulative facts to intensify without varying the right claimed.[69] On the other hand, although there is some opinion to the contrary,[70] matter in its nature pertinent and even essential may become impertinent from its manner of statement, as by being prolix,[71] and especially is this true of redundant matter, as where instruments properly described are again set forth *in hæc verba*.[72]

2. What Constitutes Scandal. Neither suitors nor solicitors should be allowed to manifest their personal feelings in the bill,[73] therefore matter which is scandalous or unnecessarily reflects upon defendant should be stricken out.[74] Scandal consists of any unnecessary allegation which bears cruelly upon the moral character of an individual, or states anything which is contrary to good manners, or anything which is unbecoming the dignity of the court to hear, or which charges some person with a crime, not necessary to be shown in the cause.[75] Reckless charges of fraud and conspiracy may amount to scandal.[76] No averment is, however, open to an objection for scandal, unless it is also impertinent, for a charge, no matter how defamatory it may be, is not scandalous if it be relevant to the case made by the bill.[77]

530; Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287. But formerly it was necessary to dismiss *in toto*. Gibbs *v.* Clagett, 2 Gill & J. 14. And see holding the same McIntosh *v.* Alexander, 16 Ala. 87.

63. As by striking out a part of the prayer for relief (Hodges *v.* Pingree, 10 Gray (Mass.) 14; Brady *v.* Weeks, 3 Barb. (N. Y.) 157; Murray *v.* Hay, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773. And see *supra*, VII, G, 5, b), or by submitting the case on a single aspect (Morse *v.* South, 80 Fed. 206). The objection is obviated where defendant removes one ground of complaint. Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715.

Where the bill is ambiguous, the defect may be cured by avoiding the construction which would present it, and plaintiff cannot object to such construction. Turnipseed *v.* Goodwin, 9 Ala. 372.

64. Huston *v.* Sellers, 12 Phila. (Pa.) 520; 1 Daniell Ch. Pr. 455.

65. Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14. Impertinence consists in recitals of fact which are entirely immaterial to the issue. Marshall's Estate, 16 Phila. (Pa.) 271.

66. Kirkpatrick *v.* Corning, 40 N. J. Eq. 241 [*reversing* 39 N. J. Eq. 22].

67. Tucker *v.* Cheshire R. Co., 21 N. H. 29.

Steps culminating in a fraud attacked may properly be set out. Perkins *v.* Center, 35 Cal. 713.

Trustees under a will suing for an injury to the trust property may state the will, the death of the testator, and their assumption of the trust. Hawley *v.* Wolverton, 5 Paige (N. Y.) 522.

68. Goodrich *v.* Parker, 1 Minn. 195; Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343; Hawley *v.* Wolverton, 5 Paige (N. Y.) 522. See also Robertson *v.* Dunne, (Fla. 1903) 33 So. 530.

69. Noble *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175.

70. Bally *v.* Williams, McClel. & Y. 334; Lowe *v.* Williams, 4 L. J. Ch. O. S. 199, 2 Sim. & St. 574, 1 Eng. Ch. 574.

71. Gompertz *v.* Best, 4 L. J. Exch. Eq. 17, 1 Y. & C. Exch. 117; Slack *v.* Evans, 7 Price 278 note. See also Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343; Putnam *v.* Putnam, 2 Code Rep. (N. Y.) 64; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14.

72. Goodrich *v.* Parker, 1 Minn. 195. See 1 Daniell Ch. Pr. 454.

73. McConnel *v.* Holobush, 11 Ill. 61.

74. McConnel *v.* Holobush, 11 Ill. 61.

75. Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; 1 Daniell Ch. Pr. 452.

76. Brown *v.* Davis, 62 Fed. 519, 10 C. C. A. 532.

77. *Connecticut.*— Lankton *v.* Scott, Kirby 356.

3. REMEDIES. While impertinence and scandal are serious vices in a bill they are not grounds of demurrer.[78] The remedy is generally provided by rule, and is usually by exception specifying the objectionable matter, and a reference to a master to strike it out.[79] The court has, however, the inherent power to protect its records against such matter and may act *sua sponte*.[80] Counsel signing the bill are sometimes charged with costs.[81]

VIII. PLEADINGS IN DEFENSE.

A. Modes of Defense — 1. IN GENERAL. A defendant appearing has the election of four regular modes of defense to the bill, to wit, disclaimer,[82] demurrer, plea, and answer.[83] While merely giving a pleading sufficient in substance a wrong name is not fatal,[84] care must be taken that the pleading resorted to be in substance sufficient as the appropriate mode of defense, for often a single mode is alone appropriate to the assertion of particular defensive matter.[85] Regard

Illinois.— Highways Com'rs *v.* Deboe, 43 Ill. App. 25.

Minnesota.— Goodrich *v.* Parker, 1 Minn. 195.

North Carolina.— Henry *v.* Henry, 62 N. C. 334, 93 Am. Dec. 87.

England.— Coffin *v.* Cooper, 6 Ves. Jr. 514, 31 Eng. Reprint 1171; Mitford Eq. Pl. 47.

See 19 Cent. Dig. tit. "Equity," §§ 380, 381.

Bacon Ord. 56 defines scandal as matter libelous or slanderous against any that is not a party to the suit, or against such as are parties to the suit, upon matters impertinent.

78. Simonton *v.* Bacon, 49 Miss. 582; 1 Daniell Ch. Pr. 456.

79. 1 Daniell Ch. Pr. 456.

In the federal courts the matter is governed by rules 26 and 27, providing that every bill shall be expressed in as brief and succinct terms as it reasonably can be and shall contain no unnecessary recital of deeds, documents, contracts, or other instruments *in haec verba*, or any other impertinent matter or any scandalous matter not relevant to the suit, and for written specific exceptions to be filed on or before the next rule day after the process shall be returnable, and for reference to a master thereon, with provisions for costs.

Objection may be taken on taxation of costs. Hood *v.* Inman, 4 Johns. Ch. (N. Y.) 437.

If no application to strike out allegations of fact is made plaintiff should be permitted to prove them. Redmond *v.* Dana, 3 Bosw. (N. Y.) 615.

80. Pinneo *v.* Goodspeed, 104 Ill. 184; Coffin *v.* Cooper, 6 Ves. Jr. 514, 31 Eng. Reprint 1171.

In the federal courts, equity rule 27, requiring written exceptions on or before the next rule day after the return of process, does not deprive the federal courts of the power of acting on their own initiative. Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14. It was held proper where a bill contained scandalous charges, supported by unfounded evidence, to dismiss it, without considering a partial equity in favor of plaintiff arising from an estoppel. Brown *v.* Davis, 62 Fed. 519, 10 C. C. A. 532.

81. McConnel *v.* Holobush, 11 Ill. 61; Mitford Eq. Pl. 47. Bacon Ord. 56 provides for reproof or punishment of counsel signing.

U. S. Eq. Rule 26 provides that if the master finds in support of the exceptions, plaintiff shall pay defendant all his costs in the suit up to that time, unless the court otherwise orders. If the master reports against the exceptions plaintiff shall be entitled to costs occasioned by the reference.

82. The reasons for treating a disclaimer as a defense and distinct from an answer are stated *infra*, VIII, B.

83. Barton Suit Eq. 101; 2 Daniell Ch. Pr. 2; Mitford Eq. Pl. 97; Story Eq. Pl. 436. The election belongs to defendant; plaintiff cannot compel him to demur to test the sufficiency of his bill. Davison *v.* Johnson, 16 N. J. Eq. 112.

84. Goodwin *v.* McGehee, 15 Ala. 232; Watson *v.* Gaylord, 1 Root (Conn.) 137. As to allowing a plea to stand as an answer see *infra*, VIII, E, 5; as to answers taken as cross bills see *infra*, X, H.

85. Where a defect appears on the face of a bill the objection must be raised by demurrer and not by plea. Mains *v.* Homer Steel-Fence Co., 116 Mich. 526, 74 N. W. 735; Sperry *v.* Miller, 2 Barb. Ch. (N. Y.) 632; Evertson *v.* Ogden, 8 Paige (N. Y.) 275; Hostetter Co. *v.* E. G. Lyons Co., 99 Fed. 734; McCloskey *v.* Barr, 38 Fed. 165; Noyes *v.* Willard, 18 Fed. Cas. No. 10,374, 1 Woods 187. But a good plea may be presented by averring, along with facts contained in the bill, additional facts making out a defense. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 50 Fed. 151.

The defense of innocent purchaser cannot be raised by demurrer but must be set up by plea or answer. Heatherington *v.* Lewenberg, 61 Miss. 372; Scudder *v.* Van Amburgh, 4 Edw. (N. Y.) 29; High *v.* Batte, 10 Yerg. (Tenn.) 335.

Defense consisting of variety of circumstances, making it necessary to go into evidence at large, must be made by answer and not by plea. Carroll *v.* Potter, Walk. (Mich.) 355; Loud *v.* Sergeant, 1 Edw. (N. Y.) 164.

For other illustrations of the necessity of

must also be had to local statutes and rules, which have greatly changed, and differently in different jurisdictions, the chancery rules affecting the choice of a defense.[86]

2. Conjoint Resort to Different Modes of Defense. It is not essential that the entire bill be met by the same mode of defense.[87] Defendant may demur to a part of the bill and answer the residue;[88] plead to part and answer the residue;[89] demur to part, plead to part, and answer the residue;[90] or demur to part, plead to part, disclaim as to part, and answer the residue.[91] Where such course is adopted it is essential that the pleading designate with precision the portion of the bill to which it is intended to apply.[92] The entire bill must, however, be met by some form of defense; defendant must answer all which he does not otherwise cover.[93] On the other hand care should be taken not to cover any portion of the bill by two modes of defense, the rule being that one may not at the same time demur and plead to the same matter,[94] or demur and answer the same matter.[95] A like rule forbids a plea and defensive answer to the same mat-

properly selecting the mode of defense see the discussions of grounds of demurrers and pleas *infra*, VIII, C, D.

86. Want of necessary parties must in the federal courts be raised by answer (U. S. *v.* Gillespie, 6 Fed. 803), but elsewhere it may be raised by plea (Ulrici *v.* Papin, 11 Mo. 42; Scholl *v.* Schoener, 1 Woodw. (Pa.) 200). See *supra*, V, H, 3, b.

Ala. Code, § 701, abolishing the replication, permits plaintiff to ignore allegations in the answer not set out by special plea and not responsive to the bill. Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.

In Pennsylvania, under rule of court, all defenses are made by answer or demurrer. By virtue thereof everything which might heretofore have been raised by demurrer or plea may now be raised by answer (Brower *v.* Kantner, 190 Pa. St. 182, 43 Atl. 7), and a plea of the statute of limitations will be dismissed (Moore *v.* Bush, 5 Pa. Dist. 141, 17 Pa. Co. Ct. 252).

Tenn. Code, § 4384, prescribes the order of defenses and the adoption of one waives those preceding it. Cooke *v.* Richards, 11 Heisk. 711. Defendant cannot therefore reserve the benefit of a demurrer in his answer. Lowry *v.* Naff, 4 Coldw. 370.

Although objection to answering improper matter may, under the local practice, be saved by defendant in his answer, it is said to be the better practice to plead or demur. Atterberry *v.* Knox, 8 Dana (Ky.) 282.

87. 2 Daniell Ch. Pr. 3, 349; Mitford Eq. Pl. 98.

88. Pleasants *v.* Glasscock, Sm. & M. Ch. (Miss.) 17; Waring *v.* Suydam, 4 Edw. (N. Y.) 426; Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417; Livingston *v.* Story, 9 Pet. (U. S.) 632, 9 L. ed. 255.

89. Clark *v.* Saginaw City Bank, Harr. (Mich.) 240.

90. Bennett *v.* Bennett, 63 N. J. Eq. 306, 49 Atl. 501; Underwood *v.* Warner, 3 Phila. (Pa.) 414; Bull *v.* Bell, 4 Wis. 54.

91. 2 Daniell Ch. Pr. 349.

92. Clark *v.* Saginaw City Bank, Harr. (Mich.) 240; 2 Daniell Ch. Pr. 350. See also *infra*, VIII, C, 5, f.

93. Graves *v.* Blondell, 70 Me. 190; Ferguson *v.* O'Harra, 8 Fed. Cas. No. 4,740, Pet. C. C. 493. This rule follows from the importance formerly attached to discovery, and consequent compulsion of an answer to a good bill. The special defenses by demurrer or plea are used to show that the requirement of an answer would be improper, the disclaimer that it would be unnecessary. 2 Daniell Ch. Pr. 3; Mitford Eq. Pl. 1. Therefore defendant must answer all that he has not shown reasons for not answering.

Where a plea presents matters in full defense, it is unnecessary to answer parts of the bill not involved in the subject of the plea. Sims *v.* Lyle, 22 Fed. Cas. No. 12,891, 4 Wash. 301.

94. Hoadley *v.* Smith, 36 Conn. 371; Souzer *v.* De Meyer, 2 Paige (N. Y.) 574; Ewing *v.* Ewing, 2 Phila. (Pa.) 371; Hostetter Co. *v.* E. G. Lyons Co., 99 Fed. 734. See also *infra*, VIII, C, 6, c, (IV). A paper purporting to be both a plea and a demurrer should be stricken from the file. Coleman *v.* Toop, Wright (Ohio) 315.

U. S. Eq. Rules 32 and 37 do not permit one to demur, plead, and answer at the same time to the whole bill. Crescent City Live Stock, etc., Co. *v.* Butchers' Union Live Stock, etc., Co., 12 Fed. 225.

Discretion of court.— The court has power to permit a demurrer and plea at the same time to the entire bill. Alexander *v.* Alexander, 13 App. Cas. (D. C.) 334, 45 L. R. A. 806. If the court has power to permit a demurrer to the whole bill and at the same time pleas thereto, such power will be exercised only to prevent injustice. U. S. *v.* American Bell Telephone Co., 30 Fed. 523.

95. Gray *v.* Regan, 23 Miss. 304; 2 Daniell Ch. Pr. 350. Defendant cannot answer a bill and demur to the interrogatories. Kisor *v.* Stancifer, Wright (Ohio) 323.

Demurrer in answer.— Defendant cannot incorporate in an answer to the whole bill a demurrer to any part of it (Bird *v.* Magowan, (N. J. Ch. 1898) 43 Atl. 278), unless at least the demurrer is left for consideration as if it stood alone (Holt *v.* Daniels, 61 Vt. 89, 17 Atl. 786).

ter,[96] but under some circumstances it is necessary to fortify a plea by an answer giving discovery as to the matter to which the plea relates.[97] The consequence of violating these rules is in general that a plea is taken to overrule a demurrer which it overlaps, and an answer to overrule a demurrer or a plea, but the practice in this regard now varies.[98]

B. Disclaimers. A disclaimer is a pleading under oath whereby a defendant denies that he has or claims any right to the thing in demand and renounces all claim thereto.[99] It is sometimes treated as a form of answer,[1] but is really a distinct kind of defense,[2] as it has for its object the immediate termination of the suit,[3] by showing that a further answer is unnecessary.[4] It is therefore usually treated as a separate mode of defense.[5] A disclaimer is available only to a defendant charged merely with having an interest in the subject-matter and not with a liability with reference thereto.[6] It is proper only where his renunciation of interest should lead to a dismissal of the bill against him.[7] One cannot disclaim where he is charged with fraud,[8] or where a liability remains for costs.[9] The disclaimer must be full and explicit,[10] and must renounce not only the interest charged in the bill but all right in any capacity and to any extent.[11] It may, however, be restricted to a portion of the subject-matter.[12] It has been remarked that a disclaimer can seldom be put in alone.[13] Defendant may have had an interest with which he has parted and an answer is therefore required to show if this be a fact, and if so to enable plaintiff to make the proper parties.[14] A defendant who disclaims cannot be compelled to answer as to the after value of the property.[15] Plaintiff may, if he thinks the disclaimer improper or not supported by sufficient answer, present the question by exceptions in the same manner as to an answer;[16] otherwise, he should dismiss with costs as to the disclaiming defendant or amend.[17] He may, however, pray a decree against defendant on satisfying the court that he had probable cause for bringing the bill, but such decree is usually granted without costs.[18] In form a disclaimer is like an answer, having regularly the same commencement and conclusion.[19]

Where a demurrer and answer are filed, the court may permit the answer to be withdrawn and the case heard on the demurrer. *In re* Finley, 196 Pa. St. 140, 46 Atl. 443.

In Maine and Virginia a demurrer and an answer may be interposed to the same matter. Smith *v.* Kelley, 56 Me. 64; Bassett *v.* Cunningham, 7 Leigh (Va.) 402. See also Rosset *v.* Greer, 3 W. Va. 1.

96. Souzer *v.* De Meyer, 2 Paige (N. Y.) 574.

97. See *infra*, VIII, D, 5.

98. See *infra*, VIII, C, 6, c, (IV); VIII, D, 6.

99. 2 Daniell Ch. Pr. 233.

1. Mitford Eq. Pl. 97.

2. 2 Daniell Ch. Pr. 234.

3. Mitford Eq. Pl. 98.

4. Mitford Eq. Pl. 11.

5. Barton Suit Eq. 101; Story Eq. Pl. 435.

6. 2 Daniell Ch. Pr. 233.

7. Isham *v.* Miller, 44 N. J. Eq. 61, 14 Atl. 20; Ellsworth *v.* Curtis, 10 Paige (N. Y.) 105.

8. Bromberg *v.* Heyer, 69 Ala. 22; Bulkeley *v.* Dunbar, 1 Anstr. 37.

9. Dupuy *v.* Leavenworth, 17 Cal. 262.

10. Worthington *v.* Lee, 2 Bland (Md.) 678.

11. Bentley *v.* Cowman, 6 Gill & J. (Md.) 152.

12. As where a defendant pleads that he is a *bona fide* purchaser of a portion of a tract of land in controversy, he must complete his defense by disclaiming as to the remainder. Tompkins *v.* Anthon, 4 Sandf. Ch. (N. Y.) 97.

13. 2 Daniell Ch. Pr. 233; Mitford Eq. Pl. 253.

14. Mitford Eq. Pl. 233. A disclaimer must be accompanied by an answer denying such facts as may be necessary. Worthington *v.* Lee, 2 Bland (Md.) 678. And see Proctor *v.* Plumer, 112 Mich. 393, 70 N. W. 1028. It was held sufficient in a suit to restrain ejectment, to disclaim, and to answer alleging a conveyance of all interest to one of defendants, naming him. Spofford *v.* Manning, 2 Edw. (N. Y.) 358.

15. Tooker *v.* Slosson, 4 Edw. (N. Y.) 114.

16. Glassington *v.* Thwaites, 2 Russ. 458, 3 Eng. Ch. 458, 38 Eng. Reprint 408.

17. 2 Daniell Ch. Pr. 235.

18. Spofford *v.* Manning, 2 Edw. (N. Y.) 358, 2 Daniell Ch. Pr. 236. See also Mitford Eq. Pl. 254.

19. See form in Barton Suit Eq. 102. It seems that this is because it is almost always supported by an answer and incorporated therein.

In suits relating to patents, a defendant sometimes disclaims as to certain claims within his patent. See, generally, PATENTS.

C. Demurrers — 1. Nature and Function — a. Testing Sufficiency of Bill. While a demurrer is said to be an answer in law to a bill,[20] inasmuch as it is a mode of defense,[21] its function is much the same as at law,[22] being to test the sufficiency of the bill.[23] Its purpose is to determine whether upon the facts as stated plaintiff is entitled to relief in equity,[24] or defendant is required to answer.[25] It is to be observed that a demurrer may challenge not only the sufficiency in substance of the facts alleged, but their sufficiency as stated, and may therefore reach defects in the form of the bill.[26] It will lie not only to an entire bill but to some distinct portion of one.[27]

b. Use Confined to Bills. Under distinctive equity procedure the use of demurrers is confined to defending against bills. There can be no demurrer to a plea[28] or to an answer.[29]

c. For What Purposes Necessary — (I) *Generally.* A demurrer is not only the proper but the sole remedy for defects in the frame of the bill,[30] or generally for defects curable by amendment.[31] Thus where a bill is sufficient in general

20. New Jersey *v.* New York, 6 Pet. (U. S.) 323, 8 L. ed. 414.

21. See *supra*, VIII, A, 1.

22. Martin *v.* McBryde, 38 N. C. 531; Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25.

23. Goodrich *v.* Thompson, 88 Ill. 206; Judson *v.* Stephens, 75 Ill. 255; Huston *v.* Sellers, 12 Phila. (Pa.) 520.

24. Johnson *v.* Roberts, 102 Ill. 655; Stroup *v.* Chalcraft, 52 Ill. App. 608.

Demurrer is founded on some dry point of law which goes to the absolute denial of the relief sought. Verplank *v.* Caines, 1 Johns. Ch. (N. Y.) 57.

Where the bill contains no ground for relief demurrer is the appropriate defense. Gallagher *v.* Roberts, 9 Fed. Cas. No. 5,194, 1 Wash. 320.

25. Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25. A demurrer is an allegation of defendant's, which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for plaintiff to proceed upon or to oblige defendant to answer; or that for some reason apparent on the face of the bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether defendant shall be compelled to make answer to plaintiff's bill or to some certain part thereof. Mitford Eq. Pl. 99.

26. 2 Daniell Ch. Pr. 45. See *infra*, VIII, C, 4, k.

27. Mitford Eq. Pl. 99. See also *supra*, VIII, A, 2; *infra*, VIII, C, 5, f.

28. *Illinois.*— Dixon *v.* Dixon, 61 Ill. 324.

Indiana.— Raymond *v.* Simonson, 4 Blackf. 77.

Kentucky.— Thomas *v.* Brashear, 4 T. B. Mon. 65.

Mississippi.— Winters *v.* Claitor, 54 Miss. 341; Beck *v.* Beck, 36 Miss. 72.

New Hampshire.— Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465.

New Jersey.— Travers *v.* Ross, 14 N. J. Eq. 254.

See 19 Cent. Dig. tit. "Equity," § 487.

29. *Florida.*— Edwards *v.* Drake, 15 Fla. 666.

Illinois.— Stone *v.* Moore, 26 Ill. 165.

Pennsylvania.— Com. *v.* Pittston Ferry Bridge Co., 8 Kulp 29.

West Virginia.— Copeland *v.* McCue, 5 W. Va. 264.

United States.—Barrett *v.* Twin City Power Co., 111 Fed. 45; Stokes *v.* Farnsworth, 99 Fed. 836; Crouch *v.* Kerr, 38 Fed. 549.

See 19 Cent. Dig. tit. "Equity," § 487.

Plaintiff's course on an insufficient answer is according to circumstances to except to the answer or to set the cause down for hearing on bill and answer. Stone *v.* Moore, 26 Ill. 165; Burge *v.* Burns, Morr. (Iowa) 287; Barrett *v.* Twin City Power Co., 111 Fed. 45. And see *infra*, VIII, E, 9, c, (II), (A).

30. *Illinois.*— Kuchenbeiser *v.* Beckert, 41 Ill. 172; Dupuy *v.* Gibson, 36 Ill. 197.

Iowa.— Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Mississippi.— Whitney *v.* Cotten, 53 Miss. 689.

Missouri.— Sayer *v.* Devore, 99 Mo. 437, 13 S. W. 201.

Tennessee.— Randall *v.* Payne, 1 Tenn. Ch. 137; Long *v.* Page, 10 Humphr. 540.

United States.— Newman *v.* Moody, 19 Fed. 858.

See 19 Cent. Dig. tit. "Equity," §§ 487, 501.

Technical objections are waived if not made before reference to a master. Pingree *v.* Coffin, 12 Gray (Mass.) 288.

Merely formal objections must be made by demurrer or insisted on in the answer. McElwain *v.* Willis, 3 Paige (N. Y.) 505. Formal defects cannot be objected to for the first time on appeal. McCoy *v.* Boley, 21 Fla. 803; Gordon *v.* Clarke, 10 Fla. 179.

After proof has been taken the bill will not be critically studied to find defects in form. Pelham *v.* Edelmeyer, 15 Fed. 262, 21 Blatchf. 188.

31. Glover *v.* Hembree, 82 Ala. 324, 8 So. 251; Seals *v.* Robinson, 75 Ala. 363; Oli-

statements defendant must usually demur if he desires to question it for want of particularity.[32] A failure to demur waives objection for repugnancy in allegations of the bill,[33] the personal disability of plaintiff,[34] and prematureness in instituting the suit.[35] It is also said that a failure to demur waives the advantage of matter in bar apparent on the face of the bill.[36] On the other hand it is sometimes said that wherever a general demurrer would lie relief will be refused, although none was interposed,[37] and that the court may *sua sponte* make any objection which should have been raised by demurrer, when necessary for the orderly administration of justice.[38] So it is held that a bill may be dismissed on the hearing, although not demurred to, where it does not show a right to equitable relief,[39] but generally a motion to dismiss is not a proper method of testing the equity of a bill.[40] Where the bill shows that the amount in controversy is beneath the cog-

phant *v.* Hartley, 32 Ark. 465; Smith *v.* Blake, 96 Mich. 542, 55 N. W. 978.

Absence of proof.— Where an averment is defective and the proof would not sustain it, if properly drawn, the appellate court will reverse the decree, although no objection was made below and a statute forbids a reversal for insufficiency of the bill unless excepted to below. Oliver *v.* Palmer, 11 Gill & J. (Md.) 426.

Where a bill contains improper matter, as impertinence or scandal, the remedy is not by demurrer (Parsons *v.* Johnson, 84 Ala. 254, 4 So. 385), but by exception (see *supra*, VII, H, 3).

32. Falls Village Water Power Co. *v.* Tibbetts, 31 Conn. 165; Provisional Municipality *v.* Lehman, 57 Fed. 324, 6 C. C. A. 349; Chicago, etc., R. Co. *v.* Pullman Palace-Car Co., 50 Fed. 24.

Objection on appeal is available where the bill leaves it uncertain whether a mortgage on which the bill is founded was executed by one or two of the defendants and the evidence does not remove the uncertainty. McGowan *v.* Mobile Branch Bank, 7 Ala. 823. But the common formula questioning the bill for want of certainty is insufficient on appeal to raise the point that the injury averred was not stated specifically. Pratt *v.* Lewis, 39 Mich. 7.

Waiver of objection.— A stipulation to use as evidence the proof taken on a former hearing waives the right to criticize the bill for want of minuteness. Rowell *v.* Jewett, 71 Me. 408.

Failure to allege facts constituting fraud is a defect not cured even by a finding of fraud. Gernt *v.* Cusack, 106 Tenn. 141, 59 S. W. 335.

33. American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299.

34. Chicago *v.* Cameron, 22 Ill. App. 91. If plaintiff does not object the court will determine the question of personal privilege on motion to dismiss the bill. Bicycle Step-ladder Co. *v.* Gordon, 57 Fed. 529.

35. Haskell *v.* Waties, 2 Rich. Eq. (S. C.) 8.

36. Tappan *v.* Evans, 11 N. H. 311.

37. Cheuvete *v.* Mason, 4 Greene (Iowa) 231; Hickman *v.* Cooke, 3 Humphr. (Tenn.) 640.

Substantial defects are not waived by answer. Kuchenbeiser *v.* Beckert, 41 Ill. 172; Gibbs *v.* Cunningham, 4 Md. Ch. 322. Where relief is prayed against the agent of a corporation, properly brought in for discovery alone, he may demur to the relief or insist upon the objection at the hearing. Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188.

Under an order taking a bill pro confesso defendant may take advantage of any matter which would be ground of demurrer. Wilson *v.* Waterman, 6 Rich. Eq. (S. C.) 255.

38. Klein *v.* Commercial Nat. Bank, 44 Leg. Int. (Pa.) 144.

39. Moore *v.* Dial, 3 Stew. (Ala.) 155; Herbert *v.* Hobbs, 3 Stew. (Ala.) 9; Chambers *v.* Chalmers, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572; Allen *v.* Burke, 2 Md. Ch. 534. See also *supra*, II, F, 1.

Where the remedy is purely legal, a court of equity will refuse to grant it, even though the bill be not demurred to. Binney *v.* Turner, Walk. (Miss.) 498. *Contra*, Crocker *v.* Dillon, 133 Mass. 91; Groves *v.* Fulsome, 16 Mo. 543, 57 Am. Dec. 247. In Wisconsin, under the code, it is held that an answer waives the objection that the complaint does not state an equitable cause of action. Tanner *v.* Gregory, 71 Wis. 490, 37 N. W. 830. But in New York the contrary has been held. McCann *v.* Hazard, 36 Misc. 7, 72 N. Y. Suppl. 45. By Tenn. St. (1852) c. 365, objections to jurisdiction in equity are waived by answer, but the court may permit, at any time before the cause is set down for hearing, the answer to be withdrawn and a demurrer to be filed (Lowe *v.* Morris, 4 Sneed 69); otherwise the chancellor will determine the cause on legal principles (Johnson *v.* Price, 3 Head 549).

40. Thrasher *v.* Partee, 37 Ga. 392; Swinney *v.* Beard, 71 Ill. 27; Tamaroa *v.* Southern Illinois Normal University, 54 Ill. 334; Brill *v.* Stiles, 35 Ill. 305, 85 Am. Dec. 364; Conover *v.* Ruckman, 32 N. J. Eq. 685; Henderson *v.* Mathews, 1 Lea (Tenn.) 34.

In **Alabama** a motion to dismiss is the proper proceeding to attack a bill for want of equity (Lockard *v.* Lockard, 16 Ala. 423; Haughy *v.* Strang, 2 Port. 177, 27 Am. Dec. 648) or for want of jurisdiction (Porter *v.* Worthington, 14 Ala. 584).

nizance of the court it is not necessary for defendant to demur but he may move to dismiss.[41]

(II) *Defects Cured by Subsequent Pleadings or Proof.* Although a bill may be so defective that a mere failure to demur would not waive the objection, still defendant, if he pass it without demurrer, may sometimes aid it by averments in his answer, or it may be aided by the evidence.[42] This rule is, however, often restricted to cases where the bill is merely insufficient in detail,[43] or where the averment supplied by the answer is implied in the bill,[44] or where the defective statement was due to plaintiff's ignorance of his rights;[45] and an entire failure to state a case for relief, it is often held, cannot be aided by subsequent proceedings.[46] It has been held that where the bill failed to show jurisdiction in equity defendant waived the benefit of a demurrer by filing a cross bill founded on matters of equitable cognizance,[47] but not by filing a cross bill seeking legal relief.[48]

2. Right to Demur. It may be laid down as a general rule that only such defendants as are affected by a defect in a bill have a right to demur thereto; or to put it in another form a defendant against whom a case is sufficiently stated cannot demur for an insufficient statement against other defendants. The principle has its most frequent application in the denial of demurrers for misjoinder of defendants when interposed by one properly joined and not injuriously affected by the misjoinder.[49] So where two different causes are improperly

Tenn. Code, § 4386, now authorizes the dismissal of a bill for want of equity appearing on its face, and under this even matter in abatement may be raised by such a motion. Brown *v.* Pace, (Ch. App. 1898) 49 S. W. 355.

41. See *supra*, II, E, 4, c. Where this fact does not appear from the bill it must be pleaded. Bradt *v.* Kirkpatrick, 7 Paige (N. Y.) 62.

42. *Alabama.*— Chapman *v.* Hamilton, 19 Ala. 121.

Arkansas.— Pindall *v.* Trevor, 30 Ark. 249.

Illinois.— Webb *v.* Hollenbeck, 48 Ill. App. 514.

Kentucky.— Samuel *v.* Minter, 3 A. K. Marsh. 480; Rankin *v.* Maxwell, 2 A. K. Marsh. 488, 12 Am. Dec. 431; Pennebaker *v.* Wathan, 2 A. K. Marsh. 315.

Nevada.— Hawthorne *v.* Smith, 3 Nev. 182, 93 Am. Dec. 397.

Virginia.— Salamone *v.* Keiley, 80 Va. 86; Brewis *v.* Lawson, 76 Va. 36.

See 19 Cent. Dig. tit. "Equity," §§ 656, 657.

Where decree is sought on facts disclosed by answer, the entire answer must be taken together, matter in discharge as well as matter in charge. Mulloy *v.* Young, 10 Humphr. (Tenn.) 298; Neal *v.* Robinson, 8 Humphr. (Tenn.) 435.

43. Fisher *v.* Stone, 4 Ill. 68; Neilson *v.* Churchill, 5 Dana (Ky.) 333; Edwards *v.* Massey, 8 N. C. 359.

44. Bierly *v.* Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303.

45. Deatly *v.* Murphy, 3 A. K. Marsh. (Ky.) 472.

46. *Alabama.*— Lockard *v.* Lockard, 16 Ala. 423.

California.— Mercier *v.* Lewis, 39 Cal. 532.

Maryland.—West *v.* Hall, 3 Harr. & J. 221; Townshend *v.* Duncan, 2 Bland 45; Lingan *v.* Henderson, 1 Bland 236; Ridgeway *v.* Toram, 2 Md. Ch. 303; Small *v.* Owings, 1 Md. Ch. 363.

Michigan.— Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230.

North Carolina.— Edwards *v.* Massey, 8 N. C. 359.

Vermont.— Thomas *v.* Warner, 15 Vt. 110.

Virginia.— Eib *v.* Martin, 5 Leigh 132.

See 19 Cent. Dig. tit. "Equity," §§ 656, 657.

Jurisdictional averments can never be supplied by answer. Tait *v.* American Freehold Land Mortg. Co., 132 Ala. 193, 31 So. 623.

Relief on the answer and evidence will not be given when they are directly opposed to the allegations of the bill. Skinner *v.* Barney, 19 Ala. 698.

47. Crease *v.* Lawrence, 48 Ark. 312, 3 S. W. 196; Sale *v.* McLean, 29 Ark. 612.

48. Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599 [*reversing* 73 Ill. App. 203].

49. *Alabama.*— Toulmin *v.* Hamilton, 7 Ala. 362.

Arkansas.— Christian *v.* Crocker, 25 Ark. 327, 99 Am. Dec. 223; Gartland *v.* Dunn, 11 Ark. 720.

Georgia.— Warthen *v.* Brantley, 5 Ga. 571; Rice *v.* Tarver, 4 Ga. 571.

Michigan.— Bigelow *v.* Sanford, 98 Mich. 657, 57 N. W. 1037; Torrent *v.* Hamilton, 95 Mich. 159, 54 N. W. 634; Barstow *v.* Smith, Walk. 394.

New Jersey.— Couse *v.* Columbia Powder Mfg. Co., (Ch. 1895) 33 Atl. 297; Olds *v.* Regan, (Ch. 1895) 32 Atl. 827; Bermes *v.* Frick, 38 N. J. Eq. 88; Miller *v.* Jamison, 24 N. J. Eq. 41.

New York.— New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592; Cherry *v.* Monro, 2 Barb. Ch. 618; Whitbeck *v.* Edgar, 2 Barb. Ch. 106; Crosby *v.* Berger, 4 Edw. 210.

Pennsylvania.— Hill *v.* Bonaffon, 2 Wkly. Notes Cas. 356.

Tennessee.— Payne *v.* Berry, 3 Tenn. Ch. 154.

joined because some defendants are not affected by both a defendant who is affected by both may not demur,[50] but if two entirely disconnected claims are joined any defendant may demur.[51] All defendants being affected by a non-joinder of necessary parties or by a misjoinder of plaintiffs, any may demur therefor.[52] It has been held that the court will not entertain a demurrer by one alone of several defendants whose liabilities are joint.[53] A defendant consenting to a decree providing for further action on the original bill, and who accepts the benefit of such decree, estops himself from thereafter demurring to such bill;[54] but an order denying a motion to dissolve an injunction does not preclude a defendant from demurring on the same ground upon which he moved to dissolve.[55] An answer waives objections to the form and manner of proceeding and if a defendant answers he cannot generally thereafter demur.[56] Leave must first be obtained to withdraw the answer,[57] and leave will not be given where there has been great delay in making the application and further proceedings have been taken.[58]

3. TIME TO DEMUR. Until recent times defendant might demur as of course to the whole bill, only within eight days of his appearance,[59] and if an order was made giving further time to demur, plead, or answer, it was always conditioned that defendant should not demur alone but must plead to or answer some part of the bill.[60] This strict rule was afterward changed, allowing according to circumstances from five to ten weeks to plead, answer, or demur, not demurring alone; but only twelve days were even then permitted to demur alone.[61] In the United States defendant may usually demur at any time within the original time to answer, but the matter is governed by statutes or rules.[62] Under the common rule to answer defendant may demur,[63] and the same is true where time is

Wisconsin.— Great Western Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373.

United States.—Buerk *v.* Imhaeuser, 8 Fed. 457; Hill *v.* Bonaffon, 12 Fed. Cas. No. 6,488, 2 Wkly. Notes Cas. (Pa.) 356.

See 19 Cent. Dig. tit. "Equity," § 491.

The rule is not restricted to such cases but forbids a demurrer by one for a statement defective as against another. Garner *v.* Lyles, 35 Miss. 176.

50. Torrent *v.* Hamilton, 95 Mich. 159, 54 N. W. 634; Atwill *v.* Ferrett, 1 Fed. Cas. No. 640, 2 Blatchf. 39.

51. Swift *v.* Eckford, 6 Paige (N. Y.) 22.

52. Peoria, etc., R. Co. *v.* Pixley, 15 Ill. App. 283. And see *supra*, V, H.

53. Von Glahn *v.* De Rossett, 76 N. C. 292.

54. McGehee *v.* Mott, 60 Ga. 159.

55. Augusta Nat. Bank *v.* Printup, 63 Ga. 570.

56. McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837; Newman *v.* Moody, 19 Fed. 858. Of course this rule does not prevail in jurisdictions where a defendant is permitted at the same time to demur and answer to the same matter. Rosset *v.* Greer, 3 W. Va. 1. If defendant answers the original bill he cannot demur generally to an amended bill. Evans *v.* Dunning, 3 Phila. (Pa.) 410.

Where a defendant dies after answer and proof taken, his executor cannot demur to the bill, as he can only defend in the same manner as his testator might have defended had he survived. Pope *v.* Towles, 3 Hen. & M. (Va.) 47.

57. Anderson *v.* Newman, 60 Miss. 532.

Even where a statute gives the right to change one's plea, a plea to the merits must be withdrawn before a demurrer can be filed. Hoadley *v.* Smith, 36 Conn. 371.

58. Sanderson *v.* Sanderson, 17 Fla. 820; Pancoast *v.* Reeves, 7 Phila. (Pa.) 383.

If leave is given and no objection taken the irregularity is waived. Pope *v.* Towles, 3 Hen. & M. (Va.) 47.

59. 2 Daniell Ch. Pr. 78.

60. Mitford Eq. Pl. 170.

61. Order X (1833).

62. U. S. Eq. Rule 18 requires a defendant to file his plea, demurrer, or answer on the rule day next succeeding that of entering his appearance. Defendant, however, may demur at any time before the bill is taken *pro confesso*. Oliver *v.* Decatur, 18 Fed. Cas. No. 10,494, 4 Cranch C. C. 458.

In Colorado, if a rule to plead expires in term-time, a demurrer may be filed at any time before application for a default; but if it expires in vacation a demurrer filed after the rule day will be taken from the file. Walker *v.* Tiffin Gold, etc., Min. Co., 2 Colo. 89.

In Georgia a demurrer for want of equity cannot be put in at the trial term, but this rule of practice does not apply where there was originally equity in the bill but plaintiff has abandoned it after the time to demur. Rose *v.* West, 50 Ga. 474. The right to demur may be lost by laches. Epping *v.* Aiken, 71 Ga. 600; Isaacs *v.* Tinley, 58 Ga. 457.

In West Virginia, as one may demur and plead at the same time and to the same matter, where an answer is on file defendant may demur under the same restrictions that he might answer at any time before final decree. Rosset *v.* Greer, 3 W. Va. 1.

63. Kilgour *v.* Crawford, 51 Ill. 249; Bracken *v.* Kennedy, 4 Ill. 558. Where a

extended by stipulation.[64] But a defendant who obtains a special extension of time to answer cannot under such an order demur.[65] Where an order for a decree *pro confesso* has been set aside with leave to answer, defendant may not demur.[66] A demurrer has been held too late after an order of reference,[67] and a demurrer filed out of time has been disregarded.[68] Where a demurrer is filed within time the court may permit a second one to be filed later.[69] One defendant may appear and demur before the others are served.[70]

4. Grounds of Demurrer — a. Ground Must Appear on Face of Bill — Speaking Demurrers. The purpose of a demurrer being to test the sufficiency of the bill,[71] it lies only for defects appearing on the face of the bill.[72] As no bill is sufficient unless it states facts sufficient to entitle plaintiff to the aid of a court of equity,[73] a defect in this respect, although it appears negatively only, will ground a demurrer.[74] Where other grounds are urged the defect must affirmatively appear. Thus where the bill states a *prima facie* case matter in bar can be taken advantage of by demurrer when it is stated without sufficient avoidance in the bill itself, but not otherwise.[75] A demurrer for want of necessary parties does not lie unless the bill shows the existence of persons whose presence is necessary, yet who are not made parties.[76] A demurrer on the ground that another action is pending will not lie unless the bill shows the pendency of such an action between the same parties in respect to the same subject-matter,[77] and a corporation defendant cannot on demurrer take advantage of a provision in its foreign or special charter unless such provision is disclosed by the bill.[78] A demurrer which seeks to violate these rules by relying on facts not appearing in the bill is termed a speaking demurrer,[79] and is bad.[80]

special order was agreed upon for a commission to take an answer, but complainant neglected to enter the order, and instead thereof entered and served the regular order, it was held that defendant might demur under the regular order. Lakens *v.* Fielden, 11 Paige (N. Y.) 644.

64. Bedell *v.* Bedell, 2 Barb. Ch. (N. Y.) 99.

65. Ulrici *v.* Papin, 11 Mo. 42; Davenport *v.* Sniffen, 1 Barb. (N. Y.) 223; Lakens *v.* Fielden, 11 Paige (N. Y.) 644; Cowman *v.* Lovett, 10 Paige (N. Y.) 559; Burrall *v.* Raineteaux, 2 Paige (N. Y.) 331.

Defendant in contempt for want of answer cannot purge his contempt by demurrer filed after attachment issued. Wallis *v.* Talmadge, 10 Paige (N. Y.) 443.

Order extending time "to answer or demur" authorizes defendant to demur to the whole bill. May *v.* Smith, 40 N. C. 187.

A defendant served by publication who applies within the time provided by statute and is given leave to answer may demur for substantial defects but not for those that are merely technical. Scott *v.* Millikin, 60 Ill. 108.

66. Hand *v.* Hand, 60 N. J. Eq. 518, 46 Atl. 770; Allen *v.* Bangus, 1 Swan (Tenn.) 404.

A non-resident defendant under such circumstances may demur. Garr *v.* Ogden, 4 Edw. (N. Y.) 625.

67. Hoadley *v.* Smith, 36 Conn. 371.

68. Trapnall *v.* Hill, 31 Ark. 345.

69. Harvey *v.* Richmond, etc., R. Co., 64 Fed. 19.

70. Jones *v.* Fulghum, 3 Tenn. Ch. 193.

71. See *supra*, VIII, C, 1, a.

72. *Alabama.*— Bromberg *v.* Heyer, 69 Ala. 22.

District of Columbia.— Phelps *v.* McDonald, 2 MacArthur 375.

Georgia.— Clarke *v.* East Atlanta Land Co., 113 Ga. 21, 38 S. E. 323; Griffin *v.* Stewart, 101 Ga. 720, 29 S. E. 29.

New Jersey.— Riley *v.* Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099.

Virginia.— Harris *v.* Thomas, 1 Hen. & M. 18.

United States.— Chicago, etc., R. Co. *v.* Macomb, 2 Fed. 18.

See 19 Cent. Dig. tit. "Equity," § 496.

73. See *supra*, VII, C, 1.

74. See *infra*, VIII, C, 4, c.

75. Tappan *v.* Evans, 11 N. H. 311; Post *v.* Beacon Vacuum Pump, etc., Co., 89 Fed. 1, 32 C. C. A. 151, 84 Fed. 371, 28 C. C. A. 431.

76. White *v.* Curtis, 2 Gray (Mass.) 467; Boston Water Power Co. *v.* Boston, etc., R. Corp., 16 Pick. (Mass.) 512; Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Sheffield, etc., Coal, etc., Co. *v.* Newman, 77 Fed. 787, 23 C. C. A. 459. Where a judgment creditor is mentioned in the bill, a demurrer for his non-joinder will not lie unless the bill states positively that the judgment is subsisting and unsatisfied. Brinkerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139.

77. Williamson *v.* Smith, 4 Pa. Dist. 307.

78. Aaron *v.* Supreme Lodge K. of H., (Miss. 1894) 15 So. 115; Clark *v.* Rhode Island Locomotive Works, 24 R. I. 307, 53 Atl. 47.

79. 2 Daniell Ch. Pr. 72.

80. *Florida.*— Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

b. Want of Jurisdiction. A want of jurisdiction apparent on the face of the bill is ground of demurrer.[81]

c. Want of Equity. Unless the bill presents a case of equitable cognizance and shows plaintiff to be entitled to the aid of a court of equity it is demurrable.[82] A demurrer for want of equity lies, however, only where taking all the allegations of the bill as established there would be no ground for a decree granting relief.[83] So defendant cannot single out a portion of a bill as not presenting a matter of equitable cognizance and demur thereto, if the bill otherwise states a case for equitable relief and the portion objected to presents a matter which equity, having acquired jurisdiction for other purposes, would dispose of in order to render the remedy complete.[84] A defendant may demur on the ground that plaintiff has an adequate remedy at law.[85] But where the bill shows equity, the demurrer cannot be sustained unless the existence of an adequate legal remedy affirmatively appears from the bill.[86] Under the codes it is generally held that the question whether a complaint or petition states a case at law or in equity cannot be raised by demurrer.[87]

Georgia.— Redd *v.* Wood, Ga. Dec., Pt. II, 174.

Mississippi.— Gray *v.* Regan, 23 Miss. 304.

New Jersey.— Teeter *v.* Veitch, (Ch. 1904) 57 Atl. 160; Black *v.* Shreeve, 7 N. J. Eq. 440.

New York.— Brooks *v.* Gibbons, 4 Paige 374; Tallmadge *v.* Lovett, 3 Edw. 563.

Pennsylvania.— Fitzsimmons *v.* Lindsay, 205 Pa. St. 79, 54 Atl. 488; Mengel *v.* Lehigh Coal, etc., Co., 24 Pa. Co. Ct. 152.

South Carolina.— Saxon *v.* Barksdale, 4 Desauss. 522.

United States.— Lamb *v.* Starr, 14 Fed. Cas. No. 8,021, Deady 350; Blackburn *v.* Stannard, 23 Fed. Cas. No. 1,468.

England.— Brownsword *v.* Edwards, 2 Ves, 243, 28 Eng. Reprint 157.

See 19 Cent. Dig. tit. "Equity," §§ 496, 511.

Treating as plea.— Such a demurrer may in the absence of objection be treated as a plea. U. S. *v.* Peralta, 99 Fed. 618.

81. *Georgia.*— Kendrick *v.* Whitfield, 20 Ga. 379.

Illinois.— Emerson *v.* Western Union R. Co., 75 Ill. 176.

Michigan.— Earle *v.* Humphrey, 121 Mich. 518, 80 N. W. 370.

North Carolina.— Smith *v.* Morehead, 59 N. C. 360.

Ohio.— Pease *v.* Sandusky Steamboat Co., 1 Ohio Dec. (Reprint) 150, 2 West. L. J. 550.

United States.— Noyes *v.* Willard, 18 Fed. Cas. No. 10,374, 1 Woods 187; Pond *v.* Vermont Valley R. Co., 19 Fed. Cas. No. 11,265, 12 Blatchf. 280.

See 19 Cent. Dig. tit. "Equity," § 497.

Exclusive federal jurisdiction.— Where the purpose of a bill in a state court is the appointment of a receiver for and the sale of a steam tow-boat, a demurrer will lie on the ground of the exclusive jurisdiction of the federal courts. Inskeep *v.* Hook, 8 Pa. Dist. 241.

Non-residence in county.— In Georgia it is not a ground of demurrer that one of the defendants does not reside in the county where the bill is filed. Lawson *v.* Cunningham, 21 Ga. 454.

Tenn. Code, § 4319, permitting a defendant by answer to rely on matters of demurrer does not apply to questions of jurisdiction, which must be taken by demurrer. Rankin *v.* Craft, 1 Heisk. 711.

82. Taylor *v.* Buchan, 16 Ga. 541; Morel *v.* Houstoun, R. M. Charlt. (Ga.) 284; Reed *v.* Johnson, 24 Me. 322; Maguire's Appeal, 102 Pa. St. 120; Newman *v.* Westcott, 29 Fed. 49.

83. Bell *v.* Clark, 71 Miss. 603, 14 So. 318; Bleeker *v.* Bingham, 3 Paige (N. Y.) 246; Bradshaw *v.* Bradshaw, 9 Pa. Dist. 1.

Where bill is framed in double aspect, one aspect entitling plaintiff to equitable relief, it is not demurrable for want of equity, because only on the hearing can it be determined whether the equitable aspect is well founded. Strawberry Hill *v.* Chicago, etc., R. Co., 41 Fed. 568. See also Hiatt *v.* Parker, 29 Kan. 765.

84. Champlin *v.* Parish, 3 Edw. (N. Y.) 581. See also *supra*, II, C.

85. *California.*— Lupton *v.* Lupton, 3 Cal. 120.

Illinois.— Wangelin *v.* Goe, 50 Ill. 459.

New Jersey.— Gifford *v.* Thorn, 7 N. J. Eq. 90.

Pennsylvania.— Maguire's Appeal, 102 Pa. St. 120.

Wyoming.—Ivinson *v.* Hutton, 1 Wyo. 178.

United States.— Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. 25.

See 19 Cent. Dig. tit. "Equity," § 497.

Repugnant stipulation.— Where with the demurrer was filed a stipulation, waiving objections on the ground that there was an adequate remedy at law, the stipulation was disregarded as repugnant to the demurrer. Richards *v.* Lake Shore, etc., R. Co., 124 Ill. 516, 16 N. E. 909 [*affirming* 25 Ill. App. 344].

86. Bunn *v.* Timberlake, 104 Ala. 263, 16 So. 97; Boston Water Power Co. *v.* Boston, etc., R. Corp., 16 Pick. (Mass.) 512; Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342. See also *supra*, II, A.

87. Reid *v.* Wilson, 109 Ga. 424, 34 S. E. 608; McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Georgia

d. Staleness and Laches. It is generally held broadly that a demurrer will lie for laches or staleness appearing on the face of the bill.[88] This rule is quite generally observed where the bill shows that the analogous period of limitations has expired,[89] and is sometimes limited to such cases.[90] It is held that a demurrer will lie where the bill without giving any excuse discloses either limitations[91] or

Independent School Dist. *v.* Victory Independent School Dist., 41 Iowa 321; Brown *v.* Mallory, 26 Iowa 469; Gray *v.* Coan, 23 Iowa 344; Pella *v.* Scholte, 21 Iowa 463; Træer *v.* Lytle, 20 Iowa 301; Lebanon *v.* Forrest, 15 B. Mon. (Ky.) 168; Tripp *v.* Hunt, 45 N. Y. App. Div. 100, 61 N. Y. Suppl. 585. *Contra,* Metropolitan El. R. Co. *v.* Johnston, 158 N. Y. 739, 53 N. E. 1128 [*affirming* 84 Hun 83, 32 N. Y. Suppl. 49]; Jackson *v.* New York, 62 N. Y. App. Div. 46, 70 N. Y. Suppl. 877 [*reversing* 34 Misc. 380, 69 N. Y. Suppl. 879].

This rule results from conformity of procedure and not from the uniting of legal and equitable jurisdictions in the same court. Where the court has jurisdiction both at law and in equity, the fact that the suit is brought in equity when it should be at law is ground for demurrer alone and not for an objection to the jurisdiction. Adams *v.* Beach, 1 Phila. (Pa.) 99.

88. *Alabama.*— Scruggs *v.* Decatur Mineral, etc., Co., 86 Ala. 173, 5 So. 440; Bercy *v.* Lavretta, 63 Ala. 374; Greenlees *v.* Greenlees, 62 Ala. 330.

California.—Sublette *v.* Tinney, 9 Cal. 423.

District of Columbia.— Cammack *v.* Carpenter, 3 App. Cas. 219.

Florida.— Johnson *v.* McKinnon, (1903) 34 So. 272.

Illinois.— Furlong *v.* Riley, 103 Ill. 628; Ilett *v.* Collins, 103 Ill. 74; Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 299, 454.

Iowa.— Pierson *v.* David, 1 Iowa 23.

Kansas.—Leavenworth *v.* Douglass, 59 Kan. 416, 53 Pac. 123.

Massachusetts.— Fogg *v.* Price, 145 Mass. 513, 14 N. E. 741.

New Jersey.— Dringer *v.* Jewett, 43 N. J. Eq. 701, 13 Atl. 664.

Ohio.—Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478.

Oregon.— Wilson *v.* Wilson, 41 Oreg. 459, 69 Pac. 923.

Pennsylvania.— Montgomery's Estate, 3 Brewst. 306.

Rhode Island.— Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001.

Tennessee.— McClung *v.* Sneed, 3 Head 218.

West Virginia.— Phillips *v.* Piney Coal Co., 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040; Whittaker *v.* Southwest Virginia Imp. Co., 34 W. Va. 217, 12 S. E. 507; Jackson *v.* Hull, 21 W. Va. 601.

United States.— Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718; Lansdale *v.* Smith, 106 U. S. 391, 1 S. Ct. 350, 27 L. ed. 219; Maxwell *v.* Kennedy, 8 How. 210, 12 L. ed. 1051; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520; Merrill *v.* Monticello, 66 Fed. 165; Hinchman *v.* Kelley, 54 Fed. 63, 4 C. C. A. 189; McCabe *v.* Mathews, 40 Fed. 338; Horsford *v.* Gudger, 35 Fed. 388 [*reversed* on stipulation 136 U. S. 639, 10 S. Ct. 1069, 34 L. ed. 556].

See 19 Cent. Dig. tit. "Equity," § 498.

89. *Alabama.*— Cary *v.* Simmons, 87 Ala. 524, 6 So. 416; Thompson *v.* Parker, 68 Ala. 387.

Arkansas.— Faulkner *v.* Thompson, 14 Ark. 478.

Georgia.— Caldwell *v.* Montgomery, 8 Ga. 106.

Illinois.— Parmelee *v.* Price, 105 Ill. App. 271.

United States.— Lansdale *v.* Smith, 106 U. S. 391, 1 S. Ct. 350, 27 L. ed. 219; Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470; Wisner *v.* Ogden, 30 Fed. Cas. No. 17,914, 4 Wash. 631.

England.— Hoare *v.* Peck, 2 L. J. Ch. 123, 6 Sim. 51, 9 Eng. Ch. 51; Hovenden *v.* Annesley, 2 Sch. & Lef. 617, 9 Rev. Rep. 119; Foster *v.* Hodgson, 19 Ves. Jr. 180, 34 Eng. Reprint 485. *Contra,* Deloraine *v.* Browne, 3 Bro. Ch. 633, 29 Eng. Reprint 739.

See 19 Cent. Dig. tit. "Equity," § 498.

Contra, in Connecticut (Bulkley *v.* Bulkley, 2 Day 363) and in New York under the code and before its adoption (Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067; Mt. Morris *v.* King, 77 Hun 18, 28 N. Y. Suppl. 281; Fellers *v.* Lee, 2 Barb. 488; McDowl *v.* Charles, 6 Johns. Ch. 132; Denston *v.* Morris, 2 Edw. 37).

In suit to recover property, real or personal, a demurrer will not lie unless the bill shows an adverse possession for the statutory period. Shorter *v.* Smith, 56 Ala. 208.

On demurrer by one defendant, it is error to dismiss as to all, as the defense is one which must be claimed. Solomon *v.* Solomon, 81 Ala. 505, 1 So. 82.

90. Baent *v.* Kennicutt, 57 Mich. 268, 23 N. W. 808; Sprague *v.* Rhodes, 4 R. I. 301; Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3; Cuthbert *v.* Creasy, 6 Madd. 189.

The defense of laches cannot be interposed by demurrer. Fairplay *v.* Park County, 29 Colo. 57, 67 Pac. 152; French *v.* Woodruff, 25 Colo. 339, 54 Pac. 1015; Ogilvy Irrigating, etc., Co. *v.* Insinger, (Colo. App. 1904) 75 Pac. 598; Sage *v.* Culver, 147 N. Y. 241, 41 N. E. 513; Gleason *v.* Carpenter, 74 Vt. 399, 52 Atl. 966. Where lapse of time creates not an absolute bar but only a presumption of satisfaction, a demurrer will not lie. Fellers *v.* Lee, 2 Barb. (N. Y.) 488; Drake *v.* Wild, 65 Vt. 611, 27 Atl. 427. *Contra,* Olden *v.* Hubbard, 34 N. J. Eq. 85; Bird *v.* Inslee, 23 N. J. Eq. 363.

91. Meyer *v.* Saul, 82 Md. 459, 33 Atl. 539.

laches,[92] but not where it excuses the delay.[93] In no case will the demurrer be good unless the bill distinctly and without the aid of inference discloses the existence of the defense.[94]

e. **Multifariousness.** A demurrer will lie for multifariousness and is generally the only remedy available to defendant therefor.[95]

f. **Objections Relating to Parties.** A demurrer lies where a want of necessary parties is disclosed by the bill itself.[96] Demurrer is also the appropriate remedy for misjoinder of parties, either plaintiff[97] or defendant.[98] Incapacity of plaintiff to sue, when it appears from the bill, may be raised by demurrer;[99] but defects in the service cannot be so raised.[1]

92. Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804; Nash *v.* Ingalls, 101 Fed. 645, 41 C. C. A. 545 [*affirming* 79 Fed. 510].

93. McGee *v.* Welch, 18 App. Cas. (D. C.) 177; Newberger *v.* Wells, 51 W. Va. 624, 42 S. E. 625; Ulman *v.* Iaeger, 67 Fed. 980.

Sufficiency of the excuse may be raised by the demurrer. Coryell *v.* Klehm, 157 Ill. 462, 41 N. E. 864.

94. *Mississippi.*—Matthews *v.* Sontheimer, 39 Miss. 174.

New Jersey.— Hoxsey *v.* New Jersey Midland R. Co., 33 N. J. Eq. 119.

New York.— Muir *v.* Leake, etc., Orphan House, 3 Barb. Ch. 477.

Rhode Island.— Warren *v.* Providence Tool Co., 19 R. I. 360, 33 Atl. 876.

United States.— Brush Electric Co. *v.* Ball Electric Light Co., 43 Fed. 899; Jones *v.* Slauson, 33 Fed. 632.

See 19 Cent. Dig. tit. "Equity," § 498.

No presumption can be indulged on demurrer in favor of a bill which shows an obviously stale demand. French *v.* Dickey, 3 Tenn. Ch. 302.

95. See *supra*, VII, G, 8. Where the demurrer is both for want of equity and for multifariousness and the bill shows equity, the demurrer may be overruled, although the bill is multifarious. Storrs *v.* Wallace, 54 Mich. 112, 19 N. W. 770.

96. *Arkansas.*— Porter *v.* Clements, 3 Ark. 364.

Florida.— Betton *v.* Williams, 4 Fla. 11.

Illinois.— Deniston *v.* Hoagland, 67 Ill. 265.

Kentucky.— Wolford *v.* Phelps, 2 J. J. Marsh. 31.

Maryland.— Ellicott *v.* Ellicott, 2 Md. Ch. 468.

Mississippi.— Harding *v.* Cobb, 47 Miss. 599.

New Jersey.— Wilson *v.* Bellows, 30 N. J. Eq. 282; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252.

New York.—Mitchell *v.* Lenox, 2 Paige 280.

North Carolina.— King *v.* Galloway, 58 N. C. 122; Little *v.* Buie, 58 N. C. 10.

Virginia.— Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671; Clayton *v.* Henley, 32 Gratt. 65.

West Virginia.—Barr *v.* Clayton, 29 W. Va. 256, 11 S. E. 899; Pappenheimer *v.* Roberts, 24 W. Va. 702.

United States.— Carey *v.* Brown, 92 U. S. 171, 23 L. ed. 469.

See 19 Cent. Dig. tit. "Equity," § 499.

Non-joinder of a merely proper party against whom no relief is prayed is not ground for demurrer (Graham *v.* Graham, 85 Ill. App. 460), nor is the non-joinder of a necessary but dispensable party, provided the bill states the reason for not joining him (Baker *v.* Atkins, 62 Me. 205; Palmer *v.* Stevens, 100 Mass. 461). See also *supra*, V, H, 3, b, (III). Where assignees of a mortgage sued to foreclose, describing themselves as trustees, it was held that a demurrer would not be sustained for non-joinder of the *cestui que trust*. It would not be presumed that the trust was one requiring such joinder. Curtis *v.* Tyler, 9 Paige (N. Y.) 432. In Massachusetts non-joinder of all the stockholders in a bill to charge stock-holders with corporate debts cannot be taken advantage of by demurrer. Essex County *v.* Lawrence Mach. Shop, 10 Allen (Mass.) 352.

97. Stookey *v.* Carter, 92 Ill. 129; Johnson *v.* Vail, 14 N. J. Eq. 423; Eureka Marble Co. *v.* Windsor Mfg. Co., 47 Vt. 430.

A demurrer to the entire bill lies where one plaintiff has no interest in the controversy. Clarkson *v.* De Peyster, 3 Paige (N. Y.) 336. And see *supra*, V, F, 2, c; V, H, 2.

98. Green *v.* Ingram, 16 Ga. 164; White *v.* Delschneider, 1 Oreg. 254. *Contra*, Fry *v.* Street, 37 Ark. 39. See *supra*, V, H, 3, a. The fact that a bill to foreclose a mortgage alleges nothing against a defendant will not ground a demurrer, if the notice annexed to the subpœna shows that he was brought in as claiming a mortgage lien on the property. Wheeler, etc., Mfg. Co. *v.* Filer, 52 N. J. Eq. 164, 28 Atl. 13.

99. Hoyt *v.* Hoyt, 58 Vt. 538, 3 Atl. 316.

1. Where the proper parties are named in the bill, a demurrer for want of parties will not lie on the ground that some have not been served. Kilgour *v.* New Orleans Gaslight Co., 14 Fed. Cas. No. 7,764, 2 Woods 144. It is no ground of demurrer that the bill was not served. Livingston *v.* Marshall, 82 Ga. 281, 11 S. E. 542. If a defendant is charged in the bill in the proper capacity a demurrer will not lie because the subpœna was issued without stating the capacity in which he is sued. Walton *v.* Herbert, 4 N. J. Eq. 73. Under a statute (Rev. p. 1189) requiring a ticket, describing land to be affected, to be attached to the subpœna, a failure to do so cannot be raised by demurrer. Ludington *v.* Elizabeth, 32 N. J. Eq. 159. One cannot by demurrer raise the point that a failure to issue process on the original bill prevented an amendment from relating back

g. Statute of Frauds. The rule of common-law pleading that, with respect to acts valid at common law but regulated as to mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute,[2] so far prevails in equity as to protect a bill so framed against demurrer,[3] and therefore a demurrer will not lie where a bill sets out an agreement within the statute of frauds without alleging a compliance with the statute.[4]

h. Former Decree. If a bill shows distinctly that a decree has been rendered in a former suit between the parties with regard to the same subject-matter a demurrer will lie, whether the present bill be inconsistent with that decree,[5] or merely unnecessary because full relief could be had under the former decree.[6] In the latter case, however, the bill is not demurrable, unless it discloses that the relief already had extends to the entire case now made.[7]

i. Prematureness. A demurrer will lie to a bill which appears on its face to have been filed prematurely, before plaintiff became entitled to enforce his right.[8]

j. Bills Charging Fraud. A general demurrer to a bill charging fraud is bad.[9] Such allegations must be answered,[10] and defendant may then demur as to other grounds of relief.[11] The restriction does not apply when the facts alleged are insufficient to constitute fraud,[12] or when they do not entitle plaintiff to any relief.[13]

k. Defects in Form of the Bill. Objections to the form of the bill must generally be taken by demurrer.[14] Defects which may be so objected to are such as the failure in the introduction to state the places of abode of the parties;[15] failure to allege facts positively where positiveness is required,[16] or want of certainty generally;[17] the want of an offer to do equity where such is required;[18] and the want of an oath to the bill in cases where one is required.[19] As to the failure of counsel to sign the bill the rule is not uniform,[20] nor is it as to a failure to file exhibits with the bill.[21] A bill is not demurrable for improperly waiving

to save the statute of limitations. Green *v.* Tippah County, 58 Miss. 337.

2. Stephens Pl. 373.

3. Pleading under this rule is not always, however, advisable. 1 Daniell Ch. Pr. 473.

4. Whiting *v.* Dyer, 21 R. I. 85, 41 Atl. 895; Cranston *v.* Smith, 6 R. I. 231. And see, generally, FRAUDS, STATUTE OF.

5. Davis *v.* Hall, 57 N. C. 403.

6. Brooks *v.* Gibbons, 4 Paige (N. Y.) 374.

7. Allis *v.* Stowell, 15 Fed. 242.

8. Haskell *v.* Waties, 2 Rich. Eq. (S. C.) 8; Sarter *v.* Gordon, 2 Hill Eq. (S. C.) 121.

9. Stovall *v.* Northern Bank, 5 Sm. & M. (Miss.) 17; Niles *v.* Anderson, 5 How. (Miss.) 365; Ross *v.* Vertner, Freem. (Miss.) 587; Carter *v.* Longworth, 4 Ohio 384. And see, generally, FRAUD. Such a demurrer will not be favored. Rambo *v.* Rambo, 4 Desauss. (S. C.) 251.

10. Schley *v.* Dixson, 24 Ga. 273, 71 Am. Dec. 121; Miller *v.* Saunders, 17 Ga. 92; Rollins *v.* Thompson, 13 Sm. & M. (Miss.) 522; Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456; Burnley *v.* Jeffersonville, 4 Fed. Cas. No. 2,181, 3 McLean 336. Where the circumstances charged in the bill have the appearance of collusion or fraud, defendant will be held to strict rules in answering. Smith *v.* Loomis, 5 N. J. Eq. 60.

11. Hentz *v.* Delta Bank, 76 Miss. 429, 24 So. 902.

12. Bell *v.* Henderson, 6 How. (Miss.) 311.

13. Hanson *v.* Field, 41 Miss. 712; Hamilton *v.* Lockhart, 41 Miss. 460; Box *v.* Stanford, 13 Sm. & M. (Miss.) 93, 51 Am. Dec. 142.

14. Pelham *v.* Edelmeyer, 15 Fed. 262, 21 Blatchf. 188.

Mispleading in matter of form alone is generally not prejudicial and will be disregarded after answer. Tiernan *v.* Poor, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225. See also *supra*, VIII, C, 1, c.

15. Winnipissiogee Lake Co. *v.* Worster, 29 N. H. 433; Rowley *v.* Eccles, 1 Sim. & St. 511, 1 Eng. Ch. 511.

16. Uxbridge *v.* Staveland, 1 Ves. 56, 27 Eng. Reprint 888.

Under the codes an objection that an allegation is on information and belief instead of positively must be raised by motion. Jones *v.* Pearl Min. Co., 20 Colo. 417, 38 Pac. 700.

17. See *supra*, VII, C, 2.

Incorrect conclusion drawn by pleader from facts stated is not ground for demurrer. Boutwell *v.* Vandiver, 123 Ala. 634, 26 So. 322, 82 Am. St. Rep. 149; Rapier *v.* Gulf City Paper Co., 64 Ala. 330.

18. Godbolt *v.* Watts, 2 Anstr. 543.

19. Gove *v.* Pettis, 4 Sandf. Ch. (N. Y.) 403; 1 Daniell Ch. Pr. 503.

Where affidavit to only part of the bill is required a demurrer to the whole because it is not sworn to is bad. Laight *v.* Morgan, 2 Cai. Cas. (N. Y.) 344.

20. See *infra*, XIV, A, 1.

21. Stallworth *v.* Farnham, 64 Ala. 259. *Contra*, Parsons *v.* Wilkerson, 10 Mo. 713. Where such failure affects only a prayer for

an answer under oath.[22] Illegibility is not ground for demurrer,[23] nor is the leaving of blanks not relating to matters of substance.[24] It is said that a demurrer will lie for defects in the prayer of the bill,[25] but it is no ground for demurrer that a bill improperly prays for incidental relief.[26]

1. Demurrers to Discovery. Where, as is now usual, relief is the main object of a bill and the discovery sought is incidental thereto, a demurrer to the relief extends to the discovery.[27] But the discovery may have a further purpose and not be incidental to relief, and in such case, if it be improperly sought, defendant may demur to so much of the bill as seeks discovery;[28] and although the discovery be incidental to relief properly sought, defendant may demur to the discovery if plaintiff be not entitled thereto.[29] The principal grounds for such demurrers are that the bill calls on defendant to answer charges imputing to him a criminal offense,[30] or subjecting him to a penalty or forfeiture,[31] or calls upon him to disclose a privileged professional communication.[32] In order to ground the demurrer it need not appear that the answer must necessarily have such effect or that it alone would produce such an effect. It is sufficient if it appears from the bill that such might be the probable effect,[33] or that the answer would be one step in a series having such a result.[34] The particular nature of these and kindred

an injunction which is only part of the object of the bill, a general demurrer will not lie. Miller *v.* Baltimore County Marble Co., 52 Md. 642.

22. Because such waiver is void and defendant may still answer under it. Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347.

Motion to strike out the waiver is the remedy. Springfield Co. *v.* Ely, 44 Fla. 319, 32 So. 892.

23. Downer *v.* Staines, 4 Wis. 372, 5 Wis. 159.

24. McKenzie *v.* Baldridge, 49 Ala. 564.

25. Kuchenbeiser *v.* Berkert, 41 Ill. 172; Norton *v.* Hixon, 25 Ill. 439, 79 Am. Dec. 338.

A bill without prayer for general relief and asking only for special relief, not warranted by its statement, is demurrable. Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059. But a demurrer will not be sustained under such circumstances where the statute prescribes the relief which should be granted. Hipp *v.* Huchett, 4 Tex. 20.

A demurrer for multifariousness without specifying the particulars will not reach the prayer. Dillard, etc., Co. *v.* Smith, 105 Tenn. 372, 59 S. W. 1010.

Under the codes defects in the prayer are not ground of demurrer. Rollins *v.* Forbes, 10 Cal. 299; Saline County *v.* Sappington, 64 Mo. 72; Lester *v.* Seilliere, 50 N. Y. App. Div. 239, 63 N. Y. Suppl. 748; Logan *v.* Moore, 54 N. Y. Suppl. 462; Garner *v.* Thorn, 56 How. Pr. (N. Y.) 452.

26. Walsh *v.* King, 74 Mich. 350, 41 N. W. 1080; Payne *v.* Berry, 3 Tenn. Ch. 154.

27. Manning *v.* Drake, 1 Mich. 34; Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35; Souza *v.* Belcher, 3 Edw. (N. Y.) 117; Boyd *v.* Hoyt, 5 Paige (N. Y.) 65; Mitford Eq. Pl. 148.

Demurrer lies to the whole bill in such case if plaintiff is not entitled to relief (Johnson *v.* Ford, 109 Fed. 501), or if jurisdiction depends on the right to discovery and a good case for relief is not stated (Brockway *v.* Copp, 3 Paige (N. Y.) 539; Livingston *v.* Harris, 3 Paige (N. Y.) 528).

A demurrer to the discovery only will be overruled if it would be equally valid to the relief. Brownell *v.* Curtis, 10 Paige (N. Y.) 210; Wistar *v.* McManes, 54 Pa. St. 318, 93 Am. Dec. 700.

If defendant wishes to avoid full answer it has been said that he must demur to the discovery. Weisman *v.* Heron Min. Co., 57 N. C. 112; Payne *v.* Hathaway, 3 Vt. 212. See criticism of this view in Langdell Eq. Pl. 97.

28. Manning *v.* Drake, 1 Mich. 34; Mitford Eq. Pl. 148. If plaintiff, entitled to discovery only, prays also for relief, the whole bill is demurrable. Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35.

29. Mitford Eq. Pl. 149.

30. Dennison *v.* Yost, 61 Md. 139; Winsor *v.* Bailey, 55 N. H. 218; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; East India Co. *v.* Campbell, 1 Ves. 246, 27 Eng. Reprint 1010. The demurrer must be confined to that part of the bill seeking such particular discovery. Weisman *v.* Heron Min. Co., 57 N. C. 112.

31. Cadwallader *v.* Granville Alexandrian Soc., 11 Ohio 292; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Suffolk *v.* Green, 1 Atk. 450, 26 Eng. Reprint 286; Sharp *v.* Carter, 3 P. Wms. 375, 24 Eng. Reprint 1108.

32. U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396.

33. Northwestern Bank *v.* Nelson, 1 Gratt. (Va.) 108.

Where scienter was necessary to liability to the penalty, it was held that defendant could not demur to discovery of the act, the bill not charging guilty knowledge. Le Roy *v.* Veeder, 1 Johns. Cas. (N. Y.) 417.

34. Paxton *v.* Douglas, 19 Ves. Jr. 225, 12 Rev. Rep. 175, 34 Eng. Reprint 502.

exemptions from the general duty of testifying is not peculiar to defendants in equity and is elsewhere treated.[35] A defendant may also demur to discovery of things immaterial to the relief claimed,[36] or to the discovery of a title not in privity with that of plaintiff,[37] or of matters in hazard of a title equal in equity with that of plaintiff, as that of a purchaser without notice.[38] A demurrer to the discovery will not lie because an oath to the answer is waived,[39] and of course it does not lie unless the impropriety of discovery appears on the face of the bill.[40] Where for the latter reason a demurrer will not lie defendant may answer, omitting the objectionable matter, and resist exceptions.[41]

5. Forms of Demurrers — a. In General. A demurrer should be entitled, to indicate its character, "the demurrer of C D to the bill of complaint of A B."[42] Then comes a formal protestation against the truth of the bill,[43] and if the demurrer be partial a designation of the portion of the bill demurred to.[44] The grounds of the demurrer are then stated, and the demurrer closes with a formal conclusion, averring in general terms "divers other errors and defects" and praying judgment whether defendant should make further answer.[45] The demurrer must be signed by counsel and must in some jurisdictions be further fortified by certificate or affidavit that it is deemed well taken and is not for delay.[46]

b. Necessity of Stating Grounds. It is not sufficient for defendant to state merely that he demurs to the bill, but he must state the grounds upon which he demurs.[47] For some purposes it is sufficient, however, to state the grounds in very broad and general terms, while in others they must be stated with particularity.[48] This gives rise to a classification of demurrers as general or special.[49]

c. General Demurrers — (I) *What Demurrers Are General.* A general demurrer goes only to the substance of the bill,[50] and in general terms assigns as ground of demurrer that the bill contains no matter of equity whereon the court can give plaintiff relief.[51] Demurrers which depart from the ordinary formula, but use language having a similar scope, are often treated as general demurrers.[52]

35. See Criminal Law, 12 Cyc. 400 *et seq.*; and, generally, Witnesses.

36. Montague *v.* Dudman, 2 Ves. 396, 30 Eng. Reprint 253.

37. Stroud *v.* Deacon, 1 Ves. 37, 27 Eng. Reprint 876.

38. Jerrard *v.* Saunders, 2 Ves. Jr. 454, 30 Eng. Reprint 721.

39. Payne *v.* Berry, 3 Tenn. Ch. 154.

40. Bliss *v.* Parks, 175 Mass. 539, 56 N. E. 566. For this reason a demurrer to discovery sought by an amended bill will not lie on the ground that such discovery has already been given by answer to the original. Chazournes *v.* Mills, 2 Barb. Ch. (N. Y.) 466.

41. Chazournes *v.* Mills, 2 Barb. Ch. (N. Y.) 466. See also Burns *v.* Hobbs, 29 Me. 273.

42. 2 Daniell Ch. Pr. 68. This form should be varied according to circumstances, as "the joint and several demurrer of C D and E F," etc., or, if accompanied by answer, "the demurrer and answer of C D," etc. Barton Suit Eq. 106; 2 Daniell Ch. Pr. 68.

A demurrer to an amended bill may be so styled; it is not necessary to style it a demurrer to the original and amended bill. Smith *v.* Bryon, 3 Madd. 428. See also Griffin *v.* Augusta, etc., R. Co., 72 Ga. 423.

43. Probably borrowed from the protestation of common-law pleading with a view to avoid concluding the pleader in later proceedings by the admissions implied from the demurrer. Mitford Eq. Pl. 173.

44. 2 Daniell Ch. Pr. 69.

45. See form in Barton Suit Eq. 106.

46. See *infra*, XIV, B, 3.

47. Nash *v.* Smith, 6 Conn. 421; Duffield *v.* Greaves, Cary 87, 21 Eng. Reprint 47; 2 Daniell Ch. Pr. 71; Mitford Eq. Pl. 173. The grounds should be stated without argument. Harrington *v.* McLean, 62 N. C. 258.

A demurrer misstating the effect of a bill may be overruled. Larter *v.* Canfield, 59 N. J. Eq. 461, 45 Atl. 616.

48. 2 Daniell Ch. Pr. 71.

49. See *infra*, VIII, C, 5, c, d.

50. Hoskins *v.* Hattenback, 14 Iowa 314; Harrington *v.* McLean, 62 N. C. 258; Corrothers *v.* Sargent, 20 W. Va. 351; Nicholas *v.* Murray, 18 Fed. Cas. No. 10,223, 5 Sawy. 320.

51. Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25; Barton Suit Eq. 108.

Terms distinguished.—Confusion sometimes arises from styling a demurrer to the entire bill a general demurrer and one to part of the bill a special demurrer. The latter is more properly styled a partial demurrer, and the former, for want of a better term and to avoid confusion, a demurrer to the whole bill. This confusion of terms leads to the frequent practice of styling a general demurrer, from its language, a demurrer for want of equity.

52. As where a demurrer states several special reasons going to the general equity of the bill. Ideal Clothing Co. *v.* Hazle, 126

In some states there are statutes or rules requiring in all cases a specification of the grounds of demurrer, and in whole or in part abolishing the use of general demurrers.[53]

(11) *When Applicable.* A general demurrer for want of equity is good only where the bill fails to state any ground whatever for equitable relief.[54] If such a case be stated the demurrer must be overruled, however imperfect the manner of the statement may be.[55] To sustain the demurrer the court must be satisfied that no discovery or proof properly called for by the bill can make the subject-matter of the suit a proper case for equitable relief.[56]

d. Special Demurrers. A special demurrer particularly pointing out the cause

Mich. 262, 85 N. W. 735; Golden *v.* Goode, 76 Miss. 400, 24 So. 905. A demurrer is general when it challenges the jurisdiction of the court over the persons of defendant and also over the subject-matter. Hentz *v.* Delta Bank, 76 Miss. 429, 24 So. 902.

A motion to strike out a bill because "it shows no ground for the interposition of a court of equity" is in effect a general demurrer. Meyers *v.* Schuman, (N. J. Ch. 1895) 31 Atl. 460.

A speaking demurrer (see *supra*, VIII, C, 4, a) has been treated as a general demurrer. Burroughs School *v.* Horry County, 62 S. C. 68, 39 S. E. 793.

The usual formula of the codes that no facts are stated sufficient to constitute a cause of action is unknown to chancery practice and is at most a general demurrer. Nicholas *v.* Murray, 18 Fed. Cas. No. 10,223, 5 Sawy. 320.

Under the codes vague statements, not following the prescribed form, are disregarded. Bristol *v.* New England R. Co., 70 Conn. 305, 39 Atl. 235, 40 L. R. A. 479; Martin *v.* Martin, 74 Ind. 207.

53. Ala. Code, § 3350, prohibits the hearing of a demurrer which assigns merely that there is no equity in the bill. Pate *v.* Hinson, 104 Ala. 599, 16 So. 527; McGuire *v.* Van Pelt, 55 Ala. 344; Erwin *v.* Reese, 54 Ala. 589; Hart *v.* Clark, 54 Ala. 490; Chambers *v.* Wright, 52 Ala. 444.

Tenn. Code, § 2934, has practically the same effect. Fitzgerald *v.* Cummings, 1 Lea 232; Finley *v.* McCormick, 6 Heisk. 392; Chesney *v.* Rodgers, 1 Heisk. 239.

In New Jersey a rule of court requires a demurrer, whether general or special, to state the particular grounds on which it is based. A general assignment of want of equity is held to satisfy this rule where such want of equity is obvious from a mere inspection of the bill, but not otherwise. Demarest *v.* Terhune, 62 N. J. Eq. 663, 50 Atl. 664; Parker *v.* Stevens, 61 N. J. Eq. 163, 47 Atl. 573; Larter *v.* Canfield, 59 N. J. Eq. 461, 45 Atl. 616; Essex Paper Co. *v.* Greacen, 45 N. J. Eq. 504, 19 Atl. 466. Where performance of a contract is essential to relief, the failure of a bill to allege such performance may be reached by general demurrer. Goldengay *v.* Smith, 62 N. J. Eq. 354, 50 Atl. 456. Still a demurrer on the ground that the bill does not present a case sufficient for answer or relief will be stricken out on motion. Waldron *v.* Bishop, 58 N. J. Eq. 583, 43 Atl. 1098 [*affirming* 56 N. J. Eq. 484, 40 Atl. 447]. But see Demarest *v.* Terhune, 62 N. J. Eq. 663, 50 Atl. 664.

54. *Florida.*— Orlando *v.* Equitable Bldg., etc., Assoc., (1903) 33 So. 986; Louisville, etc., R. Co. *v.* Gibson, 43 Fla. 315, 31 So. 230.

Georgia.— Harden *v.* Miller, Dudley 120.

Illinois.— Wormley *v.* Wormley, 207 Ill. 411, 69 N. E. 865.

Minnesota.—Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

West Virginia.— Miller *v.* Hare, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491.

United States.— Edwards *v.* Bay State Gas Co., 91 Fed. 946.

See 19 Cent. Dig. tit. "Equity," § 509.

It turns the inquiry solely to the equities of the bill. Wellborn *v.* Tiller, 10 Ala. 305.

Constitutionality of statute.— Where a complaint sought to restrain the collection of a tax and alleged that the statute under which it was levied was unconstitutional, a general demurrer raised the question of the validity of the statute. Howland *v.* Kenosha County, 19 Wis. 247.

Under the codes it has been held that where the complaint attempts to state an equitable cause of action, a general demurrer raises the question whether the plaintiff is entitled to the relief demanded (Copeland *v.* Cheney, 116 Ga. 685, 43 S. E. 59; Stokes *v.* Sprague, 110 Iowa 89, 81 N. W. 195), or whether he has an adequate remedy at law (Glover *v.* Hargadine-McKittrick Dry-Goods Co., 62 Nebr. 483, 87 N. W. 170; Gullickson *v.* Madsen, 87 Wis. 19, 57 N. W. 965; Lawson *v.* Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. Rep. 528). *Contra*, Foster *v.* Watson, 16 B. Mon. (Ky.) 377.

55. Robinson *v.* Kunkleman, 117 Mich. 193, 75 N. W. 451; Merrifield *v.* Ingersoll, 61 Mich. 4, 27 N. W. 714. See also Freeman *v.* Reagan, 26 Ark. 373.

56. Pleasants *v.* Fay, 13 App. Cas. (D. C.) 237; Morton *v.* Granada Male, etc., Academies, 8 Sm. & M. (Miss.) 773; Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. (N. Y.) 583, 54 N. Y. Suppl. 116; Le Roy *v.* Veeder, 1 Johns. Cas. (N. Y.) 417; Sprague *v.* Rhodes, 4 R. I. 301. It must be certain that the bill would be dismissed at the hearing on any state of the proof, appropriate to the allegations, and no inferences of fact can be drawn unfavorable to plaintiff. Sprague *v.* Rhodes, 4 R. I. 301; Dike *v.* Greene, 4 R. I. 285.

must be resorted to in order to reach any formal defect,[57] such as the failure to name defendant in the prayer for process,[58] suing on behalf of plaintiff and others instead of for plaintiff alone,[59] the improper framing of the bill to obtain the relief prayed,[60] or in general, any defects readily curable by amendment.[61] A special demurrer must also be resorted to, where facts are stated sufficient to call for relief, in order to attack the statement of such facts for want of certainty,[62] or inconsistency.[63] A demurrer for want of parties must be special, pointing out the necessary parties who are omitted, by name or otherwise.[64] A demurrer for misjoinder of parties must also be special.[65] Great care should be taken to point out the precise defect, wherever a special ground is stated.[66]

e. Demurrers Ore Tenus. The rigor of requiring the grounds of demurrer to be accurately stated is moderated in practice by permitting a defendant, who has on record a demurrer sufficient in form, to point out and argue on the hearing grounds of demurrer in addition to those formally assigned.[67] This is called demurring *ore tenus*.[68] Thus where a general demurrer fails defendant may

57. *Iowa.*—Hoskins *v.* Hattenback, 14 Iowa 314.

Maine.— Laughton *v.* Harden, 68 Me. 208.

New Jersey.— Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164.

North Carolina.—Harrington *v.* McLean, 62 N. C. 258.

Vermont.— Stewart *v.* Flint, 57 Vt. 216.

See 19 Cent. Dig. tit. "Equity," §§ 506–510.

58. Boon *v.* Pierpont, 28 N. J. Eq. 7. Or in the introduction where the rules so require. McCoy *v.* Boley, 21 Fla. 803.

59. Parish *v.* Sloan, 38 N. C. 607.

60. Proctor *v.* Plumer, 112 Mich. 393, 70 N. W. 1028.

61. Forbes *v.* Whitlock, 3 Edw. (N. Y.) 446.

62. *Michigan.*— Farwell *v.* Johnston, 34 Mich. 342.

Minnesota.—Chouteau *v.* Rice, 1 Minn. 106.

New Jersey.— Wilson *v.* Hill, 46 N. J. Eq. 367, 19 Atl. 1097.

Pennsylvania.— Brady *v.* Standard Loan Assoc., 14 Wkly. Notes Cas. 419.

Wisconsin.—Farmers' L. & T. Co. *v.* Fisher, 17 Wis. 114.

United States.— Pacific Live-Stock Co. *v.* Hanley, 98 Fed. 327.

See 19 Cent. Dig. tit. "Equity," §§ 507, 509.

63. Murrell *v.* Jones, 40 Miss. 565; Brady *v.* Standard Loan Assoc., 14 Wkly. Notes Cas. (Pa.) 419.

64. *Alabama.*— Chambers *v.* Wright, 52 Ala. 444; Chapman *v.* Hamilton, 19 Ala. 121.

California.— Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Georgia.— Parker *v.* Cochran, 97 Ga. 249, 22 S. E. 961; Hughes *v.* Hughes, 72 Ga. 173; Hightower *v.* Mustian, 8 Ga. 506.

New York.— Dias *v.* Bouchaud, 10 Paige 445.

North Carolina.— Caldwell *v.* Blackwood, 54 N. C. 274.

West Virginia.—Robinson *v.* Dix, 18 W. Va. 528.

United States.— Dwight *v.* Central Vermont R. Co., 9 Fed. 785, 20 Blatchf. 200.

See 19 Cent. Dig. tit. "Equity," § 506. See also *supra*, V, H.

Demurrer overruled reserving objection.— Where the omitted party would be a formal party for one purpose of the bill but indispensable for another, a general demurrer was overruled, reserving to defendant the right to insist by his answer upon the objection so far as he was indispensable. Gorham *v.* Gorham, 3 Barb. Ch. (N. Y.) 24.

65. Reese *v.* Reese, 89 Ga. 645, 15 S. E. 846; Jackson *v.* Glos, 144 Ill. 21, 32 N. E. 536.

66. Acquiescence.— A statement that the "right of complainant is stale" merely implies that plaintiff has slept on his rights a long time and does not raise the point that the bill shows acquiescence. Ashurst *v.* Peck, 101 Ala. 499, 14 So. 541.

Limitations.— Merely alleging the statute of limitations as a ground does not raise the point that the bill does not sufficiently allege a disability taking the case out of the statute. Fearn *v.* Shirley, 31 Miss. 301, 66 Am. Dec. 575. Where the demurrer stated the statute of limitations, it did not reach the leaving of a blank in the bill where a date should have appeared which would fix the accrual of the right. Watson *v.* Byrd, 53 Miss. 480.

Want of title to sue.— A demurrer to a bill by an assignee of a mortgage on the ground that plaintiff had not shown that she was the owner or that an executor was authorized to assign does not raise the objection that the heirs and executor of the mortgagee should be parties. Marsh *v.* Wells, 89 Ill. App. 485.

A demurrer for misjoinder of defendants and multifariousness does not raise the point that certain parties could not be joined by amendment. Schaub *v.* Welded Barrel Co., (Mich. 1902) 90 N. W. 335.

67. McDermott *v.* Blois, R. M. Charlt. (Ga.) 281; Vanhorn *v.* Duckworth, 42 N. C. 261; Hastings *v.* Belden, 55 Vt. 273; Crouch *v.* Hickin, 1 Keen 385, 15 Eng. Ch. 385.

68. 2 Daniell Ch. Pr. 73.

In code practice the term is sometimes applied to arguing matter of demurrer on the

demur *ore tenus* for want of parties,[69] or for misjoinder,[70] or because the suit was not brought by next friend.[71] A ground not formally assigned nor assigned *ore tenus* below cannot generally be assigned *ore tenus* on appeal.[72] A demurrer *ore tenus* must be coextensive with the demurrer of record, that is to say, if the formal demurrer goes to the whole bill grounds cannot be assigned *ore tenus* going to only a part thereof.[73] A defendant is not allowed costs on the sustaining of a demurrer *ore tenus*;[74] and on the other hand plaintiff is generally allowed costs on the overruling of the formal demurrer, although the demurrer *ore tenus* is sustained.[75]

f. Partial Demurrers. As a demurrer is an entirety and must be overruled altogether, if bad in part,[76] defendant must not demur to the whole bill if any distinct part is not open to the objection, but he must in that case confine his demurrer to that portion of the bill to which it is applicable.[77] For the same reason a demurrer to several parts of a bill is bad if any of the parts demurred to is not open to the objection urged.[78] On the other hand a partial demurrer cannot be directed to allegations not separable from the rest of the bill,[79] and not together and alone constituting the basis of some portion of the relief sought.[80] A demurrer to that part of a bill seeking a writ of ne exeat is not good, for the reason that such writ is not in itself a remedy, but is merely a provisional writ which is used as a means to effectuate the remedy.[81] It is an indispensable

trial of issues of fact. See Hoff *v.* Olson, 101 Wis. 118, 76 N. W. 1121, 70 Am. St. Rep. 903; Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891; Sherry *v.* Smith, 72 Wis. 339, 39 N. W. 556.

69. Van Orden *v.* Van Orden, (N. J. Ch. 1898) 41 Atl. 671; Stillwell *v.* McNeely, 2 N. J. Eq. 305.

On appeal.— Where the demurrer was for want of parties but defective for not showing who ought to have been made parties, and was sustained below, defendant was permitted to raise the objection *ore tenus* on appeal. Caldwell *v.* Blackwood, 54 N. C. 274.

70. Barrett *v.* Doughty, 25 N. J. Eq. 379.

71. Garlick *v.* Strong, 3 Paige (N. Y.) 440.

72. Walker *v.* Smith, 28 Ala. 569; Somerby *v.* Buntin, 118 Mass. 279, 19 Am. Rep. 459. See, however, Caldwell *v.* Blackwood, 54 N. C. 274.

73. Clark *v.* Davis, Harr. (Mich.) 227; Equitable Life Assur. Soc. *v.* Paterson, 1 Fed. 126; Pitts *v.* Short, 17 Ves. Jr. 213, 34 Eng. Reprint 82. *Contra*, Wright *v.* Dame, 1 Metc. (Mass.) 237.

74. Tourton *v.* Flower, 3 P. Wms. 369, 24 Eng. Reprint 1105.

75. Atty.-Gen. *v.* Brown, 1 Swanst. 265, 36 Eng. Reprint 384; Durdant *v.* Redman, 1 Vern. Ch. 78, 23 Eng. Reprint 324.

76. See *infra*, VIII, C, 6, c, (II).

77. Moore *v.* Alabama Nat. Bank, 120 Ala. 89, 23 So. 831; Crowder *v.* Denny, 3 Head (Tenn.) 359. A demurrer to the entire bill will not reach unnecessary charges contained therein (Beach *v.* Beach, 11 Paige (N. Y.) 161), or a prayer for relief which is merely too broad (Whitbeck *v.* Edgar, 2 Barb. Ch. (N. Y.) 106).

Objections relating to parties.— A demurrer to whole bill for want of parties is bad if as to any claim of the bill there is no defect of parties. Weston *v.* Blake, 61 Me. 452; Trenton Pass. R. Co. *v.* Wilson, 53 N. J. Eq. 577, 32 Atl. 1. But where the bill as it stands entitles plaintiff to certain relief and would entitle him to other relief if other parties were added, and the prayer is for such other relief, defendant may demur to the whole bill for want of parties. Dart *v.* Palmer, 1 Barb. Ch. (N. Y.) 92. Where a bill shows a demand for which all the plaintiffs properly join, a demurrer to the entire bill for misjoinder of plaintiffs is bad, although the bill embraces a claim for one of the plaintiffs alone. Clarkson *v.* De Peyster, 3 Paige (N. Y.) 320.

Staleness.— Where a portion of the relief is barred by lapse of time and a portion not, the demurrer must be confined to that part asserting the stale demand. Radcliff *v.* Rowley, 2 Barb. Ch. (N. Y.) 23.

A demurrer to discovery must be confined to that portion of the bill seeking discovery of privileged matter. Burpee *v.* Smith, Walk. (Mich.) 327.

Charges of fraud must be answered, and a demurrer covering a part of a bill charging a combination to defraud is bad. Shearer *v.* Shearer, 50 Miss. 113.

Demurrer to original and supplemental bill is bad where it goes only to the new matter of the supplemental bill. Dillon *v.* Davis, 3 Tenn. Ch. 386.

Defective verification.— But a demurrer to the entire bill because a part was not verified was held good, where the part requiring the verification covered the entire equity of the bill. Alston *v.* Jones, 3 Barb. Ch. (N. Y.) 397.

78. Larter *v.* Canfield, 59 N. J. Eq. 461, 45 Atl. 616.

79. Munch *v.* Shabel, 37 Mich. 166.

80. Payne *v.* Berry, 3 Tenn. Ch. 154; Brien *v.* Buttorff, 2 Tenn. Ch. 523; U. S. *v.* Southern Pac. R. Co., 40 Fed. 611.

81. Shainwald *v.* Lewis, 69 Fed. 487.

requisite in a partial demurrer that it must clearly and with certainty point out the part to which it is directed.[82]

g. Demurrer Incorporated in Answer. Where there is a demurrer to a part of the bill and an answer to the residue, the two may in the absence of special rule to the contrary be incorporated in the same instrument, the answer following the demurrer; and such was the usual practice in England.[83] As heretofore stated some jurisdictions permit a demurrer and answer to the same matter, and in others the court has power to authorize such pleading.[84] Under these circumstances grounds of demurrer may be incorporated in an answer to the whole bill.[85] Furthermore a ground of demurrer not waived by answer, such as general want of equity, may be insisted upon at the hearing by reservation of such ground in the answer.[86] Sometimes rules provide that instead of a formal demurrer defendant may insist on special matter in the answer and have the same benefit as if he had demurred. It is held that this merely states the common practice and applies only to matters affecting the merits, and is not permissible for matters in abatement,[87] or going to the jurisdiction, personal disability, or the like.[88]

6. Hearing and Determination of Demurrers — a. Setting Down For Hearing. A demurrer may be brought on by either party having it set down for hearing.[89] A demurrer by one defendant may be heard before service on the others.[90] The practice as to the time when a demurrer may be set down for argument, the party whose duty it is primarily to have it set down, and the consequence of a failure to seasonably set it down, varies greatly in different jurisdictions, and the local rules must be consulted.[91] If it is desired to object because of an irregularity in

82. Gray *v.* Regan, 23 Miss. 304; Jarvis *v.* Palmer, 11 Paige (N. Y.) 650; Chicago, etc., R. Co. *v.* Macomb, 2 Fed. 18.

Designation of defective part.— It must specify by paragraph, page, folio, or some other mode of reference the part to which it is intended to apply. Atwill *v.* Ferrett, 1 Fed. Cas. No. 640, 2 Blatchf. 39. But it is sufficiently definite if it designates by subject the parts covered, as "the allegations of fraud" or "the invalidity of the assignment by the defendant company." Boardman *v.* Keystone Standard Watch Co., 8 Lanc. L. Rev. 25. But a demurrer "to all that part of the bill not pleaded or demurred to, for want of jurisdiction" is bad for uncertainty (Payne *v.* Berry, 3 Tenn. Ch. 154), as is also, after a plea to "all the accounts arising out of" the transaction, a demurrer to the residue of the bill (Clancy *v.* Craine, 17 N. C. 363). The rule has been stated that the court must not be put to the trouble of looking into the bill or answer to see what is covered by the demurrer, and that therefore it will not do to answer certain things and demur to the rest of the bill, without otherwise designating the portion demurred to. Devonsher *v.* Newenham, 2 Sch. & Lef. 199. The designation must be such that on a reference of the answer to the residue, on exceptions for insufficiency, the master may determine how much of the bill remains after the demurrer, to be answered. Jarvis *v.* Palmer, 11 Paige (N. Y.) 650; Devonsher *v.* Newenham, 2 Sch. & Lef. 199.

83. 2 Daniell Ch. Pr. 75.

84. See *supra*, p. 259, notes 94, 95.

85. Harland *v.* Person, 93 Ala. 273, 9 So. 379.

86. Lovette *v.* Longmire, 14 Ark. 339; Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 146; Teague *v.* Dendy, 2 McCord Eq. (S. C.) 207, 16 Am. Dec. 643.

Adequate remedy at law.— A reservation of all advantage which might have been had by demurring enables defendant to raise the question whether plaintiff has an adequate remedy at law. Chicago, etc., R. Co. *v.* Ferguson, 106 Ill. App. 356; Schack *v.* McKey, 97 Ill. App. 460. It has been said that the general reservation at the commencement of the answer is insufficient for such purpose. O'Neill *v.* Cole, 4 Md. 107; Matney *v.* Ratliff, 96 Va. 231, 31 S. E. 512.

Answer admitting substance of bill and denying plaintiff's right to relief is in effect a demurrer. Bennett *v.* Bennett, 63 N. J. Eq. 306, 49 Atl. 501.

87. Wood *v.* Mann, 2 Fed. Cas. No. 17,952, 1 Sumn. 578.

88. Livingston *v.* Story, 11 Pet. (U. S.) 351, 9 L. ed. 746.

Filing separate demurrer with the answer sufficiently complies with such a rule. Spofford *v.* Smith, 59 N. H. 366.

In Vermont such a rule further provides that if the demurrer is overruled, the bill shall be taken as confessed, if it can be without an answer. Under this the court may, in its discretion, on overruling the demurrer, refuse to permit defendant to go to hearing on the merits. State *v.* Massey, 72 Vt. 210, 47 Atl. 834.

89. 2 Daniell Ch. Pr. 83. This is usually done by plaintiff. 2 Daniell Ch. Pr. 85.

90. Thomas *v.* Winter, 21 Ga. 358. See Morgan *v.* Scott, Minor (Ala.) 81, 12 Am. Dec. 35.

91. U. S. Eq. Rule 38 provides that if plaintiff shall not set down a demurrer for

the bringing on of the demurrer for hearing, such objection must be interposed *in limine*, as it is waived by proceeding to argument,[92] and the same is true of an informality in the method of interposing the demurrer,[93] or of an objection founded on the previous waiving by defendant of the defense set up in the demurrer.[94]

b. What Is Considered on Hearing — (I) *In General.* On the hearing of a demurrer the court looks only to the facts stated in the bill, because the demurrer lies only to a bill,[95] and for defects appearing on the face thereof.[96] Writings properly exhibited, being generally deemed part of the bill, are considered;[97] but not any other writings.[98] The court cannot take notice of an extraneous fact depriving the bill of its equity,[99] nor can it consider documentary evidence on file in the case,[1] or even, it seems, consider evidence submitted by consent.[2] A demurrer does, however, present for consideration the construction of an instrument made a part of the bill,[3] and the question whether the facts alleged justify the conclusions placed upon them.[4] The demurrer is to be determined as of the time when it was filed.[5]

(II) *Admissions by Demurrer* — (A) *Facts Well Pleaded.* For the purposes of hearing and disposing of a demurrer every part of the bill must be taken as true.[6] It is said that the demurrer admits the truth of all facts stated in the

argument on the rule day when it is filed or on the next succeeding rule day, he shall be deemed to admit the sufficiency thereof and his bill shall be dismissed as of course unless the judge shall allow him further time. Under this rule if plaintiff does not have a demurrer set down on the rule day when it is filed, it cannot be ready for argument before the next rule day. Gillette *v.* Doheny, 65 Fed. 715.

In some jurisdictions if defendant fails to set a demurrer down for hearing it will be overruled *pro forma*. Memphis, etc., R. Co. *v.* Owens, 60 Miss. 227; Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76; Chattanooga Grocery Co. *v.* Livingston, (Tenn. Ch. App. 1900) 59 S. W. 470. For cases illustrating and construing local practice with regard to setting demurrers down for hearing see the following cases:

Alabama.— Frey *v.* Fenn, 126 Ala. 291, 28 So. 789.

Georgia.— Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201; Murphy *v.* Tallulah Steam Fire Engine Co. No. 3, 72 Ga. 196; Barnett *v.* People's Bank, 65 Ga. 51.

Maine.— Hewett *v.* Adams, 50 Me. 271.

Michigan.— Zabel *v.* Harshman, 68 Mich. 270, 36 N. W. 71.

North Carolina.— Smith *v.* Ballard, 3 N. C. 156.

South Carolina.— Cartee *v.* Spence, 24 S. C. 550.

Tennessee.— Harding *v.* Egin, 2 Tenn. Ch. 39.

Texas.— O'Neal *v.* Wills Point Bank, 64 Tex. 644.

See 19 Cent. Dig. tit. "Equity," § 515.

92. Puterbaugh *v.* Elliott, 22 Ill. 157; Hyre *v.* Hoover, 3 W. Va. 11.

93. As by its being separate instead of being incorporated in the answer as required by statute. Shaw *v.* Lindsey, 60 Ala. 344; Crawford *v.* Childress, 1 Ala. 482.

94. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 61 Fed. 543.

95. See *supra*, VIII, C, 1, b.

An answer cannot be considered. Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471.

96. See *supra*, VIII, C, 4, a.

97. See *supra*, VII, D.

98. **Record of former suit.**— A bill to impeach a decree to which plaintiff was not a party is an original bill, and on demurrer thereto the record in the former suit may not be looked into except so far as it is made part of the bill. Richardson *v.* Loree, 94 Fed. 375, 36 C. C. A. 301.

A court of equity cannot allow oyer, so that an improper allowance of oyer does not justify the incorporation of the instrument into a demurrer. Hamilton *v.* Downer, 152 Ill. 651, 38 N. E. 733 [*affirming* 46 Ill. App. 541].

99. Fitzsimmons *v.* Lindsay, 205 Pa. St. 79, 54 Atl. 488.

1. Mills *v.* Larrance, 186 Ill. 635, 58 N. E. 219.

2. Stratton *v.* Dewey, 79 Fed. 32, 24 C. C. A. 435. But see Hamilton *v.* Downer, 152 Ill. 651, 38 N. E. 733 [*affirming* 46 Ill. App. 541].

3. Winter *v.* Gorsuch, 51 Md. 180. The court refused, however, on demurrer to determine the validity of proceedings set out as the foundation of plaintiff's title. Jones *v.* Paul, 9 Mo. 293.

4. As whether facts alleged to show part performance are sufficient to constitute part performance. Van Dyne *v.* Vreeland, 11 N. J. Eq. 370.

5. Where the original party showed no title, the demurrer was sustained, although after it was filed parties having a right to sue were joined. Scott *v.* McFarland, 34 Miss. 363.

Amendments suggested and interpolated on the hearing cannot affect the demurrer. Mutual Reserve Fund L. Assoc. *v.* Bradbury, 53 N. J. Eq. 643, 33 Atl. 960.

6. Pagan *v.* Sparks, 18 Fed. Cas. No. 10,659, 2 Wash. 325.

bill,[7] but a more accurate statement is that it admits only such facts as are well pleaded.[8]

(B) *What Is Not Admitted.* By virtue of the restriction of the rule just stated to well pleaded facts, a demurrer does not admit an assertion in the nature of argument or inference based on facts pleaded,[9] or that the construction of an instrument set out is that alleged by the pleader,[10] or in general any allegations in the nature of legal conclusions.[11] On the other hand admission of the facts

The material charges must be assumed to be true. Force *v.* Dutcher, 17 N. J. Eq. 165.

7. *Alabama.*— Gardner *v.* Knight, 124 Ala. 273, 27 So. 298. *Contra,* by statute, Forrest *v.* Robinson, 4 Port. 44.

California.— Tuolumne Water Co. *v.* Chapman, 8 Cal. 392.

Georgia.— Anderson *v.* Walton, 35 Ga. 202.

Illinois.— Myers *v.* Knight, 33 Ill. 284; Moore *v.* Hoisington, 31 Ill. 243; Stewart *v.* Croes, 10 Ill. 442; Sharples *v.* Baker, 100 Ill. App. 108.

Kentucky.— Shepherd *v.* McIntire, 5 Dana 574.

Maine.— Baker *v.* Atkins, 62 Me. 205.

Maryland.— Maddox *v.* White, 4 Md. 72, 59 Am. Dec. 67.

Michigan.—Wales *v.* State Bank, Harr. 308.

North Carolina.— Long *v.* Beard, 6 N. C. 337.

Pennsylvania.— Bitting's Appeal, 105 Pa. St. 517; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31.

Texas.— Jouett *v.* Jouett, 3 Tex. 150.

United States.— Bayerque *v.* Cohen, 2 Fed. Cas. No. 1,134, McAll. 113.

See 19 Cent. Dig. tit. "Equity," § 494.

Exhibits filed with the bill must be accepted as true. Ulman *v.* Iaeger, 67 Fed. 980.

Where plaintiffs sue as heirs, a demurrer admits that they are such. Edmonson *v.* Marshall, 6 J. J. Marsh. (Ky.) 448.

It will not be presumed that matter in avoidance of the bill exists (Puget Sound Nat. Bank *v.* King County, 57 Fed. 433), or that payments alleged in the bill were made for a purpose different from that alleged (Dakota Bldg., etc., Assoc. *v.* Price, 169 U. S. 45, 18 S. Ct. 251, 42 L. ed. 655).

A fact not distinctly alleged is not admitted by demurrer. Union Pac. R. Co. *v.* Meier, 28 Fed. 9. A demurrer on the ground of the statute of limitations is not defeated by an averment in the bill that the debt is due and unpaid, because the bar is created by the positive provisions of the statute and does not rest on presumption of payment. Nevitt *v.* Bacon, 32 Miss. 212, 66 Am. Dec. 609.

Special demurrers are governed by the rule stated in the text. Woodworth *v.* Edwards, 30 Fed. Cas. No. 18,014, 3 Woodb. & M. 120. A bill referred to an alleged corporation but denied its legal existence. On demurrer for failure to make such corporation a party it was held that the demurrer admitted that the corporation did not exist, and must therefore be overruled. Wilmington *v.* Addicks, (Del. 1893) 44 Atl. 781.

8. *District of Columbia.*— Dauphin *v.* Key, MacArthur & M. 203.

Illinois.— Shaw *v.* Allen, 184 Ill. 77, 56 N. E. 403 [*affirming* 85 Ill. App. 23]; Johnson *v.* Roberts, 102 Ill. 655; Roby *v.* Cossitt, 78 Ill. 638; Dunham *v.* Hyde Park, 75 Ill. 371; Newell *v.* Bureau County, 37 Ill. 253; Stow *v.* Russell, 36 Ill. 18; Women's Catholic O. of F. *v.* Haley, 86 Ill. App. 330.

New Hampshire.— Pearson *v.* Tower, 55 N. H. 36.

New Jersey.— Gohle *v.* Andruss, 2 N. J. Eq. 66; Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

United States.— Griffing *v.* Gibb, 2 Black 519, 17 L. ed. 353; Manchester Commercial Bank *v.* Buckner, 20 How. 108, 15 L. ed. 862; Foote *v.* Linck, 9 Fed. Cas. No. 4,913, 5 McLean 616.

See 19 Cent. Dig. tit. "Equity," § 494.

Material facts stated with reasonable certainty in the stating part of a bill are well pleaded and therefore admitted. Paterson, etc., R. Co. *v.* Jersey City, 9 N. J. Eq. 434.

Where original and supplemental bill conflict, the conflicting averments are not admitted. Chouteau *v.* Rice, 1 Minn. 106.

9. *Alabama.*— McCreery *v.* Berney Nat. Bank, 116 Ala. 224, 22 So. 577, 67 Am. St. Rep. 105.

Illinois.— Johnson *v.* Roberts, 102 Ill. 655.

Michigan.— Churchill Tp. *v.* Cummings Tp., 51 Mich. 446, 16 N. W. 805.

New Jersey.— Olden *v.* Hubbard, 34 N. J. Eq. 85.

United States.—Dillon *v.* Barnard, 21 Wall. 430, 22 L. ed. 673.

See 19 Cent. Dig. tit. "Equity," § 494.

10. Maese *v.* Hermann, 17 App. Cas. (D. C.) 52 [*affirmed* in 183 U. S. 572, 22 S. Ct. 91, 46 L. ed. 335]; Clark *v.* Mutual Reserve Fund L. Assoc., 14 App. Cas. (D. C.) 154, 43 L. R. A. 390; Donaldson *v.* Wright, 7 App. Cas. (D. C.) 45; Lea *v.* Robeson, 12 Gray (Mass.) 280; Le Baron *v.* Shepherd, 21 Mich. 263.

11. *District of Columbia.*— Clark *v.* Mutual Reserve Fund L. Assoc., 14 App. Cas. 154, 43 L. R. A. 390; Smith *v.* Reynolds, 9 App. Cas. 261; Dauphin *v.* Key, MacArthur & M. 203.

Illinois.— Newell *v.* Bureau County, 37 Ill. 253; Stow *v.* Russell, 36 Ill. 18; Mills *v.* Brown, 3 Ill. 548; Henderson *v.* Virden Coal Co., 78 Ill. App. 437.

Massachusetts.— Tompson *v.* Redemption Nat. Bank, 106 Mass. 128.

Mississippi.—Tennent *v.* Barksdale, (1887) 3 So. 80; Partee *v.* Kortrecht, 54 Miss. 66.

New Hampshire.— Pearson *v.* Tower, 55 N. H. 36.

New Mexico.— Lockhart *v.* Leeds, 10 N. M. 568, 63 Pac. 48.

pleaded carries with it an admission of whatever conclusion necessarily results from those facts, regardless of any statement of such conclusion in the bill.[12] No allegation is admitted contrary to a fact of which the court takes judicial notice,[13] or in conflict with exhibits made a part of the bill.[14] It has been held that where allegations are on information and belief, a demurrer admits only that plaintiff is so informed and believes and not that the fact exists.[15] Of course a demurrer by one defendant, although he be the principal defendant, does not operate as an admission affecting his co-defendants.[16]

c. Rules Governing Determination — (I) *Joint Demurrer Good as to One Defendant Alone.* The doctrine generally accepted is that where two defendants join in a demurrer, it may be held good and sustained as to one of them and held bad and overruled as to the other.[17]

(II) *Demurrer Too Broad.* A demurrer is an entirety,[18] and if too broad must be overruled *in toto*.[19] A demurrer to the whole bill must be overruled if the bill is sufficient to entitle plaintiff to any relief.[20] Such a demurrer must be

New York.— Starbuck *v.* Farmers' L. & T. Co., 28 N. Y. App. Div. 308, 51 N. Y. Suppl. 8.

Pennsylvania.— Bussier *v.* Weekey, 4 Pa. Super. Ct. 69 [*reversing* 18 Pa. Co. Ct. 33].

United States.— Preston *v.* Smith, 26 Fed. 884; Dillon *v.* Barnard, 7 Fed. Cas. No. 3,915, Holmes 386 [*affirmed* in 21 Wall. 430, 22 L. ed. 673].

See 19 Cent. Dig. tit. "Equity," § 494.

Allegation that plaintiff was devisee of a certain interest was held admitted by a demurrer on the ground that the bill did not show that the will was properly executed and proved to give him an exclusive right. Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325.

12. Cox *v.* Mobile, etc., R. Co., 44 Ala. 611; Craft *v.* Thompson, 51 N. H. 536. If the allegations of fact are sufficient they are not impaired by the allegation of an incorrect conclusion. Berwind *v.* Canadian Pac. R. Co., 98 Fed. 158.

13. Griffin *v.* Augusta, etc., R. Co., 72 Ga. 423; Taylor *v.* Barclay, 7 L. J. Ch. O. S. 65, 2 Sim. 213, 29 Rev. Rep. 82, 2 Eng. Ch. 213. Therefore an averment in a bill will not prevail when it is in contradiction of the record in the cause. Hutton *v.* Joseph Bancroft, etc., Co., 83 Fed. 17. See also Green *v.* Dodge, 6 Ohio 80, 25 Am. Dec. 736. As to judicial notice by courts of their own records see EVIDENCE, II, C, 3, d, (I), (G).

14. New York Nat. Park Bank *v.* Halle, 30 Ill. App. 17; Gusdorff *v.* Schleisner, 85 Md. 360, 37 Atl. 170; Cornell *v.* Green, 43 Fed. 105.

Averment of a parol agreement incompatible with written instruments set up does not stand admitted. Dillon *v.* Barnard, 7 Fed. Cas. No. 3,915, Holmes 386 [*affirmed* in 21 Wall. 430, 22 L. ed. 673].

15. *Alabama.*— Cameron *v.* Abbott, 30 Ala. 416.

Illinois.— Walton *v.* Westwood, 73 Ill. 125.

New Jersey.— Trimble *v.* American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912.

Ohio.—Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478.

England.—Egremont *v.* Cowell, 5 Beav. 620.

See 19 Cent. Dig. tit. "Equity," § 494.

As to the foregoing cases it is to be observed that with the exception of Trimble *v.* American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912, none of the averments in question was formally proper, or of a fact proper so to plead. See *supra*, VII, C, 2, f.

16. Edwards *v.* Edwards, 2 Strobh. Eq. (S. C.) 101.

17. Dzialynski *v.* Jacksonville Bank, 23 Fla. 346, 2 So. 696; Barstow *v.* Smith, Walk. (Mich.) 394; London *v.* Levy, 8 Ves. Jr. 398, 32 Eng. Reprint 408. *Contra*, Brown *v.* Tallman, (N. J. Ch. 1903) 54 Atl. 457 (multifariousness); Willard *v.* Reas, 26 Wis. 540.

A joint demurrer by husband and wife may be overruled as to the husband and sustained as to the wife, as she need not defend separately. Crane *v.* Deming, 7 Conn. 387; Wooden *v.* Morris, 3 N. J. Eq. 65.

18. Washington *v.* Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555; O'Harra *v.* Cox, 42 Miss. 496; Reed *v.* Beall, 42 Miss. 472; Marye *v.* Dyche, 42 Miss. 347.

19. Durling *v.* Hammar, 20 N. J. Eq. 220; Metler *v.* Metler, 18 N. J. Eq. 270; Phœnix Ins. Co. *v.* Day, 4 Lea (Tenn.) 247.

20. *Alabama.*— Barksdale *v.* Davis, 114 Ala. 623, 22 So. 17; Beall *v.* Lehman Durr Co., 110 Ala. 446, 18 So. 230; George *v.* Georgia Cent. R., etc., Co., 101 Ala. 607, 14 So. 752.

District of Columbia.— Sanche *v.* Electrolibration Co., 4 App. Cas. 453.

Florida.— Johnson *v.* McKinnon, (1903) 34 So. 272; El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823.

Georgia.— Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13; McLaren *v.* Steapp, 1 Ga. 376.

Illinois.— Wescott *v.* Wicks, 72 Ill. 524; Brown *v.* Hogle, 30 Ill. 119; Women's Catholic O. of F. *v.* Haney, 86 Ill. App. 330; Crane *v.* Hutchinson, 3 Ill. App. 30 [*affirmed* in 100 Ill. 269].

Indiana.— Fancher *v.* Ingraham, 6 Blackf. 139.

Iowa.— Harrington *v.* Cubbage, 3 Greene 307.

Kentucky.— Graves *v.* Downey, 3 T. B. Mon. 353.

overruled if any part of the bill is good,[21] and entitles plaintiff to either relief or discovery.[22] Where a bill sets up several claims it is not as a whole demurrable if any claim is sufficient.[23] The same principle applies where a demurrer is inter-

Maine.— Laughton *v.* Harden, 68 Me. 208; Burns *v.* Hobbs, 29 Me. 273.

Massachusetts.— Robinson *v.* Guild, 53 Mass. 323.

Michigan.— C. H. Little Co. *v.* Woodward Ave. Cemetery Assoc., (1903) 97 N. W. 682; Flynn *v.* Detroit Third Nat. Bank, 122 Mich. 642, 81 N. W. 572; Darrah *v.* Boyce, 62 Mich. 480, 29 N. W. 102; Hoffman *v.* Ross, 25 Mich. 175; Hawkins *v.* Clermont, 15 Mich. 511; Burpee *v.* Smith, Walk. 327; Edwards *v.* Hulburt, Walk. 54; Williams *v.* Hubbard, Walk. 28; Ankrim *v.* Woodworth, Harr. 355; Thayer *v.* Lane, Harr. 247; Clark *v.* Davis, Harr. 227.

Mississippi.—Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658; Graves *v.* Hull, 27 Miss. 419.

Missouri.— Ulrici *v.* Papin, 11 Mo. 42.

New Hampshire.— Craft *v.* Thompson, 51 N. H. 536; Currier *v.* Concord R. Corp., 48 N. H. 321.

New Jersey.— Reading *v.* Stover, 32 N. J. Eq. 326; Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Drummond *v.* Westervelt, 24 N. J. Eq. 30; Vail *v.* New Jersey Cent. R. Co., 23 N. J. Eq. 466; Brownlee *v.* Lockwood, 20 N. J. Eq. 239; Durling *v.* Hammar, 20 N. J. Eq. 220; Banta *v.* Moore, 15 N. J. Eq. 97; Outwater *v.* Berry, 6 N. J. Eq. 63.

New York.—Le Roy *v.* Veeder, 1 Johns. Cas. 417; Laight *v.* Morgan, 2 Cai. Cas. 344, 1 Johns. Cas. 429; Chazournes *v.* Mills, 2 Barb. Ch. 466; Stuyvesant *v.* New York, 11 Paige 414; Brockway *v.* Copp, 3 Paige 539; Kimberly *v.* Sells, 3 Johns. Ch. 467; Verplank *v.* Caines, 1 Johns. Ch. 57; Le Fort *v.* Delafield, 3 Edw. 32.

North Carolina.— Sikes *v.* Truitt, 57 N. C. 361; Earp *v.* Earp, 54 N. C. 239; Barnawell *v.* Threadgill, 40 N. C. 86; Thompson *v.* Newlin, 38 N. C. 338, 42 Am. Dec. 169.

Ohio.— Carter *v.* Longworth, 4 Ohio 384.

Pennsylvania.— Thomas *v.* Boswell, 14 Phila. 197; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31; Everhart *v.* Everhart, 4 Luz. Leg. Reg. 259.

Tennessee.— Riddle *v.* Motley, 1 Lea 468; Fay *v.* Jones, 1 Head 442; Russel *v.* Lanier, 4 Hayw. 289; Blount *v.* Garen, 3 Hayw. 88.

Vermont.— Shed *v.* Garfield, 5 Vt. 39.

West Virginia.— Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

United States.— Livingston *v.* Storey, 9 Pet. 632, 9 L. ed. 255; Failey *v.* Talbee, 55 Fed. 892; Merriam *v.* Holloway Pub. Co., 43 Fed. 450; Conklin *v.* Wehrman, 38 Fed. 874; Mercantile Trust, etc., Co. *v.* Rhode Island Hospital Trust Co., 36 Fed. 863; La Croix *v.* May, 15 Fed. 236; Buerk *v.* Imhaeuser, 8 Fed. 457; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Brandon Mfg. Co. *v.* Prime, 4 Fed. Cas. No. 1,810, 3 Ban. & A. 191, 14 Blatchf. 371; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347; Hosmer *v.* Jewett, 12 Fed. Cas. No. 6,713, 6 Ben. 208; Perry *v.* Littlefield, 20 Fed. Cas. No. 11,008, 17 Blatchf. 272.

See 19 Cent. Dig. tit. "Equity," § 508.

A demurrer for argumentativeness extending to the entire bill cannot be sustained if any allegations are not open to that objection. Bliss *v.* Parks, 175 Mass. 539, 56 N. E. 566.

Striking out part of bill.— While a demurrer which is too broad must be overruled, the part of the bill on which plaintiff is not entitled to relief will be struck out. Lindsley *v.* Personette, 35 N. J. Eq. 355.

21. *Alabama.*—Lea *v.* Iron Belt Mercantile Co., 119 Ala. 271, 24 So. 28.

Florida.— Orlando *v.* Equitable Building, etc., Assoc., (1903) 33 So. 986; Durham *v.* Stephenson, 41 Fla. 112, 25 So. 284.

Georgia.— Lowe *v.* Burke, 79 Ga. 164, 3 S. E. 449.

New York.— Boyle *v.* Brooklyn, 71 N. Y. 1.

Tennessee.— Blount *v.* Garen, 3 Hayw. 88; Lowry *v.* Stapp, (Ch. App. 1899) 53 S. W. 194; McNutt *v.* Roberts, (Ch. App. 1898) 48 S. W. 300; Overall *v.* Avant, (Ch. App. 1897) 46 N. W. 1031; Hall *v.* Clavert, (Ch. App. 1897) 46 S. W. 1120.

West Virginia.— Eakin *v.* Hawkins, 48 W. Va. 364, 37 S. E. 622.

United States.— Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347.

See 19 Cent. Dig. tit. "Equity," § 508.

Assigned reasons limited.— A demurrer to the whole bill, which assigns reasons going only to certain allegations and not to the whole case, is bad. Russel *v.* State Nat. Bank, 104 Tenn. 614, 58 S. W. 245.

22. *Georgia.*— Hollsclaw *v.* Johnson, Ga. Dec., Pt. II, 146; Griggs *v.* Thompson, Ga. Dec. 146.

Iowa.— Powell *v.* Spaulding, 3 Greene 443.

Massachusetts.— Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401.

Mississippi.— Morton *v.* Granada Male, etc., Academies, 16 Miss. 773.

New Jersey.—Metler *v.* Metler, 19 N. J. Eq. 457; Miller *v.* Ford, 1 N. J. Eq. 358.

New York.— Le Roy *v.* Servis, 1 Cai. Cas. iii, 2 Am. Dec. 281; Parsons *v.* Bowne, 7 Paige 354; Higinbotham *v.* Burnet, 5 Johns. Ch. 184; Livingston *v.* Livingston, 4 Johns. Ch. 294; Kimberly *v.* Sells, 3 Johns. Ch. 467; Wood *v.* Hathaway, 2 Ch. Sent. 12.

Rhode Island.— Gorman *v.* Stillman, 24 R. I. 264, 52 Atl. 1088.

See 19 Cent. Dig. tit. "Equity," § 508.

Discovery.— Where plaintiff is properly before the court for discovery and the bill prays relief, a general demurrer is bad unless no discovery could make the case proper for equitable jurisdiction. Le Roy *v.* Veeder, 1 Johns. Cas. (N. Y.) 417.

23. Tillman *v.* Thomas, 87 Ala. 321, 6 So. 151, 13 Am. St. Rep. 42; Junior Order Bldg., etc., Assoc. *v.* Sharpe, 63 N. J. Eq. 500, 52

posed to several parts of the bill and one of the parts demurred to is good.[24] It has been held that if a demurrer is bad as to one plaintiff it must be overruled altogether,[25] but the general rule is that the entire bill is bad if it does not state a case in favor of all the plaintiffs.[26]

(III) *Demurrer Too Narrow.* It was formerly the rule in England that if a demurrer did not cover so much of the bill as it might properly have extended to, it would be overruled;[27] but this doctrine was abolished there,[28] and does not seem to have gained acceptance in the United States.[29]

(IV) *Demurrer Overruled by Plea or Answer.* The necessity, in presenting different defenses to the same bill, of designating particularly the portions of the bill to which each is intended to apply has already been pointed out.[30] If defendant demurs in part and answers in part, and does not specify the parts to which each defense applies, or does not distinctly specify them, the demurrer will be disregarded as being overruled by the answer.[31] There must be no overlapping of defenses,[32] and if the same matter is covered to any extent by a demurrer and also by a plea or answer the plea or answer overrules the demurrer.[33] Thus a demurrer to the whole bill is overruled by an answer to the whole bill,[34] or to any part thereof,[35] and a general answer to the bill overrules any demurrer.[36] So

Atl. 832; Cartee *v.* Spence, 24 S. C. 550; Castleman *v.* Veitch, 3 Rand. (Va.) 598.

Additional partial demurrers.— But where in such case there is a demurrer to the whole bill and also partial demurrers to each claim, the partial demurrer to the insufficient claim should be sustained. Gay *v.* Skeen, 36 W. Va. 582, 15 S. E. 64.

Demurrers for multifariousness have been noted as exceptions to the rule. Gooch *v.* Green, 102 Ill. 507; Dimmock *v.* Bixby, 20 Pick. (Mass.) 368.

24. Chazournes *v.* Mills, 2 Barb. Ch. (N. Y.) 466; Le Fort *v.* Delafield, 3 Edw. (N. Y.) 32. But see *supra*, VII, G, 5, b.

25. Gibson *v.* Jayne, 37 Miss. 164.

26. See *supra*, V, F, 2, c.

27. Dawson *v.* Sadler, 2 L. J. Ch. O. S. 80, 172, 1 Sim. & St. 537, 1 Eng. Ch. 537.

28. Order 36 (1841).

29. U. S. Eq. Rule 36 provides that no demurrer shall be held bad and overruled upon argument only because such demurrer shall not cover so much of the bill as it might by law have extended to.

In Oregon it was held that where a demurrer was directed to one of several causes of action which were substantially the same, it would be treated as if it went to the entire bill. Hughes *v.* Pratt, 37 Oreg. 45, 60 Pac. 707.

30. See *supra*, VIII, A, 2.

31. Bruen *v.* Bruen, 4 Edw. (N. Y.) 640.

32. See *supra*, VIII, A, 2.

33. *Kentucky.*— Beauchamp *v.* Gibbs, 1 Bibb 481.

Maryland.— Chase's Case, 1 Bland 206, 17 Am. Dec. 277.

Mississippi.— Fall *v.* Hafter, 40 Miss. 606; Baines *v.* McGee, 1 Sm. & M. 208.

New York.— Kuypers *v.* Reformed Dutch Church, 6 Paige 570; Spofford *v.* Manning, 6 Paige 383; Clark *v.* Phelps, 6 Johns. Ch. 214.

Ohio.— Muskingum Bank *v.* Carpenter, Wright 729.

Pennsylvania.— Barbey's Appeal, 119 Pa. St. 413, 13 Atl. 451; Wolf *v.* Eynn, 5 Kulp 5.

South Carolina.— Robertson *v.* Bingley, 1 McCord Eq. 333; Saxon *v.* Barksdale, 4 Desauss. 522.

United States.—Adams *v.* Howard, 9 Fed. 347, 20 Blatchf. 38.

See 19 Cent. Dig. tit. "Equity," § 492.

Demurrer properly incorporated in answer is not overruled thereby. Johnson *v.* Wingfield, (Tenn. Ch. App. 1897) 42 S. W. 203. See *supra*, VIII, C, 5, g.

Bad demurrer treated as answer.— Where defendant answers and demurs to the same matter, the demurrer is bad, but it may be considered as part of the answer. Miller *v.* Furse, Bailey Eq. (S. C.) 187.

Demurrer to part, followed by answer to the residue, is not overruled. Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23.

34. Droop *v.* Ridenour, 9 App. Cas. (D. C.) 95; Thomas *v.* Boswell, 14 Phila. (Pa.) 197; Strang *v.* Richmond, etc., R. Co., 101 Fed. 511, 41 C. C. A. 474.

When a bill is amended after answer and defendant is given leave to have his answer stand as an answer to the amended bill, there can be no demurrer except to new matters set up in the amendment. Pennsylvania Co. *v.* Bond, 99 Ill. App. 535. But the chancellor may permit an answer to be withdrawn and a demurrer filed. Saunders *v.* Savage, (Tenn. Ch. App. 1900) 63 S. W. 218.

35. McDermott *v.* Blois, R. M. Charlt. (Ga.) 281; Pieri *v.* Shieldsboro, 42 Miss. 493; Kessler's Case, 1 Lehigh Val. L. Rep. (Pa.) 153.

Bad partial demurrer.—Where the different paragraphs of a bill are interdependent so that there can be no proper partial demurrer, an answer necessarily overrules an attempted partial demurrer. Sledge *v.* Dickson, 81 Miss. 501, 33 So. 282.

36. Bond *v.* Jones, 8 Sm. & M. (Miss.) 368; McElhenny's Appeal, 61 Pa. St. 188 [*modifying* decree in 6 Phila. 495]; New

if defendant demurs, and afterward answers as to the same matter, the demurrer is overruled or waived.[37] Where a demurrer to the whole bill is overruled by an answer to part, grounds of demurrer limited to other parts of the bill cannot be considered.[38] The doctrine of an answer overruling a demurrer has been in part abrogated by rule in the federal courts.[39] The demurrer of one defendant is not overruled by the plea of a co-defendant.[40]

(v) *Demurrer Waived, Abandoned, or Withdrawn.* A defendant may waive or abandon his demurrer, not only by expressly withdrawing it,[41] but by conduct inconsistent with an intention to rely upon it; as by proceeding to final hearing on the merits without a disposition of the demurrer,[42] by stipulating the facts and submitting the case for decision thereon,[43] or by consenting to a decree either interlocutory[44] or final.[45] The right to have a demurrer considered on appeal may be lost by answering over after an order overruling it.[46] Filing a

York, etc., Coal Co. *v.* Spencer, 3 Pa. Dist. 694; Brooke *v.* Phillips, 6 Phila. (Pa.) 392; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAll. 271.

Answer alleging ignorance, etc.— Where there was a demurrer to a portion of the bill, and the answer concluded by alleging defendant's ignorance of all matters in the bill not covered by the answer and left them for plaintiff to prove, it was held that such answer overruled the demurrer. Spofford *v.* Manning, 6 Paige (N. Y.) 383.

37. *Alabama.*— Ray *v.* Womble, 56 Ala. 32.

Illinois.—French *v.* Commercial Nat. Bank, 97 Ill. App. 533.

Indiana.— Watson *v.* Clendennin, 6 Blackf. 477.

Mississippi.— Robinson *v.* Francis, 7 How. 458.

New Jersey.— Droste *v.* Hall, (Ch. 1894) 29 Atl. 437.

Pennsylvania.— Casselberry *v.* Citizens' Pass. R. Co., 6 Pa. Dist. 50, 18 Pa. Co. Ct. 342.

See 19 Cent. Dig. tit. "Equity," § 492.

Such answer by a merely formal party, against whom no relief is prayed, will not result in retention of the bill as to him where demurrers by others overthrow the equity of the bill. Brown *v.* Pratt, 56 N. C. 202.

38. Hentz *v.* Delta Bank, 76 Miss. 429, 24 So. 902.

39. **U. S. Eq. Rule** 37 provides that no demurrer or plea shall be held bad and overruled upon argument only because the answer of defendant may extend to some part of the same matter as may be covered by such demurrer or plea. It is held that notwithstanding this rule defendant cannot demur, plead, and answer to the whole bill (Crescent City Live-Stock, etc., Co. *v.* Butchers' Union Live-Stock, etc., Co., 12 Fed. 225), or demur to the whole bill and answer the whole bill (Droop *v.* Ridenour, 9 App. Cas. (D. C.) 95; Strang *v.* Richmond, etc., R. Co., 101 Fed. 511, 41 C. C. A. 474), without leave of court (Alexander *v.* Alexander, 13 App. Cas. (D. C.) 334, 45 L. R. A. 806. And see Huntington *v.* Laidley, 79 Fed. 865). On the contrary it has been held that the rule applies to a demurrer and answer put in at the same time to the whole bill. Hayes *v.* Dayton, 8 Fed. 702, 18 Blatchf. 420.

In Pennsylvania while an answer to the whole bill overrules a demurrer to the whole bill (Thomas *v.* Boswell, 14 Phila. 197), plaintiff cannot take advantage of the fact that a partial answer covers the same ground to a certain extent as a partial demurrer (Moyer *v.* Livingood, 2 Woodw. 317).

40. Dakin *v.* Union Pac. R. Co., 5 Fed. 665.

41. **A defendant is entitled to withdraw** his demurrer on motion after it has been set down upon payment of costs. Downes *v.* East India Co., 6 Ves. Jr. 586, 31 Eng. Reprint 1208. This may be done before final decision, after an intimation that the judge will overrule the demurrer. Smith *v.* Hornsby, 70 Ga. 552.

Defendant may at the hearing waive a part of the grounds of demurrer and such parts will then be disregarded. Garrett *v.* Garrett, 2 Strobh. Eq. (S. C.) 272.

42. *Alabama.*— Daughdrill *v.* Helms, 53 Ala. 62; Martin *v.* Hewitt, 44 Ala. 418.

Illinois.— Long *v.* Fox, 100 Ill. 43.

Mississippi.— Norton *v.* Coley, 45 Miss. 125.

Missouri.— Dunklin County *v.* Clark, 51 Mo. 60.

Tennessee.— Scott *v.* Levy, 6 Lea 662; Kyle *v.* Riley, 11 Heisk. 230.

Vermont.— Waterman *v.* Buck, 63 Vt. 544, 22 Atl. 15.

See 19 Cent. Dig. tit. "Equity," § 493.

Application of this rule depends largely upon the practice as to whose duty it is to obtain a decision on the demurrer. See *supra*, VIII, C, 6, a.

43. Roach *v.* Gardner, 9 Gratt. (Va.) 89.

44. As by reference of cause to take an account. Rittenhouse *v.* Harman, 7 W. Va. 380.

45. Foster *v.* Foster, 126 Ala. 257, 28 So. 624.

Demurrer overlooked.— Where a cause has proceeded to decree without the attention of the court being called to a demurrer, the demurrer will be deemed waived, and not considered on appeal. Kiernan *v.* Blackwell, 27 Ark. 235; Cessna *v.* Benedict, 98 Ill. App. 440.

46. See Appeal and Error, 2 Cyc. 646. See also Baumgartner *v.* Bradt, 207 Ill. 345, 69 N. E. 912; Cline *v.* Cline, 204 Ill. 130, 68 N. E. 545. Where a demurrer is overruled with leave to rely on it in the answer, but the

cross bill does not constitute an abandonment of a demurrer which defendant has already filed to the bill.[47]

7. Disposition of Case on Demurrer — a. Implied Decision of Demurrer. A demurrer is sometimes considered as overruled by implication, in the absence of an express order of that character, as by rendering a decree granting relief to plaintiff,[48] or by ordering defendant to answer.[49] The granting of a preliminary injunction does not adjudicate a demurrer on file.[50]

b. Sustaining Demurrer — (i) *Finality of Decision.* According to strict practice the sustaining of a demurrer to the whole bill puts the case out of court,[51] and if the decision has clearly gone to the merits, it operates as *res judicata*.[52] Plaintiff if he desires to amend should ask leave to do so,[53] and before the entry of the order sustaining the demurrer.[54] A demurrer to a part of the bill, although sustained, does not lead to a dismissal of the bill,[55] and plaintiff may amend as if no demurrer had been interposed.[56] It has been held that where one defendant demurs, and discloses an entire want of equity in the bill as against any of the defendants the entire bill may be dismissed.[57]

(ii) *Leave to Amend.* In England, while an amendment was practically

ground of demurrer is not pleaded in the answer and the case is heard on its merits, the ground of demurrer is waived. Kerns *v.* Perry, (Tenn. Ch. App. 1898) 48 S. W. 729.

Objection for multifariousness is waived by answering over. Van Vleet *v.* De Witt, 200 Ill. 153, 65 N. E. 677; Whipple *v.* Eddy, 161 Ill. 114, 43 N. E. 789.

Waiver by plaintiff.— In like manner a plaintiff in effect confesses a demurrer and waives the right to review an order sustaining it by amending his bill to remove the objection (Lookout Bank *v.* Sousong, 90 Tenn. 590, 18 S. W. 389), or by abandoning the pleading demurred to, as by going to hearing on the original bill after the sustaining of a demurrer to the amendment (Smith *v.* Smith, 169 Ill. 623, 48 N. E. 306 [*affirming* 69 Ill. App. 314]).

47. Bennett *v.* Bennett, 63 N. J. Eq. 306, 49 Atl. 501. But see *supra*, VIII, C, 1, c, (II).

48. Cochran *v.* Miller, 74 Ala. 50; Richmond Sav. Bank *v.* Powhatan Clay Mfg. Co., 102 Va. 274, 46 S. E. 294; Le Sage *v.* Le Sage, 52 W. Va. 323, 43 S. E. 137; Hinchman *v.* Ballard, 7 W. Va. 152.

49. Mason *v.* Bair, 33 Ill. 194.

50. Jenkins *v.* Nolan, 79 Ga. 295, 5 S. E. 34.

But sustaining a general demurrer precludes an injunction. Mowbray *v.* Lawrence, 14 Abb. Pr. (N. Y.) 160.

51. Coleman *v.* Butt, 130 Ala. 266, 30 So. 364; Alfred Richards Brick Co. *v.* Atkinson, 16 App. Cas. (D. C.) 462; Cullison *v.* Bossom, 1 Md. Ch. 95; Smith *v.* Barnes, Dick. 67, 21 Eng. Reprint 193. This result does not necessarily follow. Fleece *v.* Russell, 13 Ill. 31.

A decree simply sustaining a demurrer without further order is not final. Rose *v.* Gibson, 71 Ala. 35; Parker *v.* Flagg, 127 Mass. 28.

52. Corrothers *v.* Sargeut, 20 W. Va. 351; Mitford Eq. Pl. 175.

Supplemental bill correcting defect.—Where a demurrer was sustained and a bill dismissed because of a defective acknowledgment of a mortgage relied on, it was held that the dismissal did not bar a supplemental bill, showing a subsequent correction of the acknowledgment. Grotenkemper *v.* Carver, 4 Lea (Tenn.) 375.

A decree sustaining a demurrer and dismissing for want of equity is not subject to objection that it concludes all the equitable rights of the parties growing out of the contract in controversy. Smith *v.* Bell, 70 Ill. App. 490.

53. De Louis *v.* Meek, 2 Greene (Iowa) 55, 50 Am. Dec. 491; Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380, 42 L. R. A. 531.

Leave as of course.— Where the court can see on the argument that the defect may be cured by amendment, it is usual to give leave to amend; but if this is not obvious plaintiff must apply for leave on petition. State Bank *v.* Niles, Walk. (Mich.) 398. See also *infra*, VIII, C, 7, b, (II).

54. Wray *v.* Hazlett, 1 Brewst. (Pa.) 295; Crowder *v.* Turney, 3 Coldw. (Tenn.) 551; Bomar *v.* Parker, 68 Tex. 435, 4 S. W. 599.

The demurrer should not be sustained unless the defects are not amendable or plaintiff declines to amend. Lamb *v.* Jeffrey, 41 Mich. 719, 3 N. W. 204.

55. Beauchamp *v.* Gibbs, 1 Bibb (Ky.) 481.

The proper order, where there is a bad demurrer to the entire bill and a good demurrer to part, is to dismiss so much of the bill as is held bad, overrule the demurrer to the residue, and rule defendant to answer thereto. Giant Powder Co. *v.* California Powder Works, 98 U. S. 126, 25 L. ed. 77.

56. Mallery *v.* Dudley, 4 Ga. 52; Lookout Bank *v.* Susong, 90 Tenn. 590, 18 S. W. 389; 2 Daniell Ch. Pr. 91; Mitford Eq. Pl. 174.

57. Griffiths *v.* Griffiths, 198 Ill. 632, 64 N. E. 1069; De Louis *v.* Meek, 2 Greene (Iowa) 55, 50 Am. Dec. 491. *Contra*, Ballin *v.* Ferst, 55 Ga. 546.

never permitted, when sought after the sustaining of a demurrer to the entire bill,[58] it frequently happened that upon the hearing of a demurrer, where the defect could be remedied, the court, instead of sustaining the demurrer, gave plaintiff leave to amend his bill on payment of costs.[59] In the United States the practice is quite liberal, and it is said that where the bill discloses merits, the court on sustaining a demurrer must give leave to amend the bill.[60] It is practically the uniform practice, where the bill shows equity, not to dismiss it for want of parties, but to permit an amendment bringing them in.[61] It is discretionary on demurrer for misjoinder of plaintiffs to permit an amendment, striking out the names of some of them.[62] Plaintiff is usually permitted to amend when the bill on demurrer is found to be multifarious.[63] Allowance of an amendment rests, however, substantially in the discretion of the court,[64] and while in cases other

58. 2 Daniell Ch. Pr. 88.

59. 2 Daniell Ch. Pr. 89; 1 Daniell Ch. Pr. 521.

60. *Alabama.*— Wright *v.* Dunklin, 83 Ala. 317, 3 So. 597; Gilmer *v.* Wallace, 75 Ala. 220; Goodlett *v.* Kelly, 74 Ala. 213; Conner *v.* Smith, 74 Ala. 115; Massey *v.* Modawell, 73 Ala. 421; Yonge *v.* Hooper, 73 Ala. 119; Stoudenmire *v.* De Bardelaben, 72 Ala. 300; Kingsbury *v.* Milner, 69 Ala. 502; Little *v.* Snedecor, 52 Ala. 167.

Arkansas.— Palmer *v.* Rankins, 30 Ark. 771.

Georgia.— Thurmond *v.* Clark, 47 Ga. 500.

Kansas.— Hunt *v.* Fyffe, McCahon 75.

Maryland.— Roser *v.* Slade, 3 Md. Ch. 91.

Mississippi.— Hiller *v.* Cotton, 48 Miss. 593.

North Carolina.— Netherton *v.* Candler, 78 N. C. 88. See also Worth *v.* Gray, 59 N. C. 4.

Tennessee.— Peyton *v.* Rawlins, 4 Hayw. 77.

Virginia.— Rose *v.* King, 4 Hen. & M. 475.

West Virginia.—Shonk *v.* Knight, 12 W. Va. 667.

United States.— Hunt *v.* Rousmaniere, 12 Fed. Cas. No. 6,898, 2 Mason 342.

See 19 Cent. Dig. tit. "Equity," § 520.

Amendment excusing laches.— It was held error to dismiss a bill on demurrer without permitting amendment to excuse laches, the order having been made on the ground of laches not urged by counsel. Cottrell *v.* Watkins, 89 Va. 801, 17 S. E. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754.

Formal defects.— An opportunity should be given to amend a bill defective only in form. Barnard *v.* Cushman, 35 Ill. 451; Ferguson *v.* Hass, 62 N. C. 113. It is not the duty of the court in such case to grant an amendment without application therefor, but a dismissal should be without prejudice. Alexander *v.* Moye, 38 Miss. 640. A refusal to allow an amendment asked at the hearing is error. McElwain *v.* Willis, 3 Paige (N. Y.) 505. Plaintiff may be permitted to amend to cure a formal objection made *ore tenus*. Garlick *v.* Strong, 3 Paige (N. Y.) 440.

61. *Alabama.*— Tindal *v.* Drake, 51 Ala. 574; Colbert *v.* Daniel, 32 Ala. 314.

Georgia.— Ferrill *v.* Perryman, 34 Ga. 576; Fulton *v.* Smith, 27 Ga. 413; Hightower *v.* Mustian, 8 Ga. 506.

Kentucky.— Cooper *v.* Gunn, 4 B. Mon. 594.

Maryland.— Davis *v.* Clabaugh, 30 Md. 508.

New York.— Cunningham *v.* Pell, 6 Paige 655.

North Carolina.— Netherton *v.* Candler, 78 N. C. 88; Caldwell *v.* Blackwood, 54 N. C. 274; Smith *v.* Kornegay, 54 N. C. 40; Marshall *v.* Lovelass, 1 N. C. 325.

South Carolina.— Frazer *v.* Legare, Bailey Eq. 389.

Tennessee.— Gray *v.* Hays, 7 Humphr. 588.

West Virginia.— Pappenheimer *v.* Roberts, 24 W. Va. 702; Mitchell *v.* Chancellor, 14 W. Va. 22; Welton *v.* Hutton, 9 W. Va. 339; Stewart *v.* Jackson, 8 W. Va. 29.

See 19 Cent. Dig. tit. "Equity," § 520. See also *supra*, V, I.

The proper order is to sustain the demurrer and dismiss the bill unless plaintiff brings in the parties. If the demurrer is general it should be overruled and plaintiff ordered to bring in the needed parties. Eagle *v.* Beard, 33 Ark. 497.

It is discretionary to permit the decision to stand over that plaintiff may apply to amend his bill. Magruder *v.* Campbell, 40 Ala. 611.

62. Heacock *v.* Durand, 42 Ill. 230.

A bill showing right in infant plaintiff should not be dismissed, because another plaintiff improperly joined with him; the infant should be permitted to strike out the name of the other plaintiff. Grimes *v.* Wilson, 4 Blackf. (Ind.) 331.

63. Marriott *v.* Givens, 8 Ala. 694; McElwee *v.* Massey, 10 Rich. Eq. (S. C.) 377; Jefferson *v.* Gaines, 7 Baxt. (Tenn.) 368; Johnson *v.* Brown, 2 Humphr. (Tenn.) 327, 37 Am. Dec. 556. See also *supra*, VII, G, 8.

Discretionary.— A multifarious bill is not amendable as of course. Swift *v.* Eckford, 6 Paige (N. Y.) 22.

64. Cullison *v.* Bossom, 1 Md. Ch. 95; Hartford Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567, 25 L. ed. 815; Boston, etc., R. Co. *v.* Parr, 98 Fed. 483; Dowell *v.* Applegate, 8 Fed. 698, 7 Sawy. 239. Where a single judge sustained a demurrer and reserved the correctness of the decision for the full court, the latter on affirming it ordered the question of amendment to be heard by a single judge. Phœnix Ins. Co. *v.* Abbott, 127 Mass. 558. The chancellor is not bound to allow an amendment *ex mero motu* on sustaining a demurrer for want of equity on final hearing. State Bank *v.* Ellis, 30 Ala. 478.

than those above stated an amendment will be allowed where justice so requires,[65] it will be denied where the bill is wholly without equity,[66] for laches in making the application,[67] or where no amendment could be made improving the bill.[68] Plaintiff will not be permitted to present an essentially different case by amendment.[69] A *pro forma* decree dismissing a bill has been held proper in order to permit a speedy appeal.[70]

(III) *Effect of Dismissal on Demurrer.* Dismissal of a bill on demurrer puts the case out of court unless the bill is amended,[71] and also dismisses any cross bill which may have been filed.[72] On sustaining a demurrer to a supplemental bill, it is, however, error to dismiss the original,[73] and it is improper on sustaining a demurrer to make further direction disposing of money in court, the right to which is doubtful, without a hearing on the question.[74]

c. Overruling Demurrer — (I) *Finality of Decision.* An order overruling a demurrer is not final,[75] it merely determines that there is sufficient equity in the bill to require an answer.[76]

(II) *Right of Defendant to Answer.* The general rule is that on overruling a demurrer to the entire bill a final decree cannot be taken at once, but defendant must be ruled to answer.[77] In some jurisdictions a special rule to

U. S. Eq. Rule 35 expressly provides that on the allowance of a demurrer the court may on motion of plaintiff allow him to amend on such terms as shall be deemed reasonable.

65. Alfred Richards Brick Co. *v.* Atkinson, 16 App. Cas. (D. C.) 462; Keerl *v.* Keerl, 28 Md. 157; Dowell *v.* Applegate, 8 Fed. 698, 7 Sawy. 239.

Where, by simply striking out objectionable features, the defect may be obviated this should be permitted, and it is error to dismiss the bill. Bigelow *v.* Sanford, 98 Mich. 657, 57 N. W. 1037.

In Georgia it was said that after a demurrer has been sustained plaintiff, in order to amend, must show beyond reasonable doubt a case for equitable relief. Picquet *v.* Augusta, 64 Ga. 516.

66. McLeod *v.* Dell, 9 Fla. 427; Puterbaugh *v.* Elliott, 22 Ill. 157; Lyon *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 184; Fisher *v.* Walter, 3 C. Pl. (Pa.) 161. It is too late to amend a bill after hearing on demurrer for want of equity. McComas *v.* Minor, Walk. (Miss.) 513.

67. Merchants' Bank *v.* Stevenson, 7 Allen (Mass.) 489; Boston, etc., R. Co. *v.* Parr, 98 Fed. 483.

After affirmance by the supreme court of the decree sustaining the demurrer an application for leave to amend was held too late. State Bank *v.* Niles, Walk. (Mich.) 398.

68. Picken *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997.

Amendment presenting only the same question will not be allowed. Lea *v.* Robeson, 12 Gray (Mass.) 280.

69. March *v.* Mayers, 85 Ill. 177; Bannon *v.* Comegys, 69 Md. 411, 16 Atl. 129.

Amplified statement.— Where the original bill charged fraud in procuring a conveyance, an amendment stating different misrepresentations as having induced the fraud does not present such a different case as to constitute an abuse of discretion in refusing to strike the amended bill from the files. Jones *v.* Van Doren, 130 U. S. 684, 9 S. Ct. 685, 32 L. ed. 1077.

70. Cambers *v.* Waterman, 8 Phila. (Pa.) 82. See also Hyndman *v.* Hyndman, 19 Vt. 9, 46 Am. Dec. 171.

71. See *supra*, VIII, C, 7, b, (I).

72. Johnamsen *v.* Tarver, 74 Ga. 402; Wright *v.* Frank, 61 Miss. 32.

73. McElwain *v.* Willis, 3 Paige (N. Y.) 505.

74. Conway *v.* Waverley Tp., 15 Mich. 257.

75. Armor *v.* Lyon, 1 Colo. 7. A finding in the decree overruling a demurrer that from the facts set forth in tne bill the orator is entitled to relief is mere surplusage and will be disregarded. Hall *v.* Dana, 2 Aik. (Vt.) 381.

76. Clark *v.* Pence, (Tenn. Sup. 1903) 76 S. W. 885; Battle *v.* Street, 85 Tenn. 282, 2 S. W. 384. Where one is made a party by a bill which merely suggests that he claims some interest, without other language charging him, and he demurs and the demurrer is overruled, if he takes no further step he is deemed to have abandoned his claim. Davenport *v.* Bartlett, 9 Ala. 179. Overruling a demurrer is an adjudication that plaintiff is entitled to some relief but not as to the extent of the relief. Johnston *v.* Wheelock, 63 Ga. 623.

77. *Arkansas.*— Campbell *v.* Savage, 33 Ark. 678.

Indiana.— Henderson *v.* Dennison, 1 Ind. 152; Lefavour *v.* Justice, 5 Blackf. 366; Kipper *v.* Glancey, 2 Blackf. 356; Bottorf *v.* Conner, 1 Blackf. 287.

Missouri.— Cole County *v.* Augney, 12 Mo. 132.

New York.— Smith *v.* Ballantyne, 10 Paige 101.

Virginia.— Northwestern Bank *v.* Nelson, 1 Gratt. 108; Sutton *v.* Gatewood, 6 Munf. 398.

West Virginia.— Billingslea *v.* Manear, 47 W. Va. 785, 35 S. E. 847; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Pecks *v.* Cham-

answer must be made on overruling the demurrer, and in others a time to answer is given by general rule.[78] If time is required beyond that limited defendant should apply therefor on notice.[79] Under the order to answer defendant cannot file a plea; special leave for that purpose is required.[80] The practice of requiring an answer after a demurrer overruled is not entirely uniform; some jurisdictions permit an immediate decree.[81] In no case, however, where proof is necessary for the rendition of a decree should one be rendered on overruling a demurrer without such proof.[82]

(III) *Overruling Partial Demurrer.* Where a partial demurrer, accompanied by answer, is overruled, the order should merely overrule the demurrer with costs;[83] an order to answer over is not necessary.[84] Defendant need not further answer, and plaintiff, if he wishes to require a further answer, must except to the answer already on file.[85] If, however, defendant has taken no proof in support of his answer, leave will not be granted to open proof on the overruling of the demurrer.[86]

(IV) *Renewing Demurrer or Questions Presented Thereby.* After a demurrer has been overruled defendant cannot in general put in any other

bers, 8 W. Va. 210; Nichols *v.* Nichols, 8 W. Va. 174.

See 19 Cent. Dig. tit. "Equity," § 519.

A recital in a decree overruling a demurrer that defendant did not ask further time to answer indicates a waiver of the right. Mitchell *v.* Evans, 29 W. Va. 569, 2 S. E. 84.

78. Florida has a rule (No. 51) similar to the federal equity rule given at the end of this note, and it is held thereunder that an answer may be required before the following rule day. Myers *v.* McGahagan, 26 Fla. 303, 8 So. 447.

In Michigan the proper practice is to grant leave to answer and on failure to answer to enter a final decree. Creasey *v.* St. George's Soc., 34 Mich. 51.

In New Jersey chancery rule 25 allows forty days to answer, and the duty to answer under this rule is not affected by an unserved order. Vanderbeck *v.* Perry, 30 N. J. Eq. 78.

In West Virginia defendant is entitled to a rule to answer which need not be served. Billingslea *v.* Manear, 47 W. Va. 785, 35 S. E. 847; Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Pecks *v.* Chambers, 8 W. Va. 210; Nichols *v.* Nichols, 8 W. Va. 174.

U. S. Eq. Rule 34 provides that defendant shall be assigned to answer the next succeeding rule day, or at such other period as, consistently with justice and the rights of defendant, the same can in the judgment of the court be reasonably done; in default thereof the bill shall be taken *pro confesso*. See *supra*, head of this note, for construction of similar rule in Florida. A defendant who has interposed a groundless demurrer for purposes of delay may be required to pay costs and plaintiff's expenses as a condition for leave to answer. Merrimac Mattress Mfg. Co. *v.* Schlesinger, 124 Fed. 237.

79. Atlantic Ins. Co. *v.* Lemar, 10 Paige (N. Y.) 385; Hurd *v.* Haynes, 9 Paige (N. Y.) 604.

80. White *v.* Dummer, 2 N. J. Eq. 527. Leave will not be given to file a plea which if true would be no bar to relief. Seeley *v.* Price, 5 N. J. Eq. 231.

81. In Illinois it is in the discretion of the court to rule defendant to answer or proceed at once to decree. Wangelin *v.* Goe, 50 Ill. 459; Iglehart *v.* Miller, 41 Ill. App. 439. But see Bruschke *v.* Der Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715.

In Maine a rule (59 Me. 605) permitted final judgment on a demurrer. It is held that this rule was intended to prevent demurrers for delay and the court for good cause might allow an answer. Portland, etc., R. Co. *v.* Boston, etc., R. Co., 65 Me. 122.

In the New York chancery there was a rule similar to the Maine rule just mentioned, but it did not apply where the demurrer was put in in good faith. Bowman *v.* Marshall, 9 Paige 78.

In Ohio an answer was not permitted without an affidavit of merits. Baldwin *v.* Creed, Wright 729; Manley *v.* Hunt, 1 Ohio 257.

In Pennsylvania defendant may answer unless the demurrer was for vexation and delay. Corbet *v.* Oil City Fuel Supply Co., 5 Pa. Super. Ct. 19, 40 Wkly. Notes Cas. 480.

In Vermont it is proper, where the case involves a new question requiring the construction of a statute by the supreme court, to send the case there at once without the expense of a trial on an issue of fact. State *v.* Massey, 72 Vt. 210, 47 Atl. 834. If defendant elects to go to the supreme court on a demurrer he will not after defeat there be permitted to answer. Bailey *v.* Holden, 50 Vt. 14.

In Virginia if defendant in default of answer files a demurrer and it is overruled, the court may proceed to a decree. Brent *v.* Washington, 18 Gratt. 526; Reynolds *v.* Commonwealth Bank, 6 Gratt. 174.

82. Deuel *v.* Hawke, 2 Minn. 50.

83. Siffkin *v.* Manning, 9 Paige (N. Y.) 222.

84. O'Hare *v.* Downing, 130 Mass. 16.

85. Bragg *v.* Whitcomb, Walk. (Mich.) 307; Cotes *v.* Turner, Bunb. 123.

86. Orendorf *v.* Budlong, 12 Fed. 24.

demurrer,[87] but by leave of court, when the first demurrer is too broad, defendant may be permitted to interpose one less extensive,[88] and if plaintiff amends his bill defendant may demur, although a demurrer to the original bill has been overruled.[89] A decision on demurrer is conclusive of the questions decided until reversed,[90] and it is therefore held that where a demurrer is overruled, without reserving the benefit thereof by answer, the question determined cannot be again raised by the answer,[91] or on the hearing.[92]

D. Pleas — 1. Nature and Function — a. In General. A plea has been defined to be a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred.[93] Its proper office is to bring forward some one distinct matter of fact which is a complete defense to the whole bill or to some distinct part of it to which the plea applies.[94] It cannot be made to perform the functions of a demurrer, and is therefore bad if it states nothing except what already appears on the face of the bill.[95] It has been held that a plea cannot be resorted to for presentation of facts occurring after the filing of the bill,[96] but the practice of the English chancery permitted such facts to be pleaded.[97] A plea questions plaintiff's right to compel an answer,[98] and cannot be used to assert a right pertaining to procedure and not affecting the duty to answer.[99] The purpose of a plea is to shorten the controversy, and when it will not have that effect it will be overruled.[1] Therefore if the defense consists of a variety of circumstances making it necessary to go into the examination of witnesses at large a plea is unavailing.[2]

b. For What Purposes Necessary. Certain defenses, not appearing on the face of the bill, must, if made at all, be presented by plea and not by answer. Such are those going to the jurisdiction of the person of defendant,[3] the capacity of

87. Hoge *v.* Junkin, 79 Va. 220; Fuller *v.* Knapp, 24 Fed. 100.

88. Thorpe *v.* Macauley, 5 Madd. 218; Clegg *v.* Legh, 4 Madd. 207.

89. Moore *v.* Armstrong, 9 Port. (Ala.) 697; Bowes *v.* Hoeg, 15 Fla. 403.

90. Kilpatrick *v.* Strozier, 67 Ga. 247.

91. Wilson *v.* Hall, 67 Ga. 53; Tison *v.* Tison, 14 Ga. 167; McNairy *v.* Nashville, 2 Baxt. (Tenn.) 251.

In Tennessee before the code there could be no appeal from a ruling on demurrer and defendant might therefore make the same objection in his answer. McNairy *v.* Nashville, 2 Baxt. 251; Avery *v.* Holland, 2 Overt. 71.

Objection of adequate remedy at law may be taken by answer after the overruling of a demurrer on that ground. Anderson *v.* Olsen, 188 Ill. 502, 59 N. E. 239, 80 Am. St. Rep. 190 [*affirming* 90 Ill. App. 189].

92. Atty.-Gen. *v.* Purmort, 5 Paige (N. Y.) 620; Boyd *v.* Sims, 87 Tenn. 771, 11 S. W. 948.

93. Mitford Eq. Pl. 177.

94. Union Branch R. Co. *v.* East Tennessee, etc., R. Co., 14 Ga. 327; Goodrich *v.* Pendleton, 3 Johns. Ch. (N. Y.) 384; Weisman *v.* Heron Min. Co., 57 N. C. 112; Farley *v.* Kittson, 120 U. S. 303, 7 S. Ct. 534, 30 L. ed. 684; Knox Rock-Blasting Co. *v.* Rairdon Stone Co., 87 Fed. 969; Mitford Eq. Pl. 177; 2 Daniell Ch. Pr. 97. It is not strictly correct to say, as some of the cases cited do, that a plea must be confined to a single fact. It is sometimes necessary to state a number of facts, but they must together tend to a single point or matter operating as a defense. See *infra*, VIII, D, 4, c, (IV).

95. Keen *v.* Brown, (Fla. 1903) 35 So. 401; Black *v.* Black, 15 Ga. 445; Davis *v.* Davis, 57 N. J. Eq. 252, 41 Atl. 353; Cozine *v.* Graham, 2 Paige (N. Y.) 177; Phelps *v.* Garrow, 3 Edw. (N. Y.) 139. See also *supra*, VIII, A, 1. A plea is bad which alleges only facts appearing on the face of the bill and negatives matter which plaintiff should have affirmed in his bill. Garrett *v.* New York Transit, etc., Co., 29 Fed. 129. No plea is necessary to bring to the notice of the court matters appearing on the face of the record. Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46.

96. Wright *v.* Meek, 3 Greene (Iowa) 472.

97. Matter arising between the bill and the plea might be pleaded, but matter arising after pleading to the bill did not ground a plea *puis darrein continuance*. 2 Daniell Ch. Pr. 98.

98. Weisman *v.* Heron Min. Co., 57 N. C. 112; Farley *v.* Kittson, 120 U. S. 303, 7 S. Ct. 534, 30 L. ed. 684; Mitford Eq. Pl. 238.

99. Constitutional right to jury trial of a certain issue cannot be presented by plea. Defendant should answer and then claim the right by motion. Hoitt *v.* Burleigh, 18 N. H. 389.

1. Anderson *v.* Audenreid, 8 Phila. (Pa.) 96.

2. Carroll *v.* Potter, Walk. (Mich.) 355; Loud *v.* Sergeant, 1 Edw. (N. Y.) 164; Mitford Eq. Pl. 177.

3. Kimball *v.* Walker, 30 Ill. 482; Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470. Matter to show want of jurisdiction must be set up by plea and not by motion. Pond *v.* Vermont Valley R. Co., 19 Fed. Cas.

plaintiff to sue,[4] the pendency of another suit for the same cause,[5] and in general all matters in abatement.[6] Defenses in bar may now usually be reserved for answer.[7]

2. Right and Time to Plead. In the English chancery a defendant might file a plea at any time before the return of an attachment with proclamations.[8] In the United States the time depends upon statutes or rules, but generally a plea may be filed without leave at any time within the period allowed for answer.[9] A plea cannot generally be filed after answer[10] or after hearing.[11] Defendant may waive his right to plead by conduct inconsistent with its assertion, as by a stipulation extending time to answer to the merits,[12] or by submission for final decree under an agreement of compromise.[13] Defendant pleading has control of the

No. 11,265, 12 Blatchf. 280. A plea is the proper method of questioning the jurisdiction. Campbell *v.* Crawford, 63 Ala. 392; Emerson *v.* Western Union R. Co., 75 Ill. 176; Wilson *v.* American Palace Car Co., (N. J. Err. & App. 1903) 55 Atl. 997; Shelby *v.* Johnson, 7 Humphr. (Tenn.) 503.

W. Va. Code, c. 125, § 16, provides that where the bill shows proper matter for the jurisdiction of the court, no exception for the want of jurisdiction shall be allowed, except it be taken by plea. Middleton *v.* White, 5 W. Va. 572.

Suit in wrong county.— If a suit relating to land is brought in a county other than that in which a greater part of the land lies the defense must be raised by plea and not by demurrer. Ulrici *v.* Papin, 11 Mo. 42.

4. Chicago *v.* Cameron, 22 Ill. App. 91; Hoyt *v.* Hoyt, 58 Vt. 538, 3 Atl. 316.

Legality of an assignment under which plaintiff claims must be tested by plea. Chalfont *v.* Johnston, 3 Yeates (Pa.) 16; Nicholas *v.* Murray, 18 Fed. Cas. No. 10,223, 5 Sawy. 320.

Representative capacity.— So too the validity of the appointment of one of three plaintiffs suing as executors. Burger *v.* Potter, 32 Ill. 66.

5. Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479; Pierce *v.* Feagans, 39 Fed. 587. *Contra*, Withers *v.* Denmead, 22 Md. 135.

Where both suits are in the same court plaintiff may be compelled to elect without a plea. Moore *v.* Grubbs, 3 B. Mon. (Ky.) 77.

In Tennessee a plea of a former suit pending may be incorporated in an answer, but the answer must have all the certainty required of a plea. Connell *v.* Furgason, 5 Coldw. 401.

6. St. Mary's Bank *v.* St. John, 25 Ala. 566; Chapman *v.* School Dist., 5 Fed. Cas. No. 2,607, Deady 108.

U. S. Eq. Rule 39 provides that defendant shall be entitled in all cases, by answer, to insist upon all matters of defense (not being matters of abatement or to the character of the parties or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by plea in bar.

7. See U. S. Eq. Rule 39; and *infra*, VIII, E, 1, c.

Genuineness of an instrument filed with the bill as the basis of the suit may be assailed without a plea of *non est factum*. Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

In a bill to set aside an award, if the bill sets out the award defendant need not plead it in order to rely upon it. Tyler *v.* Stephens, 7 Ga. 278.

8 Sanders *v.* Murney, 1 Sim. & St. 225, 1 Eng. Ch. 225.

9. U. S. Eq. Rule 18 makes it the duty of defendant to file his plea, demurrer, or answer on the rule day next succeeding that of entering his appearance, but rule 32 allows him to plead at any time before the bill is taken for confessed. Oliver *v.* Decatur, 18 Fed. Cas. No. 10,494, 4 Cranch C. C. 458. These rules apply to dilatory pleas. Ewing *v.* Blight, 8 Fed. Cas. No. 4,589, 3 Wall. Jr. 134.

After expiration of time.— Where defendant is required to plead by a particular day, he cannot plead thereafter without special leave. Flanders *v.* Whittaker, 13 Ill. 707. He may in such case plead at any time before default is asked. Lambert *v.* Hyers, 27 Ill. App. 400.

After a decree nisi a plea in abatement cannot be filed. Simpson *v.* Edmiston, 23 W. Va. 675.

10. See *infra*, VIII, D, 6.

A plea of the statute of limitations may in the discretion of the court be filed after answer, but only upon the showing of a sufficient excuse for not interposing it in proper time. Bartles *v.* Gibson, 17 Fed. 293.

11. Curd *v.* Lewis, 1 Dana (Ky.) 351.

Plea inadvertently withheld.— The facts that a plea had been made out and unwittingly retained in the attorney's desk, and that similar pleas had been duly filed in similar cases pending between the parties, did not warrant a resort to such plea after plaintiff had closed his case. McDougald *v.* Banks, 13 Ga. 451.

After submission of the case the court cannot allow a plea of infancy without notice, and without setting aside the submission. Wilkinson *v.* Buster, 115 Ala. 578, 22 So. 34.

After interlocutory decree and an issue ordered defendant cannot plead limitations. Wilson *v.* Turberville, 30 Fed. Cas. No. 17,844, 2 Cranch C. C. 27.

12. Morgan *v.* Corlies, 81 Ill. 72.

13. Foster *v.* Foster, 126 Ala. 257, 28 So. 624.

plea and may withdraw it, and other defendants cannot complain of such action.[14]

3. GROUNDS OF PLEAS. To attempt to specify the different defenses which may be properly presented by plea would require one to cover practically the entire domain of defenses.[15] It seems that every character of defense which may be resolved to a single point may be thus presented.[16]

4. FORM AND SUFFICIENCY OF PLEAS — a. Classes of Pleas. Pleas in equity have been usually classified, according to the nature of the defense presented, as pleas to the jurisdiction of the court, to the person of plaintiff or defendant, and in bar of the suit.[17] More generally they are classified as at law, as pleas in abatement and pleas in bar.[18] It is generally considered, however, that the distinction between pleas in bar and pleas in abatement is of little or no practical consequence, and the same would be true *a fortiori* of the further subdivision of pleas in abatement above stated.[19] A more practical classification is based on the character of the averments, as consisting of entirely new matter, of denials, or both, and so classified, pleas are affirmative or pure, negative, and anomalous.[20]

b. Formal Parts of Pleas. A plea in form resembles a demurrer, being entitled in the same manner, except that it is styled a plea, commencing with a similar protestation, and if partial, a like designation of the portion of the bill to which it relates, then stating the facts constituting the defense, and closing with a prayer whether defendant shall be required to make further answer.[21] A plea must be signed by counsel,[22] and must usually be sworn to, and sometimes certified by counsel to be well taken.[23]

c. Requisites of Pleas — (1) *In General.* At least as great strictness in pleading as to matter of substance is required in equity as at law.[24] The plea must be perfect in itself,[25] responsive to the bill,[26] and must state every fact necessary to make it a complete defense to the entire equity of the bill or that portion covered by the plea.[27] Rules of good pleading require that such facts be pleaded

14. Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

15. See discussions of the subject in 2 Daniell Ch. Pr. 135 *et seq.*; Mitford Eq. Pl. 178 *et seq.*

16. See Story Eq. Pl. 652.

U. S. Eq. Rule 52 requires want of proper parties to be pleaded by answer, or at least dispenses with the necessity of a plea. U. S. *v.* Gillespie, 6 Fed. 803.

17. 2 Daniell Ch. Pr. 136; Mitford Eq. Pl. 177.

18. Beames on Pleas 58; 2 Daniell Ch. Pr. 136.

19. Evans *v.* Monot, 57 N. C. 227; 2 Daniell Ch. Pr. 136. Lord Thurlow professed not to understand the distinction. Merrewether *v.* Mellish, 13 Ves. Jr. 435, 33 Eng. Reprint 357.

20. 2 Daniell Ch. Pr. 98, 99. See *infra*, VIII, D, 4, e, f, g.

21. See *supra*, VIII, C, 5, a; and form in Barton Suit Eq. 110.

22. Simes *v.* Smith, 4 Madd. 366. See also *infra*, XIV, A, 1.

23. U. S. Eq. Rule 31. See also *infra*, XIV.

24. Danels *v.* Taggart, 1 Gill & J. (Md.) 311.

25. Allen *v.* Randolph, 4 Johns. Ch. (N. Y.) 693; Stuart *v.* Warren, 1 N. Y. Leg. Obs. 293.

26. Wilson *v.* Wilson, 25 R. I. 446, 56 Atl. 773.

27. *Florida.*— Da Costa *v.* Dibble, 40 Fla. 418, 24 So. 911.

Maine.— Quint *v.* Little, 4 Me. 495.

Maryland.— Danels *v.* Taggart, 1 Gill & J. 311.

Massachusetts.— Newton *v.* Thayer, 17 Pick. 129.

New Jersey.— Miller *v.* U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Mount *v.* Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726; Meeker *v.* Marsh, 1 N. J. Eq. 198.

New York.—Stuart *v.* Warren, 1 N. Y. Leg. Obs. 293.

Wisconsin.— Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 5 Wis. 173.

United States.— McCloskey *v.* Barr, 38 Fed. 165; Piatt *v.* Oliver, 19 Fed. Cas. No. 11,114, 1 McLean 295.

England.— Hardman *v.* Ellames, Coop. t. Brough. 351, 4 L. J. Ch. 181, 2 Myl. & K. 732, 7 Eng. Ch. 732, 39 Eng. Reprint 1124, 5 Sim. 640, 9 Eng. Ch. 640; Forbes *v.* Skelton, 1 Jur. 117, 6 L. J. Ch. 159, 8 Sim. 335, 8 Eng. Ch. 335.

See 19 Cent. Dig. tit. "Equity," §§ 401, 403.

All intendments must be excluded, and if a case can be supposed consistent with the facts pleaded, which would render the plea inoperative, the plea is bad. Whitlock *v.* Fiske, 3 Edw. (N. Y.) 131.

A plea of prior decree in bar must show that the former suit was between substan-

positively[28] and not hypothetically,[29] or left to inference.[30] They must be pleaded with particularity and certainty,[31] and not argumentatively,[32] or by way of conclusion.[33] A negative pregnant renders the plea bad.[34]

(II) *Matters in Abatement.* Pleas in abatement are not favored and are strictly construed.[35] A plea to the jurisdiction that part of defendants are not residents of the county must state where their residence is.[36] But a plea showing lack of jurisdiction of the court over defendant need not designate another tribunal in which he may be sued.[37] A plea of another suit pending in the same court or another court of concurrent jurisdiction is proper,[38] but it must be accurate and positive and show that the purposes of the two suits are the same.[39] It must set forth the general character and object of the other suit,[40] must show that the subject-matter is the same,[41] and that the whole relief sought in the second suit is obtainable in the first.[42] If the former suit has been dismissed and an appeal has been taken, the plea must show that the appeal has been regularly perfected and is still pending.[43] A plea for want of parties is in bar and not in abatement.[44]

tially the same parties, for the same subject-matter, that the same point was in issue, and that the allegations as to relief were substantially the same. Da Costa *v.* Dibble, 40 Fla. 418, 24 So. 911.

A plea of purchaser for valuable consideration must deny notice, not only to the purchaser, but to any agent. Griffith *v.* Griffith, Hoffm. (N. Y.) 153.

A plea of want of parties is not good where the bill shows that such parties are out of the jurisdiction. Milligan *v.* Milledge, 3 Cranch (U. S.) 220, 2 L. ed. 417.

Plea alleging that plaintiff is non compos mentis, but not showing that he has been so adjudged or that a committee has been appointed, is bad. Dudgeon *v.* Watson, 23 Fed. 161, 23 Blatchf. 161.

Where a bill is framed on two theories, a plea to the whole bill, setting up facts going in bar of only one of the theories, is bad. Supreme Lodge K. & L. of H. *v.* Wing, 131 Ala. 395, 31 So. 3.

28. McCloskey *v.* Barr, 38 Fed. 165.

A plea may be on information and belief when it relates to acts of third persons not within defendant's knowledge. Parker *v.* Parker, Walk. (Mich.) 457.

29. Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329].

30. Da Costa *v.* Dibble, 40 Fla. 418, 24 So. 911; Meeker *v.* Marsh, 1 N. J. Eq. 198.

31. A plea by stock-holders that the corporation has assets remaining is bad when it does not state what such assets are. Lane *v.* Morris, 8 Ga. 468.

A plea that plaintiff is incapacitated, without specifying the particular incapacity, is bad. Corlies *v.* Corlies, 23 N. J. Eq. 197.

A plea of a purchaser for valuable consideration must show to whom the consideration was paid (Tompkins *v.* Ward, 4 Sandf. Ch. (N. Y.) 594), and that it was paid before notice of plaintiff's equity (High *v.* Batte, 10 Yerg. (Tenn.) 335).

A plea of laches must state fully the circumstances on which defendant relies as constituting laches. Hancock *v.* Carlton, 6 Gray (Mass.) 39; Crafts *v.* Crafts, 23 R. I. 5, 52 Atl. 890.

Denials must be specific and not general. Mains *v.* Homer Steel-Fence Co., 116 Mich. 526, 74 N. W. 735.

32. Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249; McDonald *v.* Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492; Wood *v.* Mann, 30 Fed. Cas. No. 17,951, 1 Sumn. 506.

33. McCloskey *v.* Barr, 38 Fed. 165. On the other hand it is sufficient to allege facts from which the conclusion follows, without stating the conclusion itself. Cook *v.* Mancius, 3 Johns. Ch. (N. Y.) 427; Harpending *v.* New York Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029.

34. Rhino *v.* Emery, 79 Fed. 483.

35. Freidlander *v.* Pollock, 45 Tenn. 490.

36. Lester *v.* Stevens, 29 Ill. 155.

37. Wilson *v.* American Palace Car Co., (N. J. Err. & App. 1903) 55 Atl. 997.

38. Streater *v.* Ricketts, 2 Kulp (Pa.) 529. And see, generally, Abatement and Revival, 1 Cyc. 40.

39. Macey *v.* Childress, 2 Tenn. Ch. 23.

40. State Bank *v.* Williams, Harr. (Md.) 219.

41. Griffing *v.* A. A. Griffing Iron Co., 61 N. J. Eq. 269, 48 Atl. 910.

Sufficiency of averment.—This may be done either by averring the object of the first suit and stating that the present suit was brought for the same matter, or by omitting the latter statement and stating facts sufficient to show that such is the fact. Griffing *v.* A. A. Griffing Iron Co., 61 N. J. Eq. 269, 48 Atl. 910; Davison *v.* Johnson, 16 N. J. Eq. 112; McEwen *v.* Broadhead, 11 N. J. Eq. 129.

42. Griffing *v.* A. A. Griffing Iron Co., 61 N. J. Eq. 269, 48 Atl. 910; Nixon's Estate, 13 Wkly. Notes Cas. (Pa.) 284; Brooke *v.* Phillips, 6 Phila. (Pa.) 392; Streater *v.* Ricketts, 2 Kulp (Pa.) 529.

43. Moss *v.* Ashbrooks, 12 Ark. 369.

44. Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,068, 1 McAll. 26.

(III) *Exhibits.* An instrument essential to the establishment of the defense pleaded must be exhibited as in a bill,[45] and when this is done it becomes a part of the plea,[46] and will defeat the plea if it shows that the defense set up is not good.[47]

(IV) *Singleness.* An essential characteristic of a plea is that it presents a single ground of defense, going to the entire equity of the bill or some distinct portion thereof.[48] Therefore a plea which states facts constituting more than one ground of defense is bad for duplicity.[49] The requirement is that the defense presented should be single, and not that such defense should consist of a single fact. Therefore the plea may consist of a variety of facts, provided that they conduce to a single point and give as their result one clear ground disposing of the bill.[50] Different pleas may be pleaded to different parts of the same bill.[51] The rule against duplicity is not confined, however, to embracing two defenses in one plea, but forbids also the interposition, without leave of the court, of two or more separate pleas to the whole bill or to the same part thereof.[52] Leave to file several pleas is not granted as of course, or almost so, as at law, but only on special motion on notice,[53] and only when such proceeding appears to be necessary to save defendant from great inconvenience,[54] and where they present well defined issues which may be determined separately from the general equities of the bill, without injustice to plaintiff.[55] The proper remedy for duplicity is to compel defendant to elect which plea he will stand on.[56]

45. Williams *v.* McAfee, Ky. Dec. 7. See also *supra*, VII, D.

46. Wheeler *v.* McCormick, 29 Fed. Cas. No. 17,498, 8 Blatchf. 267.

47. Garrett *v.* New York Transit, etc., Co., 29 Fed. 129.

48. See *supra*, VIII, D, 1, a.

49. Mains *v.* Homer Steel-Fence Co., 116 Mich. 526, 74 N. W. 735; Albany City Bank *v.* Dorr, Walk. (Mich.) 317; Rhode Island *v.* Massachusetts, 14 Pet. (U. S.) 210, 10 L. ed. 423; Briggs *v.* Stroud, 58 Fed. 717; Gaines *v.* Mausseaux, 9 Fed. Cas. No. 5,176, 1 Woods 118; Nobkissen *v.* Hastings, 4 Bro. Ch. 253, 29 Eng. Reprint 879, 2 Ves. Jr. 84, 30 Eng. Reprint 535.

To a bill by an assignee of several demands defendant pleaded that the assignor had made other and conflicting assignments. This plea was held bad as raising an indefinite number of issues. Porter *v.* Young, 85 Va. 49, 6 S. E. 803.

One matter for demurrer.— It seems that where one of the defenses appears on the face of the bill, and is therefore matter for demurrer and not for plea, it will still render the plea double. Hostetter Co. *v.* E. G. Lymons Co., 99 Fed. 734; Gaines *v.* Mausseaux, 9 Fed. Cas. No. 5,176, 1 Woods 118.

50. Rochester Bank *v.* Emerson, 10 Paige (N. Y.) 115; Southern L. Ins., etc., Co. *v.* Davis, 4 Edw. (N. Y.) 588; Vacuum Oil Co. *v.* Eagle Oil Co., 122 Fed. 105; MacVeagh *v.* Denver City Waterworks Co., 85 Fed. 74, 29 C. C. A. 33; Hazard *v.* Durant, 25 Fed. 26; Reissner *v.* Anness, 20 Fed. Cas. No. 11,686, 3 Ban. & A. 148; Whitbread *v.* Brockhurst, 1 Bro. Ch. 404, 28 Eng. Reprint 1205.

Specific denials of all facts charged in the bill which if true would defeat the defense interposed by the plea do not render the plea double. Harrison *v.* Farrington, 38 N. J. Eq. 358; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178; Rhino *v.* Emery, 79 Fed. 483.

A plea of the statute of limitations, setting up two matters, either of which would establish that defense, is not double. Boggs *v.* Forsyth, 2 Sandf. (N. Y.) 533; Didier *v.* Davison, 2 Sandf. Ch. (N. Y.) 61.

51. New York, etc., Coal Co. *v.* Spencer, 3 Pa. Dist. 694.

52. *New Jersey.*— Wooley *v.* Pemberton, (Ch. 1887) 10 Atl. 159.

New York.— Didier *v.* Davison, 10 Paige 515; Saltus *v.* Tobias, 7 Johns. Ch. 214.

Pennsylvania.— New York, etc., Coal Co. *v.* Spencer, 3 Pa. Dist. 694; Underwood *v.* Warner, 3 Phila. 414.

Tennessee.— Benson *v.* Jones, 1 Tenn. Ch. 498.

United States.— U. S. *v.* Dalles Military Road Co., 148 U. S. 49, 13 S. Ct. 465, 37 L. ed. 362; U. S. *v.* California, etc., Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. ed. 354; Bunker Hill, etc., Min., etc., Co. *v.* Shoshone Min. Co., 109 Fed. 504, 47 C. C. A. 200; Gilbert *v.* Murphy, 100 Fed. 161; McCloskey *v.* Barr, 38 Fed. 165; Noyes *v.* Willard, 18 Fed. Cas. No. 10,374, 1 Woods 187; Reissner *v.* Anness, 20 Fed. Cas. No. 11,686, 3 Ban. & A. 148; Wheeler *v.* McCormick, 29 Fed. Cas. No. 17,498, 8 Blatchf. 267.

See 19 Cent. Dig. tit. "Equity," § 404.

One plea to the whole bill and several pleas to distinct parts are bad. Van Hook *v.* Whitlock, 3 Paige (N. Y.) 409.

53. Mount *v.* New York Manhattan Bank, 44 N. J. Eq. 297, 18 Atl. 80; Mount *v.* Manhattan Co., 43 N. J. Eq. 25, 9 Atl. 114; Underwood *v.* Warner, 3 Phila. (Pa.) 414, 2 Daniell Ch. Pr. 105.

54. Didier *v.* Davison, 10 Paige (N. Y.) 515; Van Hook *v.* Whitlock, 3 Paige (N. Y.) 409; Underwood *v.* Warner, 3 Phila. (Pa.) 414; Gibson *v.* Whitehead, 4 Madd. 241.

55. Gilbert *v.* Murphy, 100 Fed. 161.

56. Saltus *v.* Tobias, 7 Johns. Ch. (N. Y.) 214; Noyes *v.* Willard, 18 Fed. Cas. No.

d. Partial Pleas. Like a demurrer, a plea may be to the whole bill or to some distinct portion thereof,[57] and if partial it must as in the case of a demurrer state distinctly to what part it is intended to apply.[58] The consequence of a failure to properly restrict a plea, and by such failure make it extend to parts covered by an answer, is much the same as in the case of an overlapping demurrer and answer;[59] but a plea, unlike a demurrer, is not necessarily overruled altogether because it is not good as to the whole bill or to all the portion which it purports to cover.[60] It has been held that where two defendants join in a plea in abatement it will be overruled if bad as to one of them.[61]

e. Affirmative or Pure Pleas. An affirmative or pure plea is one which merely states matter not apparent on the bill, and relies on the effect of such matter as a bar to plaintiff's claim.[62]

f. Negative Pleas. A negative plea introduces no new facts, but relies merely upon the denial of some matter in the bill upon which plaintiff's right depends.[63] The validity of a negative plea has been questioned.[64] Such pleas have, however, in recent times been very generally allowed,[65] but must be supported by answer.[66]

g. Anomalous Pleas. A third class of pleas in frequent use was referred to by a standard text-writer as being of an anomalous nature,[67] and such pleas are therefore for want of a better term generally styled anomalous pleas.[68] A plea to be good must show a complete defense and exclude every element which might defeat it.[69] Therefore where defendant desires to rely on some matter stated in the bill, but thereby impeached, it is not sufficient to merely reassert the matter relied on, but the plea must in addition thereto deny the matter in impeachment.[70] For example, where a bill seeks to set aside a release, or claims in opposition

10,374, 1 Woods 187; Reissner *v.* Anness, 20 Fed. Cas. No. 11,686, 3 Ban. & A. 148.

In England a double plea interposed without leave was overruled. 2 Daniell Ch. Pr. 105.

Striking out.— Under special circumstances it was held proper to strike out the allegations of the first plea, which seemed to go to the general equities of the bill, and to proceed upon the second, which was a good plea. U. S. *v.* Dalles Military Road Co., 148 U. S. 49, 13 S. Ct. 465, 37 L. ed. 362; U. S. *v.* California, etc., Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. ed. 354.

57. Beard *v.* Bowler, 2 Fed. Cas. No. 1,180, 2 Bond 13; 2 Daniell Ch. Pr. 106.

58. Davison *v.* Schermerhorn, 1 Barb. (N. Y.) 480; Jarvis *v.* Palmer, 11 Paige (N. Y.) 650; Van Hook *v.* Whitlock, 3 Paige (N. Y.) 409; Salkeld *v.* Science, 2 Ves. 107, 28 Eng. Reprint 71.

59. See *supra*, VIII, C, 6, c, (IV); *infra*, VIII, D, 6.

60. Searight *v.* Payne, 1 Tenn. Ch. 186; Kirkpatrick *v.* White, 14 Fed. Cas. No. 7,850, 4 Wash. 595; Wythe *v.* Palmer, 30 Fed. Cas. No. 18,120, 3 Sawy. 412; Dormer *v.* Fortescue, 2 Atk. 282, 26 Eng. Reprint 573; Duncalf *v.* Blake, 1 Atk. 52, 26 Eng. Reprint 35. It is said that this is true only as to the extent of the bill covered, but not as to the defense presented; that if such defense is bad in part, the plea must be overruled. Searight *v.* Payne, 1 Tenn. Ch. 186; 2 Daniell Ch. Pr. 107.

61. Simpson *v.* Edmiston, 23 W. Va. 675.

62. 2 Daniell Ch. Pr. 98; Story Eq. Pl. 660. As it does not controvert the bill in any particular, it is analogous to a plea in abatement, of estoppel, or in confession and avoidance at the common law.

63. 2 Daniell Ch. Pr. 98.

64. Bailey *v.* Le Roy, 2 Edw. (N. Y.) 514; Benson *v.* Jones, 1 Tenn. Ch. 498; Milligan *v.* Milledge, 3 Cranch (U. S.) 220, 2 L. ed. 417; Newman *v.* Wallis, 2 Bro. Ch. 143, 29 Eng. Reprint 82. Where a bill stated a decree for the sale of mortgaged premises and that the decree was fraudulently obtained, but stated no clause foreclosing plaintiff, a plea of the decree, alleging that plaintiff was foreclosed, was held not to be negative. Hilton *v.* Bissell, 1 Sandf. Ch. (N. Y.) 407.

65. *Illinois.*— Spangler *v.* Spangler, 19 Ill. App. 28.

New York.—Champlin *v.* Champlin, 2 Edw. 362.

Tennessee.— Benson *v.* Jones, 1 Tenn. Ch. 498.

United States.— Rhino *v.* Emery, 79 Fed. 483; Dwight *v.* Central Vermont R. Co., 9 Fed. 785, 20 Blatchf. 200.

England.— Hitchins *v.* Lander, Coop. Ch. 34, 14 Rev. Rep. 214, 10 Eng. Ch. 34; Armitage *v.* Wadsworth, 1 Madd. 189; Drew *v.* Drew, 2 Ves. & B. 159, 35 Eng. Reprint 279.

See 19 Cent. Dig. tit. "Equity," § 400.

66. See *infra*, VIII, D, 5.

67. 2 Daniell Ch. Pr. 102.

68. See Fletcher Eq. Pl. & Pr. 239; Langdell Eq. Pl. 101.

69. See *supra*, VIII, D, 4, c, (I).

70. Henderson *v.* Chaires, 35 Fla. 423, 17 So. 574; 2 Daniell Ch. Pr. 99.

thereto, and charges matter to avoid the release, defendant may not merely plead the release but must deny the matter in avoidance,[71] and a plea of the statute of limitations must deny facts stated in the bill which if true would remove the bar.[72] A bill by a mortgagor alleged an entry by the mortgagee and a subsequent agreement to reconvey when the rents should have paid the mortgage debt. A plea, alleging the entry for condition broken, without denying the agreement, was bad.[73] In denying that plaintiffs are assignees, as claimed in the bill, it is proper to allege facts rendering the assignment void.[74] A plea relying on matter with reference to which fraud is charged must deny the fraud,[75] but a plea of limitations to a bill charging fraud need not deny the fraud.[76]

5. SUPPORTING PLEA BY ANSWER. While the object of a plea is to put an end to the case without the necessity of a general answer,[77] defendant cannot by pleading certain matter defeat plaintiff's right to any discovery which by his bill he has sought with regard to that very matter. The general averments of a plea must therefore be supported by a particular answer, affording such discovery.[78] The general rule as to the necessity of such an answer is, that if there is any charge in the bill which is an equitable circumstance in favor of plaintiff's case against the matter pleaded, that charge must be denied by way of answer.[79] A negative plea which squarely denies a statement of the bill would seem therefore to require the support of an answer;[80] but it has been pointed out that defendant is entitled to know what particular discovery is required, and that it is only where plaintiff has sought particular discovery as to the fact denied by the plea, as by charging circumstances by way of evidence, that defendant need support even a negative plea by answer.[81] The true rule therefore is not that every negative plea must be supported by answer, but every such plea must be supported by answer as to facts and circumstances charged in the bill in support of the statement denied by the plea.[82] The principle involved requires an answer in support of an anomalous plea,[83] which is only necessary where the bill anticipates and avoids the bar pleaded,[84] and also in support of a plea to a bill which, without stating the matter in bar, charges any facts or circumstances which if true would operate to defeat the bar.[85] A pure plea must for this reason be supported by answer to meet any specific charges in the bill which would defeat the plea.[86] In general, however,

71. Fish *v.* Miller, 5 Paige (N. Y.) 26; Allen *v.* Randolph, 4 Johns. Ch. (N. Y.) 693; Crawley *v.* Timberlake, 36 N. C. 346; Lloyd *v.* Smith, 1 Anstr. 258.

72. Wright *v.* Le Claire, 4 Greene (Iowa) 420; Foster *v.* Foster, 51 Vt. 216; Stearns *v.* Page, 22 Fed. Cas. No. 13,339, 1 Story 204.

73. Quint *v.* Little, 4 Me. 495.

74. Southern L. Ins., etc., Co. *v.* Davis, 4 Edw. (N. Y.) 588. Such a plea and many others of this class, it should be noted, closely resemble the special traverse of the common law.

75. Lawrence *v.* Pool, 2 Sandf. (N. Y.) 540.

76. Boggs *v.* Forsyth, 2 Sandf. (N. Y.) 533.

77. See *supra*, VIII, D, 1, a.

78. 2 Daniell Ch. Pr. 112.

79. 2 Daniell Ch. Pr. 113; Mitford Eq. Pl. 236; Story Eq. Pl. 684.

80. Benson *v.* Jones, 1 Tenn. Ch. 498; Dwight *v.* Central Vermont R. Co., 9 Fed. 785, 20 Blatchf. 200.

81. Seifred *v.* People's Bank, 1 Baxt. (Tenn.) 200; Thring *v.* Edgar, 2 Sim. & St. 274, 1 Eng. Ch. 274.

82. Cox *v.* Griffin, 17 Ga. 249; Everitt *v.* Watts, 3 Edw. (N. Y.) 486; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178; Rhino *v.* Emery, 79 Fed. 483; Thring *v.* Edgar, 2 Sim. & St. 274, 1 Eng. Ch. 274.

83. Bellows *v.* Stone, 8 N. H. 280; Somerset Bank *v.* Veghte, 42 N. J. Eq. 39, 6 Atl. 278; Bloodgood *v.* Kane, 8 Cow. (N. Y.) 360; Souzer *v.* De Meyer, 2 Paige (N. Y.) 574; Roche *v.* Morgell, 2 Sch. & Lef. 721. As to anomalous pleas see *supra*, VIII, D, 4, g. Even in such a plea if the bill merely states the bar as a pretense, and denies it without charging any circumstance in support of the denial, an answer is said to be unnecessary. Hare Disc. 30.

In modern practice matter charged in avoidance of an anticipated bar does not require an answer in support of the plea setting up the bar, unless defendant is specially interrogated. Hilton *v.* Guyott, 42 Fed. 249.

84. See *supra*, VIII, D, 4, g.

85. Rousekulp *v.* Kershner, 49 Md. 516; Stuart *v.* Warren, 1 N. Y. Leg. Obs. 293; Whitthorne *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 147; 2 Daniell Ch. Pr. 115.

86. A plea of *bona fide* purchase must be supported by answer where the bill contains any allegations which would charge defend-

as a pure plea does not controvert any matter in the bill, no discovery and consequently no answer in support is requisite.[87] A plea to a bill charging fraud must generally be accompanied by an answer specifically denying the fraud.[88] Care must be taken that the answer does not go beyond the matter of the plea,[89] and that it be confined to matters strictly responsive to the bill.[90] It must be specific and not general in its denials.[91] It may be on information and belief as to any matter not alleged to be the acts of defendant, or concerning which he cannot be presumed to have personal knowledge.[92] On argument every fact charged in the bill which if true would defeat the plea will be taken as true unless denied in the answer,[93] and therefore if a plea requires an answer and none is put in the plea will be overruled.[94] On the hearing of a plea the answer may be read to counterprove it.[95]

6. Plea Overruled by Answer. As a plea presents a reason for not answering, it is overruled or waived by an answer, not merely in support of the plea, covering any part of the bill to which the plea relates.[96] This harsh rule has, however, in some jurisdictions been modified where the plea and answer are to parts only of the bill and happen to overlap.[97] An answer to the entire bill over-

ant with notice. Tompkins *v.* Ward, 4 Sandf. Ch. (N. Y.) 594. So a plea of account stated or of a release, although not mentioned in the bill. Schwarz *v.* Wendell, Harr. (Mich.) 395. See also State Bank *v.* Wilson, 9 Ill. 57. Where a plea to the jurisdiction raises an issue as to the amount in controversy, defendant may be required to answer interrogatories relating thereto before the cause proceeds. Playford *v.* Lockard, 65 Fed. 870.

87. A plea of want of parties needs no support by answer (Goldsmith *v.* Gilliland, 24 Fed. 154, 10 Sawy. 606), nor in the federal courts, a plea that one of the parties is a citizen of a state other than that alleged in the petition for removal (McDonald *v.* Salem Capital Flour-Mills Co., 51 Fed. 577, 12 Sawy. 492).

A plea of the statute of limitations, where the bill does not contain allegations avoiding the operation of the statute, requires no answer (Conover *v.* Wright, 6 N. J. Eq. 613, 47 Am. Dec. 213; Smith *v.* Hickman, Cooke (Tenn.) 330; West Portland Homestead Assoc. *v.* Lownsdale, 17 Fed. 205, 9 Sawy. 106), but it does require an answer in its support where the bill contains such allegations (Chapin *v.* Coleman, 11 Pick. (Mass.) 331; Boggs *v.* Forsyth, 2 Sandf. (N. Y.) 533; Bloodgood *v.* Kane, 8 Cow. (N. Y.) 360; West Portland Homestead Assoc. *v.* Lownsdale, 17 Fed. 205, 9 Sawy. 106)

88. Taylor *v.* Duncanson, 20 D. C. 505; Spivey *v.* Frazee, 7 Ind. 661; French *v.* Shotwell, 5 Johns. Ch. (N. Y.) 555; Greene *v.* Harris, 11 R. I. 5.

U. S. Eq. Rule 32 expressly so requires.

89. See *infra*, VIII, D, 6.

90. Tompkins *v.* Ward, 4 Sandf. Ch. (N. Y.) 594.

91. Goodrich *v.* Pendleton, 3 Johns. Ch. (N. Y.) 384.

92. Bolton *v.* Gardner, 3 Paige (N. Y.) 273.

93. Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178.

94. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270.

95. Excepting to the sufficiency of the answer admits the validity of the plea. Hatch *v.* Bancroft-Thompson Co., 67 Fed. 802; 2 Daniell Ch. Pr. 222.

Where a bill attacks a decree for fraud and the plea relies upon the decree, it is impracticable to determine the validity of the plea until the determination of the issues made by bill and answer. Dobson *v.* Peck, 103 Fed. 904.

96. *Maryland.*— State Bank *v.* Dugan, 2 Bland 254.

Michigan.— Clark *v.* Saginaw City Bank, Harr. 240.

New York.— Bolton *v.* Gardner, 3 Paige 273.

South Carolina.— Joyce *v.* Gunnels, 2 Rich. Eq. 259.

Tennessee.— Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

United States.— Ferguson *v.* O'Harra, 8 Fed. Cas. No. 4,740, Pet. C. C. 493.

See 19 Cent. Dig. tit. "Equity," § 407.

Where defendant pleads the statute of frauds, and answers admitting the contract, the answer overrules the plea. Macon Episcopal Church *v.* Wiley, Riley Eq. (S. C.) 156, 30 Am. Dec. 386.

An answer overrules a plea only when it relates to matters which defendant by his plea declines to answer. Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178.

97. U. S. Eq. Rule 37; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 84 Fed. 379. See also Huston *v.* Sellers, 12 Phila. (Pa.) 520. The federal rule above cited does not apply where the answer extends to the whole matter covered by the plea (Phœnix Mut. L. Ins. Co. *v.* Grant, MacArthur & M. (D. C.) 117; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905), or where the answer is to the entire bill (see *infra*, note 13).

Hazard of defendant.— The difficulty of determining in many cases whether and to

rules any plea.[98] If defendant pleads and afterward answers to the merits his plea is waived.[99] An answer in support of a plea is not a separate defense,[1] and of course does not overrule the plea;[2] but if an answer for that purpose goes beyond what is necessary, and sets up any matter not merely in support of the plea, it will overrule the plea.[3]

7. Determination and Disposition of Pleas — a. Determining Sufficiency — (1) *Striking Out and Setting Down For Hearing.* Plaintiff should move to strike a plea from the files if he desires to object to it for want of form,[4] or as being an unauthorized pleading.[5] If he wishes to question its sufficiency in substance the proper course is to have it set down for argument.[6] While a demurrer to a plea is improper,[7] it is treated as a matter of form alone,[8] and the irregularity may be ignored and the demurrer treated as a setting down for hearing.[9] In England either party, if plaintiff did not reply, might obtain an order for argument;[10] but in the United States the primary duty of bringing it on varies in different jurisdictions.[11] The time when a plea may be set down for argument also

what extent a plea need be supported by answer subjects defendant to great hazard under the strict rule. If he answers too little in support of his plea the plea will be overruled; if he answers too much or unnecessarily the same result follows. See 2 Daniell Ch. Pr. 206 note.

98. Summers *v.* Murray, 2 Edw. (N. Y.) 205; Joyce *v.* Gunnels, 2 Rich. Eq. (S. C.) 259; Taylor *v.* Luther, 23 Fed. Cas. No. 13,796, 2 Sumn. 228. *Contra,* Talbot *v.* Darnall, 6 B. Mon. (Ky.) 486; Sharp *v.* Carlile, 5 Dana (Ky.) 487; Saddler *v.* Glover, 1 Bibb (Ky.) 53.

This rule applies in the federal courts, rule 37 not applying where the answer is to the entire bill. Huntington *v.* Laidley, 79 Fed. 865; Hudson *v.* Randolph, 66 Fed. 216, 13 C. C. A. 402.

If answer commences as answer to whole bill, although in reality it only answers part, it overrules a plea to the residue. Leacraft *v.* Demprey, 4 Paige (N. Y.) 124.

Right to rely on plea in abatement is waived by answering to the merits. Marshall *v.* Otto, 59 Fed. 249.

Where a plea and answer are inconsistent, the answer overrules the plea. Bradford *v.* Spyker, 32 Ala. 134; Brownell *v.* Curtis, 10 Paige (N. Y.) 210.

99. Miller *v.* Perks, 63 Ill. App. 140; Quinn *v.* Moss, 12 Sm. & M. (Miss.) 365; Price *v.* Mitchell, 10 Sm. & M. (Miss.) 179; Wilson *v.* Scruggs, 7 Lea (Tenn.) 635.

A plea in abatement is not waived by answering after the plea has been overruled. Klepper *v.* Powell, 6 Heisk. (Tenn.) 503.

1. Hart *v.* Sanderson, 16 Fla. 264.

2. Seifred *v.* People's Bank, 1 Baxt. (Tenn.) 200.

3. *Massachusetts.*— Andrews *v.* Brown, 3 Cush. 130.

New Hampshire.— Bell *v.* Woodward, 42 N. H. 181.

New Jersey.— Corlies *v.* Corlies, 23 N. J. Eq. 197.

New York.— Bangs *v.* Strong, 10 Paige 11; Tompkins *v.* Ward, 4 Sandf. Ch. 594.

United States.— Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56; Stearns *v.* Page, 22 Fed. Cas. No. 13,339, 1 Story 204. But see U. S. Eq. Rule 37.

See 19 Cent. Dig. tit. "Equity," § 407.

4. Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249; Irwin *v.* Henderson, 13 Fed. Cas. No. 7,084, 2 Cranch C. C. 167. See also Vacuum Oil Co. *v.* Eagle Oil Co., 122 Fed. 105.

5. As where it contains matter proper only in an answer. Armengaud *v.* Coudert, 27 Fed. 247, 23 Blatchf. 484.

6. *Florida.*— Spaulding *v.* Ellsworth, 39 Fla. 76, 21 So. 812.

Illinois.— Lester *v.* Stevens, 29 Ill. 155; Cochran *v.* McDowell, 15 Ill. 10.

Maryland.— Moreton *v.* Harrison, 1 Bland 491.

New Jersey.— Davison *v.* Johnson, 16 N. J. Eq. 112; Flagg *v.* Bonnel, 10 N. J. Eq. 82.

Tennessee.— Hannum *v.* McInturf, 6 Baxt. 225.

United States.— Armengaud *v.* Coudert, 27 Fed. 247, 23 Blatchf. 484.

See 19 Cent. Dig. tit. "Equity," § 409.

In Massachusetts it was held that the proper course was to move to set it aside. Newton *v.* Thayer, 17 Pick. 129.

In the federal courts a motion to quash the plea is unauthorized. Hatch *v.* Bancroft-Thompson Co., 67 Fed. 802.

7. See *supra,* VIII, C, 1, b.

8. Klepper *v.* Powell, 6 Heisk. (Tenn.) 503.

9. Breeding *v.* Grantland, 135 Ala. 497, 33 So. 544; Raymond *v.* Simonson, 4 Blackf. (Ind.) 77; Zimmerman *v.* So Relle, 80 Fed. 417, 25 C. C. A. 518. See also Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465.

10. 2 Daniell Ch. Pr. 219.

11. U. S. Eq. Rule 33 provides that plaintiff may set down the plea to be argued, and rule 38 provides that if he shall not reply to it or set it down for argument on the rule day when it is filed or on the next succeeding rule day he shall be deemed to admit the truth and sufficiency thereof.

In Maryland if defendant's plea is not set down for hearing and no replication is filed to it, it will not operate as a bar. Chase *v.* McDonald, 7 Harr. & J. 160.

depends on local regulations.[12] A plea to the jurisdiction should be disposed of before another defense is considered, but a failure to do so will not invalidate the decree.[13] Where a record in bar of relief is pleaded, defendant may be required to show it before plaintiff replies or sets down the plea,[14] and where some defendants demurred and others had pleaded, but had obtained leave to withdraw the pleas, and it was doubtful whether they remained before the court, action on them was postponed until the hearing of the demurrer.[15]

(II) *What Is Considered on Hearing.* When a cause is heard on a plea, the inquiry is substantially as it would be on a demurrer to the plea.[16] Every fact in the plea which is well pleaded is for the purposes of the hearing assumed to be true,[17] and every allegation in the bill, not denied by the plea, is also assumed to be true.[18] The sufficiency of the bill cannot be questioned.[19]

(III) *Disposition of Case on Hearing* — (A) *Overruling Plea.* If upon the hearing the plea be determined bad and overruled defendant is entitled to answer, as in the case of a demurrer overruled.[20] When a plea has been overruled on its merits, the same defense cannot be presented by another plea[21] or by answer.[22]

(B) *Saving Benefit of Plea to Hearing.* If the court on the argument considers that, although the plea may be good, there may be matter which plaintiff might show in avoidance, it may order the plea to stand over until the hearing, saving to defendant the benefit thereof.[23] This has the effect of adjudging the plea to be *prima facie* good, but to permit plaintiff to reply and prove such

In Mississippi, where plaintiff set down the cause for hearing on the plea, and then, without objection, went to hearing on defendant's motion to dissolve the injunction and dismiss the bill, it was held that he could not in the appellate court test the sufficiency of the plea. Foxworth *v.* Magee, 48 Miss. 532.

In New Jersey it is defendant's duty to set the plea down for argument. McEwen *v.* Broadhead, 11 N. J. Eq. 129; Flagg *v.* Bonnel, 10 N. J. Eq. 82.

In Tennessee defendant may have a rule on plaintiff to set down the plea. Montgomery *v.* Olwell, 1 Tenn. Ch. 183.

12. See U. S. Eq. Rule 38 in the preceding note; Gordon *v.* St. Paul Harvester Works, 23 Fed. 147.

13. Smith's Estate, 4 Kulp (Pa.) 238.

14. Phelps *v.* Elliott, 26 Fed. 881, 23 Blatchf. 470.

15. Campbell *v.* New York, 33 Fed. 795.

16. Davison *v.* Johnson, 16 N. J. Eq. 112.

17. Wilson *v.* Mitchell, 43 Fla. 107, 30 So. 703; Spaulding *v.* Ellsworth, 39 Fla. 76, 21 So. 812; York Mfg. Co. *v.* Cutts, 18 Me. 204; Rowley *v.* Williams, 5 Wis. 151; Metcalf *v.* America School Furniture Co., 122 Fed. 115; Cook *v.* Sterling Electric Co., 118 Fed. 45; McCloskey *v.* Barr, 38 Fed. 165; Burrell *v.* Hackley, 35 Fed. 833; Mellus *v.* Thompson, 16 Fed. Cas. No. 9,405, 1 Cliff. 125.

Want of form in the plea is not a ground of objection at the hearing. Cook *v.* Sterling Electric Co., 118 Fed. 45; Kellner *v.* New York Mut. L. Ins. Co., 43 Fed. 623.

18. Spaulding *v.* Ellsworth, 39 Fla. 76, 21 So. 812; Miller *v.* U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; McCloskey *v.* Barr, 38 Fed. 165; Goldsmith *v.* Gilliland, 24 Fed. 154, 10 Sawy. 606.

19. Lawrence *v.* Pool, 2 Sandf. (N. Y.) 540; Van Hook *v.* Whitlock, 3 Paige (N. Y.) 409. *Contra,* Beard *v.* Bowler, 2 Fed. Cas. No. 1,180, 2 Bond 13.

20. Adriaans *v.* Lyon, 8 App. Cas. (D. C.) 532; Bush *v.* Bush, 1 Strobh. Eq. (S. C.) 377; Kendrick *v.* Davis, 3 Coldw. (Tenn.) 524; Wooster *v.* Blake, 7 Fed. 816. See also U. S. Eq. Rule 34.

Defendant may plead again instead of answering. 2 Daniell Ch. Pr. 228.

Plea to part, answer to residue.— It has been held that, on pleas to a part of the bill and answer to the residue, if the pleas are overruled the bill should be taken *pro confesso* as to the part not answered. Easton *v.* Collier, 3 Mo. 379. The correct practice is, however, to the contrary, and as in the case of overruling a partial demurrer. 2 Daniell Ch. Pr. 230. See also *supra,* VIII, C, 7, c, (III).

21. Freeland *v.* Johnson, 2 Anstr. 407.

22. Tison *v.* Tison, 14 Ga. 167; Murray *v.* Coster, 4 Cow. (N. Y.) 617; Townsend *v.* Townsend, 2 Paige (N. Y.) 413; Coster *v.* Murray, 7 Johns. Ch. (N. Y.) 167; Sharon *v.* Hill, 26 Fed. 337, 11 Sawy. 291; Pentlarge *v.* Pentlarge, 22 Fed. 412, 22 Blatchf. 120. *Contra,* Ringgold *v.* Stone, 20 Ark. 526.

If overruled without considering its merits, defendant is not precluded from relying on the same defense in his answer. Matthews *v.* Roberts, 2 N. J. Eq. 338; Murray *v.* Coster, 4 Cow. (N. Y.) 617; Jarvis *v.* Palmer, 11 Paige (N. Y.) 650.

Waiver of objection.— A defense presented by answer will be considered, although a plea of the same matter was overruled, if plaintiff does not object. Goodrich *v.* Pendleton, 4 Johns. Ch. (N. Y.) 549.

23. Mitford Eq. Pl. 240.

matters in avoidance.[24] In like manner the court may without passing upon its merits overrule the plea without prejudice to the right of defendant to set forth the same matter in his answer.[25] The benefit of a plea has been saved to the hearing on a motion to set it aside for an objection which might be obviated by proof.[26]

(c) *Ordering Plea to Stand For Answer.* Under some circumstances the court may instead of overruling a plea direct it to stand for an answer.[27]

(d) *Allowing Plea.* If the plea be allowed on argument, this merely adjudges it to be good if true, and plaintiff must have an opportunity to take issue upon it.[28]

b. Determining Truth of Plea — (i) *Replication.* If plaintiff desires to take issue upon the plea, either without a hearing as to its sufficiency, or after it has been allowed on such hearing, he may file a replication and proceed to take proof as in the case of an answer.[29]

(ii) *Effect of Replication.* The effect of replying to a plea is to admit its entire sufficiency and to stake the result on its falsity in fact.[30]

(iii) *Disposition of Case After Replication.* As a replication confesses the sufficiency of a plea, the whole case turns on the determination of the issues so made. If defendant proves the plea the bill should be dismissed, either in whole or to the extent covered by the plea.[31] If defendant fails to prove his

24. Hancock *v.* Carlton, 6 Gray (Mass.) 39; Cooth *v.* Jackson, 6 Ves. Jr. 12, 31 Eng. Reprint 913.

25. Chisholm *v.* Johnson, 84 Fed. 384.

26. Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249.

27. See *infra*, VIII, E, 5.

28. *Florida.*— Austin *v.* Hoxsie, 44 Fla. 199, 32 So. 878.

Maryland.— Rouskulp *v.* Kershner, 49 Md. 516.

Michigan.— Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471.

New Jersey.— Flagg *v.* Bonnel, 10 N. J. Eq. 82.

Tennessee.— Hannum *v.* McInturf, 6 Baxt. 225.

United States.— U. S. *v.* Dalles Military Road Co., 140 U. S. 599, 11 S. Ct. 988, 35 L. ed. 560; MacVeagh *v.* Denver City Waterworks Co., 85 Fed. 74, 29 C. C. A. 33.

See 19 Cent. Dig. tit. "Equity," §§ 411, 412.

If a motion is made which confesses the truth of the plea the court will deal with the cause as if the plea had been sustained. Fulton *v.* Greacen, 44 N. J. Eq. 443, 15 Atl. 827.

If the truth of the plea stands admitted of record or established by the report of the master plaintiff cannot take issue. Holmes *v.* Remsen, 7 Johns. Ch. (N. Y.) 286.

29. 2 Daniell Ch. Pr. 220.

30. *Alabama.*—Holloway *v.* Southern Bldg., etc., Assoc., 136 Ala. 160, 33 So. 887; Tyson *v.* Decatur Land Co., 121 Ala. 414, 26 So. 507.

Arkansas.— Miller *v.* Fraley, 21 Ark. 22.

New Jersey.— Hunt *v.* West Jersey Traction Co., 62 N. J. Eq. 225, 49 Atl. 434; Miller *v.* U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509.

New York.— Dows *v.* McMichael, 2 Paige 345.

United States.— Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592; McAleer *v.* Lewis, 75 Fed. 734; Bean *v.* Clark, 30 Fed. 225; Birdseye *v.* Heilner, 27 Fed. 289; Hughes *v.* Blake, 12 Fed. Cas. No. 6,845, 1 Mason 515.

See 19 Cent. Dig. tit. "Equity," § 411.

Replying to answer in support of a plea does not confess the sufficiency of the plea. Foster *v.* Foster, 51 Vt. 216.

31. *Alabama.*—Holloway *v.* Southern Bldg., etc., Assoc., 136 Ala. 160, 33 So. 887; Tyson *v.* Decatur Land Co., 121 Ala. 414, 26 So. 507.

Arkansas.— Miller *v.* Fraley, 21 Ark. 22; Peay *v.* Duncan, 20 Ark. 85.

Colorado.— Denver *v.* Lobenstein, 3 Colo. 216.

District of Columbia.— Giesy *v.* Truman, 17 App. Cas. 449.

Indiana.— Sampson *v.* Hendricks, 8 Blackf. 288.

Maryland.— Danels *v.* Taggart, 1 Gill & J. 311, *dictum.*

Michigan.— Hurlbut *v.* Britain, 2 Dougl. 191.

Missouri.— Bell *v.* Simonds, 14 Mo. 100.

New York.— Dows *v.* McMichael, 6 Paige 139.

Wisconsin.— Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436.

See 19 Cent. Dig. tit. "Equity," §§ 401, 411.

Dismissal should not in all cases be absolute; the entire bill should not be dismissed on sustaining a plea to a part. Durham *v.* Stephenson, 41 Fla. 112, 25 So. 284. A dismissal on a plea of another suit pending should be with leave to file a supplemental bill if such suit be discontinued. Moore *v.* Holt, 3 Tenn. Ch. 141. On allowing a plea for want of parties an amendment should be permitted. Franklin *v.* Franklin, 2 Swan (Tenn.) 521.

plea, he will not be permitted to answer, and plaintiff may take his decree according to his case as stated in his bill.[32]

c. Preliminary Reference to Master. The regular practice is, not to set a plea down for argument or to reply in the first instance, but to refer it to a master to determine its truth, where the plea sets up a former judgment in bar,[33] or a former suit pending.[34] On the coming in of the master's report the plea stands for argument on its sufficiency.[35] Plaintiff may, however, instead of obtaining the reference, have the plea set down for hearing,[36] or reply.[37]

E. Answers — 1. Nature and Functions — a. Twofold Nature of Answer. While an answer is uniformly considered as a mode of defense,[38] it serves not only that purpose, but the further purpose of giving the discovery to which a plaintiff in equity is entitled.[39] The requirements of the latter object have given rise to peculiar rules relating to the sufficiency and effect of answers appropriate to that purpose, but often applied without discrimination to the answer when considered as a defensive pleading.[40]

b. Necessity of Answer. Unless defendant disclaims,[41] or can and does protect himself by demurrer[42] or plea,[43] he must answer either the whole bill or that part not covered by demurrer or plea.[44]

c. Answer Must Set Up All Defenses. A defendant who answers must set up every ground and circumstance on which he intends to rely as a defense,[45] either

U. S. Eq. Rule 33 provides that if upon an issue the facts stated in the plea be determined for defendant, they shall avail him as far as in law and equity they ought to avail him. The uncertainty of this language is not greatly aided by the decisions. It has been held that the doctrine stated in the text still prevails. Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592; Birdseye *v.* Heilner, 27 Fed. 289. But it has also been held that under the rule a replication does not admit the sufficiency of a plea. Soderberg *v.* Armstrong, 116 Fed. 709; Jones *v.* Hillis, 100 Fed. 355. Where the facts are found in part for defendant and in part for plaintiff, the relief will be limited accordingly. Pearce *v.* Rice, 142 U. S. 28, 12 S. Ct. 130, 35 L. ed. 925; Earll *v.* Metropolitan St. R. Co., 87 Fed. 528. The decision no longer depends wholly on the truth of the plea. Plaintiff may prove facts in avoidance. Elgin Wind Power, etc., Co. *v.* Nichols, 65 Fed. 215, 12 C. C. A. 578. Where a plea meets all the claims of a bill and is found true the bill must be dismissed. Horn *v.* Detroit Dry-Dock Co., 150 U. S. 610, 14 S. Ct. 214, 37 L. ed. 1199. See also Farley *v.* Kittson, 120 U. S. 303, 7 S. Ct. 534, 30 L. ed. 684; Rhode Island *v.* Massachusetts, 14 Pet. (U. S.) 210, 10 L. ed. 423; Hughes *v.* Blake, 6 Wheat. (U. S.) 435, 5 L. ed. 303 [*affirming* 12 Fed. Cas. No. 6,845, 1 Mason 515]; Cottle *v.* Krementz, 25 Fed. 494; Myers *v.* Dorr, 17 Fed. Cas. No. 9,988, 13 Blatchf. 22.

32. Adriaans *v.* Lyon, 8 App. Cas. (D. C.) 532; Ferry *v.* Moore, 18 Ill. App. 135; Hunt *v.* West Jersey Traction Co., 62 N. J. Eq. 225, 49 Atl. 434; Dows *v.* McMichael, 2 Paige (N. Y.) 345.

Plaintiff may notwithstanding enforce discovery by an examination before a master. Dows *v.* McMichael, 2 Paige (N. Y.) 345.

Under U. S. Eq. Rule 34 it seems defendant may still answer. Westervelt *v.* Library Bureau, 118 Fed. 824, 55 C. C. A. 436.

After unsuccessful trial of plea to the jurisdiction defendant may answer to the merits. Battelle *v.* Youngstown Rolling Mill Co., 16 Lea (Tenn.) 355.

33. Emma Silver Min. Co. *v.* Emma Silver Min. Co., 1 Fed. 39, 17 Blatchf. 389; 2 Daniell Ch. Pr. 178.

34. McEwen *v.* Broadhead, 11 N. J. Eq. 129; Green *v.* Neal, 2 Heisk. (Tenn.) 217; 2 Daniell Ch. Pr. 149.

Under Tenn. Code the practice as to other pleas prevails in such cases. Montgomery *v.* Olwell, 1 Tenn. Ch. 183.

Where former suit is not in same court the practice does not prevail. Zimmerman *v.* So Relle, 80 Fed. 417, 25 C. C. A. 518.

35. Hart *v.* Philips, 9 Paige (N. Y.) 293; Wilkes *v.* Henry, 4 Edw. (N. Y.) 672.

The only question presented is whether the plea is good in point of form. McEwen *v.* Broadhead, 11 N. J. Eq. 129.

36. Rowley *v.* Williams, 5 Wis. 151.

37. McEwen *v.* Broadhead, 11 N. J. Eq. 129.

38. See *supra*, VIII, A, 1.

39. 2 Daniell Ch. Pr. 239; Mitford Eq. Pl. 244; Story Eq. Pl. § 845.

40. See Langdell Eq. Pl. 68.

41. See *supra*, VIII, B.

42. See *supra*, VIII, C.

43. See *supra*, VIII, D.

44. 2 Daniell Ch. Pr. 238; Mitford Eq. Pl. 244. Formerly defendant was in all such cases compelled to answer. Now, while plaintiff may for the purposes of discovery compel an answer (see *infra*, VIII, E, 7), a failure to answer may be treated like a default at law, the bill be taken as confessed, and the appropriate decree rendered. See *infra*, VIII, E, 6, d; XXIII, D, 2.

45. *Arkansas.*— Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271.

entire or partial.[46] Defenses arising after the filing of the bill should also be interposed by answer.[47] Plaintiff is entitled to be apprised of the nature of the defense relied on,[48] and if defendant states evidential facts, avowing their purpose to be to make out a particular defense, he cannot on the hearing use them to establish a different defense to which plaintiff's attention was not called.[49] It is said that in equity it is permissible to set out matters of law as well as matters of fact,[50] and defendant may in general set up want of equity or other meritorious defense by answer instead of demurrer.[51] If, however, facts appear on the face of the bill sufficient to defeat it, such facts need not be averred by way of defense.[52] Defendant may likewise is most cases assert by answer defenses which might have been interposed by plea.[53] New matter constituting a counter demand cannot in general be inserted in an answer,[54] but where facts which might be made the ground of suit against plaintiff constitute also an equitable defense

Illinois.— Harris *v.* Cornell, 80 Ill. 54; Amberg *v.* Nachtway, 92 Ill. App. 608.

Iowa.— Seymour *v.* Shea, 62 Iowa 708, 16 N. W. 196.

Michigan.— Van Dyke *v.* Davis, 2 Mich. 144.

Mississippi.— Fox *v.* Coon, 64 Miss. 465, 1 So. 629; Bacon *v.* Ventress, 32 Miss. 158.

New Jersey.— Wright *v.* Wright, 51 N. J. Eq. 475, 26 Atl. 166; Mead *v.* Coombs, 26 N. J. Eq. 173; Moores *v.* Moores, 16 N. J. Eq. 275; Brantingham *v.* Brantingham, 12 N. J. Eq. 160.

Pennsylvania.— Harvey *v.* Lance, 1 Luz. Leg. Obs. 315.

South Carolina.— Cummings *v.* Coleman, 7 Rich. Eq. 509, 62 Am. Dec. 402.

Vermont.— Warren *v.* Warren, 30 Vt. 530.

Virginia.— Rorer Iron Co. *v.* Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285.

Wisconsin.— Weeks *v.* Milwaukee, etc., R. Co., 78 Wis. 501, 47 N. W. 737.

United States.— Rejall *v.* Greenhood, 60 Fed. 784.

See 19 Cent. Dig. tit. "Equity," §§ 415, 416.

In New York the existence of adequate remedy at law is not available as a defense unless presented by the answer. Bell *v.* Spotts, 40 N. Y. Super. Ct. 552; Livingston *v.* Livingston, 4 Johns. Ch. 287, 8 Am. Dec. 562.

Defense may be set up in different aspects, as by stating facts rendering applicable different provisions of the statute of limitations. Von Schroder *v.* Brittan, 98 Fed. 169.

46. Ford *v.* David, 1 Bosw. (N. Y.) 569.

47. Raelble *v.* Goebbel, (N. J. Ch. 1886) 6 Atl. 21; Lyon *v.* Brooks, 2 Edw. (N. Y.) 110.

No matter how late the defense arises, leave should be obtained to set it up by answer. A defense to the merits should not be heard on motion and affidavits. Ferguson *v.* Collins, 8 Ark. 241; Holden *v.* Gilbert, 7 Paige (N. Y.) 208.

48. 2 Daniell Ch. Pr. 240.

49. Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066; Bennett *v.* Neale, Wightw. 324.

50. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 76 Fed. 15.

51. *Arkansas.*— Meux *v.* Anthony, 11 Ark. 411, 52 Am. Dec. 274.

Illinois.— Black *v.* Miller, 173 Ill. 489, 50 N. E. 1009; Harley *v.* Chicago Sanitary Dist., 54 Ill. App. 337.

Maryland.— Hughes *v.* Jones, 2 Md. Ch. 178.

Michigan.— Highstone *v.* Franks, 93 Mich. 52, 52 N. W. 1015.

South Carolina.— Miller *v.* Furse, Bailey Eq. 187.

See 19 Cent. Dig. tit. "Equity," §§ 414, 416. And for questions which can be raised only by answer see *supra*, VIII, C, 1, c, (I).

Answers denying both truth and sufficiency of bill are irregular, but are sanctioned by long and general practice. Arnold *v.* Middletown, 39 Conn. 401.

Remedy at law.— An issue of fact as to the adequacy of a remedy at law is not raised by a general assertion in the answer that there is such remedy, where the bill states facts showing there is none. Abbott *v.* Gaches, 20 Wash. 517, 56 Pac. 28.

Validity of a deed attacked by a bill is submitted for adjudication by answering to the merits. Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.

52. Fowler *v.* Lewis, A. K. Marsh. (Ky.) 443; Child *v.* Brace, 4 Paige (N. Y.) 309; Young *v.* McClung, 9 Gratt. (Va.) 336; Kerr *v.* Moon, 9 Wheat. (U. S.) 565, 6 L. ed. 161.

53. *Florida.*— Hollingsworth *v.* Handcock, 7 Fla. 338.

Illinois.— Pierce *v.* McClellan, 93 Ill. 245.

Iowa.— Childs *v.* Griswold, 15 Iowa 438.

Pennsylvania.— Perry *v.* Kinley, 1 Phila. 505.

Tennessee.— Mulloy *v.* Paul, 2 Tenn. Ch. 155.

Virginia.— Donnell *v.* King, 7 Leigh 393.

See 19 Cent. Dig. tit. "Equity," § 414. And for defenses which can be presented only by plea see *supra*, VIII, D, 1, b.

In Alabama all matters of plea may be embraced in the answer. Crawford *v.* Childress, 1 Ala. 482.

54. Morgan *v.* Tipton, 17 Fed. Cas. No. 9,809, 3 McLean 339.

A **set-off** does not generally constitute a defense. Killam *v.* Jenkins, 25 Vt. 643; Whittemore *v.* Patten, 84 Fed. 51.

Under W. Va. Code, c. 125, § 35, defendant may introduce such matter in his answer,

against plaintiff's demand, they may be pleaded defensively in the answer.[55] Defendant is not restricted to a single defense, but may present in his answer all the defenses which he may have,[56] provided they be not inconsistent.[57]

2. RIGHT AND TIME TO ANSWER. The time within which a defendant may answer of right depends upon local statutes and rules.[58] An answer may be filed before rule day.[59] After defendant has answered it is generally irregular to answer anew without leave.[60] Defendant may in general answer after the overruling of a demurrer,[61] after a bill has been amended,[62] and after a decree has

but he must pray for cross relief. Middleton *v.* Selby, 19 W. Va. 167.

55. As where plaintiff claims a right derived through fraud practised on defendant. Fitzpatrick *v.* Beatty, 6 Ill. 454; Rau *v.* Von Zedlitz, 132 Mass. 164.

In a suit for reconveyance of land transferred as security, a subsequent parol agreement for absolute purchase may be pleaded as a defense. Frede *v.* Pflugradt, 85 Wis. 119, 55 N. W. 159.

Legal claims may be set up if they arise out of matters in the bill. Hume *v.* Long, 6 T. B. Mon. (Ky.) 116.

56. Sharp *v.* Carlile, 5 Dana (Ky.) 487; Holton *v.* Guinn, 65 Fed. 450; Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88. They should, however, be separately stated. Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88.

57. See *infra*, VIII, E, 4, e.

58. U. S. Eq. Rule 18 makes it the duty of a defendant to file his plea, demurrer, or answer on the rule day next succeeding that of entering his appearance. Defendant may, however, answer at any time before the bill is taken *pro confesso*. Hayman *v.* Keally, 11 Fed. Cas. No. 6,265, 3 Cranch C. C. 325; Oliver *v.* Decatur, 18 Fed. Cas. No. 10,494, 4 Cranch C. C. 458. An irregular motion for a decree does not invalidate a subsequent answer. Perkins *v.* Hendryx, 31 Fed. 522. The court will not permit a bill to be taken *pro confesso* when defendant tenders his answer, but it may then impose terms on defendant. Halderman *v.* Halderman, 11 Fed. Cas. No. 5,908, Hempst. 407. U. S. Eq. Rule 19 provides that when the bill is taken *pro confesso* the court may proceed to decree at any time after the expiration of thirty days from and after the entry of the order, and that the decree shall be deemed absolute unless the court shall at the same term set aside the same or enlarge the time for filing the answer upon cause shown. Under this rule the decree is merely *nisi*. Pendleton *v.* Evans, 19 Fed. Cas. No. 10,920, 4 Wash. 336. It is of right and not as favor for a defendant to file his answer before the decree is made absolute. Mason *v.* Jones, 16 Fed. Cas. No. 9,239, 1 Hayw. & H. 323.

In Illinois, and formerly in New York, an answer might be filed at any time before the entry of an order taking the bill *pro confesso*. Dunn *v.* Keegin, 4 Ill. 292; Hoxie *v.* Scott, Clarke (N. Y.) 457.

At any time before final decree, it is frequently matter of right to answer. Alexander *v.* Quigley, 2 Duv. (Ky.) 399; Sharitz *v.* Moyers, 99 Va. 519, 39 S. E. 166; Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91; Bean *v.* Simmons, 9 Gratt. (Va.) 389; Bowles *v.* Woodson, 6 Gratt. (Va.) 78; Crim *v.* Davisson, 6 W. Va. 465. Actual entry of the decree seems necessary to foreclose the right. Buford *v.* North Roanoke Land, etc., Co., 90 Va. 418, 18 S. E. 914; Bean *v.* Simmons, 9 Gratt. (Va.) 389. But see Kimble *v.* Wotring, 48 W. Va. 412, 37 S. E. 606. A statute giving the right to answer before final decree does not prevent the court from letting in defendant to answer for cause, after final decree. Oliver *v.* Palmer, 11 Gill & J. (Md.) 137.

For construction of various local rules see the following cases:

Alabama.— Hurter *v.* Robbins, 21 Ala. 585; Davenport *v.* Bartlett, 9 Ala. 179.

Georgia.— Jordan *v.* Faircloth, 27 Ga. 372; Green *v.* McLaren, 7 Ga. 107.

Kentucky.— Bleight *v.* McIlvoy, 4 T. B. Mon. 142.

Mississippi.— Jones *v.* Hervey, 66 Miss. 99, 5 So. 517.

North Carolina.— Marsh *v.* Grist, 62 N. C. 349.

See 19 Cent. Dig. tit. "Equity," § 417.

59. Heyman *v.* Uhlman, 34 Fed. 686.

But for every purpose, except a motion to dissolve an injunction, it will be treated as filed at rules. White *v.* Cahal, 11 Humphr. (Tenn.) 253.

Appearance before appearance day does not shorten the time to answer. Ingersoll *v.* Notman, 1 Phila. (Pa.) 291.

60. American L. Ins., etc., Co. *v.* Bayard, 3 Barb. Ch. (N. Y.) 610.

Where an irregular and unsworn answer is filed by counsel in defendant's absence, defendant may within the time allowed to answer file a proper one. Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

61. See *supra*, VIII, C, 7, c, (II).

He is not bound to have his answer ready to file at the time when the demurrer is overruled. Mason *v.* Foster, 3 J. J. Marsh. (Ky.) 283.

Until the demurrer is decided he is not bound to answer. Ballance *v.* Loomis, 22 Ill. 82.

62. Iglehart *v.* Lee, 4 Md. Ch. 514; Nelson *v.* Eaton, 66 Fed. 376, 13 C. C. A. 523.

An amendment at the first term does not excuse a defendant from complying with the usual rule to answer. Carter *v.* McDougald, 7 Ga. 93.

It is not necessary to extend to a new party the same time the original parties had. Mc-

been set aside for fraud.[63] The time to answer is extended during an abatement of a suit,[64] and during a stay of proceedings.[65] It is within the discretion of the court to permit an answer to be filed after expiration of the period regularly limited,[66] and in so doing defendant will be restricted to a meritorious defense.[67] Leave to answer will be denied for laches.[68] Where the court acted upon an answer filed out of time without objection, no objection can be made in the appellate court.[69] An answer does not become effective until it is actually filed.[70]

3. Form of Answer — a. In General. An answer is so entitled as to show whose answer it is and what bill it answers.[71] Formerly the title was regarded with great strictness and the bill taken from the files for irregularity therein,[72] and it seems that still the title must be substantially sufficient.[73] Following the title there is inserted a formal reservation of the benefit and advantage of exception to the errors and insufficiencies of the bill.[74] Then comes the response to the various statements, charges, and interrogatories of the bill, together with such

Dougald *v.* Dougherty, 14 Ga. 674. *Contra*, Hoxey *v.* Carey, 12 Ga. 534.

A cross bill must be answered before an amended bill filed thereafter. Scales *v.* Nichols, 3 Hayw. (Tenn.) 229.

63. Mayersback *v.* Fauntleroy, 3 J. J. Marsh. (Ky.) 535.

64. Upshaw *v.* Hargrove, 6 Sm. & M. (Miss.) 286.

65. Southern Nat. Bank *v.* Darling, 49 N. J. Eq. 398, 23 Atl. 475.

66. *Arkansas.*— Mayes *v.* Hendry, 33 Ark. 240.

Georgia.— Thornton *v.* Hightower, 17 Ga. 1 (holding refusal to permit an answer, under circumstances calling for indulgence, to be erroneous); Harwell *v.* Armstrong, 11 Ga. 328.

Illinois.— Smith *v.* Brittenham, 88 Ill. 291.

Kentucky.— Smith *v.* Walton, 4 Bibb 283.

New York.— As to the former practice of the New York chancery in extending time see Atlantic Ins. Co. *v.* Lemar, 10 Paige 505; Hunt *v.* Wallis, 6 Paige 371.

North Carolina.— Sheppard *v.* Collins, 2 N. C. 55.

United States.— McGregor *v.* Vermont L. & T. Co., 104 Fed. 709, 44 C. C. A. 709.

See 19 Cent. Dig. tit. "Equity," § 417.

No precise rule exists, and it is within the discretion of the court to relieve the defendant from the consequences of his default. Wooster *v.* Woodhull, 1 Johns. Ch. (N. Y.) 539.

Leave to answer may be denied because of circumstances implying a waiver of the right. Mitchell *v.* McKinny, 6 Heisk. (Tenn.) 83.

67. Vanderveer *v.* Holcomb, 22 N. J. Eq. 555; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 846. He will not be permitted to plead usury (Marsh *v.* Lasher, 13 N. J. Eq. 253; Collard *v.* Smith, 13 N. J. Eq. 43), or sometimes the statute of limitations (Hawes *v.* Hoyt, 11 How. Pr. (N. Y.) 454; Wilson *v.* Turberville, 30 Fed. Cas. No. 17,844, 2 Cranch C. C. 27).

Under an order extending "time to answer" defendant may answer denying combination and demur to the rest of the bill. Littlejohn *v.* Burton, 3 N. C. 127.

68. Fulton Bank *v.* Beach, 6 Wend. (N. Y.) 36; Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273. An answer filed out of time after notice of a default and a reference to a master will be stricken from the files. Dorn *v.* Smith, 85 Ill. App. 516.

69. Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439.

70. Lindsey *v.* Stevens, 5 Dana (Ky.) 104; White *v.* Lewis, 2 A. K. Marsh. (Ky.) 123; Giles *v.* Eaton, 54 Me. 186.

71. As "the answer of A B, defendant, to the bill of complaint of C D, complainant," or "the joint and several answer of A B and C D," etc. The answer of an infant or other person answering by guardian or committee is entitled accordingly. 2 Daniell Ch. Pr. 266.

72. This was done where the words "to the bill of complaint of" were omitted. Pieters *v.* Thompson, Coop. Ch. 249, 11 Eng. Ch. 249.

73. An answer may be rejected where the title does not show what bill it purports to answer. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

Where one is sued as executrix and devisee, and in the title to the answer appears to answer as executrix alone, but in the body answers as devisee she is before the court as devisee. Kinney *v.* Harvey, 2 Leigh (Va.) 70, 21 Am. Dec. 597.

The proper remedy for a defective title is to move to take the answer from the files; an exception will not lie. Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291.

74. See form in Barton Suit Eq. 115. It has been said that this form was probably intended to prevent a conclusion that defendant, having submitted to answer the bill, admitted everything which he did not controvert, and especially such matters as he might have objected to by demurrer or plea. Mitford Eq. Pl. 249. It is doubtful whether this reservation has any efficacy. Barton Suit Eq. 115 note; Story Eq. Pl. § 870.

In New Jersey its use is forbidden. Plum *v.* Smith, 56 N. J. Eq. 468, 39 Atl. 1070;

new matter as defendant may desire to show for his defense or protection.[75] The answer closes with another formal part, generally denying combination,[76] generally traversing any part of the bill which may not have been answered,[77] offering to verify, much as in a common-law plea of new matter, and praying for a dismissal with costs.[78] An answer must be signed by counsel[79] and by defendants answering,[80] and must in general be upon oath.[81]

b. By Several Defendants. In general plaintiff is entitled to an answer from every defendant,[82] and each must answer fully and directly and not merely by reference to another answer.[83] It has been held that where there is unity of interest, an answer by one defendant inures to the benefit of all.[84] Where two or more defendants are similarly interested, and appear by the same solicitor, they ought to answer jointly.[85] A husband and wife must answer jointly unless a special order is made for the wife to answer separately.[86] An answer is irregular unless signed and sworn to by all the defendants whose answer it purports to be, and plaintiff need not accept it as the answer of all.[87] An answer is also irregular

Fairchild *v.* Fairchild, 43 N. J. Eq. 473, 11 Atl. 426.

75. 2 Daniell Ch. Pr. 268; Mitford Eq. Pl. 249.

There is no required or established form for this, the substantial part of the answer, but orderly pleading demands that defendant should first respond to the bill and then set up his defenses (Langdell Eq. Pl. 68). and that he should distinctly and separately state such defenses (Graham *v.* Mason, 10 Fed. Cas. No. 5,671, 4 Cliff. 88).

76. Forbidden in New Jersey. Fairchild *v.* Fairchild, 43 N. J. Eq. 473, 11 Atl. 426.

77. This general traverse seems to have come down to us from ancient times when defendant used only to set forth his case in the answer without answering every clause in the bill. Anonymous, 2 P. Wms. 87, 24 Eng. Reprint 652.

78. See form in Barton Suit Eq. 119.

79. Wall *v.* Stubbs, 2 Ves. & B. 354, 15 Rev. Rep. 210, 35 Eng. Reprint 354.

80. 2 Daniell Ch. Pr. 269.

81. See *infra*, XIV, B, 5.

82. 2 Daniell Ch. Pr. 238.

83. Carr *v.* Weld, 18 N. J. Eq. 41; Wells *v.* Stratton, 1 Tenn. Ch. 328.

In Maryland one defendant may refer to and adopt the answer of another. Warfield *v.* Banks, 11 Gill & J. (Md.) 98; Binney's Case, 2 Bland (Md.) 99.

Where two defendants answer jointly, and one speaks positively for himself, it is said that the other, if he is not charged upon his own knowledge, may say that he has perused the answer and believes it to be true, but that this may not be done where they answer separately. 2 Daniell Ch. Pr. 266.

84. Driver *v.* White, (Tenn. Ch. 1898) 51 S. W. 994.

The answer of one partner on behalf of the firm is sufficient where the others are not charged with personal knowledge (Reynolds *v.* Dothard, 11 Ala. 531), and where no effort is made to get the answer of the others (Freeland *v.* Royall, 2 Hen. & M. (Va.) 575).

Where, under a statute, plaintiffs are required to substantiate their own title, the defense of one defendant inures to the benefit of all. Stockton *v.* Williams, Walk. (Mich.) 120.

85. 2 Daniell Ch. Pr. 265.

The penalty for answering separately in such case without good cause is an imposition of costs; but the propriety of separate answers will not be determined before the hearing. Van Sandau *v.* Moore, 4 L. J. Ch. O. S. 177, 1 Russ. 441, 25 Rev. Rep. 101, 46 Eng. Ch. 391.

U. S. Eq. Rule 62 provides that costs will not be allowed for separate answers or other proceedings by two or more defendants, employing the same solicitor, unless a master on reference shall certify that such separate answers and proceedings were necessary and proper and ought not to have been joined together. A joint and several answer of joint defendants is not required. A joint answer is sufficient if all the defendants swear to it. Davis *v.* Davidson, 7 Fed. Cas. No. 3,631, 4 McLean 136.

When their interests are not distinct parties cannot answer severally. Dunlap *v.* McIlvoy, 3 Litt. (Ky.) 269.

Where a solicitor has prepared an answer for one defendant and is employed by others shortly before answer day, he is not required to apply for an extension of time to answer for the first, in order that all may answer together. Pentz *v.* Hawley, 2 Barb. Ch. (N. Y.) 552.

86. Robbins *v.* Abrahams, 5 N. J. Eq. 16, 51; Toole *v.* De Kay, 4 Sandf. Ch. (N. Y.) 385.

87. Bailey Washing Mach. Co. *v.* Young, 2 Fed. Cas. No. 751, 1 Ban. & A. 96, 12 Blatchf. 199. Where one defendant did not sign or swear to an answer purporting to be that of all, a separate answer, filed by him without leave after the case was set down for hearing, was taken from the files as irregular. Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307.

The answer of one of three executors will not be considered their joint answer, although the clerk's entry shows that all appeared and filed their answer. Chinn *v.* Heale, 1 Munf. (Va.) 63.

unless it purports to be the answer of defendant himself, not merely that of his agent or attorney.[88]

c. Exhibits. Defendant should exhibit, as in the case of a bill,[89] an instrument referred to as containing details to which plaintiff is entitled,[90] or facts material to his defense.[91] If a deed is stated to be executed, delivered, and recorded in a certain book, and a copy is set forth in the schedule showing a due acknowledgment, this sufficiently pleads the deed, as acknowledged and recorded;[92] but where the answer states the effect of the deed alone without producing it or annexing a copy, only the substance as set out in the answer is before the court.[93] Where a writing is exhibited, it is unnecessary to state its purport, as the writing is itself the evidence thereof.[94] Unnecessary matter should not be exhibited.[95] Affidavits annexed to an answer need not be taken on notice nor need copies be served on plaintiff.[96]

4. Sufficiency of Answer — a. Answer Must Be Full — (i) *General Rule.* A rule well established, following from plaintiff's right to discovery, is that where defendant submits to answer he must answer fully.[97] It was formerly doubted whether an answer totally denying plaintiff's right must proceed to give discovery to which plaintiff was only entitled consequentially upon establishing his right,[98] but the question was finally settled by requiring a full answer even in such a case.[99] In the federal courts the rule is otherwise.[1]

(ii) *Answering Interrogatories.* A defendant must answer specifically

88. Palmer *v.* Yarborough, 36 N. C. 310.

89. See *supra*, VII, D.

90. Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

91. Demere *v.* Scranton, 8 Ga. 43.

92. New *v.* Bame, 3 Sandf. Ch. (N. Y.) 191.

93. Roosevelt *v.* Ellithorp, 10 Paige (N. Y.) 415. Where the answer states the effect of a deed without annexing a copy, and craves leave to refer to it, it is so far a part of the answer as to entitle plaintiff to an order for its production. Roosevelt *v.* Ellithorp, 10 Paige (N. Y.) 415.

94. Davis *v.* Davis, 17 N. H. 560.

95. Mohler *v.* Ephrata Water Co., 16 Pa. Co. Ct. 493.

96. Stotesbury *v.* Vail, 13 N. J. Eq. 390; Gariss *v.* Gariss, 13 N. J. Eq. 320.

97. *Georgia.*— Cleghorn *v.* Rutherford, 26 Ga. 152; Beall *v.* Blake, 10 Ga. 449.

Kentucky.— Atterberry *v.* Knox, Dana 282.

Maryland.— Hagthorp *v.* Hook, 1 Gill & J. 270; Rider *v.* Riely, 2 Md. Ch. 16.

New Jersey.— Manley *v.* Mickle, 55 N. J. Eq. 563, 37 Atl. 738.

New York.— Phillips *v.* Prevost, 4 Johns. Ch. 205; Champlin *v.* Champlin, 2 Edw. 362.

South Carolina.— Robertson *v.* Bingley, 1 McCord Eq. 333.

England.— Mazarredo *v.* Maitland, 3 Madd. 66.

See 19 Cent. Dig. tit. "Equity," §§ 422, 428.

A defendant who demurs to the relief only must answer to the discovery, although the demurrer is sustained. Lane *v.* Roche, Riley Eq. (S. C.) 215.

Although a bill is defective, if it shows a proper case for equitable relief and defendant does not demur, he must make full answer. Thompson *v.* Paul, 8 Humphr. (Tenn.) 114. See, however, Tartar *v.* Gibbs, 24 Md. 223.

Defendant may answer to part, stating reasons why he should not be compelled to answer further. Hunt *v.* Gookin, 6 Vt. 462.

Parties being now competent as witnesses, answers are no longer required to conform to the old rules as to sufficiency of an answer to a bill of discovery. Field *v.* Hastings, 65 Fed. 279.

Under the codes, where a demurrer to an answer will not lie, if the answer presents any defense the rule requiring full answer can hardly apply. Carr *v.* Bosworth, 68 Iowa 669, 27 N. W. 913; Peebles *v.* Isaminger, 18 Ohio St. 490.

98. Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205 (holding that the rule requiring a full answer does not apply where defendant objects to discovery because plaintiff has no title); Taylor *v.* Milner, 11 Ves. Jr. 41, 32 Eng. Reprint 1003; Donegal *v.* Stewart, 3 Ves. Jr. 446, 30 Eng. Reprint 1098.

99. Mazarredo *v.* Maitland, 3 Madd. 66. See also Carneal *v.* Wilson, 3 Litt. (Ky.) 80; Utica Bank *v.* Messereau, 7 Paige (N. Y.) 517; Wyckoff *v.* Sniffen, 2 Edw. (N. Y.) 581; Weisman *v.* Heron Min. Co., 57 N. C. 112.

If untrue allegations are inserted in the bill to give the court apparent jurisdiction, defendant may deny such allegations and as to the residue of the bill insist that plaintiff's remedy is at law. Such an answer will bar relief but not discovery. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

A bill for an account of sales of a book alleged to have been published by defendant was sufficiently met by a denial that any such book was published, without rendering an account of sales of a book which was published but alleged to be a different one. Armstrong *v.* Crocker, 10 Gray (Mass.) 269.

1. U. S. Eq. Rule 39 provides that the rule requiring a full answer shall no longer apply in cases where defendant might protect him-

every interrogatory which the bill calls upon him to answer,[2] unless it is not based upon and does not relate to any statement or charge contained in the bill,[3] or unless irrelevant,[4] or unless it calls for privileged matter.[5] The answer must have all the precision and detail called for by the interrogatory,[6] and must be direct and unequivocal as to defendant's state of mind either that he does believe the matter inquired of or that he cannot form any belief or has none.[7]

(III) *Answering Independently of Interrogatories.* Special interrogatories were devised only to prevent an evasion of the general duty to answer.[8] The general interrogatory is sufficient to require in itself a full and direct response to every averment of the bill, with all its material circumstances.[9] It is said, however, that if defendant admits sufficient to entitle plaintiff to the decree he prays

self by plea from such answer and discovery; that he may insist by answer on all matters of defense in bar of or to the merits of the bill of which he might avail himself by plea in bar, and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer upon filing a plea in bar and an answer in support of such plea. See Gaines *v.* Agnelly, 9 Fed. Cas. No. 5,173, 1 Woods 238; Samples *v.* Bank, 21 Fed. Cas. No. 12,278, 1 Woods 523. A defendant may not protect himself from full discovery on the ground that, although he has set out every defense, each one might have been interposed by plea. National Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 83 Fed. 26. An answer attacking the jurisdiction and setting up other defenses does not waive such other defenses, when brought up on motion to dismiss for want of jurisdiction. Reavis *v.* Reavis, 101 Fed. 19.

2. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338; Hopkins *v.* Stump, 2 Harr. & J. (Md.) 301; Moors *v.* Moors, 17 N. H. 481; Ross *v.* Gibson, 20 Fed. Cas. No. 12,074.

Under U. S. Eq. Rule 39 an answer in support of a plea in bar is not subject to exception, because it does not answer all the interrogatories of the bill. Hatch *v.* Bancroft-Thompson Co., 67 Fed. 802.

Although the answer denies the whole merits of the bill interrogatories must be answered specifically. Paper Co. *v.* Hincken, 21 Wkly. Notes Cas. (Pa.) 227.

Waiver of oath to the answer does not excuse defendant from answering interrogatories (National Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 83 Fed. 26), although it does excuse an answer to statements of evidence without an interrogatory (Field *v.* Hastings, 65 Fed. 279).

Under the Kentucky code defendant is not required to answer interrogatories in a reply. Foard *v.* Grinter, (1892) 18 S. W. 1034.

3. White *v.* White, 3 Dana (Ky.) 374; Kisor *v.* Stancifer, Wright (Ohio) 323; Alexandria Mechanics' Bank *v.* Lynn, 1 Pet. (U. S.) 376, 7 L. ed. 185; Fuller *v.* Knapp, 24 Fed. 100. See also *supra*, VII, B, 6, 8. Interrogatories must be answered, when founded merely on evidentiary statements in the bill. Mechanics' Bank *v.* Levy, 3 Paige (N. Y.) 606.

4. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; Vreeland *v.* New Jersey Stone Co., 25 N. J. Eq. 140.

In order to excuse refusal to answer an interrogatory for irrelevancy, it must appear that the answer would in no aspect of plaintiff's case be of service to him. Gilkey *v.* Paige, Walk. (Mich.) 520.

Answer to a comparatively unimportant question may be compelled without deciding an undiscussed question upon which the propriety of the interrogatory depends. Miller *v.* Saunders, 17 Ga. 92. It is sometimes said that an interrogatory must be answered without reference to its materiality. Wootten *v.* Burch, 2 Md. Ch. 190.

5. See *infra*, VIII, E, 4, a, (IV), (B).

6. O'Connor *v.* Williams, (N. J. Ch. 1902) 53 Atl. 550.

Where inquiry is to exact amount paid by defendant on a certain note, an answer that the note was paid in full is too general. Feller *v.* Winchester, 3 Greene (Iowa) 244.

7. Brooks *v.* Byam, 4 Fed. Cas. No. 1,947, 1 Story 296.

8. See *supra*, VII, B, 8.

9. *Georgia.*—Jordan *v.* Jordan, 16 Ga. 446; Pitts *v.* Hooper, 16 Ga. 442.

Illinois.—Hopkins *v.* Medley, 97 Ill. 402.

Maryland.—Hagthorp *v.* Hook, 1 Gill & J. 270.

Mississippi.—Carmichael *v.* Hunter, 4 How. 308, 35 Am. Dec. 401.

New Hampshire.—Miles *v.* Miles, 27 N. H. 440.

New York.—New York M. E. Church *v.* Jaques, 1 Johns. Ch. 65.

United States.—McClaskey *v.* Barr, 40 Fed. 559.

See 19 Cent. Dig. tit. "Equity," § 428.

Where oath to the answer is waived, it is sufficient to meet all allegations required for sufficiency as a pleading, without answering charges which are merely evidentiary. Field *v.* Hastings, 65 Fed. 279.

When a bill contains inconsistent statements, it is enough for defendant to answer the weakest case. Marshall *v.* Drawhorn, 27 Ga. 275.

U. S. Eq. Rule 40, prior to 1850, provided that a defendant should not be bound to answer any statement or charge, unless especially and particularly interrogated thereto. See Treadwell *v.* Cleaveland, 24 Fed. Cas. No. 14,155, 3 McLean 283; Wilson *v.* Stolley, 30 Fed. Cas. No. 17,839, 4 McLean 272. That rule was repealed and it was there provided that it should not be necessary to interrogate

for, the answer is sufficient, although it does not meet the whole bill,[10] and that it is not essential that each paragraph of the bill be answered separately and in detail. It is enough if each material allegation is fully answered.[11] A general allegation, there being no specific charge or interrogatory, may be answered with equal generality;[12] but an answer so general as to amount merely to an inference or conclusion is bad without stating the facts from which the inference or conclusion is drawn.[13]

(IV) *What Need Not Be Answered*— (A) *Immaterial Allegations.* The rule requiring a full answer is generally deemed not to require an answer to allegations which are immaterial,[14] and the test in this respect is to ascertain whether an answer would be material to plaintiff's case, whether proof on the subject might assist in supporting his equity.[15] Whatever plaintiff is bound to state in his bill defendant is bound to answer,[16] but a mere recital need not be answered in the absence of a special interrogatory directed thereto.[17]

(B) *Matters of Privilege.* While defendant must answer, notwithstanding any prejudice to his pecuniary interest generally,[18] he need not answer a charge which if confessed would subject him to punishment,[19] or to a penalty or a forfeiture.[20] It is sufficient to excuse the answer that it might furnish a step in the

a defendant specially and particularly upon any statement in the bill, unless plaintiff desires to do so to obtain a discovery. 10 How. v.

10. Berry *v.* Winter, 28 Ga. 602.

11. Moyer *v.* Livingood, 2 Woodw. (Pa.) 317.

12. Quackenbush *v.* Van Riper, 1 N. J. Eq. 476; Parsons *v.* Cumming, 18 Fed. Cas. No. 10,775, 1 Woods 461. The answer need only meet what is expressly charged and not what is left to inference. Stafford *v.* Brown, 4 Paige (N. Y.) 88. But where a bill charged a sale on credit, without taking security, a denial that the sale was without security was insufficient; the answer should show what security was taken. Robinson *v.* Woodgate, 3 Edw. (N. Y.) 422.

Where an instrument is set forth, but the contents not stated as independent facts, defendant need only answer as to the existence of such instrument, without answering the facts contained in it. Morris *v.* Parker, 3 Johns. Ch. (N. Y.) 297.

13. Payne *v.* Atterbury, Harr. (Mich.) 414; Manice *v.* New-York Dry Dock Co., 3 Edw. (N. Y.) 143; Union Mut. Ins. Co. *v.* Commercial Mut. Mar. Ins. Co., 24 Fed. Cas. No. 14,372, 2 Curt. 524 [*affirmed* in 19 How. 318, 15 L. ed. 636].

14. *Connecticut.*—Butler *v.* Catling, 1 Root 310.

Maryland.— Hagthorp *v.* Hook, 1 Gill & J. 270.

New Hampshire.— Dinsmoor *v.* Hazelton, 22 N. H. 535.

New Jersey.—Vreeland *v.* New Jersey Stone Co., 25 N. J. Eq. 140. But see Hogencamp *v.* Ackerman, 10 N. J. Eq. 267.

New York.— Utica Ins. Co. *v.* Lynch, 3 Paige 210; French *v.* Shotwell, 6 Johns. Ch. 235.

United States.— Peters *v.* Tonopah Min. Co., 120 Fed. 587.

See 19 Cent. Dig. tit. "Equity," § 428.

15. Gilkey *v.* Paige, Walk. (Mich.) 520; Tucker *v.* Cheshire R. Co., 21 N. H. 29; Batterson *v.* Ferguson, 1 Barb. (N. Y.) 490; Hardeman *v.* Harris, 7 How. (U. S.) 726, 12 L. ed. 889. Defendant need only answer those points which are necessary to enable the court to make a decree against him. Agar *v.* Regent's Canal Co., Coop. Ch. 212, 11 Eng. Ch. 212. He need not answer as to the correctness of a mere mathematical proposition stated in the bill. McIntyre *v.* Union College, 6 Paige (N. Y.) 239.

Allegations provable by other testimony should nevertheless be answered if they are material. Davis *v.* Mapes, 2 Paige (N. Y.) 105.

16. Van Cortlandt *v.* Beekman, 6 Paige (N. Y.) 492.

Concerning exhibit.— An averment that a true and correct copy of a plat is attached to the bill as an exhibit need not be answered, there being no rule of pleading requiring the attaching of such an exhibit. Peters *v.* Tonopah Min. Co., 120 Fed. 587.

17. Newhall *v.* Hobbs, 3 Cush. (Mass.) 274; Mechanics' Bank *v.* Levy, 3 Paige (N. Y.) 606.

18. Dyer *v.* Martin, 5 Ill. 146.

19. *Connecticut.*— Butler *v.* Catling, 1 Root 310.

Kentucky.—Atterberry *v.* Knox, 8 Dana 282; Leigh *v.* Everheart, 4 T. B. Mon. 379, 16 Am. Dec. 160.

Maryland.— Wootten *v.* Burch, 2 Md. Ch. 190.

New York.— Union Bank *v.* Barker, 3 Barb. Ch. 358; Mechanics' Bank *v.* Levy, 3 Paige 606; Leggett *v.* Postley, 2 Paige 599.

Ohio.— Kibby *v.* Kibby, Wright 607.

Pennsylvania.— U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31.

See 19 Cent. Dig. tit. "Equity," § 431.

Civil fraud.— Where two defendants are charged with fraudulent acts, but no concert of action is charged, so that a felony is not imputed, each must answer as to the fraud. Attwood *v.* Coe, 4 Sandf. Ch. (N. Y.) 412.

20. Atterberry *v.* Knox, 8 Dana (Ky.) 282; Legoux *v.* Wante, 3 Harr. & J. (Md.)

proceeding against defendant.[21] Defendant should not answer where the answer would involve a breach of professional confidence,[22] and he may refuse to answer disclosing his trade secrets,[23] and, it has been said, his own insolvency.[24] Defendant need not render an account in his answer, where the duty of accounting in the matter devolves upon plaintiff.[25] While in such cases defendant may generally protect himself by demurring to the discovery,[26] he is not obliged to do so, but may submit his objection in the answer.[27] It seems that if the answer objects to a discovery of particular facts and proceeds to answer some of those facts the objection is overruled.[28]

b. Specific, Direct, and Non-Evasive Denials. An answer is insufficient which in general terms denies the allegations of the bill. Each charge and allegation must be specifically confessed or denied,[29] but where the bill merely charges in general terms the denial need not be more specific.[30] The answer must meet the charges directly, without equivocation or evasion.[31] A denial will not be implied.[32] It must meet the point in substance; and a literal denial in the terms of the bill which fails to meet the substance of the charge is bad.[33] A statement of explanatory facts must frequently be added to avoid an exception for evasiveness.[34] No

184; Wolf *v.* Wolf, 2 Harr. & G. (Md.) 382, 18 Am. Dec. 313.

21. Wolf *v.* Wolf, 2 Harr. & G. (Md.) 382, 18 Am. Dec. 313; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31.

On bill for fraudulently overdrawing account, defendant may be interrogated as to his intent in overdrawing. Mechanics' Bank *v.* Levy, 3 Paige (N. Y.) 606.

22. Champlin *v.* Champlin, 2 Edw. (N. Y.) 362; Robertson *v.* Bingley, 1 McCord Eq. (S. C.) 333.

23. Federal Mfg., etc., Co. *v.* International Bank Note Co., 119 Fed. 385.

24. Mayer *v.* Galluchat, 6 Rich. Eq. (S. C.) 1.

25. Newhall *v.* Hobbs, 3 Cush. (Mass.) 274.

26. See *supra*, VIII, C, 4, l.

27. 2 Daniell Ch. Pr. 249. See Fuller *v.* Knapp, 24 Fed. 100. Where defendant might have protected himself from a particular discovery by demurrer or plea to the whole bill, if he submits to answer the bill he must answer as fully as in any other case. Gilkey *v.* Paige, Walk. (Mich.) 520.

An answer setting out excuses for not meeting interrogatories must be as specific as a demurrer for that purpose. Boyer *v.* Kelly, 113 Fed. 580. See U. S. Eq. Rule 44.

28. Cuyler *v.* Bogert, 3 Paige (N. Y.) 186. But see Perry *v.* Kinley, 1 Phila. (Pa.) 505, 5 Pa. L. J. Rep. 326.

29. *California.*— Dewey *v.* Bowman, 8 Cal. 145.

Maryland.— Wootten *v.* Burch, 2 Md. Ch. 190.

New York.—Pettit *v.* Candler, 3 Wend. 618; Woods *v.* Morrell, 1 Johns. Ch. 103.

Pennsylvania.— Hoyt *v.* Kingston Coal Co., 8 Kulp 352.

United States.— Holton *v.* Guinn, 65 Fed. 450.

See 19 Cent. Dig. tit. "Equity," § 426.

Each circumstance must be met. Where matters are charged to have occurred with certain attendant circumstances, it is not sufficient to deny the charge in the words of the bill. King *v.* Ray, 11 Paige (N. Y.) 235. The formal general traverse is no response to particular allegations. King *v.* Spencer, 1 Bibb (Ky.) 290. But a general denial of all the material allegations will be held sufficient to make an issue on appeal, in the absence of exceptions in the court below. Burlew *v.* Quarrier, 16 W. Va. 108.

30. Wingo *v.* Hardy, 94 Ala. 184, 10 So. 659; Cowles *v.* Carter, 39 N. C. 105.

31. *Alabama.*— Grady *v.* Robinson, 28 Ala. 289.

Georgia.— Miller *v.* Saunders, 17 Ga. 92.

Kentucky.— Sallee *v.* Duncan, 7 T. B. Mon. 382; Lee *v.* Vaughan, Ky. Dec. 238.

Mississippi.— Mead *v.* Day, 54 Miss. 58.

Missouri.— Gamble *v.* Johnson, 9 Mo. 605.

New Jersey.— Pierson *v.* Ryerson, 5 N. J. Eq. 196.

North Carolina.— Thompson *v.* Mills, 39 N. C. 390.

United States.— Caldwell *v.* Carrington, 9 Pet. 86, 9 L. ed. 60.

See 19 Cent. Dig. tit. "Equity," § 423.

Although an answer be evasive, plaintiff cannot have relief if his bill does not clearly disclose the facts. Scotts *v.* Hume, Litt. Sel. Cas. (Ky.) 378.

32. Kelley *v.* Ryder, 18 R. I. 455, 28 Atl. 807.

33. Grady *v.* Robinson, 28 Ala. 289 (negative pregnant is bad); Jones *v.* Wing, Harr. (Mich.) 301; Dinsmoor *v.* Hazelton, 22 N. H. 535; Moors *v.* Moors, 17 N. H. 481; Smith *v.* Loomis, 5 N. J. Eq. 60.

He must deny disjunctively where he denies a charge embracing several particulars. Pierson *v.* Ryerson, 5 N. J. Eq. 196; Davis *v.* Mapes, 2 Paige (N. Y.) 105.

Not only authority but ratification should be denied where a bill alleges authority in an agent to perform an act. Clark *v.* Van Riemsdyk, 9 Cranch (U. S.) 153, 3 L. ed. 688.

34. To a bill alleging that defendant had not paid for certain property, an answer al-

particular form of words is required, however, and it is sufficient if the defense is clearly made in substance, although not formally.[35] The whole answer will be taken together, and a denial evasive by itself may be made sufficient by other statements in the answer.[36] On the other hand a denial counts for nothing when accompanied by admissions which disprove it.[37] Charges of fraud in a bill must be met by answer,[38] and as to these defendant must deny with particularity and will be held to strict rules.[39]

c. Answering According to Knowledge, Information, and Belief — (I) *The General Requirement.* The general interrogatory is that defendant shall answer according to the best of his knowledge, information, and belief, or sometimes according to the best of his knowledge, remembrance, information, and belief.[40] This requirement must be observed,[41] and an answer is insufficient which responds as to defendant's knowledge alone. It must state any information defendant may have relating to matters called for, and his belief concerning the same.[42] The answer must distinctly show what is stated on knowledge and what on information and belief.[43]

(II) *When Answer Must Be Positive.* When the bill charges an act of defendant or other matter within defendant's knowledge he must answer positively.[44] It is insufficient in such case merely to disclaim knowledge,[45] or recollection,[46] or to deny on information and belief.[47] Where from lapse of time the court is satisfied that a positive answer cannot be made the rule is relaxed,[48] but then defendant must state his information and belief.[49]

leging payment was held evasive for not saying for whom, by whom, or by whose money payment was made. Wilson *v.* Woodruff, 5 Mo. 40, 31 Am. Dec. 194. To a bill charging a purchase for certain improper purposes, an answer denying the purposes specified and averring that the purchase was for other purposes without specifying them was held insufficient. Place *v.* Providence, 12 R. I. 1. But such details need not be stated in support of a general allegation, where they would be wholly collateral to the object of the bill. Berryman *v.* Sullivan, 13 Sm. & M. (Miss.) 65.

35. Ragsdale *v.* Stuart, 8 Ark. 268; Newaygo County Mfg. Co. *v.* Stevens, 79 Mich. 398, 44 N. W. 852; Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210; Kelley *v.* Lewis, 4 W. Va. 456.

36. McMahon *v.* O'Donnell, 20 N. J. Eq. 306. The whole answer will be read to ascertain whether a particular averment presents an issue of fact or merely a legal conclusion. Orman *v.* Barnard, 5 Fla. 528.

37. Sayre *v.* Fredericks, 16 N. J. Eq. 205; Robinson *v.* Stewart, 10 N. Y. 189; Adams *v.* Adams, 21 Wall. (U. S.) 185, 22 L. ed. 504.

38. See *supra*, VIII, C, 3, j.

39. Reed *v.* Cross, 14 Me. 259; Gray *v.* Regan, 23 Miss. 304; Smith *v.* Loomis, 5 N. J. Eq. 60; Fellows *v.* Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412; Mechanics' Bank *v.* Levy, 1 Edw. (N. Y.) 316.

40. See *supra*, VII, B, 8.

41. Cleghorn *v.* Rutherford, 26 Ga. 152; Miles *v.* Miles, 27 N. H. 440; Dinsmoor *v.* Hazelton, 22 N. H. 535; Tradesmen's Bank *v.* Hyatt, 2 Edw. (N. Y.) 195; Painter *v.* Harding, 3 Phila. (Pa.) 144.

42. *New Hampshire.*— Miles *v.* Miles, 27 N. H. 440.

New Jersey.— Kinnaman *v.* Henry, 6 N. J. Eq. 90.

New York.— Mechanics' Bank *v.* Levy, 3 Paige 606.

North Carolina.— Bailey *v.* Wilson, 21 N. C. 182.

Pennsylvania.—Painter *v.* Harding, 3 Phila. 144.

Vermont.— Devereaux *v.* Cooper, 11 Vt. 103.

United States.— Commonwealth Title Ins., etc., Co. *v.* Cummings, 83 Fed. 767.

See 19 Cent. Dig. tit. "Equity," § 427.

43. Stallworth *v.* Lassiter, 59 Ala. 558.

44. Noyes *v.* Inland, etc., Coasting Co., MacArthur & M. (D. C.) 1; Dinsmoor *v.* Hazelton, 22 N. H. 535; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103.

45. Barbee *v.* Inman, 5 Blackf. (Ind.) 439; McAllister *v.* Clopton, 51 Miss. 257; Sloan *v.* Little, 3 Paige (N. Y.) 103. But where it was charged that defendant had assented to a certain agreement, an answer was held sufficient which stated that he never had any knowledge, information, or belief of the agreement. Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24.

46. Cobb *v.* Haynes, 8 B. Mon. (Ky.) 137.

47. Burpee *v.* Janesville First Nat. Bank, 4 Fed. Cas. No. 2,185, 5 Biss. 405; Taylor *v.* Luther, 23 Fed. Cas. No. 13,796, 2 Sumn. 228; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAll. 271. But an assertion that defendant "does not believe and denies" a matter is a positive denial. Philadelphia Trust, etc., Co. *v.* Scott, 45 Md. 451.

48. Hall *v.* Wood, 1 Paige (N. Y.) 404. A positive answer will not be required where the fact charged did not occur within six years. Carey *v.* Jones, 8 Ga. 516.

49. Sloan *v.* Little, 3 Paige (N. Y.) 103.

(III) *Answering on Information and Belief.* When the facts charged are not within defendant's knowledge he may and must answer according to his information and belief.[50] In so doing it is essential that defendant state both his information[51] and his belief.[52] Defendant may not disclaim information where information is within his reach, but must in such case obtain it and state it.[53] An answer on information and belief, when properly put in, is sufficient as a pleading in order to present an issue;[54] but being after all merely hearsay it does not operate as evidence in favor of defendant.[55]

(IV) *How Ignorance Should Be Pleaded.* The rule requiring an answer according to knowledge, information, and belief demands that a defendant, in order to avoid, because of ignorance, an answer as to the truth of matters charged, should deny that he has any knowledge, information, or belief concerning such matter,[56] or that he has any knowledge or information sufficient to form a belief.[57] It seems also that a denial of any knowledge or information is alone sufficient without requiring a statement as to belief;[58] but any less comprehensive form is bad.[59]

50. Noyes *v.* Inland, etc., Coasting Co., MacArthur & M. (D. C.) 1; Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361; Griffith *v.* Griffith, 9 Paige (N. Y.) 315; Norton *v.* Woods, 5 Paige (N. Y.) 260; Galatian *v.* Erwin, Hopk. (N. Y.) 48; Woodruff *v.* Cook, 2 Edw. (N. Y.) 259; Jones *v.* Hawkins, 41 N. C. 110.

N. Y. Code Civ. Proc. § 526, adopts the old chancery verification, and under it a defendant must at his peril deny on information and belief where he is without personal knowledge. Brotherton *v.* Downey, 21 Hun 436, 59 How. Pr. 206.

51. Sanderlin *v.* Sanderlin, 24 Ga. 583; Livingston *v.* Gibbons, 5 Johns. Ch. (N. Y.) 250; Robinson *v.* Woodgate, 3 Edw. (N. Y.) 422; Kittredge *v.* Claremont Bank, 14 Fed. Cas. No. 7,858, 3 Story 590; Kittredge *v.* Claremont Bank, 14 Fed. Cas. No. 7,859, 1 Woodb. & M. 244. An answer on knowledge and belief was held sufficient when made by an executor of a deceased partner to a bill by a surviving partner for an account. Heartt *v.* Corning, 3 Paige (N. Y.) 566.

52. Dinsmoor *v.* Hazelton, 22 N. H. 535; Cuyler *v.* Bogert, 3 Paige (N. Y.) 186; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; Kittredge *v.* Claremont Bank, 14 Fed. Cas. No. 7,859, 1 Woodb. & M. 244.

He need not express any belief concerning the matters charged if he denies having ever had any knowledge or information in relation to the matters charged. Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210; Buchanan *v.* Noel, 12 Phila. (Pa.) 431.

53. Swift *v.* Swift, 13 Ga. 140; Thompson *v.* Mills, 39 N. C. 390; Enyard *v.* Enyard, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 319; Kittredge *v.* Claremont Bank, 14 Fed. Cas. No. 7,859, 1 Woodb. & M. 244.

54. *Alabama.*— Agnew *v.* McGill, 96 Ala. 496, 11 So. 537.

Arkansas.— Fairhurst *v.* Lewis, 23 Ark. 435.

Mississippi.— Carpenter *v.* Edwards, 64 Miss. 595, 1 So. 764.

New York.— Hutchinson *v.* Smith, 7 Paige 26.

United States.— Earle *v.* Art Library Pub. Co., 95 Fed. 544; Robinson *v.* Mandell, 20 Fed. Cas. No. 11,959, 3 Cliff. 169.

See 19 Cent. Dig. tit. "Equity," § 424.

55. Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784; Coale *v.* Chase, 1 Bland (Md.) 136; Kent *v.* Ricards, 3 Md. Ch. 392; Mason *v.* Jones, 16 Fed. Cas. No. 9,240, 1 Hayw. & H. 329.

An injunction will not be dissolved on an answer that defendant does not know as to facts charged and does not believe them. Quackenbush *v.* Van Riper, 1 N. J. Eq. 476. See, generally, Injunctions.

56. *In re* Holladay Case, 27 Fed. 830.

57. Guynn *v.* McCauley, 32 Ark. 97; Carr *v.* Bosworth, 68 Iowa 669, 27 N. W. 913.

58. Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210; Morris *v.* Parker, 3 Johns. Ch. (N. Y.) 297; Tradesmen's Bank *v.* Hyatt, 2 Edw. (N. Y.) 195. *Contra,* Bond *v.* Duer, 3 Phila. (Pa.) 207.

59. A denial of knowledge, without answering as to information and belief, is bad. Hopper *v.* Overstreet, 79 Miss. 241, 30 So. 637; Ryan *v.* Anglesea R. Co., (N. J. Ch. 1888) 12 Atl. 539; King *v.* Ray, 11 Paige (N. Y.) 235; Norton *v.* Warner, 3 Edw. (N. Y.) 106; Tradesmen's Bank *v.* Hyatt, 2 Edw. (N. Y.) 195; Brown *v.* Atkinson, 9 Kulp (Pa.) 164; Bradford *v.* Geiss, 3 Fed. Cas. No. 1,768, 4 Wash. 513. An answer admitting that allegations may be true but that defendant has no knowledge thereof except as read in the bill is insufficient. Rienzle *v.* Barker, (N. J. Ch. 1886) 4 Atl. 309. An express denial, where the answer elsewhere admits that defendant is ignorant, is not satisfactory. Bailey *v.* Stiles, 3 N. J. Eq. 245. An assertion that defendant does not recollect having done an act is neither a denial of the act nor of belief concerning it. Talbot *v.* Sebree, 1 Dana (Ky.) 56. An answer that defendant has no knowledge, information, and belief that the charge is not true is insufficient. Brooks *v.* Byam, 4 Fed. Cas. No. 1,947, 1 Story 296.

A denial of all fraud in defendant and all knowledge of fraud in his grantor is insufficient without a denial of knowledge of the facts from which fraud is inferred. Worme-

d. Pleading Defenses. The foregoing rules[60] are based chiefly on plaintiff's right to discovery. When it comes to pleading defenses it is said that the same degree of accuracy is not required as in a bill.[61] There must be such certainty as will inform plaintiff of the nature of the defense,[62] and every material fact must be stated, and not left to inference,[63] and stated in a concise and intelligible manner.[64] Averments of conclusions alone are of course insufficient,[65] as is also a merely argumentive allegation.[66] The material facts should usually be treated with particularity and not in general terms.[67] The precise nature of the defense should be indicated.[68] In setting up by answer a defense which might have been the subject of a plea defendant is usually required to set it out with the same certainty as in a plea.[69] Notice of prior equities must be denied whether notice is charged in the bill or not,[70] and one claiming as a *bona fide* purchaser must explicitly deny the fact of notice, and knowledge of every circumstance from which such notice could be inferred.[71] He must show that the consideration was paid,[72] and that the purchase was completed before notice was acquired.[73]

e. Consistency. An answer must be consistent,[74] and defendant may not insist upon a defense based on the truth of an allegation in the bill which he

ley *v.* Wormeley, 30 Fed. Cas. No. 18,047, 1 Brock. 330.

60. See *supra*, VIII, E, 4, a, b, c.

61. Jenkins *v.* Greenbaum, 95 Ill. 11; King *v.* King, 9 N. J. Eq. 44.

62. Jenkins *v.* Greenbaum, 95 Ill. 11.

63. Mahar *v.* O'Hara, 9 Ill. 424; Gates *v.* Adams, 24 Vt. 70.

64. Bausman *v.* Denny, 73 Fed. 69.

65. Andrews *v.* Jones, 10 Ala. 400; McKim *v.* Mason, 2 Md. Ch. 510; Holmes *v.* Dole, Clarke (N. Y.) 71.

66. Young *v.* Mitchell, 33 Ark. 222.

67. Where it devolves upon a defendant to show that a plaintiff was informed of a certain matter, it is not sufficient to allege that information was given; the facts communicated must be stated. Hays *v.* Doane, 11 N. J. Eq. 84. But to meet a charge that plaintiff relied solely on defendant for advice, it was held sufficient to answer that plaintiff inquired of third persons, without naming them. Armstrong *v.* Crocker, 10 Gray (Mass.) 269.

A general charge of usury is unavailing without stating facts constituting usury. Mosier *v.* Norton, 83 Ill. 519. See, generally, USURY.

An answer averring ratification by shareholders of acts of the board of directors must state the time, manner, and circumstances of the ratification. Eidman *v.* Bowman, 58 Ill. 444, 11 Am. Rep. 90.

An answer pleading consent of a majority of the abutting owners to the construction of a railroad on the street must state who consented and show that they are a majority. Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. (N. Y.) 364.

Denial that a contract existed modo et forma is bad; defendant must show in what form it existed if at all. Pusey *v.* Wright, 31 Pa. St. 387. See also Luburg's Appeal, (Pa. 1889) 17 Atl. 245.

68. Orman *v.* Barnard, 5 Fla. 528, distinguishing between a defense of want of consideration and illegality or failure of consideration.

It seems that the statute of frauds may be availed of by merely denying the contract, leaving plaintiff the task of establishing it by competent evidence. Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Ontario Bank *v.* Root, 3 Paige (N. Y.) 478. See, generally, FRAUDS, STATUTE OF. But it is insufficient to allege that the contract is void in law. Vanpell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143.

69. Marvin *v.* Hampton, 18 Fla. 131; High *v.* Batte, 10 Yerg. (Tenn.) 335. *Contra*, Servis *v.* Beatty, 32 Miss. 52.

70. Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271; Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361; Manhattan Co. *v.* Evertson, 6 Paige (N. Y.) 457; Woodruff *v.* Cook, 2 Edw. (N. Y.) 259. One asserting a legal right is not bound to deny notice of subsequent interests, unless the bill alleges notice. King *v.* McVicker, 3 Sandf. Ch. (N. Y.) 192.

71. Ledbetter *v.* Walker, 31 Ala. 175; Miller *v.* Fraley, 21 Ark. 22; Balcom *v.* New-York L. Ins., etc., Co., 11 Paige (N. Y.) 454; Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566.

The rule has been stated that if notice is specially charged there must be a denial of all circumstances referred to from which notice can be inferred. Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388.

72. Cummings *v.* Coleman, 7 Rich. Eq. (S. C.) 509, 62 Am. Dec. 402; Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388. *Contra*, Servis *v.* Beatty, 32 Miss. 52.

73. Minor *v.* Willoughby, 3 Minn. 225; Grimstone *v.* Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Pillo-- *v.* Shannon, 3 Yerg. (Tenn.) 508; Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388. Want of notice may be made out by showing ignorance of certain facts merely, essential to plaintiff's equity. Tompkins *v.* Anthon, 4 Sandf. Ch. (N. Y.) 97.

74. *Indiana.*— Driver *v.* Driver, 6 Ind. 286.

New Jersey.—Gilbert *v.* Galpin, 11 N. J. Eq. 445; Commercial Bank *v.* Reckless, 5 N. J. Eq. 650.

New York.— Hawley *v.* Cramer, 4 Cow. 717.

denies in the answer.[75] If defendant sets up inconsistent defenses in a sworn answer he shall not have the benefit of either.[76]

f. Impertinence and Scandal. Impertinent matter should be struck out of an answer,[77] at the cost of the offending solicitor.[78] The nature of the objection for impertinence is much the same as in the case of bills,[79] but the determination of what is impertinent is governed by somewhat different considerations. The answer is given a liberal consideration,[80] and matter will not be stricken out if it can have any influence on the decision of the suit, either as to relief or as to costs.[81] The test is said to be to inquire whether the matter could be put in issue.[82] Allegations are impertinent if they go beyond those of the bill and cannot affect the result.[83] Any matter which is responsive to the bill is pertinent;[84] as are matters going to the right of plaintiff,[85] matters appealing to discretion, where relief rests in discretion,[86] matters influencing the question of costs,[87] or other matters of benefit, although less directly, to defendant.[88] On the other hand matters which are the foundation for cross relief alone are impertinent in an

North Carolina.— Green *v.* Burt, 37 N. C. 545.

United States.— Cleveland Sav., etc., Co. *v.* Bear Valley Irr. Co., 112 Fed. 693.

See 19 Cent. Dig. tit. "Equity," § 425.

75. Child *v.* Emerson, 99 Mich. 38, 57 N. W. 1042; Kinloch *v.* Meyer, Speers Eq. (S. C.) 427. Defenses may be set up if they are not wholly inconsistent with denials. Hopper *v.* Hopper, 11 Paige (N. Y.) 46.

Denial in cross bill.— An answer is bad which relies on certain contracts, the validity of which are denied in a cross bill. Cleveland Sav., etc., Co. *v.* Bear Valley Irr. Co., 112 Fed. 693.

76. Ozark Land Co. *v.* Leonard, 24 Fed. 660; Jesus Colle- *v.* Gibbs, 4 L. J. Exch. Eq. 42, 1 Y. & C. Exch. 145; Leech *v.* Bailey, 6 Price 504. An answer is not inconsistent so as to deprive defendant of its benefit, where it alleges a general conclusion and sets forth the particulars by which it is reached. Woodville *v.* Reed, 26 Md. 179.

77. Royston *v.* Royston, 29 Ga. 82; Conwell *v.* Claypool, 8 Blackf. (Ind.) 124.

Where pertinent and impertinent matter are blended so that they cannot be separated the whole may be excepted to. Norton *v.* Woods, 5 Paige (N. Y.) 260.

78. McConnell *v.* Holobush, 11 Ill. 61.

79. See *supra*, VII, H, 1.

80. Griswold *v.* Hill, 11 Fed. Cas. No. 5,835, 1 Paine 390.

81. Robertson *v.* Dunne, (Fla. 1903) 33 So. 530; Tucker *v.* Cheshire R. Co., 21 N. H. 29; Haberman *v.* Kaufer, 60 N. J. Eq. 271, 47 Atl. 48; Leslie *v.* Leslie, 50 N. J. Eq. 155, 24 Atl. 1029; Tower *v.* White, 10 Paige (N. Y.) 395; Van Rensselaer *v.* Brice, 4 Paige (N. Y.) 174. Exceptions for impertinence will not be sustained unless it is apparent that the matter is immaterial and irrelevant or is stated with needless prolixity. Chapman *v.* Portland School Dist., 5 Fed. Cas. No. 2,607, Deady 108.

82. Spaulding *v.* Farwell, 62 Me. 319; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; Roulston *v.* Ralston, 13 Phila. (Pa.) 175.

83. *Illinois.*— Highway Com'rs *v.* Deboe, 43 Ill. App. 25.

New Jersey.— Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343.

New York.— Norton *v.* Woods, 5 Paige 260; Woods *v.* Morrell, 1 Johns. Ch. 103.

West Virginia.— Rust *v.* Rust, 17 W. Va. 901.

United States.—Barrett *v.* Twin City Power Co., 111 Fed. 45.

See 19 Cent. Dig. tit. "Equity," § 434.

A disclaimer of all interest renders impertinent anything not responsive to the bill. Saltmarsh *v.* Hockett, 1 Lea (Tenn.) 215.

84. McIntyre *v.* Union College, 6 Paige (N. Y.) 239; Monroy *v.* Monroy, 1 Edw. (N. Y.) 382; Marshall's Estate, 16 Phila. (Pa.) 271; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 84 Fed. 379; Chapman *v.* Portland School Dist., 5 Fed. Cas. No. 2,607, Deady 108; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381.

Schedule and receipts.—Where a bill prayed a discovery of sums expended by an executor, with the times and circumstances of such expenditures and that copies of the accounts should be annexed, a schedule annexed to the answer, setting forth each item of debit and credit, was held not impertinent, but copies of receipts taken for payments explained in the answer were impertinent. Scudder *v.* Bogert, 1 Edw. (N. Y.) 372.

Impertinent matter in a bill does not justify the introduction of similar matter in the answer. Langdon *v.* Pickering, 19 Me. 214.

85. Smith *v.* Crocheron, 2 Edw. (N. Y.) 501; Jolly *v.* Carter, 2 Edw. (N. Y.) 209.

86. Barrett *v.* Twin City Power Co., 111 Fed. 45.

87. Tucker *v.* Cheshire R. Co., 21 N. H. 29; Leslie *v.* Leslie, 50 N. J. Eq. 155, 24 Atl. 1029; Van Rensselaer *v.* Brice, 4 Paige (N. Y.) 174; Desplaces *v.* Goris, 1 Edw. (N. Y.) 350.

88. As a reference to books of account for the purpose of corroborating the answer (Norton *v.* Woods, 5 Paige (N. Y.) 260), or a reservation of a right to file a cross bill in a certain contingency (Desplaces *v.* Goris, 1 Edw. (N. Y.) 350), or an allegation inserted to exclude a presumption which might arise from silence, and be injurious in a subsequent suit (Jolly *v.* Carter, 2 Edw.

answer,[89] as are also matters of argument, based on the statements of the bill, but containing no new fact,[90] and matters of which defendant could not be permitted to avail himself.[91] It is impertinent also to reiterate[92] or to set out immaterial details, or immaterial parts of documents or proceedings.[93] Scandalous matter[94] will likewise be stricken out.[95]

5. Plea Ordered to Stand For Answer. If on argument the court considers that matter offered by way of a plea may be a defense in whole or in part, but that the plea is formally defective, it will instead of overruling the plea direct it to stand for an answer.[96] When this is done without leave to plaintiff to except, the order implies that the plea is deemed sufficient as an answer, although not necessarily a full defense.[97] Defendant may be given leave to file a more formal answer,[98] or the right may be reserved in plaintiff to except.[99] When the right to except is reserved, the order allowing the plea to stand for an answer implies that it contains matter which if put in form of an answer would have been available as a defense to all or part of the matters which it professes to cover, but that plaintiff is entitled to further discovery.[1] An answer containing denials

(N. Y.) 209). Allegations which are material in their nature are not necessarily impertinent because they are facts of which the court may take notice. Wells *v.* Oregon, etc., R. Co., 15 Fed. 561, 8 Sawy. 600. A paragraph which sets up a question of law and fact pertinent to the issue will not be stricken out, although the legal proposition may not be sound. Huston *v.* Sellers, 12 Phila. (Pa.) 520.

89. Mrzena *v.* Brucker, 3 Tenn. Ch. 161; Armstrong *v.* Chemical Nat. Bank, 37 Fed. 466.

A prayer for relief is impertinent in an answer. Chapman *v.* Portland School Dist., 5 Fed. Cas. No. 2,607, Deady 108.

90. Perkins *v.* Morgan, 107 Ga. 835, 33 S. E. 705; Florida Mortg., etc., Co. *v.* Finlayson, 74 Fed. 671.

91. As allegations attempting to reopen what has become *res judicata* (Jones *v.* Roberts, 4 Edw. (N. Y.) 611; Langdon *v.* Goddard, 14 Fed. Cas. No. 8,061, 3 Story 13), allegations varying the terms of a written contract (Barbee *v.* Inman, 5 Blackf. (Ind.) 439), or averments of matters excluded from consideration by an admitted contract (Barrett *v.* Twin City Power Co., 111 Fed. 45). Allegations of an attempted settlement to which plaintiff did not accede are impertinent. Langdon *v.* Goddard, 14 Fed. Cas. No. 8,061, 3 Story 13.

92. Norton *v.* Woods, 5 Paige (N. Y.) 260; Lawrence *v.* Lawrence, 4 Edw. (N. Y.) 357.

Repetition in a further answer or in an answer to an amended bill of matter contained in a former answer is impertinent. Garr *v.* Hill, 6 N. J. Eq. 457: Gier *v.* Gregg, 10 Fed. Cas. No. 5,406, 4 McLean 202.

Superfluous averments.— It is impertinent to insert allegations of facts which might be proved under other averments of the answer. Armstrong *v.* Chemical Nat. Bank, 37 Fed. 466.

93. Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343; Norton *v.* Woods, 5 Paige (N. Y.) 260: Hood *v.* Inman, 4 Johns. Ch. (N. Y.) 437; Jolly *v.* Carter, 2 Edw. (N. Y.) 209; Johnson *v.* Tucker, 2 Tenn. Ch. 244.

94. For definition see *supra*, VII, H, 2.

95. McConnell *v.* Holobush, 11 Ill. 61; King *v.* Sea Ins. Co., 26 Wend. (N. Y.) 62; Norton *v.* Woods, 5 Paige (N. Y.) 260; Sommers *v.* Torrey, 5 Paige (N. Y.) 54, 28 Am. Dec. 411; Johnson *v.* Tucker, 2 Tenn. Ch. 244.

Defendant may not impute discreditable motive to plaintiff in bringing the suit, not affecting his right to bring it. Whittemore *v.* Patten, 84 Fed. 51.

Recrimination of scandalous charges in the bill is none the less scandalous. Rees *v.* Evans, 1 Ch. Sent. (N. Y.) 6.

What is pertinent cannot be scandalous. Henry *v.* Henry, 62 N. C. 334, 98 Am. Dec. 87.

96. Leacraft *v.* Demprey, 4 Paige (N. Y.) 124; Stuart *v.* Warren, 1 N. Y. Leg. Obs. 293; Brien *v.* Marsh, 1 Tenn. Ch. 625; 2 Daniell Ch. Pr. 227. This may be done where the plea is good in part and bad in part (French *v.* Shotwell, 5 Johns. Ch. (N. Y.) 555) or where a plea and answer are put in to the same matter (Souzer *v.* De Meyer, 2 Paige (N. Y.) 574).

A plea showing that defendant has no interest in the subject-matter will not be allowed to stand for an answer, but its benefit should be saved to the hearing. Williams *v.* Empire Transp. Co., 29 Fed. Cas. No. 17,720, 3 Ban. & A. 533.

97. Beall *v.* Blake, 10 Ga. 449; McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543. The order determines that the plea contains matter which properly presented constitutes a valid defense to some material part covered by it. Orcutt *v.* Orms, 3 Paige (N. Y.) 459.

98. Brien *v.* Marsh, 1 Tenn. Ch. 625. See also Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242.

99. Brien *v.* Marsh, 1 Tenn. Ch. 625; 2 Daniell Ch. Pr. 227.

1. McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543.

of allegations which plaintiff is required to prove to make out his title has been treated as a negative plea.[2]

6. Admissions by Answer — a. Express Admissions. Where a fact is alleged in the bill and admitted in the answer the admission is conclusive,[3] but an admission of the allegations of the bill is not an admission that plaintiff is entitled to the relief prayed.[4] No admission in an answer can avail plaintiff unless the fact admitted is substantially alleged in the bill.[5]

b. Admissions by Express Implication. Whatever be the rule as to the effect of leaving allegations wholly unanswered,[6] admissions are frequently expressly implied from what is stated in the answer. Thus, where a defense or denial is evasive and does not cover all the facts essential to its validity, it will be held to admit that the essential facts not covered favor plaintiff.[7] While an answer is subject to exceptions if it denies generally instead of specifically, or literally

2. Stimson Land Co. *v.* Rawson, 62 Fed. 426.

3. *Alabama.*—Taunton *v.* McInnish, 46 Ala. 619; Ozley *v.* Ikelheimer, 26 Ala. 332; Adams *v.* Shelby, 10 Ala. 478.

Florida.— Clarkson *v.* Louderback, 36 Fla. 660, 19 So. 887.

Georgia.—Imboden *v.* Etowah, etc., Hydraulic Hose Min. Co., 70 Ga. 86; Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank-Road Co., 15 Ga. 39.

Illinois.— Texas Home Ins., etc., Co. *v.* Myer, 93 Ill. 271; Padfield *v.* Padfield, 64 Ill. 166; Weider *v.* Clark, 27 Ill. 251.

Kentucky.— Wright *v.* Wright, 2 Litt. 8.

Maryland.— Robertson *v.* Parks, 3 Md. Ch. 65.

Mississippi.— Williamson *v.* Downs, 34 Miss. 402.

New Jersey.— Poor Children's Relief Corp. *v.* Eden, 62 N. J. Eq. 542, 50 Atl. 606; Voorhees *v.* Voorhees, 18 N. J. Eq. 223.

Wisconsin.— Cooper *v.* Tappan, 9 Wis. 361.

United States.— Cavender *v.* Cavender, 114 U. S. 464, 5 S. Ct. 955, 29 L. ed. 212.

See 19 Cent. Dig. tit. "Equity," §§ 689, 690.

The rule as to unsworn answers is the same. Hickson *v.* Bryan, 75 Ga. 392; Sims *v.* Ferrill, 45 Ga. 585; Durfee *v.* McClurg, 6 Mich. 223; Craft *v.* Schlag, 61 N. J. Eq. 567, 49 Atl. 431; Smith *v.* Potter, 3 Wis. 432.

Evidence that the admission was made by mistake cannot be received to avoid its effect. Hollister *v.* Barkley, 11 N. H. 501, amended or supplemental answer is the remedy.

Relation to statute of frauds.— Where the answer admits the making of a contract alleged in the bill, without asserting that it was not in writing, defendant cannot object on the hearing on the ground that it was within the statute of frauds. Brewer *v.* Peed, 7 J. J. Marsh. (Ky.) 230; Vaupell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143. But see Box *v.* Stanford, 13 Sm. & M. (Miss.) 93, 51 Am. Dec. 142. See, generally, Frauds, Statute of.

On admission of facts showing duty to account an account will be ordered, although indebtedness is denied. Koons *v.* Bute, 2 Phila. (Pa.) 170.

Admission of a guardian ad litem does not, however, dispense with proof against the infant. Chaffin *v.* Kimball, 23 Ill. 36; Townsend *v.* McIntosh, 14 Ind. 57. See, generally, Infants.

Admission that a deed bears a certain date does not estop defendant from showing that it was delivered thereafter and fraudulently antedated. Holbrook *v.* Worcester Bank, 12 Fed. Cas. No. 6,597, 2 Curt. 244. An admission that a certain deed was made of such date and of such purport and effect as in the bill mentioned does not preclude all inquiry as to the purpose of the deed as charged in the bill. Brown *v.* Balen, 33 N. J. Eq. 469.

The admission of one defendant does not relieve plaintiff from the necessity of making proof as against others. Henderson *v.* Hall, 134 Ala. 455, 32 So. 840, 63 L. R. A. 673; Desplaces *v.* Goris, 2 Edw. (N. Y.) 422; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

4. Hendrickson *v.* Winne, 3 How. Pr. (N. Y.) 127.

5. Hoff *v.* Burd, 17 N. J. Eq. 201; Melvin *v.* Robinson, 42 N. C. 80; Beech *v.* Haynes, 1 Tenn. Ch. 569; Jackson *v.* Ashton, 11 Pet. (U. S.) 229, 9 L. ed. 698; Battle *v.* New York Mut. L. Ins. Co., 2 Fed. Cas. No. 1,109, 10 Blatchf. 417. A decree will not be given plaintiff on a new cause for relief shown in the answer in connection with matter of discharge. Jameson *v.* Shelby, 2 Humphr. (Tenn.) 198.

6. See *infra*, VIII, E, 6, c.

7. Higgins *v.* Curtiss, 82 Ill. 28; Price *v.* Boswell, 3 B. Mon. (Ky.) 13; Greenwade *v.* Greenwade, 3 Dana (Ky.) 495; McCampbell *v.* Gill, 4 J. J. Marsh. (Ky.) 87; Sallee *v.* Duncan, 7 T. B. Mon. (Ky.) 382; Lawless *v.* Blakey, 4 T. B. Mon. (Ky.) 488; Tate *v.* Field, 56 N. J. Eq. 35, 37 Atl. 440; Bowker *v.* Gleason, (N. J. Ch. 1887) 11 Atl. 324; Crary *v.* Smith, 2 N. Y. 60.

When defendant evades discovery of a date within his knowledge it will be taken to be that which is most beneficial to plaintiff and consistent with the other circumstances. Tarpley *v.* Wilson, 33 Miss. 467. See also Coleman *v.* Ross, 46 Pa. St. 180.

Equivocal denial.— Where the bill averred that a preëmption claim was canceled by

instead of substantially,[8] such denials are not taken to admit the facts attempted to be controverted.[9] There are cases holding that an answer setting up a distinct meritorious defense, without questioning the right of plaintiff to sue in the capacity alleged in the bill, admits such right,[10] and even that such distinct defense admits that in other respects plaintiff's case as stated in the bill is true, there being no denials thereof.[11]

c. Effect of Not Answering Particular Allegations. Although from what appears in the answer an admission is sometimes implied of certain matters not denied,[12] mere silence as to a matter charged in the bill, unaccompanied by circumstances from which an admission may be so expressly implied, does not constitute, as at law, an admission of the matter so passed over; and plaintiff, unless he compels a further answer, must prove such matter.[13] This general rule is sometimes restricted to cases where the allegations in question are not charged or presumed to be within the knowledge of defendant, such allegations not being admitted by

the proper authority, and the answer denied that the claim was legally canceled and alleged that, if canceled, it was without sufficient authority, the answer was held to admit the averments of the bill. Holmes *v.* State, 100 Ala. 291, 14 So. 51.

Notice of a trust charged in the bill is admitted by an answer admitting that defendant had heard that an estate was in some way devised in trust for plaintiff. Haywood *v.* Ensley, 8 Humphr. (Tenn.) 460.

Request.— An admission that plaintiff had asked defendant what she could pay him meets an allegation that plaintiff had repeatedly asked defendant for his bill. Armstrong *v.* Crocker, 10 Gray (Mass.) 269.

8. See *supra*, VIII, E, 4, b.

9. *Alabama.*— White *v.* Wiggins, 32 Ala. 424; Savage *v.* Benham, 17 Ala. 119.

Massachusetts.— Parkman *v.* Welch, 19 Pick. 231.

Mississippi.—Madison County *v.* Paxton, 57 Miss. 701.

West Virginia.— Sandusky *v.* Faris, 49 W. Va. 150, 38 S. E. 563; Core *v.* Bell, 20 W. Va. 169.

United States.— U. S. *v.* Ferguson, 54 Fed. 28.

See 19 Cent. Dig. tit. "Equity," § 426.

10. Niles *v.* Williams, 24 Conn. 279; Owings *v.* Patterson, 1 A. K. Marsh. (Ky.) 620.

11. Woodworth *v.* Huntoon, 40 Ill. 131, 89 Am. Dec. 340; Taylor *v.* Webb, 54 Miss. 36. Conducting the whole litigation on the assumption that entire reliance is on the affirmative defense set up renders it unnecessary for plaintiff to prove a negative fact not admitted expressly. Shook *v.* Proctor, 27 Mich. 349, 377.

12. See *supra*, VIII, E, 6, b.

13. *Alabama.*—Crompton *v.* Vasser, 19 Ala. 259.

Arkansas.— Blakeney *v.* Ferguson. 14 Ark. 640; Cummins *v.* Harrell, 6 Ark. 308.

Delaware.— Cochran *v.* Couper, 1 Harr. 200.

Georgia.— Keaton *v.* McGwier, 24 Ga. 217.

Illinois.— Glos *v.* Cratty, 196 Ill. 193, 63 N. E. 690; Wilson *v.* Augur, 176 Ill. 561, 52 N. E. 289; Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436]; Litch *v.* Clinch, 136 Ill. 410, 26 N. E. 579; Glos *v.* Randolph, 133 Ill. 197, 24 N. E. 426; Hopkins *v.* Medley, 97 Ill. 402; Nelson *v.* Pinegar, 30 Ill. 473; Dooley *v.* Stipp, 26 Ill. 86; Morgan *v.* Herrick, 21 Ill. 481; Wilson *v.* Kinney, 14 Ill. 27; Fuqua *v.* Robinson, 10 Ill. 128; Bachmann *v.* Supreme Lodge K. & L. of H., 44 Ill. App. 188; Yates *v.* Thompson, 44 Ill. App. 145.

Kentucky.— Owings *v.* Patterson, 1 A. K. Marsh. 325.

Maryland.— Crowe *v.* Wilson, 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343; Joice *v.* Taylor, 6 Gill & J. 54, 25 Am. Dec. 325; Stewart *v.* Stone, 3 Gill & J. 510; Warfield *v.* Gambrill, 1 Gill & J. 503.

Michigan.— Morris *v.* Morris, 5 Mich. 171.

Mississippi.— Gartman *v.* Jones, 24 Miss. 234.

Missouri.— Ingram *v.* Tompkins, 16 Mo. 399; Gamble *v.* Johnson, 9 Mo. 605.

North Carolina.—Lunn *v.* Johnson, 38 N. C. 70; Tate *v.* Conner, 17 N. C. 224.

Ohio.— McArthur *v.* Phœbus, 2 Ohio 415.

South Carolina.— Moffat *v.* McDowall, 1 McCord Eq. 434.

Tennessee.— Hill *v.* Walker, 6 Coldw. 424, 98 Am. Dec. 465; Smith *v.* Turner, (Ch. App. 1898) 48 S. W. 396.

Virginia.— Coleman *v.* Lyne, 4 Rand. 454.

United States.— Young *v.* Grundy, 6 Cranch 51, 3 L. ed. 149; Lovell *v.* Johnson, 82 Fed. 206; Smith *v.* Ewing, 23 Fed. 741; Rogers *v.* Marshall, 13 Fed. 59, 3 McCrary 87. But see Surget *v.* Byers, 23 Fed. Cas. No. 13,629, Hempst. 715.

See 19 Cent. Dig. tit. "Equity," § 445.

The usual general traverse at the end of the answer (see *supra*, VIII, E, 3, a) is sufficient to put in issue allegations as to which there is no direct response. Stackpole *v.* Hancock, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814. But defendant is not free from some degree of suspicion for declining to answer interrogatories which he might easily have answered. McDowell *v.* Goldsmith, 2 Md. Ch. 370.

Stipulation.— If the cause is set down for hearing on bill and answer, and the parties agree that everything not denied shall be taken as true, the court may decree accordingly. Devereaux *v.* Cooper, 11 Vt. 103.

silence,[14] while allegations presumed to be within the knowledge of defendant are taken as admitted.[15] Again in a few jurisdictions it has been held that any material allegation in the bill, not denied or alluded to in the answer, must be taken as true.[16] Even under such a rule a defendant does not by silence admit matters of inference or law,[17] or matters contained in interrogatories having no foundation in the allegations of the bill.[18] A denial of knowledge concerning a matter puts plaintiff to his proof.[19] Sometimes by statute or rule there must be a sworn denial to put in issue the execution of a written instrument which is the foundation of the suit.[20]

d. Effect of Not Answering at All. Formerly plaintiff was required in all cases to make proof of his bill in the absence of an answer admitting it,[21] but in comparatively recent times, in order to prevent the inconvenience and failures of justice resulting from this rule, the practice, aided by acts of parliament, was established in England, of permitting plaintiff to take the bill as confessed after the failure of process to procure an answer.[22] In the United States the practice is general of permitting a decree to be taken *pro confesso*, if defendant does not answer within the time he is ruled to do so,[23] and consequently if a defendant who has been served with a subpœna permits the bill to be taken *pro confesso* for want of an answer or of an appearance, he thereby admits the truth of every

14. *Alabama.*—Clark *v.* Jones, 41 Ala. 349; Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122; Mobile Bank *v.* Planters', etc., Bank, 8 Ala. 772; Thorington *v.* Carson, 1 Port. 257.

Arkansas.— Bonnell *v.* Roane, 20 Ark. 114; Hardy *v.* Heard, 15 Ark. 184.

Kentucky.— Ball *v.* Townsend, Litt. Sel. Cas. 325; Kennedy *v.* Meredith, 3 Bibb 465.

Mississippi.— Cowen *v.* Alsop, 51 Miss. 158.

Pennsylvania.—Buchanan *v.* Noel, 12 Phila. 431.

Virginia.—Cropper *v.* Burton, 5 Leigh 426. See 19 Cent. Dig. tit. "Equity," § 445.

15. Smilie *v.* Siler, 35 Ala. 88; Kirkman *v.* Vanlier, 7 Ala. 217; Fritz *v.* Tudor, 2 Duv. (Ky.) 173; Armitage *v.* Wickliffe, 12 B. Mon. (Ky.) 488; Higgins *v.* Conner, 3 Dana (Ky.) 1; Bledsoe *v.* Martin, 5 J. J. Marsh. (Ky.) 520; Lytle *v.* Breckenridge, 3 J. J. Marsh. (Ky.) 663; Tobin *v.* Wilson, 3 J. J. Marsh. (Ky.) 63; Mosely *v.* Garrett, 1 J. J. Marsh. (Ky.) 212; Hutchison *v.* Sinclair, 7 T. B. Mon. (Ky.) 291; Mitchell *v.* Maupin, 3 T. B. Mon. (Ky.) 185; Pierson *v.* Meaux, 3 A. K. Marsh. (Ky.) 4; Moore *v.* Lockett, 2 Bibb (Ky.) 67, 4 Am. Dec. 683; Clute *v.* Bool, 8 Paige (N. Y.) 83; Smitheal *v.* Gray, 1 Humphr. (Tenn.) 491, 34 Am. Dec. 664. So held with regard to an affidavit opposing a motion for an injunction. Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

16. Conwell *v.* Claypool, 8 Blackf. (Ind.) 124 [*compare* Sandford *v.* Shelby, 4 Blackf. (Ind.) 134]; Neale *v.* Hagthrop, 3 Bland (Md.) 551; Pinnell *v.* Boyd, 33 N. J. Eq. 190; Jones *v.* Knauss, 31 N. J. Eq. 609; Lee *v.* Stiger, 30 N. J. Eq. 610; Wyckoff *v.* Gardner, (N. J. Ch. 1886) 5 Atl. 801; Thomas *v.* Austin, 4 Barb. (N. Y.) 265.

Elsewhere in announcing this rule it is usually restricted to particular facts or circumstances. Thus it has been held that where facts are alleged in the bill, and without denying them matter in avoidance is set up in the answer, such facts need not be proved. Pelham *v.* Floyd, 9 Ark. 530.

In Kentucky while capacity to sue need not be proved unless denied (Reading *v.* Ford, 1 Bibb 338), where heirship is essential to plaintiff's case and it is not charged in the bill, it must be proved unless admitted in the answer (Oldham *v.* Rowan, 3 Bibb 534).

In Virginia, an allegation of the bill, supported by a recital in a deed which was the foundation of the suit, was held admitted, because not denied. Scott *v.* Gibbon, 5 Munf. 86.

W. Va. Code, c. 125, § 36, provides substantially as stated in the text; but it is held that a general denial puts plaintiff to proof. Warren *v.* Syme, 7 W. Va. 474.

After repeated allowances of exceptions for failure to answer an allegation it has been held that it may be taken as confessed. Hale *v.* Continental L. Ins. Co., 20 Fed. 344.

17. Merrill *v.* Plainfield, 45 N. H. 126.

18. Burnett *v.* Garnett, 18 B. Mon. (Ky.) 68.

19. *Delaware.*— Cochran *v.* Couper, 1 Harr. 200.

Maryland.— Briesch *v.* McCauley, 7 Gill 189; Hagthorp *v.* Hook, 1 Gill & J. 270.

New Jersey.— Black *v.* Keiley, 23 N. J. Eq. 358.

Tennessee.— Haley *v.* Lacy, 1 Swan 498.

Virginia.— Ronald *v.* Princeton Bank, 90 Va. 813, 20 S. E. 780; Norman *v.* Hill, 2 Patt. & H. 676.

United States.— Brooks *v.* Byam, 4 Fed. Cas. No. 1,947, 1 Story 296.

20. Bonner *v.* Young, 68 Ala. 35; Mickle *v.* Maxfield, 42 Mich. 304, 3 N. W. 961; Yeary *v.* Cummins, 28 Tex. 91; James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53.

21. 1 Daniell Ch. Pr. 679.

22. For the history and details of the English practice see 1 Daniell Ch. Pr. 680.

23. See *infra*, XXIII, D.

material allegation of the bill.[24] The extent and import of the admissions must be gathered from the whole bill, including the exhibits attached.[25] Defendant does not admit anything not alleged,[26] conclusions of plaintiff from facts stated,[27] or allegations which plaintiff would not have been permitted to prove, had the bill been answered;[28] nor does he admit that the allegations of the bill are sufficient to support a decree.[29] Defendant may be protected against admissions from failure to answer by a stipulation that proof shall be taken and that he may offer evidence.[30]

7. Compelling Answer. Notwithstanding the modern right to take the bill as confessed for want of an answer,[31] plaintiff may sometimes require discovery in order to properly frame a decree, and for this purpose defendant may by proceedings for contempt be compelled to answer.[32] In England the practice existed of issuing a commission to take the answer of a party abroad or in the country, and such process has in some cases been resorted to in the United States.[33]

8. Withdrawing Answer. The court may always in its discretion permit a defendant to withdraw his answer to avoid admissions inadvertently made,[34] or to permit a demurrer to be filed.[35] But permission to withdraw an answer in order

24. *Alabama.*— Jones *v.* Beverly, 45 Ala. 161.

Illinois.— Sullivan *v.* Sullivan, 42 Ill. 315.

Iowa.— Thatcher *v.* Haun, 12 Iowa 303.

Kentucky.— Atwood *v.* Harrison, 5 J. J. Marsh. 329.

Maryland.— Fitzhugh *v.* McPherson, 3 Gill 408; Luckett *v.* White, 10 Gill & J. 480; Robinson *v.* Townshend, 3 Gill & J. 413.

Mississippi.— Ramsey *v.* Barbaro, 12 Sm. & M. 293.

New York.— Caines *v.* Fisher, 1 Johns. Ch. 8.

Pennsylvania.— Harvey *v.* Lance, 1 Luz. Leg. Obs. 315.

United States.— U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118.

See 19 Cent. Dig. tit. "Equity," § 444.

Extent of rule.— Where a defendant was charged with having submitted to a foreclosure and having received a conveyance to defraud his children, heirs of his deceased wife, and did not answer the bill, the interest was decreed to be in the children, although there was evidence to support a finding that the transaction was in good faith. Lucas *v.* Parks, 84 Mich. 202, 47 N. W. 550. Allegations are taken as confessed, although the facts are not charged to be within defendant's knowledge, and although they might subject him to punishment. Atterberry *v.* Knox, 8 Dana (Ky.) 282.

Failure to answer an amended bill admits the allegations so far as they are not met by the previous answer (McClain *v.* Waters, 9 Dana (Ky.) 55), but not where denied in the answer to the original bill (Greenwade *v.* Greenwade, 3 Dana (Ky.) 495).

Failure to answer a supplemental bill confesses its allegations where it is recognized by the court and parties, although not regularly filed. Story *v.* Moon, 3 Dana (Ky.) 331.

25. Cook *v.* Woodbury County, 13 Iowa 21. Defendant admits merely the right manifested by the bill and exhibits. McKinley *v.* Butler, 4 Litt. (Ky.) 196.

26. Cramer *v.* Bode, 24 Ill. App. 219.

27. Cramer *v.* Bode, 24 Ill. App. 219.

28. Waugh *v.* Schlenk, 23 Ill. App. 433.

29. Koster *v.* Miller, 149 Ill. 195, 37 N. E. 46.

30. Pearl *v.* Nashville, Meigs (Tenn.) 597. For the practice and detailed effect of taking bills *pro confesso* see *infra*, XXIII, D.

31. See *supra*, VIII, E, 6, d.

32. The proceedings for this purpose are governed locally by statutes or rules which must be consulted.

U. S. Eq. Rule 18 provides that plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against defendant to compel an answer. See as to early practice Anonymous, 1 Fed. Cas. No. 442, 1 Cranch C. C. 139; Dowson *v.* Packard, 7 Fed. Cas. No. 4,049, 3 Cranch C. C. 66.

A corporation can be required to answer but not under oath. Gamewell Fire-Alarm Tel. Co. *v.* New York City, 31 Fed. 312.

For miscellaneous matters of practice in compelling answer in different jurisdictions see Thatcher *v.* Haun, 12 Iowa 303; McKim *v.* Odom, 3 Bland (Md.) 407; Stafford *v.* Brown, 4 Paige (N. Y.) 360; Brownson *v.* Reynolds, Hopk. (N. Y.) 416; People *v.* Boyd, 2 Edw. (N. Y.) 516; Large *v.* Bristol Steam Tow-Boat, etc., Co., 2 Ashm. (Pa.) 394.

33. *Alabama.*— Hanson *v.* Patterson, 17 Ala. 738.

Connecticut.— Lynde *v.* Patten, 2 Root 515.

New York.— Lakens *v.* Fielden, 11 Paige 644.

North Carolina.— Irving *v.* Irving, 3 N. C. 141; Hunt *v.* Williams, 1 N. C. 143.

United States.—Wilkins *v.* Jordan, 29 Fed. Cas. No. 17,665, 3 Wash. 226.

See 19 Cent. Dig. tit. "Equity," § 442.

34. Rowan *v.* Kirkpatrick, 14 Ill. 1; Williams *v.* Carle, 10 N. J. Eq. 543; White *v.* Miller, 158 U. S. 128, 15 S. Ct. 788, 39 L. ed. 921.

35. Kimbrough *v.* Curtis, 50 Miss. 117; Merchant *v.* Preston, 1 Lea (Tenn.) 280; Chesnutt *v.* Frazier, 6 Baxt. (Tenn.) 217; Saunders *v.* Savage, (Tenn. Ch. 1900) 63

to file a demurrer or a plea will not be given when the question can as well be raised by answer as by demurrer or plea.[36]

9. Objections to Answer — a. In General. There is no regular mode of pleading, like a demurrer, whereby to test the validity of an answer as a defensive pleading.[37] An answer may be taken from the files and sometimes portions expunged on motion for certain irregularities,[38] and exceptions lie for certain defects, relating chiefly to discovery.[39] If, however, plaintiff wishes to test the general validity of the answer as a defense to his bill his only course is to set the case down for hearing on bill and answer.[40] It follows that if the answer is in part good as a defense the validity of the rest cannot be determined until hearing after proof taken.[41]

b. Striking From Files. A motion will lie to strike from the files an answer which is wholly irregular as a pleading,[42] as where it is filed by a stock-holder, asserting a defense for the corporation, and the corporation itself has not refused to defend,[43] or where it is so evasive as to be a mere delusion and not amount to an answer at all.[44] An answer may be stricken from the files because not properly sworn to;[45] but not because of defects in pleading.[46] Portions of answers have been stricken out, not because of their defects as a defense, but because of irregularity in interposing them.[47]

c. Exceptions — (i) *Office of Exceptions.* The method of taking advantage of particular defects in the answer is by exception,[48] a proceeding which has

S. W. 218; Weisiger *v.* Richmond Ice-Mach. Co., 90 Va. 795, 20 S. E. 361.

36. Rauschmeyer *v.* Scranton City Bank, 1 C. Pl. (Pa.) 17; Phelps *v.* Elliott, 30 Fed. 396.

37. Stone *v.* Moore, 26 Ill. 165; Barrett *v.* Twin City Power Co., 111 Fed. 45; Adams *v.* Bridgewater Iron Co., 6 Fed. 179.

38. See *infra*, VIII, E, 9, b.

39. See *infra*, VIII, E, 9, c.

40. Stone *v.* Moore, 26 Ill. 165; Burge *v.* Burns, Morr. (Iowa) 287; Barrett *v.* Twin City Power Co., 111 Fed. 45.

41. Huston *v.* Sellers, 12 Phila. (Pa.) 520.

Possibly on motion some order might be taken to dispose of part of a case in the first instance, if great delay and expense might thereby be avoided. Adams *v.* Bridgewater Iron Co., 6 Fed. 179.

That an answer is insufficient in some particulars does not destroy its effect on the points which it answers directly. Whitney *v.* Robbins, 17 N. J. Eq. 360.

42. Futch *v.* Jeffries, 59 Miss. 506; Farmers' L. & T. Co. *v.* Jewett, 3 Ch. Sent. (N. Y.) 53; Allis *v.* Stowell, 5 Fed. 203, 10 Biss. 57. If an answer contains a response to any material allegation it cannot be stricken from the files. May *v.* Williams, 17 Ala. 23; Squier *v.* Shaw, 24 N. J. Eq. 74.

43. Park *v.* Ulster, etc., Petroleum Co., 25 W. Va. 108.

44. Spivey *v.* Frazee, 7 Ind. 661; Travers *v.* Ross, 14 N. J. Eq. 254.

45. Hodges *v.* Phillip, 50 Miss. 362; Vermilya *v.* Christie, 4 Sandf. Ch. (N. Y.) 376.

An order denying such a motion with leave to defendants to further verify, if so advised, is merely permissive and does not decide that further verification is necessary. McGorray *v.* O'Connor, 87 Fed. 586, 31 C. C. A. 114.

46. As for containing inconsistent statements (Carpenter *v.* Gray, 38 N. J. Eq. 135), or because it is rambling and verbose (Stokes *v.* Farnsworth, 99 Fed. 836), or because it does not name all the defendants, or because it contains interlineations, unless such interlineations were made after the answer was sworn to (McLure *v.* Colclough, 17 Ala. 89).

An unsworn answer will not be taken from the files because it contains defenses which defendant knows to be false. Denison *v.* Bassford, 7 Paige (N. Y.) 370.

In New Jersey, by rule, objections to pleadings may be made by motion, but in the case of answers, such motions take the place of exceptions and cannot be given the effect of a demurrer. Hanneman *v.* Richter, 63 N. J. Eq. 753, 803, 53 Atl. 177; Brill *v.* Mary A. Riddle Co., (Ch. 1900) 47 Atl. 223; Haberman *v.* Kaufer, 60 N. J. Eq. 271, 47 Atl. 48; Doane, etc., Lumber Co. *v.* Essex Bldg., etc., Co., 59 N. J. Eq. 142, 45 Atl. 537; Meredith *v.* New Jersey Zinc, etc., Co., 55 N. J. Eq. 211, 37 Atl. 539, (1898) 41 Atl. 229; Heckscher *v.* Trotter, 41 N. J. Eq. 502, 5 Atl. 652; Crane *v.* Ely, 40 N. J. Eq. 79; Westervelt *v.* Ackerson, 35 N. J. Eq. 43. See also as to this procedure Doane, etc., Lumber Co. *v.* Essex Bldg., etc., Co., 59 N. J. Eq. 142, 45 Atl. 537; Grey *v.* Bowman, (N. J. Ch. 1888) 13 Atl. 226; Conway *v.* Wilson, 44 N. J. Eq. 457, 11 Atl. 734; Combs *v.* Combs, (N. J. Ch. 1885) 3 Atl. 354.

47. As a demurrer incorporated in an answer, where a formal demurrer on the same ground has been overruled (Fields *v.* Killion, 129 Ala. 373, 29 So. 797), an allegation of tender where the money has not been brought into court (Conwell *v.* Claypool, 8 Blackf. (Ind.) 124), and allegations of usury set up for the purpose of claiming a forfeiture, in an answer filed under an extension of time (Hill *v.* Colie, 25 N. J. Eq. 469).

48. Brown *v.* Scottish-American Mortg. Co., 110 Ill. 235; Nenninger *v.* Fietsam, 29 Ill.

for its principal object determining whether the answer is sufficiently responsive to the bill, and enforcing rules as to discovery.[49] By exceptions plaintiff cannot question the sufficiency of the answer as a defense,[50] or of new matter contained in the answer and inserted for the purpose of setting up a substantive defense.[51] Exceptions are not favored and will not be allowed if calculated to surprise,[52] or if captious and unimportant,[53] or if their allowance could be of no benefit to plaintiff.[54]

(II) *Grounds of Exception* — (A) *Insufficiency.* Exceptions are the proper resort where the answer is insufficient in not fully responding to the bill,[55] but will lie only where some particular allegation, charge, or interrogatory is not fully answered.[56] Exceptions will not lie for the omission of what is immaterial.[57] An answer is subject to exception for not being sufficiently explicit,[58] or for being evasive.[59] The object of exceptions for insufficiency being to secure more perfect discovery, it has been held, where the failure to answer an allegation admits its truth,[60] that an exception will not lie because of such failure,[61] or where the bill does not seek discovery.[62] It is for the same reason held in some jurisdictions

App. 648; Arnold *v.* Styles, 2 Blackf. (Ind.) 391; Barrett *v.* Twin City Power Co., 111 Fed. 45.

49. Clute *v.* Bool, 8 Paige (N. Y.) 83; Barrett *v.* Twin City Power Co., 111 Fed. 45; Walker *v.* Jack, 88 Fed. 576, 31 C. C. A. 462 [*reversing* 79 Fed. 138].

50. Walker *v.* Jack, 88 Fed. 576, 31 C. C. A. 462 [*reversing* 79 Fed. 138].

51. Spencer *v.* Van Duzen, 1 Paige (N. Y.) 555; Jolly *v.* Carter, 2 Edw. (N. Y.) 209; Whitney *v.* Belden, 1 Edw. (N. Y.) 386; Lanum *v.* Steel, 10 Humphr. (Tenn.) 280; Barrett *v.* Twin City Power Co., 111 Fed. 45; Bower Barff Rustless Iron Co. *v.* Wells Rustless Iron Co., 43 Fed. 391; Adams *v.* Bridgewater Iron Co., 6 Fed. 179.

The proper method if plaintiff desires greater particularity in the statement of such matters is to move to amend his bill. Jolly *v.* Carter, 2 Edw. (N. Y.) 209; Whitney *v.* Belden, 1 Edw. (N. Y.) 386.

If the facts alleged are wholly immaterial, they may be excepted to for impertinence. Spencer *v.* Van Duzen, 1 Paige (N. Y.) 555.

An affirmative defense in the form of denials of allegations not contained in the bill makes the answer subject to exception. Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291.

52. Surget *v.* Byers, 23 Fed. Cas. No. 13,629, Hempst. 715.

53. Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 393; Gleaves *v.* Morrow, 2 Tenn. Ch. 592; Surget *v.* Byers, 23 Fed. Cas. No. 13,629, Hempst. 715.

Exceptions by a merely formal plaintiff will not be sustained if the answer is sufficient as to the real parties in interest. Bentley *v.* Cleaveland, 22 Ala. 814.

54. Davis *v.* Mapes, 2 Paige (N. Y.) 105; Gleaves *v.* Morrow, 2 Tenn. Ch. 592.

55. *Alabama.*— Mobile Bank *v.* Planters', etc., Bank, 8 Ala. 772.

Arkansas.— Ringgold *v.* Patterson, 15 Ark. 209; Blakeney *v.* Ferguson, 14 Ark. 640.

Illinois.— Ryan *v.* Melvin. 14 Ill. 68.

Indiana.— Pegg *v.* Davis, 2 Blackf. 281.

Maryland.— Warfield *v.* Gambrill, 1 Gill & J. 503; Hagthorp *v.* Hook, 1 Gill & J. 270.

North Carolina.— Tate *v.* Conner, 17 N. C. 224.

Virginia.— Baker *v.* Morris, 10 Leigh 284.

See 19 Cent. Dig. tit. "Equity," §§ 521–524.

Until he does answer fully defendant may be in such case pressed by exception. Rider *v.* Riely, 22 Md. 540; Rider *v.* Riely, 2 Md. Ch. 16.

Plaintiff cannot by motion compel answer to interrogatories. Fuller *v.* Knapp, 24 Fed. 100.

U. S. Eq. Rule 39, permitting a defendant to answer setting up pleadable matter in bar and not to answer further, renders such an answer free from exception because it does not fully meet the bill; but if the bar is insufficient, or not supported by proper matter to rebut allegations repugnant to the bar, an exception will lie. Gaines *v.* Agnelly, 9 Fed. Cas. No. 5,173. 1 Woods 238.

56. West *v.* Williams, 1 Md. Ch. 358; Stafford *v.* Brown, 4 Paige (N. Y.) 88; Barrett *v.* Twin City Power Co., 111 Fed. 45. Exceptions on the ground that a detailed account is not given of the management of a trust fund, which came into defendant's hands as agent, will not be sustained when the bill called only for an account of the business of the trust, and not the business of the agency. West *v.* Williams, 1 Md. Ch. 358.

An answer not presenting an equitable defense is not for that reason alone insufficient. Steepy *v.* Public Service Corp., (N. J. Ch. 1903) 56 Atl. 127.

57. Davis *v.* Mapes, 2 Paige (N. Y.) 105; Fay *v.* Jewett, 2 Edw. (N. Y.) 323; Baggot *v.* Henry, 1 Edw. (N. Y.) 7; Gleaves *v.* Morrow, 2 Tenn. Ch. 592.

58. Blaisdell *v.* Stevens, 16 Vt. 179; Richardson *v.* Donehoo, 16 W. Va. 685.

59. Phillips *v.* Overton, 4 Hayw. (Tenn.) 291; Blaisdell *v.* Stevens, 16 Vt. 179.

60. See *supra*, VIII, E, 6, c.

61. Clute *v.* Bool, 8 Paige (N Y.) 83; Richardson *v.* Donehoo, 16 W. Va. 685.

62. Pearson *v.* Treadwell, 179 Mass. 462, 61 N. E. 44. **The doctrine that exceptions for insufficiency are confined to cases where plaintiffs are compelled to rely on defendants**

that where an answer under oath is waived the answer cannot be excepted to for insufficiency,[63] nor can an answer by a corporation under its seal.[64] It is not ground for exception to an answer otherwise sufficient that defendant has not filed a deed relied on as an exhibit.[65]

(B) *Impertinence and Scandal.* Exceptions are the proper method of objecting to impertinent or scandalous matter in an answer, and of having it stricken out.[66] An exception on this ground will not be allowed unless it is especially clear that the allegations objected to are wholly immaterial,[67] and tend to the introduction of improper evidence,[68] or if to strike out such allegations would render meaningless or change the meaning of what remains.[69] An exception for impertinence cannot be sustained in part, and will not be allowed if it embraces any pertinent matter.[70]

(C) *On Overruling of Partial Demurrer or Plea.* Where a defendant demurs or pleads to part of the bill and answers the residue, and the plea or demurrer is overruled, the answer remains,[71] and if plaintiff desires a further answer to the part of the bill covered by the demurrer or plea, he must except, whether the demurrer or plea was overruled in due course,[72] or is held to be overruled by the overlapping of the answer.[73]

(D) *Pleas Ordered to Stand For Answer.* Where a plea is ordered to stand for an answer, the order implies that the plea is deemed sufficient as an answer,[74] and plaintiff may not except thereto unless the right to do so is expressly reserved.[75]

to prove their case does not apply to bills for relief. McClaskey *v.* Barr, 40 Fed. 559.

63. Morris *v.* Morris, 5 Mich. 171; McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543; Hatch *v.* Eustaphieve, Clarke (N. Y.) 63; Carpenter *v.* Benson, 4 Sandf. Ch. (N. Y.) 496; Sheppard *v.* Akers, 1 Tenn. Ch. 326.

Contra.— Ryan *v.* Anglesea R. Co., (N. J. Ch. 1888) 12 Atl. 539; Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 393; McTwiggan *v.* Hunter, 19 R. I. 68, 31 Atl. 693; Whittemore *v.* Patten, 81 Fed. 527. In Illinois by force of certain statutes it is now held that exceptions will lie, although the answer is not under oath. Farrand *v.* Long, 184 Ill. 100, 56 N. E. 313; Bauerle *v.* Long, 165 Ill. 340, 46 N. E. 227. See also James P. Hair Co. *v.* Daily, 161 Ill. 379, 43 N. E. 1096. Formerly the rule was otherwise in that state. Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Goodwin *v.* Bishop, 50 Ill. App. 145 [*affirmed* in 145 Ill. 421, 34 N. E. 47].

64. Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599.

65. The court may in such a case order the paper to be produced. Turnage *v.* Fisk, 22 Ark. 286.

66. *Arkansas.*— Burr *v.* Burton, 18 Ark. 214.

New Jersey.— Squier *v.* Shaw, 24 N. J. Eq. 74; Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343.

New York.— Spencer *v.* Van Duzen, 1 Paige 555.

Pennsylvania.— Roulston *v.* Ralston, 13 Phila. 175.

West Virginia.— Bennett *v.* Pierce, 45 W. Va. 654, 31 S. E. 972.

United States.—Barrett *v.* Twin City Power Co., 111 Fed. 45; Stonemetz Printers' Machinery Co. *v.* Brown Folding-Mach. Co., 46 Fed. 72.

See 19 Cent. Dig. tit. "Equity," § 525.

67. Bush *v.* Adam, 22 Fla. 177; Dodd *v.* Wilkinson, 42 N. J. Eq. 647, 9 Atl. 685; Wilkinson *v.* Dodd, 42 N. J. Eq. 234, 7 Atl. 327; Pettebone *v.* Everhart, 4 Kulp (Pa.) 353; Barrett *v.* Twin City Power Co., 111 Fed. 45.

68. Gleaves *v.* Morrow, 2 Tenn. Ch. 592.

If they have such tendency the exceptions will be sustained, although otherwise frivolous. McIntyre *v.* Union College, 6 Paige (N. Y.) 239.

69. German *v.* Machin, 6 Paige (N. Y.) 288; McIntyre *v.* Union College, 6 Paige (N. Y.) 239; Franklin *v.* Keeler, 4 Paige (N. Y.) 382.

70. *Florida.*— Bush *v.* Adam, 22 Fla. 177.

Minnesota.— Goodrich *v.* Parker, 1 Minn. 195.

New York.— Balcom *v.* New York L. Ins., etc., Co., 11 Paige 454; Curtis *v.* Masten, 11 Paige 15; Norton *v.* Woods, 5 Paige 260; Buloid *v.* Miller, 4 Paige 473; Van Rensselaer *v.* Brice, 4 Paige 174; Desplaces *v.* Goris, 1 Edw. 350.

Pennsylvania.— Com. *v.* Pittston Ferry Bridge Co., 8 Kulp 29.

United States.— Chapman *v.* School Dist., 5 Fed. Cas. No. 2,607, Deady 108.

See 19 Cent. Dig. tit. "Equity." § 525.

71. See *supra*, VIII, C, 6, c, (IV); VIII, D, 7, a, (III), (A).

72. Siffkin *v.* Manning, 9 Paige (N. Y.) 222; Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188.

73. Kuypers *v.* Reformed Dutch Church, 6 Paige (N. Y.) 570; Summers *v.* Murray, 2 Edw. (N. Y.) 205.

74. See *supra*, VIII, E, 5.

75. Leaycraft *v.* Dempsey, 15 Wend. (N. Y.) 83; Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.)

(III) *Right and Time to Except* — (A) *Generally.* Plaintiff may of right and of course file exceptions within a certain period, usually fixed by rule, after the filing of the answer.[76] The time may be enlarged for cause shown.[77] By strict practice exceptions for impertinence must be filed and reported on before exceptions for insufficiency can be filed;[78] but exceptions for scandal may be filed at any stage of the case.[79] Where an answer accompanies a plea or demurrer, plaintiff cannot except until the plea or demurrer has been argued, unless he intends thereby to admit the validity of the plea or demurrer.[80]

(B) *Exceptions to Further Answer.* Plaintiff must raise all his objections to the sufficiency of an answer in the first instance, and he may not except to a further answer for new cause founded on the original bill.[81] If the further answer is insufficient, it must be referred on the old exceptions.[82] If the bill is amended, new exceptions may be filed for failure to sufficiently answer the amendments,[83] and the case will be referred on the old and new exceptions together.[84]

(IV) *Form of Exceptions* — (A) *In General.* Exceptions must be in writ-

242; Sellon *v.* Lewen, 3 P. Wms. 239, 24 Eng. Reprint 1045.

Defendant may, however, except to the residue of the answer. Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242; Coke *v.* Wilcocks, Moseley 73, 25 Eng. Reprint 279.

Where a bill has been amended after ordering the plea to stand as an answer, plaintiff cannot, by excepting to an answer to the amendment, compel a further answer to the part covered by the plea. Leaycraft *v.* Dempsey, 15 Wend. (N. Y.) 83.

Plaintiff is not obliged to except when leave is given; he may treat the plea as a sufficient answer. McCormick *v.* Chamberlin, 11 Paige (N. Y.) 543.

76. By Lord Lyndhurst's Orders of 1828, No. IV, the time for excepting for insufficiency was fixed at two months, and if exceptions were not delivered within that time the answer was taken as sufficient. U. S. Eq. Rule 61 gives plaintiff until the rule day next succeeding that of filing the answer, with a similar provision. In an early case it was held that after the two months exceptions might be filed if plaintiff had not been ruled to reply. Brent *v.* Venable, 4 Fed. Cas. No. 1,842, 3 Cranch C. C. 227. This was before the adoption of rule 66.

In Pennsylvania if twenty days have expired, and plaintiff has been ruled to reply, he cannot except. Schooley *v.* Shoemaker, 4 Kulp 345.

Motion to dissolve injunction. — Although all exceptions on file must be determined with a motion to dissolve an injunction, plaintiff may after such motion has been decided, but within the regular time, file exceptions. Salmon *v.* Clagett, 3 Bland (Md.) 125.

Exceptions cannot be filed in open court where rules provide that they shall be acted on by the clerk and master. Wood *v.* McFerrin, 2 Baxt. (Tenn.) 493.

Exceptions filed after time without leave will not be considered. Lawrence *v.* Hall, 3 R. I. 150.

77. Hammond *v.* Houston, 20 Ga. 29; Nash *v.* Taylor, 3 N. C. 125; Marsh *v.* Crawford, 1 Swan (Tenn.) 116.

Exceptions will not be permitted after the beginning of the final hearing (Severns *v.* Hill, 3 Bibb (Ky.) 240), on the day set for hearing (Belt *v.* Blackburn, 28 Md. 227), or after the parties have been taking evidence for several months and the cause has been prepared for hearing (McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765).

Leave to withdraw. — When exceptions have been filed out of time and on examination it is found that the cause can be more speedily determined by a withdrawal of the exceptions, time will not be enlarged and plaintiff will be allowed to withdraw them. American L. & T. Co. *v.* East, etc., R. Co., 40 Fed. 384.

78. Raphael *v.* Birdwood, 1 Swanst. 228, 36 Eng. Reprint 368. This course may be pursued in the federal courts. Patriotic Bank *v.* Washington Bank, 18 Fed. Cas. No. 10,806, 5 Cranch C. C. 602. The court may order a further answer on exceptions for insufficiency submitted to, before exceptions for impertinence are disposed of. Lawrence *v.* Lawrence, 4 Edw. (N. Y.) 357.

79. Ellison *v.* Burgess, 2 P. Wms. 312 note *a*, 24 Eng. Reprint 744.

80. Stuart *v.* Warren, 1 N. Y. Leg. Obs. 293; Siffkin *v.* Manning, 9 Paige (N. Y.) 222; 2 Daniell Ch. Pr. 301. It has been said that exceptions will not lie to an answer in aid of a plea. Leftwich *v.* Orne, Freem. (Miss.) 207. But see Cotes *v.* Turner, Bunb. 123.

Plaintiff admits the truth of a plea by excepting, before its argument, to the accompanying answer. Brownell *v.* Curtis, 10 Paige (N. Y.) 210.

81. Chazournes *v.* Mills, 2 Barb. Ch. (N. Y.) 466; Eager *v.* Wiswall, 2 Paige (N. Y.) 369; Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159. See also Read *v.* Consequa, 20 Fed. Cas. No. 11,607, 4 Wash. 335.

82. Partridge *v.* Haycraft, 11 Ves. Jr. 570, 32 Eng. Reprint 1210.

83. Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159; Van Wagenen *v.* Murray, 1 Edw. (N. Y.) 319.

84. Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159; Partridge *v.* Haycraft, 11 Ves. Jr. 570, 32 Eng. Reprint 1210. See

ing,[85] and should be properly entitled to indicate their character.[86] They must not be couched in general terms, but must indicate specifically what is objected to.[87] Amendments in substance are rarely permitted,[88] but amendments in matters of form are allowed,[89] and the substance may be looked into and the exceptions considered, although they are stated to be taken on one ground while they are in fact based upon another.[90] Separate exceptions to the same matter on different grounds are in general not allowed,[91] but may be under special circumstances.[92]

(B) *For Insufficiency.* An exception for insufficiency must set forth the particular points in the bill which are not sufficiently answered.[93] It must state the charges in the bill to which the exception is addressed,[94] the interrogatory applicable thereto, and the terms of the answer *verbatim*.[95] If these requirements are not met the exceptions may be struck from the files on motion,[96] or will be disallowed on argument.[97]

(C) *For Impertinence.* Exceptions for impertinence must point out the objectionable passages with such clearness as to enable the opposite party and the officers of the court to ascertain precisely what is objectionable.[98] As such exceptions cannot be allowed unless good *in toto*, and cannot be allowed to a part of an impertinent passage, they must embrace the entire matter subject to the particular exception, and must not embrace more.[99]

(V) *Hearing and Determination of Exceptions.* Unless defendant submits to the exceptions, they must be decided before further proceedings are taken;[1] but a decree will not be reversed because exceptions were not passed upon if they are not well founded.[2] The regular method of determining exceptions is by reference to a master,[3] but they are now frequently heard by the court.[4] If the exceptions are disallowed and plaintiff chooses to abide by them the answer is

also Hart *v.* Small, 4 Paige (N. Y.) 333; Sanford *v.* Bissell, 1 Johns. Ch. (N. Y.) 383.

85. Arnold *v.* Slaughter, 36 W. Va. 589, 15 S. E. 250; 2 Daniell Ch. Pr. 304.

86. Otherwise they may be suppressed. Williams *v.* Davies, 1 Sim. & St. 426, 1 Eng. Ch. 426.

87. Turnage *v.* Fisk, 22 Ark. 286; Peck *v.* Osteen, 37 Fla. 427, 20 So. 549; Ward *v.* Ward, 50 W. Va. 517, 40 S. E. 472; Arnold *v.* Slaughter, 36 W. Va. 589, 15 S. E. 250. *Contra*, under statute, Barrett *v.* Oliver, 7 Gill & J. (Md.) 191.

88. 2 Daniell Ch. Pr. 307.

89. Whittemore *v.* Patten, 84 Fed. 51.

90. Barrett *v.* Twin City Power Co., 111 Fed. 45.

91. McIntyre *v.* Union College, 6 Paige (N. Y.) 239.

92. Methodist Episcopal Church *v.* Jaques, Hopk. (N. Y.) 453.

For form of exceptions see Barton Suit Eq. 132.

93. Buloid *v.* Miller, 4 Paige (N. Y.) 472; Baker *v.* Kingsland, 3 Edw. Ch. (N. Y.) 138. See also Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298; New York Mut. L. Ins. Co. *v.* Cokefair, 41 N. J. Eq. 142, 3 Atl. 686; Schultz *v.* Phenix Ins. Co., 77 Fed. 375.

94. Schultz *v.* Phenix Ins. Co., 77 Fed. 375.

95. Fuller *v.* Knapp, 24 Fed. 100; Brooks *v.* Byam, 4 Fed. Cas. No. 1,947, 1 Story 296. The court must be able to see by referring to the bill alone, in connection with the exception, that the answer desired is called for. West *v.* Williams, 1 Md. Ch. 358.

96. Baker *v.* Kingsland, 3 Edw. (N. Y.) 138.

97. McKeen *v.* Field, 4 Edw. (N. Y.) 379; Baker *v.* Kingsland, 3 Edw. (N. Y.) 138; Sandusky *v.* Faris, 49 W. Va. 150, 38 S. E. 563; Bower Barff Rustless Iron Co. *v.* Wells Rustless Iron Co., 43 Fed. 391. Exceptions may be dismissed for want of precision after the master has reported. Myers *v.* Kingston Coal Co., 3 Kulp (Pa.) 137.

98. Whitmarsh *v.* Campbell, 1 Paige (N. Y.) 645; Bennett *v.* Pierce, 45 W. Va. 654, 31 S. E. 972.

99. Seymour *v.* Brewster, 2 Ch. Sent. (N. Y.) 63. See *supra*, VIII, E, 9, c, (II), (B).

1. Clarke *v.* Tinsley, 4 Rand. (Va.) 250. If defendant does not desire to yield to a part of the exceptions, he must have them passed upon. If without that he answers further he must respond to all the exceptions. Eager *v.* Wiswall, 2 Paige (N. Y.) 369.

2. Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554; Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810.

3. Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; Mason *v.* Mason, 4 Hen. & M. (Va.) 414; 2 Daniell Ch. Pr. 312. See also as to practice Peale *v.* Bloomer, 8 Paige (N. Y.) 78; Richards *v.* Barlow, 1 Paige (N. Y.) 323.

4. Satterwhite *v.* Davenport, 10 Rich. Eq. (S. C.) 305.

U. S. Eq. Rule 63 provides that where exceptions are filed for insufficiency, if defendants shall not submit to them and file an amended answer on the next succeeding rule day, plaintiff shall forthwith set them down for hearing on the next succeeding rule day thereafter, before a judge of the court, and if he shall not do so they shall be deemed

to be taken as true.[5] If the exceptions are sustained defendant should be ruled to answer further,[6] if then defendant neglects to comply with the rule the bill may be taken *pro confesso*.[7] Where exceptions are taken to part of the answer defendant may be ordered to answer over only so far as the exceptions extend;[8] but defendant may supply other deficiencies in the original answer, although not covered by the exceptions,[9] or set up new defenses which may have arisen;[10] and plaintiff may file new interrogatories and defendant will be required to answer them and the exceptions together.[11]

d. Waiver of Objections. Plaintiff waives all insufficiencies of the answer by going to hearing on bill and answer,[12] or by filing a replication.[13] Exceptions already on file may be withdrawn,[14] or may be waived by conduct inconsistent with insisting upon them.[15] It is said that defects in an answer are not entirely cured by a failure to object to them, and that they will still have an influence on the decision of the case.[16] Plaintiff has, however, been held in some cases to have waived the entire absence of an answer.[17]

IX. REPLICATIONS.

A. Nature and Function — 1. In General. A replication is plaintiff's answer or reply to defendant's plea or answer.[18] Its purpose is to put in issue the facts alleged in the answer.[19] By the interposition of a general replication

abandoned. A reference to a master and on a different day is a nullity. La Vega *v.* Lapsley, 14 Fed. Cas. No. 8,123, 1 Woods 428.

5. Prettyman *v.* Barnard, 37 Ill. 105. The answer is to be taken as true where it denies the entire bill and is excepted to for not answering the interrogatories. Gorman *v.* Banigan, 22 R. I. 22, 46 Atl. 38.

6. Holly *v.* Powell, 63 Ill. 139; Craig *v.* People, 47 Ill. 487. A subpœna for the further answer may issue immediately on the filing the master's report. Richards *v.* Barlow, 1 Paige (N. Y.) 323. If the master neglects to fix a time for the further answer plaintiff must apply to the court to obtain a further answer. Corning *v.* Cooper, 7 Paige (N. Y.) 587.

U. S. Eq. Rule 64 provides that if the exceptions shall be allowed defendant shall be bound to put in a full answer thereto on the next succeeding rule day.

Error in sustaining exceptions is waived by filing an amended answer. Derry *v.* Ross, 5 Colo. 295.

7. See *infra*, XXIII, D.

Decree will be reversed on appeal if in such case the exceptions have been improperly allowed. Marsh *v.* Crawford, 1 Swan (Tenn.) 116.

8. Pegg *v.* Davis, 2 Blackf. (Ind.) 281.

9. Alderman *v.* Potter, 6 Paige (N. Y.) 658.

10. Alderman *v.* Potter, 6 Paige (N. Y.) 658.

11. Case *v.* Abeel, 1 Paige (N. Y.) 630.

12. Stone *v.* Moore, 26 Ill. 165; Kitchell *v.* Burgwin, 21 Ill. 40; Teil *v.* Roberts, 3 Hayw. (Tenn.) 139; Dangerfield *v.* Claiborne, 2 Hen. & M. (Va.) 17.

Where an allegation may be taken pro confesso for failure to answer it taking such an order waives exceptions. Griffith *v.* Depew, 3 A. K. Marsh. (Ky.) 177, 13 Am. Dec. 141.

13. *Arkansas.*— Ringgold *v.* Patterson, 15 Ark. 209; Blakeney *v.* Ferguson, 14 Ark. 640.

Indiana.— Townsend *v.* McIntosh, 14 Ind. 57.

Maryland.— Chambers *v.* Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572.

New Hampshire.— Bellows *v.* Stone, 8 N. H. 280.

North Carolina.— Worth *v.* Gray, 59 N. C. 380.

Virginia.— Coleman *v.* Lyne, 4 Rand. 454.

West Virginia.— Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

United States.— Slater *v.* Maxwell, 6 Wall. 268, 18 L. ed. 796.

Replying waives objections to form, with regard to defenses pleaded (McKim *v.* Mason, 2 Md. Ch. 510), but it does not cure defects of substance (Everts *v.* Agnes, 4 Wis. 343, 65 Am. Dec. 314).

Leave to withdraw replication in order to file exceptions will not be given after unexplained delay. Brown *v.* Ricketts, 2 Johns. Ch. (N. Y.) 425.

14. American L. & T. Co. *v.* East, etc., R. Co., 40 Fed. 384; Penn *v.* Butler, 19 Fed. Cas. No. 10,931, Wall. Sr. 4.

15. As by setting down a plea for argument after excepting to the accompanying answer (Brownell *v.* Curtis, 10 Paige (N. Y.) 210), by replying (Berry *v.* Mathewes, 7 Ga. 457), or by both parties proceeding with the cause in disregard of an order to answer over (Pegg *v.* Davis, 2 Blackf. (Ind.) 281).

16. Doughty *v.* Doughty, 7 N. J. Eq. 227.

17. As by consenting to a reference to take accounts (State *v.* Carrington. 19 Ind. 258), or by going to trial without taking any steps to enforce an answer to a supplemental bill (Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234).

18. Mitford Eq. Pl. 255.

19. Alfred Richards Brick Co. *v.* Prott, 16 App. Cas. (D. C.) 293; Cavender *v.* Cavender, 8 Fed. 641, 3 McCrary 158.

every allegation in the answer not responsive to the bill is denied and must be proved before it can be used by the party making it.[20]

2. Answer Without Replication. If no replication to an answer is filed the answer is taken as true,[21] and no evidence can be received to contradict it.[22] The failure to reply admits not only allegations of new matter,[23] but also the truth of denials contained in the answer.[24] It seems that an exception exists where a record is pleaded, the existence of which may be tried without a replication,[25] and in the case of averments in the answer of facts which could not be within defendant's knowledge.[26] The admission does not extend to averments contradicted by other facts stated in the answer,[27] nor does it apply to an answer by one defendant, when all that it contains is set up in the answer of a co-defendant which is replied to, and the proofs thereon adduced make out plaintiff's case.[28] A disclaimer requires no replication.[29] In some jurisdictions statutes have abolished replications and placed the answer in issue without them.[30]

B. Right and Time to Reply — 1. In General. As in the case of other pleadings, statutes or rules fix a time within which plaintiff may reply of

20. Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51.

Where a bill anticipates a defense and avoids it and the defense is set up by plea and answer, the replication makes an issue on the charges. Souzer *v.* De Meyer, 2 Paige (N. Y.) 574.

21. *Arkansas.*— Byers *v.* Sexton, 22 Ark. 533.

Illinois.— Farrell *v.* McKee, 36 Ill. 225; De Wolf *v.* Long, 7 Ill. 679; Independent Medical College *v.* Zeigler, 86 Ill. App. 360.

New Jersey.— Cammann *v.* Traphagan, 1 N. J. Eq. 28.

Pennsylvania.—Sigle *v.* Bird in Hand Turnpike Co., 3 Lanc. L. Rev. 258.

Tennessee.— Martin *v.* Reese, (Ch. App. 1899) 57 S. W. 419.

Virginia.— Pickett *v.* Chilton, 5 Munf. 467.

United States.— Peirce *v.* West, 19 Fed. Cas. No. 10,909, Pet. C. C. 351.

See 19 Cent. Dig. tit. "Equity," § 486.

Defense set up in answer to petition is admitted if no replication is filed. Thomas *v.* De Baum, 14 N. J. Eq. 37; Conrad's Estate, 13 Phila. (Pa.) 207.

When replication not required.— Matters of inference or conclusion do not require a replication (Merrill *v.* Plainfield, 45 N. H. 126), nor do immaterial allegations (Briggs *v.* Enslow, 44 W. Va. 499, 29 S. E. 1008).

22. Byers *v.* Sexton, 22 Ark. 533; Peirce *v.* West, 19 Fed. Cas. No. 10,909, Pet. C. C. 351. Plaintiff must without replication substantiate by proof averments of his bill neither admitted nor denied by the answer. De Wolf *v.* Long, 7 Ill. 679.

23. *Alabama.*— Lucas *v.* Darien Bank, 2 Stew. 280.

Arkansas.— Hannah *v.* Carrington, 18 Ark. 85; Sneed *v.* Town, 9 Ark. 535.

Indiana.— Hale *v.* Plummer, 6 Ind. 121.

New York.— Dale *v.* McEvers, 2 Cow. 118; Atkinson *v.* Manks, 1 Cow. 691.

Pennsylvania.— Leberman *v.* Leberman, 18 Phila. 254.

West Virginia.—Wilt *v.* Huffman, 46 W. Va. 473, 33 S. E. 279.

See 19 Cent. Dig. tit. "Equity," § 486.

The reason for the rule in regard to new matter is to give defendant an opportunity of proving such new matter if plaintiff does not intend to admit it. Thrifts *v.* Fritz, 101 Ill. 457 [*reversing* 7 Ill. App. 55]; Rogers *v.* Mitchell, 41 N. H. 154; 2 Daniell Ch. Pr. 386.

Without a replication new substantive matter of defense must in some jurisdictions be proved. Brown *v.* Cutler, 8 Ohio 142; Paine *v.* French, 4 Ohio 318; Brown *v.* McDonald, 1 Hill Eq. (S. C.) 297.

24. Errissman *v.* Errissman, 25 Ill. 136; Payne *v.* Frazier, 5 Ill. 55.

General traverse in answer to supplemental bill was held sufficient to require a replication. Day *v.* Potter, 9 Paige (N. Y.) 645.

Denial of fraudulent intent, unless replied to, repels the inference of fraud from facts stated in the bill and admitted in the answer, unless such facts conclusively show a fraudulent intent. Wight *v.* Prescott, 2 Barb. (N. Y.) 196.

25. Stone *v.* Moore, 26 Ill. 165; Mills *v.* Pittman, 1 Paige (N. Y.) 490.

26. Tabb *v.* Cabell, 17 Gratt. (Va.) 160.

Allegation that defendant is informed and believes that the transaction is tainted with usury is insufficient to require a replication. Suydam *v.* Bartle, 10 Paige (N. Y.) 94. But allegations of facts on information and belief are generally within the rule. Gates *v.* Adams, 24 Vt. 70.

27. Wight *v.* Prescott, 2 Barb. (N. Y.) 196; Coal River Nav. Co. *v.* Webb, 3 W. Va. 438.

28. Wright *v.* Bates, 13 Vt. 341.

29. Edelin *v.* Lyon, 1 App. Cas. (D. C.) 87; Spofford *v.* Manning, 2 Edw. (N. Y.) 358; Williams *v.* Longfellow, 3 Atk. 582, 26 Eng. Reprint 1135.

30. See as to the effect of such statutes Harris *v.* Collins, 75 Ga. 97; Wells *v.* Query, Litt. Sel. Cas. (Ky.) 210; Hughes *v.* Phelps, 3 Bibb (Ky.) 198; Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 32 So. 937; Collins *v.* North British, etc., Ins. Co., 91 Tenn. 432, 19 S. W. 525; Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

course,[31] but in some jurisdictions defendant cannot set the case down on bill and answer until plaintiff has been specially ruled to reply.[32] If plaintiff amends his bill after answer, it is irregular to file a replication before the time for answering the amended bill.[33]

2. How Failure to Reply May Be Cured. A replication being now a purely formal pleading,[34] plaintiff is quite readily relieved from the consequences of a failure to file it in time. While it is said that leave to file a replication *nunc pro tunc* will not be granted unless the court is satisfied that a hearing on bill and answer would work injustice to plaintiff,[35] leave will be given where the bill and answer differ materially, and proof is necessary to a proper understanding of the case.[36] The court will, where there has been excusable delay, permit a replication to be filed *nunc pro tunc*,[37] or may in its discretion order to stand a replication filed without leave after time.[38] The filing of a replication after notice of a motion to dismiss for want thereof is good cause against the motion,[39] but after a hearing on bill and answer and a direction of dismissal plaintiff cannot reply as of right,[40] and leave will not be given where no mistake or excusable inadvertence is suggested.[41] The court may permit a replication *nunc pro tunc* after decree,[42] but must give defendant leave to take any testimony which may thereby be rendered necessary.[43] After a cause has been set down for hearing on bill and answer, allowing plaintiff to reply is discretionary;[44] but the court will permit it on reasonable cause,[45] and should impose terms protecting defendant.[46] Where the parties without a replication have actually proceeded with the taking of proofs, defendant has had all advantage which he would have had if the replication had been seasonably filed, and plaintiff will be permitted of course to file it *nunc pro tunc*.[47] Indeed, filing a replication seems then unnecessary, as it will be deemed

31. U. S. Eq. Rule 66 provides that where an answer shall not be excepted to or shall be adjudged or deemed sufficient, plaintiff shall file a replication on or before the next succeeding rule day thereafter, and unless he do so defendant shall be entitled to a dismissal, unless a replication is allowed to be filed *nunc pro tunc*. If an answer is filed before the return-day of the writ, the replication should be filed on the rule day next succeeding the return of the writ. Heyman *v.* Uhlman, 34 Fed. 686. By force of rules 61 and 66 plaintiff has until the rule day after the answer to except for insufficiency, and until the next succeeding rule day to reply. Hendrickson *v.* Bradley, 85 Fed. 508, 29 C. C. A. 303. Plaintiff must reply to each answer under the rules, regardless of the state of the pleadings as to other defendants. Coleman *v.* Martin, 6 Fed. Cas. No. 2,986, 6 Blatchf. 291.

In counting time the day on which the answer is filed or served should be excluded. Vandenburgh *v.* Van Rensselaer, 6 Paige (N. Y.) 147.

32. Schooley *v.* Shoemaker, 4 Kulp (Pa.) 345; Lowry *v.* McGee, 5 Yerg. (Tenn.) 238. It is premature to enter a rule to reply within the time allowed for taking exceptions. Purvis *v.* Leech, 16 Wkly. Notes Cas. (Pa.) 541.

33. Richardson *v.* Richardson, 5 Paige (N. Y.) 58. Plaintiff should if he desires to amend after answer apply for an extension of time to reply. Vermilyea *v.* Odell, 4 Paige (N. Y.) 121. Although a further answer after amendment of the bill is waived, defendant may answer *gratis*, and plaintiff may reply, whether a further answer is filed or not, upon the expiration of the time to answer. Trust, etc., Ins. Co. *v.* Jenkins, 8 Paige (N. Y.) 589.

34. See *infra*, IX, C.

35. Sea Ins. Co. *v.* Day, 9 Paige (N. Y.) 247.

36. Micklewaite *v.* Rhodes, 1 Barb. (N. Y.) 57.

37. Robinson *v.* Randolph, 20 Fed. Cas. No. 11,963, 4 Ban. & A. 317.

38. Fischer *v.* Hayes, 6 Fed. 76, 19 Blatchf. 26.

39. Griswold *v.* Inman, Hopk. (N. Y.) 86.

40. Snyder *v.* Martin, 17 W. Va. 276, 41 Am. Rep. 670.

41. Bullinger *v.* Mackey, 4 Fed. Cas. No. 2,126, 14 Blatchf. 355.

42. Daly *v.* Hosmer, 102 Mich. 392, 60 N. W. 758.

43. Dabney *v.* Preston, 25 Gratt. (Va.) 838.

44. Smith *v.* West, 3 Johns. Ch. (N. Y.) 363.

45. As where plaintiff's solicitor had been ill (La Roque *v.* Davis, 2 Edw. (N. Y.) 599) or was not familiar with the practice (Peirce *v.* West, 19 Fed. Cas. No. 10,909, Pet. C. C. 351), or even because it appeared that plaintiff had not intended to admit the answer (Armistead *v.* Bozman, 36 N. C. 117). Where by agreement a cause was submitted on bill, answer, and replication, it was treated as if a replication had been filed, although in fact none had been. Glenn *v.* Hebb, 12 Gill & J. (Md.) 271.

46. Warren *v.* Twilley, 10 Md. 39.

47. Tedder *v.* Stiles, 16 Ga. 1; Gaskill *v.* Sine, 13 N. J. Eq. 130; Lyon *v.* Tallmadge, 14 Johns. (N. Y.) 501.

waived by proceeding as if it were on file, as by submitting the case on pleadings and proof,[48] by going to hearing on the facts,[49] by taking proofs,[50] or even by cross-examining witnesses,[51] or consenting to a commission to take testimony.[52] An appellate court will not consider the absence of a replication if the point was not made below.[53]

C. Form and Sufficiency — **1. General Replication.** The general replication is entitled, like other pleadings after the bill, so as to show its character and the answer to which it replies.[54] It commences with a reservation of the advantage of exception to the insufficiencies of the answer,[55] and an offer to maintain and prove the bill to be true and sufficient and the answer insufficient. Then follows a formal general traverse of the answer, with a formal verification.[56] It need not be signed by counsel.[57]

2. Special Replication. Formerly pleadings in chancery were special throughout, and ran on to issue as at common law; but the inconvenience of this practice led to the disuse of special replications, leaving plaintiff to amend his bill if the answer disclosed the necessity of pleading new matter.[58] In accordance with the later English practice special replications are in the United States usually not allowed,[59] and if filed may be stricken out on motion,[60] or the new matter may be treated as surplusage, and the remainder if sufficient as such regarded as a general replication.[61] Where by modifications of practice the matter of a cross bill may be incorporated in the answer, a general replication is insufficient to

48. *Illinois.*— Jones *v.* Neely, 72 Ill. 449; Durham *v.* Mulkey, 59 Ill. 91; Marple *v.* Scott, 41 Ill. 50; Stark *v.* Hillibert, 19 Ill. 344; Webb *v.* Alton M. & F. Ins. Co., 10 Ill. 223.

Indiana.— Bunts *v.* Cole, 7 Blackf. 265, 41 Am. Dec. 226; Demaree *v.* Driskill, 3 Blackf. 115.

Massachusetts.— Holt *v.* Weld, 140 Mass. 578, 5 N. E. 506.

West Virginia.— Moore *v.* Wheeler, 10 W. Va. 35; Martin *v.* Rellehan, 3 W. Va. 480.

United States.—Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Jones *v.* Brittan, 13 Fed. Cas. No. 7,455, 1 Woods 667.

See 19 Cent. Dig. tit. "Equity," § 667.

Defect in a replication is *a fortiori* waived by such proceeding. Unity Co. *v.* Equitable Trust Co., 204 Ill. 595, 68 N. E. 654 [*affirming* judgment in 107 Ill. App. 449], case of an unsigned replication.

49. Corbus *v.* Teed, 69 Ill. 205; Holmes *v.* Clifford, 95 Ill. App. 245; Dudley *v.* Eastman, 70 N. H. 418, 50 Atl. 101. See, however, Stiles *v.* Burch, 5 Paige (N. Y.) 132.

By going to trial before a committee or master replication is waived. Lord *v.* Sill, 23 Conn. 319; Kaegebein *v.* Higgie, 51 Ill. App. 538.

50. *Illinois.*— Marple *v.* Scott, 41 Ill. 50.

Maryland.— Hall *v.* Clagett, 48 Md. 223.

Montana.— Fabian *v.* Collins, 3 Mont. 215.

North Carolina.— Fleming *v.* Murph, 59 N. C. 59.

Virginia.— Jones *v.* Degge, 84 Va. 685, 5 S. E. 799.

West Virginia.— Martin *v.* Rellehan, 3 W. Va. 480.

United States.— Fischer *v.* Wilson, 9 Fed. Cas. No. 4,812, 4 Ban. & A. 228, 16 Blatchf. 220.

See 19 Cent. Dig. tit. "Equity," § 667.

51. Brooks *v.* Mead, Walk. (Mich.) 389.

52. Hall *v.* Clagett, 48 Md. 223.

53. Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769; Clements *v.* Moore, 6 Wall. (U. S.) 299, 18 L. ed. 786. See also Taylor *v.* Gibbs, 3 B. Mon. (Ky.) 316; Scott *v.* Clarkson, 1 Bibb (Ky.) 277.

54. As "the replication of A B, plaintiff to the answer of C D, defendant." Barton Suit Eq. 144. Where defendants had filed pleas, a replication stated to be to their answers was disregarded, and the pleas taken as true. Beals *v.* Illinois, etc., R. Co., 133 U. S. 290, 10 S. Ct. 314, 33 L. ed. 608.

55. This is purely formal and useless, as the replication walves exceptions. See *supra*, VIII, E, 9, d.

56. See form in Barton Suit Eq. 144.

As to verification see *infra*, XIV, B, 6.

57. Barton Suit Eq. 146; 2 Daniell Ch. Pr. 388.

58. 2 Daniell Ch. Pr. 387; Mitford Eq. Pl. 255.

59. White *v.* Morrison, 11 Ill. 361; Shaeffer *v.* Weed, 8 Ill. 511; Newton *v.* Thayer, 17 Pick. (Mass.) 129; McClane *v.* Shepherd, 21 N. J. Eq. 76; Duponti *v.* Mussy, 8 Fed. Cas. No. 4,185, 4 Wash. 128.

U. S. Eq. Rule 66 requires the general replication to be filed.

In the New York chancery, a special replication could not be filed without leave of the court. Storms *v.* Storms, 1 Edw. 358.

60. Mason *v.* Hartford, etc., R. Co., 10 Fed. 334. A special replication, filed after a motion to dismiss for want of a general replication, was disregarded and the bill dismissed. Blue Ridge Clay, etc., Co. *v.* Floyd-Jones, 26 Fed. 817.

61. Pinney *v.* Pinney, (Fla. 1903) 35 So. 95; White *v.* Morrison, 11 Ill. 361; Shaeffer *v.* Weed, 8 Ill. 511; Wren *v.* Spencer Optical

traverse such matter,[62] and a special replication is sometimes provided for to answer that purpose.[63] Where a special replication is admitted it cannot serve to set up new grounds of relief.[64]

D. Withdrawal of Replication. If plaintiff has occasion to amend his bill after replication filed he must get leave to withdraw his replication;[65] and must show that the amendment is material and why it was not made before.[66] Leave may be given to withdraw the replication in order to set the cause down on bill and answer,[67] and even for the purpose of moving to take the answer from the files.[68]

X. CROSS BILLS.

A. Nature and Functions — 1. DEFINITION. A cross bill is a bill brought by a defendant against a plaintiff or other parties in a former bill depending, touching the matter in question in that bill.[69]

2. FOR WHAT PURPOSES PROPER OR NECESSARY — a. To Obtain Affirmative Relief. In order that a defendant may have any affirmative relief, it is generally essential that he should proceed by cross bill for that purpose.[70] A cross bill

Mfg. Co., 30 Fed. Cas. No. 18,062, 5 Ban. & A. 61.

62. Coach *v.* Kent Cir. Judge, 97 Mich. 563, 56 N. W. 937.

63. See W. Va. Code, c. 125, § 35. In such case the special replication must be restricted to the matter of the cross bill, and so far as the answer is defensive merely a special replication is not admissible. Ward *v.* Ward, 50 W. Va. 517, 40 S. E. 472; Elliot *v.* Trahern, 35 W. Va. 634, 14 S. E. 223; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21; Smith *v.* Turley, 32 W. Va. 14, 9 S. E. 46; Enoch *v.* Livingston, etc., Min., etc., Co., 23 W. Va. 314; Middleton *v.* Selby, 19 W. Va. 167; Vanbibber *v.* Beirne, 6 W. Va. 168. See also Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297.

64. Minor *v.* Woodbridge, 2 Root (Conn.) 274; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568.

65. Moshier *v.* Knox College, 32 Ill. 155; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Thorn *v.* Germand, 4 Johns. Ch. (N. Y.) 363; Hampson *v.* Quayle, 12 R. I. 508.

66. Brown *v.* Ricketts, 2 Johns. Ch. (N. Y.) 425; Dougherty *v.* Murphy, 10 Phila. (Pa.) 509; Richmond Tp. School Dist. *v.* Thompson, 2 Woodw. (Pa.) 345.

U. S. Eq. Rule 29 requires such order to be made after notice, and on proof by affidavit that the application is not made for the purpose of vexation or delay or that the matter of the proposed amendment is material and could not with reasonable diligence have been sooner introduced into the bill.

67. Brown *v.* Ricketts, 2 Johns. Ch. (N. Y.) 425.

68. American L. Ins., etc., Co. *v.* Bayard, 3 Barb. Ch. (N. Y.) 610.

69. Mitford Eq. Pl. 75. See also Story Eq. Pl. § 389; Tison *v.* Tison, 14 Ga. 167, 171; Kemp *v.* Mitchell, 36 Ind. 249, 256; Kidder *v.* Barr, 35 N. H. 235, 251.

Cross petition.— Nebr. Code Civ. Proc. §§ 1, 429, authorizing the court to determine the ultimate rights of the parties as between themselves, and granting to defendant any affirmative relief to which he may be entitled, authorize the use of remedies furnished by the old common-law or equity practice, including the right to bring cross petitions. Armstrong *v.* Mayer, (1903) 95 N. W. 51.

70. *Alabama.*—Cotton *v.* Scott, 97 Ala. 447, 12 So. 65; Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Ketchum *v.* Creagh, 53 Ala. 224; Gallagher *v.* Witherington, 29 Ala. 420; Cummings *v.* Gill, 6 Ala. 562; Cullum *v.* Erwin, 4 Ala. 452; Harris *v.* Carter, 3 Stew. 233.

Arkansas.— Pike *v.* Underhill, 24 Ark. 124.

California.— Hungarian Hill Gravel Min. Co. *v.* Moses, 58 Cal. 168.

Colorado.— Nippel *v.* Hammond, 4 Colo. 211; Mills *v.* Buttrick, 4 Colo. 53; Sisty *v.* Bebee, 4 Colo. 52; Abbott *v.* Monti, 3 Colo. 561; Tucker *v.* McCoy, 3 Colo. 284.

Connecticut.— Kimberly *v.* Fox, 27 Conn. 307.

Florida.— Sanford *v.* Cloud, 17 Fla. 557.

Georgia.— Turk *v.* Turk, 3 Ga. 422, 46 Am. Dec. 434.

Illinois.— Irwin *v.* Dyke, 109 Ill. 528; White *v.* White, 103 Ill. 438; Smith *v.* West, 103 Ill. 332; Campbell *v.* Benjamin, 69 Ill. 244; Price *v.* Blackmore, 65 Ill. 386; Norman *v.* Hudleston, 64 Ill. 11; Hanna *v.* Ratekin, 43 Ill. 462; Stone *v.* Smoot, 39 Ill. 409; Atkin *v.* Merrell, 39 Ill. 62; Mason *v.* McGirr, 28 Ill. 322; McConnel *v.* Smith, 23 Ill. 560; Jones *v.* Smith, 14 Ill. 229; Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193; Ballance *v.* Underhill, 4 Ill. 453; McCann *v.* O'Connell, 54 Ill. App. 209; Erlinger *v.* Boul, 7 Ill. App. 40.

Iowa.— Holladay *v.* Johnson, 12 Iowa 563; MacGregor *v.* MacGregor, 9 Iowa 65; Armstrong *v.* Pierson, 5 Iowa 317; Compton *v.* Comer, 4 Iowa 577.

Massachusetts.—Andrews *v.* Gilman, 122 Mass. 471.

Michigan.— Vroman *v.* Thompson, 51 Mich. 452, 16 N. W. 808; Vary *v.* Shea, 36 Mich. 388; Schwarz *v.* Sears, Walk. 170.

Mississippi.— Millsaps *v.* Pfeiffer, 44 Miss. 805.

New Jersey.— Tallman *v.* Wallack, 54 N. J. Eq. 655, 33 Atl. 1059; Brands *v.* De Witt, 44

must be resorted to whether the relief sought is against plaintiff,[71] or against a co-defendant.[72] Generally it is said that a cross bill is proper whenever complete

N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909; Petty *v.* Young, 43 N. J. Eq. 654, 9 Atl. 377, 12 Atl. 392; Duryee *v.* Linsheimer, 27 N. J. Eq. 366; Allen *v.* Roll, 25 N. J. Eq. 163; Leddel *v.* Starr, 19 N. J. Eq. 159; Scott *v.* Lalor, 18 N. J. Eq. 301; French *v.* Griffin, 18 N. J. Eq. 279; Hoff *v.* Burd, 17 N. J. Eq. 201; Miller *v.* Gregory, 16 N. J. Eq. 274; Speer *v.* Whitfield, 10 N. J. Eq. 107.

North Carolina.— Weisman *v.* Smith, 59 N. C. 124.

Pennsylvania.— Borckman's Appeal, (1886) 10 Atl. 425; McIlvain *v.* Market Co., 2 Wkly. Notes Cas. 208.

Tennessee.— Hagar *v.* Wilson, (Ch. App. 1897) 46 S. W. 1033; Lewis *v.* Glass, 92 Tenn. 147, 20 S. W. 571; Bussey *v.* Gant, 10 Humphr. 238; Cloud *v.* Hamilton, 3 Yerg. 81; Mrzena *v.* Brucker, 3 Tenn. Ch. 161.

Vermont.— Ward *v.* Seymour, 51 Vt. 320.

Washington.— Distler *v.* Dabney, 7 Wash. 431, 35 Pac. 138, 1119.

United States.— McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746; Ford *v.* Douglas, 5 How. 143, 12 L. ed. 89; Carnochan *v.* Christie, 11 Wheat. 446, 6 L. ed. 516; Wood *v.* Collins, 60 Fed. 139, 8 C. C. A. 522; Armstrong *v.* Chemical Nat. Bank, 37 Fed. 466; Meissner *v.* Buek, 28 Fed. 161; Chapin *v.* Walker, 6 Fed. 794, 2 McCrary 175.

See 19 Cent. Dig. tit. "Equity," § 450.

Following cases are perhaps sufficient to illustrate this use of a cross bill. In a suit to restrain ejectment, defendant, on prevailing, cannot be awarded possession of the land without a cross bill, although the land is in possession of a receiver appointed at plaintiff's request. Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234. Where defendant relies on the invalidity of an instrument on which plaintiff bases his right, a cross bill is necessary to secure its cancellation. Bay *v.* Shrader, 50 Miss. 326. A defendant, claiming the right to retain moneys which plaintiff seeks to recover, on the ground of a resulting trust to himself, must by cross bill establish the trust. Beck *v.* Beck, 43 N. J. Eq. 39, 10 Atl. 155. Affirmative relief must in the federal courts be sought by distinctive cross bill, although the state practice authorizes a different procedure. White *v.* Bower, 48 Fed. 186.

71. *Alabama.*—Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27.

Illinois.— Conwell *v.* McCowan, 53 Ill. 363.

Massachusetts.— Atlanta Mills *v.* Mason, 120 Mass. 244.

Mississippi.— Thomason *v.* Neeley, 50 Miss. 310.

New Jersey.— Manley *v.* Mickle, 55 N. J. Eq. 563, 37 Atl. 738.

Ohio.— Glick *v.* Gregg, 19 Ohio 57.

Pennsylvania.— Williams *v.* Concord Cong. Church, 193 Pa. St. 120, 44 Atl. 272; Freeland *v.* South Penn Oil Co., 189 Pa. St. 54, 41 Atl. 1000.

Virginia.— Cox *v.* Price, (1895) 22 S. E. 512.

United States.—Brandon Mfg. Co. *v.* Prime, 4 Fed. Cas. No. 1,810, 3 Ban. & A. 191, 14 Blatchf. 371.

See 19 Cent. Dig. tit. "Equity," §§ 450–454.

Any equity which cannot be made effective by answer may be presented by cross bill and enforced against the original plaintiff (Brady *v.* Young, 4 Phila. (Pa.) 127), but no relief can be given without a cross bill except such as necessarily follows the dismissal of the original (Nelson *v.* Lowndes County, 93 Fed. 538, 35 C. C. A. 419).

Under the codes the purposes of a cross bill for relief against plaintiff are generally accomplished by incorporating the cross demands in the answer under the name of a counter-claim. Cross relief against a co-defendant is under some codes obtained by setting forth the facts with a proper prayer in the answer, and serving it on the co-defendant, and under others, through a cross complaint or cross petition. See, generally, PLEADING; RECOUPMENT; SET-OFF AND COUNTER-CLAIM.

Set-off and counter-claim.— A set-off or counter-claim, in the sense in which the terms are used at common law or under the codes, is unknown to chancery practice, and cannot be urged as a defense. Killam *v.* Jenkins, 25 Vt. 643; Brande *v.* Gilchrist, 18 Fed. 465. A demand of that nature must be asserted by cross bill (Pearson *v.* Darrington, 32 Ala. 227; Cartwright *v.* Clark, 4 Metc. (Mass.) 104; Meek *v.* McCormick, (Tenn. Ch. App. 1897) 42 S. W. 458; American Nat. Bank *v.* Nashville Warehouse, etc., Co., (Tenn. Ch. App. 1896) 36 S. W. 960; Brande *v.* Gilchrist, 18 Fed. 465), and then, if not connected with the subject-matter of the original bill, must show an equity which would be sufficient to sustain an original bill for a set-off (Derby *v.* Gage, 38 Ill. 27; Irving *v.* De Kay, 10 Paige (N. Y.) 319). When the claim is of such a character as to show that it operated to discharge plaintiff's demand before the original bill was filed, it may be presented by answer. Goodwin *v.* McGehee, 15 Ala. 232. In the New York chancery a statute permitted set-offs in equity in the same manner as at law. Irving *v.* De Kay, 10 Paige (N. Y.) 319; Chapman *v.* Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264.

Answer as cross bill.— In some jurisdictions defendant may make his answer a cross bill by praying therein for relief. See *infra*, X, H.

72. *Alabama.*— Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590; Watts *v.* Eufaula Nat. Bank, 76 Ala. 474.

Illinois.— Howe *v.* South Park Com'rs, 119 Ill. 101, 7 N. E. 333; Rowan *v.* Bowles, 21 Ill. 17; Ellison *v.* Salem Coal, etc., Co., 43 Ill. App. 120.

Indiana.— Fletcher *v.* Holmes, 25 Ind. 458.

Kentucky.—Cavin *v.* Williams, 3 Bush 343; Talbot *v.* McGee, 4 T. B. Mon. 375.

justice cannot be done on the original bill and answer,[73] in order to obtain full relief to all parties as to the matters charged in the original bill.[74] An exception to the rule requiring a cross bill as the foundation for affirmative relief to a defendant exists in cases where the court entertains the original bill only on condition that plaintiff consents to submit himself to the same justice being rendered to defendant that he asks for himself,[75] as in a bill for an accounting, on which a balance may be decreed in favor of defendant without cross bill,[76] and in suits for specific performance, in which plaintiff himself may be compelled to perform.[77] It is also said that a cross bill is unnecessary to justify relief against plaintiff or a co-defendant, where the whole matter is already before the court and no substantial right is invaded by such a decree.[78]

b. To Obtain Discovery. A cross bill lies on behalf of a defendant against plaintiff, a co-defendant or both, for the purpose of obtaining discovery in aid of a defense.[79] It is by this means alone that a defendant may compel the produc-

Michigan.— Feige *v.* Babcock, 111 Mich. 538, 70 N. W. 7.

New Jersey.— Carpenter *v.* Gray, 37 N. J. Eq. 389; Brinkerhoff *v.* Franklin, 21 N. J. Eq. 334.

United States.— Augusta Commercial Bank *v.* Sandford, 103 Fed. 98.

See 19 Cent. Dig. tit. "Equity," § 453.

Subrogation.— Defendants who are sureties must seek subrogation by cross bill (Stokes *v.* Little, 65 Ill. App. 255. But see Macey *v.* Childress, 2 Tenn. Ch. 438), but a defendant in foreclosure may be subrogated to the rights of a prior mortgagee without a cross bill (Gerrish *v.* Bragg, 55 Vt. 329).

Relief without cross bill may be granted where the bill itself asks relief in favor of certain defendants against others. Williamson *v.* Johnston, 4 T. B. Mon. (Ky.) 253. In some jurisdictions relief against a co-defendant may be given on a prayer therefor in the answer. Myers *v.* Baker, Hard. (Ky.) 544; McKay *v.* Welch, 22 Tex. 390.

73. Davis *v.* Cook, 65 Ala. 617; Richards *v.* Todd, 127 Mass. 167.

74. Winfrey *v.* Williams, 5 B. Mon. (Ky.) 428; Armstrong *v.* Mayer, (Nebr. 1903) 95 N. W. 51; Phipps *v.* Kent, 1 Chest. Co. Rep. (Pa.) 158; Ayres *v.* Carver, 17 How. (U. S.) 591, 15 L. ed. 179; Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389. A cross bill is necessary whenever a decree on the bill will not determine the litigation. Erlinger *v.* Boul, 7 Ill. App. 40.

Suit in nature of cross bill.— On the principle stated in the text it was held that, during the pendency of a suit by attorneys who had procured a judgment to cancel a satisfaction thereof, the judgment creditor might maintain a suit in the nature of a cross bill to enforce the lien of the judgment. Higginbotham *v.* May, 90 Va. 233, 17 S. E. 941.

75. See *supra*, II, C, 2, c; III, M. See also Mooney *v.* Walter, 69 Ala. 75. In a suit to restrain the foreclosure of a mortgage, an offer, on decreeing the mortgage void, to pay what might be found due to defendant, does not authorize a decree of foreclosure where the mortgage is found valid and there is no cross bill. Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 13 So. 564.

76. *Arkansas.*— Saunders *v.* Wood, 15 Ark. 24.

Florida.— Wooten *v.* Bellinger, 17 Fla. 289.

Illinois.— Nyburg *v.* Pearce, 85 Ill. 393.

Tennessee.— Polk *v.* Mitchell, 85 Tenn. 634, 4 S. W. 221.

England.— Clarke *v.* Tipping, 9 Beav. 284.

See 19 Cent. Dig. tit. "Equity," § 454. See also ACCOUNTS AND ACCOUNTING, 1 Cyc. 441.

Where plaintiff abandons demand for an accounting, his bill praying for an accounting and other relief, defendant without a cross bill cannot compel an accounting. Schulz *v.* Schulz, 138 Ill. 665, 28 N. E. 808.

In a bill for a partnership accounting, the accounts of another partnership cannot be settled without a cross bill. Brewer *v.* Norcross, 17 N. J. Eq. 219.

77. Owings' Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Fife *v.* Clayton, 13 Ves. Jr. 546, 33 Eng. Reprint 398. See, generally, SPECIFIC PERFORMANCE.

Cross bill to reform a contract before the court at the suit of the other party is not necessary. The facts relied on may be pleaded by answer, and the court will enforce the contract as if it were reformed. Northern R. Co. *v.* Ogdensburg, etc., R. Co., 18 Fed. 815.

78. McCormick *v.* District of Columbia, 7 Mackey (D. C.) 534; Vanderveer *v.* Holcomb, 17 N. J. Eq. 87. See for instances of this practice Pitts *v.* Powledge, 56 Ala. 147; Hall *v.* Harris, 113 Ill. 410; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Sale *v.* Crutchfield, 8 Bush (Ky.) 636; Walker *v.* Burks, 48 Tex. 206.

79. *Georgia.*— Josey *v.* Rogers, 13 Ga. 478.

Iowa.— Compton *v.* Comer, 4 Iowa 577.

Mississippi.— Millsaps *v.* Pfeiffer, 44 Miss. 805.

New Jersey.— Chester Iron Co. *v.* Beach, 40 N. J. Eq. 63; Miller *v.* Gregory, 16 N. J. Eq. 274.

United States.— Ayres *v.* Carver, 17 How. 591, 15 L. ed. 179; Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389.

See 19 Cent. Dig. tit. "Equity," § 450.

tion, as primary evidence against plaintiff, of papers which have not already been made part of the case.[80]

c. To Introduce Newly Arising Defenses. A defendant, in order to take advantage of a defense arising *pendente lite*, must assert it in the form of a cross bill praying a dismissal of the original, this procedure taking the place of a plea *puis darrein continuance* at common law.[81] By strict practice this course must also be taken where the defense affects only a co-defendant.[82]

d. When Unnecessary. Where the matter of a cross bill is equally available in the answer, by way of defense to the original bill, a cross bill is unnecessary.[83] Therefore a cross bill will not be permitted to set up a mere defense, existing when the answer is filed, unless discovery is required;[84] and a cross bill is equally improper, even where relief is required, if such relief can be had on the principles already stated[85] by answer.[86] The rule is that where all the objects sought can be attained by answer, a cross bill will not be permitted;[87] but, although an answer is available for the main purpose, a cross bill may be used where the circumstances call for protection beyond that which could be had by answer.[88] It is said that

Retention for relief.— If a cross bill cannot be sustained as one for discovery, it will not be retained for the purpose of relief unless it makes out a case for relief independently of the discovery. Young *v.* Colt, 30 Fed. Cas. No. 18,155, 2 Blatchf. 373.

A statute authorizing defendant to take plaintiff's testimony was held cumulative, and not to prevent a cross bill for discovery. Millsaps *v.* Pfeiffer, 44 Miss. 805.

Averments in cross bill.— A general charge that evidence can be obtained only by addressing the conscience of the adversary party is sufficient, without specifying the facts entitling cross plaintiff to such discovery. Josey *v.* Rogers, 13 Ga. 478.

80. Commercial Bank *v.* State Bank, 4 Hill (N. Y.) 516; Spragg *v.* Corner, 2 Cox Ch. 109, 30 Eng. Reprint 50.

81. Pearson *v.* Darrington, 32 Ala. 227; Mills *v.* Larrance, 186 Ill. 635, 58 N. E. 219; Ferris *v.* McClure, 36 Ill. 77; French *v.* Bellows Falls Sav. Inst., 67 Ill. App. 179; Lambert *v.* Lambert, 52 Me. 544; Burdell *v.* Burdell, 2 Barb. (N. Y.) 473; Miller *v.* Fenton, 11 Paige (N. Y.) 18; Mitford Eq. Pl. 76.

82. Metropolis Nat. Bank *v.* Sprague, 21 N. J. Eq. 530.

83. *Alabama.*— Parker *v.* Marks, 82 Ala. 548, 3 So. 5; Trippe *v.* Trippe, 29 Ala. 637.

Florida.— Sanderson *v.* Sanderson, 17 Fla. 820.

Illinois.— Wight *v.* Downing, 90 Ill. App. 1.

New Jersey.— Ames *v.* New Jersey Franklinite Co., 12 N. J. Eq. 66, 72 Am. Dec. 385.

New York.— Slee *v.* Bloom, 20 Johns. 669, 685.

Tennessee.— La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. 420.

West Virginia.— Armstrong *v.* Wilson, 19 W. Va. 108.

See 19 Cent. Dig. tit. "Equity," § 454.

Credits, and matters going merely to the reduction of plaintiff's *prima facie* demand, may be shown defensively without a cross bill. Alston *v.* Alston, 34 Ala. 15; Williams *v.* Mitchell, 30 Ala. 299; Dayton *v.* Melick, 27 N. J. Eq. 362; Redfield *v.* Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889.

84. Taunton *v.* McInnish, 46 Ala. 619; Talmage *v.* Pell, 9 Paige (N. Y.) 410; American, etc., Mortg., etc., Corp. *v.* Marquam, 62 Fed. 960.

Defense, known when answer was filed to the original bill, cannot be interposed by cross bill. Draper *v.* Gordon, 4 Sandf. Ch. (N. Y.) 210.

85. See *supra*, X, A, 2, a.

86. *Alabama.*—Eslava *v.* Crampton, 61 Ala. 507; Taunton *v.* McInnish, 46 Ala. 619; Masterson *v.* Masterson, 32 Ala. 437.

Georgia.— Bullock *v.* Brown, 20 Ga. 472.

New Jersey.—Johnson *v.* Buttler, 31 N. J. Eq. 35.

New York.— Braman *v.* Wilkinson, 3 Barb. 151; Jennings *v.* Webster, 8 Paige 503, 35 Am. Dec. 722; Coxe *v.* Smith, 4 Johns. Ch. 271.

Tennessee.— Woodard *v.* Bird, 105 Tenn. 671, 59 S. W. 143.

See 19 Cent. Dig. tit. "Equity," § 450.

Where either by answer or by action at law defendant has sufficient remedy, there is no occasion for a cross bill. Sprague *v.* Waldo, 38 Vt. 139.

Cross bill to obtain direction of an issue which might be had by motion in the original suit will not be entertained. Carter *v.* Harvey, (Miss. 1890) 7 So. 286.

87. *Georgia.*— Tison *v.* Tison, 14 Ga. 167.

Illinois.— Hook *v.* Richeson, 115 Ill. 431, 5 N. E. 98; Newberry *v.* Blatchford, 106 Ill. 584; Morgan *v.* Smith, 11 Ill. 194.

Maryland.— Glenn *v.* Clark, 53 Md. 580.

Massachusetts.— Bogle *v.* Bogle, 3 Allen 158.

New York.— Weed *v.* Smull, 3 Sandf. Ch. 273.

Tennessee.— Brown *v.* Bell, 4 Hayw. 287; Montgomery *v.* Olwell, 1 Tenn. Ch. 169.

See 19 Cent. Dig. tit. "Equity," §§ 450, 454.

88. Where the matter of the cross bill constitutes a defense and at the same time entitles defendant to relief beyond the dismissal of the bill, and such relief cannot be had by answer, a cross bill is proper. Paxton *v.* Stackhouse, 4 Kulp (Pa.) 403. A cross bill may be permitted to insure relief to defend-

where one defendant files a cross bill bringing the whole matter before the court, a second cross bill by another defendant will not be entertained.[89] An infant defendant will be protected by the court without his filing a cross bill.[90]

B. Time For Filing Cross Bills. Defendant may not file a cross bill before he answers the original,[91] and it should properly be filed, if against plaintiff, at the time the answer is put in to the original.[92] A cross bill against a co-defendant can hardly be put in at that time, because, until the answers are in, neither defendant knows what the other may set up.[93] The right is generally held to exist until publication passes in the original suit,[94] but not thereafter where it involves the taking of proof.[95] It is, however, within the discretion of the court to permit a cross bill after publication passed,[96] as where it does not delay the hearing,[97] or where plaintiff has kept defendant in ignorance of the facts entitling him to file the cross bill.[98] Where justice requires it may be filed after hearing,[99] but ordinarily it will not then be permitted.[1] The court may always deny leave to file a cross bill for unreasonable delay.[2]

C. When Leave to File Necessary. The practice doubtless very largely prevails of obtaining leave of the court to file a cross bill, but it seems that such leave is not in general necessary.[3] A contrary doctrine is sometimes stated;[4] but in nearly all cases where leave of court is held requisite, some circumstances

ant, where he would be deprived thereof if plaintiff should fail in his proof. Wilcox *v.* Allen, 36 Mich. 160. Although the advantage to be had by reforming a contract might be obtained by setting up the mistake defensively, nevertheless if the parties so desire, the court will permit a cross bill for reformation. Northern R. Co. *v.* Ogdensburg, etc., R. Co., 20 Fed. 347. But a defendant in a creditor's bill cannot allege payment and demand cancellation of the judgment upon which the bill is founded, where he does not by answer set up the same satisfaction of the judgment as a defense. Draper *v.* Gordon, 4 Sandf. Ch. (N. Y.) 210.

89. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566. A demurrer will not be sustained on this ground. Van Bibber *v.* Hilton, 84 Cal. 585, 24 Pac. 308, 598.

90. Gilmore *v.* Gilmore, 109 Ill. 277.

91. Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327.

92. Vanderveer *v.* Holcomb, 21 N. J. Eq. 105; Irving *v.* De Kay, 10 Paige (N. Y.) 319.

93. Huber *v.* Diebold, 25 N. J. Eq. 170; Vanderveer *v.* Holcomb, 21 N. J. Eq. 105.

94. Cartwright *v.* Clark, 4 Metc. (Mass.) 104; White *v.* Buloid, 2 Paige (N. Y.) 164; Sterry *v.* Arden, 1 Johns. Ch. (N. Y.) 62.

When plaintiff is seeking to discontinue a cross bill may be filed after answer to enable defendant to settle the rights in litigation. Pullman's Palace-Car Co. *v.* Central Transp. Co., 49 Fed. 261.

Cross bill must be filed before the pleadings are made up unless cause is shown to the contrary. Josey *v.* Rogers, 13 Ga. 478.

95. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 250; Gouverneur *v.* Elmendorf, 4 Johns. Ch. (N. Y.) 357.

If it does not seek to introduce new testimony on the matters in issue in the original, it may be filed after publication has passed. Neal *v.* Foster, 34 Fed. 496, 13 Sawy. 236.

96. Bowman *v.* Cleveland Bldg., etc., Assoc., (Tenn. Ch. App. 1900) 59 S. W. 669.

97. Davis *v.* American, etc., Christian Union, 100 Ill. 313.

98. Berryman *v.* Graham, 21 N. J. Eq. 370.

99. Cartwright *v.* Clark, 4 Metc. (Mass.) 104.

After final decree in a partition suit defendant may not, in the absence of fraud or mistake, assert a greater interest than has already been adjudged. Fread *v.* Fread, 165 Ill. 228, 46 N. E. 268 [*affirming* 61 Ill. App. 586].

One entitled to come in to defend after decree based on service by publication may defend in any manner, including a cross bill. Belcher *v.* Wilkerson, 54 Miss. 677.

Upon setting aside a decree pro confesso the court granted leave to defendant to refile a cross bill upon which process had not issued until the decree was entered, with such amendments as might be deemed proper. Bosworth *v.* Sandlin, (Fla. 1903) 35 So. 66.

1. Cartwright *v.* Clark, 4 Metc. (Mass.) 104; Cartwright *v.* Johnston, 110 Mich. 312, 68 N. W. 144; Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122. A cross bill cannot be filed after hearing on the original, unless directed by the court. Roberts *v.* Peavey, 29 N. H. 392. After hearing and decree leave should be refused to file a cross bill involving the taking of additional testimony. Rogers *v.* Riessner, 31 Fed. 591.

2. Williams *v.* Sax, (Tenn. Ch. App. 1897) 43 S. W. 868; Baker *v.* Rathbone Oil Tract Co., 7 W. Va. 454.

3. Neal *v.* Foster, 34 Fed. 496, 13 Sawy. 236. See also Inter-State Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342 [*affirming* 71 Ill. App. 529].

Although filed without leave a cross bill may be entertained by the court. Osborne *v.* Barge, 30 Fed. 805.

4. Finlayson *v.* Lipscomb, 16 Fla. 751.

existed taking the case out of the usual course and calling for the exercise of the court's discretion.[5]

D. Cross Bill by Direction of Court. The accomplishment by cross bill of the object of obtaining a complete determination of the entire subject-matter and the adjustment of all rights[6] is not left entirely to the volition of the parties; but when it appears that the suit as framed is insufficient to bring before the court the rights of all the parties and the matters necessary to a just and full determination of the cause, the court will even at the hearing direct a proper cross bill to be filed.[7]

E. Parties to Cross Bills.— 1. PLAINTIFFS. Any defendant who has a right in the subject in controversy not presented by the original bill may assert it by cross bill;[8] but in general it is essential that such defendant might have filed an original bill for the same purpose.[9] A cross bill by one in whose favor a decree is made in the original suit may, however, be dismissed as useless,[10] and, where the matter is already before the court on the cross bill of one defendant, it is proper to dismiss a second cross bill by another.[11] Parties sued as representing a class of numerous persons[12] may present a cross bill on behalf of the class.[13] One not a party to the original bill may not as a general rule exhibit a cross bill;[14] but a purchaser from a party *pendente lite* may file a cross bill to protect his rights.[15]

2. DEFENDANTS. A cross bill requires the same parties defendant as would an original bill for the same purpose.[16] Whether the cross bill must fail if such

5. Where a stock-holder seeks to defend for a corporation and file a cross bill on its behalf leave is held necessary. Bronson *v.* La Crosse, etc., R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725.

An intervener must obtain leave. Fleming *v.* Weagley, 32 Ill. App. 183; Dickerman *v.* Northern Trust Co., 80 Fed. 450, 25 C. C. A. 549.

Where there has been great delay leave is necessary. Baker *v.* Rathbone Oil Tract Co., 7 W. Va. 454; Indiana Southern R. Co. *v.* Liverpool, etc., Ins. Co., 109 U. S. 168, 3 S. Ct. 108, 27 L. ed. 895.

Where an answer had been taken as a cross bill, leave was held necessary to file a supplemental answer and cross bill, setting up newly discovered facts, but it was held error to refuse leave. Brooks *v.* Moody, 25 Ark. 452.

For injunction.— Where defendant asks leave to file a cross bill asking for an injunction, leave may be given to file the cross bill, without passing on the right to an injunction. Brush Electric Co. *v.* Brush-Swan Electric Light Co., 43 Fed. 701.

6. See *supra*, X, A, 2, a.

7. Sims *v.* Burk, 109 Ind. 214, 9 N. E. 902; Stevens *v.* Stevens, 24 N. J. Eq. 77, 574; Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 250; Hall *v.* Calvert, (Tenn. Ch. App. 1897) 46 S. W. 1120; Mitford Eq. Pl. 77.

Where defendant set up a discharge in bankruptcy as a defense which plaintiff claimed to be fraudulent, defendant was required to file a cross bill bringing forward the defense, in order that plaintiff might by answer thereto more effectually meet it. Scott *v.* Grant, 10 Paige (N. Y.) 485.

8. Fletcher *v.* Wilson, Sm. & M. Ch. (Miss.) 376.

9. Hackley *v.* Mack, 60 Mich. 591, 27 N. W. 871. See also Osborne *v.* Barge, 30 Fed. 805.

Change of venue in the original suit does not affect the right to file a cross bill. Davis *v.* American, etc., Christian Union, 100 Ill. 313.

A demand not affecting his own right cannot be attacked by defendant by a cross bill. Mutual L. Ins. Co. *v.* Cokefair, 41 N. J. Eq. 142, 3 Atl. 686.

10. Minnesota Co. *v.* St. Paul Co., 6 Wall. (U. S.) 742, 18 L. ed. 856.

11. Gilman *v.* New Orleans, etc., R. Co., 72 Ala. 566.

12. See *supra*, V, C, 4, b, (II).

13. Carlton *v.* Southern Mut. Ins. Co., 72 Ga. 371.

14. Marks *v.* Aubry, 2 A. K. Marsh. (Ky.) 205; Payne *v.* Cowan, Sm. & M. Ch. (Miss.) 26; Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33; Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

But if plaintiffs answer a cross bill filed by a stranger they cannot by motion have it taken from the files. Payne *v.* Cowan, Sm. & M. Ch. (Miss.) 26.

In Illinois a cross bill may be filed by a stranger (Hall *v.* Davis, 44 Ill. 494), and defendants brought in by cross bill may in turn exhibit cross bills (Blair *v.* Illinois Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269).

Intervener.— The right of a stranger to file a cross bill depends largely upon the general right of intervention (see *supra*, V, G, 3), and an intervener may not set up an interest adverse to the title in controversy. Farmers' L. & T. Co. *v.* San Diego St. Car Co., 40 Fed. 105.

15. Whitbeck *v.* Edgar, 2 Barb. Ch. (N. Y.) 106.

16. McGillis *v.* Hogan, 85 Ill. App. 194; Fletcher *v.* Holmes, 25 Ind. 458; Bibb *v.* Wilson, 31 Miss. 624; Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924; Grobe *v.* Roup, 46

necessary parties are not parties to the original suit, or whether, on the other hand, they may be brought in on the cross bill, although not parties to the original, is a question upon which the practice is not uniform. In some jurisdictions it is held that new parties cannot be introduced by cross bill;[17] in others the practice of bringing in new parties is recognized.[18] Again it is held that new parties may be brought in where necessary to obtain affirmative relief,[19] but not for the purpose of bringing forward new matter by way of defense.[20] A cross bill in the nature of an original bill may be filed to assert a joint demand against a surviving plaintiff in the original bill and the representative of a deceased plaintiff.[21] Plaintiff in the original should be a defendant in a cross bill, although it be directed mainly against a co-defendant; because a controversy between defendants cannot be made the ground of a cross bill unless its settlement is necessary to a complete decree on the case made by the bill.[22] New parties cannot be brought in to settle such a controversy.[23]

F. Form of Cross Bills. A cross bill must be as complete and perfect as an original bill,[24] and must be good within itself, not relying upon reference to the original bill for any of its essential averments.[25] It must be so framed that both causes may be heard together and a single decree entered.[26] Regularly a cross bill, in addition to having all the requirements of an original bill for the same purpose, should state the original bill so far as to show its parties, scope, and object and should state what proceedings have been had thereon;[27] but it has

W. Va. 488, 33 S. E. 261; Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 438. But see Cooper *v.* McNeill, 14 Ill. App. 408. A cross bill cannot be taken *pro confesso* against one not named as a party thereto. Madeiras *v.* Catlett, 7 T. B. Mon. (Ky.) 475.

17. Wright *v.* Frank, 61 Miss. 32; Bishop *v.* Miller, 48 Miss. 364; Ladner *v.* Ogden, 31 Miss. 332; Oswald *v.* Givens, Rich. Eq. Cas. (S. C.) 326; Cobb *v.* Baxter, 1 Tenn. Ch. 405; Shields *v.* Barrow, 17 How. (U. S.) 130, 15 L. ed. 158; Bunel *v.* O'Day, 125 Fed. 303.

Plaintiff's remedy will not be delayed by the introduction of new parties on a cross bill. Odom *v.* Owen, 2 Baxt. (Tenn.) 446.

Where another suit is already pending for the same object it is proper to sustain a demurrer to a cross bill requiring new parties. Perea *v.* Harrison, 7 N. M. 666, 41 Pac. 529.

18. Scott *v.* Millikin, 60 Ill. 108; Fletcher *v.* Holmes, 25 Ind. 458; Martin *v.* Kester, 49 W. Va. 647, 39 S. E. 599.

19. *Illinois.*— Jones *v.* Smith, 14 Ill. 229.

New Jersey.—Haberman *v.* Kaufer, 60 N. J. Eq. 271, 47 Atl. 48.

Tennessee.—Hildebrand *v.* Beasley, 7 Heisk. 121.

West Virginia.— Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462.

United States.—Brandon Mfg. Co. *v.* Prime, 4 Fed. Cas. No. 1,810, 3 Ban. & A. 191, 14 Blatchf. 371.

See 19 Cent. Dig. tit. "Equity," § 467.

Parties who attempt to come in under a cross bill filed by one who is found to have no standing in court must abide by the result. Stainback *v.* Junk Bros. Lumber, etc., Co., 98 Tenn. 306, 39 S. W. 530.

20. Richman *v.* Donnell, 53 N. J. Eq. 32, 30 Atl. 533; Thruston *v.* Big Stone Gap Imp. Co., 86 Fed. 484.

21. Brown *v.* Story, 2 Paige (N. Y.) 594.

22. Weaver *v.* Alter, 29 Fed. Cas. No. 17,308, 3 Woods 152.

23. Kennedy *v.* Kennedy, 66 Ill. 190; McGavock *v.* Morrison, 3 Tenn. Ch. 355. See also Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

24. *Alabama.*— Hooper *v.* Armstrong, 69 Ala. 343.

Arkansas.— Trapnall *v.* Burton, 24 Ark. 371.

Georgia.— See McGehee *v.* Mott, 60 Ga. 159.

Illinois.— McCagg *v.* Heacock, 42 Ill. 153.

New Jersey.— Borden *v.* Murphy, (Ch. 1886) 3 Atl. 408. See also Eastwood *v.* Worrall, (Ch. 1886) 5 Atl. 180.

Tennessee.— Nelson *v.* Trigg, 3 Tenn. Cas. 733.

United States.— Greenwalt *v.* Duncan, 16 Fed. 35, 5 McCrary 132.

See 19 Cent. Dig. tit. "Equity," § 469.

25. Cookerly *v.* Duncan, 87 Ind. 332; Masters *v.* Beckett, 83 Ind. 595.

Failure to allege a demand in a cross bill is not ground for reversal where the original bill absolutely denies the cross plaintiff's claim. Troendle *v.* Van Nortwick, 98 Fed. 785, 39 C. C. A. 386.

An instrument on which the bill is based may be looked to as a part of a cross bill relating to the construction thereof. Swan *v.* Castleman, 4 Baxt. (Tenn.) 257.

Under a statute permitting an answer to incorporate a cross bill, the words "process waived" at the end of the answer prevent its consideration as a cross bill. Hamilton *v.* Hewgley, 3 Baxt. (Tenn.) 216. But although such answer presents no specific prayer for relief, if it shows a right to relief the prayer may be treated as amended. Cooley *v.* Harris, 92 Mich. 126, 135, 52 N. W. 997.

26. McDougald *v.* Dougherty, 14 Ga. 674.

27. Mitford Eq. Pl. 75; Story Eq. Pl. 401.

been pointed out that this requirement was due to the fact that a cross bill might in England be filed in a court other than that in which the original was pending, and that where as in the federal courts a cross bill must be filed in the same court as the original, it is necessary only to set forth so much, with regard to the original and the proceedings thereon, as may be necessary to disclose the right sought to be brought before the court.[28] A defect in the title does not invalidate a cross bill otherwise sufficient.[29]

G. Sufficiency of Cross Bills — 1. Relation to Subject-Matter of Original Bill. A cross bill may and usually does introduce new facts and new issues not disclosed by the original bill;[30] but such new facts and issues must relate to the subject-matter of the original,[31] and must be so closely connected therewith as to constitute the cross bill a mere auxiliary of the original or a dependency thereon.[32] It must not set up matter which is not germane to the matter of the original bill.[33] Questions which are entirely distinct from those presented in the original

28. Neal *v.* Foster, 34 Fed. 496, 13 Sawy. 236.

29. Russell *v.* Lamb, 82 Iowa 558, 48 N. W. 939; Lavis *v.* Consumers' Brewing Co., 106 Fed. 435.

30. Nelson *v.* Dunn, 15 Ala. 501; Price *v.* Stratton, (Fla. 1903) 33 So. 644; Robins *v.* Swain, 68 Ill. 197; Follansbee *v.* Scottish-American Mortg. Co., 7 Ill. App. 486; Peoria, etc., R. Co. *v.* Bryan, 5 Ill. App. 387; Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389.

31. *Alabama.*— Continental L. Ins. Co. *v.* Webb, 54 Ala. 688; Nelson *v.* Dunn, 15 Ala. 501.

Arkansas.— Pindall *v.* Trevor, 30 Ark. 249.

Florida.— Price *v.* Stratton, (1903) 33 So. 644.

Illinois.— Lund *v.* Skanes Enskilda Bank, 96 Ill. 181; Robins *v.* Swain, 68 Ill. 197.

Kentucky.— Crabtree *v.* Bank, 1 Metc. 482; May *v.* Armstrong, 3 J. J. Marsh. 260, 20 Am. Dec. 137.

Michigan.— Hackley *v.* Mack, 60 Mich. 591, 27 N. W. 871; Andrews *v.* Kibbee, 12 Mich. 94, 83 Am. Dec. 766.

Mississippi.— Gilmer *v.* Felhour, 45 Miss. 627; Fletcher *v.* Wilson, Sm. & M. Ch. 376.

New Jersey.— Beck *v.* Beck, 43 N. J. Eq. 39, 10 Atl. 155; Kirkpatrick *v.* Corning, 40 N. J. Eq. 343 [*affirming* 39 N. J. Eq. 136].

New York.— Griffith *v.* Merritt, 19 N. Y. 529; Galatian *v.* Erwin, Hopk. 48.

Tennessee.—Hildebrand *v.* Beasley, 7 Heisk. 121.

United States.— Cross *v.* De Valle, 1 Wall. 1, 17 L. ed. 515; Ayres *v.* Carver, 17 How. 591, 15 L. ed. 179; Johnson R. Signal Co. *v.* Union Switch, etc., Co., 43 Fed. 331; Lautz *v.* Gordon, 28 Fed. 264.

See 19 Cent. Dig. tit. "Equity," § 447.

32. Ferry *v.* Krueger, 43 N. J. Eq. 295, 14 Atl. 811 [*affirming* 41 N. J. Eq. 432, 5 Atl. 452]; Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389.

Cross bill must not have a purpose distinct from that of the original. Cross *v.* De Valle, 1 Wall. (U. S.) 1, 17 L. ed. 515; Randolph *v.* Robinson, 20 Fed. Cas. No. 11,561. But *compare* Armstrong *v.* Mayer, (Nebr. 1903) 95 N. W. 51, as to a cross petition.

33. *Alabama.*— O'Neill *v.* Perryman, 102 Ala. 522, 14 So. 898; Andrews *v.* Hobson, 23 Ala. 219.

Georgia.—Johnson *v.* Stancliff, 113 Ga. 886, 39 S. E. 296; Brownlee *v.* Warmack, 90 Ga. 775, 17 S. E. 102; Sasser *v.* Sasser, 73 Ga. 275.

Illinois.—Wight *v.* Downing, 90 Ill. App. 1.

Maryland.—Canton *v.* McGraw, 91 Md. 744, 47 Atl. 1030.

Missouri.— Mathiason *v.* St. Louis, 156 Mo. 196, 56 S. W. 890.

Nebraska.—Armstrong *v.* Mayer, (1903) 95 N. W. 51.

New Jersey.—Allen *v.* Fury, 53 N. J. Eq. 35, 30 Atl. 551.

Tennessee.— Cohen *v.* Woollard, 2 Tenn. Ch. 686.

Vermont.— Rutland *v.* Paige, 24 Vt. 181; Slason *v.* Wright, 14 Vt. 208.

West Virginia.— Riggs *v.* Armstrong, 23 W. Va. 760.

United States.— Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478 [*affirming* 7 N. M. 666, 41 Pac. 529]; Goff *v.* Kelly, 74 Fed. 327.

See 19 Cent. Dig. tit. "Equity," § 447.

An exception has been intimated where some special circumstance, such as insolvency or non-residence of plaintiff, exists. Davis *v.* Cook, 65 Ala. 617; Hornor *v.* Hanks, 22 Ark. 572; Quick *v.* Lemon, 105 Ill. 578. *Contra*, Rowan *v.* Sharps' Rifle Mfg. Co., 33 Conn. 1; Stonemetz Printers' Machinery Co. *v.* Brown Folding Mach. Co., 46 Fed. 851.

Application of the rule may be illustrated by the following cases, holding that the cross bill was germane to the original and proper: On a bill to restrain an execution sale, a cross bill to establish the lien of the judgment and enforce it against the property in question. Chicago, etc., R. Co. *v.* Chicago Third Nat. Bank, 134 U. S. 276, 10 S. Ct. 550, 33 L. ed. 900. See also Jones *v.* Thacker, 61 Ga. 329. On a bill to foreclose a cross bill to restrain foreclosure (Ray *v.* Home, etc., Invest., etc., Co., 106 Ga. 492, 32 S. E. 603), or *vice versa* (Duggar *v.* Dempsey, 13 Wash. 396, 43 Pac. 357). On a bill to restrain the execution of an award, a cross bill to enforce it. North British, etc., Ins. Co. *v.* Lathrop, 70 Fed. 429,

bill cannot be introduced by a cross bill, although such questions be connected with the subject-matter of the original bill;[34] nor can a new subject-matter be introduced, although the controversy with relation thereto and that with relation to the subject-matter of the original bill arise out of the same transaction.[35] A cross bill will of course not lie to litigate a question open only to a direct proceeding for the purpose involved.[36] A controversy between co-defendants cannot be introduced by cross bill, unless its settlement is necessary to a complete decree on the case made by the bill.[37] Therefore a defendant cannot litigate matters with another defendant in which plaintiff is not concerned.[38] The objection that a cross bill is not germane to the original is waived by a general answer to the cross bill.[39]

17 C. C. A. 175. On a bill to enforce a contract, a cross bill to avoid it for fraud. Griffin *v.* Orman, 9 Fla. 22. On a bill to establish title claimed under a decree, a cross bill to impeach the decree. Lloyd *v.* Kirkwood, 112 Ill. 329. On a bill to compel an assignment of a certificate of purchase, a cross bill to obtain a deed in pursuance of the certificate. Davis *v.* American, etc., Christian Union, 100 Ill. 313. On a bill to establish title, a cross bill to declare a trust in favor of defendant (Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047), or to attack plaintiff's title, as obtained in fraud of creditors (Remer *v.* McKay, 38 Fed. 164). On a creditors' bill, a cross bill to establish an equitable title to the land. Orr *v.* Echols, 119 Ala. 340, 24 So. 357. See also Waller *v.* Logan, 5 B. Mon. (Ky.) 515. On a bill to restrain a defendant in ejectment from cutting timber, pending the ejectment action, a cross bill on equitable grounds to restrain the further prosecution of such action. Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351. For other instances see the following cases:

Illinois.— Hurd *v.* Case, 32 Ill. 45, 83 Am. Dec. 249.

Michigan.— Griffin *v.* Griffin, 112 Mich. 87, 70 N. W. 423.

New Jersey.—Haberman *v.* Kaufer, 60 N. J. Eq. 271, 47 Atl. 48.

Tennessee.— Hodgins *v.* Fanning, 4 Baxt. 574.

United States.— Gasquet *v.* Fidelity Trust Co., 57 Fed. 80, 6 C. C. A. 253 [*reversing* 53 Fed. 850].

See 19 Cent. Dig. tit. "Equity," §§ 447, 448.

Proper cross bills against co-defendants are the following: On a bill to enforce a vendor's lien, a cross bill by a subvendee of a part of the land to first subject that retained by the vendee. Hammond *v.* Perry, 38 Iowa 217; Wright *v.* Brander, 62 Miss. 82. On a bill to foreclose, a cross bill by the mortgagor to set aside a conveyance of the equity of redemption to his co-defendant. Dawson *v.* Vickery, 150 Ill. 398, 37 N. E. 910. On a bill to restrain a forfeiture of a street railway franchise, a cross bill by a mortgagee for a receiver to conduct the business of the company so as to prevent acts of forfeiture. Union St. R. Co. *v.* Saginaw, 115 Mich. 300, 73 N. W. 243.

Cross bills not germane to the original are the following: In a suit by creditors of a decedent's estate to sell lands for the payment of purchase-money, a cross bill by the widow for the assignment of dower. Shelton *v.* Carpenter, 60 Ala. 201. In a suit by an assignee in bankruptcy to set aside as fraudulent a conveyance by the bankrupt to his wife, a cross bill by the wife for dower. Humes *v.* Scroggs, 64 Ala. 40. In a suit by a partner for an accounting and a distribution of assets among creditors, a cross bill by creditors to charge a stranger as a partner and to reach individual assets of the partners. Rosenbaum *v.* Kershaw, 40 Ill. App. 659. In a suit to set aside a conveyance as having been obtained by fraud, a cross bill for possession. Phipps *v.* Kent, 1 Chest. Co. Rep. (Pa.) 158. In a suit for interference and infringement of a patent, a cross bill for infringement of defendant's patent. Stonemetz Printers' Machinery Co. *v.* Brown Folding Mach. Co., 46 Fed. 851.

Proper cross bills.— In a suit to quiet title as to one defendant and for partition against the other, the former may file a cross bill to declare void the title of both other parties. Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175. If one of several defendants of opposite interests desires to question the right of another defendant, he may do so by cross bill. Armstrong *v.* Pratt, 2 Wis. 299.

34. Goff *v.* Kelly, 74 Fed. 327.

35. Hogg *v.* Hoag, 107 Fed. 807.

36. Agua Pura Co. *v.* Las Vegas, 10 N. M. 6, 60 Pac. 208.

37. Weaver *v.* Alter, 29 Fed. Cas. No. 17,308, 3 Woods 152.

38. *Alabama.*—Tutwiler *v.* Dunlap, 71 Ala. 126; Andrews *v.* Hobson, 23 Ala. 219.

Kentucky.—Crabtree *v.* Banks, 1 Metc. 482.

New Jersey.— Carpenter *v.* Gray, 37 N. J. Eq. 389.

Tennessee.— Pollard *v.* Wellford, 99 Tenn. 113, 42 S. W. 23.

United States.—Stuart *v.* Hayden, 169 U. S. 1, 18 S. Ct. 274, 42 L. ed. 639 [*affirming* 72 Fed. 402, 18 C. C. A. 618]; Ayres *v.* Carver, 17 How. 591, 15 L. ed. 179; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8.

See 19 Cent. Dig. tit. "Equity," §§ 447, 448.

39. Ackley *v.* Croucher, 203 Ill. 530, 68 N. E. 86; Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524.

2. JURISDICTION OF SUBJECT-MATTER. The jurisdiction acquired by virtue of the original bill extends to the matter of a cross bill having a proper relation to that of the original, although the court might not have been able to acquire jurisdiction for the purpose of an independent suit having the purpose of the cross bill alone.[40] This is because the cross bill is merely auxiliary and dependent on the original; and for the same reason it is said that a cross bill need not allege any independent ground of equity.[41] It has often been decided that any independent relief sought by a cross bill must be of an equitable character,[42] but on the other hand it has been held that matters purely legal may be relied upon, and that legal relief may be awarded upon facts growing out of or connected with the equities of the original bill.[43]

3. CONSISTENCY WITH ANSWER. A cross bill must be entirely consistent with the case made by the answer to the original.[44]

H. Allowing Answer to Stand as Cross Bill. Where an answer contains matter which should be presented by cross bill and possesses in other respects the requisites of a cross bill, it is sometimes treated as such, and allowed to stand as a cross bill, without requiring defendant interposing it to put in a separate formal pleading.[45] In some jurisdictions express provision is made whereby the

40. Bowman *v.* Long, 27 Ga. 178; Kaegebein *v.* Higgie, 51 Ill. App. 538; Haberman *v.* Kaufer, 60 N. J. Eq. 271, 47 Atl. 48; Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171, 11 S. Ct. 61, 34 L. ed. 625; Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047.

After final decree on the original, a cross bill, where the court would have no original jurisdiction, cannot be entertained for a collateral purpose. Smith *v.* Johnson, 2 Heisk. (Tenn.) 225. But see Lair *v.* Jelf, 3 Dana (Ky.) 181.

The court may refuse to entertain a cross bill over which it would have no original jurisdiction, where there are no special equities requiring determination of the matters involved. Scruggs *v.* Driver, 31 Ala. 274. See, generally, COURTS, 11 Cyc. 683.

41. Davis *v.* Cook, 65 Ala. 617; Nelson *v.* Dunn, 15 Ala. 501; Thomason *v.* Neeley, 50 Miss. 310; Mitford Eq. Pl. 76.

Jurisdiction aided by cross bill.— There are even cases holding that where the cross bill is founded on matter clearly of equitable cognizance, it will supply a defect in that respect in the original bill and give the court jurisdiction of both. Radcliffe *v.* Scruggs, 46 Ark. 96; Cockrell *v.* Warner, 14 Ark. 345. *Contra*, Carroll *v.* Richardson, 87 Ala. 605, 6 So. 342; Dill *v.* Shahan, 25 Ala. 694, 60 Am. Dec. 540.

A cross bill merely for defense need not be of equitable cognizance but if it seeks relief outside of the case made by the original it must show ground of equitable jurisdiction. Winn *v.* Dillard, 60 Ala. 369; Armstrong *v.* Mayer, (Nebr. 1903) 95 N. W. 51.

Dismissal for want of equity.— Where the circumstances of a transaction, as alleged in a cross bill, disclose no equity, the cross bill will be dismissed. Kemeys *v.* Netterstrom, 86 Ill. App. 590.

42. *Arkansas.*—Hughey *v.* Bratton, 48 Ark. 167, 2 S. W. 698; Trapnall *v.* Hill, 31 Ark. 345.

District of Columbia.— Brown *v.* Boker, 20 D. C. 99.

Florida.— Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351.

Illinois.— Tobey *v.* Foreman, 79 Ill. 489.

Mississippi.— Wright *v.* Frank, 61 Miss. 32.

Virginia.— Rosenberger *v.* Keller, 33 Gratt. 489.

United States.— Lautz *v.* Gordon, 28 Fed. 264.

See 19 Cent. Dig. tit. "Equity," § 464.

A claim for damages for breach of covenant which would accrue to a defendant only on the contingency of plaintiff's success in his original bill cannot be set up against a co-defendant. Brooks *v.* Martin, 62 Miss. 217.

43. *Alabama.*— Goodwin *v.* McGehee, 15 Ala. 232.

Illinois.— French *v.* Bellows Falls Sav. Inst., 67 Ill. App. 179.

Kentucky.— Hall *v.* Edrington, 8 B. Mon. 47.

Pennsylvania.— Phipps *v.* Kent, 1 Chest. Co. Rep. 158.

Tennessee.—Beal *v.* Smithpeter, 6 Baxt. 356.

United States.— Weathersbee *v.* American Freehold Land Mortg. Co., 77 Fed. 523.

See 19 Cent. Dig. tit. "Equity," § 464. See also *supra*, II, C, 2, b.

44. Hatchett *v.* Blanton, 72 Ala. 423; Dill *v.* Shahan, 25 Ala. 694, 60 Am. Dec. 540; Graham *v.* Tankersley, 15 Ala. 634; Jackson *v.* Grant, 18 N. J. Eq. 145; Draper *v.* Gordon, 4 Sandf. Ch. (N. Y.) 210; Hudson *v.* Hudson, 3 Rand. (Va.) 117.

45. *Arkansas.*—Allen *v.* Allen, 14 Ark. 666.

Maryland.— Young *v.* Twigg, 27 Md. 620.

New Hampshire.—Cox *v.* Leviston, 63 N. H. 283.

Ohio.— Klonne *v.* Bradstreet, 7 Ohio St. 322.

Virginia.—Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Mettert *v.* Hagan, 18 Gratt. 231.

United States.— Book *v.* Justice Min. Co., 58 Fed. 827.

See 19 Cent. Dig. tit. "Equity," § 471.

If the parties agree to consider an answer as a cross bill the court will so treat it. Gray *v.* Taylor, (N. J. Ch. 1897) 38 Atl. 951;

matter of a cross bill may be inserted in an answer and relief be prayed.[46] The answer in such case must possess all the requisites of a cross bill,[47] and must be proceeded on in a similar manner.[48]

I. Defenses to Cross Bills. In the absence of statute process must be issued and served upon defendants to a cross bill,[49] and in any event a reasonable opportunity must be given to defend.[50] A defendant to both original and cross bill must separately interpose his defense to each.[51] The modes of defense and the grounds of each are substantially the same as in the case of an original bill.[52] As no independent ground of equity jurisdiction is in general required to support a defensive cross bill,[53] a demurrer for defect in that regard does not lie;[54] but a demurrer will lie to a cross bill for relief if, taken in connection with the other pleadings, it shows no right to affirmative relief.[55] Objection that the cross bill does not set up matter appropriate to such a pleading, as where it contains merely matter of defense, available by way of answer, may be raised by demurrer.[56] A demurrer will not lie on the ground that a cross bill is filed before the original was answered;[57] but a cross bill so filed will be taken from the files on motion,[58]

Passumpsic Sav. Bank *v.* St. Johnsbury First Nat. Bank, 53 Vt. 82. See also Jones *v.* Robinson, 77 Ala. 499.

46. For cases illustrating this practice see the following:

Alabama.— Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27.

Illinois.— Thielman *v.* Carr, 75 Ill. 385; Grove *v.* Carlisle, 18 Ill. 338. *Contra*, McConnell *v.* Hodson, 7 Ill. 640.

Iowa.— Keith *v.* Losier, 88 Iowa 649, 55 N. W. 952.

Kentucky.— Johnson *v.* Morrison, 5 B. Mon. 106; Madison *v.* Wallace, 2 Dana 61; Purdee *v.* Huston, 6 J. J. Marsh. 251; Wilson *v.* Bodley, Litt. 55; McConnell *v.* Donnell, Ky. Dec. 314.

Michigan.— Hackley *v.* Mack, 60 Mich. 591, 27 N. W. 871.

Nevada.— Low *v.* Blackburn, 2 Nev. 70.

Tennessee.— Nichol *v.* Nichol, 4 Baxt. 145; Odom *v.* Owen, 2 Baxt. 446.

West Virginia.— Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451; McMullen *v.* Eagan, 21 W. Va. 233; Moore *v.* Wheeler, 10 W. Va. 35.

See 19 Cent. Dig. tit. "Equity," § 471.

The right to do so is sometimes confined to cases where relief is sought against plaintiff alone. Lehman *v.* Dozier, 78 Ala. 235; Heironimus *v.* Harris, 14 B. Mon. (Ky.) 313; Hall *v.* Fowlkes, 9 Heisk. (Tenn.) 745; Leonard *v.* Smith, 34 W. Va. 442, 12 S. E. 479. An irregularity in praying for relief against a co-defendant is waived by plaintiff where he answers the pleading as a cross bill. Jones *v.* Robinson, 77 Ala. 499.

Defendant may resort to an original bill in a proper case instead of answering by way of cross bill. Clark *v.* Wilson, 56 Miss. 753.

A cross bill cannot be treated as an answer. Morrow *v.* Morrow, 2 Tenn. Ch. 549.

47. Taunton *v.* McInnish, 46 Ala. 619; McGillis *v.* Hogan, 85 Ill. App. 194; Elliston *v.* Morrison, 3 Tenn. Ch. 280.

48. *Ex p.* Woodruff, 123 Ala. 99, 26 So. 509; Hudspeth *v.* Thomason, 46 Ala. 470; Marr *v.* Lewis, 31 Ark. 203, 25 Am. Rep. 553; McGillis *v.* Hogan, 190 Ill. 176, 60 N. E. 91 [*affirming* 85 Ill. App. 194]; Ballance *v.* Underhill, 4 Ill. 453; Cumberland Land Co. *v.* Canter Lumber Co., (Tenn. Ch. App. 1895) 35 S. W. 886; Keele *v.* Cunningham, 2 Heisk. (Tenn.) 288; Curd *v.* Davis, 1 Heisk. (Tenn.) 574.

49. See *supra*, VI, A, 2, d.

50. Holbrook *v.* Prettyman, 44 Ill. 311; Tucker *v.* St. Louis L. Ins. Co., 63 Mo. 588; Cockle Separator Mfg. Co. *v.* Clark, 23 Nebr. 702, 37 N. W. 628. Leave will not be given to answer a cross bill and take proof, after a decree settling the rights of the parties. Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595.

Answer to a cross bill cannot be required until the answer to the original has been adjudged sufficient. Purvis *v.* Leech, 16 Wkly. Notes Cas. (Pa.) 541.

Where an amended bill is filed after cross bill, the latter must be first answered. Scales *v.* Nichols, 3 Hayw. (Tenn.) 229.

51. Crutcher *v.* Trabue, 5 Dana (Ky.) 80.

52. Barker *v.* Belknap, 39 Vt. 168. See also *supra*, VIII.

53. See *supra*, X, G, 2.

54. Lambert *v.* Lambert, 52 Me. 544; Gilmer *v.* Felhour, 45 Miss. 627.

55. Harding *v.* Olson, 76 Ill. App. 475.

56. McDaniel *v.* Callan, 75 Ala. 327; Wing *v.* Goodman, 75 Ill. 159; Gordon *v.* Johnson, 79 Ill. App. 423; Buckingham *v.* Wesson, 54 Miss. 526; Beck *v.* Beck, 43 N. J. Eq. 39, 10 Atl. 155. Defendants intending themselves to present certain matter by answer cannot demur to a cross bill interposed merely to present such matter and not seeking relief against such defendants, although the cross bill is not apt for the purpose intended. Stevens *v.* Stevens, 26 N. J. Eq. 101.

57. Cobb *v.* Baxter, 1 Tenn. Ch. 405.

58. Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327.

The irregularity is waived if plaintiff answers the cross bill and proceeds without requiring an answer to the original. Davis *v.* Hall, 92 Ill. 85.

as will also a cross bill which is inconsistent with the answer to the original,[59] or is based on matters irrelevant to the case made by the bill.[60] A plaintiff in the original bill will not be permitted to interpose as a defense to a cross bill the fact that another suit is pending for the same purpose as the cross bill, he being precluded from setting up such defense by having brought the plaintiff in the cross bill into court to litigate the matter.[61] An irregularity in proceeding by cross bill is waived by permitting the case to progress to hearing or decree without objection.[62] A defendant must answer a proper cross bill.[63] In determining the sufficiency of an answer to a cross bill the allegations of the original bill are to be considered,[64] and it seems that one who is defendant in both original and cross bill may by reference incorporate his answer to the original into that to the cross bill.[65] An answer to a cross bill cannot be made the vehicle for the introduction of matter which should appear in the original bill.[66]

J. Staying Proceedings on Original Bill. The filing of a cross bill does not of itself operate to stay proceedings on the original until the cross bill can be answered or brought on for hearing,[67] and an order for that purpose will not be granted as a matter of course,[68] but only when necessary to the protection of the parties.[69]

XI. AMENDED PLEADINGS.

A. Amended Bills — 1. Purposes of Amendment — a. Correcting Errors and Formal Defects. A bill may be amended to correct a formal defect[70] or mis-

59. Ragor *v.* Brenock, 175 Ill. 494, 51 N. E. 888.

60. Hanneman *v.* Richter, 63 N. J. Eq. 753, 53 Atl. 177, holding that a motion to strike out is a substitute for a demurrer.

61. Brandon Mfg. Co. *v.* Prime, 4 Fed. Cas. No. 1,810, 3 Ban. & A. 191, 14 Blatchf. 371.

62. Gould *v.* Stanton, 17 Conn. 377; Gottschalk Co. *v.* Live Oak Distillery Co., 7 App. Cas. (D. C.) 169; Bound *v.* South Carolina R. Co., 58 Fed. 473, 7 C. C. A. 322.

A decision made on a cross bill in a case not proper for it is as conclusive as in any other case. Farmers', etc., Bank *v.* Bronson, 14 Mich. 361.

An irregular cross bill may be treated as a petition and relief be given accordingly. Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33.

63. If the original plaintiff fails to answer a cross bill, his own bill will be dismissed or the cross bill taken as true. Byrd *v.* Sabin, 8 Ark. 279. An answer in the nature of a cross bill requires no answer if it makes no case. Horton *v.* Mercier, 31 Ga. 225. A general replication to such an answer is insufficient. Coach *v.* Kent Cir. Judge, 97 Mich. 563, 56 N. W. 937. On the other hand an answer to a cross bill may be treated as a sufficient replication to the cross plaintiff's answer to the original. Whyte *v.* Arthur, 17 N. J. Eq. 521.

64. McIlvain *v.* Southwestern Market Co., 10 Phila. (Pa.) 371.

If there is no answer the original, so far as it amounts to an answer, should be treated as making an issue. Hunt *v.* Makemson, 56 Tex. 9.

Admissions contained in the answer to a cross bill prevail as against allegations in the original bill. Cornelison *v.* Browning, 9 B. Mon. (Ky.) 50.

65. Interstate Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9, 52 N. E. 342 [*affirming* 71 Ill. App. 529].

66. Campbell *v.* Johnston, 4 Dana (Ky.) 177; Brown *v.* Troup, 33 Miss. 35. If the answer to the cross bill make substantially the same case as the original bill, it is not bad, although it may to some extent modify the original bill. Spivey *v.* Platon, 29 Ark. 603.

67. Beauchamp *v.* Putnam, 34 Ill. 378; Griswold *v.* Simmons, 50 Miss. 137; Williams *v.* Carle, 10 N. J. Eq. 543.

68. White *v.* Buloid, 2 Paige (N. Y.) 164.

69. Farmers' L. & T. Co. *v.* Seymour, 9 Paige (N. Y.) 538.

Where surviving plaintiffs in original bill are insolvent proceedings will be stayed in order to have a single accounting. Brown *v.* Story, 2 Paige (N. Y.) 594.

Where the state filed an inquisition in the nature of a cross bill, the original suit was stayed only so far as it involved the rights of the state. Stevens *v.* Stevens, 24 N. J. Eq. 77.

When a demurrer to the cross bill is sustained a stay will be denied. Hunt *v.* Oliver, 16 Fed. Cas. No. 6,894.

70. Buckley *v.* Corse, 1 N. J. Eq. 504. A mere technical irregularity may not be amended in order to enable the party amending to take advantage of a similar inadvertence on the part of his adversary. Ridabock *v.* Levy, 8 Paige (N. Y.) 197, 35 Am. Dec. 682.

Where a cause is removed to a federal court from a state court it cannot be dismissed because the complaint does not contain the address, averments as to citizenship, or proper prayers, such defects going only to the form and being amendable of course. Dancel *v.* United Shoe Machinery Co., 120 Fed. 839.

take,[71] or, where the bill sets forth a substantial case, to correct a defective statement.[72]

b. Changes Relating to Parties. As before stated[73] a failure to make the proper parties is not generally fatal to the bill, but new parties may be brought in. Where a plaintiff has failed to bring in necessary parties defendant the court will not dismiss the bill, but will give leave to plaintiff to amend it by adding the necessary parties.[74] An amendment may also be made on application of plaintiff

A failure to state the residence of the parties may be cured by amendment. Harvey *v.* Richmond, etc., R. Co., 64 Fed. 19.

71. *Alabama.*— Walker *v.* Hallett, 1 Ala. 379.

Georgia.— McDougald *v.* Williford, 14 Ga. 665.

Illinois.— Thomas *v.* Coultas, 76 Ill. 493; Wise *v.* Twiss, 54 Ill. 301.

Missouri.— McLaurine *v.* Monroe, 30 Mo. 462.

New York.— Ayres *v.* Valentine, 2 Edw. 451.

Wisconsin.— Fery *v.* Pfeiffer, 18 Wis. 510.

See 19 Cent. Dig. tit. "Equity," § 552.

Mistake in matter of substance.— Where a bill erroneously stated the return-day of an execution, an amendment to insert the true return-day was deemed a matter of substance, and it was held that there could be no amendment without giving defendant an opportunity to answer anew. Pardee *v.* De Calay, 7 Paige (N. Y.) 132.

72. Wynne *v.* Alford, 29 Ga. 694; Smith *v.* Smith, 4 Rand. (Va.) 95; Morgan *v.* Morgan, 42 W. Va. 542, 26 S. E. 294; Mellor *v.* Smither, 114 Fed. 116. Where a matter has not been put in issue with sufficient precision an amendment will always be permitted. McDougald *v.* Williford, 14 Ga. 665; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Cram *v.* Munro, 1 Edw. (N. Y.) 123.

73. See *supra*, V, G, 1, 2; V, I.

74. *Alabama.*— Gayle *v.* Singleton, 1 Stew. 566.

Delaware.— Wilmington *v.* Addicks, 7 Del. Ch. 56, 43 Atl. 297.

Georgia.— Napier *v.* Howard, 18 Ga. 437.

Illinois.— Hopkins *v.* Roseclare Lead Co., 72 Ill. 373; Thomas *v.* Adams, 30 Ill. 37.

Kentucky.— Hoofman *v.* Marshall, 1 J. J. Marsh. 64; Stevens *v.* Terrel, 3 T. B. Mon. 131; Foster *v.* Hunt, 3 Bibb 32.

Maine.— Beals *v.* Cobb, 51 Me. 348.

Michigan.— Woodward *v.* Clark, 15 Mich. 104.

New York.— Peck *v.* Mallams, 10 N. Y. 509; Vanderwerker *v.* Vanderwerker, 7 Barb. 221; Tooker *v.* Oakley, 10 Paige 288; Van Epps *v.* Van Deusen, 4 Paige 64, 25 Am. Dec. 516; Bregaw *v.* Claw, 4 Johns. Ch. 116.

North Carolina.— Arendell *v.* Blackwell, 16 N. C. 354.

Pennsylvania.— Savage *v.* Fortner, 2 Chest. Co. 271; McIlvain *v.* Christ Church, 2 Woodw. 293.

South Carolina.— Roddy *v.* Elam, 12 Rich. Eq. 343; Cabeen *v.* Gordon, 1 Hill Eq. 51.

Vermont.— Noyes *v.* Sawyer, 3 Vt. 160.

Virginia.— Yates *v.* Law, 86 Va. 117, 9 S. E. 508; Belton *v.* Apperson, 26 Gratt. 207; Holland *v.* Trotter, 22 Gratt. 136; Jameson *v.* Deshields, 3 Gratt. 4; Allen *v.* Smith, 1 Leigh 231.

West Virginia.—Ratliff *v.* Sommers, (1904) 46 S. E. 712.

Wisconsin.— Orton *v.* Knab, 3 Wis. 576.

United States.— Hunt *v.* Wickliffe, 2 Pet. 201, 7 L. ed. 397; Scott *v.* Mansfield, etc., R. Co., 23 Fed. Cas. No. 13,541, 2 Flipp. 15.

See 19 Cent. Dig. tit. "Equity," § 554.

A bill filed in behalf of a class may be amended to let in those interested. Harrison *v.* St. Mark's Church, 14 Wkly. Notes Cas. (Pa.) 387.

At what stage of proceedings. — An amendment to make new parties is an exception to the rule forbidding amendments after witnesses have been examined. Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371. The belief of counsel that no amendment was necessary may excuse a failure to amend by adding parties before the hearing. Stover *v.* Wood, 26 N. J. Eq. 56. Even on appeal leave may be given to add necessary parties. Lewis *v.* Darling, 16 How. (U. S.) 1, 14 L. ed 819. But U. S. Eq. Rule 29 forbids such amendment after replication, where it might have been made before. Clifford *v.* Coleman, 5 Fed. Cas. No. 2,894, 13 Blatchf. 210; Ross *v.* Carpenter, 20 Fed. Cas. No. 12,072, 6 McLean 382.

Party no longer interested.— An amendment charging that one, because of whose absence a decree had been reversed, had no longer any interest avoids the necessity of bringing him in. Atterberry *v.* Knox, 4 B. Mon. (Ky.) 90.

An amendment will not be permitted to bring in parties having no apparent interest (Riely *v.* Kinzel, 85 Va. 480, 7 S. E. 907), or where the court is without jurisdiction of the parties to the original bill (Cromwell *v.* Cunningham, 4 Sandf. Ch. (N. Y.) 384).

Amendment of pleadings.—Where new parties are made, both sides should where necessary be given leave to amend their pleadings so as to exhibit their case as they may desire. Dabney *v.* Preston, 25 Gratt. (Va.) 838.

When court may dismiss bill.—By virtue of U. S. Eq. Rule 52, if a plaintiff fails to set down an objection made by answer for want of parties for hearing on that objection, he will not on the hearing of the cause be entitled to amend as of course; but the court may dismiss the bill. So also in Pennsylvania. Scholl *v.* Schoener, 1 Woodw. (Pa.) 200.

in order to bring in parties proper but not necessary.[75] A party may not on the hearing shift his demand from one defendant to another, on the strength of their answers, but he may amend his bill for that purpose,[76] and he may even amend in some cases by substituting a different defendant for the one originally sued.[77] A bill may likewise be amended by striking out the name of a plaintiff improperly joined,[78] by adding another plaintiff,[79] or by a change in the character in which plaintiff sues.[80] By amendment a party may be transposed from one side of the record to the other.[81]

c. Adding Statements. By amending his bill plaintiff may not only be permitted to amplify the statement of his case,[82] but also to add allegations necessary to complete the case,[83] or even to add a new claim consistent with the original bill.[84] While it is said that the court is without authority to permit amendments to supply essential jurisdictional averments,[85] such amendments are in fact some-

75. Hook *v.* Brooks, 24 Ga. 175; Marsh *v.* Green, 79 Ill. 385.

76. Hilleary *v.* Hurdle, 6 Gill (Md.) 105.

77. The court may permit the name of a principal to be substituted for that of an agent (Jennings *v.* Springs, Bailey Eq. (S. C.) 181), but after a decree against a principal, sureties cannot be brought in (Clifton *v.* Haig, 4 Desauss. (S. C.) 330).

A defect in suing defendants as partners when they constituted a corporation may be cured by amendment. Needham *v.* Washburn, 17 Fed. Cas. No. 10,082, 4 Cliff. 254.

Where process was prayed against officers alone, instead of the corporation, the cause was on appeal remanded for amendment. Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46.

Where suit was brought against a corporation, and it appeared on hearing that it had no legal existence, it was held to be within the court's discretion to permit the stockholders to be substituted. Vermont Min., etc., Co. *v.* Windham County Bank, 44 Vt. 489.

78. Reybold *v.* Herdman, 2 Del. Ch. 34; Insurance Co. of North America *v.* Svendsen, 74 Fed. 346; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,306, 8 Blatchf. 347. But not where such amendment would make an entire change of plaintiffs, as where the bill had already been amended to bring in all the plaintiffs except those whom it was sought by a second amendment to strike out. McKay *v.* Broad, 70 Ala. 377.

79. McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148; Pitts *v.* Powledge, 56 Ala. 147.

Where the bill shows that complainant has assigned his interest, an amended bill cannot be filed by the assignee. Keyser *v.* Renner, 87 Va. 249, 12 S. E. 406.

80. Seibert *v.* Seibert, 1 Brewst. (Pa.) 531; Bradford *v.* Felder, 2 McCord Eq. (S. C.) 168; Coffman *v.* Sangston, 21 Gratt. (Va.) 263.

81. Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68; Hewett *v.* Adams, 50 Me. 271; Smith *v.* Hadley, 64 N. H. 97, 5 Atl. 717; Dare *v.* Allen, 2 N. J. Eq. 288. This will not be done simply to permit a removal of the cause into another jurisdiction. Burlew *v.* Quarrier, 16 W. Va. 108.

Where a bill was brought by husband and wife when it should have been for the wife with the husband as a defendant, it was held to be in the court's discretion on the hearing to permit a transposition of the parties or to dismiss the bill. Michan *v.* Wyatt, 21 Ala. 813.

82. *Alabama.*— Hart *v.* Clark, 54 Ala. 490.
Georgia.— Clarke *v.* East Atlanta Land Co., 113 Ga. 21, 38 S. E. 323.
Maine.— Hewett *v.* Adams, 50 Me. 271.
Mississippi.— Carey *v.* Fulmer, 74 Miss. 729, 21 So. 752.
Virginia.— Linn *v.* Carson, 32 Gratt. 170.
See 19 Cent. Dig. tit. "Equity," § 552.

For discovery.—Allegations may be inserted for the purpose of securing discovery. Thomas *v.* Stone, Walk. (Mich.) 117.

83. Larkins *v.* Biddle, 21 Ala. 252; Fenno *v.* Coulter, 14 Ark. 38; Tidball *v.* Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867.

84. Hewett *v.* Adams, 50 Me. 271; McMann *v.* Westcott, 47 Mich. 177, 10 N. W. 190; Nellis *v.* Pennock Mfg. Co., 38 Fed. 379. A suit having been brought to reform and foreclose a mortgage and satisfaction having been pleaded, plaintiff was permitted to amend, setting up a new mortgage which had been given in lieu of that set out in the original bill, the suit having been brought by mistake on the old mortgage. McMann *v.* Westcott, 47 Mich. 177, 10 N. W. 190. An amendment may be permitted to charge a purchaser with notice of a mistake which the bill seeks to reform. Cross *v.* Bean, 81 Me. 525, 17 Atl. 710.

A bill by an infant legatee to enforce payment of a legacy should not be dismissed for want of an averment that the debts had been paid. An amendment should be permitted. Childress *v.* Harrison, 47 Ala. 556.

Where new parties were added by amendment, but the bill as framed contained nothing to charge them, further amendments for that purpose were permitted. Detroit Third Nat. Bank *v.* Wayne County Cir. Judge, 81 Mich. 438, 45 N. W. 830.

Executors may supply a statement omitted from a bill filed by the testator. Coster *v.* Griswold, 4 Edw. (N. Y.) 364.

85. Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451; Dickinson *v.* Consolidated Traction Co., 114 Fed. 232.

times permitted.[86] Plaintiff will not be permitted to amend by adding immaterial statements,[87] or by adding facts which have been wilfully withheld.[88] An amendment will not be permitted which will have the effect of rendering the bill multifarious,[89] and if the bill is already multifarious no amendment will be permitted which does not remove that objection.[90]

d. Making a Different Case. An amended bill must not be repugnant to the original,[91] nor may it present an entirely new and essentially different case, entirely changing the purpose of the suit.[92] This principle is clear, but difficulties arise in determining what constitutes an essentially different case. A different

86. Where the entire equity of the bill depended upon the time when a judgment was recovered, it was held that the failure to allege the time, with reference to other facts, might be supplied by amendment. Ellsworth *v.* Cook, 8 Paige (N. Y.) 643.

Showing amount in controversy.— Where a bill in a federal court failed to allege the amount in controversy, but did not affirmatively show a want of jurisdiction, it was held that plaintiff might amend. Home Ins. Co. *v.* Nobles, 63 Fed. 641.

87. Gale *v.* Harby, 20 Fla. 171; Johnson *v.* Worthy, 17 Ga. 420; Tyler *v.* Galloway, 13 Fed. 477, 21 Blatchf. 66.

88. Leberman *v.* Leberman, 18 Phila. 254.

89. Jordan *v.* Jordan, 16 Ga. 446; Linn *v.* Patton, 10 W. Va. 187. Amendments adding necessary parties do not in themselves render a bill multifarious. Dobyns *v.* Hawley, 76 Va. 537. An amendment does not render a bill multifarious unless it states a new cause of action. North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 86 Wis. 292, 56 N. W. 870.

90. Rose *v.* Rose, 11 Paige (N. Y.) 166. Statements of demands having no connection with the main purpose of the bill may be stricken out by amendment, and the objection for multifariousness be thereby obviated. Alabama Warehouse Co. *v.* Jones, 62 Ala. 550; Weyman *v.* Thompson, 50 N. J. Eq. 8, 25 Atl. 205.

91. *Alabama.*—Rumbly *v.* Stainton, 24 Ala. 712.

Maryland.— Cockey *v.* Plempel, 86 Md. 181, 37 Atl. 792.

Vermont.— Hill *v.* Hill, 53 Vt. 578.

Virginia.— Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913.

West Virginia.— Seborn *v.* Beckwith, 30 W. Va. 774, 5 S. E. 450.

See 19 Cent. Dig. tit. "Equity," § 561.

In furtherance of justice, an amendment may be allowed, although it contradicts a material allegation of the bill (Hall *v.* Fisher, 3 Barb. Ch. (N. Y.) 637), but only upon a showing of inadvertence or mistake in the original, or other satisfactory reasons (Hill *v.* Harriman, 95 Tenn. 300, 32 S. W. 202).

92. *Alabama.*— Crabb *v.* Thomas, 25 Ala. 212; Larkins *v.* Biddle, 21 Ala. 252.

Arkansas.— Cook *v.* Bronaugh, 13 Ark. 183.

Colorado.— Givens *v.* Wheeler, 5 Colo. 598.

Connecticut.— Minor *v.* Woodbridge, 2 Root 274.

Georgia.— Rogers *v.* Atkinson, 14 Ga. 320; Carey *v.* Smith, 11 Ga. 539.

Mississippi.—Dickson *v.* Poindexter, Freem. 721.

Missouri.— Burnham *v.* Tillery, 85 Mo. App. 453.

New Jersey.— Carter *v.* Carter, 63 N. J. Eq. 726, 53 Atl. 160 [*affirmed* in (Err. & App. 1903) 55 Atl. 132].

New York.— Curtis *v.* Leavitt, 11 Paige 386.

Pennsylvania.— Wilhelm's Appeal, 79 Pa. St. 120; Bergner, etc., Brewing Co. *v.* Commercial Exch., 12 Wkly. Notes Cas. 460; Chambers *v.* Waterman, 1 Leg. Gaz. 60.

Virginia.— Pettyjohn *v.* Burson, (1895) 22 S. E. 508; Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913; Belton *v.* Apperson, 26 Gratt. 207; Lambert *v.* Jones, 2 Pat. & H. 144.

West Virginia.—Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402; Christian *v.* Vance, 41 W. Va. 754, 24 S. E. 596; Bird *v.* Stout, 40 W. Va. 43, 20 S. E. 852; Seborn *v.* Beckwith, 30 W. Va. 774, 5 S. E. 450.

United States.— Shields *v.* Barrow, 58 U. S. 130, 15 L. ed. 158; Judson *v.* Courier Co., 25 Fed. 705; Goodyear *v.* Bourn, 10 Fed. Cas. No. 5,561, 3 Blatchf. 266.

See 19 Cent. Dig. tit. "Equity," § 561.

After announcement of an adverse decision an amendment may be denied which entirely changes the scope of the bill. Sawyer *v.* Campbell, (Ill. 1885) 2 N. E. 660.

Laches of plaintiff.— An essentially different case may not made by amendment five years after plaintiff is apprised of his mistake in the original bill. Tomlinson *v.* Savage, 22 N. C. 68.

One who has originally no cause of action cannot introduce one arising after the filing of the original bill. Mellor *v.* Smither, 114 Fed. 116.

The frame and structure of a bill may be amended so as to obtain entirely different relief. Belton *v.* Apperson, 26 Gratt. (Va.) 207.

To conform to proof.— A bill may be amended so as to change its character even after decree, where it is clear that the cause was tried as it would have been tried had the original bill been like the amended bill. Tremaine *v.* Hitchcock, 23 Wall. (U. S.) 518, 23 L. ed. 97.

To conform to plaintiff's intention.—An essentially different case may be presented by amendment, where it is clear that plaintiff had intended originally to present such case, and the sufficiency of the original bill to do

case is not made by averments setting out the case more specifically or fully,[93] or by adding new facts or grounds for relief consistent with those originally presented,[94] although the relief demanded is thereby broadened or even changed, the main general object of the bill remaining the same.[95] An amendment will not be permitted which changes the case as to all defendants and presents a new case against new defendants,[96] nor may a plaintiff by amendment entirely change the grounds on which he seeks relief.[97] Therefore, while a plaintiff may amend by alleging the same title as claimed in the original bill, but obtained in a somewhat different way,[98] he may not in general assert a different title,[99] and especially where the change entails a change in the capacity in which plaintiff sues.[1] Where the grounds of the amended bill are repugnant to those of the original a new case is presented and the amendment will not be permitted.[2]

e. Facts Newly Discovered or Newly Arising. An amendment will be per-

so was a matter as to which counsel might differ. Drew *v.* Beard, 107 Mass. 64.

93. Conner *v.* Smith, 88 Ala. 300, 7 So. 150; Hauk *v.* Van Ingen, 196 Ill. 20, 63 N. E. 705 [*affirming* 97 Ill. App. 642]; Ewing *v.* Ferguson, 33 Gratt. (Va.) 548.

94. *Alabama.*— Harrison *v.* Yerby, (1893) 14 So. 321.

District of Columbia.— Brainard *v.* Buck, 16 App. Cas. 595.

Maryland.— Jeffrey *v.* Flood, 70 Md. 42, 16 Atl. 444.

Michigan.— Earle *v.* Grove, 92 Mich. 285, 52 N. W. 615.

United States.— Brainard *v.* Buck, 184 U. S. 99, 22 S. Ct. 458, 46 L. ed. 449 [*affirming* 16 App. Cas. (D. C.) 595]; Mills *v.* Scott, 43 Fed. 452.

See 19 Cent. Dig. tit. "Equity," § 562.

95. *Alabama.*— Smith *v.* Gordon, (1903) 34 So. 838; Metcalf *v.* Arnold, (1902) 32 So. 763; Freeman *v.* Pullen, 130 Ala. 653, 31 So. 451; Bellinger *v.* Lehman, 103 Ala. 385, 15 So. 600; Collins *v.* Stix, 96 Ala. 338, 11 So. 380; Winston *v.* Mitchell, 93 Ala. 554, 9 So. 551.

Georgia.— Merchants', etc., Bank *v.* Masonic Hall, 65 Ga. 603.

Iowa.— Thatcher *v.* Haun, 12 Iowa 303.

Massachusetts.— King *v.* Howes, 181 Mass. 445, 63 N. E. 1062.

Pennsylvania.— Clark *v.* Pittsburgh Natural Gas Co., 184 Pa. St. 188, 39 Atl. 86; Philadelphia *v.* Schuylkill River East Side R. Co., 15 Wkly. Notes Cas. 364.

Virginia.— Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

West Virginia.— McCrum *v.* Lee, 38 W. Va. 583, 18 S. E. 757.

United States.— Battle *v.* New York Mut. L. Ins. Co., 2 Fed. Cas. No. 1,109, 10 Blatchf. 417.

See 19 Cent. Dig. tit. "Equity," § 562.

Amendment which will require a rehearing and further testimony by presenting a new ground for relief will not be allowed. Goodbody *v.* Goodbody, 95 Ill. 456.

Amendment merely anticipating a defense and meeting it, without urging any new ground for relief, is allowable. Brooks *v.* Spann, 63 Miss. 198.

Amendment changing the conclusions of the pleader from the facts stated and praying different relief is proper. McDonell *v.* Finch, 131 Ala. 85, 31 So. 594.

A new case is not made by adding new parties and a prayer for alternative relief. Meads *v.* Hartley, 4 Mackey (D. C.) 391.

96. Leggett *v.* Bennett, 48 Ala. 380.

97. Carter *v.* Carter, 63 N. J. Eq. 726, 53 Atl. 160.

98. Bennett *v.* Woolfolk, 15 Ga. 213; McDougald *v.* Williford, 14 Ga. 665.

99. Marshall *v.* Olds, 86 Ala. 296, 5 So. 506; Penn *v.* Spence, 54 Ala. 35; Larkins *v.* Biddle, 21 Ala. 252; Miles *v.* Strong, 60 Conn. 393, 22 Atl. 959. But see Johnson *v.* Durner, 88 Ala. 580, 7 So. 245; Moore *v.* Alvis, 54 Ala. 356; Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec. 556.

A creditor's bill to redeem land sold at sheriff's sale cannot be transformed into a bill to enforce a trust in the land. Ward *v.* Patton, 75 Ala. 207.

A bill to enforce a trust arising out of a contract cannot be transformed into one to enforce a right of dower. Miazza *v.* Yerger, 53 Miss. 135.

1. A bill by a creditor for himself and all other creditors cannot be transformed into one to enforce a mortgage for himself alone. Scott *v.* Ware, 64 Ala. 174.

A bill to enforce a lien cannot be transformed into one to settle an estate and disburse assets among all creditors. Piercy *v.* Beckett, 15 W. Va. 444.

A bill to enforce demands of a corporation for the benefit of its creditors cannot be transformed into one to enforce a demand by plaintiff against defendants directly. Chambers *v.* Waterman, 1 Leg. Gaz. (Pa.) 60.

A bill on behalf of a wife cannot be transformed into one by the husband. King *v.* Avery, 37 Ala. 169.

2. Thompson *v.* McCulloch, 16 Ga. 527; Ogden *v.* Moore, 95 Mich. 290, 54 N. W. 899; Coleman *v.* Pinkard, 2 Humphr. (Tenn.) 185; Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 38 Fed. 57. See also Bristol *v.* Bristol, etc., Waterworks, 25 R. I. 189, 55 Atl. 710.

To make an amendment improper there must be a repugnancy between the purposes of the original and amended bills and not merely a change in the relief asked. Cain *v.* Gimon, 36 Ala. 168. Thus it has been held that a bill to reform an instrument cannot

mitted even at a late stage of the case in order to bring within the issues facts existing when the original bill was filed, but not discovered until shortly before the amendment was asked, where the case made by the amendment is not thereby rendered inconsistent with that made by the original bill.[3] Facts occurring after filing of the original should, however, be presented, where proper at all, by supplemental bill,[4] and cannot generally be introduced by amendment.[5] A well recognized exception to this rule exists where plaintiff was without capacity to sue when the original bill was filed, and the incapacity is thereafter removed, the want of capacity being such that defendant could have waived it.[6] It has also been held that where plaintiff's right to sue was inchoate when he filed his bill, he may by amendment show its consummation,[7] and in some jurisdictions amendments to introduce newly occurring facts seem to be permitted generally.[8]

f. Amending Prayer. The prayer for relief may be amended with or without incidental amendments in the body of the bill, where a different case is not made and the effect of the amendment is to enable the court to adapt its relief to

be amended into one to cancel it (Kennerty *v.* Etiwan Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669), or one to cancel an instrument be converted into one to compel specific performance thereof (Gardner *v.* Knight, 124 Ala. 273, 27 So. 298. But see Papin *v.* Goodrich, 103 Ill. 86; Ferry *v.* Clarke, 77 Va. 397). A bill to redeem from a sale cannot be converted into one to set it aside (Robinson *v.* United Trust, 71 Ark. 222, 72 S. W. 992. But see York *v.* Murphy, 91 Me. 320, 39 Atl. 992), and a bill by an assignee to foreclose a mortgage cannot be converted into one against his assignor to rescind the assignment (Baker *v.* Graves, 101 Ala. 247, 13 So. 275). See also for similar instances: Howell *v.* Motes, 54 Ala. 1; Darling *v.* Roarty, 5 Gray (Mass.) 71; Pratt *v.* Bacon, 10 Pick. (Mass.) 123; Tappan *v.* Western, etc., R. Co., 3 Lea (Tenn.) 106; Savage *v.* Worsham, 104 Fed. 18. On the other hand it has been held proper to permit an amendment where the original bill alleged an absolute title and the amended a transfer absolute in form but intended as a mortgage (Ingraham *v.* Foster, 31 Ala. 123); also to permit a suit to foreclose to be converted into one for specific performance, where the instrument was void as an executed contract (Randall *v.* Jaques, 20 Fed. Cas. No. 11,553), or one for specific performance into one to enforce a resulting trust (Milner *v.* Stanford, 102 Ala. 277, 14 So. 644), or one to reform and foreclose into one to reform and remove a cloud (Hawkins *v.* Pearson, 96 Ala. 369, 11 So. 304), or one to enforce a trust into one to quiet title (Newell *v.* Newell, 14 Kan. 202), or one to restrain action by one of two claimants to a fund into a bill for interpleader (Hastings *v.* Cropper, 3 Del. Ch. 165). There is no departure in changing a bill to partition land into one asking its sale and distribution of the proceeds (Fite *v.* Kennamer, 90 Ala. 470, 7 So. 920), or *vice versa* (Berry *v.* Tennessee, etc., R. Co., 134 Ala. 618, 33 So. 8; Watson *v.* Godwin, 4 Md. Ch. 25).

Before issue.— If a plaintiff may amend at all so as to make a case inconsistent with that originally made, he must do so before issue. Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258.

3. *Illinois.*— Jefferson *v.* Kennard, 77 Ill. 246.

Maryland.— Ridgeway *v.* Toram, 2 Md. Ch. 303.

Michigan.— Briggs *v.* Briggs, 20 Mich. 34.

Mississippi.— Hardie *v.* Bulger, 66 Miss. 577, 6 So. 186.

United States.— Anthony *v.* Campbell, 112 Fed. 212, 50 C. C. A. 195.

See 19 Cent. Dig. tit. "Equity," § 564.

4. See *infra*, XII, A, 2.

5. Hammond *v.* Place, Harr. (Mich.) 438; Hope *v.* Brinckerhoff, 4 Edw. (N. Y.) 660. If the original bill is demurrable an amended bill founded on facts occurring after the original is also demurrable. Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585. Matter occurring after the original cannot be introduced by amendment so as to vitiate proceedings already had. Camp *v.* Bancroft, 26 Ga. 393. A transaction occurring after the original cannot be introduced by amendment making a new and different case. Wright *v.* Frank, 61 Miss. 32.

6. Buck *v.* Buck, 11 Paige (N. Y.) 170; Swatzel *v.* Arnold, 23 Fed. Cas. No. 13,682, Woolw. 383.

7. Scheerer *v.* Agee, 113 Ala. 383, 21 So. 81; Butler *v.* Butler, 4 Litt. (Ky.) 201; Totten *v.* Nighbert, 41 W. Va. 800, 24 S. E. 627.

8. *Alabama.*— Alabama Warehouse Co. *v.* Jones, 62 Ala. 550.

Georgia.— Kirtland *v.* Macon, 62 Ga. 747.

Kentucky.— Leach *v.* Gentry, 1 J. J. Marsh. 349.

Missouri.— Pratt *v.* Walther, 42 Mo. App. 491.

Vermont.— Blaisdell *v.* Stevens, 16 Vt. 179.

Virginia.— Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

See 19 Cent. Dig. tit. "Equity," § 564.

Where no answer has been filed, an amendment may be allowed touching matters occurring after the filing of the bill. **Luft** *v.* Gossrau, 31 Ill. App. 530.

the case made by the bill and sustained by the proof.[9] Before answer filed plaintiff may amend by inserting or striking out a waiver of discovery.[10] But the effect of a sworn answer cannot be destroyed by an amendment subsequently made waiving the oath.[11] It seems that if the special relief asked is waived other relief cannot be obtained by amendment where it could not be had under the prayer for general relief,[12] but a prayer for general relief may be added by amendment.[13]

g. Amending to Meet the Answer. If plaintiff wishes to merely traverse the answer he must do so by replication,[14] and not by amending his bill.[15] In order, however, to meet affirmatively a defense which appears in the answer the bill should be amended by stating such defense as a pretense and adding a charge in reply thereto.[16] The right to amend is not confined to the avoidance of defenses presented by the answer, but extends generally so as to enable plaintiff to conform his case to new facts presented by the answer, to enable plaintiff to state particulars where the answer is such as to call for greater particularity than was at first required,[17] to enable him to avail himself of an admission contained in the

9. *Alabama.*— Truss *v.* Miller, 116 Ala. 494, 22 So. 863.

Georgia.— Tate *v.* Goff, 89 Ga. 184, 15 S. E. 30; De Lacy *v.* Hurst, 83 Ga. 223, 9 S. E. 1052; Dearing *v.* Charleston Bank, 6 Ga. 581.

Maine.— Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059.

Mississippi.— Crane *v.* Davis, (1896) 21 So. 17.

New Hampshire.— Pennock *v.* Ela, 41 N. H. 189.

Vermont.— Smith *v.* Onion, 19 Vt. 427.

Virginia.— Parrill *v.* McKinley, 9 Gratt. 1, 58 Am. Dec. 212.

United States.— Pendery *v.* Carleton, 87 Fed. 41, 30 C. C. A. 510; Maynard *v.* Tilden, 28 Fed. 688; Hardin *v.* Boyd, 113 U. S. 756, 5 S. Ct. 771, 28 L. ed. 1141 [*distinguishing* Shields *v.* Barrow, 17 How. 130, 15 L. ed. 158].

See 19 Cent. Dig. tit. "Equity," § 566.

Allowable amendment.— A bill was filed by a mortgagee seeking to establish an equitable lien, and assuming that the mortgage was void. All the equities having been gone into and the lien refused, plaintiff was permitted to amend so as to pray foreclosure should the mortgage become valid. Church *v.* Holcomb, 45 Mich. 29, 7 N. W. 167.

Amendments not allowable.— But where a bill sought to set aside a contract on the ground of fraud, it was held that plaintiff could not amend by adding an alternative prayer for specific performance. Shields *v.* Barrow, 17 How. (U. S.) 130, 15 L. ed. 158. An amendment praying an account will not be allowed after final hearing on bill, answer, and proofs. Jones *v.* Wadsworth, 11 Phila. (Pa.) 239. A prayer may not be amended so as to change the object of the bill. Curtis *v.* Leavitt, 4 Edw. (N. Y.) 246.

An offer to amend by adding a new prayer must specify the grounds of the prayer. Mitchell *v.* Fullington, 83 Ga. 301, 9 S. E. 1083.

As to amending prayers under the codes see Stephenson *v.* Stephenson, 72 S. W. 742, 24 Ky. L. Rep. 1873; Comstock *v.* White, 31 Barb. (N. Y.) 301; Zimmerman *v.* Dickerhoff, 14 N. Y. St. 595; Dusenbury *v.* Dusenbury, 4 N. Y. Civ. Proc. 126.

10. Price *v.* Price, 90 Ga. 244, 15 S. E. 774; Merchants', etc., Nat. Bank *v.* Masonic Hall, 65 Ga. 603.

11. Springfield Co. *v.* Ely, 44 Fla. 319, 32 So. 892. Where an infant defendant on coming of age was permitted to waive the answer of his guardian *ad litem* and answer anew, plaintiff was permitted to amend his bill and waive the oath to the answer. Stephenson *v.* Stephenson, 6 Paige (N. Y.) 353.

12. Livingston *v.* Hayes, 43 Mich. 129, 5 N. W. 78.

Where there is no prayer for general relief no relief can be granted other than that specially prayed. Halsted *v.* Meeker, 18 N. J. Eq. 136. See also *supra*, VII, B, 9.

If the bill and the proofs make a strong case for relief not specially sought the prayer may be amended and the relief granted. New York F. Ins. Co. *v.* Tooker, 35 N. J. Eq. 408.

13. McCrum *v.* Lee, 38 W. Va. 583, 18 S. E. 757.

14. See *supra*, IX, 1.

15. Smith *v.* Vaughan, 78 Ala. 201; Lanier *v.* Hill, 30 Ala. 111.

16. Beattie *v.* Abercrombie, 18 Ala. 9; Connerton *v.* Millar, 41 Mich. 608, 2 N. W. 932; Roundtree *v.* Gordon, 8 Mo. 19; Spencer *v.* Van Duzen, 1 Paige (N. Y.) 555. This purpose must be accomplished by amendment and not by special replication. Vattier *v.* Hinde, 7 Pet. (U. S.) 252, 8 L. ed. 675.

Where lapse of time is set up as a defense plaintiff may amend to set up facts in excuse of his delay. Johnson *v.* Johnson, 5 Ala. 90; Keeton *v.* Keeton, 20 Mo. 530; Wharton *v.* Lowrey, 29 Fed. Cas. No. 17,481, 2 Dall. 364. Leave will not be given to set up an excuse which is evidently false. Prescott *v.* Hubbell, 1 Hill Eq. (S. C.) 210.

To meet a defense presented by supplemental answer plaintiff has a right seasonably to amend. Ward *v.* Ward, 50 W. Va. 517, 40 S. E. 472.

17. Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Chalfants *v.* Martin, 25 W. Va.

answer,[18] or of a new equity in his favor disclosed by the answer.[19] So plaintiff may amend to adapt his case to a state of facts first appearing in the answer, but differing in detail from those assumed in drawing the bill.[20] It seems that an amendment will not be permitted, at least unless very good cause is shown, merely to add interrogatories, without any statements or charges for their foundation other than those already contained in the bill.[21] Defendant cannot require plaintiff to amend so as to expose defects in his case.[22]

h. When Formal Amendment Unnecessary. The court will sometimes treat a formal defect as amended without an actual amendment,[23] and even omissions may under some circumstances be disregarded.[24] Where new matter in the answer is of such a character as to require an amendment to the bill, but the parties proceed to proofs and such new matter is not proved, the necessity for an amendment no longer exists.[25] Where matter which should be introduced by an amended bill is presented by one miscalled a supplemental bill, the court will treat it as an amendment.[26]

2. At What Time Bill May Be Amended — a. General Rule. The court may in its discretion permit amendments at any stage of the case,[27] and this discretion is exercised with a view to the character of the amendment and the circumstances under which it is sought, amendments of a purely formal character being freely permitted, but amendments substantially changing the case being rarely allowed in its later stages.[28] Application to amend the bill should in any case be made as soon as practicable after the necessity therefor is discovered,[29] and an amendment otherwise proper may be denied for laches in making the application.[30] So

394. Plaintiff should apply for leave to amend his bill when he discovers from the answer that it is necessary to allege new facts in order to get a complete answer. Duponti *v.* Mussy, 8 Fed. Cas. No. 4,185, 4 Wash. 128.

18. Hoff *v.* Burd, 17 N. J. Eq. 201.

An amendment for this purpose must aver the facts which it is desired to take advantage of; a statement that plaintiff is willing to accept defendant's version will not do. Hyre *v.* Lambert, 37 W. Va. 26, 16 S. E. 446.

19. Highway Com'rs *v.* Dehoe, 43 Ill. App. 25; Gerrish *v.* Black, 99 Mass. 315; Carrow *v.* Adams, 65 N. C. 32.

20. Horn *v.* Clements, (N. J. Ch. 1887) 8 Atl. 530; Redstrake *v.* Surron, (N. J. Ch. 1886) 3 Atl. 693; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; *In re* Wellhouse, 113 Fed. 962. Leave may be given on the hearing of an application for an injunction to supply an omission which is made the ground of an objection in the answer. Delaware, etc., Canal Co. *v.* Raritan, etc., R. Co., 14 N. J. Eq. 445.

21. Garner *v.* Keaton, 13 Ga. 431; Richardson *v.* Wolfe, 31 Miss. 616.

22. Phelps *v.* Elliott, 26 Fed. 881, 23 Blatchf. 470.

23. Cahalan *v.* Monroe, 56 Ala. 303. Where all the material facts were alleged but the bill failed to distinguish between acts of one as executor proper and as executor under a power coupled with a trust, and no objection was made in the court below, it was held that an amendment was not imperative. Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130.

24. Ferris *v.* Hoglan, 121 Ala. 240, 25 So. 834. Notice may be proved without a charge of notice where the answer denies notice. O'Neill *v.* Cole, 4 Md. 107. In a suit to charge a trustee for wasting trust funds it is unnecessary to amend in order to charge each fresh malversation. Harrison *v.* Mock, 10 Ala. 185.

25. Batre *v.* Auze, 5 Ala. 173.

26. Bauer Grocer Co. *v.* Zelle, 172 Ill. 407, 50 N. E. 238; Cheek *v.* Tilley, 31 Ind. 121. Such a misnaming of a bill cannot prejudice defendants after hearing on the merits. Hess *v.* Final, 32 Mich. 515. An affidavit used on a hearing of an application for the appointment of a receiver cannot be treated as an amended bill. Sidway *v.* Missouri Land, etc., Co., 116 Fed. 381.

27. Jefferson County *v.* Ferguson, 13 Ill. 33; Shaw *v.* Monson Maine Slate Co., 96 Me. 41, 51 Atl. 285; Truly *v.* Lane, 7 Sm. & M. (Miss.) 325, 45 Am. Dec. 305; Perkins *v.* Hays, Cooke (Tenn.) 189, 5 Am. Dec. 680.

Md. St. (1854) c. 230, allows amendments at any time before final decree. Calvert *v.* Carter, 18 Md. 73.

An order sustaining a demurrer as to one aspect of a bill framed in a double aspect is interlocutory only, and an amendment may be permitted at any time before final decree. Globe-Wernicke Co. *v.* Fred Macey Co., 119 Fed. 696, 56 C. C. A. 304.

28. Evans *v.* Bolling, 5 Ala. 550; Sumrall *v.* Ryan, 1 J. J. Marsh. (Ky.) 97; Taylor *v.* Longworth, 14 Pet. (U. S.) 172, 10 L. ed. 405; Walden *v.* Bodley, 14 Pet. (U. S.) 156, 10 L. ed. 398.

29. Carey *v.* Smith, 11 Ga. 539; State Bank *v.* Niles, Walk. (Mich.) 398; Rodgers *v.* Rodgers, 1 Paige (N. Y.) 424.

30. Richmond Tp. School Dist. *v.* Thompson, 2 Woodw. (Pa.) 345; Johnston *v.* Gros-

where defendant, relying on the frame of the original bill, has altered his situation so that an amendment would operate to his prejudice, plaintiff will not thereafter be permitted to amend.[31]

b. Before Replication. Few questions arise as to the right to amend a bill before a replication is filed or the cause set down for hearing on bill and answer. As already stated plaintiff may in most cases amend his bill after a demurrer has been sustained.[32] Before answer amendments are allowed often as of right,[33] but it sometimes rests in the discretion of the court.[34] Amendments after answer rest in discretion,[35] and such amendments are freely allowed in order to permit plaintiff to meet the case made by the answer.[36]

c. After Replication and Before Hearing. The proper time to amend is before issue,[37] and special cause must be shown in order to justify an amendment thereafter,[38] it being held that the filing of a replication precludes plaintiff from making an amendment where he knew the necessity therefor before filing the replication.[39] A mere inadvertence may be corrected at any time, at least before hearing,[40] but very special cause must usually be shown in order to amend after a case is ready for hearing,[41] and new matters cannot generally be introduced after the cause is set down for hearing.[42] Except to enable plaintiff to conform his

venor, 105 Tenn. 353, 59 S. W. 1028; Marr *v.* Wilson, 2 Lea (Tenn.) 229. An amendment should not be denied for staleness of the demand asserted in the bill, where the objection remains open to the defendant at a later stage. Fisher *v.* Rutherford, 9 Fed. Cas. No. 4,823, Baldw. 188.

An excuse must be given for not having incorporated the matter of the amendment in the original bill. Carey *v.* Smith, 11 Ga. 539; Rodgers *v.* Rodgers, 1 Paige (N. Y.) 424; North American Coal Co. *v.* Dyett, 2 Edw. (N. Y.) 115.

31. Curtis *v.* Leavitt, 11 Paige (N. Y.) 386.

32. See *supra*, VIII, C, 7, b, (II).

After general demurrer for want of equity, the substance of the bill should not be changed, and amendments should be restricted to curing defects of parties or omissions or mistakes connected with the substance. Seymour *v.* Long Dock Co., 17 N. J. Eq. 169.

33. Droullard *v.* Baxter, 2 Ill. 191.

U. S. Eq. Rule 28 provides that plaintiff may of course and without costs amend his bill in any manner whatsoever before any copy has been taken out of the clerk's office, and in any small matters afterward; that he amend in a material point as of course after a copy has been taken before answer, plea, or demurrer, but shall pay the costs occasioned thereby, and furnish defendant a copy of the amendment. An absolute right exists to amend a bill after the sustaining of objections to the jurisdiction to entertain it in the form in which it is framed, where there has been no demurrer, plea, or answer. Insurance Co. of North America *v.* Svendsen, 74 Fed. 346.

Under the Alabama practice, if a motion is made to dismiss for want of equity, leave to amend asked at the same time should be granted. Martin *v.* Mohr, 56 Ala. 221. See also East *v.* East, 80 Ala. 199.

34. Grange Warehouse Assoc. *v.* Owen, 86 Tenn. 355, 7 S. W. 457.

35. Craig *v.* People, 47 Ill. 487.

U. S. Eq. Rule 29 provides that after answer, plea, or demurrer and before replication plaintiff may, upon motion or petition, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day on payment of costs or without, as the judge may direct.

36. See *supra*, XI, A, 1, g.

37. Richmond Tp. School Dist. *v.* Thompson, 2 Woodw. (Pa.) 345.

38. Boyd *v.* Clements, 8 Ga. 522.

39. Vermilyea *v.* Odell, 4 Paige (N. Y.) 121; Sears *v.* Powell, 5 Johns. Ch. (N. Y.) 259; Wilbur *v.* Collier, Clarke (N. Y.) 315.

In federal courts and in Pennsylvania.— U. S. Eq. Rule 29 provides that after replication plaintiff shall not be permitted to withdraw it and amend his bill, except upon a special order of a judge upon motion or petition after due notice and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause. Where an amendment is allowed at the hearing in the presence of both parties, it will be presumed that it was made on sufficient evidence and not for the purpose of vexation or delay. Mills *v.* Scott, 43 Fed. 452. The court should deny the application unless it is supported by the affidavit required by the rule. Beavers *v.* Richardson, 118 Fed. 320. The same rule exists in Pennsylvania. Howard *v.* Olyphant Borough, 181 Pa. St. 191, 37 Atl. 258.

40. Holland *v.* Trotter, 22 Gratt. (Va.) 136.

41. Rogers *v.* Atkinson, 14 Ga. 320. See Rucker *v.* Howard, 2 Bibb (Ky.) 166.

42. Robinson *v.* United Trust, 71 Ark. 222, 72 S. W. 992; Patterson *v.* Fowler, 23 Ark.

bill to the proofs received,[43] amendments will not be permitted after the evidence has been taken unless under very special circumstances,[44] and the rule is that amendments at that stage must not be such as to substantially change the issues.[45] Amendments may, however, be made at this stage to bring in new parties,[46] but even for that purpose the application should be made earlier if the objection was raised by the answer.[47]

d. At Hearing. The power of the court to permit an amendment on final hearing is exercised only in furtherance of justice, where it is required for the protection of plaintiff and does not substantially abridge the right of defense.[48] Amendments have been permitted under such circumstances to bring in new parties,[49] to add an averment of the amount in controversy, where essential to the jurisdiction,[50] to amend the prayer,[51] to perfect a defective statement,[52] to meet matter set up in the answer,[53] and where the real truth was not disclosed by the answer and appeared only in the evidence.[54] The court will refuse leave where the amendment would make a substantially different case,[55] or where, because of laches, weakness of proof, or other circumstances, the case does not commend itself to the favorable consideration of the court.[56]

e. After Submission and Before Decree. After a hearing and submission of

459; Walker *v.* Brown, 45 Miss. 615; Vertner *v.* Griffith, Walk. (Miss.) 414. Where an objection that a bill was prematurely filed is not made until the cause is set down for hearing, and by that time plaintiff's case is complete, the bill will not be dismissed, but plaintiff may amend on terms. Sarter *v.* Gordon, 2 Hill Eq. (S. C.) 121.

43. See *infra*, XI, A, 2, g. An amendment will not be allowed after proof taken where there is no proof to support it. Wright *v.* Dunklin, 83 Ala. 317, 3 So. 597; Curtis *v.* Goodenow, 24 Mich. 18.

44. Bowen *v.* Idley, 6 Paige (N. Y.) 46; Thorn *v.* Germand, 4 Johns. Ch. (N. Y.) 363.

45. Steinriede *v.* Tegge, 14 S. W. 357, 12 Ky. L. Rep. 377; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258; Dodd *v.* Astor, 2 Barb. Ch. (N. Y.) 395; Bass *v.* Feigenspan, 82 Fed. 260.

Long delay in seeking an amendment may control the discretion of the court in refusing leave after proof has been taken. Hoofstitler *v.* Hostetter, 172 Pa. St. 575, 33 Atl. 753; O'Malley *v.* O'Malley, 11 Wkly. Notes Cas. (Pa.) 39.

In Pennsylvania the decisions are conflicting as to the propriety of an amendment after a reference to a master and the examination of witnesses. See Matlack *v.* Mutual L. Ins. Co., 3 Pa. Dist. 138, 14 Pa. Co. Ct. 188; Dougherty's Appeal, 1 Wkly. Notes Cas. (Pa.) 593 [*reversing* 10 Phila. 509].

46. Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Bowen *v.* Idley, 6 Paige (N. Y.) 46; Thorn *v.* Germand, 4 Johns. Ch. (N. Y.) 363; Holland *v.* Trotter, 22 Gratt. (Va.) 136; Ratliff *v.* Sommers, (W. Va. 1904) 46 S. E. 712. But see Parsons *v.* Johnson, 84 Ala. 254, 4 So. 385.

In Virginia it was held that a supplemental bill and not an amended bill must be resorted to to bring in new parties after publication. Pleasants *v.* Logan, 4 Hen. & M. 489.

47. Vanderwerker *v.* Vanderwerker, 7 Barb. (N. Y.) 221; Scholl *v.* Schoener, 1 Woodw. (Pa.) 200. Where objection for want of parties is made by answer the bill should be amended before further expense is incurred, but the court may permit a later amendment on payment of costs. Van Epps *v.* Van Dusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516.

48. Ogden *v.* Thornton, 30 N. J. Eq. 569; Midmer *v.* Midmer, 26 N. J. Eq. 299.

In Illinois amendments may be made at the hearing if no party is surprised or unreasonably delayed thereby. Koch *v.* Roth, 150 Ill. 212, 37 N. E. 317 [*affirming* 47 Ill. App. 458].

In Kentucky it was held that an amendment should not be permitted at the hearing, but that the error was harmless if it did not affect the decree. Dunn *v.* Dunn, 1 J. J. Marsh. 585. But see Rogers *v.* Rogers, 15 B. Mon. 364.

As to the Michigan practice see Goodenow *v.* Curtis, 18 Mich. 298.

49. McDougald *v.* Dougherty, 11 Ga. 570; Hutchinson *v.* Reed, Hoffm. (N. Y.) 316; Oliver *v.* Dix, 21 N. C. 158; Roddy *v.* Elam, 12 Rich. Eq. (S. C.) 343.

50. Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357.

51. Morrison *v.* Mayer, 63 Mich. 238, 29 N. W. 698.

52. Gorham *v.* Wing, 10 Mich. 486; Boehme *v.* Rall, 51 N. J. Eq. 541, 26 Atl. 832.

53. Munch *v.* Shabel, 37 Mich. 166.

54. Howell *v.* Sebring, 14 N. J. Eq. 84. See also Crocket *v.* Lee, 7 Wheat. (U. S.) 522, 5 L. ed. 513.

55. Peacock *v.* Terrey, 9 Ga. 137; Sweet *v.* Mitchell, 15 Wis. 641.

Under special circumstances plaintiff was permitted at the hearing to transform his bill from one to discharge a mortgage into a bill to redeem. Harrigan *v.* Bacon, 57 Vt. 644.

56. Barton *v.* Long, 45 N. J. Eq. 841, 14 Atl. 565, 566, 568, 19 Atl. 623; Midmer *v.* Midmer, 26 N. J. Eq. 299. An amendment should never be permitted to aid a party in

the cause the discretion of the court is still less readily moved to permit an amendment,[57] and an amendment will not then be permitted, the effect of which would be to materially change the issues or introduce new issues,[58] unless at least an opportunity is given to introduce further proofs.[59] It is proper to refuse an amendment after an adverse decision has been announced, especially where plaintiff has been guilty of laches.[60] Amendments have been permitted in matters more or less formal, as to remove a purely technical objection to the testimony,[61] or to attach exhibits.[62] Permission also has been given to correct a description of the land involved after submission,[63] but denied after decree and sale thereunder.[64] The latitude allowed in adding new parties continues after submission, and amendments for that purpose may be permitted.[65] A formal amendment to show jurisdiction of the person will be permitted after an order taking the bill *pro confesso*.[66]

f. After Decree. Amendments after decree are rarely permitted, and never when their effect would be to add a new claim or present a materially different case.[67] No amendment can be made after a dismissal,[68] or where the rights of third persons have intervened.[69] An amendment may be permitted to correct a clerical error,[70] or after a decree *nisi*.[71] Slight circumstances of laches in failing

suppressing a material fact. Fricke *v.* Magee, 10 Wkly. Notes Cas. (Pa.) 50.

57. Gubbins *v.* Laughtenschlager, 75 Fed. 615.

58. *Alabama.*— McKinley *v.* Irvine, 13 Ala. 681.

Illinois.— Sawyer *v.* Campbell, 130 Ill. 186, 22 N. E. 458.

New York.— Shephard *v.* Merril, 3 Johns. Ch. 423.

Rhode Island.— National Bank of Commerce *v.* Smith, (1892) 24 Atl. 469.

United States.— Snead *v.* McCoull, 12 How. 407, 13 L. ed. 1043.

See 19 Cent. Dig. tit. "Equity," § 563.

Amendment which is unsupported by proof will not then be permitted. Alexander *v.* Taylor, 56 Ala. 60.

Amendments should be made before report of the facts by a committee, under the former Connecticut practice, but under special circumstances they may be made thereafter. Hoyt *v.* Smith, 27 Conn. 468; Camp *v.* Waring, 25 Conn. 520. After overruling exceptions to an auditor's report it is too late to amend. Bryant *v.* Welch, 68 Ga. 292. See also Sanborn *v.* Sanborn, 7 Gray (Mass.) 142.

59. Andrus *v.* Smith, 133 Cal. 78, 65 Pac. 320; Mason *v.* Bair, 33 Ill. 194.

It is not error to refuse an amendment which may require the taking of additional testimony and result in an entirely different determination of the case. Prehm *v.* Porter, 165 Mo. 115, 65 S. W. 264.

60. Bill *v.* Schilling, 39 W. Va. 108, 19 S. E. 514; Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326 [*affirming* 51 Fed. 693].

Under Ill. Rev. St. c. 22, § 37, it is not error to allow an amendment after decision and before entry of decree. Booth *v.* Wiley, 102 Ill. 84.

Under Ala. Code, § 3449, authorizing amendments at any time before final decree, a disallowance of an amendment filed on the day of the entry of the decree is proper, where it does not appear that it was filed before the decree was rendered. Beatty *v.* Brown, 85 Ala. 209, 4 So. 609.

Amended bill filed eight years after the original and on the day the original was dismissed should be disregarded on appeal. Terry *v.* McLure, 103 U. S. 442, 26 L. ed. 403.

61. Hamilton *v.* Southern Nevada Gold, etc., Min. Co., 33 Fed. 562.

62. Brown *v.* Redwyne, 16 Ga. 67.

63. Rhea *v.* Puryear, 26 Ark. 344.

64. Owen *v.* Bankhead, 82 Ala. 399, 3 So. 97.

65. Marsh *v.* Green, 79 Ill. 385; Ford *v.* Belmont, 7 Bosw. (N. Y.) 508.

This may be permitted even on appeal, where the want of such party is all that prevents relief. Lewis *v.* Darling, 16 How. (U. S.) 1, 14 L. ed. 819.

Where such new parties have ceased to be necessary by a termination of their interest, permission to amend will not be given. Ingraham *v.* Dunnell, 5 Metc. (Mass.) 118.

66. Classon *v.* Cooley, 8 N. Y. 426. See also Scott *v.* Davis, 9 Rich. Eq. (S. C.) 38.

67. *Alabama.*—Munter *v.* Linn, 61 Ala. 492.

District of Columbia.—Ambler *v.* Archer, 2 App. Cas. 41.

New Jersey.— Jones *v.* Davenport, 45 N. J. Eq. 77, 17 Atl. 570.

New York.— Lloyd *v.* Brewster, 4 Paige 537, 27 Am. Dec. 88; Morris *v.* Mowatt, 4 Paige 142.

Vermont.— Norton *v.* Parsons, 67 Vt. 526, 32 Atl. 481.

See 19 Cent. Dig. tit. "Equity," § 563.

68. Emory *v.* Keighan, 88 Ill. 516; Elston *v.* Drake, 5 Blackf. (Ind.) 540.

An amendment after demurrer must be made before judgment on the demurrer. Holliday *v.* Riordon, 12 Ga. 417.

69. Brinegar *v.* Allen, 2 Duv. (Ky.) 99. No amendment can be made after decree and the filing of a supplemental bill. Clark *v.* Hull, 31 Miss. 520.

70. Donnelly *v.* Ewart, 3 Rich. Eq. (S. C.) 18. But see Cummings *v.* Gill, 6 Ala. 562.

71. Lytle *v.* Breckenridge, 3 J. J. Marsh. (Ky.) 663. A decree determining all matters except the adjustment of an account, which was left to the register, was held to be final

to amend before decree will prevent the allowance of the amendment thereafter.[72] An amendment may be permitted on appeal to prevent surprise,[73] as to conform the bill to a state of facts which had been assumed by both parties in the taking of the proofs.[74] An amendment may be made after reversal,[75] but not so as to present a different case.[76]

g. Amending to Conform to Proof. One class of amendments is freely permitted without much regard to the time when the application is made, except that they should be made promptly after the necessity therefor appears,[77] and generally before final decree.[78] The amendments so permitted are to conform the pleading to the proofs actually made.[79] The reason for allowing such amendments is that where the parties have treated the matter as being in issue, and have introduced evidence thereto, no surprise can be occasioned by the amendment, and the case does not fall within the reason of the rule requiring material amendments to be made at an early stage of the proceeding.[80] Amendments are therefore permitted where the evidence has made out a case for relief, but differing in some of its phases, sometimes materially, from the case made by the bill,[81] and also where

and to prevent subsequent amendments. Hunt *v.* Stockton Lumber Co., 113 Ala. 387, 21 So. 454. See also Hazard *v.* Hidden, 14 R. I. 356.

An order for a decree is not a final decree in itself, and an amendment may be made before the decree thereon is extended. Gilpatrick *v.* Glidden, 82 Me. 201, 19 Atl. 166.

72. Kirby *v.* Thompson, 6 Johns. Ch. (N. Y.) 79; Palmer *v.* Palmer, 6 Rich. Eq. (S. C.) 150.

73. Boyd *v.* Clements, 8 Ga. 522. See also King *v.* King, 45 Ga. 195; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169.

74. Williams *v.* Chambers, 45 N. C. 75.

75. Reversal with leave to amend is a common practice. Langley *v.* Langley, 121 Ala. 70, 25 So. 707; Ryall *v.* Prince, 71 Ala. 66; Parks *v.* Parks, 66 Ala. 326; Martin *v.* Martin, 22 Ala. 86; Ogden *v.* Thornton, 30 N. J. Eq. 569; Peck *v.* Mallams, 10 N. Y. 509; Lamb *v.* Cecil, 25 W. Va. 288; Estho *v.* Lear, 7 Pet. (U. S.) 130, 8 L. ed. 632; Crocket *v.* Lee, 7 Wheat. (U. S.) 522, 5 L. ed. 513; Union Cent. L. Ins. Co. *v.* Phillips, 102 Fed. 19, 41 C. C. A. 263; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520. See also Mandeville *v.* Burt, 8 Pet. (U. S.) 256, 8 L. ed. 936. But this will not be done to enable plaintiff to make an entirely different case (Williams *v.* Barnes, 28 Ala. 613; Squire *v.* Hewlett, 141 Mass. 597, 6 N. E. 779) or to introduce facts which were known to him when he filed his bill (McEwen *v.* Gillespie, 3 Lea (Tenn.) 204; Fogg *v.* Union Bank, 4 Baxt. (Tenn.) 539).

76. Fenno *v.* Coulter, 14 Ark. 38; Hannum *v.* Cameron, 20 Miss. 509.

77. Midmer *v.* Midmer, 26 N. J. Eq. 299.

78. Winter *v.* Merrick, 69 Ala. 86.

Under Ill. Rev. St. c. 37, § 65, which permits the court at the succeeding term to set aside a decree rendered in vacation, an amendment to conform to proofs may be allowed at the term following the entry of the decree. Cooper *v.* Gum, 152 Ill. 471, 39 N. E. 267.

79. *California.*— Tryon *v.* Sutton, 13 Cal. 490.

Georgia.— Sears *v.* Odell, 66 Ga. 234.

Illinois.— Hewitt *v.* Dement, 57 Ill. 500.

Mississippi.— Bacon *v.* Conn, Sm. & M. Ch. 348.

Missouri.— Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177.

New Hampshire.— Bellows *v.* Stone, 14 N. H. 175.

New York.—Ryerson *v.* Minton, 3 Edw. 382.

Pennsylvania.— Fetterling's Estate, 1 Woodw. 169.

Tennessee.— Patton *v.* Dixon, 105 Tenn. 97, 58 S. W. 299.

West Virginia.—Ratliff *v.* Sommers, (1904) 46 S. E. 712; Lamb *v.* Cecil, 25 W. Va. 288.

Wisconsin.— Brayton *v.* Jones, 5 Wis. 117; School Dist. No. 3 *v.* Macloon, 4 Wis. 79.

See 19 Cent. Dig. tit. "Equity," § 547.

Ala. Code, § 3449, expressly providing for such amendments, refers to proofs already taken, and an amendment will be denied if unsupported by facts proved. Beatty *v.* Brown, 85 Ala. 209, 4 So. 609.

It is sometimes held error to refuse such an amendment. Henderson *v.* Hall, 134 Ala. 455, 32 So. 840, 63 L. R. A. 673; Mix *v.* People, 116 Ill. 265, 4 N. E. 783.

80. Moshier *v.* Knox College, 32 Ill. 155. See also Van Riper *v.* Claxton, 9 N. J. Eq. 302; Walker *v.* Bamberger, 17 Utah 239, 54 Pac. 108.

Defendant should be permitted to amend his answer it seems, and to take further evidence if necessary. Fletcher *v.* Titusville Gas, etc., Co., 8 Phila. (Pa.) 559.

81. *Alabama.*— Gilmer *v.* Wallace, 75 Ala. 220; Munchus *v.* Harris, 69 Ala. 506; Moore *v.* Alvis, 54 Ala. 356.

California.— Connalley *v.* Peck, 3 Cal. 75.

Connecticut.— Camp *v.* Waring, 25 Conn. 520.

Illinois.— South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732; Lewis *v.* Lanphere, 79 Ill. 187; Martin *v.* Eversal, 36 Ill. 222.

Kentucky.— Stephenson *v.* Stephenson, 72 S. W. 742, 24 Ky. L. Rep. 1873, held reversible error to refuse leave to amend.

Michigan.— Babcock *v.* Twist, 19 Mich. 516.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

there is a similar variance between the bill and the findings of a master or committee;[82] but the power is exercised only to correct the bill in certain of its particulars, and not where the amendment would affect its general scope and present essentially a new case.[83] In most of the cases cited the amendment was asked and allowed on the hearing, but it may be made after the hearing,[84] after verdict on issues submitted to the jury,[85] or sometimes even on appeal.[86]

3. AMENDMENT OF SWORN BILLS. Where a bill is verified it is usually for the purpose of obtaining an injunction or other special remedy thereon, and the question of permitting amendments thereto is usually more or less complicated with questions relating to the granting of such remedy.[87] Such amendments may be permitted to prevent a failure of justice,[88] but are allowed with great caution.[89] The court will in some cases permit a sworn bill to be amended by amplifying or adding to its averments;[90] but not by striking out an averment, except under a clear showing of very special circumstances, such as mistake.[91] The amendment may not be made after answer without notice,[92] or without an excuse for the delay.[93] The proposed amendment must be presented with the application, and its truth sworn to;[94] and if allowed it must not be made by altering the original bill but must be engrossed and annexed to the original.[95]

4. NECESSITY OF OBTAINING LEAVE TO AMEND — a. In General. While amendments in formal matters and, in the early stages of the case, in matters of sub-

New Hampshire.— Doe *v.* Doe, 37 N. H. 268.

Pennsylvania.— Woods *v.* McMillan, 32 Pittsb. Leg. J. 363.

West Virginia.— Doonan *v.* Glynn, 26 W. Va. 225; Lamb *v.* Laughlin, 25 W. Va. 300.

Wisconsin.— Hitchcock *v.* Merrick, 15 Wis. 522.

United States.— Neale *v.* Neale, 9 Wall. 1, 19 L. ed. 590; Tufts *v.* Tufts, 24 Fed. Cas. No. 14,233, 3 Woodb. & M. 456.

See 19 Cent. Dig. tit. "Equity," § 547.

A statement which turns out to be unsupported by proof may be stricken out. O'Connor *v.* O'Connor, 20 R. I. 256, 38 Atl. 370.

82. Stevens *v.* Church, 41 Conn. 369; Garner's Appeal, 1 Walk. (Pa.) 438.

83. *Alabama.*— Park *v.* Lide, 90 Ala. 246, 7 So. 805; Jones *v.* Reese, 65 Ala. 134.

Missouri.— Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177.

New Mexico.— Perea *v.* Gallegos, 4 N. M. 333, 20 Pac. 105.

New York.— Buffalo, etc., Ferry Co. *v.* Allen, 12 N. Y. Civ. Proc. 64.

West Virginia.— Lamb *v.* Cecil, 25 W. Va. 288.

See 19 Cent. Dig. tit. "Equity," § 547.

Where the bill charges actual fraud and the testimony shows constructive fraud alone the amendment should be made before hearing. Murray *v.* Hilton, 8 App. Cas. (D. C.) 281.

84. Greenland Church, etc., Soc. *v.* Hatch, 48 N. H. 393; Bellows *v.* Stone, 14 N. H. 175; Hampton *v.* Nicholson, 23 N. J. Eq. 423; Davison *v.* Davison, 13 N. J. Eq. 246.

85. Clark *v.* Keene First Cong. Soc., 46 N. H. 272.

86. Seymour *v.* Long Dock Co., 17 N. J. Eq. 169.

87. See, generally, INJUNCTIONS.

Where verification is unnecessary, it is no objection to amendment that the bill is verified. Ackley *v.* Croucher, 203 Ill. 530, 68 N. E. 86; Campbell *v.* Powers, 139 Ill. 128, 28 N. E. 1062.

88. Bauer Grocer Co. *v.* Zelle, 172 Ill. 407, 50 N. E. 238; Hall *v.* Fisher, 3 Barb. Ch. (N. Y.) 637.

89. Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46; Fricke *v.* Magee, 10 Wkly. Notes Cas. (Pa.) 50.

A rule permitting amendments of course before answer, plea, or demurrer does not include a sworn bill. Parker *v.* Grant, 1 Johns. Ch. (N. Y.) 434.

90. Carey *v.* Smith, 11 Ga. 539; Walker *v.* Walker, 3 Ga. 302; Marble *v.* Bonhotel, 35 Ill. 240; Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46; Renwick *v.* Wilson, 6 Johns. Ch. (N. Y.) 81.

Where a necessary party has been omitted he may be brought in by amendment after the dissolution of an injunction. Atkins *v.* Billings, 72 Ill. 597.

91. North River Bank *v.* Rogers, 8 Paige (N. Y.) 648; Swift *v.* Eckford, 6 Paige (N. Y.) 22. The whole substance of the bill cannot be stricken out by amendment and new matter inserted. Hart *v.* Henderson, 66 Ga. 568. It has been held that no material part can be stricken out. Carey *v.* Smith, 11 Ga. 539; Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46.

92. West *v.* Coke, 5 N. C. 191.

93. Everett *v.* Winn, Sm. & M. Ch. (Miss.) 67.

94. Rogers *v.* De Forest, 3 Edw. (N. Y.) 171. Where a bill sought an accounting and also an injunction, an unsworn amendment was allowed after replication where it related solely to the accounting. Gregg *v.* Brower, 67 Ill. 525.

95. Layton *v.* Ivans, 2 N. J. Eq. 387.

stance, are permitted with great liberality,[96] the allowance of any amendment and at any stage, in the absence of statute or rule to the contrary, rests in the discretion of the court,[97] and an order must be obtained granting leave.[98] Therefore an amendment which would otherwise be proper may be disallowed if it is clear that it could not be substantiated,[99] or if relief could not be granted upon the bill when amended.[1] When leave has been granted the order will be rescinded before the amendment is actually made at the request of the party obtaining the order.[2] In modern practice there are frequently provisions whereby amendments at early stages of the case or in formal matters may be made of course,[3] but, although the rule goes of course, such a rule must be entered in the absence of provisions to the contrary.[4]

b. Imposition of Terms. Where the allowance of amendments is discretionary the court may impose any terms, not in themselves unreasonable, as a condition of permitting the amendment.[5] The terms should be such as to protect

96. Field *v.* Middlesex Banking Co., 77 Miss. 180, 26 So. 365; Smith *v.* Harrington, 49 Miss. 771; Huffman *v.* Hummer, 17 N. J. Eq. 269; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169. See also *supra*, XI, A, 2, 3.

97. *California.*— Graham *v.* Stewart, 68 Cal. 374, 9 Pac. 555.

Florida.— Saunders *v.* Richard, 35 Fla. 28, 16 So. 679.

Georgia.— McDougald *v.* Williford, 14 Ga. 665; McDougald *v.* Dougherty, 11 Ga. 570; Georgia R., etc., Co. *v.* Milnor, 8 Ga. 313.

Illinois.— Gordon *v.* Reynolds, 114 Ill. 118, 28 N. E. 455; March *v.* Mayers, 85 Ill. 177; Barm *v.* Bragg, 70 Ill. 283; McArtee *v.* Engart, 13 Ill. 242.

Maryland.— West *v.* Hall, 3 Harr. & J. 221.

Mississippi.— Tanner *v.* Hicks, 4 Sm. & M. 294.

Pennsylvania.— Fricke *v.* Magee, 10 Wkly. Notes Cas. 50.

Vermont.— Porter *v.* Rutland Bank, 19 Vt. 410.

West Virginia.—Bill *v.* Schilling, 39 W. Va. 108, 19 S. E. 514.

United States.— Berliner Gramophone Co. *v.* Seaman, 113 Fed. 750, 51 C. C. A. 440.

See 19 Cent. Dig. tit. "Equity," § 545.

The court cannot of its own motion amend the pleadings. Caldwell *v.* King, 76 Ala. 149; Michigan Farmers' Bank *v.* Griffith, 2 Wis. 443.

98. Bondurant *v.* Sibley, 37 Ala. 565; Walsh *v.* Smyth, 3 Bland (Md.) 9; Baker *v.* Baldwin, 1 R. I. 489. See also 1 Daniell Ch. Pr. 519.

Where the court's attention was not called to an amendment error cannot be assigned because it was not allowed. Beatty *v.* Brown, 85 Ala. 209, 4 So. 609.

99. Prescott *v.* Hubbell, 1 Hill Eq. (S. C.) 210.

1. *Alabama.*— Tutwiler *v.* Atkins, 106 Ala. 194, 17 So. 394.

Georgia.— Thurmond *v.* Clark, 47 Ga. 500.

Massachusetts.— Platt *v.* Squire, 5 Cush. 551.

South Carolina.— Porter *v.* Cain, McMull. Eq. 81.

West Virginia.—Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402.

See 19 Cent. Dig. tit. "Equity," § 545.

2. Brooks *v.* Colby, 25 Ga. 634.

Where leave to amend was given on payment of costs of the answer and of opposing the application, plaintiff, if he elects not to amend, need not pay the costs of the answer, but must pay the cost of opposing the application. Van Ness *v.* Cantine, 4 Paige (N. Y.) 55.

By U. S. Eq. Rule 30, plaintiff is deemed to have abandoned an order to amend made after answer, plea, or demurrer, unless he file his amendment or amended bill on or before the next succeeding rule day.

3. **In Alabama** it seems that the absolute right to amend exists until final decree. Stein *v.* McGrath, 116 Ala. 593, 22 So. 861; Smith *v.* Coleman, 59 Ala. 260. But, after defendants have pleaded, a bill insufficient as one for discovery cannot as matter of right be amended by adding interrogatories. McCaw *v.* Barker, 115 Ala. 543, 22 So. 131.

In Indiana an amendment before answer is a matter of right. Cheek *v.* Tilley, 31 Ind. 121.

In various jurisdictions.— In New York by chancery rule 34 an unsworn bill might be amended as of course before replication and without payment of costs if a further answer was not thereby required. See Clark *v.* Judson, 2 Barb. 90; Williams *v.* Hogeboom, 8 Paige 469. The same period is fixed in some other jurisdictions within which an amendment may be made as of course. Hammond *v.* Place, Harr. (Mich.) 438; Buckley *v.* Corse, 1 N. J. Eq. 504; Mt. Olivet Cemetery Co. *v.* Budeke, 2 Tenn. Ch. 480.

By U. S. Eq. Rules 28 and 29 plaintiff may of course and without costs amend in any matter before a copy of the bill has been taken out of the clerk's office, and in small matters thereafter. He may amend as of course on payment of costs after such copy has been taken and before answer, plea, or demurrer. After answer, plea, or demurrer he may obtain an order without notice to amend his bill with or without costs as may be directed. After replication he must apply on notice and submit to terms.

4. Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 170.

5. Heeren *v.* Kitson, 28 Ill. App. 259; Neale *v.* Neale, 9 Wall. (U. S.) 1, 19 L. ed. 290.

other parties from injury,[6] and usually include the payment of costs occasioned by the amendment.[7] Where a party is relying on a technical right and makes a slip in his pleading the court will impose as a condition of an amendment that he offer to do full equity,[8] and defendant may be given the benefit of a sworn answer by requiring that plaintiff shall not waive an answer under oath.[9]

5. Method of Amending. Where it is necessary to obtain leave of the court to amend a bill, the substance at least of the proposed amendments should be submitted with the application,[10] and the facts rendering the amendment necessary should be stated.[11] Minor amendments are sometimes made by interlineation of the original bill,[12] but where the amendments are so considerable that the original bill would be seriously defaced there must be a separate engrossment,[13] and it is sometimes held that no amendment should be made by interlineation but always by separate bill.[14] When the latter course is pursued the amended bill should recite so much of the original as is necessary to make the amendments intelligible,[15] and by strict practice it should be attached to the original.[16] The whole bill, together with the amendments, is sometimes reëngrossed, in which case the amendment should be in some way clearly designated.[17] Whether the amend-

In the federal courts it is a gross irregularity to hear a cause without imposing terms, on an amended bill filed after replication. Washington, etc., R. Co. *v.* Washington, 10 Wall. (U. S.) 299, 19 L. ed. 894.

Even where amendment is a matter of right the court is sometimes given authority to impose terms. Mahone *v.* Williams, 39 Ala. 202; Rives *v.* Walthall, 38 Ala. 329.

Plaintiff may be released from complying with terms imposed where subsequent proceedings render the terms unjust. Hancock *v.* Carlton, 6 Gray (Mass.) 39.

6. McDougald *v.* Dougherty, 11 Ga. 570.

7. Boynton *v.* Brastow, 38 Me. 577.

The costs of a further answer where one is necessary are sometimes imposed. Van Ness *v.* Cantine, 4 Paige (N. Y.) 55; French *v.* Shotwell, 4 Johns. Ch. (N. Y.) 505; Beekman *v.* Waters, 3 Johns. Ch. (N. Y.) 410.

To avoid demurrer.— The court may without deciding a demurrer permit an amendment to avoid the demurrer, on payment of costs incurred by defendant. Crowder *v.* Turney, 3 Coldw. (Tenn.) 551.

In Pennsylvania it is said that there is no rule requiring the payment of costs as a condition of amendment (Rose *v.* Rose, 1 Phila. 365), but payment of costs is nevertheless sometimes required (Matlack *v.* New York Mut. L. Ins. Co., 3 Pa. Dist. 138, 14 Pa. Co. Ct. 188; Porter *v.* English, 1 Phila. 85).

The payment of costs will under some circumstances be entirely remitted (Stevens *v.* Bosch, 54 N. J. Eq. 59, 33 Atl. 293), and under other circumstances payment of the entire costs of the suit may be required (Drew *v.* Beard, 107 Mass. 64).

8. Hartson *v.* Davenport, 2 Barb. Ch. (N. Y.) 77; Post *v.* Boardman, Clark (N. Y.) 523.

9. Vilas *v.* Jones, 10 Paige (N. Y.) 76.

10. *Illinois.*— Campbell *v.* Powers, 139 Ill. 128, 28 N. E. 1062 [*affirming* 37 Ill. App. 308].

Maine.— Hewett *v.* Adams, 50 Me. 271.

Missouri.— Taylor *v.* Blair, 14 Mo. 437.

Pennsylvania.— Fletcher *v.* Titusville Gas, etc., Co., 8 Phila. 559.

Rhode Island.— Baker *v.* Baldwin, 1 R. I. 489.

See 19 Cent. Dig. tit. "Equity," § 549.

Where the application is to strike out, the portions to be omitted should be designated. Renwick *v.* Wilson, 6 Johns. Ch. (N. Y.) 81.

Where an amendment can be made of course the proposed amendments need not be stated. Hunt *v.* Holland, 3 Paige (N. Y.) 78.

Where application is based on evidence before the court the amendment need not be verified by affidavit. Bauer Grocer Co. *v.* Zelle, 172 Ill. 407, 50 N. E. 238.

11. Walsh *v.* Smyth, 3 Bland (Md.) 9.

12. 1 Daniell Ch. Pr. 547. And see Frey *v.* Fenn, 126 Ala. 291, 28 So. 789; Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780, 21 S. E. 1010.

13. 1 Daniell Ch. Pr. 548.

14. Walsh *v.* Smyth, 3 Bland (Md.) 9; Peirce *v.* West, 18 Fed. Cas. No. 10,910, 3 Wash. 354.

15. Walsh *v.* Smyth, 3 Bland (Md.) 9; Peirce *v.* West, 18 Fed. Cas. No. 10,910, 3 Wash. 354. If the connection between the amended and the original bill is not made to appear a further amendment for that purpose may be permitted. Benzien *v.* Lovelass, 1 N. C. 567.

The amended bill should state the facts directly and not use such an expression as, "by way of amendment showeth." Grim *v.* Wheeler, 3 Edw. (N. Y.) 448.

16. 1 Daniell Ch. Pr. 548.

17. Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159; Luce *v.* Graham, 4 Johns. Ch. (N. Y.) 170. If amendments be so made before the original bill has been served or an appearance entered it is not necessary to designate the amendment. Hunt *v.* Holland, 3 Paige (N. Y.) 78.

If amendments are not designated objection should be made on that ground or defendant

ment be by interlineation, by separate bill, or by reëngrossment of the entire bill, it must be actually made, and neither a stipulation nor an order for amendment will be treated as an amendment.[18]

6. Operation and Effect of Amendment. An amended bill is considered as an original bill,[19] or rather as a continuation of the original,[20] and with the original constitutes but a single bill and one record.[21] The averments of the original and amended bills and the prayers of both will be taken together.[22] Care should therefore be taken, in substituting averments, not only to add the new averments in the amended bill, but to strike out the old ones which are to be superseded, as otherwise both will stand.[23] A further consequence of the rule is that generally the amendment is treated as relating back to the filing of the original bill,[24] but this will not be done where it would prejudice defendant.[25] A still further consequence of the general rule is that the amendment of a bill after a default waives the default and *ipso facto* opens a decree *pro confesso*,[26] so that defendant is permitted to answer the entire bill.[27] An amendment after answer and replication opens the pleadings only to the extent that new matter has been presented.[28]

7. Defenses to Amended Bill — a. Moving to Take From Files. Where a bill has been irregularly amended the proper course for defendant is to move to take it from the files or to expunge the amendments.[29] If the irregularity is

will be held to answer the amendments as if they had been properly designated. Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159.

It is not error to refuse leave to substitute a new bill for an original bill with amendments thereto and a supplemental bill. Fitch *v.* Gray, 162 Ill. 337, 44 N. E. 726.

18. Wilson *v.* King, 23 N. J. Eq. 150. But see *supra*, XI, A, 1, h.

19. Carey *v.* Smith, 11 Ga. 539; Hinton *v.* Ellis, 27 W. Va. 422.

20. 1 Daniell Ch. Pr. 509.

21. Carey *v.* Hillhouse, 5 Ga. 251; Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332, 11 N. E. 258; Security Trust Co. *v.* Tarpey, 66 Ill. App. 589; Munch *v.* Shabel, 37 Mich. 166; Vere *v.* Glynn, Dick. 441, 21 Eng. Reprint 341.

Where a bond was made for the return of property which had been seized under the original bill, the obligors were held not to be discharged by an amendment merely adding parties without varying the frame of the bill. Falls *v.* Weissinger, 11 Ala. 801.

22. Brackin *v.* Newman, 121 Ala. 311, 26 So. 3; Lewis *v.* Lanphere, 79 Ill. 187; Security Trust Co. *v.* Tarpey, 66 Ill. App. 589; Rigney *v.* De Graw, 100 Fed. 213.

23. Milton *v.* Hogue, 39 N. C. 415.

Where a corporation is made defendant as such to the original bill, it will be considered defendant to an amended bill which refers to the original and prays that the defendants thereto be made defendants to the amended bill, and this although the amended bill denies the existence of the corporation. Empire Coal, etc., Co. *v.* Empire Coal, etc., Co., 150 U. S. 159, 14 S. Ct. 66, 37 L. ed. 1037.

Amendment to correct error.— Averments in an amended bill will not necessarily be rejected because contradicting the original, as the purpose may have been to correct an error in the original. McDougald *v.* Williford, 14 Ga. 665.

24. *Alabama.*— Adams *v.* Phillips, 75 Ala. 461; Lipscomb *v.* McClellan, 72 Ala. 151.

Connecticut.— Hoyt *v.* Smith, 28 Conn. 466.

Georgia.— Carey *v.* Hillhouse, 5 Ga. 251.

Illinois.— Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

New York.— Hurd *v.* Everett, 1 Paige 124, 19 Am. Dec. 395.

See 19 Cent. Dig. tit. "Equity," § 567.

Therefore matters occurring after filing the original cannot be properly set up in an amended bill. Jones *v.* McPhillips, 82 Ala. 102, 2 So. 468.

25. McDougald *v.* Dougherty, 11 Ga. 570.

26. Lyndon *v.* Lyndon, 69 Ill. 43; Scudder *v.* Voorhis, 1 Barb. (N. Y.) 55; Utica Bank *v.* Finch, 1 Barb. Ch. (N. Y.) 75. And see Ewing *v.* Beauchamp, 6 B. Mon. (Ky.) 422.

27. South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732; Lyndon *v.* Lyndon, 69 Ill. 43; Gibson *v.* Rees, 50 Ill. 383.

An amendment by striking out a defendant does not permit other defendants to refile a demurrer which has been overruled. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

28. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 4 Phila. (Pa.) 157.

29. Orvis *v.* Cole, 14 Ill. App. 283; 1 Daniell Ch. Pr. 551. Such a motion will not lie where the amendment was regularly made. Rose *v.* Rose, 1 Phila. (Pa.) 365; Lant *v.* Manley, 75 Fed. 627, 21 C. C. A. 457; Lichtenauer *v.* Cheney, 8 Fed. 876, 3 McCrary 119.

An ex parte allowance of an amendment does not preclude defendant from moving to take it from the files. Chambers *v.* Waterman, 1 Leg. Gaz. (Pa.) 60.

Where defendant objects on the application for leave to amend and states that he will present his objection on a motion to strike out, the latter motion will be treated as an objection to the motion to amend. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 38 Fed. 57.

technical only the motion must be made at the first opportunity,[30] and the right to so move is it seems in all cases waived by consenting to the amendment,[31] or by long acquiescence.[32] An amendment cannot be objected to for irregularity in making it, on the hearing,[33] or on appeal.[34]

b. Demurrer. The regularity of an amendment cannot be raised by demurrer where the amendment was made on leave of the court,[35] and, on the other hand a demurrer and not an objection to an amendment is the proper method of testing the merits of the amendment.[36] An amendment may be demurred to at whatever stage the amendment be made.[37] The demurrer may be to the whole bill, if the amendment is made before answer,[38] or even if made after answer, where it changes the nature of the case.[39] Otherwise, where the bill is amended after answer, a demurrer must be restricted to the amendment or to the amended bill.[40] An amended bill may be demurred to on the ground of repugnancy to the original.[41] The effect of sustaining a demurrer to an amended bill stating a new cause is to dismiss the amended bill and let the original stand.[42]

c. Plea. An amended bill is open to plea in the same manner as to demurrer.[43] If defendant has answered the original bill the answer may be read to counterplead such plea.[44] If the bill is amended after a plea to the original, defendant may correspondingly amend his plea in matter of substance,[45] and where the amendment is made after disallowing a plea to the original bill defendant may plead anew to the amended bill.[46]

d. Answer. Where a bill has been materially amended defendant should be ruled to answer the amended bill,[47] unless an answer is waived, and in that case

30. Cowman *v.* Lovett, 10 Paige (N. Y.) 559.

31. Sarber *v.* McConnell, 64 Ark. 450, 43 S. W. 395; Farmer's L. & T. Co. *v.* Reid, 3 Edw. (N. Y.) 414.

32. Bondurant *v.* Sibley, 37 Ala. 565; Farmer's L. & T. Co. *v.* Reid, 3 Edw. (N. Y.) 414.

33. Beall *v.* Blake, 16 Ga. 119; Hunt *v.* Walker, 40 Miss. 590. *Aliter* where the right to object has been expressly reserved. Hart *v.* Henderson, 66 Ga. 568.

34. Clements *v.* Nicholson, 6 Wall. (U. S.) 299, 18 L. ed. 786.

35. McGehee *v.* Jones, 10 Ga. 127.

36. Vanderser *v.* McMillan, 28 Ga. 339. A demurrer may be interposed without excepting to the order granting leave to amend. Wright *v.* Frank, 61 Miss. 32.

37. Booth *v.* Stamper, 10 Ga. 109; Cowman *v.* Lovett, 10 Paige (N. Y.) 559.

38. Booth *v.* Stamper, 10 Ga. 109.

Where a plaintiff tacitly confesses a plea by amending his bill to meet it, the plea does not stand as an answer to the amended bill, and a demurrer may be interposed as if there had been no plea. Tompkins *v.* Hollister, 60 Mich. 470, 27 N. W. 651.

39. Sanche *v.* Electrolibration Co., 4 App. Cas. (D. C.) 453; Griffin *v.* Augusta, etc., R. Co., 72 Ga. 423; Booth *v.* Stamper, 10 Ga. 109.

If an amendment changes the parties and grounds for relief a demurrer will lie, although a demurrer to the original bill has been overruled. Scott *v.* Calvit, 3 How. (Miss.) 148.

40. Bond *v.* Pennsylvania Co., 171 Ill. 508, 49 N. E. 545; Evans *v.* Dunning, 3 Phila. (Pa.) 410; State *v.* Mitchell, 104 Tenn. 336, 58 S. W. 365.

A demurrer cannot be taken to an amendment, but only to a bill as amended. Hodges *v.* Verner, 100 Ala. 612, 13 So. 679.

41. Ray *v.* Womble, 56 Ala. 32; Winter *v.* Quarles, 43 Ala. 692.

42. State *v.* Mitchell, 104 Tenn. 336, 58 S. W. 365.

43. 2 Daniell Ch. Pr. 205; 1 Daniell Ch. Pr. 550. The fact that the amendment presents matter occurring after suit brought may be presented by plea. Seattle, etc., R. Co. *v.* Union Trust Co., 79 Fed. 179, 24 C. C. A. 512.

44. Noel *v.* Ward, 1 Madd. 322, 16 Rev. Rep. 229. An answer to the original bill overrules a plea to the personal disability of plaintiff filed after amendment. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 4 Phila. (Pa.) 157.

45. Bassett *v.* Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179.

46. American Bible Soc. *v.* Hague, 10 Paige (N. Y.) 549.

47. Adams *v.* Gill, 158 Ill. 190, 41 N. E. 738; Cowman *v.* Lovett, 10 Paige (N. Y.) 559; Trust, etc., Ins. Co. *v.* Jenkins, 8 Paige (N. Y.) 589; Cunningham *v.* Pell, 6 Paige (N. Y.) 655; Jackson *v.* Edwards, 2 Edw. (N. Y.) 582.

A notice of the amendment seems sometimes sufficient. Littlefield *v.* Schmoldt, 24 Ill. App. 624; Cockey *v.* Plempel, 86 Md. 181, 37 Atl. 792.

Amendment of bill with exceptions to answer.—Where there is an application to amend the bill and also exceptions to the answer, the court may require an answer at

notice must be given of the waiver.[48] Plaintiff is entitled to an answer to new matter incorporated by amendment,[49] but not where the answer to the original fully responds to the amended bill.[50] Defendant may if he sees fit answer anew in all cases, even to the extent of setting up new defenses,[51] except where the amendment is purely formal and does not affect the right of the answering defendant.[52] Where several answers have been filed to the original bill defendants will not be permitted to answer jointly the amended bill.[53] It is competent, where the circumstances require no new answer, to order the original answer to stand as an answer to a bill amended on the hearing.[54] It is improper in answering an amended bill to repeat the matter set up in the original answer unless the amendment has substantially varied the case.[55] If a plea was standing to the original bill an answer to the amended bill overrules the plea and should meet the entire bill.[56]

B. Amended and Supplemental Answers — 1. General Rules. Amendments to answers may be permitted,[57] and this with freedom as to matters of form, dates, and verbal inaccuracies;[58] but with caution in other cases,[59] when it must be made to appear that the amendment is material and necessary to protect defendant,[60] that the amendment is true or highly probable, and that there was no great negligence on the part of defendant.[61] Except to correct clerical errors or supply formal defects,[62] or perhaps to strike out allegations,[63] the amendment should not be by interlineation or erasure but by filing a supplemental answer embodying the amendments.[64]

the same time to the amendments and to the matter of the exceptions. Kittredge *v.* Claremont Bank, 14 Fed. Cas. No. 7,858, 3 Story 590.

48. Cowman *v.* Lovett, 10 Paige (N. Y.) 559; Trust, etc., Ins. Co. *v.* Jenkins, 8 Paige (N. Y.) 589.

49. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; West *v.* Hall, 3 Harr. & J. (Md.) 221.

If it be not answered the whole bill will be taken as confessed unless a further answer to the amended bill is waived. Tedder *v.* Stiles, 16 Ga. 1. See also Sallade *v.* Lykens Tp. School Directors, 2 Pearson (Pa.) 51.

Where discovery is waived a formal answer is required, but nothing more. Bard *v.* Chamberlain, 5 Ch. Sent. (N. Y.) 73.

50. Fitzhugh *v.* McPherson, 9 Gill & J. (Md.) 51; Salisbury *v.* Miller, 14 Mich. 160.

51. Burney *v.* Ball, 24 Ga. 505; Tedder *v.* Stiles, 16 Ga. 1; Bauer Grocer Co. *v.* Zelle, 172 Ill. 407, 50 N. E. 238; Thompson *v.* Maxwell Land Grant, etc., Co., 3 N. M. 269, 6 Pac. 193; Trust, etc., Ins. Co. *v.* Jenkins, 8 Paige (N. Y.) 589; Bowen *v.* Idley, 6 Paige (N. Y.) 46.

Plaintiff cannot waive an answer under oath to an amended bill, where the original answer was under oath. Burras *v.* Looker, 4 Paige (N. Y.) 227.

52. Whiting Paper Co. *v.* Busse, 95 Ill. App. 288; Oldham *v.* Rowan, 4 Bibb (Ky.) 544; Casserly *v.* Waite, 124 Mich. 157, 82 N. W. 841. Where an amendment was made to obviate the necessity of a bill of revivor, new defenses not relating to the matter of the amendment were held improper. Dyer *v.* Cranston Print Works Co., 20 R. I. 143, 37 Atl. 632.

Amending a bill of discovery so as to make it also one for relief entitles plaintiff to amend his answer so as to set up defenses. Perkins *v.* Hendryx, 31 Fed. 522.

53. Bard *v.* Chamberlain, 5 Ch. Sent. (N. Y.) 73.

54. Lindsey *v.* Lindsey, 40 Ill. App. 389.

55. Bowen *v.* Idley, 6 Paige (N. Y.) 46.

56. Peck *v.* Burgess, Walk. (Mich.) 485.

57. Williams *v.* Williams, 3 N. C. 220.

58. Smith *v.* Babcock, 22 Fed. Cas. No. 13,008, 3 Sumn. 583.

59. Hughes *v.* Bloomer, 9 Paige (N. Y.) 269.

60. Carey *v.* Ector, 7 Ga. 99; Burgin *v.* Giberson, 23 N. J. Eq. 403; Tillinghast *v.* Champlin, 4 R. I. 128; Foutty *v.* Poar, 35 W. Va. 70, 12 S. E. 1096; McKay *v.* McKay, 33 W. Va. 724, 11 S. E. 213.

After several amendments another will not be permitted to repeat former denials. Greene *v.* Harris, 11 R. I. 5.

Defendant may amend to conform to the proof and have advantage of facts admitted by plaintiff. Cox *v.* Westcoat, 29 N. J. Eq. 551.

61. Higgins *v.* Curtiss, 82 Ill. 28; Tillinghast *v.* Champlin, 4 R. I. 128; Foutty *v.* Poar, 35 W. Va. 70, 12 S. E. 1096; Smith *v.* Babcock, 22 Fed. Cas. No. 13,008, 3 Sumn. 583.

62. Burgin *v.* Giberson, 23 N. J. Eq. 403.

63. Oliver *v.* Persons, 29 Ga. 568.

64. Burgin *v.* Giberson, 23 N. J. Eq. 403; Huffman *v.* Hummer, 17 N. J. Eq. 269; Vandervere *v.* Reading, 9 N. J. Eq. 446; Bowen *v.* Cross, 4 Johns. Ch. (N. Y.) 375; Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659.

U. S. Eq. Rule 60 provides that after replication or setting down for hearing, material amendments may not be made except by special leave, and that the court or judge granting leave may in his discretion require the amendments to be separately engrossed and

2. PURPOSES OF AMENDMENT — a. Correcting Mistakes. A mistake in the original answer may be corrected by amendment.[65] This is frequently permitted where the mistake was that of the solicitor.[66] While as a general rule an admission in an answer cannot be retracted by an amended answer,[67] still this may be done when it is shown that the admission was made by mistake.[68] The fact that defendant was misled by the generality of the bill is sufficient to require that he be permitted to amend so as to meet the case as afterward disclosed.[69] It is a condition of permitting the amendment to correct a mistake that plaintiff shall not be prejudiced.[70]

b. Setting Up New Defenses. A defendant is sometimes permitted by amended or supplemental answer to set up a defense not raised by the original,[71] but this will not be done where the defense existed and was known when the original answer was filed,[72] or where the defense is not consistent with the ends of jus-

added to the original answer so as to be distinguishable therefrom.

A new answer, with the amendments added, must be made, or the original answer withdrawn by leave of court and the amendments added, or the amendments must refer to the portions of the answer intended to be amended. Mason *v.* Detroit City Bank, Harr. (Mich.) 222.

The titles of further answers must correspond with the order under which they are put in. Bennington Iron Co. *v.* Campbell, 2 Paige (N. Y.) 159.

All the answers are taken together, and this rule is to protect plaintiff by giving him the benefit of all statements respondent may have made. Greene *v.* Harris, 11 R. I. 5. See also Munch *v.* Shabel, 37 Mich. 166.

65. *Georgia.*—Mounce *v.* Byars, 11 Ga. 180. *Indiana.*— Coquillard *v.* Suydam, 8 Blackf. 24.

Kentucky.— McWilliams *v.* Herndon, 3 Dana 568.

Massachusetts.— Bernard *v.* Toplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465.

New Jersey.— Vandervere *v.* Reading, 9 N. J. Eq. 446.

United States.— Smith *v.* Babcock, 22 Fed. Cas. No. 13,008, 3 Sumn. 583.

See 19 Cent. Dig. tit. "Equity," § 570.

Amendment to let in writings omitted by accident or mistake will be readily permitted. Smith *v.* Babcock, 22 Fed. Cas. No. 13,008, 3 Sumn. 583.

Amendment to remove an ambiguity or explain an obscurity in an original answer will be permitted. Murdock's Case, 2 Bland (Md.) 461, 20 Am. Dec. 381; Graves *v.* Niles, Harr. (Mich.) 332.

66. Maher *v.* Bull, 39 Ill. 531; McMichael *v.* Brennan, 31 N. J. Eq. 496; Arnaud *v.* Grigg, 29 N. J. Eq. 1; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 2 Rob. (N. Y.) 642; Bowen *v.* Cross, 4 Johns. Ch. (N. Y.) 375.

Defendant was permitted to amend on terms where matter had been omitted because former counsel advised defendant that it constituted no defense. Burgin *v.* Giberson, 23 N. J. Eq. 403.

Where the original answer was false in fact, and the only excuse alleged was that the solicitor who drew it had assured defendant that it was all right, and there was no showing that defendant was not at the time aware of the nature of the answer, leave to amend was refused. Vandervere *v.* Reading, 9 N. J. Eq. 446.

Insufficient showing.— A mere affidavit of a solicitor that an answer, filed three years before, had been filed in the absence of defendant and inadvertently omitted to plead limitations was held insufficient to justify an amendment. Wilson *v.* Wilson, 2 Lea (Tenn.) 17.

67. Raines *v.* Jones, 4 Humphr. (Tenn.) 490; Ruggles *v.* Eddy, 20 Fed. Cas. No. 12,118, 1 Ban. & A. 92, 11 Blatchf. 524.

Where an amended answer withdraws an admission the latter is still to be given such effect as may seem just. Kenah *v.* The John Markee Jr., 3 Fed. 45. And see Greene *v.* Harris, 11 R. I. 5.

68. Downing *v.* Bacon, 7 Bush (Ky.) 680; Hollister *v.* Barkley, 11 N. H. 501; Hughes *v.* Bloomer, 9 Paige (N. Y.) 269.

69. Thompson *v.* Thompson, 2 B. Mon. (Ky.) 161.

70. Vandervere *v.* Reading, 9 N. J. Eq. 446. See also Mounce *v.* Byars, 11 Ga. 180.

71. Brooks *v.* Moody, 25 Ark. 452; Haskell *v.* Brown, 65 Ill. 29; White *v.* Turner, 2 Gratt. (Va.) 502; Thames, etc., Mar. Ins. Co. *v.* Continental Ins. Co., 37 Fed. 286.

Facts improperly alleged by way of cross bill, which are properly a defense, may be set up by amended answer. Van Winkle *v.* Armstrong, 41 N. J. Eq. 402, 5 Atl. 449.

Where union of answer and cross bill is permitted the matter of a cross bill has been permitted to be added to an answer by amendment. Canant *v.* Mappin, 20 Ga. 730; Brands *v.* De Witt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909.

72. Howe *v.* Russell, 36 Me. 115; Giles *v.* Giles, 1 Bailey Eq. (S. C.) 428; Furman *v.* Edwards, 3 Tenn. Ch. 365; India Rubber Comb Co. *v.* Phelps, 13 Fed. Cas. No. 7,025, 8 Blatchf. 85; Suydam *v.* Truesdale, 23 Fed. Cas. No. 13,656, 6 McLean 459. Where an order had been made giving leave to amend, and leave to both parties to surcharge and falsify, it was held that defendant might amend in this respect even as to matters

tice.[73] An amendment of this character may be made necessary by averments in the answers of other defendants.[74] In the absence of mistake the court will not permit an amendment which will entirely change the nature and theory of the defense,[75] at least after protracted litigation and at a late stage of the case.[76]

c. Facts Newly Discovered or Newly Arising. If material facts are discovered after the filing of the original answer an amendment is proper for the purpose of introducing them,[77] provided defendant was not grossly negligent in not discovering them sooner.[78] As to matters by way of defense, not merely discovered but occurring after the commencement of the suit, the regular method of introducing them is not by amendment,[79] but by cross bill.[80] In some jurisdictions, however, such matter may be inserted by amended or supplemental answer.[81]

3. Sworn and Unsworn Answers. It has been said that no distinction is recognized, as to permitting amendments, between sworn answers and answers the oath to which has been waived,[82] and such cases as advert to the distinction seem nevertheless to apply the same rules.[83]

4. At What Time Answer May Be Amended. In some jurisdictions formal amendments at any stage,[84] and substantial amendments before replication, may be made as of course.[85] Except where such rules apply the allowance of an

known when he filed the original answer. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418. *Aliter* as to matters already adjudicated. Calvert *v.* Carter, 18 Md. 73.

73. Third Ave. Sav. Bank *v.* Dimock, 24 N. J. Eq. 26; Western Reserve Bank *v.* Stryker, Clarke (N. Y.) 380.

Where a plea of the statute of limitations was overruled, because of an acknowledgment by the debtor, defendant was not permitted to amend his answer to avoid the effect of the acknowledgment. Murray *v.* Coster, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333.

74. McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430. Such an amendment will not be permitted where the matter applicable to the case of the other defendants was known and considered when the original answer was filed and deliberately omitted. Mechanics' Nat. Bank *v.* H. C. Burnet Mfg. Co., 32 N. J. Eq. 236.

Where a new party has been added to the bill on motion merely, defendant may amend his answer. Stevens *v.* Terrel, 3 T. B. Mon. (Ky.) 131.

75. Graves *v.* Niles, Harr. (Mich.) 332.

Where no new facts are stated the theory of the defense may not be changed even on the ground of mistake. Waterman *v.* Merrill, 29 Fed. Cas. No. 17,258, 2 Abb. 478 note.

Amendment inconsistent with the original answer will not be permitted (Williams *v.* Jones, 79 Ala. 119), at least where the facts were known when the original was filed (Chattanooga Grocery Co. *v.* Livingston, (Tenn. Ch. App. 1900) 59 S. W. 470).

Where an infant defendant attains his majority he may put in a new answer on showing that he has a better defense than his guardian put in for him. Mason *v.* Debow, 3 N. C. 178.

76. Joyce *v.* Growney, 154 Mo. 253, 55 S. W. 466; Elder *v.* Harris, 76 Va. 187.

77. Brooks *v.* Moody, 25 Ark. 452; Talmage *v.* Pell, 9 Paige (N. Y.) 410; Foote *v.* Silsby, 9 Fed. Cas. No. 4,918, 1 Blatchf. 545.

Where defendant has answered generally for want of particular knowledge of the facts, he may amend to make his answer more specific after discovering the particulars. Caster *v.* Wood, 5 Fed. Cas. No. 2,505, Baldw. 289.

78. Matthews *v.* Dunbar, 3 W. Va. 138. And see Schultz *v.* Phenix Ins. Co., 77 Fed. 375.

79. Hackley *v.* Mack, 60 Mich. 591, 27 N. W. 871; Taylor *v.* Titus, 2 Edw. (N. Y.) 135.

80. See *supra*, X, A, 2, c.

81. May *v.* Coleman, 84 Ala. 325, 4 So. 144; Hennings *v.* Connor, 4 Bibb (Ky.) 298; Barnegat City Beach Assoc. *v.* Buzby, (N. J. Ch. 1890) 20 Atl. 214; Furman *v.* North, 4 Baxt. (Tenn.) 296. And see U. S. *v.* Morris, 7 Mackey (D. C.) 8; Tripp *v.* Vincent, 3 Barb. Ch. (N. Y.) 613.

82. Cook *v.* Bee, 2 Tenn. Ch. 343.

83. Amendments to sworn answers will be allowed in cases of mistake (Martin *v.* Atkinson, 5 Ga. 390; Johnson *v.* Sale, 1 Leg. Gaz. (Pa.) 413), fraud, surprise, and the discovery of new matter (Martin *v.* Atkinson, *supra*). An amendment will not be permitted on final hearing to set up facts known when the original was sworn to (Marsh *v.* Mitchell, 26 N. J. Eq. 497), nor will an unconscionable amendment be permitted (Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540).

84. Evans *v.* Bolling, 5 Ala. 550; Sumrall *v.* Ryan, 1 J. J. Marsh. (Ky.) 97; Walden *v.* Bodley, 14 Pet. (U. S.) 156, 10 L. ed. 398.

85. Roberts *v.* Stigleman, 78 Ill. 120; Hughes *v.* Phelps, 3 Bibb (Ky.) 198; Wilson *v.* Anderson, 13 Montg. Co. Rep. (Pa.) 44; Gubbins *v.* Laughtenschlager, 75 Fed. 615.

U. S. Eq. Rule 60 provides that an answer may be amended as of course in any matter of form or by filling a blank or correcting a date or reference to a document, or other small matter, at any time before replication is put in or the cause set down for hearing upon bill and answer.

In Alabama there is an absolute right to amend before final decree. See *Ex p.* Ashurst, 100 Ala. 573, 13 So. 542; Cowart *v.* Harrod,

amendment is always in the discretion of the court,[86] and no absolute rules limit the time of making application, each case depending on its own circumstances.[87] A new defense may be inserted even after considerable delay when no evidence has yet been taken;[88] but after depositions have been taken the application will be looked upon with distrust, and there must be a showing of mistake or ignorance of the facts.[89] Substantial amendments should rarely be allowed after the cause is ready for hearing,[90] and only when the delay is satisfactorily accounted for.[91] An amendment may be made in a proper case after a reference to a master,[92] but it is generally denied after the master has reported.[93] After the direction and trial of an issue it is too late to insert matter relating to that issue.[94] Formal amendments to correct mistakes will be allowed after the hearing.[95] Amendments have been allowed, where meritorious, after the announcement of the decision,[96] but unwillingly,[97] and unless meritorious they are then denied.[98]

12 Ala. 265. But *compare* Lanier *v.* Driver, 24 Ala. 149; Pinkston *v.* Taliaferro, 9 Ala. 547.

86. *Illinois.*— Scott *v.* Harris, 113 Ill. 447.

Maryland.— Calvert *v.* Carter, 18 Md. 73.

New Jersey.—Hoffman *v.* Hummer, 17 N. J. Eq. 269.

Pennsylvania.— Leach *v.* Ansbacher, 55 Pa. St. 85.

United States.— Hudson *v.* Randolph, 66 Fed. 216, 13 C. C. A. 402; Caster *v.* Wood, 5 Fed. Cas. No. 2,505, Baldw. 289.

See 19 Cent. Dig. tit. "Equity," §§ 545, 546.

An answer amended without leave is a nullity (Fulton Bank *v.* Beach, 6 Wend. (N. Y.) 36), and will be taken from the files (Thomas *v.* Frederick County School, 7 Gill & J. (Md.) 369).

87. Martin *v.* Atkinson, 5 Ga. 390.

88. Rowe *v.* Thomas, 8 Kulp (Pa.) 449.

89. Bell *v.* Hall, 5 N. J. Eq. 49.

The evidence already taken will be looked into to see if it is probable that the new averment will be supported. Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50.

Defendant was permitted to retract an admission contained in an unsworn answer, after the taking of depositions, on a showing of mistake. Taylor *v.* Dodd, 5 Ind. 246.

Leave to insert averments relying on the statute of frauds was denied after the taking of proof tending to establish the contract denied in the original answer. Cook *v.* Bee, 2 Tenn. Ch. 343.

90. Evans *v.* Bolling, 5 Ala. 550; Sumrall *v.* Ryan, 1 J. J. Marsh. (Ky.) 97; Walden *v.* Bodley, 14 Pet. (U. S.) 156, 10 L. ed. 398.

Exercise of discretion.— Leave has been denied, after the cause was set for hearing, to amend because the facts were unknown to counsel at an earlier period (Webster Loom Co. *v.* Higgins, 29 Fed. Cas. No. 17,341, 13 Blatchf. 349), and because defendant had not known that the facts in law constituted a defense (Branch *v.* Dawson, 9 Ga. 592); but leave has been granted to correct an oversight of the solicitor who drew the answer, where plaintiff was not surprised (Arnaud *v.* Grigg, 29 N. J. Eq. 1). Leave has been given to set up a new defense where the hearing was not delayed. Depue *v.* Sergent, 21 W. Va. 326; Tracewell *v.* Boggs, 14 W. Va. 254. Leave has been given to set up the statute of frauds after plaintiff had closed his testimony (Hamm *v.* Barnegat, etc., Imp. Co., (N. J. Ch. 1887) 8 Atl. 531), but denied after the cause was set down for hearing (Jackson *v.* Cutright, 5 Munf. (Va.) 308). Leave was denied on the call of the case to restrict the operation of a disclaimer, where the error was caused by the ignorance of counsel. Martin *v.* Noble, 29 Ind. 216.

91. Smallwood *v.* Lewin, 13 N. J. Eq. 123.

92. Olin *v.* Day, 2 Pa. Co. Ct. 457. But not where defendant might without the amendment avail himself of the matter before the master. Evory *v.* Candee, 8 Fed. Cas. No. 4,582, 5 Ban. & A. 67.

93. *Georgia.*— Mackenzie *v.* Flannery, 90 Ga. 590, 16 S. E. 710.

Illinois.— Foster *v.* Van Ostern, 72 Ill. App. 307.

Pennsylvania.—Rickett's Appeal, (1888) 12 Atl. 60.

Virginia.— Liggon *v.* Smith, 4 Hen. & M. 405.

United States.— New York Cent. Trust Co. *v.* Wabash, etc., R. Co., 50 Fed. 857.

See 19 Cent. Dig. tit. "Equity," § 572.

Leave to insert matter deliberately omitted will then be refused. Williams *v.* Snyder, 4 Luz. Leg. Reg. (Pa.) 273.

94. New York Wire-Railing Co. *v.* Cake, 18 Fed. Cas. No. 10,217.

95. McMichael *v.* Brennan, 31 N. J. Eq. 496.

96. Spink *v.* McCall, 52 Iowa 432, 3 N. W. 471; Welch *v.* Arnett, 46 N. J. Eq. 548, 22 Atl. 124.

97. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

98. Eureka Co. *v.* Edwards, 80 Ala. 250; Lexow *v.* Pennsylvania Diamond Drill Co., 5 Pa. Dist. 499; Calloway *v.* Dobson, 4 Fed. Cas. No. 2,325, 1 Brock. 119.

When the court is about to sign a final decree, it is too late to amend an answer. Burnham *v.* Hoffman, Walk. (Miss.) 381.

After decision and submission of draft of decree defendants were not permitted to retract admissions as to their citizenship so as to defeat the jurisdiction; it being doubtful whether lapse of time would not bar a new suit in the state court. Gubbins *v.* Laughtenschlager, 75 Fed. 615.

Leave to amend is very generally denied after decree, either interlocutory,[99] or final.[1] After an appeal has been perfected the trial court cannot allow a new defense to be interposed,[2] and after affirmance a supplemental answer may not be filed, unless upon the showing that defendant has not been at fault and that great hardship would result from a refusal.[3] After reversal amendments may be permitted,[4] but not to contradict the original answer.[5] Under a variety of circumstances leave to amend has been denied because of laches in making the application.[6] An amendment will not be permitted in anticipation of the result of an appeal from an order in the cause, as the application is premature.[7]

5. Application For Leave to Amend. Where an amended or supplemental answer cannot be filed of course the application for leave to amend must be supported by affidavit,[8] showing a sufficient reason within the rules already stated,[9] and setting out the proposed amendments.[10] The amendment must not extend beyond the terms of the order,[11] but the order itself does not effect an amendment, which does not become operative until the amended answer is actually filed.[12] On considering the application the court will look into the entire record, and will not confine itself merely to the petition or affidavit.[13]

C. Amending Pleas. Amendments of pleas are allowed with reluctance, and only where the original plea is substantially good, and the defect which it is sought to remedy is formal or the result of accident.[14]

D. Amending Cross Bills. The rules regarding the amendment of bills apply in general to the amendment of cross bills, but greater liberality is indulged than in the case of an original bill.[15] Verification of a cross bill in a case where

99. McRae *v.* David, 7 Rich. Eq. (S. C.) 375; Cock *v.* Evans, 9 Yerg. (Tenn.) 287; Flora *v.* Rogers, 4 Hayw. (Tenn.) 202.

1. Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Vail *v.* Central Ry. Co., (N. J. Ch. 1886) 4 Atl. 663. Leave was refused to insert matter to support a finding contained in the decree. Deere *v.* Nelson, 73 Iowa 186, 34 N. W. 809.

2. Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1028.

3. United R., etc., Co. *v.* Long Dock Co., 41 N. J. Eq. 407, 5 Atl. 578.

4. Hanserd *v.* Gray, 46 Miss. 75.

5. Montague *v.* Selb, 106 Ill. 49.

6. *Alabama.*— Goodwin *v.* McGehee, 15 Ala. 232.

Kentucky.— Boone *v.* Helm, 4 Dana 403.

Michigan.— Graves *v.* Niles, Harr. 332.

New Jersey.— Wilson *v.* Wintermute, 27 N. J. Eq. 63.

New York.— Gouverneur *v.* Elmendorf, 4 Johns. Ch. 357.

Wisconsin.— Stout *v.* Shew, 1 Pinn. 438, 42 Am. Dec. 579.

See 19 Cent. Dig. tit. "Equity," §§ 572, 575.

7. Fulton Bank *v.* Beach, 1 Paige (N. Y.) 429.

8. Thomas *v.* Doub, 1 Md. 252; Williamson *v.* Carnan, 1 Gill & J. (Md.) 184; McKim *v.* Thompson, 1 Bland (Md.) 150; Graham *v.* Skinner, 57 N. C. 94; Huffman *v.* Hummer, 17 N. J. Eq. 269.

9. McKim *v.* Thompson, 1 Bland (Md.) 150; Graham *v.* Skinner, 57 N. C. 94; Smallwood *v.* Lewin, 13 N. J. Eq. 123.

10. Freeman *v.* Michigan State Bank, Harr. (Mich.) 311; Graham *v.* Skinner, 57 N. C. 94.

In order to substitute a new answer, the proposed answer should be submitted with the motion. Schmidt *v.* Braley, 112 Ill. 48, 1 N. E. 267.

Where plaintiff consents to an order giving leave generally to amend, he cannot thereafter object that the order did not specify the particular amendment. Stokes *v.* Farnsworth, 99 Fed. 836.

11. Graves *v.* Niles, Harr. (Mich.) 332.

12. White *v.* Hampton, 9 Iowa 181.

An order made in vacation directing the filing of an amended answer attached to the petition was held an allowance of the amendment, which became at once a part of the record. Blanks *v.* Walker, 54 Ala. 117.

13. Chattanooga Grocery Co. *v.* Livingston, (Tenn. Ch. App. 1900) 59 S. W. 470. The right to amend must, however, appear from the petition itself. Calvert *v.* Carter, 18 Md. 73.

14. Tompkins *v.* Ward, 4 Sandf. Ch. (N. Y.) 594; Allen *v.* Randolph, 4 Johns. Ch. (N. Y.) 693; Stuart *v.* Warren, 1 N. Y. Leg. Obs. 293; 2 Daniell Ch. Pr. 230.

A plea may be amended by adding a new fact, unknown when the original was filed but consistent therewith. Freeman *v.* Michigan State Bank, Harr. (Mich.) 311.

A general statutory provision allowing amendment of any pleading applies to pleas in equity and abolishes the strict chancery rule. Crease *v.* Babcock, 10 Metc. (Mass.) 525.

15. Nelson *v.* Dunn, 15 Ala. 501. And see also Kyle *v.* McKenzie, 94 Ala. 236, 10 So. 654; Jones *v.* Hillis, 91 Ill. App. 403; Gillespie *v.* Crawford, (Tex. Civ. App. 1897) 42 S. W. 621; Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

verification is not required by law performs no office and therefore constitutes no obstacle to its amendment.[16]

XII. SUPPLEMENTAL BILLS.

A. Nature and Functions — 1. IN GENERAL. It is usually said that the purpose of a supplemental bill is to supply some defect in the frame or structure of the original.[17] This statement standing alone confuses the purposes of amended and supplemental bills. A supplemental bill may be resorted to only where an amendment is not available.[18] To justify a supplemental bill it must appear that new matter has arisen since the original was filed, or new facts discovered, or that plaintiff was in some way prevented from availing himself of such matter at an earlier stage of the case.[19] The matter of the supplemental bill must be such that it might under some circumstances have been the proper subject of amendment;[20] but a supplemental bill is the proper proceeding, and in aid of justice will be permitted, to remedy imperfections after the time for amendment has passed.[21]

2. MATTERS NEWLY ARISING. Facts which occur after the filing of the original bill cannot in general be incorporated by amendment,[22] and a supplemental bill is the proper and essential proceeding to introduce such facts.[23] It is not suffi-

Delay in making the application sometimes results in refusal of leave. Kelly *v.* Kershaw, 5 Utah 295, 14 Pac. 804; Ferguson Contracting Co. *v.* Manhattan Trust Co., 118 Fed. 791, 55 C. C. A. 529.

Amendment of course.— Before a cross bill is answered plaintiff therein may amend without leave under statutory provision that original bills may be so amended and that proceedings on cross bills shall be the same as on other bills. Jackson *v.* Lemler, (Miss. 1903) 35 So. 306.

16. Ackley *v.* Croucher, 203 Ill. 530, 68 N. E. 86.

17. Mitford Eq. Pl. 33, 59; Story Eq. Pl. 332.

18. *Alabama.*— Bowie *v.* Minter, 2 Ala. 406.

Illinois.— Burke *v.* Smith, 15 Ill. 158.

Mississippi.—Walker *v.* Gilbert, 7 Sm. & M. 456.

New Hampshire.—Dodge *v.* Dodge, 29 N. H. 177.

New Jersey.—Commercial Assur. Co. *v.* New Jersey Rubber Co., 61 N. J. Eq. 446, 49 Atl. 155; Barriclo *v.* Trenton Mut. L., etc., Ins. Co., 13 N. J. Eq. 154.

New York.—Fulton Bank *v.* New York, etc., Canal Co., 4 Paige 127; Stafford *v.* Howlett, 1 Paige 200; Hope *v.* Brinckerhoff, 4 Edw. 660.

North Carolina.— Murray *v.* King, 40 N. C. 223.

United States.— Henry *v.* Travelers' Ins. Co., 45 Fed. 299; Swatzel *v.* Arnold, 23 Fed. Cas. No. 13,682, Woolw. 383.

See 19 Cent. Dig. tit. "Equity," §§ 584, 586.

An objection to a supplemental bill that it brings forth matter arising before the suit was brought comes too late at the hearing. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

Difference between supplemental and amended bills is merely technical. Rogers *v.* Solomons, 17 Ga. 598. Where leave is given to file a supplemental bill to bring in facts newly arising, other matters may be introduced which might have been brought into the original bill by amendment. Graves *v.* Niles, Harr. (Mich.) 332; Mallor *v.* Smither, 114 Fed. 116, 52 C. C. A. 64. In a few cases amendments and supplemental bills have been treated as concurrent remedies. McCaffrey *v.* Benson, 40 La. Ann. 10, 3 So. 393; Dickinson *v.* Codwise, 4 Edw. (N. Y.) 341; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,758, 2 Blatchf. 72. The greater liberality now shown in permitting amendments has rendered less frequent a resort to supplemental bills.

19. Pedrick *v.* White, 1 Metc. (Mass.) 76. See also Ridgeway *v.* Toram, 2 Md. Ch. 303.

20. Clark *v.* Hull, 31 Miss. 520.

21. Seymour *v.* Long Dock Co., 17 N. J. Eq. 169; Williams *v.* Birbeck, Hoffm. (N. Y.) 359; Clifton *v.* Haig, 4 Desauss. (S. C.) 330; Nevada Nickel Syndicate *v.* National Nickel Co., 86 Fed. 486; Veazie *v.* Williams, 28 Fed. Cas. No. 16,906, 3 Story 54. A supplemental bill will not be permitted merely to drop out of the case some of the defendants. Mosgrove *v.* Kountz, 14 Fed. 315, 4 McCrary 561.

After discovery of names of stock-holders personally liable, in pursuance of a bill filed for that purpose, a supplemental bill may be filed for relief against them. Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. (N. Y.) 301.

22. See *supra*, XI, A, 1, e.

23. *Alabama.*— Barringer *v.* Burke, 21 Ala. 765; Collins *v.* Lavenberg, 19 Ala. 682; Bowie *v.* Minter, 2 Ala. 406; Walker *v.* Hallett, 1 Ala. 379.

Arkansas.— Greer *v.* Turner, 36 Ark. 17.

California.—Van Maren *v.* Johnson, 15 Cal. 308.

cient foundation for a supplemental bill that new matter has arisen merely tending to corroborate the party's evidence,[24] or that a fact has occurred which does not change the rights or interests of the parties;[25] but an additional right accruing to plaintiff pending the suit should be set up by supplemental bill,[26] and this may be done for the purpose of varying the relief as such newly occurring facts may demand.[27] New matters arising in avoidance of a plea should also be set up by supplemental bill.[28] If new matters have arisen on which a decree might be rendered without reference to the matters contained in the original, a supplemental bill is improper; plaintiff should dismiss the original and file a new bill.[29]

3. Transfers of Interest Pendente Lite. Where the interest of a party is transferred pending the suit and the proceedings become for that reason defective a supplemental bill is the proper method for bringing in the new party.[30] This may be done where plaintiff acquires a new right,[31] or where the interests of defendants have been transferred to strangers.[32] So also where one has acquired

Illinois.— Burke *v.* Smith, 15 Ill. 158.

Maine.— Birmingham *v.* Lesan, 77 Me. 494, 1 Atl. 151.

Massachusetts.— Saunders *v.* Frost, 5 Pick. 275.

Michigan.—Fisher *v.* Holden, 84 Mich. 494, 47 N. W. 1063; Graves *v.* Niles, Harr. 332.

Minnesota.— Chouteau *v.* Rice, 1 Minn. 106.

New Hampshire.— Gove *v.* Lyford, 44 N. H. 525; Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371.

New Jersey.— Hoppock *v.* Cray, (Ch. 1891) 21 Atl. 624.

New York.— Hope *v.* Brinckerhoff, 4 Edw. 660.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tennessee.— Payne *v.* Beech, 2 Tenn. Ch. 708.

Virginia.—Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748.

West Virginia.— Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250. But in this state a supplemental bill is no longer necessary to set forth facts newly arising as this may be done by amendment. Crumlish *v.* Shenandoah Valley R. Co., 28 W. Va. 623.

Wisconsin.—Boorman *v.* Sunnuchs, 42 Wis. 233.

United States.— Coburn *v.* Cedar Valley Land, etc., Co., 138 U. S. 196, 11 S. Ct. 258, 34 L. ed. 876 [*affirming* 29 Fed. 584]; Kennedy *v.* Georgia Bank, 8 How. 586, 12 L. ed. 1209; Sheffield, etc., Coal, etc., Co. *v.* Newman, 77 Fed. 787, 23 C. C. A. 459; Copen *v.* Flesher, 6 Fed. Cas. No. 3,211, 1 Bond 440; Swatzel *v.* Arnold, 23 Fed. Cas. No. 13,682, Woolw. 383.

See 19 Cent. Dig. tit. "Equity," § 586.

New matter shown by petition.— Although new matters might be presented by petition the court may overrule a demurrer on that ground to a supplemental cross bill setting up such matter, and treat such cross bill as a petition. Foscue *v.* Lyon, 55 Ala. 440. Where new matter is presented by petition instead of supplemental bill, a party who submits proof cannot after decision object to such method of proceeding. Coburn *v.* Cedar Valley Land, etc., Co., 138 U. S. 196, 11 S. Ct. 258, 34 L. ed. 876 [*affirming* 29 Fed. 584].

24. Barriclo *v.* Trenton Mut. L., etc., Ins. Co., 13 N. J. Eq. 154; Lyster *v.* Stickney, 12 Fed. 609, 4 McCrary 109; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,267, 3 Story 299. See also Pennsylvania Co. *v.* Bond, 99 Ill. App. 535.

Motion is the proper method of introducing newly discovered evidence. North American Coal Co. *v.* Dyett, 2 Edw. (N. Y.) 115.

25. As the becoming of age of an infant plaintiff, pending the suit. Campbell *v.* Bowne, 5 Paige (N. Y.) 34.

26. Kelly *v.* Galbraith, 186 Ill. 593, 58 N. E. 431 [*affirming* 87 Ill. App. 63]; Saunders *v.* Frost, 5 Pick. (Mass.) 275; White *v.* Bullock, 3 Edw. (N. Y.) 453.

27. Ramey *v.* Green, 18 Ala. 771; Bernhard *v.* Bruner, 65 Ill. App. 641; Hasbrouck *v.* Shuster, 4 Barb. (N. Y.) 285; Hope *v.* Brinckerhoff, 4 Edw. (N. Y.) 660; Boorman *v.* Sunnuchs, 42 Wis. 233.

28. Hendry *v.* Clardy, 8 Fla. 77; Chouteau *v.* Rice, 1 Minn. 106; Hill *v.* Hite, 85 Fed. 268, 29 C. C. A. 549.

29. Milner *v.* Milner, 2 Edw. (N. Y.) 114.

30. Hazelton Tripod-Boiler Co. *v.* Citizens' St. R. Co., 72 Fed. 325; Hoxie *v.* Carr, 12 Fed. Cas. No. 6,802, 1 Sumn. 173. See U. S. Eq. Rule 57.

Abatement by transfer of interest see Abatement and Revival, 1 Cyc. 116.

31. Winn *v.* Albert, 2 Md. Ch. 42; Jaques *v.* Hall, 3 Gray (Mass.) 194; Wilder *v.* Keeler, 3 Paige (N. Y.) 164, 23 Am. Dec. 781.

A new title to relief, consisting in authority conferred by the legislature to represent other interests, may be asserted by supplemental bill. Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

Quitclaims between existing parties in a partition suit changing the extent of their interest were held not to necessitate a supplemental bill. Kane *v.* Parker, 4 Wis. 123.

32. Toulmin *v.* Hamilton, 7 Ala. 362; Caldwell *v.* Biggsville First Nat. Bank, 89 Ill.

the interest of a party pending the suit he may himself file a supplemental bill, whether the interest acquired be that of plaintiff,[33] or one acquired from a defendant.[34] By strict practice a supplemental bill is proper only where the same parties or the same interests remain before the court; but where new parties with new interests, arising from events happening since the institution of the suit, are brought before the court, it should not be by supplemental bill but by original bill in the nature of a supplemental bill.[35] The distinction between supplemental bills and original bills in the nature of supplemental bills is purely technical and is frequently disregarded.[36]

B. Time For Filing — 1. In General. There can be no exact limit fixed within which a supplemental bill may be filed, as the events rendering it necessary may occur or become known at any stage of the proceedings; but a party will not be permitted to file a supplemental bill if with knowledge of the facts rendering it necessary he without excuse permits the cause to proceed and its condition to change without making the application.[37] A stranger who has purchased the cause of action will not be permitted to set up his rights by bill in the nature of

App. 448; North American Coal Co. *v.* Dyett, 2 Edw. (N. Y.) 115; Carow *v.* Mowatt, 1 Edw. (N. Y.) 9.

33. *Illinois.*— Lunt *v.* Stephens, 75 Ill. 507.

Iowa.— Wright *v.* Meek, 3 Greene 472.

Maryland.— Collateral Security Bank *v.* Fowler, 42 Md. 393.

New York.— Watt *v.* Crawford, 11 Paige 470; Wilder *v.* Keeler, 3 Paige 164, 23 Am. Dec. 781.

South Carolina.— Bennett *v.* Calhoun Loan, etc., Assoc., 9 Rich. Eq. 163.

Tennessee.— Cheek *v.* Anderson, 2 Lea 194.

Virginia.— Sherrard *v.* Carlisle, 1 Patt. & H. 12.

West Virginia.— List *v.* Pumphrey, 3 W. Va. 672.

United States.— New York Cent. Trust Co. *v.* Western North Carolina R. Co., 89 Fed. 24.

See 19 Cent. Dig. tit. "Equity," § 586.

One who acquires plaintiff's interest after decree may file a supplemental bill, if necessary, to obtain further action to obtain its benefit. Secor *v.* Singleton, 41 Fed. 725.

34. Whitbeck *v.* Edgar, 4 Sandf. Ch. (N. Y.) 427; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. (N. Y.) 70.

Where attorneys are assignees of their clients of a portion of a fund in court for distribution, they may file a supplemental bill to give notice of their lien. Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801.

35. Bowie *v.* Minter, 2 Ala. 406; Butler *v.* Cunningham, 1 Barb. (N. Y.) 85; Campbell *v.* Bowne, 5 Paige (N. Y.) 34; Kerr *v.* Webb, 9 Rich. Eq. (S. C.) 369; Boorman *v.* Sunnuchs, 42 Wis. 233; Story Eq. Pl. § 345.

A voluntary purchaser pendente lite of all plaintiff's interests should proceed by original bill in the nature of a supplemental bill and not by supplemental bill proper. Steele *v.* Taylor, 1 Minn. 274; Trabue *v.* Bankhead, 2 Tenn. Ch. 412; Baker *v.* Baker, 89 Fed. 673; Hazelton Tripod-Boiler Co. *v.* Citizens' St. R. Co., 72 Fed. 325; Ross *v.* Ft. Wayne, 58 Fed. 404; Campbell *v.* New York, 35 Fed. 14; Tappan *v.* Smith, 23 Fed. Cas. No. 13,748, 5 Biss. 73.

Sale of trade-mark.— But a supplemental bill is the proper proceeding in a suit for infringement of a trade-mark, where plaintiff has sold his business, good-will, and trade-mark, but not his right to recover for past infringement, because in that case the original plaintiff retains an interest. Davis *v.* Smith, 105 Fed. 949.

Where plaintiff parted with his entire interest after answer a bill in the nature of a supplemental bill was held to be the proper method for defendant to set up the fact. Pue *v.* Pue, 4 Md. Ch. 386.

One whose claim accrues before the suit was instituted cannot file an original bill in the nature of a supplemental bill. Butler *v.* Cunningham, 1 Barb. (N. Y.) 85.

36. Story Eq. Pl. § 345.

37. Cheeseman *v.* Sturges, 19 Abb. Pr. (N. Y.) 293; Dias *v.* Merle, 4 Paige (N. Y.) 259; Pendleton *v.* Fay, 3 Paige (N. Y.) 204; Henry *v.* Travelers' Ins. Co., 45 Fed. 299. See also Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,267, 3 Story 299.

An administrator suing will not be required to show as much diligence in discovering facts as one suing in his own right. Owens *v.* Love, 9 Fla. 325.

Discovery cannot be sought by supplemental bill after a receiver has been appointed by decree and has proceeded to reduce the property to his possession. Dunham *v.* Eaton, etc., R. Co., 8 Fed. Cas. No. 4,150, 1 Bond 492.

If nothing has occurred to change the rights of the parties matter which would be the proper subject of amendment cannot be introduced by supplemental bill, although the facts were unknown until after the cause was at issue. Dias *v.* Merle, 4 Paige (N. Y.) 259.

Delay was held not unreasonable, under the circumstances, and the progress of the case not such as to forbid the filing of the bill, in French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252; Pedrick *v.* White, 1 Metc. (Mass.) 76; McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430; Miller *v.* Clark, 49 Fed. 695.

a supplemental bill after a decree has been directed and before it has been entered.[38]

2. After Decree. A supplemental bill may be filed either before or after decree.[39] If after decree it may be in aid thereof, where some further action proves to be necessary in order to obtain its benefit,[40] or it may be to impeach the decree, and it is then a supplemental bill in the nature of a bill of review.[41] Leave will not be given after decree to file a supplemental bill to set up matters which might with reasonable diligence have been ascertained and determined in the original decree,[42] nor will it be permitted to vary the relief or principles established by the decree.[43] A supplemental bill cannot be filed after an absolute dismissal of the original,[44] but after a dismissal without prejudice, with leave to plaintiff to apply for relief under certain conditions, the application may be by supplemental bill.[45]

C. Right to File. A supplemental bill may not be filed as of course, but only on leave of the court for cause shown,[46] and granted *ex parte* or upon notice, according to local regulations.[47] The application is addressed to the discretion of the court,[48] and leave will be granted if probable cause is shown,[49] although there may be grave doubts as to plaintiff's right to the relief prayed therein.[50] A supplemental bill making an essentially different case from that contemplated in the leave given to file it will be taken from the files.[51] A bill filed without leave as an original bill, but which is properly a supplemental bill, may be allowed to stand as a supplemental bill,[52] and the refusal of the court to strike out a bill filed without leave is equivalent to leave to file it.[53] The irregular filing of a supple-

38. Hazleton Tripod-Boiler Co. *v.* Citizens' St. R. Co., 72 Fed. 325.

39. O'Hara *v.* Shepherd, 3 Md. Ch. 306; Mitford Eq. Pl. 59.

40. Gunn *v.* Gunn, 95 Ga. 439, 22 S. E. 552; O'Hara *v.* Shepherd, 3 Md. Ch. 306; Herd *v.* Bewley, 1 Heisk. (Tenn.) 524; Secor *v.* Singleton, 41 Fed. 725.

After decree reserving some matter for further consideration a supplemental bill may be filed. Campbell *v.* Harlston, 3 N. C. 157.

Where a decree of foreclosure is stayed by the payment of interest and costs, subsequent mortgagees, who were parties to the bill, must resort to supplemental bill to avail themselves of the decree. Rankin *v.* Reformed Protestant Dutch Church, 1 Edw. (N. Y.) 20.

41. Mitford Eq. Pl. 59. See also *infra*, XXIV, F, 1, c.

42. Boynton *v.* Ingalls, 70 Me. 461; Ashuelot R. Co. *v.* Cheshire R. Co., 59 N. H. 409; Mosgrove *v.* Kountze, 14 Fed. 315, 4 McCrary 561. Nor after an interlocutory decree. Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,267, 3 Story 299.

43. Van Wert *v.* Boyes, 140 Ill. 89, 29 N. E. 710 [*reversing* 38 Ill. App. 426]; O'Hara *v.* Shepherd, 3 Md. Ch. 306; Clark *v.* Hull, 31 Miss. 520; Hurt *v.* Jones, 75 Va. 341.

44. Burke *v.* Smith, 15 Ill. 158.

45. Chesterman *v.* Seeley, 6 Pa. Dist. 159, 19 Pa. Co. Ct. 193.

46. *Alabama.*— Bowie *v.* Minter, 2 Ala. 406.

Maryland.— Winn *v.* Albert, 2 Md. Ch. 42.

Massachusetts.— Pedrick *v.* White, 1 Metc. 76.

New Hampshire.— Tappan *v.* Evans, 12 N. H. 330.

New Jersey.— Allen *v.* Taylor, 3 N. J. Eq. 435, 29 Am. Dec. 721.

See 19 Cent. Dig. tit. "Equity," § 588.

47. Unless otherwise controlled by rule the application may be *ex parte*. Winn *v.* Albert, 2 Md. Ch. 42; Lawrence *v.* Bolton, 3 Paige (N. Y.) 294; Eager *v.* Price, 2 Paige (N. Y.) 333.

Notice to parties who have appeared will be required in a doubtful case (Winn *v.* Albert, 2 Md. Ch. 42), or where some special relief is sought immediately (Lawrence *v.* Bolton, 3 Paige (N. Y.) 294).

U. S. Eq. Rule 57 requires notice in all cases. The petition for leave, however, need not embrace the matter of the supplemental bill, but only show the ground on which the relief is asked. Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,758, 2 Blatchf. 72.

48. Turner *v.* Berry, 8 Ill. 541.

The application may be renewed where it was denied on special grounds due to misapprehension. Smith *v.* Wainwright, 24 Vt. 97.

49. Eager *v.* Price, 2 Paige (N. Y.) 333; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,758, 2 Blatchf. 72.

50. Oregon, etc., Co. *v.* Northern Pac. R. Co., 32 Fed. 428.

If a supplemental bill has equity leave should not be refused because the matter has already been adjudicated, but defendant should be left to plead former recovery. Dulin *v.* Caldwell, 29 Ga. 362.

51. Stockton *v.* American Tobacco Co., 53 N. J. Eq. 400, 32 Atl. 261.

52. Mackintosh *v.* Flint, etc., R. Co., 34 Fed. 582.

53. Ward *v.* Whitfield, 64 Miss. 754, 2 So. 493.

mental bill is waived unless objection is made in the court below,[54] and before hearing.[55] The irregularity is also waived by consenting to the filing,[56] or by demurring[57] or answering.[58]

D. Form and Sufficiency — 1. Form in General. A supplemental bill should state the original bill and the proceedings thereon,[59] but only so far as may be necessary under the circumstances in order properly to put in issue the supplemental matter and show its relation to the original.[60] It is not the practice to reiterate substantively facts stated in the original, but only to state them by reference as having been represented therein.[61] The bill must then state the supplemental matter, pray for relief appropriate to its object, and conclude with a prayer for process.[62]

2. Parties. Where a stranger who has acquired an interest himself files a supplemental bill, he must bring in as parties thereto all the remaining parties to the original,[63] and the same is true wherever a supplemental bill is filed for the purpose of putting in issue a new fact;[64] but where the bill is rendered necessary only by the acquisition of interest by a defendant, or a stranger who must be brought in, only that person need be made a defendant unless the interests of others will be affected.[65]

3. Relation to the Original Bill. A supplemental bill is a mere addition to or continuation of the original bill,[66] constituting therewith a single record,[67] and

54. Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456.

55. Walker *v.* Hallett, 1 Ala. 379; Boyes *v.* Van Wert, 38 Ill. App. 426 [*affirmed* on this point in 140 Ill. 89, 29 N. E. 710].

56. Hyer *v.* Caro, 17 Fla. 332.

57. Allen *v.* Taylor, 3 N. J. Eq. 435, 29 Am. Dec. 721. The court may in its discretion dismiss a supplemental bill filed without authority, but the irregularity is not ground for a demurrer. Barriclo *v.* Trenton Mut. L., etc., Ins. Co., 13 N. J. Eq. 154. And see Orvis *v.* Cole, 14 Ill. App. 283.

58. Adair *v.* Cummins, 48 Mich. 375, 12 N. W. 495.

59. 3 Daniell Ch. Pr. 175.

60. It has been said that if the supplemental bill be filed after decree it should merely state the decree, and if before the decree, only the prayer of the bill. Onge *v.* Truelock, 2 Molloy 31. But it has been pointed out that this is true only where the supplemental bill is for the sole purpose of bringing in a transferee. 3 Daniell Ch. Pr. 176.

Where the object is to bring a new interest before the court, and not merely to continue the suit as against a transferee of an interest already represented, enough must be stated to show a right to relief against the new party. 3 Daniell Ch. Pr. 176.

A bill by infants after attaining majority, referring to but not reciting the substance of a previous bill filed by their guardian in his own name, will not entitle the infants to the decree sought by the guardian. Bowie *v.* Minter, 2 Ala. 406.

Where an assignee brought a suit and afterward filed a supplemental bill stating simply that the assignor had died and plaintiff had been appointed his administrator, it was held that this merely accounted for failure to serve process on the assignor and did not entitle plaintiff to relief as administrator. Walter *v.* Clark, 6 J. J. Marsh. (Ky.) 629.

U. S. Eq. Rule 58 provides that it shall not be necessary to set forth any of the statements in the original suit unless the special circumstances of the case shall require it.

61. Edgar *v.* Clevenger, 3 N. J. Eq. 464; Lloyd *v.* Johnes, 9 Ves. Jr. 37, 7 Rev. Rep. 147, 32 Eng. Reprint 514.

A bill in the nature of a supplemental bill, bringing in new parties, must state the whole case against the new defendants so that they may answer, and a reference to the original is insufficient. Chase *v.* Searles, 45 N. H. 511.

62. 3 Daniell Ch. Pr. 178, 182. See also *supra*, VI, A, 2, c.

63. 3 Daniell Ch. Pr. 180. Where owners in severalty of distinct properties united in a bill to restrain a nuisance, and a supplemental bill became necessary on behalf of one, it was held proper to exhibit it in the names of both. Blunt *v.* Hay, 4 Sandf. Ch. (N. Y.) 362.

64. Greenwood *v.* Atkinson, 5 Sim. 419, 9 Eng. Ch. 419.

65. Bignall *v.* Atkins, 6 Madd. 369. See also Allen *v.* Taylor, 3 N. J. Eq. 435, 29 Am. Dec. 721; McGown *v.* Yerks, 6 Johns. Ch. (N. Y.) 450; Ensworth *v.* Lambert, 4 Johns. Ch. (N. Y.) 605.

66. Ramey *v.* Green, 18 Ala. 771; Hill *v.* Hill, 10 Ala. 527; Gillett *v.* Hall, 13 Conn. 426; Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Smith *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 151.

A supplemental bill bringing in new parties is as to them so far a new suit that it is deemed commenced when the supplemental bill is filed. Morgan *v.* Morgan, 10 Ga. 297.

67. Potier *v.* Barclay, 15 Ala. 439; Shellabarger Mill, etc., Co. *v.* Willing, 81 Ill. App. 30; Harrington *v.* Slade, 22 Barb.

both must be read together.[68] Hence there must be such a connection between the matter of the original and of the supplemental bill that a single bill combining the matter of both would not be multifarious.[69] It follows further that the supplemental bill must not be repugnant to the original.[70]

4. NECESSITY OF EQUITY IN ORIGINAL BILL. If the original bill be fatally defective, so that no valid decree could be rendered thereon, it cannot be supported by nor will it support a supplemental bill stating matters occurring after the original was filed to cure the defect.[71] A failure to demur on this ground waives the objection.[72]

E. Defenses. Besides the ordinary grounds of demurrer defendant to a supplemental bill may demur thereto on the ground that it is not properly connected with the original,[73] that it presents newly arising matter to aid an original fatally defective,[74] or that for any other reason it is not properly supplemental.[75] Pleas and answers are governed by the same rules as to form and substance as pleas and answers to the original.[76] The answer should be confined to the supplemental bill and cannot be made the pretext for adding to or amending the answer to the original.[77] Where the purpose of the bill is merely to bring in a new party he alone should answer it.[78]

(N. Y.) 161; Smith *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 151.

68. Potier *v.* Barclay, 15 Ala. 439; Cunningham *v.* Rogers, 14 Ala. 147; Gillett *v.* Hall, 13 Conn. 426; Aust *v.* Rosenbaum, 74 Miss. 893, 21 So. 555.

69. Williams *v.* Winans, 20 N. J. Eq. 392; Smith *v.* Pyrites Min., etc., Co., 101 Va. 301, 43 S. E. 564; McComb *v.* Lobdell, 32 Gratt. (Va.) 185; Minnesota Co. *v.* St. Paul Co., 6 Wall. (U. S.) 742, 18 L. ed. 856. The connection with the original bill must be necessary and evident. Dickson *v.* Poindexter, Freem. (Miss.) 721.

An additional title to relief with reference to the same subject-matter is germane to the original bill. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Gage *v.* Parker, 103 Ill. 528. Where both original and supplemental bill seeks foreclosure of securities pledged for the same debt, they are not multifarious, although the form of the indebtedness has been changed by the rendition of a decree ascertaining it. Jenkins *v.* International Bank, 111 Ill. 462.

Objection that a new case is set up in a supplemental bill must be raised by demurrer. Crump *v.* Perkins, 18 Fla. 353; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

70. Leonard *v.* Cook, (N. J. Ch. 1890) 21 Atl. 47; Sanderlin *v.* Thompson, 17 N. C. 539; Straughan *v.* Hallwood, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29; Maynard *v.* Green, 30 Fed. 643.

71. *Alabama.*— Vaughan *v.* Vaughan, 30 Ala. 329; Land *v.* Cowan, 19 Ala. 297; Hill *v.* Hill, 10 Ala. 527.

Florida.— Neubert *v.* Massman, 37 Fla. 91, 19 So. 625.

Illinois.— Heffron *v.* Knickerbocker, 57 Ill. App. 339.

Indiana.— Patten *v.* Stewart, 24 Ind. 332.

Maine.— Birmingham *v.* Lesan, 77 Me. 494, 1 Atl. 151.

Maryland.— Winn *v.* Albert, 2 Md. Ch. 42.

Mississippi.—Brown *v.* State Bank, 31 Miss. 454.

New Jersey.— Edgar *v.* Clevenger, 3 N. J. Eq. 258.

New York.— Candler *v.* Pettit, 1 Paige 168, 19 Am. Dec. 399.

Pennsylvania.— Butler's Appeal, (1886) 6 Atl. 708; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180; Mitcheson *v.* Harlan, 3 Phila. 385.

West Virginia.— Straughan *v.* Hallwood, 30 W. Va. 274, 3 S. E. 394, 8 Am. St. Rep. 29.

United States.— Mellor *v.* Smither, 114 Fed. 116, 52 C. C. A. 64; New York Security, etc., Co. *v.* Lincoln St. R. Co., 74 Fed. 67; Putney *v.* Whitmire, 66 Fed. 385.

See 19 Cent. Dig. tit. "Equity," § 584.

If the original bill is sustainable on any ground, even for temporary relief alone, a supplemental bill may be filed. Edgar *v.* Clevenger, 3 N. J. Eq. 258.

72. Pinch *v.* Anthony, 10 Allen (Mass.) 470; Lowry *v.* Harris, 12 Minn. 255. *Contra*, Straughan *v.* Hallwood, 30 W. Va. 274, 3 S. E. 394, 8 Am. St. Rep. 29. Where defendants, in answering the original, alleged want of equity, the question may be raised by demurrer to a supplemental bill thereafter filed. Williams *v.* Winans, 22 N. J. Eq. 573.

73. See *supra*, XII, D, 3.

74. See *supra*, XII, D, 4.

75. Williams *v.* Winans, 20 N. J. Eq. 392; Woodruff *v.* Brugh, 6 N. J. Eq. 465; Stafford *v.* Howlett, 1 Paige (N. Y.) 200; Wing *v.* Champion, 1 Tenn. Ch. 517; 3 Daniell Ch. Pr. 183.

The mere misnaming of the bill, if it be otherwise sufficient, is not fatal. Northman *v.* Liverpool, etc., Ins. Co., 1 Tenn. Ch. 312. See also Miller *v.* Saunders, 18 Ga. 492.

76. 3 Daniell Ch. Pr. 184, 185. Where the case made by the supplemental bill requires for its support evidence under the original which is inadmissible against defendants in the supplemental bill, they need not answer the supplemental bill. Stover *v.* Wood, 29 N. J. Eq. 156.

77. Swan *v.* Dent, 2 Md. Ch. 111.

78. Calwell *v.* Boyer, 8 Gill & J. (Md.) 136.

XIII. BILLS OF REVIVOR.

A. Nature and Functions — 1. BILLS OF REVIVOR PROPER. The purpose of a bill of revivor is to continue a suit which has abated from the want of proper parties;[79] but only where title has passed to the person who is to be brought in, by mere operation of law, so that such person is merely to be ascertained but the title is not open to litigation;[80] as where by the death of a party his title passes to his heirs or personal representatives.[81] In the absence of statutes removing the disabilities of married women, a bill of revivor is also necessary, upon the marriage of a female plaintiff, in order to continue the suit with her husband as a party.[82] The bill may be filed not only to revive a pending suit, but to revive a decree, by a party having an interest in its enforcement or against representatives chargeable with its performance.[83]

2. BILLS IN THE NATURE OF BILLS OF REVIVOR. When the death of a party is attended with such a transmission of interest that the title itself may be litigated, as well as the identity of the person entitled, a bill of revivor proper is inadequate,[84] and the proceeding must be by original bill in the nature of a bill of revivor.[85] This is the case where the title has passed by will instead of descent.[86] A bill of this character is proper where upon the dissolution of a defendant corporation its title passes to an assignee[87] or receiver appointed by another court.[88]

3. BILLS OF REVIVOR AND SUPPLEMENT. When a bill of revivor is necessary, plaintiff therein is permitted also to introduce new matter proper for a supplemental bill.[89] Such a bill is called a bill of revivor and supplement, and is merely a compound of a bill of revivor and a supplemental bill, continuing an abated suit and supplying defects in the original.[90]

B. Time For Filing. The occasion for a revivor may arise and a bill of revivor be proper at any time before or after decree, and such a bill may in gen-

79. Kennedy *v.* Georgia State Bank, 8 How. (U. S.) 586, 12 L. ed. 1209.

80. Barnett *v.* Powers, 40 Mich. 317; Metal Stamping Co. *v.* Crandall, 17 Fed. Cas. No. 9,493*c*; Mitford Eq. Pl. 63; Story Eq. Pl. § 364. See also ABATEMENT AND REVIVAL, 1 Cyc. 102.

81. Cullum *v.* Batre, 2 Ala. 415; Aldridge *v.* Dunn, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224; Barnett *v.* Powers, 40 Mich. 317; Johnson *v.* Thomas, 2 Paige (N. Y.) 377; Nicoll *v.* Roosevelt, 3 Johns. Ch. (N. Y.) 60. See also ABATEMENT AND REVIVAL, 1 Cyc. 102.

Statutes frequently authorize revivor without a bill for that purpose; but such statutes may not be exclusive so as to forbid a proceeding by bill. Pells *v.* Coon, Hopk. (N. Y.) 450. See ABATEMENT AND REVIVAL, 1 Cyc. 103 note 98.

An order substituting an administrator as complainant operates in itself as a revivor. Webster *v.* Hitchcock, 11 Mich. 56.

A mere motion may not be revived by bill (Hendrix *v.* Clay, 2 A. K. Marsh. (Ky.) 462), but the suit must be revived before a pending motion therein can be decided (Reed *v.* Butler, 11 Abb. Pr. (N. Y.) 128).

82. Hall *v.* Hall, 1 Bland (Md.) 130; Douglass *v.* Sherman, 2 Paige (N. Y.) 358; Phelps *v.* Sproule, 4 Sim. 318, 6 Eng. Ch. 318; Mitford Eq. Pl. 54.

83. Cochran *v.* Couper, 2 Del. Ch. 27; Hord *v.* Marshall, 5 Dana (Ky.) 495; Ridgely *v.* Bond, 18 Md. 433; Peer *v.* Cookerow, 14 N. J. Eq. 361; Story Eq. Pl. § 366 *et seq.*

Revivor of a reviving decree operates to again revive the original. Shainwald *v.* Lewis, 69 Fed. 487.

To bring in a posthumous heir and divest his title a bill of revivor cannot be filed after decree in the cause. McConnel *v.* Smith, 23 Ill. 611.

One who has lost his right to proceed under a decree cannot file a bill to revive it. Peer *v.* Cookerow, 14 N. J. Eq. 361.

84. Peer *v.* Cookerow, 14 N. J. Eq. 361.

85. Mitford Eq. Pl. 66.

86. See ABATEMENT AND REVIVAL, 1 Cyc. 102.

87. Chester *v.* Life Assoc. of America, 4 Fed. 487.

88. Griswold *v.* Hilton, 87 Fed. 256.

A corporation deriving title through purchase at a foreclosure sale is not entitled to revive a suit which had been brought by the mortgagor to restrain the collection of taxes on the property. Keokuk, etc., R. Co. *v.* Scotland County Ct., 152 U. S. 318, 14 S. Ct. 605, 38 L. ed. 457.

89. Glenn *v.* Hebb, 17 Md. 260; Webster *v.* Hitchcock, 11 Mich. 56; Brandon *v.* Mason, 1 Lea (Tenn.) 615. See also ABATEMENT AND REVIVAL, 1 Cyc. 108 notes 18, 19.

90. Bowie *v.* Minter, 2 Ala. 406; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306.

eral be filed at any time before the statutory period of limitations;[91] but a revivor will be denied if not sought until after a very long period of inaction.[92]

C. Right to File. A plaintiff may generally file a bill of revivor as a matter of right without obtaining leave of the court.[93] Prior to decree a defendant may not file a bill to revive;[94] but he may on motion compel plaintiff to do so or dismiss his bill.[95] After decree it has been said that the rights of the parties having been ascertained any party can revive;[96] but this is true only where defendant has some interest under the decree which he is entitled to enforce by further proceedings.[97]

D. Form and Sufficiency. A bill of revivor should concisely state the parties and object of the original bill and the proceedings thereon, the abatement and plaintiff's title to revive, and should pray that the suit be revived accordingly.[98] If the instrument contains the proper averments for a bill of revivor it will be so considered, although styled by another name.[99]

E. Parties. In the case of abatement by death the revivor should be by or against the personal representatives or heirs or devisees as the nature of the interest demands.[1] Upon the death or marriage of a plaintiff all the remaining parties must be made parties to a bill to revive; but upon the death of a defendant only the representatives of the deceased defendant need be made defendants in the bill of revivor.[2] Where the bill is filed after decree all interested in carrying the decree into execution must be made parties,[3] but no others.[4]

F. Process. Necessity of process upon bills of revivor and the method of service are in general the same as upon ordinary bills.[5]

G. Defenses. Demurrers, pleas, and answers to a bill of revivor are subject to the same rules as in the case of original bills.[6] If supplemental matter be improperly inserted in the bill a demurrer for that reason should be restricted to such matter.[7] A bill to revive several distinct suits may be demurred to for multifariousness.[8] New defenses to the original cannot be interposed in answer to a bill of revivor,[9] nor can matters already decided in the original cause be

91. Shainwald *v.* Lewis, 69 Fed. 487; and cases cited in ABATEMENT AND REVIVAL, 1 Cyc. 105 note 8.

92. Riely *v.* Kinzell, 85 Va. 480, 7 S. E. 907 (twenty-eight years after a decree reserving leave to apply for further directions); Hubbell *v.* Lankenau, 63 Fed. 881 (twelve years). See also ABATEMENT AND REVIVAL, 1 Cyc. 105 note 9, 106 note 12.

93. Webster *v.* Hitchcock, 11 Mich. 56; Roach *v.* La Farge, 43 Barb. (N. Y.) 616, 19 Abb. Pr. (N. Y.) 67; U. S. Eq. Rule 56. But see Holman *v.* Norfolk Bank, 12 Ala. 369.

94. Reid *v.* Stuart, 20 W. Va. 382; 3 Daniell Ch. Pr. 205.

95. Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287; Chowick *v.* Dimes, 3 Beav. 290.

96. 3 Daniell Ch. Pr. 208.

97. Horwood *v.* Schmedes, 12 Ves. Jr. 311, 33 Eng. Reprint 118. It has been suggested that a defendant can revive only after a decree to account. Anonymous, 3 Atk. 691, 26 Eng. Reprint 1197. This view seems too narrow. 3 Daniell Ch. Pr. 209; Story Eq. Pl. § 372.

98. 3 Daniell Ch. Pr. 213, 214; Mitford Eq. Pl. 70; Story Eq. Pl. § 374. See also ABATEMENT AND REVIVAL, 1 Cyc. 106–108.

U. S. Eq. Rule 58 renders it unnecessary to set forth any statements in the original suit unless the special circumstances of the case shall require.

The bill must show complete right in plaintiffs seeking to revive. Lemon *v.* Rector, 15 Ark. 436. See also ABATEMENT AND REVIVAL, 1 Cyc. 108 note 17.

99. Reid *v.* Stuart, 20 W. Va. 382; Shainwald *v.* Lewis, 69 Fed. 487.

1. See ABATEMENT AND REVIVAL, 1 Cyc. 108. Where a decree directed lands to be sold and the proceeds distributed among the encumbrancers and heirs, the share of the former is personalty, and on the death of one of them his personal representatives must be brought in for the purpose of distribution. Ridgely *v.* Bond, 18 Md. 433.

2. 3 Daniell Ch. Pr. 210. See also ABATEMENT AND REVIVAL, 1 Cyc. 108.

3. 3 Daniell Ch. Pr. 211.

4. Leggett *v.* Sellon, 3 Paige (N. Y.) 84; Peer *v.* Cookerow, 14 N. J. Eq. 361. But see Riely *v.* Kinzel, 85 Va. 480, 7 S. E. 907.

5. See ABATEMENT AND REVIVAL, 1 Cyc. 110.

6. 3 Daniell Ch. Pr. 219.

If a demurrer be overruled leave should not be given to plead over, but an order reviving should be at once made. Nye *v.* Slaughter, 27 Miss. 638.

7. See ABATEMENT AND REVIVAL, 1 Cyc. 109 note 22.

8. McDermott *v.* McGowan, 4 Edw. (N. Y.) 592.

9. Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769. See also ABATEMENT AND REVIVAL, 1 Cyc. 109 note 24.

reopened.[10] The court will not refuse to revive a decree on the ground that it is unjust.[11] A cross bill may be filed to a bill of revivor and supplement, presenting matter germane to the new matter of the bill.[12]

XIV. SIGNING AND VERIFYING PLEADINGS.

A. Signing — 1. By Counsel. In the absence of statute or rule to the contrary all pleadings in equity must be signed by counsel,[13] except disclaimers [14] and general replications.[15] The rule holds also as to other papers, not technically pleadings, which are put in by counsel, as exceptions to an answer.[16] The object of requiring the signature of counsel to a bill is to obtain the certificate, implied from the signature, that the bill contains matter proper to be presented to the court in that form,[17] and the same general object seems to exist in the case of

10. Winston *v.* McAlpine, 65 Ala. 377; Arnold *v.* Styles, 2 Blackf. (Ind.) 291. A plea that the original cause was barred by limitations before the suit was brought and that the bill of revivor was barred by lapse of time after the abatement was held bad for duplicity. Littlejohn *v.* Williams, 21 N. C. 343.

11. State *v.* Mobile, 24 Ala. 701.

12. Powers *v.* Hibbard, 114 Mich. 533, 72 N. W. 339.

13. Bills.— *Michigan.*— Bernier *v.* Bernier, 72 Mich. 43, 40 N. W. 50; Eveland *v.* Stephenson, 45 Mich. 394, 8 N. W. 62.

New Jersey.— Davis *v.* Davis, 19 N. J. Eq. 180; Wright *v.* Wright, 8 N. J. Eq. 143.

New York.— Partridge *v.* Jackson, 2 Edw. 520; Carey *v.* Hatch, 2 Edw. 190; Gove *v.* Pettis, 4 Sandf. Ch. 403.

Vermont.— Martin *v.* Palmer, 72 Vt. 409, 48 Atl. 655.

West Virginia.— Dever *v.* Willis, 42 W. Va. 365, 26 S. E. 176.

United States.— Dwight *v.* Humphreys, 8 Fed. Cas. No. 4,216, 3 McLean 104; Roach *v.* Hulings, 20 Fed. Cas. No. 11,874, 5 Cranch C. C. 637; U. S. Eq. Rule 24.

England.— Kirkley *v.* Burton, 5 Madd. 378.

See 19 Cent. Dig. tit. "Equity," § 613.

Sufficiency of signature.— The signature should be by counsel and not merely in the name of counsel (Davis *v.* Davis, 19 N. J. Eq. 180), but it is sufficient if the signature appears on the back of the bill (Litton *v.* Armstead, 9 Baxt. (Tenn.) 514; Dwight *v.* Humphreys, 8 Fed. Cas. No. 4,216, 3 McLean 104). A signature to a notice to defendant required by rule of court is sufficient. Everhart *v.* Everhart, 3 Luz. Leg. Reg. (Pa.) 55. The bill must be signed on behalf of all the plaintiffs. Chapman *v.* Banker, etc., Pub. Co., 128 Mass. 478.

Demurrers.— Graham *v.* Elmore, Harr. (Mich.) 265; 2 Daniell Ch. Pr. 77; Mitford Eq. Pl. 170; Story Eq. Pl. § 461.

Pleas.— Barton Suit Eq. 113; 2 Daniell Ch. Pr. 211.

Answers.— Davis *v.* Davidson, 7 Fed. Cas. No. 3,631, 4 McLean 136; Barton Suit Eq. 121; 2 Daniell Ch. Pr. 268; Mitford Eq. Pl. 250.

Signature by a solicitor is sufficient. Freehold Mut. Loan Assoc. *v.* Brown, 28 N. J. Eq. 42.

Omission of the signature will not invalidate the decree. Sears *v.* Hyer, 1 Paige (N. Y.) 483.

14. Dickerson *v.* Hodges, 43 N. J. Eq. 45, 10 Atl. 111.

15. 2 Daniell Ch. Pr. 388.

16. Hitchcock *v.* Rhodes, 42 N. J. Eq. 495, 8 Atl. 317.

17. The requirement of signature by counsel is said to have existed since the time of Sir Thomas More, prior to which the bill was examined before it would be entertained, by the court itself or by a master in chancery. Cooper Eq. Pl. 18; 2 Daniell Ch. Pr. 409; 1 Hargrave L. Tr. 302. The object is sometimes stated to be to hold counsel responsible for impertinence and scandal (Mitford Eq. Pl. 47), and this seems to be the main object indicated in Lord Clarendon's orders (Beames Orders Ch. 165).

U. S. Eq. Rule 24 provides that the signature of counsel shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Certificates of counsel.— A formal certificate of counsel is sometimes required instead of that implied by signature alone. U. S. Eq. Rule 31 provides that no demurrer or plea shall be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law. See Secor *v.* Singleton, 9 Fed. 809, 3 McCrary 230. Similar requirements exist elsewhere. See Taylor *v.* Brown, 32 Fla. 334, 13 So. 957; Mill River Loan Fund Assoc. *v.* Claflin, 9 Allen (Mass.) 101; Hoagland *v.* See, 40 N. J. Eq. 469, 3 Atl. 513.

In Florida a failure to so certify a demurrer must be taken advantage of by motion to strike or it is waived. Keen *v.* Jordan, 13 Fla. 327.

In the federal courts the want of such certificate is fatal, and the demurrer or plea should be disregarded. Shefficld Furnace Co. *v.* Witherow, 149 U. S. 574, 13 S. Ct. 936, 37 L. ed. 853; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Dupree *v.* Leggett, 124 Fed. 700; American Steel, etc., Co. *v.* Wire Drawers',

other pleadings.[18] If a bill be not signed it will be taken from the files,[19] and it is also open to demurrer.[20] If a bill be filed without a signature the defect may be supplied without costs,[21] and is waived by answer.[22] With the obliteration of the distinction between solicitors and counselors the requirement of signature by counsel has been so far modified that a signature by solicitors is sufficient.[23]

2. By Parties. An answer must be signed by defendant answering,[24] unless under special circumstances the court directs it to be received without a signature.[25] This is true, although the oath to the answer has been waived.[26] A disclaimer must also be signed by the disclaiming defendant, and his signature should be attested.[27] An affidavit or petition should be signed by the person swearing thereto.[28] A bill need not be signed by plaintiff.[29]

B. Verifying — 1. Bills. As a general rule a bill in equity requires no verification.[30] An affidavit must, however, accompany the bill in certain cases. In suits for the discovery of deeds and writings, and for relief founded thereon, there must be an affidavit that they are not in the custody or power of plaintiff,

etc., Unions Nos. 1 & 3, 90 Fed. 598; Preston *v.* Finley, 72 Fed. 850. But see Goodyear *v.* Toby, 10 Fed. Cas. No. 5,585, 6 Blatchf. 130. No certificate is required to an answer. McGorray *v.* O'Connor, 87 Fed. 586, 31 C. C. A. 114.

In Pennsylvania counsel must certify to a bill that the plaintiff has no adequate remedy at law. Thomas *v.* Hall, 2 Pearson (Pa.) 64; Everhart *v.* Everhart, 3 Luz. Leg. Reg. (Pa.) 55.

18. Davis *v.* Davidson, 7 Fed. Cas. No. 3,631, 4 McLean 136; Barton Suit Eq. 109.

19. Eveland *v.* Stephenson, 45 Mich. 394, 8 N. W. 62; Partridge *v.* Jackson, 2 Edw. (N. Y.) 520; Carey *v.* Hatch, 2 Edw. (N. Y.) 190; Gove *v.* Pettis, 4 Sandf. Ch. (N. Y.) 403; Roach *v.* Hulings, 20 Fed. Cas. No. 11,874, 5 Cranch C. C. 637.

20. Wright *v.* Wright, 8 N. J. Eq. 143; Dever *v.* Willis, 42 W. Va. 365, 26 S. E. 176; Dwight *v.* Humphreys, 8 Fed. Cas. No. 4,216, 3 McLean 104; Kirkley *v.* Burton, 5 Madd. 378. *Contra*, Gove *v.* Pettis, 4 Sandf. Ch. (N. Y.) 403.

21. Sill *v.* Ketchum, Harr. (Mich.) 423; Carey *v.* Hatch, 2 Edw. (N. Y.) 190.

But an order of court must be obtained for that purpose. Partridge *v.* Jackson, 2 Edw. (N. Y.) 520.

22. Turner *v.* Jenkins, 79 Ill. 228; Hatch *v.* Eustaphieve, Clarke (N. Y.) 63.

23. Henry *v.* Gregory, 29 Mich. 68; Stinson *v.* Hildrup, 23 Fed. Cas. No. 13,459, 8 Biss. 376.

Signature in the firm name of two counselors who are partners is sufficient. Hampton *v.* Coddington, 28 N. J. Eq. 557.

24. Van Valtenburg *v.* Alberry, 10 Iowa 264; Denison *v.* Bassford, 7 Paige (N. Y.) 370; Farmers' L. & T. Co. *v.* Jewett, 3 Ch. Sent. (N. Y.) 53; Cook *v.* Dews, 2 Tenn. Ch. 496. This rule was made absolute by the order of April 27, 1748. 2 Atk. 289, 26 Eng. Reprint 577.

Signature to affidavit of verification is a sufficient signature of the answer. Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327.

The answer of a corporation should be signed by its president, with the seal of the corporation affixed. Teter *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 433, 14 S. E. 146.

Defendant need not himself write his name. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

25. 2 Daniell Ch. Pr. 269. See Dumond *v.* Magee, 2 Johns. Ch. (N. Y.) 240.

26. Kimball *v.* Ward, Walk. (Mich.) 439; Farmers' L. & T. Co. *v.* Jewett, 3 Ch. Sent. (N. Y.) 53. Defendant's name may then be affixed by his solicitor. Hatch *v.* Eustaphieve, Clarke (N. Y.) 63.

Irregularity in such a case is waived unless the answer is excepted to. Stadler *v.* Hertz, 13 Lea (Tenn.) 315; Jones *v.* Carper, 2 Tenn. Ch. 626.

27. Dickerson *v.* Hodges, 43 N. J. Eq. 45, 10 Atl. 111.

28. Hathaway *v.* Scott, 11 Paige (N. Y.) 173.

29. Burns *v.* Lynde, 6 Allen (Mass.) 305; Ellas *v.* Lockwood, Clarke (N. Y.) 311; Swan *v.* Newman, 3 Head (Tenn.) 288.

A bill by a city, signed by counsel, need not have the city seal annexed. Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161. And see Fayerweather *v.* Hamilton College, 103 Fed. 546.

30. *Alabama.*— Montgomery Iron Works *v.* Capital City Ins. Co., 137 Ala. 134, 34 So. 210.

Connecticut.— Jerome *v.* Jerome, 5 Conn. 352.

Illinois.— Labadie *v.* Hewitt, 85 Ill. 341.

Iowa.— Porter *v.* Moffatt, Morr. 153.

Maine.— Frost *v.* Frost, 63 Me. 399; Baker *v.* Atkins, 62 Me. 205; Dinsmore *v.* Crossman, 53 Me. 441; Hilton *v.* Lothrop, 46 Me. 297.

Massachusetts.— Burns *v.* Lynde, 6 Allen 305.

Michigan.— Moore *v.* Cheeseman, 23 Mich. 332; Atwater *v.* Kinman, Harr. 243.

Mississippi.— Waller *v.* Shannon, 53 Miss. 500.

Tennessee.— McCamy *v.* Key, 3 Lea 247.

Wisconsin.— Carman *v.* Hurd, 1 Pinn. 619.

United States.— National Hay Rake Co. *v.* Harbert, 17 Fed. Cas. No. 10,044, 2 Wkly. Notes Cas. (Pa.) 100.

See 19 Cent. Dig. tit. "Equity," § 614.

and that he knows not where they are unless they are in the hands of defendant.[31] A bill to examine a witness *de bene esse* is required to be supported by an affidavit of the facts rendering the loss of the testimony probable.[32] Bills of interpleader must be accompanied by an affidavit showing absence of collusion.[33] A verification is also necessary where a special remedy is sought upon the bill pending the suit.[34] There are in some jurisdictions statutes or rules requiring an oath to certain other bills or parts thereof.[35] A material amendment must be verified,[36] and the same has been held of a supplemental bill.[37] Unless a cross bill is verified it will not stay proceedings on the original.[38] Where verification of a bill is required it should in general be positive,[39] and in order to sustain incidental averments on information and belief they should not only be stated in the bill to be so made,[40] but the affidavit must show clearly what allegations are sworn to positively and what on information and belief.[41] One of two joint claimants may alone verify.[42] The verification should in general be by plaintiff himself, but for good reason

31. Calvert *v.* Nichols, 8 B. Mon. (Ky.) 264; Linconfelter *v.* Kelly, 6 J. J. Marsh. (Ky.) 339; Parsons *v.* Wilson, 2 Overt. (Tenn.) 260; 1 Daniell Ch. Pr. 504. *Contra*, Cabell *v.* Megginson, 6 Munf. (Va.) 202.

A decree will not be reversed for want of such an affidavit if defendant answers or suffers a decree by default. Findlay *v.* Hinde, 1 Pet. (U. S.) 241, 7 L. ed. 128.

32. See DEPOSITIONS, 13 Cyc. 858, 859; and Laight *v.* Morgan, 2 Cai. Cas. (N. Y.) 344.

33. See, generally, INTERPLEADER.

34. See the several titles relating to such remedies, such as INJUNCTIONS; NE EXEAT; and RECEIVERS.

A bill seeking a temporary injunction is not bad on demurrer for want of oath. National Hay Rake Co. *v.* Harbert, 17 Fed. Cas. No. 10,044, 2 Wkly. Notes Cas. (Pa.) 100.

35. **Bills of discovery** must sometimes be verified by oath. Veeder *v.* Moritz, 9 Paige (N. Y.) 371; Gove *v.* Pettis, 4 Sandf. Ch. (N. Y.) 403. Such rules do not always extend to bills where discovery is sought only as incidental for relief. Montgomery Iron Works *v.* Capital City Ins. Co., 137 Ala. 134, 34 So. 210; Dinsmore *v.* Crossman, 53 Me. 441; Carman *v.* Hurd, 1 Pinn. (Wis.) 619.

For other special cases where local practice has required a verification see Brown *v.* Woods, 6 J. J. Marsh. (Ky.) 11; Brown *v.* Mesnard Min. Co., 105 Mich. 653, 63 N. W. 1000; Barringer *v.* Andrews, 58 N. C. 348; Laight *v.* Morgan, 2 Cai. Cas. (N. Y.) 344; Alston *v.* Jones, 3 Barb. Ch. (N. Y.) 397; Anonymous, 1 Barb. Ch. (N. Y.) 408; Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342.

36. McDougald *v.* Dougherty, 11 Ga. 570; Carey *v.* Smith, 11 Ga. 539; Gregg *v.* Brower, 67 Ill. 525; Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46.

An amendment to a sworn bill must be verified. Walker *v.* Ayres, 1 Iowa 449; Rodgers *v.* Rodgers, 1 Paige (N. Y.) 424. It is within the discretion of the court to require an oath to an amendment of a sworn bill. Semmes *v.* Boykin, 27 Ga. 47. The prayer may be amended and a new party added without swearing to the amendment. Livingston *v.* Marshall, 82 Ga. 281, 11 S. E. 542. An amendment merely amplifying a statement in the original bill need not be verified. Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414. If an injunction is sufficiently supported by the original bill, an amendment seeking no further injunction requires no oath. Bauer Grocer Co. *v.* Zelle, 172 Ill. 407, 50 N. E. 238.

Verification by solicitor is insufficient except under special circumstances. Lane *v.* Crossman, 58 Ill. App. 386; Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46.

Demurring to an amended bill admits the truth of its averments and therefore waives objection for want of verification. Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414.

37. Pedrick *v.* White, 1 Metc. (Mass.) 76.

38. Van Valtenburg *v.* Alberry, 10 Iowa 264; Talmage *v.* Pell, 9 Paige (N. Y.) 410.

A rule requiring bills to be verified includes cross bills for relief. Bernier *v.* Bernier, 72 Mich. 43, 40 N. W. 50.

39. Schilcer *v.* Brock, 124 Ala. 626, 27 So. 473; Pollard *v.* Southern Fertilizer Co., 122 Ala. 409, 25 So. 169; McKissack *v.* Voorhees, 119 Ala. 101, 24 So. 523; Burgess *v.* Martin, 111 Ala. 656, 20 So. 506; Mathews *v.* Cody, 60 Ga. 355; Wallace *v.* Duncan, 13 Ga. 41.

Affidavit on "knowledge and belief" is sufficient. Triebert *v.* Burgess, 11 Md. 452.

40. See *supra*, VII, C, 2, f.

41. Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1,505.

Proper form.— If the affidavit is that the bill is true to the knowledge of the deponent "except as to matters stated on information and belief" it is insufficient, because that leaves to conjecture what is so stated. It should be "except as to those matters stated to be on information and belief," for by that form the manner of statement in the bill is made the test, and the oath is certain. Chicago Exhibition Co. *v.* Illinois State Bd. of Agriculture, 77 Ill. App. 339; Earle *v.* Earle, 60 Ill. App. 360; Stirlen *v.* Neustadt, 50 Ill. App. 378. An affidavit that the facts relating to plaintiff's own acts are true and that those relating to others he believes to be true is sufficient. Collins *v.* Barksdale, 23 Ga. 602.

42. Reed *v.* Ryburn, 23 Ark. 47.

shown it may be by an agent or attorney cognizant of the facts.[43] An irregular verification may be cured by amendment,[44] and a failure to verify is waived by demurring.[45]

2. DISCLAIMERS. A disclaimer, although in reality a distinct form of pleading, is often treated as a species of answer, having the same formal parts and being put in in the same way.[46] It is therefore put in under oath,[47] except where plaintiff has in his bill waived an answer under oath.[48]

3. DEMURRERS. As a demurrer states no facts it need not be put in under oath.[49] In the federal courts, however, it must be supported by an affidavit of defendant that it is not interposed for delay.[50]

4. PLEAS. A plea must be supported by an oath as to the truth of the facts therein set forth,[51] except such pleas as would not require for their support at the hearing evidence under oath.[52] The waiver of an oath to an answer does not dispense with an oath to a plea;[53] but if a sworn answer is filed in support of the plea, and states all the matter of the plea, the plea itself need not be sworn to.[54] The oath should generally be positive;[55] but where the fact alleged involves the intent of a party or other similar element which is the subject of nice legal distinction, an affidavit on information and belief is sufficient.[56] The affidavit may be amended.[57] Under the rule in the federal courts, if a plea is not supported by proper affidavit it may be treated as a nullity and disregarded;[58] but the more general rule is that the remedy is by motion to set it aside or take it from the files,[59]

43. A creditor's bill may be sworn to by an attorney who conducted the proceedings at law, where the creditor resides at a distance. Sizer *v.* Miller, 9 Paige (N. Y.) 605. A clerk of the attorney who recovered the judgment has also been permitted to verify. Wooster Bank *v.* Spencer, Clarke (N. Y.) 386.

The next friend of a minor plaintiff may verify. Reed *v.* Ryburn, 23 Ark. 47.

Where one other than plaintiff is to verify, the facts within the knowledge of the person who is to verify should be stated positively in the bill and those not within his knowledge should be stated on information and belief, but in form they should be the statements of plaintiff. Orleans Bank *v.* Skinner, 9 Paige (N. Y.) 305. See Pitt County *v.* Cosby, 58 N. C. 254; Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1,505.

44. Shannon *v.* Fechheimer, 76 Ga. 86; Hughes *v.* Feeter, 18 Iowa 142. But not on appeal. Stirlen *v.* Neustadt, 50 Ill. App. 378.

45. Keach *v.* Hamilton, 84 Ill. App. 413.

After answer the regularity of the affidavit cannot be questioned. Allen *v.* State Bank, 21 N. C. 3.

46. 2 Daniell Ch. Pr. 234. See *supra*, VIII, B.

47. 1 Barbour Ch. Pr. 171.

48. Dickerson *v.* Hodges, 43 N. J. Eq. 45, 10 Atl. 111.

49. Mitford Eq. Pl. 170.

50. U. S. Eq. Rule 31.

If not supported by such an affidavit, as well as by certificate of counsel, it must be disregarded. See *supra*, p. 365, note 17. Plaintiff may, however, move to take a defective demurrer from the files. American Steel, etc., Co. *v.* Wire-Drawers', etc., Unions Nos. 1, 3, 90 Fed. 598.

51. *Georgia.*— Anderson *v.* Walton, 35 Ga. 202.

Illinois.— Dunn *v.* Keegin, 4 Ill. 292.

Missouri.— Roundtree *v.* Gordon, 8 Mo. 19.

New Hampshire.— Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249.

Tennessee.— Graham *v.* Nelson, 5 Humphr. 605.

See 19 Cent. Dig. tit. "Equity," § 616.

52. 2 Daniell Ch. Pr. 211.

The exception has been stated more broadly, that pleas to the jurisdiction of the court, to the disability of plaintiff, or pleas of matters of record require no oath. Mitford Eq. Pl. 239.

U. S. Eq. Rule 31 requires an affidavit of defendant, in all cases, that the plea is not interposed for delay and that it is true in point of fact.

53. Heartt *v.* Corning, 3 Paige (N. Y.) 566.

54. Toledo Tie, etc., Co. *v.* Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

55. Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

56. Ewing *v.* Blight, 8 Fed. Cas. No. 4,589, 3 Wall. Jr. 134, 1 Phila. 576.

57. Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

58. The affidavit stands on the same footing as the certificate of counsel. See cases cited *supra*, p. 365, note 17. So also in Florida. Trower *v.* Bernard, 37 Fla. 226, 20 So. 241. And see Moore *v.* Clem, (Fla. 1903) 34 So. 305; Roundtree *v.* Gordon, 8 Mo. 19.

59. Filkins *v.* Byrne, 72 Ill. 101; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249; Heartt *v.* Corning, 3 Paige (N. Y.) 566; Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

The particular defect must be pointed out in the notice. Brower *v.* Brooks, 1 Barb. (N. Y.) 423.

and that the objection for want of a sufficient affidavit cannot be first made at the hearing.[60]

5. Answers — a. In General. Since an answer affords discovery, and is evidence as well as a pleading, it must be sworn to unless plaintiff waives the oath.[61] Where several defendants file an answer each must swear thereto.[62] The answer of a corporation should be put in under the seal of the corporation, and not under oath,[63] and if in such case plaintiff requires an answer under oath he should make some of the officers parties for that purpose.[64] The form of oath varies, but it must be such as in connection with the answer itself to distinguish what is sworn to positively from what is sworn to on information and belief.[65] An

60. Craig *v.* McKinney, 72 Ill. 305; Heartt *v.* Corning, 3 Paige (N. Y.) 566; Seifred *v.* People's Bank, 1 Baxt. (Tenn.) 200; Seifreid *v.* People's Bank, 2 Tenn. Ch. 17.

61. Paige *v.* Broadfoot, 100 Ala. 610, 13 So. 426; Van Valtenburg *v.* Alberry, 10 Iowa 264; Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236; Salmon *v.* Clagett, 3 Bland (Md.) 125; Hodges *v.* Phillip, 50 Miss. 362. See also *supra*, VIII, E, 1, a.

An answer in support of a demurrer, denying combination, must be under oath. Pogson *v.* Owen, 3 Desauss. (S. C.) 31.

An answer of a non-resident, tendered after decree, must be sworn to by himself or some one knowing the facts. Jamieson *v.* Burton, 9 B. Mon. (Ky.) 444.

62. *District of Columbia.*— De Walt *v.* Doran, 21 D. C. 163.

Florida.— Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327.

Maryland.— Binney's Case, 2 Bland 99.

New Jersey.— Young *v.* Clarksville Mfg. Co., 27 N. J. Eq. 67; Vaughn *v.* Johnson, 9 N. J. Eq. 173.

Tennessee.— Cook *v.* Dews, 2 Tenn. Ch. 496. See 19 Cent. Dig. tit. "Equity," § 617.

Joint answer of husband and wife must be sworn to by both or it will not be regular as to either. Farmers' L. & T. Co. *v.* Jewett, 3 Ch. Sent. (N. Y.) 53. It is not reversible error that the husband of one of two defendants swears to the answer, where he has the fullest knowledge. Beale *v.* Bucher, 13 Pa. Super. Ct. 474.

Verification by one only.— An answer of two defendants, signed by counsel and sworn to by only one of the defendants, is not good even as the answer of defendant who swore to it. Vaughn *v.* Johnson, 9 N. J. Eq. 173. But where an answer purported to be the answer of several defendants and was sworn to by one, it was held good as to him, being within time as to him and out of time as to the others. Young *v.* Clarksville Mfg. Co., 27 N. J. Eq. 67. An answer signed and verified by one defendant and purporting to be the answer of another is a nullity. De Walt *v.* Doran, 21 D. C. 163.

If a bill is sworn to by only one of several plaintiffs, the oath of one defendant to the answer is sufficient. Arnold *v.* Slaughter, 36 W. Va. 589, 15 S. E. 250.

63. 2 Daniell Ch. Pr. 270; Mitford Eq. Pl. 9. And see Teter *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 433, 14 S. E. 146; Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291.

A municipal corporation may answer under seal with the oath of its presiding officer on belief. Champlin *v.* New York, 3 Paige (N. Y.) 573.

64. See *supra*, V, D.

65. The oath in the English chancery was as follows: "You swear that what is contained in this your answer, as far as concerns your own act and deed, is true to your own knowledge, and that what relates to the act and deed of any other person or persons, you believe to be true." 2 Daniell Ch. Pr. 270; 1 Turner Ch. Pr. (Venable ed.) 544.

In the New York chancery the oath was that defendant "has read the answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true." N. Y. Ch. Rule 18. This form has been quite generally used.

If the word "facts" is used instead of "matters" it is sufficient. Whelpley *v.* Van Epps, 9 Paige (N. Y.) 332, 37 Am. Dec. 400.

What is sworn to on knowledge must be distinguished in the answer from what is sworn to on information and belief, or the answer will be fatally defective. Miller *v.* McDougall, 44 Miss. 682. And see *supra*, XIV, B, 1.

Jurat.— A jurat is essential. Westerfield *v.* Bried, 26 N. J. Eq. 357. It seems that in the absence of rule to the contrary a general certificate by the officer administering the oath that the answer was sworn to or duly sworn to is sufficient. Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439; Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096; Fryatt *v.* Lindo, 3 Edw. (N. Y.) 239; Hickman *v.* Painter, 11 W. Va. 386. The authority of the officer to administer the oath must appear. Sitlington *v.* Brown, 7 Leigh (Va.) 271; Addison *v.* Duckett, 1 Fed. Cas. No. 77, 1 Cranch C. C. 349. A jurat signed by a notary and bearing his official seal is sufficient. Feuchtwanger *v.* McCool, 29 N. J. Eq. 151; Goodyear *v.* Hullihen, 10 Fed. Cas. No. 5,573, 2 Hughes 492. The oath must be administered and authenticated according to the laws of the jurisdiction where the proceeding is pending, and by an officer authorized by those laws.

California.— Pfeiffer *v.* Riehn, 13 Cal. 643.

Georgia.— Royston *v.* Royston, 21 Ga. 161.

Maryland.— Contee *v.* Dawson, 2 Bland 264; Snowden *v.* Snowden, 1 Bland 550; Gibson *v.* Tilton, 1 Bland 352, 17 Am. Dec. 306.

answer not properly verified will be stricken out;[66] but the court may permit a verification after filing,[67] and the defect is waived by replying,[68] or by going to final hearing.[69]

b. Waiver of Oath. In modern practice it is quite generally provided that plaintiff may in his bill waive the oath to the answer.[70] Defendant may nevertheless answer under oath,[71] and the answer may then be used as an affidavit,[72] but it is not evidence in the cause.[73]

6. Replications. It is not necessary or customary for replications to be filed under oath.[74]

XV. Matters to Be Proved.

A. Necessity of Proof — 1. Issues Generally. A consideration of the nature, requisites, and forms of equity pleading shows that the system gives no opportunity for single formal issues such as are required at the common law.[75] With the disuse of special replications,[76] the cause was put at issue by service upon defendant of a subpœna to rejoin, or an appearance *gratis* to rejoin, without the actual filing of a rejoinder.[77] Now this formality is largely disregarded and the cause deemed at issue upon the filing of the general replication.[78] Perhaps the logical view, having due regard to the history of the court of chancery and the evidential character of the responsive answer,[79] is that plaintiff must make out his entire case by proof, with the right to use the answer so far as its admissions render it available for that purpose.[80] There is no practical difference, however, between this theory and the theory of an analogy to the common law, because each party

Michigan.— Torrans *v.* Hicks, 32 Mich. 307.
New York.— Lahens *v.* Fielden, 1 Barb. 22.
See 19 Cent. Dig. tit. "Equity," § 624.

Answer of a defendant taken abroad must be taken under a commission, in the absence of statute to the contrary. Stotesbury *v.* Vail, 13 N. J. Eq. 390; Read *v.* Consequa, 20 Fed. Cas. No. 11,607, 4 Wash. 335.

66. Mitchell *v.* Tishomingo Sav. Inst., 53 Miss. 613; Pincers *v.* Robertson, 24 N. J. Eq. 348.

67. Jackson *v.* Dutton, (Fla. 1903) 35 So. 74; Holton *v.* Guinn, 65 Fed. 450.

68. Fulton Bank *v.* Beach, 6 Wend. (N. Y.) 36.

The answer then stands as an unsworn pleading. Adair *v.* Cummins, 48 Mich. 375, 12 N. W. 495.

Where plaintiff receives and retains the answer for a long time without objection, he waives the insufficiency of the jurat. Graham *v.* Stagg, 2 Paige (N. Y.) 321.

69. Bate *v.* McLaughlin, 1 A. K. Marsh. (Ky.) 207. And see Hogan *v.* Decatur Branch Bank, 10 Ala. 485; Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439.

A defendant cannot complain of a decree because he did not swear to the answer. Pfeiffer *v.* Riehn, 13 Cal. 643; Bailey *v.* Boyce, 5 Rich. Eq. (S. C.) 187.

70. U. S. Eq. Rule 41. See also *supra*, VII, B, 8.

Where a new defendant is brought in by amendment the oath may be waived by amending the original foot-note. Fisher *v.* Moog, 39 Fed. 665.

In Maryland the oath is waived unless the bill demands it. Code, Art. 16, § 103.

71. Moore *v.* Hunter, 6 Ill. 317; White *v.* Hampton, 10 Iowa 238; White *v.* Hampton, 9 Iowa 181; Case *v.* Case, 3 How. Pr. (N. Y.) 207; Woodruff *v.* Dubuque, etc., R. Co., 30 Fed. 91; Holbrook *v.* Black, 12 Fed. Cas. No. 6,590, Brunn. Col. Cas. 588. See, however, Blakemore *v.* Allen, 10 Iowa 550; Shepard *v.* Ford, 10 Iowa 502; De France *v.* Howard, 4 Iowa 524.

72. U. S. Eq. Rule 41.

Where defendant does not swear to his answer it was held in New York that it would be inferred that it was put in for delay, and the bill might be taken as confessed. Denison *v.* Bassford, 7 Paige (N. Y.) 370. An unverified answer will not support a motion to dissolve an injunction. Mahaney *v.* Lazier, 16 Md. 69.

73. U. S. Eq. Rule 41. See Guthrie *v.* Quinn, 43 Ala. 561; Connelly *v.* Carlin, 13 Iowa 383; Wilson *v.* Holcomb, 13 Iowa 110; Wilson *v.* Towle, 36 N. H. 129, and *infra*, XVII, B, 2, b, (II), (A), (B).

74. Pinney *v.* Pinney, (Fla. 1903) 35 So. 95.

75. See *supra*, VII; VIII; IX.

76. See *supra*, IX, C, 2.

77. Mitford Eq. Pl. 257.

78. U. S. Eq. Rule 66 expressly so provides.

79. See *supra*, VIII, E, 1, a; *infra*, XVII, B, 2.

80. This seems true, especially because of the general rule requiring plaintiff to establish by other proof averments not answered at all. See *supra*, VIII, E, 6, c; Milligan *v.* Wissman, (Tenn. Ch. App. 1897) 42 S. W. 811. The practice of taking the bill as confessed for want of appearance or answer is modern. See *supra*, VIII, E, 6, d.

As to burden of proof.— There is no difference between law and equity. It rests in both

is bound by the admissions contained in his pleadings,[81] and evidence on matters confessed by the pleadings will not be considered.[82]

2. What Plaintiff Must Prove. The practical rule is that it devolves upon plaintiff to establish by evidence every averment of his bill essential to entitle him to relief,[83] except such as are expressly or by implication of fact admitted by the answer.[84] This statement accords with the general rule that a defendant is not deemed to admit a particular averment by failing to answer.[85] In those

upon the party maintaining the affirmative of the issue. Pusey *v.* Wright, 31 Pa. St. 387. See, generally, Evidence.

81. Plaintiff by the admissions in his bill (Peacock *v.* Terry, 9 Ga. 137; Lawless *v.* Jones, 1 A. K. Marsh. (Ky.) 16), and defendant by those in his answer (see *supra*. VIII, E, 6, a, b).

82. Parkhurst *v.* McGraw, 24 Miss. 134; Lippincott *v.* Ridgway, 11 N. J. Eq. 526; Evans *v.* Huffman, 5 N. J. Eq. 354; Robinson *v.* Philadelphia, etc., R. Co., 28 Fed. 577; Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.

83. Thompson *v.* Thompson, 1 Yerg. (Tenn.) 97.

Immaterial averments need not be proved. Fall *v.* Simmons, 6 Ga. 265; Chiles *v.* Boon, 3 B. Mon. (Ky.) 82.

84. *Georgia.*— Brown *v.* Savannah Mut. Ins. Co., 24 Ga. 97.

Illinois.— Vanpelt *v.* Hutchinson, 114 Ill. 435, 2 N. E. 491; McVey *v.* McQuality, 97 Ill. 93; Munson *v.* Miller, 66 Ill. 380; Holbridge *v.* Bailey, 5 Ill. 124.

Indiana.— Campbell *v.* Brackenbridge, 8 Blackf. 471.

Iowa.— Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137.

Kentucky.— Wallace *v.* Twyman, 3 J. J. Marsh. 457; Saunders *v.* Saunders, 1 Bibb 558; Reading *v.* Ford, 1 Bibb 338.

Maryland.— Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306; Joice *v.* Taylor, 6 Gill & J. 54, 25 Am. Dec. 325.

Michigan.—Darling *v.* Hurst, 39 Mich. 765.

Ohio.— Fithian *v.* Corwin, 17 Ohio St. 118.

Pennsylvania.— Barclay's Appeal, 38 Leg. Int. 440; Audenreid *v.* Walker, 11 Phila. 183.

Tennessee.— Humphreys *v.* McCloud, 3 Head 235.

Virginia.— Lee County Justices *v.* Fulkerson, 21 Gratt. 182; Piper *v.* Douglas. 3 Gratt. 371; Tennent *v.* Pattons, 6 Leigh 196.

West Virginia.— Bronson *v.* Vaughn, 44 W. Va. 406, 29 S. E. 1022; Bryant *v.* Groves, 42 W. Va. 10, 24 S. E. 605.

See 19 Cent. Dig. tit. "Equity," § 642.

Equity jurisdiction.— Averments for the purpose of establishing jurisdiction in equity, unless admitted, must be proved or no relief can be granted. Shotwell *v.* Webb, 23 Miss. 375; Ontario Bank *v.* Root, 3 Paige (N. Y.) 478; McGuire *v.* Caruthers, 5 Humphr. (Tenn.) 414; Virginia Exch. Bank *v.* Morrall, 16 W. Va. 546.

Papers.— Where the answer admits the execution of deeds, copies of which are filed as exhibits, objections thereto must be made before the hearing. Green *v.* Campbell, 55 N. C. 446; Surget *v.* Byers, 23 Fed. Cas. No. 13,629, Hempst. 715. If copies be not filed the objection comes too late at the hearing. Trapnall *v.* Byrd, 22 Ark. 10. But defendant may deny the execution of an exhibit and thus put plaintiff on proof. Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657. But see Shackleford *v.* Hunt, 4 B. Mon. (Ky.) 262. If plaintiffs claim by assignment and the answer calls for proof of the assignment plaintiff cannot have a decree without such proof. Tennant *v.* Pattons, 6 Leigh (Va.) 196. The execution of a written contract must be proved as against parties not privy thereto. Thorington *v.* Carson, 1 Port. (Ala.) 257. A general traverse not on oath does not require proof of the execution of notes sued on. Garland *v.* Denny, 3 B. Mon. (Ky.) 125.

Records.— Records referred to in the pleadings, proving themselves, may be used without other proof. Walker *v.* Peay, 22 Ark. 103.

Plaintiff's title to relief.— Plaintiff must make out every fact which under the particular circumstances of the case is essential to establish the ground on which he seeks relief. Small *v.* Boudinot, 9 N. J. Eq. 381. The statute law of another state must be proved when material to plaintiff's title. Tatum *v.* Hines, 15 Ark. 180. In a bill to compel heirs to pay the bond of their ancestor, plaintiff must show that the heirs were bound by it. Piper *v.* Douglas, 3 Gratt. (Va.) 371. U. S. Eq. Rule 39 does not relieve plaintiff from the burden of proving his bill. Gaines *v.* Agnelly, 9 Fed. Cas. No. 5,173, 1 Woods 238. Plaintiff must recover on the strength of his own title. Antones *v.* Eslava, 9 Port. (Ala.) 527; Pickens *v.* Harper, Sm. & M. Ch. (Miss.) 539.

The duty of going forward with evidence on any particular issue rests, as at law, on the party holding the affirmative.

Arkansas.— Beecher *v.* Brookfield, 33 Ark. 259.

Indiana.— Fitch *v.* Polke, 7 Blackf. 564.

Iowa.— Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137.

Maryland.— Bevans *v.* Sullivan, 4 Gill 383.

Ohio.— Fithian *v.* Corwin, 17 Ohio St. 118.

Pennsylvania.— Pusey *v.* Wright. 31 Pa. St. 387: Barclay's Appeal, 38 Leg. Int. 440; Audenreid *v.* Walker, 11 Phila. 183.

Rhode Island.— Seamans *v.* Burt, 11 R. I. 320.

Tennessee.— Deaderick *v.* Watkins, 8 Humphr. 520; Ready *v.* Munday, 1 Tenn. Ch. 453.

See 19 Cent. Dig. tit. "Equity," § 726.

85. See *supra*, VIII, E, 6, c.

jurisdictions where this doctrine is not held, the rule must be modified so far as to meet the particular doctrines there prevailing.[86] Where a new defendant is brought in by supplemental bill after the proofs have been taken, and such new defendant answers both the original and the supplemental bill, the proofs already taken cannot be used against him, and the answer must be taken as true unless further proofs are taken.[87] The rule prevails as at law that the substance only of the issue need be proved.[88]

3. What Defendant Must Prove. Where a replication is filed every averment of the answer not responsive to the bill is put in issue, and defendant must establish by proof all matters of defense alleged by him by way of avoidance.[89]

86. The rule is essentially the same, the difference lying merely in what allegations are deemed admitted. The different doctrines as to this are stated *supra*, VIII, E, 6, c.

A deposition as to facts neither admitted nor denied is admissible. Denman *v.* Nelson, 31 N. J. Eq. 452.

87. Hopkins *v.* McLaren, 4 Cow. (N. Y.) 667.

88. King *v.* King, 9 N. J. Eq. 44; 2 Daniell Ch. Pr. 415.

89. *Alabama.*— Craft *v.* Russell, 67 Ala. 9; Gordon *v.* Bell. 50 Ala. 213; Webb *v.* Webb, 29 Ala. 588; Carroll *v.* Malone, 28 Ala. 521; Wellborn *v.* Tiller, 10 Ala. 305; Carpenter *v.* Devon, 6 Ala. 718; Huntsville Branch Bank *v.* Marshall, 4 Ala. 60; Forrest *v.* Robinson, 2 Ala. 215; Lucas *v.* Darien Bank, 2 Stew. 280.

Arkansas.— Stillwell *v.* Badgett, 22 Ark. 164; Shields *v.* Trammell, 19 Ark. 51; Roberts *v.* Totten, 13 Ark. 609; Scott *v.* Henry, 13 Ark. 112; Whiting *v.* Beebe, 12 Ark. 421; Pelham *v.* Moreland, 11 Ark. 442; Patton *v.* Ashley, 8 Ark. 290 And see Hartfield *v.* Brown, 8 Ark. 283.

Delaware.— Robinson *v.* Jefferson, 1 Del. Ch. 244.

District of Columbia.— Marmion *v.* McClellan, 11 App. Cas. 467; Dexter *v.* Gordon, 11 App. Cas. 60.

Florida.— Orman *v.* Barnard, 5 Fla. 528.

Georgia.— Laub *v.* Burnett, 31 Ga. 304; Dennis *v.* Ray, 9 Ga. 449.

Illinois.— Lake Shore, etc., R. Co. *v.* McMillan, 84 Ill. 208; O'Brien *v.* Fry, 82 Ill. 274; Roberts *v.* Stigleman, 78 Ill. 120; Walton *v.* Walton, 70 Ill. 142; Stark *v.* Hillibert, 19 Ill. 344; Cummins *v.* Cummins, 15 Ill. 33; Battenhousen *v.* Bullock, 8 Ill. App. 312.

Indiana.— Peck *v.* Hunter, 7 Ind. 295; Brown *v.* Woodbury, 5 Ind. 254; Baker *v.* Leathers. 3 Ind. 558; Fitch *v.* Polke, 7 Blackf. 564; Pierce *v.* Gates. 7 Blackf. 162; Clark *v.* Spears, 7 Blackf. 96; Wasson *v.* Gould. 3 Blackf. 18; Green *v.* Vardiman, 2 Blackf. 324.

Iowa.— Gilbert *v.* Mosier, 11 Iowa 498; White *v.* Hampton, 10 Iowa 238; Schaffner *v.* Grutzmacher, 6 Iowa 137.

Kentucky.—Todd *v.* Sterrett, 6 J. J. Marsh. 425; Taylor *v.* Morton, 5 J. J. Marsh. 65; Vance *v.* Vance, 5 T. B. Mon. 521; Harrison *v.* Edwards, 3 Litt. 340; Bright *v.* Haggin, Hard. 536; Tunstall *v.* McClelland, Hard. 519.

Maine.— Peaks *v.* McAvey, (1886) 7 Atl. 270; O'Brien *v.* Elliot, 15 Me. 125, 32 Am. Dec. 137.

Maryland.— Smoot *v.* Rea, 19 Md. 398; Hagthorp *v.* Hook, 1 Gill & J. 270; Ringgold *v.* Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250; Neale *v.* Hagthorp, 3 Bland 551. And see Gough *v.* Crane, 3 Md. Ch. 119.

Massachusetts.— Leach *v.* Fobes, 11 Gray 506, 71 Am. Dec. 732.

Michigan.— Hart *v.* Carpenter, 36 Mich. 402; Van Dyke *v.* Davis, 2 Mich. 144; Schwarz *v.* Wendell, Walk. 267; Atty.-Gen. *v.* Oakland County Bank, Walk. 90.

Mississippi.— Dyer *v.* Williams, 62 Miss. 302; Osborne *v.* Crump, 57 Miss. 622; Rodd *v.* Durbridge, 53 Miss. 694; Miller *v.* Lamar, 43 Miss. 383; Brooks *v.* Gillis, 12 Sm. & M. 538; Jack *v.* State, 6 Sm. & M. 494; Russell *v.* Moffitt, 6 How. 303; Planters' Bank *v.* Courtney, Sm. & M. Ch. 40; Planters' Bank *v.* Stockman, Freem. 502.

Missouri.— Walton *v.* Walton, 17 Mo. 376.

New Hampshire.— Busby *v.* Littlefield, 33 N. H. 76; Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362.

New Jersey.— Ingersoll *v.* Stiger, 46 N. J. Eq. 511, 19 Atl. 842; Wilkinson *v.* Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Brown *v.* Kahnweiler, 28 N. J. Eq. 311; Fey *v.* Fey, 27 N. J. Eq. 213; Van Dyke *v.* Van Dyke, 26 N. J. Eq. 180; Roberts *v.* Birgess, 20 N. J. Eq. 139; Stevens *v.* Post, 12 N. J. Eq. 408; Fisler *v.* Porch, 10 N. J. Eq. 243; Lovett *v.* Demarest, 5 N. J. Eq. 113; Dickey *v.* Allen, 2 N. J. Eq. 40; Miller *v.* Wack, 1 N. J. Eq. 204.

New York.— Simson *v.* Hart, 14 Johns. 63; Post *v.* Kimberly, 9 Johns. 470; Hart *v.* Ten Eyck, 2 Johns. Ch. 62; Valentine *v.* Farrington, 2 Edw. 53.

North Carolina.— Jones *v.* Jones, 36 N. C. 332; Johnson *v.* Person, 16 N. C. 364.

Ohio.— Harris *v.* Carlisle, 7 Ohio, Pt. II, 144.

Pennsylvania.— Vollmer's Appeal, 61 Pa. St. 118; Pusey *v.* Wright, 31 Pa. St. 387; Audenreid *v.* Walker, 11 Phila. 183.

Rhode Island.— Parkes *v.* Gorton, 3 R. I. 27.

South Carolina.— Cloud *v.* Calhoun, 10 Rich. Eq. 358; Barr *v.* Haseldon, 10 Rich. Eq. 53; Ellis *v.* Woods, 9 Rich. Eq. 19; Ison *v.* Ison, 5 Rich. Eq. 15; Gordon *v.* Saunders, 2 McCord Eq. 151.

Tennessee.—De Berry *v.* Hurt, 7 Baxt. 390; Deaderick *v.* Watkins. 8 Humphr. 520; Sims *v.* Sims, 5 Humphr. 370; Cocke *v.* Trotter, 10

Allegation of a former suit and decree therein constituting an estoppel must also be proved by defendant.[90]

4. Proof of Pleas. A general replication to an answer puts in issue the entire answer and calls for proof of all controverted matter;[91] but a replication to a plea puts in issue solely the truth of the plea, the burden to establish which is upon defendant,[92] and the evidence must be strictly confined to that issue.[93]

B. Proof Confined to Matters Pleaded — 1. Generally. The very object of pleadings requires that the parties be confined to the matters contained therein, and therefore no evidence will be considered except that relating to matters alleged in the bill or answer.[94] Plaintiff will be confined to matters alleged in

Yerg. 213; Napier *v.* Elam, 6 Yerg. 108; Beech *v.* Haynes, 1 Tenn. Ch. 569.

Texas.— Jouett *v.* Jouett, 3 Tex. 150.

Vermont.— Spaulding *v.* Holmes, 25 Vt. 491; Adams *v.* Adams, 22 Vt. 50; McDonald *v.* McDonald, 16 Vt. 630; Morse *v.* Slason, 16 Vt. 319; Pierson *v.* Clayes, 15 Vt. 93; Lane *v.* Marshall, 15 Vt. 85; Cannon *v.* Norton, 14 Vt. 178.

Virginia.— Lewis *v.* Mason, 84 Va. 731, 10 S. E. 529; Payne *v.* Coles, 1 Munf. 373; Norman *v.* Hill, 2 Patt. & H. 676.

Wisconsin.— Garlick *v.* McArthur, 6 Wis. 450; Sheldon *v.* Sheldon, 3 Wis. 699; Smith *v.* Potter, 3 Wis. 432.

United States.— Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786; McCoy *v.* Rhodes, 11 How. 131, 13 L. ed. 634; Clarke *v.* White, 12 Pet. 178, 9 L. ed. 1046; Allen *v.* O'Donald, 28 Fed. 17; Randall *v.* Phillips, 20 Fed. Cas. No. 11,555, 3 Mason 378; Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,947, 3 Cranch C. C. 377; Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045, Baldw. 464. And see Gernon *v.* Boccaline, 10 Fed. Cas. No. 5,366, 2 Wash. 199.

See 19 Cent. Dig. tit. "Equity," § 643.

If defendant pleads a matter of privilege to excuse him from answering interrogatories, and plaintiff replies, defendant must prove such matters. Northwestern Bank *v.* Nelson, 1 Gratt. (Va.) 108.

Matter which should have been set up by cross bill must be proved by defendant, although it be set out in the answer by way of defense. Randolph *v.* Wilson, 38 N. J. Eq. 28.

Defendant at law pleading an equitable defense becomes in effect a plaintiff and must prove his case. Waln *v.* Smith, 1 Phila. (Pa.) 362.

Until plaintiff makes out a prima facie case he cannot call upon defendant to make out his defense. Bryant *v.* Groves, 42 W. Va. 10, 24 S. E. 605. See also Cummins *v.* Harrell, 6 Ark. 308.

90. Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51.

91. O'Hare *v.* Downing, 130 Mass. 16; Anonymous, Hopk. (N. Y.) 27.

Only matters set up in bill and answer are put in issue. White *v.* Morrison, 11 Ill. 361.

Immaterial allegations are not put in issue and cannot be proved. Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294.

92. Miller *v.* U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Stead *v.* Course, 4 Cranch (U. S.) 403, 2 L. ed. 660. See *supra*, VIII, D, 7, b, (II).

The parties proceed to examination of witnesses in the same way as on replication to an answer. Reissner *v.* Anness, 20 Fed. Cas. No. 11,687.

Where defendant relies on written agreements to sustain his plea it is the duty of the court to ascertain from the instruments whether they do sustain the plea. American Graphophone Co. *v.* Edison Phonograph Works, 68 Fed. 451.

The negative part of an anomalous plea need not be proved by defendant. Farrington *v.* Harrison, 44 N. J. Eq. 232, 10 Atl. 105, 15 Atl. 8.

Facts appearing from the bill and documents accompanying it need not be proved by defendant in support of his plea. Lane *v.* Ellzey, 6 Rand. (Va.) 661.

Evidence previously taken by defendant cannot be considered on the hearing of a plea. Hancock *v.* Carlton, 6 Gray (Mass.) 39.

93. Little *v.* Stephens, 82 Mich. 596, 47 N. W. 22; Hurlbut *v.* Britain, Walk. (Mich.) 454; Fish *v.* Miller, 5 Paige (N. Y.) 26; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

94. *Arkansas.*— Trapnall *v.* Burton, 24 Ark. 371.

California.— Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725.

Illinois.— Hall *v.* Towne, 45 Ill. 493; Carmichael *v.* Reed, 45 Ill. 108; Maher *v.* Bull, 44 Ill. 97.

Indiana.— Peelman *v.* Peelman, 4 Ind. 612.

Iowa.— Shaw *v.* Livermore, 2 Greene 338.

New Jersey.— Moores *v.* Moores, 16 N. J. Eq. 275; Vansciver *v.* Bryan, 13 N. J. Eq. 434.

New York.— Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442 [*reversing* 6 Barb. 589]; James *v.* McKernon, 6 Johns. 543.

Ohio.— Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

Virginia.— Nash *v.* Nash, 28 Gratt. 686; Thompson *v.* Jackson, 3 Rand. 504, 15 Am. Dec. 721; Knibb *v.* Dixon, 1 Rand. 249.

United States.— Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529.

See 19 Cent. Dig. tit. "Equity," § 648.

Admissions of a party may be shown in evidence without being specifically charged in the pleadings.

Arkansas.— Bailey *v.* Wright, 24 Ark. 73.

his bill,[95] and defendant to defenses set up in his answer.[96] In like manner plaintiff will not be permitted to prove affirmative matter to rebut a defense, unless he has charged it in his bill.[97] A party will not be permitted to prove matters

Delaware.— Cannon *v.* Collins, 3 Del. Ch. 132.

Georgia.— Peacock *v.* Terry, 9 Ga. 137.

New Hampshire.— Lyford *v.* Gove, 44 N. H. 253.

United States.—Smith *v.* Burnham, 22 Fed. Cas. No. 13,018, 2 Sumn. 612.

See 19 Cent. Dig. tit. "Equity," § 648.

But see Brandon *v.* Cabiness, 10 Ala. 155.

95. *Florida.*— Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Illinois.— Walters *v.* Defenbaugh, 90 Ill. 241.

Kentucky.— Hunt *v.* Daniel, 6 J. J. Marsh. 398; Sprigg *v.* Albin, 6 J. J. Marsh. 158; Booth *v.* Booth, 3 Litt. 57.

Maryland.— Robinson *v.* Townshend, 3 Gill & J. 413.

Michigan.— Barrows *v.* Baughman, 9 Mich. 213.

New Jersey.— Howell *v.* Sebring, 14 N. J. Eq. 84.

New York.— James *v.* McKernon, 6 Johns. 543.

Virginia.— Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513.

Wisconsin.— Flint *v.* Jones, 5 Wis. 424; Brayton *v.* Jones, 5 Wis. 117.

United States.— Brooks *v.* Laurent, 98 Fed. 647, 39 C. C. A. 201.

See 19 Cent. Dig. tit. "Equity," § 648. See also *supra*, VII, C, 1.

Omission in bill supplied by answer.— In certain cases the answer has been held sufficient to supply matters not alleged in the bill, as where the bill did not show title in plaintiff, but the answer disclosed such title. Maury *v.* Lewis, 10 Yerg. (Tenn.) 115. See also Williams *v.* Banks, 19 Md. 22; Bailey *v.* Bailey, 8 Humphr. (Tenn.) 230. But a defective conveyance will not be perfected without proof of the consideration alleged in the bill, although the answer admits a valid but different consideration. Doe *v.* Doe, 37 N. H. 268.

Matters of estoppel are not available to plaintiff unless set up in the bill. Moran *v.* Palmer, 13 Mich. 367.

Evidence taken under an original bill is inadmissible against a defendant brought in by a supplemental bill which only charges him with knowledge of the pendency of the original. Stover *v.* Wood, 26 N. J. Eq. 56.

Affidavits may be read in support of a bill, but not to enlarge it. Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 485.

96. *Alabama.*— Grady *v.* Robinson, 28 Ala. 289.

Kentucky.— Garland *v.* Denny, 3 B. Mon. 125; Gregory *v.* Powers, 3 Litt. 339.

Maryland.— Woods *v.* Fulton, 4 Harr. & J. 329.

Mississippi.— Ricks *v.* Hilliard, 45 Miss. 359.

New Jersey.— Mann *v.* Bruce, 5 N. J. Eq. 413.

North Carolina.— Bailey *v.* Wilson, 21 N. C. 182.

Rhode Island.— Atlantic F. & M. Ins. Co. *v.* Wilson, 5 R. I. 479.

South Carolina.— Heath *v.* Blake, 28 S. C. 406, 5 S. E. 842.

United States.— The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455 [*reversing* 5 Fed. Cas. Cas. No. 2,716, 1 Sprague 39].

See 19 Cent. Dig. tit. "Equity," §§ 648, 649.

Averments of the bill may be availed of to help out the defense. Goodwin *v.* McGehee, 15 Ala. 232; Peacock *v.* Tompkins, 1 Humphr. (Tenn.) 135.

Evidence cannot be based upon a mere notice that the matter will be presented. Hudson *v.* Bigham, 12 Heisk. (Tenn.) 58; Doughty *v.* West, 7 Fed. Cas. No. 4,029.

Laches may be proved without pleading. James *v.* James, 55 Ala. 525; Calivada Colonization Co. *v.* Hays, 119 Fed. 202. But see Tibbs *v.* Clark, 5 T. B. Mon. (Ky.) 526. See also *supra*, IV, D.

Defense by infant.— Where the answer of a guardian *ad litem* prayed the protection of the court and denied that plaintiff had any interest, it was held that any defense might be availed of, as the court will protect the rights of infants even when their interests are neglected by their guardian. Stark *v.* Brown, 101 Ill. 395.

In Connecticut it was formerly the practice to permit a defendant to prove any defense without any pleading whatever. Broome *v.* Beers, 6 Conn. 198.

A written agreement to compromise, made pending the suit, may be regarded as an amended answer and also as evidence of the fact, and a decree rendered accordingly. Horton *v.* Chester Baptist Church, etc., 34 Vt. 309.

97. *Alabama.*— Beattie *v.* Abercrombie, 18 Ala. 9.

Kentucky.— Smithpeters *v.* Griffin, 10 B. Mon. 259.

New Jersey.— Cowart *v.* Perrine, 21 N. J. Eq. 101.

New York.— Bailey *v.* Ryder, 10 N. Y. 363.

United States.— Horn *v.* Detroit Dry-Dock Co., 150 U. S. 610, 14 S. Ct. 214, 37 L. ed. 1199; Piatt *v.* Vattier, 9 Pet. 405, 9 L. ed. 173.

See 19 Cent. Dig. tit. "Equity," §§ 648, 649.

Plaintiff should amend his bill in such case to lay foundation for proof. See *supra*, XI, A, 1, g.

Proof of fraud not charged.— Where an administrator sought to subject lands to the payment of debts, and defendant set up an unrecorded deed from the intestate, it was held that plaintiff might attack the deed for fraud, although no fraud was charged in the bill. Werts *v.* Spearman, 22 S. C. 200. And see Boyd *v.* Hawkins, 17 N. C. 195.

alleged so vaguely and uncertainly as not to enable the other party to prepare his case so as to secure a full and fair investigation,[98] but an argumentative denial, if distinct and certain, is sufficient to make an issue.[99]

2. Proof of Specific Facts Under General Charge. Under general allegations specific facts may be proved, provided the general charge is sufficient to apprise the adverse party of the nature of the evidence to be introduced.[1] A general charge that a defendant has coöperated with other defendants, without specific traversable charges as to the manner of so doing, will not put such defendant's acts in issue,[2] and the parties will be confined to specific facts alleged in support of charges of insolvency[3] or usury.[4] Objection that the allegations are too general cannot be first made on appeal.[5]

XVI. TAKING PROOFS.

A. Modes of Taking Proofs — 1. Evidence a Part of the Record. A fundamental idea of the chancery practice was that all proceedings, including the evidence, must be made a matter of record,[6] and therefore all evidence, documentary or otherwise, must be filed,[7] except documents already of record,[8] or

Matter of avoidance in an answer may be supported or disproved by either party. Greenleaf *v.* Highland, Walk. (Miss.) 375.

98. Nash *v.* Nash, 28 Gratt. (Va.) 686. A vague answer will be construed most strongly against defendant. Bailey *v.* Wilson, 21 N. C. 182. Where a bill alleged alterations in a note made by the maker's consent, and the answer merely denied his consent, no evidence could be received to show that the alterations were fraudulently made. Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298.

99. Haskell *v.* Doty, 78 Cal. 424, 21 Pac. 10.

1. Moores *v.* Moores, 16 N. J. Eq. 275. And see the following cases for illustrations of the rule:

Alabama.— McLure *v.* Colclough, 17 Ala. 89; Hallett *v.* Allen, 13 Ala. 554; Holman *v.* Norfolk Bank, 12 Ala. 369; Fenno *v.* Sayre, 3 Ala. 458.

Florida.— Eppinger *v.* Canepa, 20 Fla. 262.

Maryland.— Fitzhugh *v.* McPherson, 3 Gill 408.

New Jersey.— Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203.

New York.— Griffith *v.* Griffith, Hoffm. 153.

See 19 Cent. Dig. tit. "Equity," § 649.

Payment.— Under a plea of payment defendant may prove satisfaction of the demand in any manner, as by set-off or accord and satisfaction. Lee *v.* Beatty, 8 Dana (Ky.) 204; King *v.* King, 9 N. J. Eq. 44. On a bill for restitution upon the reversal of a decree which had been paid, the manner and amount of payment may be made to appear by the answer and proof. Madison *v.* Wallace, 2 Dana (Ky.) 61.

2. Dawson *v.* Hall, 2 Mich. 390.

3. Rawnsley *v.* Trenton Mut. L., etc., Ins. Co., 9 N. J. Eq. 95.

4. Munter *v.* Linn, 61 Ala. 492.

Under answer not stating where the contract was made, but charging usury, defendant will be confined to showing that it was usurious by the laws of the state where the suit was brought. Andrews *v.* Torrey, 14 N. J. Eq. 355; Campion *v.* Kille, 14 N. J. Eq. 229; Dolman *v.* Cook, 14 N. J. Eq. 56.

5. Masterson *v.* Pullen, 62 Ala. 145.

6. Smith *v.* Newland, 40 Ill. 100; Mason *v.* Bair, 33 Ill. 194; Bennett *v.* Welch, 15 Ind. 332; Cannon *v.* Crook, 32 Md. 482; Addison *v.* Bowie, 2 Bland (Md.) 606; Coffin *v.* Murphy, 62 Miss. 542.

Under Alabama rule 76 no testimony can be considered unless it is noted by the register. Tatum *v.* Yahn, 130 Ala. 575, 29 So. 201. Pleadings under this rule may not be used as evidence unless offered and noted by the register. Rice *v.* Tobias, 83 Ala. 348, 3 So. 670. Where an order of submission has been vacated and the cause resubmitted, the evidence must be again noted and entered. Reese *v.* Barker, 85 Ala. 474, 5 So. 305.

The Illinois act of Feb. 12, 1849, allowing evidence to be taken as at common law, does not dispense with the necessity of its appearing in the record. Ward *v.* Owens, 12 Ill. 283; White *v.* Morrison, 11 Ill. 361.

7. Chambers *v.* Cochran, 18 Iowa 159.

Leave may be given to file exhibits which have been misplaced. Craig *v.* Horine, 1 Bibb (Ky.) 113.

A party may require that a document, the subject-matter of the suit, be left in court for inspection. Scarborough *v.* Tunnell, 41 N. C. 103.

Payment of examiner's fees.— Where defendant's proofs are not filed because the examiner's fees have not been paid plaintiff cannot compel their filing without paying such fees. Frese *v.* Biedenfeld, 9 Fed. Cas. No. 5,111, 3 Ban. & A. 205, 14 Blatchf. 402.

Papers may not be filed after hearing except by leave of the court. Union Sugar Refinery *v.* Mathiesson, 23 Fed. Cas. No. 14,398, 3 Cliff. 146. The court has no authority after hearing to allow papers to be filed which were not before hearing a part of the record. Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535.

8. Powell *v.* Spaulding, 3 Greene (Iowa) 443.

made a part of the pleadings of the party in whose behalf they operate and admitted in the pleading of the opposite party.[9]

2. THE ANCIENT METHOD. Formerly to the principle that the evidence should be made part of the record was superadded the further requirement that it be taken secretly and preserved a secret until publication passed. Accordingly, while mere formal proof of the execution of a document not impeached by the answer might be made *viva voce* at the hearing,[10] provided an order be first obtained for that purpose,[11] all other testimony was required to be adduced in response to interrogatories framed by counsel and propounded to witnesses, and their answers taken in writing in pursuance of a commission or by an examiner of the court.[12]

3. MODERN METHODS — a. In General. The taking of testimony in equity cases is now so largely regulated by statutes and rules that the local law must always be consulted, and general statements are almost impracticable.[13]

b. Depositions — (I) *GENERALLY.* In the absence of other positive provision to the contrary the testimony of witnesses in equity suits may still be taken upon written interrogatories in pursuance of a commission issued for that purpose or upon notice, as provided by statute or rule.[14]

(II) *ORAL EXAMINATIONS.* The practice has arisen in many jurisdictions of permitting witnesses to be examined orally by counsel, instead of on written interrogatories, before an examiner or other officer by whom the testimony of such witnesses is reduced to writing and certified.[15] A frequent requirement is

9. Nick *v.* Rector, 4 Ark. 251; Lyman *v.* Little, 15 Vt. 576.

10. See *infra*, XIX, D, 2, b.

11. See *infra*, XIX, D, 2, b.

12. For a full description of the former method see 2 Daniell Ch. Pr. (1st ed.) c. 20. In view of the general disuse or modification of this old mode of proof a detailed description thereof is not deemed advisable.

13. In the federal courts the matter is regulated by equity rules 67–71. N. Y. Const. (1846) art. 6, § 8, provided that the testimony in equity cases shall be taken in like manner as in cases at law, and the same provision is continued in the present constitution, article 6, section 3. Provisions more or less similar are found in other jurisdictions.

14. See DEPOSITIONS, 13 Cyc. 834, 880. See also U. S. Eq. Rules 67, 68. The Illinois act of Feb. 12, 1849, providing for the taking of testimony in the same manner as in common law preserved the right to use depositions. Under the New York constitution (see *supra*, note 13), and other mandatory provisions of like nature, depositions can of course be used only under such circumstances as would permit their use at law.

For construction of various local provisions with regard to the taking and use of depositions see the following cases:

Alabama.— Attkisson *v.* Attkisson, 17 Ala. 256.

Arkansas.— Nick *v.* Rector, 4 Ark. 251.

Illinois.— Wallen *v.* Cummings, 187 Ill. 451, 58 N. E. 1095.

Kentucky.— Mocquot *v.* Meadows, 97 Ky. 543, 31 S. W. 129, 17 Ky. L. Rep. 371.

Maryland.— Hatton *v.* Weems, 12 Gill & J. 83; Oliver *v.* Palmer, 11 Gill & J. 426; Kerr *v.* Martin, 4 Md. Ch. 342.

Michigan.— McClintock *v.* Laing, 22 Mich. 212.

New York.— Gihon *v.* Albert, 7 Paige 278; Troup *v.* Sherwood, 3 Johns. Ch. 558.

South Carolina.— State Bank *v.* Rose, 2 Strobh. Eq. 90.

Virginia.— Burwell *v.* Burwell, 78 Va. 574; Ross *v.* Carter, 4 Hen. & M. 488.

See 19 Cent. Dig. tit. "Equity," §§ 739–742.

Depositions taken in another suit between the same parties may be used in evidence by special order of the court granting permission. Leviston *v.* French, 45 N. H. 21.

15. See DEPOSITIONS, 13 Cyc. 891.

U. S. Eq. Rule 67 provides that either party may give notice to the other that he desires the evidence to be adduced in the case to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. After such notice has been given no deposition should be taken on interrogatories except for special reasons. Bischoffscheim *v.* Baltzer, 10 Fed. 1, 20 Blatchf. 229. Under the law as it stood in 1861, it was held that evidence must be taken either in open court or upon written interrogatories, unless the parties agreed to a different course. Bronson *v.* La Crosse, etc., R. Co., 4 Fed. Cas. No. 1,930. A deposition will not be suppressed because taken by stipulation before an officer without special appointment as an examiner (J. L. Mott Iron-Works *v.* Standard Mfg. Co., 48 Fed. 345), and on leave to take testimony before any examiner, if the parties proceed in part before one and then before another, the testimony taken before the second will be allowed to stand (Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287).

that a party must furnish to his adversary in advance of the examination a list of the witnesses to be examined.[16] Under this system of examination of course all secrecy disappears, and publicity has been even encouraged.[17]

c. Examination in Open Court. As already stated[18] there are now frequent provisions whereby testimony in equity cases may or must be taken in open court as in cases at common law. This rests sometimes, when not compulsory, in the election of the parties,[19] and sometimes in the discretion of the court.[20]

B. Time For Taking Proof — 1. In General. By the chancery practice the time for taking testimony was brought to a close by an order passing publication, which in most cases had to be preceded by a rule to produce witnesses.[21] A rule to close the testimony within a specified or customary time is still, it seems, sometimes necessary;[22] but now statutes or general rules usually prescribe a fixed time

Counsel may not advise the witness on the examination that he is not compelled to answer, but it is the duty of the examiner to inform him of his rights. Taylor *v.* Wood, 2 Edw. (N. Y.) 94.

An examiner may be appointed pro hac vice. Steffee *v.* Kerr, 2 Woodw. (Pa.) 171; Smith *v.* Onion, 19 Vt. 432; Van Hook *v.* Pendleton, 28 Fed. Cas. No. 16,852, 2 Blatchf. 85.

Clerical assistance.— Under Md. Code, art. 16, § 144, the examiner may have a clerk to write down the testimony. Under U. S. Eq. Rule 67 the testimony may be taken by a skilful stenographer or typewriter under the direction of the examiner.

16. Powell *v.* Tuttle, 10 Paige (N. Y.) 522; Gaul *v.* Miller, 3 Paige (N. Y.) 192; Charruaud *v.* Charruaud, 3 Edw. (N. Y.) 273; Chase *v.* Dix, 46 Vt. 642.

17. Philadelphia *v.* Gas Works, 12 Wkly. Notes Cas. (Pa.) 568.

In the federal courts the practice of secret examinations is no longer allowed. Sickles *v.* Gloucester Co., 22 Fed. Cas. No. 12,840, 3 Wall. Jr. 186.

18. See *supra*, notes 13, 14.

19. See Maher *v.* Bull, 39 Ill. 531; Owens *v.* Ranstead, 22 Ill. 161; Kelly *v.* Wayne County Cir. Judge, 90 Mich. 264, 51 N. W. 278; People *v.* Judge Barry Cir. Ct., 27 Mich. 170; Eslow *v.* Albion Tp., 27 Mich. 4; Noonan *v.* Orton, 5 Wis. 60.

Miss. Code, § 1764, does not authorize the examination of witnesses in open court except in the cases specified. Winner *v.* Brandon, 82 Miss. 767, 35 So. 192; Dickerson *v.* Askew, 82 Miss. 436, 34 So. 157. But the code provision does not apply to equity cases tried by a jury (White *v.* Jones, (1903) 35 So. 450), nor to a case where the parties have virtually agreed that the testimony shall be taken orally, in which case one of them cannot withdraw from his agreement to the prejudice of the other (Lessly *v.* Ogden, (1904) 35 So. 825). Formerly no oral evidence was permitted. McIntyre *v.* Ledyard, Sm. & M. Ch. 91.

20. Payne *v.* Danley, 18 Ark. 441, 68 Am. Dec. 187; Blease *v.* Garlington, 92 U. S. 1, 23 L. ed. 521. See *infra*, XIX, D, 2, a.

U. S. Eq. Rule 67 provides that upon due notice given, as prescribed by previous order, the court may at its discretion permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing. An order for this purpose cannot be had *ex parte*. Mears *v.* Lockhart, 94 Fed. 274, 36 C. C. A. 239.

In Iowa there are two methods of trying equity cases: the first, which is generally applicable, requiring written evidence (Harlan *v.* Porter, 50 Iowa 446; State *v.* Orwig, 25 Iowa 280; Henderson *v.* Legg, 16 Iowa 484), the second, applicable in divorce cases, foreclosure of tax titles and of mortgages, being the same as in actions at law (State *v.* Orwig, 25 Iowa 280; White *v.* Kelly, 23 Iowa 275; Henderson *v.* Legg, 16 Iowa 484). The taking of stenographic notes is not a compliance with the law requiring written evidence. Godfrey *v.* McKean, 54 Iowa 127, 6 N. W. 151. See Code, § 2742; Laws (1878), c. 145.

21. 2 Daniell Ch. Pr. 488, 562.

Publication under the chancery practice was the open showing of depositions and the giving out of copies by the clerks or examiners. Blake Ch. Pr. 143; 2 Daniell Ch. Pr. 562; Practice Reg. 297.

Under U. S. Eq. Rule 69, publication may be ordered by any judge of the court upon due notice to the parties immediately upon the return of the commissions and depositions, or it may at any time pass in the clerk's office upon consent of the parties in writing and a copy thereof entered in the order book or indorsed upon the deposition. Where plaintiff's testimony has been taken by commission it will be published before defendant opens his case, so that defendant may know whether the case in chief has been made out. Eillert *v.* Craps, 44 Fed. 792.

Publication should be ordered on a rule day or in term-time. Coal River Nav. Co. *v.* Webb, 3 W. Va. 438.

In the New York chancery a notice of the rule to pass publication had to be served on defendant's solicitor or his agent (Billings *v.* Rattoon, 5 Johns. Ch. 189), but where such a rule had been enlarged no further rule need be entered upon the expiration of the further time (Moody *v.* Payne, 3 Johns. Ch. 294).

22. Tillotson *v.* Mitchell, 111 Ill. 518; Boon *v.* Pierpont, 32 N. J. Eq. 217; *In re* Mechanics' Labor Sav. Bank, 10 N. J. L. J. 112; James *v.* Berry, 1 Paige (N. Y.) 647;

within which the evidence shall be taken.[23] Depositions taken after expiration of the time fixed, unless the time is enlarged or leave given to file *nunc pro tunc*, will be suppressed,[24] or will be excluded on the hearing,[25] without a motion to suppress.[26] Generally evidence may not be taken before the cause is at issue and ready for proof.[27]

2. Extending Time. It rests within the discretion of the court for cause shown to extend the time for taking the proof.[28] The exercise of such discretion

Conrow *v.* Barber, 29 Wkly. Notes Cas. (Pa.) 551; Ward *v.* Peterson, 19 Wkly. Notes Cas. (Pa.) 157. Where the parties have by mutual consent waived a time rule for taking testimony an order prospective in point of time must be obtained in order to compel the other party to close his proofs. Mellus *v.* Howard, 16 Fed. Cas. No. 9,403, 2 Curt. 264. The common order to close proof is irregular after an order extending the time for taking proofs, but will be made good by relation if the order extending the time is set aside for irregularity. Studwell *v.* Palmer, 5 Paige (N. Y.) 166.

23. In Florida three calendar months after the filing of the replication is the period permitted. Maxwell *v.* Jacksonville Loan, etc., Co., (1903) 34 So. 255.

In Mississippi the time is now four months. Code (1892), § 1760. One who goes to hearing without objection before the expiration of the time waives his right to further time. Hart *v.* Bloomfield, 66 Miss. 100, 5 So. 620. Where one is brought in by supplemental bill and answers he is entitled to the regular time thereafter. Tierney *v.* Klein, 67 Miss. 173, 6 So. 739, 8 So. 424.

In Tennessee the time for proof in chief is four months after the cause is set for hearing, and for rebutting proof two months thereafter, but the court may dispose of the case earlier where it appears that no proof is essential or could be material. Rather *v.* Williams, 94 Tenn. 543, 29 S. W. 898. And see Grant *v.* Chester, (Tenn. Ch. 1899) 58 S. W. 485.

U. S. Eq. Rule 69 allows three months after the cause is at issue. Under this rule it is not at issue unless it is so as to all defendants not in default, and taken *pro confesso* as to the others. Gilbert *v.* Van Arman, 10 Fed. Cas. No. 5,414, 1 Flipp. 421.

As to other rules see Pingree *v.* Coffin, 12 Cush. (Mass.) 600; Poling *v.* Johnson, 2 Rob. (Va.) 255.

24. Wenham *v.* Switzer, 48 Fed. 612. Where notice of the taking of the deposition is not given within the time fixed by rule, and objection is made on that ground at the examination, the deposition will be suppressed. Bachelor *v.* Nelson, Walk. (Mich.) 449. An examination commenced before the expiration of time might in the New York chancery be continued thereafter until the actual entry of an order to close the proofs. Green *v.* Wheeler, 2 Ch. Sent. (N. Y.) 60.

25. Call *v.* Perkins, 68 Me. 158; Wooster *v.* Clark, 9 Fed. 854.

Under Va. Code (1873), c. 172, § 36, providing that depositions may be read if returned before the hearing or after an interlocutory decree, if relating to matter not thereby adjudged, and returned before final decree, it was held that a deposition taken after a master's report, relating to matter decided therein, must be disregarded on the hearing. Richardson *v.* Duble, 33 Gratt. (Va.) 730.

Defendant's plea will be overruled where the burden of proof rests upon him and he takes no evidence within the time provided by rule. Sharon *v.* Hill, 22 Fed. 28, 10 Sawy. 394.

26. Abbott *v.* Alsdorf, 19 Mich. 157.

27. Harris *v.* Moore, 72 Ala. 507. See Depositions, 13 Cyc. 864, 865.

But new evidence may be taken after interlocutory decree and before a rehearing, if the court so permits. Summers *v.* Darne, 31 Gratt. (Va.) 792. And see Richardson *v.* Dugle, 33 Gratt. (Va.) 730.

Pendency of an appeal does not render improper the taking of evidence on a question reserved in the decree appealed from. Barnum *v.* Barnum, 42 Md. 251.

Premature taking of testimony may be waived by subsequent conduct. Reynolds *v.* Pharr, 9 Ala. 560.

A commission may issue at any time after the filing of the bill. State Bank *v.* Rose, 2 Strobh. Eq. (S. C.) 90.

Either party may proceed during the period allowed for taking proof. Brown *v.* Brown, 22 Mich. 242.

28. *Connecticut.*— Gainty *v.* Russell, 40 Conn. 450.

Florida.— Magbee *v.* Kennedy, 26 Fla. 158, 7 So. 529; Tuten *v.* Gazan, 18 Fla. 751.

Georgia.— Warren *v.* Bunch, 80 Ga. 124, 7 S. E. 270.

Maryland.— Wagoner *v.* Wagoner, (1887) 10 Atl. 221.

Michigan.— Becker *v.* Saginaw Cir. Judge, 117 Mich. 328, 75 N. W. 885; McClung *v.* McClung, 40 Mich. 493.

Pennsylvania.— Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422; Burton's Appeal, 93 Pa. St. 214.

Wisconsin.— Stewart *v.* Stewart, 41 Wis. 624.

United States.— Ingle *v.* Jones, 9 Wall. 486, 19 L. ed. 621; Coon *v.* Abbott, 37 Fed. 98.

See 19 Cent. Dig. tit. "Equity," §§ 734, 735.

After testimony is closed before an examiner the case will not be opened by the court in order to take further testimony before a master. Freeman *v.* Stine, 13 Phila. (Pa.) 28.

depends of course on the circumstances of the case.[29] Where a new defendant is brought in by supplemental bill after proof taken, the cause should be reopened for proofs between such defendant and plaintiff.[30] Where both parties proceed with the proofs after the time for taking them has expired, they will be deemed to have consented to extend the time.[31] After publication has passed, witnesses cannot be examined except under very special circumstances,[32] and it has even sometimes been held that no extension will then be given except where the judge himself entertains a doubt, and desires to inform his conscience, or where some additional inquiry is indispensable to the rendition of a decree.[33] However,

29. **Where plaintiff has taken a long time** in making voluminous proof, the court will only in a clear case limit defendant to a short time. *In re* Mechanics' Labor Sav. Bank, 10 N. J. L. J. 112.

It is proper to enlarge the rule to pass publication until plaintiffs shall have answered a cross bill, as in such case plaintiffs have it in their power at any time to end the delay. Underhill *v.* Van Cortland, 1 Johns. Ch. (N. Y.) 500. Time will be extended to take testimony which is applicable to other pending cases in which the time has not expired. Wooster *v.* Howe Mach. Co., 10 Fed. 666.

Time will not be extended to a party who has had sufficient opportunity to take proof and shows no sufficient reason for neglecting to do so. Thayer *v.* Swift, Walk. (Mich.) 384; Jewett *v.* Albany City Bank, Clarke (N. Y.) 57. Where a defendant has by a legal slip lost his opportunity to show a transaction to be illegal, involving his own turpitude as well as that of his adversary, the court will not open the proofs and permit him to do so. Harrington *v.* Bigelow, 11 Paige (N. Y.) 349. Where a cause has been transferred for hearing to another court, it will not be remanded for further proof to establish a defense not sufficiently set up in the answer. Doggett *v.* Hogan, 40 N. C. 340. It is not error to refuse to extend time to prove an amendment to the answer setting up a legal defense. Stull *v.* Goode, 10 Heisk. (Tenn.) 58. Time will not be extended in favor of a party who has kept adverse counsel for a long time at a distant point and unreasonably delayed the taking of proof while so holding counsel for that purpose. Allington, etc., Mfg. Co. *v.* Globe Co., 73 Fed. 394.

30. McLaren *v.* Hopkins, Hopk. (N. Y.) 576.

Testimony previously taken cannot be used against new parties. Cosby *v.* Wickliffe, 7 B. Mon. (Ky.) 120; Smith *v.* Baldwin, 4 Harr. & J. (Md.) 331; Jenkins *v.* Bisbee, 1 Edw. (N. Y.) 377. Such testimony may be admitted, but the new party must be given an opportunity to cross-examine. Kingman *v.* Higgins, 100 Ill. 319.

One made a party by amendment cannot object to prior proceedings. Lytle *v.* Breckenridge, 3 J. J. Marsh. (Ky.) 663.

31. Gibson *v.* Briggs, 19 Vt. 176; Mellus *v.* Howard, 16 Fed. Cas. No. 9,403, 2 Curt. 264.

Under U. S. Eq. Rule 69, the time limit fixed will be enforced unless the court has extended it or the parties have agreed to an extension by written stipulation. Brown *v.* Worster, 113 Fed. 20.

32. Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432; Willan *v.* Willan, Coop. Ch. 291, 10 Eng. Ch. 291, 19 Ves. Jr. 590, 34 Eng. Reprint 635.

Under the old policy of secrecy it was held that after a party had learned the substance of the testimony he could not on affidavit have the case reopened for additional proof. Moody *v.* Payne, 3 Johns. Ch. (N. Y.) 294.

Where a cross bill is filed after publication plaintiff must go to hearing on the testimony already taken and answer to the cross bill. Paxton *v.* Stackhouse, 4 Kulp (Pa.) 403.

Where answers were filed on the day fixed for hearing, leave was given to take further proofs after the hearing commenced. Delaware, etc., Canal Co. *v.* Raritan, etc., R. Co., 14 N. J. Eq. 445.

Newly discovered evidence.— A party may be allowed to introduce newly discovered evidence at any time before the hearing (Ridgeway *v.* Toram, 2 Md. Ch. 303; Mulock *v.* Mulock, 28 N. J. Eq. 15), or even after the hearing (Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 119 Ill. 30, 6 N. E. 191; Stewart *v.* Stewart, 41 Wis. 624; Hitchcock *v.* Tremaine, 12 Fed. Cas. No. 6,540, 9 Blatchf. 550; Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316).

When the testimony of a witness has been excepted to the court may give the party calling him leave to examine further witnesses as to the facts contained in his testimony. Bogert *v.* Bogert, 2 Edw. (N. Y.) 399.

An amendment to the bill not calling for proof is not ground for reopening the case. De Wolf *v.* Pratt, 42 Ill. 198.

Where the interests of third parties may be affected further testimony will not be permitted. Schneider *v.* Thill, 3 Fed. 95, 18 Blatchf. 241.

After full hearing it has been held that a cause will not be retained for the preparation of testimony (Waterman *v.* Kennerly, 3 Strobh. Eq. (S. C.) 76), and that evidence affecting the rights of the parties cannot be introduced after a decision (Webb *v.* Galloway, 1 Litt. (Ky.) 78).

33. Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316.

Alabama rule 64, requiring consent or a special application to take proofs after publication, leaves unabridged the chancellor's discretion to order additional testimony to in-

another well recognized cause for taking testimony after publication is the impeachment of witnesses.[34] The application for an extension of time should be made upon notice,[35] should show that the applicant has not been negligent,[36] should state the substance of what the party expects to prove,[37] and all facts necessary to fix the terms of the order.[38] As the extension is a matter of grace conditions may be imposed on granting it.[39]

3. Impeaching Witnesses. When the testimony was taken secretly, testimony to impeach witnesses was necessarily postponed until after publication, and it was necessary to obtain a special order for that purpose, which was granted, however, almost as of course.[40] For this purpose it was necessary to file articles giving notice of what witnesses were to be impeached and the particular grounds.[41] The examination was confined to evidence of the general character of the witness to be impeached, the contradiction of particular facts sworn to by him, not material to the issue,[42] and to showing that previously to his examination he had made statements contrary to his deposition.[43] The adverse party may under such an order take testimony to contradict the impeaching testimony and establish the credit of his witnesses.[44]

C. Reëxamining Witnesses. A witness whose examination has once been closed cannot ordinarily be reëxamined as to the same matter,[45] but for cause shown the court may in its discretion make a special order permitting such reëxamination.[46] The principal causes for such reëxamination are the suppression of the previous depositions for irregularity or because the interrogatories were leading, or the curing of omissions, or correction of mistakes made by the witness.[47]

form his conscience. Dixon *v.* Higgins, 82 Ala. 284, 2 So. 289.

After submission, if some point is left unproved, the court may remand the cause to the docket and let it stand for further proof (Planters' Bank *v.* Courtney, Sm. & M. Ch. (Miss.) 40), even where the insufficiency of proof is due to the inadvertence of counsel (Sharp *v.* Wyckoff, 39 N. J. Eq. 95).

34. See *infra*, XVI, B, 3.

35. Hunt *v.* Oliver, 12 Fed. Cas. No. 6,894.

36. McClung *v.* McClung, 40 Mich. 493.

37. Thayer *v.* Swift, Walk. (Mich.) 384; Powell *v.* Tuttle, 10 Paige (N. Y.) 522. The testimony is deemed closed with that taken in rebuttal, and if it is desired to take testimony in surrebuttal, application must be made to the court, showing what the party desires to prove. Rubber Tire Wheel Co. *v.* Columbia Pneumatic Wagon Wheel Co., 89 Fed. 593.

38. Fitch *v.* Hazeltine, 2 Paige (N. Y.) 416.

39. Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

40. Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605; Russel *v.* Atkinson, 2 Dick. 532, 21 Eng. Ch. 377.

41. Troup *v.* Sherwood, 3 Johns. Ch. (N. Y.) 558; Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605; Beames Orders in Ch. 187.

42. Purcell *v.* McNamara, 8 Ves. Jr. 324, 32 Eng. Reprint 379.

The purpose of this restriction was to prevent the taking of new proof on the issues under guise of impeaching witnesses.

43. 2 Daniell Ch. Pr. 598.

Competency of a witness may be attacked indirectly by showing that his testimony as to his competency was untrue. Ambrosio *v.* Francia [*cited* in Purcell *v.* McNamara, 8 Ves. Jr. 324, 325, 32 Eng. Reprint 379].

44. Troup *v.* Sherwood, 3 Johns. Ch. (N. Y.) 558; Hinde Ch. 377.

45. Abergavenny *v.* Powell, 1 Meriv. 130, 35 Eng. Reprint 624.

After adjournment and another witness examined a witness cannot be recalled for reëxamination on the same subject. Ordronaux *v.* Helie, 3 Sandf. Ch. (N. Y.) 512.

Reëxamination without leave is ratified by agreeing to proceed on the basis of the evidence taken. Young *v.* Omohundro, 69 Md. 424, 16 Atl. 120.

46. Swartz *v.* Chickering, 58 Md. 290; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Hallock *v.* Smith, 4 Johns. Ch. (N. Y.) 649.

U. S. Eq. Rule 68, permitting depositions to be taken according to the acts of congress, provides that if such depositions be taken without notice the adverse party shall upon motion and affidavit be entitled to cross-examine either under a commission or by a new deposition taken under the acts of congress, if a court or a judge thereof shall under all the circumstances deem it reasonable. Under this rule it is discretionary to stay proceedings for that purpose. Van Hook *v.* Pendleton, 28 Fed. Cas. No. 16,852, 2 Blatchf. 85. If a party refuses to produce a witness for cross-examination his testimony in chief will be suppressed. Shapleigh *v.* Chester Electric Light, etc., Co., 47 Fed. 848.

47. 2 Daniell Ch. Pr. 585 *et seq.*

The power to reopen the evidence on the ground that witnesses have made mistakes in their testimony should be exercised with great caution. Burton's Appeal, 93 Pa. St. 214. Such power should not be exercised after decree. Harrell *v.* Mitchell, 61 Ala. 270.

A reëxamination without leave of the court is ground for suppressing the deposition of the witness.[48]

D. Objections to Evidence. All the evidence offered must in general be received in the first instance in order to preserve it on the record,[49] but objections should be made when the testimony is offered, and incorporated in the record, to be passed upon later.[50] It is proper, however, to reserve until the hearing objections going to the competency,[51] or relevancy of testimony.[52] Objections must state clearly the testimony objected to and the ground of the objection.[53] Objections are waived unless the attention of the chancellor is called thereto,[54] and by other conduct inconsistent with an insistence thereon;[55] but an express waiver of an objection must be entered on the record.[56]

48. Bonner *v.* Young, 68 Ala. 35.

49. Bilz *v.* Bilz, 37 Mich. 116; Philadelphia *v.* Gas Works, 12 Wkly. Notes Cas. (Pa.) 568; Thacher *v.* Woddrof, 4 Pa. Co. Ct. 288; Parisian Comb Co. *v.* Eschwege, 92 Fed. 721; Lloyd *v.* Pennie, 50 Fed. 4.

When admissibility is doubtful, it is usual to receive the evidence without prejudice, subject to subsequent admission or rejection. Rothmahler *v.* Myers, 4 Desauss. (S. C.) 215, 6 Am. Dec. 613. The United States circuit court has no authority to deny a party a right to take testimony because it deems such testimony irrelevant. Fayerweather *v.* Ritch, 89 Fed. 529.

Errors in admitting evidence are not available in equity. Salt Lake Foundry, etc., Co. *v.* Mammoth Min. Co., 6 Utah 351, 23 Pac. 760; Giles *v.* Hodge, 74 Wis. 360, 43 N. W. 163.

In a proper case the examiner may be authorized to pass on the admissibility of evidence. Bridesburg Mfg. Co. *v.* Lehigh Valley Iron Co., 14 Wkly. Notes Cas. (Pa.) 304. In cases of serious moment the examiner may appeal to the court for instructions. Philadelphia *v.* McManes, 17 Phila. (Pa.) 50.

50. Williams *v.* Thomas, 3 N. M. 324, 9 Pac. 356; Maxim-Nordenfelt Guns, etc., Co. *v.* Colt's Patent Firearms Mfg. Co., 103 Fed. 39; De Roux *v.* Girard, 90 Fed. 537.

Waiver.— If a party attends the taking of testimony and makes no objection, he cannot afterward object that it was not taken in the manner prescribed. Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121. Irregularities in the taking of evidence must be seasonably objected to. Williamson *v.* Johnson, 5 N. J. Eq. 537. A party who makes no objection during the taking of the evidence or progress of the cause may not object on the hearing. Webb *v.* Alton M. & F. Ins. Co., 10 Ill. 223.

51. Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756; Kennedy *v.* Meredith, 3 Bibb (Ky.) 465; Williams *v.* Vreeland, 30 N. J. Eq. 576; Williams *v.* Maitland, 36 N. C. 92.

A party who cross-examines a witness, known by him to be incompetent to testify, cannot raise the objection on the hearing. Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

52. Williams *v.* Vreeland, 30 N. J. Eq. 576; Jones *v.* Spencer, 2 Tenn. Ch. 776; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 282.

Costs may be imposed on the offending party where irrelevant testimony has been taken. Brown *v.* Worster, 113 Fed. 20; Griffith *v.* Shaw, 89 Fed. 313. See also Howell's Estate, 14 Phila. (Pa.) 329.

A decree will be reversed on appeal if based on depositions not relevant to any issue. James *v.* McKernon, 6 Johns. (N. Y.) 543.

53. Freeny *v.* Freeny, 80 Md. 406, 31 Atl. 304.

A general objection made before the master that the testimony was "irrelevant and incompetent" is not sufficiently specific. Hamilton *v.* Southern Nevada Gold, etc., Min. Co., 33 Fed. 562, 13 Sawy. 113.

Exceptions to testimony as going to a point not alleged constitute no exceptions to the averments of the bill. O'Neill *v.* Cole, 4 Md. 207.

The objection should be confined to so much of the evidence as is inadmissible, or it may be overruled. Ashmead *v.* Colby, 26 Conn. 287.

It is error to suppress all depositions if a part is relevant and admissible. Hemphill *v.* Miller, 16 Ark. 271.

A motion to strike out all of plaintiff's evidence is in the nature of a demurrer thereto, and admits every conclusion which might reasonably be drawn therefrom. Heiderich *v.* Heiderich, 18 Ill. App. 142.

54. Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193; Seals *v.* Robinson, 75 Ala. 363; Brewer *v.* Browne, 68 Ala. 210; Clarke *v.* Saxon, 1 Hill Eq. (S. C.) 69; Van Namee *v.* Groot, 40 Vt. 74.

55. An objection cannot be made to the manner of introduction of a release, where no objection was made at the time and evidence was taken attacking it for duress. Kelsey *v.* Hobby, 16 Pet. (U. S.) 269. 10 L. ed. 961. But permitting a bond to be filed without exception to the admission of a recital therein does not waive the objection that the recital is not admissible except against the obligor. James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53. An objection to evidence attacking the validity of a deed set up in the answer, on the ground that its validity was not in issue is waived unless presented before hearing by motion to suppress. Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135.

56. American Saddle Co. *v.* Hogg, 1 Fed. Cas. No. 316, Holmes 177.

XVII. RULES OF EVIDENCE.

A. Analogy Between Rules at Law and in Equity — 1. In General. In general the rules of evidence in courts of law and in courts of equity are the same,[57] unless modified by statutory provisions.[58] And a court of equity is warranted in making the same deductions from facts as a jury might make.[59]

2. Parol Evidence to Vary a Written Instrument. Parol evidence is in general inadmissible, both at law and in equity, to vary a written instrument.[60] But where the powers of the court are invoked upon the ground of mistake or fraud, parol evidence will generally be admitted to contradict or control a written instrument if its admission is necessary in order to reach the equities of the case.[61] In other classes of cases the extent to which equity will receive parol evidence to vary a written instrument has never been established by authority.[62]

B. Pleadings as Evidence — 1. The Bill as Evidence. The allegations of a bill not sworn to by the complainant are generally considered as the mere suggestions of counsel, but those contained in a bill which is verified by him are

57. Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148. Various cases where a rule at law was applied in equity are Buttlar *v.* Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. Rep. 648; Wakeman *v.* Dodd, 27 N. J. Eq. 564; Radford *v.* Carwile, 13 W. Va. 572; Harmer *v.* Gwynne, 11 Fed. Cas. No. 6,075, 5 McLean 313.

The burden of proof is the same at law and in equity (Pusey *v.* Wright, 31 Pa. St. 387), and the party maintaining the affirmative has it cast upon him (Pusey *v.* Wright, *supra*; Cochran *v.* Blount, 161 U. S. 350, 16 S. Ct. 454, 40 L. ed. 729. See also Huston *v.* Harrison, 168 Pa. St. 136, 31 Atl. 987; Clifton *v.* Weston, 54 W. Va. 250, 46 S. E. 360).

Evidence as to confessions and statements by defendant not charged in the bill is equally admissible in equity as at law. Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,266, 3 Story 181.

58. Ala. Code (1876), § 3036, which renders a written instrument, which is the foundation of an action, self-proving, unless execution is denied by a verified plea by the party charged with its execution or by whom it purports to have been executed, applies to suits in equity, although it is found in the chapter of the code devoted to evidence in proceedings in civil actions in courts of common law. Bonner *v.* Young, 68 Ala. 35 [*followed* in Hooper *v.* Strahan, 71 Ala. 75]. But see Singleton *v.* Gayle, 8 Port. (Ala.) 270.

Under Ohio Code, § 533, providing that all suits pending when the code took effect could be prosecuted to final decree as if the code had not taken effect, acts relating to the law of evidence (2 Curwen St. pp. 1522, 1597) were not repealed as to such suits pending. Hale *v.* Wetmore, 4 Ohio St. 600.

59. Thomas *v.* Frederick County School, 7 Gill & J. (Md.) 369.

60. *Alabama.*— Hart *v.* Clark, 54 Ala. 490.

Iowa.— Sullivan *v.* McLenans, 2 Iowa 437, 65 Am. Dec. 780.

Maine.— Peterson *v.* Grover, 20 Me. 363; Eveleth *v.* Wilson, 15 Me. 109.

Maryland.— Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

Wisconsin.— Cooper *v.* Tappan, 4 Wis. 362.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589.

See 19 Cent. Dig. tit. "Equity," § 674. And see, generally, Evidence.

61. Miller *v.* Cotten, 5 Ga. 341; Peterson *v.* Grover, 20 Me. 363; Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589. And see Gill *v.* Claggett, 4 Md. Ch. 470. When a party prays relief against the very face of a written contract, on the ground that such writing does not truly speak the meaning and intention and true agreement designed to be entered into, he must clearly bring himself within the exception to the general rule which gives the preference to written over parol evidence. Brantley *v.* West, 27 Ala. 542. In order to show in equity that an instrument purporting to be an agreement between husband and wife should not be allowed any effect, oral evidence is admissible that it was signed by both with the understanding that they were not legally bound thereby. Earle *v.* Rice, 111 Mass. 17. Equity, to determine whether a written instrument is in effect a mortgage, hears parol evidence, not to contradict or vary the terms of the instrument, but to raise an equity superior to it, and give it effect according to the true intent and purpose of the parties. Pioneer Gold Min. Co. *v.* Baker, 23 Fed. 258, 10 Sawy. 539.

62. A court of equity will be much more liberal in allowing parol evidence to contradict or control a written instrument, in order to reach the equities of the case, than courts of law. The principle that parol evidence may be admitted, even in defense, to vary or contradict a written instrument, has never been established by authority, although it seems that courts of chancery are more liberal in admitting it to resist than to enforce a specific performance. Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332.

competent evidence against him.[63] But the bill is not evidence against plaintiff as to an allegation of fact contained in it which is not admitted by the answer; he is not concluded thereby.[64] Plaintiff's bill filed in another suit may be read against him, on proof of his actual privity to the contents and to the filing of it.[65]

2. The Answer as Evidence — a. Hearing on Bill and Answer. When complainant sets down the cause for hearing on bill and answer, or on bill, answer, and exhibits, he thereby admits that every well pleaded averment of the answer, whether responsive to the allegations of the bill or in avoidance, is true. Having filed no replication the answer is taken as true, and therefore defendant needs no proof; and the complainant not having replied cannot offer any.[66] It is in effect a submission of the cause to the court by complainant on the contention that he

63. *Alabama.*— McRea *v.* Columbus Ins. Bank, 16 Ala. 755; Durden *v.* Cleveland, 4 Ala. 225.

Georgia.— Jones *v.* Thacker, 61 Ga. 329.

Kentucky.—Rankin *v.* Maxwell, 2 A. K. Marsh. 488, 12 Am. Dec. 431. But see Rees *v.* Lawless, 4 Litt. 218.

Missouri.— Hall *v.* Guthrie, 10 Mo. 621.

Tennessee.— Pearce *v.* Suggs, 85 Tenn. 724, 4 S. W. 526.

See 19 Cent. Dig. tit. "Equity," § 680.

An unsworn original bill is not admissible in evidence against complainant where it was prepared by his attorney under a misapprehension of facts, and an amended bill was subsequently filed. Wenegar *v.* Bollenbach, 180 Ill. 222, 54 N. E. 192.

Where defendant relies upon an admission in a bill in equity, he must as a general rule take the whole of such admission. Stuart *v.* Kissam, 2 Barb. (N. Y.) 493. For the same rule at law in regard to admissions generally see Evidence.

Viewed as a pleading plaintiff is bound by the allegations of the bill. See *supra*, XV, A, 1.

Petitions, as distinguished from bills, are generally not evidence of the facts contained in them. Chancellor *v.* Traphagen, 41 N. J. Eq. 369, 3 Atl. 263, 7 Atl. 505; Carpenter *v.* Muchmore, 15 N. J. Eq. 123. But see Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277.

64. Thompson *v.* Thompson, (Tenn. Ch. App. 1899) 54 S. W. 145.

65. A bill in chancery is not evidence in another suit against the party filing it, unless privity is shown, and cannot be so regarded when filed by the counsel of a corporation. Vanneman *v.* Swedesboro Loan, etc., Assoc., 42 N. J. Eq. 263, 7 Atl. 676. The statements in a bill in equity are evidence against plaintiff, although very feeble, so far as they are the suggestions of counsel; and it seems that it makes no difference that plaintiff gave the bill in evidence simply in order to use the answer. Drake *v.* Ramey, 3 Rich. (S. C.) 37.

66. 1 Barbour Ch. Pr. 254. At the hearing of a cause on bill and answer, no evidence can be introduced not contained in the pleadings. De Peyster *v.* Colden, 1 Edw. (N. Y.) 63.

Documents, records, etc.—At a hearing upon bill and answer plaintiff can read in evidence only such documents as are admitted in the answer, and records, or other instruments duly proved and acknowledged in such a manner as to make the production thereof, or an exemplification in case of a record, sufficient proof; and such proof and acknowledgment must appear by the bill. Latting *v.* Hall, 9 Paige (N. Y.) 383. And see Anonymous, 1 Barb. Ch. (N. Y.) 73.

Affidavits.— A bill in equity, praying for an account, was filed in a federal circuit court to recover license fees, and plaintiff moved for a decree on the bill and answer and an affidavit, and defendant put in counter affidavits. It was held, under equity rule 90, that the English practice which existed in 1842 must be followed, and not any other English practice, and that the affidavit of plaintiff could not be considered, but that the case would be heard on bill and answer. Evory *v.* Candee, 8 Fed. Cas. No. 4,583, 4 Ban. & A. 545, 17 Blatchf. 200.

On submission upon an agreed statement of facts, after a general replication to a bill in equity, the allegations in the answer are to be taken as true only so far as they are supported by the facts agreed. Taunton *v.* Taylor, 116 Mass. 254.

Waiver of replication, etc.— After replication filed answers not under oath are not evidence of the facts stated in them; but the complainant in such case may waive his replication, and the cause may be set down for hearing on bill and answer only. Dascomb *v.* Marston, 80 Me. 223, 13 Atl. 868. Where a replication is filed and the cause set down for hearing, and no rule to produce witnesses is entered, it is a waiver of the replication, and defendants are entitled to the benefit of their answers as if the cause had been set down for hearing on bill and answer. Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 607. Where a hearing is had, and a decree made thereafter, on bill, answer, and replication, it must be regarded as an argument on bill and answer, whereby the allegations of the answer are admitted, although strictly the issue should have gone to an examiner to take testimony, or in some form have been supported by evidence. Beale *v.* Bucher, 13 Pa. Super. Ct. 474. When plaintiff sets down a cause for hearing on bill, answer, and replication, without giving defendant the opportunity to substantiate his answer by proof, the effect is the same as

is entitled to the decree prayed for in his bill upon the admissions and notwithstanding the denials of the answer.[67]

though the case were heard on bill and answer alone, and the answer will be taken as true. Sterr's Estate, 13 Phila. (Pa.) 212.

67. *Alabama.*— Reese *v.* Barker, 85 Ala. 474, 5 So. 305; Floyd *v.* Floyd, 77 Ala. 353; Frazer *v.* Lee, 42 Ala. 25; Lampley *v.* Weed, 27 Ala. 621; White *v.* Florence Bridge Co., 4 Ala. 464; Cherry *v.* Belcher, 5 Stew. & P. 133; Lowry *v.* Armstrong, 3 Stew. & P. 297.

Arkansas.— Patton *v.* Ashley, 8 Ark. 290.

California.—Belt *v.* Davis, 1 Cal. 134; Von Schmidt *v.* Huntington, 1 Cal. 55.

District of Columbia.— Wagenhurst *v.* Wineland, 20 App. Cas. 85; Birdsall *v.* Welch, 6 D. C. 316.

Florida.— Hart *v.* Sanderson, 18 Fla. 103.

Georgia.— Parker *v.* Riley, 21 Ga. 427; Baldwin *v.* Lee, 7 Ga. 186. And see Ruckersville Bank *v.* Hemphill, 7 Ga. 396.

Illinois.— Roach *v.* Glos, 181 Ill. 440, 54 N. E. 1022; Derby *v.* Gage, 38 Ill. 27; Buntain *v.* Wood, 29 Ill. 504; Trout *v.* Emmons, 29 Ill. 433, 81 Am. Dec. 326; Mason *v.* McGirr, 28 Ill. 322; Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 526; Taylor *v.* Taylor, 52 Ill. App. 527.

Iowa.— Jones *v.* Jones, 13 Iowa 276; Westfall *v.* Lee, 7 Iowa 12; Childs *v.* Horr, 1 Iowa 432.

Kentucky.— Scott *v.* Cook, 4 T. B. Mon. 280.

Maryland.— Barton *v.* Baltimore City International Fraternal Alliance, 85 Md. 14, 36 Atl. 658; Mickle *v.* Cross, 10 Md. 352; Warren *v.* Twilley, 10 Md. 39; Mason *v.* Martin, 4 Md. 124; Craig *v.* Ankeney, 4 Gill 225; McKim *v.* Odom, 3 Bland 407; Contee *v.* Dawson, 2 Bland 264; *In re* Wheeler, 1 Md. Ch. 80.

Massachusetts.— Perkins *v.* Nichols, 11 Allen 542; Tainter *v.* Clark, 5 Allen 66.

Michigan.—Gates *v.* Grand Rapids, (1903) 95 N. W. 998; Huyck *v.* Bailey, 100 Mich. 223, 58 N. W. 1002; Ruhlig *v.* Wiegert, 49 Mich. 399, 13 N. W. 791.

Mississippi.— Russell *v.* Moffitt, 6 How. 303.

Missouri.— See McQueen *v.* Chouteau, 20 Mo. 222. 64 Am. Dec. 178.

New Hampshire.— Rogers *v.* Mitchell, 41 N. H. 154.

New Jersey.— Booraem *v.* Wells, 19 N. J. Eq. 87; Hoff *v.* Burd, 17 N. J. Eq. 201; Belford *v.* Crane. 16 N. J. Eq. 265, 84 Am. Dec. 155; Reed *v.* Reed, 16 N. J. Eq. 248; Gaskill *v.* Sine, 13 N. J. Eq. 130.

New York.— Atkinson *v.* Manks, 1 Cow. 691.

North Carolina.— Carrow *v.* Adams, 65 N. C. 32; Moore *v.* Hylton, 16 N. C. 429.

Ohio.— Gwin *v.* Selby, 5 Ohio St. 96; Richards *v.* Friedly, Wright 753.

Pennsylvania.— Randolph's Appeal, 66 Pa. St. 178; Hengst's Appeal. 24 Pa. St. 413; Corbin *v.* Ashhurst. 4 Pa. Dist. 347; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. 98.

Tennessee.— Remine *v.* Vance, 11 Heisk. 227.

Vermont.— Slason *v.* Wright, 14 Vt. 208; Doolittle *v.* Gookin, 10 Vt. 265.

Virginia.— Cocke *v.* Minor, 25 Gratt. 246; Jones *v.* Mason, 5 Rand. 577, 16 Am. Dec. 761; Kennedy *v.* Baylor, 1 Wash. 162.

West Virginia.— Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804; Cleggett *v.* Kittle, 6 W. Va. 452; Copeland *v.* McCue, 5 W. Va. 264.

United States.— Leeds *v.* Alexandria Mar. Ins. Co., 2 Wheat. 380, 4 L. ed. 266; Gettings *v.* Burch, 9 Cranch 372, 3 L. ed. 763; Lake Erie, etc., R. Co. *v.* Indianapolis Nat. Bank, 65 Fed. 690; U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 [*affirming* 53 Fed. 440]; Parker *v.* Concord, 39 Fed. 718; U. S. *v.* Scott, 27 Fed. Cas. No. 16,242, 3 Woods 334.

See 19 Cent. Dig. tit. "Equity," § 711.

Qualification of rule.— Where a cause is brought to a hearing on bill and answer without replication, this will not be ground for taking the answer as true to its full extent, unless it appears to have been set down for hearing at the instance of complainant. Carman *v.* Watson, 1 How. (Miss.) 333.

Formal defect in answer.— Where complainant in the bill sets the cause down for hearing on bill and answer before replication filed to the answer and before the case is at issue, he will be held at the hearing to have admitted the truth of all the allegations of the answer, notwithstanding any formal defect in the oath to such answer. Lee *v.* Bradley Fertilizer Co., 44 Fla. 787, 33 So. 456.

Matters of fact alone admitted.— Plaintiff, by setting the cause down for hearing on bill and answer, admits the truth only of the pertinent and material facts set out in the answer, and not mere matters of opinion and inference. Contee *v.* Dawson, 2 Bland (Md.) 264. Where a cause is brought to a hearing upon the bill and answer, the answer must be taken for true in all points; and in such case if defendant states that he "hopes to prove" certain facts, they must be considered proved (Brinkerhoff *v.* Brown, 7 Johns. Ch. (N. Y.) 217); but it is not meant by this rule that legal deductions insisted on in the answer are to be considered as true, but only such matters of fact as are stated in the answer by way of defense, or evidence of the equity set forth in the bill (Rodgers *v.* Rodgers, 6 Heisk. (Tenn.) 489).

Other evidence.— When a cause is set down for hearing on bill and answer, the answer must be admitted to be true in all points, and no other evidence is admitted unless it be matter of record to which the answer refers and which is provable by the record. Milligan *v.* Wissman, (Tenn. Ch. App. 1897) 42 S. W. 811. Where a cause is set down for hearing upon the bill. answer, and exhibits, a deed filed by plaintiff as an exhibit is evidence for him, as the answer is for defendant. White *v.* Green, 36 N. C. 45.

b. Hearing on Bill, Answer, and Replication — (1) *GENERAL RULE.* As soon as the cause is at issue by the filing of a replication,[68] both parties may proceed to take testimony for the purpose of establishing their respective cases.[69] Under these circumstances, at the hearing the answer of defendant under oath,[70] and where it is made on defendant's knowledge, is evidence for him,[71] so far as it is responsive to the allegations of the bill,[72] and such an answer will be taken as

Impertinent allegations in an answer cannot be used as evidence for defendant, although plaintiffs neglected to file their replications. Gunnell *v.* Bird, 10 Wall. (U. S.) 304, 19 L. ed. 913.

68. Where a replication is filed to an answer, defendant is put to his proof and cannot use his answer as evidence (Woodall *v.* Prevatt, 45 N. C. 199), except so much as may qualify or explain the meaning of some passage in the answer read in evidence by complainant (Clark *v.* Spears, 7 Blackf. (Ind.) 96).

Where replication is unnecessary in chancery pleading (Ala. Code, § 901) facts not responsive to the bill that are set out in the answer, not by way of special plea, are superfluous, and do not require any action from the complainant. Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.

Under Iowa Code (1851), where the answer does not call for a sworn replication, such replication is not equivalent to the testimony of a witness. Arms *v.* Stockton, 12 Iowa 327. A sworn replication, which neither admits nor denies the allegations of the pleading to which it is a reply, but denies all knowledge of the matters alleged, cannot be allowed the same effect as the testimony of a witness, particularly where the matters in the replication were not required by and are not responsive to the petition. Bacon *v.* Lee, 4 Iowa 490.

69. 1 Barbour Ch. Pr. 254. See also *supra*, XVI, B, 1.

70. Answer sworn to by part of several defendants cannot be admitted as the answer of the whole. Masterson *v.* Craig, 5 Litt. (Ky.) 39. See also *supra*, XIV, B, 5, a.

71. Patterson *v.* Scott, 142 Ill. 138, 31 N. E. 433 [*affirming* 37 Ill. App. 520]. If a bill is one that under the rules of chancery pleading is not required to be sworn to, but does not waive defendant's oath, a sworn answer is admissible in evidence. Pearce *v.* Suggs, 85 Tenn. 724, 4 S. W. 526. The right of a defendant to have his answer taken in evidence is coextensive with his obligation to answer. Blaisdell *v.* Bowers, 40 Vt. 126.

Defendant's answer to the charging part of the bill and responsive thereto is evidence in his favor as much as his answer to the stating part. Smith *v.* Clark, 4 Paige (N. Y.) 368.

Circumstances negativing a statement in the bill, and set forth in the answer, are so far evidence as to put plaintiff upon proof of his case, although no discovery is sought by the bill. Columbia Branch Bank *v.* Black, 2 McCord Eq. (S. C.) 344.

Where plaintiff calls upon defendant to state in his answer the consideration of a deed, and the latter does so and supports it by evidence, the answer will not be disregarded as evidence because unfavorable to plaintiff. Mattoon *v.* McGrew, 112 U. S. 713, 5 S. Ct. 369, 28 L. ed. 824; Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 4 S. Ct. 613, 28 L. ed. 577.

Credibility of the answer is a question for the court. Dunham *v.* Gates, Hoffm. (N. Y.) 185. And, although all of an answer responsive to a bill is to be received as evidence, the court may believe a part of it and disbelieve another part. Mayo *v.* Carrington, 19 Gratt. (Va.) 74.

72. See *infra*, XVII, B, 2, b, (III). Only such facts set forth in an answer as are responsive to the allegations of the bill will be considered as evidence in the cause at the hearing.

Alabama.— Barton *v.* Barton, 75 Ala. 400; Edmondson *v.* Montague, 14 Ala. 370; Fenno *v.* Sayre, 3 Ala. 458.

Arkansas.— Marshall *v.* Green, 24 Ark. 410; Walker *v.* Scott, 13 Ark. 644; Patton *v.* Ashley, 8 Ark. 290.

Florida.— Maxwell *v.* Jacksonville Loan, etc., Co., (1903) 34 So. 255; Kellogg *v.* Singer Mfg. Co., 35 Fla. 99, 17 So. 68; Orman *v.* Barnard, 5 Fla. 528.

Georgia.— Cartledge *v.* Cutliff, 29 Ga. 758; Daniel *v.* Johnson, 29 Ga. 207.

Illinois.— Lake Shore, etc., R. Co. *v.* McMillan, 84 Ill. 208; Stevenson *v.* Mathers, 67 Ill. 123; Gregg *v.* Renfrews, 24 Ill. 620; Cole *v.* Shetterly, 13 Ill. App. 420.

Indiana.— Townsend *v.* McIntosh, 14 Ind. 57; Green *v.* Vardiman, 2 Blackf. 324.

Iowa.— White *v.* Hampton, 10 Iowa 238.

Maine.— Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681.

Maryland.— Fitzhugh *v.* McPherson, 3 Gill 408; Hardy *v.* Summers, 10 Gill & J. 316, 32 Am. Dec. 167; Ringgold *v.* Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250; Jones *v.* Slubey, 5 Harr. & J. 372.

Massachusetts.— Leach *v.* Fobes, 11 Gray 506, 71 Am. Dec. 732; Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733; Mills *v.* Gore, 20 Pick. 28; New England Bank *v.* Lewis, 8 Pick. 113.

Michigan.— Hunt *v.* Thorn, 2 Mich. 213; Schwarz *v.* Wendell, Walk. 267.

Mississippi.— Massingill *v.* Carraway, 13 Sm. & M. 324.

New Jersey.— Fisler *v.* Porch, 10 N. J. Eq. 243.

North Carolina.— Lyerly *v.* Wheeler, 38 N. C. 599; Gillis *v.* Martin, 17 N. C. 470, 25 Am. Dec. 729.

Pennsylvania.— Coleman *v.* Ross, 46 Pa. St. 180; Russell's Appeal, 1 Walk. 131.

Tennessee.— Gass *v.* Arnold, 6 Baxt. 329.

true[73] until disproved;[74] but new matter in the answer constituting a defense by way of avoidance will not avail defendant unless established by proof.[75]

(II) *Limitations and Exceptions to Rule*—(A) *Answer Not on Oath in General.* This general rule is subject to several limitations and exceptions, some of which are indicated in the statement of the rule just given. If the answer is

Texas.— See Thouvenin *v.* Helzle, 3 Tex. 57.

Vermont.— Wells *v.* Houston, 37 Vt. 245; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

West Virginia.— Fluharty *v.* Beatty, 4 W. Va. 514, irresponsive allegation of fraud.

Wisconsin.— Parish *v.* Gear, 1 Pinn. 261.

United States.— Roach *v.* Summers, 20 Wall. 165, 22 L. ed. 252; Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271; Field *v.* Holland, 6 Cranch 8, 3 L. ed. 136; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246c, Hempst. 251; Wren *v.* Spencer Optical Mfg. Co., 30 Fed. Cas. No. 18,062, 5 Ban. & A. 61.

See 19 Cent. Dig. tit. "Equity," § 697.

Even against a bill charging fraud an answer if responsive is evidence. Wharton *v.* Clements, 3 Del. Ch. 209; Dilly *v.* Barnard, 8 Gill & J. (Md.) 170.

Responsive averments.— Upon a bill to set aside a mortgage as fraudulent, the answers as to the consideration are responsive and therefore evidence. Walthall *v.* Rives, 34 Ala. 91. Where an answer is directly responsive to the charges in a bill, and is precise in its denial of them, and is not discredited by what is found in any other parts of the bill, it is evidence for defendant. Longmire *v.* Herndon, 72 N. C. 629. In a suit to enforce a wife's liability in indorsing her husband's note, the husband being made a formal defendant only, and he and his wife filing separate answers, her answers so far as responsive to the bill and based on facts within her own knowledge may be used as evidence in her favor. Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377.

73. *Alabama.*— Henderson *v.* McVay, 32 Ala. 471; Hogan *v.* Smith, 16 Ala. 600; Paulling *v.* Sturgus, 3 Stew. 95.

Arkansas.— Johnson *v.* Walker, 25 Ark. 196; King *v.* Payan, 18 Ark. 583; Cummins *v.* Harrell, 6 Ark. 308; Clark *v.* Oakley, 4 Ark. 236.

District of Columbia.— Dewey Hotel Co. *v.* U. S. Electric Lighting Co., 17 App. Cas. 356.

Florida.— Ropes *v.* Jenerson, (1903) 34 So. 955; Maxwell *v.* Jacksonville Loan, etc., Co., (1903) 34 So. 255; Pierce *v.* J. M. Brunswick, etc., Co., 23 Fla. 283, 2 So. 366.

Georgia.— Flash *v.* Long, 67 Ga. 767.

Illinois.— Cissna *v.* Walters, 100 Ill. 623; Bressler *v.* McCune, 56 Ill. 475; Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270; James *v.* Bushnell, 28 Ill. 158; Reece *v.* Darby, 5 Ill. 159. And see Phelps *v.* White, 18 Ill. 41.

Iowa.— Cheuvete *v.* Mason, 4 Greene 231; Garretson *v.* Vanloon, 3 Greene 128, 54 Am. Dec. 492.

Maine.— Alford *v.* McNarrin, 44 Me. 90.

Maryland.— Rich *v.* Levy, 16 Md. 74.

Michigan.— Hinchman *v.* Detroit, 9 Mich. 103.

Mississippi.— Fulton *v.* Woodman, 54 Miss. 158; Green *v.* Creighton, 10 Sm. & M. 159, 48 Am. Dec. 742; Russell *v.* Moffitt, 6 How. 303. And see Everett *v.* Winn, Sm. & M. Ch. 67.

Missouri.— Prior *v.* Matthews, 9 Mo. 267; Laberge *v.* Chauvin, 2 Mo. 179.

New Jersey.— Wilkinson *v.* Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Van Dyke *v.* Van Dyke, 26 N. J. Eq. 180; Stearns *v.* Stearns, 23 N. J. Eq. 167; Graham *v.* Berryman, 19 N. J. Eq. 29; New Jersey Cent. R. Co. *v.* Hetfield, 18 N. J. Eq. 323; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635. And see Neldon *v.* Roof, 55 N. J. Eq. 608, 38 Atl. 429; Allen *v.* Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416.

New York.—Murray *v.* Blatchford, 1 Wend. 583, 19 Am. Dec. 537; Becker *v.* Ten Eyck, 6 Paige 68; Wakeman *v.* Grover, 4 Paige 23.

Pennsylvania.— Paul *v.* Carver, 24 Pa. St. 207, 64 Am. Dec. 649; Peacock *v.* Chambers, 3 Grant 398; Bergner, etc., Brewing Co. *v.* Philadelphia Commercial Exch., 12 Wkly. Notes Cas. 460; Cremers' Estate, 7 Wkly. Notes Cas. 544; Sterr's Estate, 7 Wkly. Notes Cas. 35; Russell's Appeal, 1 Walk. 131. And see McCoy *v.* Kane, 19 Pa. Super. Ct. 187; Fidelity Ins., etc., Co.'s Appeal, 3 Walk. 185.

South Carolina.— Dyre *v.* Sturges, 3 Desauss. 553.

Tennessee.— Wilson *v.* Morris, 94 Tenn. 547, 29 S. W. 966; McConnell *v.* Madisonville, 2 Humphr. 53.

Virginia.— Hudson *v.* Barham, 101 Va. 63, 43 S. E. 189, 99 Am. St. Rep. 884; Corbin *v.* Patton, (1896) 26 S. E. 410; Major *v.* Ficklin, 85 Va. 732, 8 S. E. 715; Blanton *v.* Brackett, 5 Call 232; Maupin *v.* Whiting, 1 Call 224; Sneed *v.* Smith, 1 Patt. & H. 46.

Wisconsin.— Coulson *v.* Coulson, 5 Wis. 79; Walton *v.* Cody, 1 Wis. 420.

United States.—Buckingham *v.* McLean, 13 How. 151, 14 L. ed. 91; Childs *v.* N. B. Carlstein Co., 76 Fed. 86; U. S. *v.* Ferguson, 54 Fed. 28; Hough *v.* Richardson, 12 Fed. Cas. No. 6,722, 3 Story 659.

See 19 Cent. Dig. tit. "Equity," § 710.

74. For the amount of evidence necessary to overcome the responsive averments under these circumstances see *infra*, XVII, B, 2, b, (IV).

75. See *supra*, XV, A, 2. When the new matter is mere pleading to found a defense upon it must be proved; but when responsive to the bill, although affirmative in form, if in effect a denial of the charge in the bill, and directly responsive thereto, it is evidence to be taken as true till disproved, not pleading whose truth is to be established by evidence. Stillwell *v.* Badgett, 22 Ark. 164.

not sworn to, it ordinarily performs only the office of a pleading, and has often been said not to be evidence for any purpose.[76] It has, however, been doubted whether such an answer should be shorn of all weight as evidence, but just what its effect and value as evidence in the cause should be has not been definitely established.[77]

(B) *Waiver of Oath by Plaintiff.* It is quite generally provided by statute or rule of court that the complainant may in his bill waive an answer under oath, and that if such an express waiver is made the answer cannot be used by defendant as evidence in his favor even when sworn to.[78] In the absence of such statutes or court rules, it has been held that the complainant cannot by waiving

76. *Alabama.*— Blum *v.* Mitchell, 59 Ala. 535; Taunton *v.* McInnish, 46 Ala. 619.

Illinois.— Goodwin *v.* Bishop, 145 Ill. 421, 34 N. E. 47 [*affirming* 50 Ill. App. 145]; Ransom *v.* Henderson, 114 Ill. 528, 4 N. E. 141; Jones *v.* Neely, 72 Ill. 449; Hopkins *v.* Granger, 52 Ill. 504; Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120.

Iowa.— Smith *v.* Phelps, 32 Iowa 537.

Maryland.— Taggart *v.* Boldin, 10 Md. 104.

Michigan.— Morris *v.* Hoyt, 11 Mich. 9.

New Jersey.— Craft *v.* Schlag, 61 N. J. Eq. 567, 49 Atl. 431; Symmes *v.* Strong, 28 N. J. Eq. 131; Freytag *v.* Hoeland, 23 N. J. Eq. 36, where oath was taken before an unauthorized officer.

United States.— Patterson *v.* Gaines, 6 How. 550, 12 L. ed. 553; U. S. Eq. Rule 41.

See 19 Cent. Dig. tit. "Equity," § 706.

The answer of a corporation, sealed with its seal and signed by its president, has the same force and effect as evidence as the answer of an individual not under oath, and no other or greater. Maryland, etc., Coal, etc., Co. *v.* Wingert, 8 Gill (Md.) 170. And see Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 54; Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

If treated as a valid answer by complainant, an unsworn answer will have the same effect in favor of defendant as if sworn to. Fulton Bank *v.* Beach, 2 Paige (N. Y.) 307.

77. 3 Greenleaf Ev. § 286. It has been held that an unsworn answer does not lose all force as evidence where it is responsive to the bill. It only changes the rule that requires the testimony of two witnesses, or one witness and strong corroborating circumstances, to overcome it. A mere preponderance of evidence will be sufficient for that purpose. Latham *v.* Staples, 46 Ala. 462. It has also been held that the facts alleged in the answer may be regarded by the court in deciding on the merits of the case, although the answer was not sworn to, where the facts regarded were admissions against defendant. Miller *v.* Payne, 4 Ill. App. 112.

78. For decisions construing such local provisions see the following cases:

Alabama.— Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Zelnicker *v.* Brigham, 74 Ala. 598. And see Ladd *v.* Smith, 107 Ala. 506, 18 So. 195.

California.— See Goodwin *v.* Hammond, 13 Cal. 168, 73 Am. Dec. 574.

District of Columbia.— Mankey *v.* Willoughby, 21 App. Cas. 314.

Florida.— Kahn *v.* Weinlander, 39 Fla. 210, 22 So. 653.

Illinois.— Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782; Patterson *v.* Scott, 142 Ill. 138, 31 N. E. 433 [*affirming* 37 Ill. App. 520]; Adlard *v.* Adlard, 65 Ill. 212; Hopkins *v.* Granger, 52 Ill. 504; Wallwork *v.* Derby, 40 Ill. 527; Willenborg *v.* Murphy, 36 Ill. 344. And see Andrews *v.* Knox County, 70 Ill. 65; Moore *v.* Hunter, 6 Ill. 317.

Indiana.— Peter *v.* Wright, 6 Ind. 183; Larsh *v.* Brown, 3 Ind. 234.

Maine.— Peaks *v.* McAvey, (1886) 7 Atl. 270; Clay *v.* Towle, 78 Me. 86, 2 Atl. 852.

Maryland.— Hall *v.* Clagett, 48 Md. 223; Dorn *v.* Bayer, 16 Md. 144; Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231.

Massachusetts.— Gerrish *v.* Towne, 3 Gray 82; Chace *v.* Holmes, 2 Gray 431; Bingham *v.* Yeomans, 10 Cush. 58.

Mississippi.— Morrison *v.* Hardin, 81 Miss. 583, 33 So. 80.

New Hampshire.— Ayer *v.* Messer, 59 N. H. 279.

New Jersey.—Sweet *v.* Parker, 22 N. J. Eq. 453. And see Walker *v.* Hill, 21 N. J. Eq. 191.

New York.— Case *v.* Case, 3 How. Pr. 207; Miller *v.* Avery, 2 Barb. Ch. 582.

United States.—Conley *v.* Nailor, 118 U. S. 127, 6 S. Ct. 1001, 30 L. ed. 112; U. S. *v.* Workingmen's Amalgamated Council, 54 Fed. 994, 26 L. R. A. 158; Treadwell *v.* Lennig, 50 Fed. 872. But see Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523.

See 19 Cent. Dig. tit. "Equity," §§ 702–704.

Effect in requiring proof by plaintiff.— The fact that a bill in chancery dispenses with the oath of defendant to his answer does not relieve complainant from proving such allegations of his bill as are put in issue by the answer. Harris *v.* Reece, 10 Ill. 212. And where in a case heard on bill and answer without testimony complainant had waived the oath of defendant to the answer, but all the allegations of the bill which supported the equity of complainant's case were directly and fully contradicted by the denials of the answer made upon the personal knowledge of defendant, it was held, there being no evidence sufficient to support the bill, that the denials in the answer must prevail. Latham *v.* Staples, 46 Ala. 462.

Waiver in amended bill.— The effect of an answer under oath to an original bill calling

an answer under oath deprive defendant of his right to answer under oath and to have the advantage of such answer as evidence in his favor.[79]

(c) *Answer on Information and Belief, Etc.* Answers on information and belief are of little or no weight as evidence and generally do no more than make an issue between the parties.[80] The same thing holds true when defendant refers to facts which are not within his own knowledge,[81] or when the answer refers

for an answer under oath cannot be avoided by the filing of an amended bill waiving the oath, and an answer to the same not under oath. The answer under oath to the original bill will still be evidence on the hearing of the cause. Stevenson *v.* Mathers, 67 Ill. 123; Wylder *v.* Crane, 53 Ill. 490; Walker *v.* Campbell, 5 Lea (Tenn.) 354; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289. And it has been held that where complainant, having ascertained what defendant's answer would be, filed a waiver of discovery, and also an amendment to his bill, the waiver did not hold good as to the answer, either to the original bill or to the amendment, the court saying that when complainant gets information from respondent, without waiver, as a part of his case, he must take all on the same terms; having received a part he can waive none. Stanford *v.* Murphy, 63 Ga. 410.

Admissions in answer.— But a defendant, in a bill for discovery and relief, whose oath has been waived, is not thereby excused from answering, and the only effect of dispensing with the oath is to deprive him of the benefit of his own declarations. Admissions contained in such answers are evidence against him. Cummins *v.* Jerman. 6 Del. Ch. 122, 33 Atl. 622; Hyer *v.* Little, 20 N. J. Eq. 443; Bartlett *v.* Gale, 4 Paige (N. Y.) 503; Uhlmann *v.* Arnholt, etc., Brewing Co., 41 Fed. 369.

Where several persons are made defendants who have no joint and common interest, so that the answer of one will not be evidence for or against the other, complainant may waive an answer on oath as to one of them, and may call for a sworn answer and a discovery from the other. Morse *v.* Hovey, 1 Barb. Ch. (N. Y.) 404.

Relief resting merely on the necessity of discovery cannot be set up where answer under oath is waived. Torret *v.* Rodgers, 39 Mich. 85.

Where an amended bill requires sworn answer, the original bill waiving answer on oath, and the only answer filed is that to the amended bill, and the cause is heard on the bill and answer, the answer is only to be taken as true so far as it is responsive to the amended bill. Taunton *v.* McInnish, 46 Ala. 619.

Unsworn answer received by consent of plaintiff will be allowed full effect as to co-defendants. Contee *v.* Dawson, 2 Bland (Md.) 264. But see Ayres *v.* Campbell, 9 Iowa 213, 74 Am. Dec. 346.

79. Vanderzer *v.* McMillan, 28 Ga. 339; Armstrong *v.* Scott, 3 Greene (Iowa) 433; Jones *v.* Abraham, 75 Va. 466 [but for exceptional case see Va. Code (1873), c. 137, § 12]. And see Story Eq. Pl. § 875*a*.

80. *District of Columbia.*— Miller *v.* District of Columbia, 5 Mackey 291.

Georgia.— Arline *v.* Miller, 22 Ga. 330 [except perhaps where the facts answered by defendant against his interest are from information and he states additionally that he believes them to be true].

Illinois.— Deimel *v.* Brown, 136 Ill. 586, 27 N. E. 44.

Massachusetts.—Copeland *v.* Crane, 9 Pick. 73.

Mississippi.— McGuffie *v.* Planters' Bank, Freem. 383.

New Jersey.— New Brunswick Poor Children's Relief Corp. *v.* Eden, 62 N. J. Eq. 542, 50 Atl. 606; Clawson *v.* Riley, 34 N. J. Eq. 348; Stevens *v.* Post, 12 N. J. Eq. 408.

Pennsylvania.— Gantt *v.* Cox, etc., Co., 199 Pa. St. 208, 48 Atl. 992; Bougher *v.* Conn, 17 Phila. 81.

Rhode Island.— Atlantic F. & M. Ins. Co. *v.* Wilson, 5 R. I. 479.

Tennessee.—McKissick *v.* Martin, 12 Heisk. 311; Wilkins *v.* May, 3 Head 173.

Vermont.— Wooley *v.* Chamberlain, 24 Vt. 270.

United States.— Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76; Allen *v.* O'Donald, 28 Fed. 17; Holladay's Case, 27 Fed. 830.

See 19 Cent. Dig. tit. "Equity," § 688.

On agent's information.— But a party called upon to answer a bill may adopt the information of his agent and make the agent's statements his own, and such an answer will be entitled to the same effect as one made upon his personal knowledge. Radcliff *v.* Bartholomew, 38 N. C. 556.

Where answer on information and belief raises an issue, and complainant introduces no proof in support of his bill, the bill should be dismissed. Dunham *v.* Gates, Hoffm. (N. Y.) 185.

81. Barclay *v.* Dawson, 26 Ark. 417; Bond *v.* Watson, 22 Ga. 637; Fletcher *v.* Faust, 22 Ga. 559; Lawrence *v.* Lawrence, 21 N. J. Eq. 317; Dutilh *v.* Coursault, 8 Fed. Cas. No. 4,206, 5 Cranch C. C. 349.

An answer professing ignorance of the transaction stated in the bill is not evidence against complainant. Its only legal effect is to compel him to establish his case by testimony. Drury *v.* Conner, 6 Harr. & J. (Md.) 288. A denial in the answer, when responsive to an allegation in the bill, of a matter not alleged to be within the peculiar knowledge of defendant, will be treated as merely putting the allegation in issue. Biscoe *v.* Coulter, 18 Ark. 423.

to facts the truth or falsehood of which defendant could not from his situation have known.[82]

(D) *Inconsistency Between Denials and Defenses in Answer.* Inconsistency between the denial made by the answer and facts which it also sets up as a defense will seriously weaken and may utterly destroy its effect as evidence.[83] This rule does not, however, ordinarily obtain where the practice is regulated by a code or practice act.[84]

(E) *Evasiveness.* The answer, to be evidence for defendant, must be direct and positive, or so expressed as to amount to a direct and positive denial or affirmation of the facts alleged and charged or denied in the bill, in order to have weight as evidence in his favor, in regard to those facts. Any evasiveness weakens the answer and may entirely deprive it of effect as evidence.[85] But a literal denial in the answer to a bill, although evasive and bad on exception, still cannot be taken as an admission of the bill.[86]

(F) *Under Codes or Practice Acts.* Many modifications of this chancery rule are of course found in those states where the practice is regulated to a greater or less extent by codes or practice acts.[87]

82. Biscoe *v.* Coulter, 18 Ark. 423; Lattomus *v.* Garman, 3 Del. Ch. 232.

Where an administrator is called upon to answer certain matters which appear to have rested exclusively within the knowledge of his intestate, it is sufficient that he swears as he is informed and believes; but his answer must be taken with reference to the reasons given for his belief, as well as to the nature of the subject of which he speaks. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270.

83. Wheat *v.* Moss, 16 Ark. 243; Barraque *v.* Siter, 9 Ark. 545; Hoboken Sav. Bank *v.* Beckman, 33 N. J. Eq. 53; Yost *v.* Hudiburg, 2 Lea (Tenn.) 627.

84. Under the code, where defendant pleads a general denial and a further defense by way of confession and avoidance, the admissions of the latter cannot be used by plaintiff to establish the issues raised by the general denial. Stanley *v.* Schoolbred, 25 S. C. 181 [*followed* in Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516].

85. Stouffer *v.* Machen, 16 Ill. 553; Sallee *v.* Duncan, 7 T. B. Mon. (Ky.) 382; Dinsmoor *v.* Hazelton, 22 N. H. 535; Wilkins *v.* Woodfin, 5 Munf. (Va.) 183. See also cases as to evasive answers *infra*, XVII, B, 2, b, (III). A sworn answer which is grossly evasive cannot have the force as evidence of one that shows apparent good faith. Fairbairn *v.* Middlemiss, 47 Mich. 372, 11 N. W. 203. It is very significant where the answer under oath evades the controlling fact in issue. Baker *v.* Baker, 13 Cal. 87.

Examples of evasiveness.— Where a bill alleged that certain letters exhibited were received from defendant, and he states in his answer that he did not write them, but does not deny that he sent them, they are to be considered as genuine. Russell *v.* Russell, 4 Dana (Ky.) 40. Although an answer is responsive to the allegations of the bill, on the point of defendant being a good-faith purchaser for value, it is not evidence for defendant when he merely states that he purchased for a specified sum, without saying that the sum was paid. Ellis *v.* Woods, 9 Rich. Eq. (S. C.) 19.

86. Russey *v.* Walker, 32 Ala. 532. See also *supra*, VIII, E, 4, b.

87. Alabama.— The answer in equity cannot be used as evidence by defendant, unless at the hearing he designates it as part of the testimony on which he relies, the 77th rule of chancery practice (Code (1876), p. 172), providing that "any testimony not offered in this way, and noted by the register on the minutes" is no part of the record, and must not be considered by the chancellor. Goodloe *v.* Dean, 81 Ala. 479, 8 So. 197. Where an answer to a bill for removal of a cloud on title, and subrogation to rights of a mortgagee, admitting a fact, is not mentioned in the note of testimony, nor even in the order of submission, it is no evidence of such fact. Tait *v.* American Freehold Land Mortg. Co., 132 Ala. 193, 31 So. 623.

California.— The answer is not evidence for defendant. Bostic *v.* Love, 16 Cal. 69.

Georgia.— A statement in a bill that the complainant is able to prove the allegations in his bill is not such a special disclaimer of discovery, under Rev. Code, § 4136, as will prevent the answer of defendant under oath from being evidence in his favor. Woodward *v.* Gates, 38 Ga. 205.

Iowa.— A set-off is not a pleading, within the meaning of the Code, section 1745, and, although sworn to, is not evidence equal to that of a disinterested witness. Thrift *v.* Redman, 13 Iowa 25.

Maryland.— Code (1888), art. 16, § 146, provides that defendant need not make oath to his answer, unless required by complainant, and that no answer, even though sworn to, shall be evidence against complainant, unless read by him at the hearing. Section 147 provides that if complainant shall not require an answer under oath, or shall require an answer only as to specified interrogatories, the answer, although under oath, except such parts as shall be directly responsive to such interrogatories, shall not be evidence for de-

(G) *Other Limitations and Exceptions.* The answer in order to be considered as evidence must be an answer to a fact averred in the bill and not an answer to a mere inference of law,[88] nor to a statement in the bill of defendant's pretensions.[89] Voluntary answers[90] and formal answers[91] are not evidence. A special force is given to an answer as evidence on an application to dissolve an injunction.[92] What the answer asserts is true is not evidence for defendant, if discovery be waived, but must be proved *aliunde*.[93] An answer is not evidence of inadmissible facts, as of a verbal agreement controlling a writing.[94] The general equitable principles of estoppel sometimes prevent a defendant from using certain facts which he has set up in his answer as evidence in his favor.[95] If an answer in equity is allowed to be withdrawn, and another answer filed, because the first one was filed by defendant's solicitor without the concurrence of his client, such answer cannot be read in evidence against defendant.[96]

(III) *RESPONSIVENESS.* The test of the application of the general rule that an answer is available as evidence of facts when responsive to the bill has been said to be whether the questions answered would be proper to a witness in a trial at law — whether they would be relevant, such as the witness would be bound to answer, and the answers be competent testimony.[97] Again it has been said that if the whole subject-matter of the statement or allegation in the answer might have been left out, then the allegations in the answer upon that subject are not responsive to the bill; but, if the omission of some statement upon that subject would furnish just ground of exception to the answer, then the answer, to the extent to which it is required, and whatever its character, whether affirmative or negative,

fendant, unless the cause is heard on bill and answer only. It was held that where an answer under oath is required, it will be evidence against complainant only if read by him at the hearing, and where not so required it will if under oath be evidence for defendant when the cause is heard on bill and answer alone, but whether or not the answer be evidence it will always when denying the allegations of the bill force complainant to prove those allegations. Davis *v.* Crockett, 88 Md. 249, 41 Atl. 66. Acts (1852), c. 133, or Acts (1853), c. 344, relating to the effect of answers as evidence, do not apply to an answer, at the hearing of a motion for the dissolution of an injunction, when such a hearing is not the final one. Bouldin *v.* Baltimore, 15 Md. 18. See also Gelston *v.* Rullman, 15 Md. 260.

Vermont.— Gen. St. c. 36, § 24, providing that parties shall not testify in their own behalf in certain cases, does not apply to an answer to a bill or petition in chancery, but the answer when responsive is evidence, notwithstanding the statute. Blaisdell *v.* Bowers, 40 Vt. 126.

West Virginia.— Under Code (1899), c. 125, §§ 38, 59, providing that if the bill be verified defendant must verify his answer and that when he in his answer denies any material allegation of the bill the effect of such denial shall only be to put plaintiff on proof, an answer to a bill is not evidence for defendant, whether it be sworn to or not. Knight *v.* Nease, 53 W. Va. 50, 44 S. E. 414. See also Nichols *v.* Nichols, 8 W. Va. 174.

Wisconsin.— A verified answer, under the code of procedure, is not evidence. Staak *v.* Sigelkow, 12 Wis. 234.

88. Gainer *v.* Russ, 20 Fla. 157; Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590.

89. Leas *v.* Eidson, 9 Gratt. (Va.) 277.

90. Kibby *v.* Kibby, Wright (Ohio) 607.

91. Reynolds *v.* Pharr, 9 Ala. 560.

92. See, generally, INJUNCTIONS.

93. Imboden *v.* Etowah, etc., Hydraulic Hose Min. Co., 70 Ga. 86; Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1.

94. Stevens *v.* Post, 12 N. J. Eq. 408. And see Jones *v.* Slubey, 5 Harr. & J. (Md.) 372. The answer, when responsive to the bill, although uncontradicted, cannot be taken to establish anything in bar of the relief prayed, which parol testimony would not be admitted to prove, for it is as evidence only that it is received. Winn *v.* Albert, 2 Md. Ch. 169.

95. Where defendant in a bill of foreclosure is the original mortgagor, his answer is never regarded as evidence to impeach the consideration of the mortgage securities. Wooley *v.* Chamberlain, 24 Vt. 270. When a testator or intestate has died in the possession of personal property, and that fact is alleged after the usual form in a bill for partition or account against the executor or administrator, the answer of the latter cannot be received as evidence in support of a title adverse to that of the testator or intestate. The executor or administrator asserting such claim must proceed to support it by the same evidence as if he were the actor in the proceedings. Reeves *v.* Tucker, 5 Rich. Eq. (S. C.) 150.

96. Hurst *v.* Jones, 10 Lea (Tenn.) 8.

97. Dunham *v.* Gates, Hoffm. (N. Y.) 185.

is but a response to the requisition of plaintiff.[98] If the answer springs out of the allegations in the bill, and its statements stand connected in substance with the subject-matter of the allegations, although they are not literally and directly responsive, it is evidence for defendant for so much as it is worth.[99] Where the answer is confined to such facts as are necessarily required by the bill and those inseparably connected with them, forming a part of one and the same transaction, the answer is responsive to the bill, as well when it discharges as when it charges defendant.[1] So it is well settled that an answer in stating the particulars of a transaction charged and inquired into by the bill is responsive.[2] Likewise so much of the answer as is necessarily connected with the responsive matter as being explanatory of it is deemed responsive.[3] An answer is responsive not only where it denies a material allegation of the bill, but also where a material disclosure is called for by the bill and made by the answer.[4] An answer is responsive to the bill only so far as it answers to a material statement or charge in the bill, as to which a disclosure is sought, and which is the subject of parol proof.[5] An evasive answer will not be considered responsive so as to be evidence in defendant's favor.[6] The rule which makes responsive answers proof for defendant applies only to fair answers, and not to those which upon their face are incredible.[7] Nevertheless the inherent improbability of allegations in an answer is insufficient in itself to overcome its responsive character.[8] The effect of an answer responsive to the bill does not depend upon defendant's competency as a witness.[9] An answer may sometimes be evidence of a fact not stated in the bill, as when the bill sets forth part of complainant's case only instead of the whole, and the part omitted and stated in the answer shows a different case from that made by the bill, and is not by avoidance merely.[10] What is responsive to a bill is to be determined by the bill, not by the interrogatories. The interrogatories can neither limit nor extend defendant's obligation to answer.[11] The application of the foregoing rules is illustrated by many cases depending each upon the particular averments of bill and answer, but presenting no general principles permitting of classification.[12]

98. Bellows *v.* Stone, 18 N. H. 465. And see Rich *v.* Austin, 40 Vt. 416; Allen *v.* Mower, 17 Vt. 61.

99. Laughlin *v.* Greene, 13 Ga. 359.

1. Maxwell *v.* Jacksonville Loan, etc., Co., (Fla. 1903) 34 So. 255.

2. Merritt *v.* Brown, 19 N. J. Eq. 286; Youle *v.* Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722; McCoy *v.* Kane, 19 Pa. Super. Ct. 187.

3. Shiels *v.* Stark, 14 Ga. 429; Lee *v.* Baldwin, 10 Ga. 208; Seybert *v.* Robinson, 2 Pa. Dist. 403, 13 Pa. Co. Ct. 198.

4. Bell *v.* Moon, 79 Va. 341; Fant *v.* Miller, 17 Gratt. (Va.) 187.

5. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270. And see Schwarz *v.* Wendell, Walk. (Mich.) 267.

6. Deimel *v.* Brown, 136 Ill. 586, 27 N. E. 44 [*affirming* 35 Ill. App. 303]; Crutcher *v.* Trabue, 5 Dana (Ky.) 80; Russell *v.* Russell, 4 Dana (Ky.) 40; Newlove *v.* Callaghan, 86 Mich. 301, 49 N. W. 214, 86 Mich. 297, 48 N. W. 1096, 24 Am. St. Rep. 123; Fairbairn *v.* Middlemiss, 47 Mich. 372, 11 N. W. 203; Applewhite *v.* Foxworth, 79 Miss. 773, 31 So. 533. And see Longmire *v.* Goode, 38 Ala. 577.

7. Stevens *v.* Post, 12 N. J. Eq. 408.

8. Hartley's Appeal, 103 Pa. St. 23. An answer responsive to a bill, although improbable, if not clearly false, is conclusive evidence for defendant in the absence of rebutting proof. Jackson *v.* Hart, 11 Wend. (N. Y.) 343.

9. Saffold *v.* Horne, 71 Miss. 762, 15 So. 639.

10. Schwarz *v.* Wendell, Walk. (Mich.) 267. And see Grey *v.* Bowman, (N. J. Ch. 1888) 13 Atl. 226.

11. McDonald *v.* McDonald, 16 Vt. 630. See also *supra*, VII, B, 6, 8.

12. For particular averments held responsive to allegations in bills see the following cases:

Alabama.— Powell *v.* Powell, 7 Ala. 582.

Arkansas.— Tenny *v.* Porter, 61 Ark. 329, 33 S. W. 211; Morrison *v.* Peay, 21 Ark. 110; Wheat *v.* Moss, 16 Ark. 243.

Georgia.— Everett *v.* Towns, 17 Ga. 15; Smith *v.* Atwood, 14 Ga. 402.

Illinois.— Boudinot *v.* Winter, 190 Ill. 394, 60 N. E. 553 [*affirming* 91 Ill. App. 106]; Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298.

Maryland.— Cowman *v.* Hall, 3 Gill & J. 398.

Massachusetts.— Armstrong *v.* Crocker, 10 Gray 269.

Michigan.— Hubbell *v.* Grant, 39 Mich. 641; Robinson *v.* Cromelein, 15 Mich. 316.

Mississippi.— Berryman *v.* Sullivan, 13 Sm. & M. 65; Oakey *v.* Rabb, Freem. 546.

(IV) *Amount of Evidence Required to Overcome Answer* — (A) *Various Statements of the Rule.* To the extent that the sworn answer of defendant is evidence in his own favor as hereinbefore stated,[13] it is obviously equal to the evidence of one witness,[14] and as plaintiff in equity always has the burden of proving that he is entitled to the relief prayed for in his bill,[15] he cannot overcome the answer of defendant so far as it is evidence and gain the relief sought by producing simply the evidence of one witness or evidence equal to that of one witness. It is accordingly well settled that the uncorroborated testimony of one witness will not overcome a responsive answer.[16] Just what amount of evidence is required has been variously stated. The most common and generally accepted

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108; Howell *v.* Robb, 7 N. J. Eq. 17; Cammack *v.* Johnson, 2 N. J. Eq. 163. And see Quackenbush *v.* Van Riper, 1 N. J. Eq. 476.

New York.— Cushman *v.* Shepard, 4 Barb. 113; Dunham *v.* Jackson, 6 Wend. 22; Woodcock *v.* Bennet, 1 Cow. 711, 13 Am. Dec. 568; Beach *v.* Bradley, 8 Paige 146.

Pennsylvania.— Hand *v.* Weidner, 151 Pa. St. 362, 25 Atl. 38; Bell *v.* Farmers' Deposit Nat. Bank, 131 Pa. St. 318, 18 Atl. 1079; Rowley's Appeal, 115 Pa. St. 150, 9 Atl. 329; Eaton's Appeal, 66 Pa. St. 483.

South Carolina.— Zimmerman *v.* Amaker, 10 S. C. 98; Belcher *v.* McKelvey, 11 Rich. Eq. 9.

Tennessee.— Hopkins *v.* Spurlock, 2 Heisk. 152.

Vermont.— Mann *v.* Betterly, 21 Vt. 326; Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697; Pierson *v.* Clayes, 15 Vt. 93.

United States.— Prentiss Tool, etc., Co. *v.* Godchaux, 66 Fed. 234, 13 C. C. A. 420; Reid *v.* McCallister, 49 Fed. 16; Comstock *v.* Herron, 45 Fed. 660.

See 19 Cent. Dig. tit. "Equity," §§ 698–700.

For particular averments held irresponsive to allegations in bills see the following cases:

Alabama.— Goodloe *v.* Dean, 81 Ala. 479, 8 So. 197; Buchanan *v.* Buchanan, 72 Ala. 55; Green *v.* Casey, 70 Ala. 417; Walker *v.* Palmer, 24 Ala. 358; Hanson *v.* Patterson, 17 Ala. 738; Walker *v.* Miller, 11 Ala. 1067; Powell *v.* Powell, 10 Ala. 900; Dunn *v.* Dunn, 8 Ala. 784; Manning *v.* Manning, 8 Ala. 138; Cummings *v.* McCullough, 5 Ala. 324.

Arkansas.— Pelham *v.* Moreland, 11 Ark. 442.

Illinois.— Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Mahoney *v.* Mahoney, 65 Ill. 406.

Iowa.— Forest *v.* McIntosh, 4 Iowa 596.

Maryland.— McNeal *v.* Glenn, 4 Md. 87.

Michigan.— Millerd *v.* Ramsdell, Harr. 373.

Mississippi.— Applewhite *v.* Foxworth, 79 Miss. 773, 31 So. 533; Dease *v.* Moody, 31 Miss. 617.

New Jersey.— Hutchinson *v.* Tindall, 3 N. J. Eq. 357.

New York.— Green *v.* Hart, 1 Johns. 580.

Rhode Island.— Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500.

Tennessee.— Davis *v.* Clayton, 5 Humphr. 446.

Vermont.— Spaulding *v.* Holmes, 25 Vt. 491.

Virginia.— Vathir *v.* Zane, 6 Gratt. 246.

Wisconsin.— Remington *v.* Willard, 15 Wis. 583.

United States.— Sargent *v.* Larned, 21 Fed. Cas. No. 12,364, 2 Curt. 340.

See 19 Cent. Dig. tit. "Equity," §§ 698–700.

13. See *supra*, XVII, B, 2, b, (I).

14. See Culbertson *v.* Luckey, 13 Iowa 12.

15. See *supra*, XV, A, 1, 2.

16. *Alabama.*— Marshall *v.* Howell, 46 Ala. 318; Camp *v.* Simon, 34 Ala. 126; Beene *v.* Randall, 23 Ala. 514; Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122; McMekin *v.* Bobo, 12 Ala. 268.

District of Columbia.— Wheeler *v.* Ryon, 1 App. Cas. 142.

Florida.— Carr *v.* Thomas, 18 Fla. 736.

Illinois.— Dunlap *v.* Wilson, 32 Ill. 517; Barton *v.* Moss, 32 Ill. 50; Stouffer *v.* Machen, 16 Ill. 553; Swift *v.* Township School Trustees, 14 Ill. 493.

Indiana.— Calkins *v.* Evans, 5 Ind. 441.

Kentucky.— Patrick *v.* Langston, 5 J. J. Marsh. 653; McCrum *v.* Preston, 5 J. J. Marsh. 332; Hudson *v.* Cheatham, 5 J. J. Marsh. 50; Young *v.* Hopkins, 6 T. B. Mon. 18; Patterson *v.* Hobbs, 1 Litt. 275; Sullivan *v.* Bates, 1 Litt. 41; Hardwick *v.* Forbes, 1 Bibb 212; Littell *v.* McIver, 1 Bibb 203.

Mississippi.— Johnson *v.* Crippen, 62 Miss. 597.

New Hampshire.— Lawton *v.* Kittredge, 30 N. H. 500.

New Jersey.— Abbott *v.* Case, 26 N. J. Eq. 187; Calkins *v.* Landis, 21 N. J. Eq. 133; Zane *v.* Cawley, 21 N. J. Eq. 130; Bent *v.* Smith, 20 N. J. Eq. 199; De Hart *v.* Baird, 19 N. J. Eq. 423. And see Commercial Bank *v.* Reckless, 5 N. J. Eq. 430.

New York.— Stafford *v.* Bryan, 3 Wend. 532; Swift *v.* Dean, 6 Johns. 523; Mason *v.* Roosevelt, 5 Johns. Ch. 534.

North Carolina.— Averitt *v.* Foy, 37 N. C. 224; Alley *v.* Ledbetter, 16 N. C. 449; Bruce *v.* Child, 11 N. C. 372.

Ohio.— Nevitt *v.* McAroy, Wright 289; Washburn *v.* Holmes, Wright 67.

Pennsylvania.— Nulton's Appeal, 103 Pa. St. 286; Baugher *v.* Conn, 1 Pa. Co. Ct. 184; Barclay's Appeal, 3 Walk. 230; Audenreid *v.* Walker, 11 Phila. 183.

South Carolina.— Counts *v.* Clarke, 3 Rich.

statement of the rule is that the testimony of two witnesses [17] or of one witness with corroborating circumstances [18] is sufficient to overcome the answer.[19] As

Eq. 418; Clark *v.* Bailey, 2 Strobh. Eq. 143; Johnson *v.* Slawson, Bailey Eq. 463; Neilson *v.* Dickenson, 1 Desauss. 133.

Tennessee.—Copeland *v.* Murphey, 2 Coldw. 64; Baker *v.* Barfield, 4 Humphr. 514; Raines *v.* Jones, 4 Humphr. 490; Tansel *v.* Pepin, 5 Yerg. 452.

Virginia.— Heffner *v.* Miller, 2 Munf. 43; Beatty *v.* Smith, 2 Hen. & M. 395; Hoomes *v.* Smock, 1 Wash. 389.

United States.— Tobey *v.* Leonards, 2 Wall. 423, 17 L. ed. 842. Hughes *v.* Blake, 6 Wheat. 453, 5 L. ed. 303 [*affirming* 12 Fed. Cas. No. 6,845, 1 Mason 515]; Walcott *v.* Watson, 53 Fed. 429; Andrews *v.* Hyde, 1 Fed. Cas. No. 377, 3 Cliff. 516; Delano *v.* Winsor, 7 Fed. Cas. No. 3,754, 1 Cliff. 501; Gould *v.* Gould, 10 Fed. Cas. No. 5,637, 3 Story 516; Hough *v.* Richardson, 12 Fed. Cas. No. 6,722, 3 Story 659; Morgan *v.* Tipton, 17 Fed. Cas. No. 9,809, 3 McLean 339; Parker *v.* Phetteplace, 18 Fed. Cas. No. 10,746, 2 Cliff. 70 [*affirmed* in 1 Wall. 684, 17 L. ed. 675]; Smith *v.* Shane, 22 Fed. Cas. No. 13,105, 1 McLean 22; Towne *v.* Smith, 24 Fed. Cas. No. 14,115, 1 Woodb. & M. 115.

See 19 Cent. Dig. tit. "Equity," §§ 715, 716.

Irresponsive averments.—The rule of equity practice that when a defendant's answer under oath expressly negatives the allegations of the bill and the testimony of one person only affirms them the court will not decree in favor of the complainant does not extend to so much of the answer as is not directly responsive to the bill. Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179.

When single witness sufficient.— The rule that one witness is not sufficient to overcome a responsive answer under oath is not applicable where defendant offers himself as a witness. Morris *v.* White, 36 N. J. Eq. 324. And upon an issue of fact formed on a bill and answer in equity being sent to a jury and the answer being read as evidence, it was held that the jury might find for plaintiff on the testimony of a single disinterested witness, if in their opinion such testimony was entitled to greater weight and credibility than the answer. Kinsey *v.* Grimes, 7 Blackf. (Ind.) 290. And an averment in a bill neither admitted nor denied by the answer of course can be proved by a single witness. Trenchard *v.* Warner, 18 Ill. 142.

17. Circumstantial evidence.—The two witnesses need not be living witnesses who were present and cognizant of the fact in controversy; circumstantial evidence, if of equal weight and credibility, takes the place of the testimony of one or both of such witnesses. Field *v.* Wilbur, 49 Vt. 157.

Two witnesses will overcome a sworn answer. Morrison *v.* Stewart, 24 Ill. 24. And see Goggins *v.* Risley, 13 Pa. Super. Ct. 316.

An answer positively denying a charge in the bill ought not to be overcome by evidence **less positive**, although coming from two witnesses. Auditor *v.* Johnson, 1 Hen. & M. (Va.) 536. And see Brittin *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497; Taintor *v.* Keys, 43 Ill. 332. But *compare* Farley *v.* Bryant, 32 Me. 474.

The oaths of two complainants in the same cause, made competent witnesses for themselves, are not legally entitled to be considered as destroying the effect of the answer, unless they seem to the court to be entitled to the weight of the oaths of two credible witnesses; and in considering their weight the interest of these witnesses must be taken into consideration. Vandergrift *v.* Herbert, 18 N. J. Eq. 466.

Testimony to two distinct conversations given by two witnesses will not be sufficient to disprove the answer. Love *v.* Braxton, 5 Call (Va.) 537.

Two witnesses need not be to the same specific fact. If they prove a repetition of the fact at different times it is sufficient. Bogart *v.* McClung, 11 Heisk. (Tenn.) 105, 27 Am. Rep. 737.

18. Documentary corroboration.— The corroborating circumstances may be by schedule and other documentary proof. Kilbourn *v.* Latta, 5 Mackey (D. C.) 304, 60 Am. Rep. 373.

Strength of circumstances.— Although the rule is often stated that the corroborating circumstances must be strong, where the court charged that the sworn answer could be overcome by one witness only where there were strong corroborating circumstances, it was held that the word "strong" should have been omitted, as it is enough if the circumstances give a clear preponderance against the answer. Durham *v.* Taylor, 29 Ga. 166. Where the testimony of one witness and corroborating circumstances are relied on to disprove an answer, it seems that the circumstances must be such that standing alone a reasonable conclusion as to the truth of the fact might be deduced from them. Maddox *v.* Sullivan, 2 Rich. Eq. (S. C.) 4, 44 Am. Dec. 234. For circumstances held insufficient see Gelston *v.* Rullman, 15 Md. 260; Baugher's Appeal, (Pa. 1887) 8 Atl. 838; Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93. In Maryland the phrase "pregnant circumstances" is often used instead of the customary phrase "corroborating circumstances." West *v.* Flannagan, 4 Md. 36; Ing *v.* Brown, 3 Md. Ch. 521; Thompson *v.* Diffenderfer, 1 Md. Ch. 489. See also Hill *v.* Bush, 19 Ark. 522, for an illustration of the use of the phrase "pregnant circumstances."

Corroboration by wife.— Under the law of Pennsylvania, the testimony of a wife, supporting that of her husband, to a fact denied in the answer, is entitled at least to the weight of a corroborating circumstance, which is sufficient to satisfy the equitable requirement. Sharp *v.* Behr, 117 Fed. 864.

19. This is the general form in which the rule is most frequently stated.

Alabama.—Marshall *v.* Croom, 52 Ala. 554;

the rule is stated in some decisions, if there is but one witness, the corroborating circumstances must be equivalent to the testimony of a second witness to over-

Easterwood *v.* Linton, 36 Ala. 175; Bryan *v.* Bryan, 34 Ala. 516; May *v.* Barnard, 20 Ala. 200; Smith *v.* Rogers, 1 Stew. & P. 317; Paulling *v.* Sturgus, 3 Stew. 95.

Arkansas.— Marshall *v.* Green, 24 Ark. 410; Brittin *v.* Crabtree, 20 Ark. 309; Shields *v.* Trammel, 19 Ark. 51; Byrd *v.* Belding, 18 Ark. 118; Dunn *v.* Graham, 17 Ark. 60; Dyer *v.* Bean, 15 Ark. 519; Jordan *v.* Fenno, 13 Ark. 593; Menifee *v.* Menifee, 8 Ark. 9; Turner *v.* Miller, 6 Ark. 463; Cummins *v.* Harrell, 6 Ark. 308.

Delaware.— Brooks *v.* Silver, 5 Del. Ch. 7; Pickering *v.* Day, 2 Del. Ch. 333.

District of Columbia.— McCartney *v.* Fletcher, 10 App. Cas. 572; Rick *v.* Neitzy, 1 Mackey 21; Burr *v.* Meyers, 2 MacArthur 524.

Florida.— Pinney *v.* Pinney, (1903) 35 So. 95; Day *v.* Jones, 40 Fla. 443, 25 So. 275; White *v.* Walker, 5 Fla. 478.

Georgia.— Low *v.* Argrove, 30 Ga. 129; Williams *v.* Philpot, 19 Ga. 567; Galt *v.* Jackson, 9 Ga. 151; Eastman *v.* McAlpin, 1 Ga. 157.

Indiana.— Achey *v.* Stephens, 8 Ind. 411; Pierce *v.* Gates, 7 Blackf. 162; McCormick *v.* Malin, 5 Blackf. 509; Coles *v.* Raymond, 5 Blackf. 435; Green *v.* Vardiman, 2 Blackf. 324.

Kentucky.— Bibb *v.* Smith, 1 Dana 580; Mason *v.* Peck, 7 J. J. Marsh. 300; Lee *v.* Vaughan, 1 Bibb 235; Myers *v.* Baker, Hard. 544; Bright *v.* Haggin, Hard. 536.

Louisiana.— Hynson *v.* Texada, 19 La. Ann. 470.

Maine.— Appleton *v.* Horton, 25 Me. 23; Bradley *v.* Chase, 22 Me. 511; Gould *v.* Williamson, 21 Me. 273.

Maryland.— Rider *v.* Reily, 22 Md. 540; Brooks *v.* Thomas, 8 Md. 367; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Glenn *v.* Grover, 3 Md. 212; Beatty *v.* Davis, 9 Gill 211; Roberts *v.* Salisbury, 3 Gill & J. 425; Hagthorp *v.* Hook, 1 Gill & J. 270; Hopkins *v.* Stump, 2 Harr. & J. 301.

Michigan.— Fields *v.* Colby, 102 Mich. 449, 60 N. W. 1048.

Missouri.— Johnson *v.* McGruder, 15 Mo. 365; Hewes *v.* Musick, 13 Mo. 395; Bartlett *v.* Glascock, 4 Mo. 62. And see French *v.* Campbell, 13 Mo. 485.

New Hampshire.— Johnson *v.* Richardson, 38 N. H. 353; Busby *v.* Littlefield, 33 N. H. 76; Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Warren *v.* Swett, 31 N. H. 332; Hollister *v.* Barkley, 11 N. H. 501; Page *v.* Page, 8 N. H. 187.

New Jersey.— Wilson *v.* Cobb, 28 N. J. Eq. 177; Bent *v.* Smith, 22 N. J. Eq. 560; Brown *v.* Bulkley, 14 N. J. Eq. 294; Chance *v.* Teeple, 4 N. J. Eq. 173.

New York.— Stafford *v.* Bryan, 1 Paige 239; Smith *v.* Brush, 1 Johns. Ch. 459.

North Carolina.— Lewis *v.* Owen, 36 N. C. 290; Speight *v.* Speight, 22 N. C. 280; Armsworthy *v.* Cheshire, 17 N. C. 456; Alley *v.* Ledbetter, 16 N. C. 449; Martin *v.* Browning, 9 N. C. 644; Cartwright *v.* Godfrey, 5 N. C. 422.

Pennsylvania.— McGary *v.* McDermott, 207 Pa. St. 620, 57 Atl. 46; Delaney *v.* Thompson, 187 Pa. St. 343, 40 Atl. 1023; Huston *v.* Harrison, 168 Pa. St. 136, 31 Atl. 987; Gleghorne's Appeal, 118 Pa. St. 383, 11 Atl. 797; Burke's Appeal, 99 Pa. St. 350; Campbell *v.* Patterson, 95 Pa. St. 447; Pusey *v.* Wright, 31 Pa. St. 387; Horton's Appeal, 13 Pa. St. 67; Hodges *v.* Laurel Run Lodge No. 344 K. of P., 2 Kulp 372; Kennedy *v.* Wentz, 1 Kulp 428; Lance *v.* Lehigh, etc., Coal Co., 16 Phila. 38; Audenreid *v.* Walker, 11 Phila. 183; Painter *v.* Harding, 3 Phila. 449.

South Carolina.— Martin *v.* Sale, Bailey Eq. 1; McCaw *v.* Blewit, 2 McCord Eq. 90; Moffat *v.* McDowall, 1 McCord Eq. 434; McDowel *v.* Teasdale, 1 Desauss. 459; Denton *v.* McKenzie, 1 Desauss. 289, 1 Am. Dec. 664; Neilson *v.* Dickenson, 1 Desauss. 133. See also Magwood *v.* Lubbock, Bailey Eq. 382.

Tennessee.— Trabue *v.* Turner, 10 Heisk. 447; McLard *v.* Linnville, 10 Humphr. 163; Smith *v.* Kincaid, 10 Humphr. 73; Van Wyck *v.* Norvell, 2 Humphr. 192; Gray *v.* Faris, 7 Yerg. 155; Meek *v.* McCormick, (Ch. App. 1897) 42 S. W. 458.

Virginia.— Coldiron *v.* Asheville Shoe Co., 93 Va. 364, 25 S. E. 238; Shurtz *v.* Johnson, 28 Gratt. 657; Powell *v.* Manson, 22 Gratt. 177; Thornton *v.* Gordon, 2 Rob. 719; Love *v.* Braxton, 5 Call 537; Maupin *v.* Whiting, 1 Call 224; Kennedy *v.* Baylor, 1 Wash. 162; Roberts *v.* Kelly, 2 Patt. & H. 396.

West Virginia.— Leachman *v.* Adamson, 5 W. Va. 443; Arnold *v.* Welton, 5 W. Va. 436.

United States.—Morrison *v.* Durr, 122 U. S. 518, 7 S. Ct. 1215, 30 L. ed. 1225; Vigel *v.* Hopp, 104 U. S. 441, 26 L. ed. 765; Georgetown Union Bank *v.* Geary, 5 Pet. 99, 8 L. ed. 60 [*affirming* 10 Fed. Cas. No. 5,241*a*, 3 Cranch C. C. 233]; Lenox *v.* Prout, 3 Wheat. 520, 4 L. ed. 449; Calivada Colonization Co. *v.* Hays, 119 Fed. 202; Daniel *v.* Mitchell, 6 Fed. Cas. No. 3,562, 1 Story 172; Gernon *v.* Boccaline, 10 Fed. Cas. No. 5,366, 2 Wash. 199; Gould *v.* Gould, 10 Fed. Cas. No. 5,637, 3 Story 516; Harper *v.* Dougherty, 11 Fed. Cas. No. 6,087, 2 Cranch C. C. 284; Hayward *v.* Eliot Nat. Bank, 11 Fed. Cas. No. 6,273, 4 Cliff. 294 [*affirmed* in 96 U. S. 611, 24 L. ed. 855]; Hughes *v.* Blake, 12 Fed. Cas. No. 6,845, 1 Mason 515 [*affirmed* in 6 Wheat. 453, 5 L. ed. 303]; Langdon *v.* Goddard, 14 Fed. Cas. No. 8,060, 2 Story 267; Lonergan *v.* Fenlon, 15 Fed. Cas. No. 8,475, 2 Pittsb. 115; Morgan *v.* Tipton, 17 Fed. Cas. No. 9,809, 3 McLean 339; Powden *v.* Johnson, 19 Fed. Cas. No. 11,353; Walker *v.* Derby, 29 Fed. Cas. No. 17,068, 5 Biss. 134.

See 19 Cent. Dig. tit. "Equity," § 722.

An answer of a corporation, sworn to by an officer of his own personal knowledge, is entitled to the benefit of this rule. Kane *v.* Schuylkill F. Ins Co., 199 Pa. St. 198, 48 Atl.

come the answer.[20] It has also been said that the answer must be taken as true unless it is proved otherwise by two witnesses, or by one witness and corroborating circumstances equal to another witness, or by other evidence entitled to the weight of two witnesses under oath.[21] Also that the answer may be overcome, not only by the testimony of two witnesses, or by one with corroborating circumstances, but by such circumstances alone, or by documentary evidence alone.[22] Whatever statement of the rule is adopted some discretion must doubtless be left with the chancellor to modify it according to the exigencies of the situation in order to prevent a miscarriage of justice.[23]

(B) *When the Rule Does Not Apply.* The rule just stated relative to the amount of evidence necessary to overcome an answer does not apply where the answer is not under oath;[24] nor where the answer is upon information and

989; Waller *v.* Kingston Coal Co., 191 Pa. St. 193, 43 Atl. 235; Riegel *v.* American L. Ins. Co., 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166; Carpenter *v.* Providence Washington Ins. Co., 4 How. (U. S.) 185, 11 L. ed. 931.

Testimony uncertain, etc.— This rule does not render the testimony of one witness, together with corroborative circumstances, sufficient to overcome the answer, where the testimony of the witness is uncertain, doubtful, and obscure, and the facts and circumstances may be reconciled with the denials and averments in the answer. Pickering *v.* Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291.

Separate facts by separate witnesses.—Positive answers responsive to the bill are not outweighed by proof of facts which are not irreconcilable with the truth of the answers and the fairness of the matters they state, especially where each material fact is related only by one witness. Huntsville Branch Bank *v.* Marshall, 4 Ala. 60.

20. Croarkin *v.* Hutchinson, 187 Ill. 633, 58 N. E. 678; Salsbury *v.* Ware, 183 Ill. 505, 56 N. E. 149; Willdey *v.* Webster, 42 Ill. 108; Trout *v.* Emmons, 29 Ill. 433, 81 Am. Dec. 326; Stouffer *v.* Machen, 16 Ill. 553; Hannaman *v.* Wallace, 97 Ill. App. 46; Boyd *v.* Brown, 74 Ill. App. 205; Mason *v.* Smith, 200 Pa. St. 270, 49 Atl. 642; Galbraith *v.* Galbraith, 190 Pa. St. 225, 42 Atl. 683; Sylvius *v.* Kosek, 117 Pa. St. 67, 11 Atl. 392, 2 Am. St. Rep. 645; Hopkins *v.* Stone Road, 21 Pa. Super. Ct. 168; Slessinger *v.* Buckingham, 17 Fed. 454, 8 Sawy. 469. It has been said, however, that the corroborating circumstances need not be equal to the testimony of one witness, in order to overcome the answer, but only sufficient to turn the scale. White *v.* Crew, 16 Ga. 416.

21. Stephens *v.* Orman, 10 Fla. 9; Hill *v.* Williams, 59 N. C. 242. And see Badger *v.* Badger, 2 Fed. Cas. No. 718, 2 Cliff. 137 [*affirmed* in 2 Wall. 87, 17 L. ed. 836]. See also Jacobs *v.* Van Sickle, 127 Fed. 62, 61 C. C. A. 598 [*affirming* decree in 123 Fed. 340].

22. Robinson *v.* Hardin, 26 Ga. 344; Jones *v.* Belt, 2 Gill (Md.) 106; Jones *v.* Abraham, 75 Va. 466; Roberts *v.* Kelly, 2 Patt. & H. (Va.) 396; Parker *v.* Phetteplace, 18 Fed. Cas. No. 10,746, 2 Cliff. 70 [*affirmed* in 1 Wall. 684, 17 L. ed. 675]. And see Ressler *v.* Witmer, 1 Pearson (Pa.) 174. But *compare* West *v.* Flannagan, 4 Md. 36; Ing *v.* Brown, 3 Md. Ch. 521.

23. See for cases of this sort Veile *v.* Blodgett, 49 Vt. 270; Field *v.* Wilbur, 49 Vt. 157; Porter *v.* Rutland Bank, 19 Vt. 410. But where it was urged that defendants to a bill should be required to offer proof in support of some of the statements of the answer, although responsive to the bill, because such proof was within their reach, while it was inaccessible to complainants, it was held that the rule requiring two witnesses or one witness with pregnant circumstances was not subject to the modification which the introduction of such a principle would involve. Thompson *v.* Diffenderfer, 1 Md. Ch. 489.

For evidence held sufficient to overcome the answer see the following cases:

Alabama.— Eldridge *v.* Turner, 11 Ala. 1049; Thomason *v.* Smithson, 7 Port. 144.

Illinois.— Preschbaker *v.* Feaman, 32 Ill. 475; McNail *v.* Welch, 26 Ill. App. 482.

Kentucky.— Winters *v.* January, Litt. Sel. Cas. 13; Pringle *v.* Samuel, 1 Litt. 43, 13 Am. Dec. 214.

New Hampshire.— Dodge *v.* Griswold, 12 N. H. 573.

New York.— Gihon *v.* Albert, 7 Paige 278.

Pennsylvania.— Rowley's Appeal, 115 Pa. St. 150, 9 Atl. 329.

See 19 Cent. Dig. tit. "Equity," § 723.

For evidence held insufficient to overcome the answer see Scott *v.* Brassell, 132 Ala. 660, 32 So. 694; Barnard *v.* Davis, 54 Ala. 565; O'Bannon *v.* Myers, 36 Ala. 551, 76 Am. Dec. 335; Starke *v.* Blackwell, 36 Ala. 154; Holley *v.* Wilkinson, 31 Ala. 196; Hayward *v.* Eliot Nat. Bank, 11 Fed. Cas. No. 6,273, 4 Cliff. 294 [*affirmed* in 96 U. S. 611, 24 L. ed. 855].

24. *Alabama.*— State Bank *v.* Edwards, 20 Ala. 512.

Indiana.— Peck *v.* Hunter, 7 Ind. 295; Moore *v.* McClintock, 6 Ind. 209; Peter *v.* Wright, 6 Ind. 183.

Ohio.— Miami Exporting Co. *v.* U. S. Bank, Wright 249.

Tennessee.— McLard *v.* Linnville, 10 Humphr. 163; Van Wyck *v.* Norvell, 2 Humphr. 192.

United States.— Patterson *v.* Gaines, 6 How. 550, 12 L. ed. 553.

See 19 Cent. Dig. tit. "Equity," § 717.

belief;[25] nor in Tennessee where the bill is sworn to as well as the answer.[26] Nor does the rule apply where defendant refers to facts not within his own knowledge,[27] or the truth or falsehood of which defendant could not from his situation have known.[28] An indefinite, evasive, or equivocal answer is not within the

25. *Alabama.*— Pearce *v.* Nix, 34 Ala. 183; Paulding *v.* Watson, 21 Ala. 279; Newman *v.* James, 12 Ala. 29; Givens *v.* Tidmore, 8 Ala. 745.

Georgia.— Rogers *v.* French, 19 Ga. 316.

Illinois.— Cunningham *v.* Ferry, 74 Ill. 426.

Indiana.— Townsend *v.* McIntosh, 14 Ind. 57.

Kentucky.— Williamson *v.* McConnell, 4 Dana 454; Whittington *v.* Roberts, 4 T. B. Mon. 173.

Mississippi.— Snell *v.* Fewell, 64 Miss. 655, 1 So. 908.

New Jersey.— Benson *v.* Woolverton, 15 N. J. Eq. 158.

New York.— Harris *v.* Knickerbocker, 5 Wend. 638; Town *v.* Needham, 3 Paige 545, 24 Am. Dec. 246; Dunham *v.* Gates, Hoffm. 185.

Pennsylvania.— Socher's Appeal, 104 Pa. St. 609; Baugher *v.* Conn, 1 Pa. Co. Ct. 184, 17 Phila. 81.

Tennessee.— McLard *v.* Linnville, 10 Humphr. 163.

United States.— Slater *v.* Maxwell, 6 Wall. 268, 18 L. ed. 796; Blair *v.* Silver Peak Mines, 84 Fed. 737, 93 Fed. 332; Berry *v.* Sawyer, 19 Fed. 286. And see Samuel *v.* Hostetter Co., 118 Fed. 257, 55 C. C. A. 111. But see Carpenter *v.* Providence Washington Ins. Co., 4 How. 185, 11 L. ed. 931.

See 19 Cent. Dig. tit. "Equity," § 718.

Denial by party not charged with knowledge of the facts will not cast on plaintiff the burden of proving them by two witnesses. Gibbs *v.* Frost, 4 Ala. 720.

Only when denial is positive does the rule apply; when denial is as to belief or is a matter of inference or argument the case is not within the rule. Toulme *v.* Clarke, 64 Miss. 471, 1 So. 624.

26. McLard *v.* Linnville, 10 Humphr. (Tenn.) 163; Searcy *v.* Pannell, 21 Fed. Cas. No. 12,584, Brunn. Col. Cas. 172, Cooke (Tenn.) 110. If the bill is sworn to, and the allegations in the bill are positive and direct, then it is oath against oath, and only one witness is required; but if the allegations in the bill are not positive, but only as to some or all of the facts alleged on information and belief, the answer will stand, unless overturned by two witnesses, or one with strong corroborating circumstances. Trabue *v.* Turner, 10 Heisk. (Tenn.) 447. And see Carrick *v.* Prater, 10 Humphr. (Tenn.) 270. When the bill and answer are both sworn to, a denial by defendant of an allegation as to which he could have no personal knowledge would at most only make an issue; but when the denial is made from his own knowledge it is conclusive, unless contradicted by at least one witness. Boyd *v.* Reed, 6 Heisk. (Tenn.) 631. But in Spence *v.* Dodd, 19 Ark. 166, 169, where the bill was verified, the court said: "We know of no rule of chancery practice which required the appellant to verify his bill by his affidavit. If the affidavit were really untrue in point of fact we know of no rule of law which would make the false oath of the appellant amount to legal perjury, and this because the affidavit was not a material requirement, and consequently an act wholly voluntary on the part of the affiant." The court accordingly held that the general rule applied.

27. *Alabama.*— Hartwell *v.* Whitman, 36 Ala. 712; Waters *v.* Greagh, 4 Stew. & P. 410.

Delaware.— Robinson *v.* Jefferson, 1 Del. Ch. 244.

Indiana.— State *v.* Holloway, 8 Blackf. 45.

Kentucky.— Taylor *v.* Morton, 5 J. J. Marsh. 65; Carneal *v.* Day, Litt. Sel. Cas. 492.

Pennsylvania.— Bussier *v.* Weekey, 11 Pa. Super. Ct. 463.

Vermont.— Loomis *v.* Fay, 24 Vt. 240.

United States.— Savings, etc., Soc. *v.* Davidson, 97 Fed. 696, 38 C. C. A. 365 [*affirming* 80 Fed. 54].

See 19 Cent. Dig. tit. "Equity," § 718.

Contra.— But in McGehee *v.* White, 31 Miss. 41, it was held that a positive and unequivocal denial in the answer of an allegation in the bill cannot be disproved except by two witnesses or by one with corroborative circumstances, even though it appears by the answer that respondent has no personal knowledge of the matter denied, it being said that the court will not look into the grounds on which the denial was made, or inquire whether it is sufficient or not as evidence.

One defendant making no answer.— Where one of two trustees is charged to have actual knowledge of a title adverse to that conveyed to them jointly, and the other trustee answers denying the allegations of the bill, but the one charged with knowledge makes no answer, the denial in the answer need not be overcome by the testimony of two witnesses or of one witness with corroborating circumstances. Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

28. *Alabama.*— Garrow *v.* Carpenter, 1 Port. 359.

Arkansas.— Watson *v.* Palmer, 5 Ark. 501.

Kentucky.— Harlan *v.* Wingate, 2 J. J. Marsh. 138; Lawrence *v.* Lawrence, 4 Bibb 357.

Maryland.— Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306; Pennington *v.* Gittings, 2 Gill & J. 208.

Mississippi.— Purvis *v.* Woodward, 78 Miss. 922, 29 So. 917.

United States.— Clark *v.* Van Riemsdyk, 9 Cranch 153, 3 L. ed. 688.

See 19 Cent. Dig. tit. "Equity," § 718.

rule.[29] Formal answers putting in issue the allegations of the bill are not within the rule.[30] Ordinarily the rule does not obtain where the practice is regulated more or less by a code or practice act.[31] And it has been held that an answer, although responsive to the bill and denying its charges, is not conclusive upon a jury, although not contradicted by two witnesses or one and an equivalent.[32] The rule does not apply to a sworn answer to a petition, being applicable only to an answer to a bill.[33]

(c) *Verbal Admissions to Overcome Answer.* The answer may be overcome by proof of verbal admissions by defendant inconsistent with the denials or other defensive allegations of the answer, but there is no general agreement as to the amount of proof necessary for this purpose.[34]

e. Answers of Co-Defendants — (i) *As Evidence For Plaintiff Against Other Defendants.* The general rule is that the answer of one defendant is not evidence in favor of plaintiff against a co-defendant.[35] But plaintiff may use

Although defendant swears positively to facts of which the answer shows that he could have no personal knowledge, evidence equivalent to two witnesses is not necessary to overcome the answer in relation to such facts. Fryrear *v.* Lawrence, 10 Ill. 325.

29. *Alabama.*— Bobe *v.* Stickney, 36 Ala. 482; Lyon *v.* Hunt, 11 Ala. 295, 46 Am. Dec. 216.

Illinois.— Deimel *v.* Brown, 136 Ill. 586, 27 N. E. 44.

Kentucky.— Amos *v.* Heatherby, 7 Dana 45; Phillips *v.* Richardson, 4 J. J. Marsh. 212.

Massachusetts.— Morse *v.* Hill, 136 Mass. 60; Farnam *v.* Brooks, 9 Pick. 212.

Missouri.— Martin *v.* Greene, 10 Mo. 652.

New York.— Jacks *v.* Nichols, 5 N. Y. 178; Harris *v.* Knickerbacker, 5 Wend. 638.

Pennsylvania.— Everhart's Appeal, 106 Pa. St. 349; Erie, etc., R. Co.'s Appeal, 3 Pennyp. 164.

See 19 Cent. Dig. tit. "Equity," § 715.

30. Reynolds *v.* Pharr, 9 Ala. 560.

31. *Arkansas.*— Conger *v.* Cotton, 37 Ark. 286.

Colorado.— Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108.

Iowa.— Mitchell *v.* Moore, 24 Iowa 394; Graves *v.* Alden, 13 Iowa 573; Shepard *v.* Ford, 10 Iowa 502 [*overruling* Bacon *v.* Lee, 4 Iowa 490; Pierce *v.* Wilson, 2 Iowa 20].

Kentucky.— Worley *v.* Tuggle, 4 Bush 168.

New York.— Stilwell *v.* Carpenter, 62 N. Y. 639, 2 Abb. N. Cas. 238.

West Virginia.— Lowry *v.* Buffington, 6 W. Va. 249.

See 19 Cent. Dig. tit. "Equity," § 722.

Since the statute allowing parties to be witnesses (Laws (1861), p. 168), an answer in chancery responsive to the bill is now to be regarded as having the same force which it would have were it defendant's deposition as a witness, and may be contradicted and complainant's case corroborated by defendant's subsequent testimony upon the hearing. Roberts *v.* Miles, 12 Mich. 297.

Bill sworn to by agent or attorney.—Where a bill is sworn to by the agent instead of the complainants, it does not entitle the latter to the benefit of Code (1880), § 1949, under which the rule requiring two witnesses or a witness and corroborating circumstances to overthrow a verified answer is dispensed with. Holmes *v.* Lemon, (Miss. 1894) 15 So. 141. So where the attorney swears to the bill. Jacks *v.* Bridewell, 51 Miss. 881.

32. Hunter *v.* Wallace, 1 Overt. (Tenn.) 239. And see Lancaster *v.* Ward, 1 Overt. (Tenn.) 430.

33. Irvine *v.* Dean, 93 Tenn. 346, 27 S. W. 666.

34. Garrett *v.* Garrett, 29 Ala. 439; Petty *v.* Taylor, 5 Dana (Ky.) 598; Hope *v.* Evans, Sm. & M. Ch. (Miss.) 195; Gillett *v.* Robbins, 12 Wis. 319.

35. *Alabama.*— Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Pearson *v.* Darrington, 32 Ala. 227; Chambliss *v.* Smith, 30 Ala. 366; Halstead *v.* Shepard, 23 Ala. 558; May *v.* Barnard, 20 Ala. 200; Julian *v.* Reynolds, 8 Ala. 680; Moore *v.* Hubbard, 4 Ala. 187; Cockerham *v.* Davis, 5 Port. 220; Collier *v.* Chapman, 2 Stew. 163.

Arkansas.— Whiting *v.* Beebe, 12 Ark. 421.

Florida.— Stackpole *v.* Hancock, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814.

Georgia.— Allen *v.* Holden, 32 Ga. 418; Adkins *v.* Paul, 32 Ga. 219; Lunday *v.* Thomas, 26 Ga. 537; Clayton *v.* Thompson, 13 Ga. 206.

Illinois.— Rust *v.* Mansfield, 25 Ill. 336.

Indiana.—McClure *v.* McCormick, 5 Blackf. 129; Thomasson *v.* Tucker, 2 Blackf. 172.

Iowa.— Jones *v.* Jones, 13 Iowa 276; Mobley *v.* Dubuque Gaslight, etc., Co., 11 Iowa 71; Williamson *v.* Haycock, 11 Iowa 40.

Kentucky.— Kennedy *v.* Davenport, 13 B. Mon. 167; Daniel *v.* Ballard, 2 Dana 296; Graham *v.* Sublett, 6 J. J. Marsh. 44; Mosely *v.* Armstrong, 3 T. B. Mon. 287; Harrison *v.* Edwards, 3 Litt. 340; Harrison *v.* Johnson, 3 Litt. 286; Hunt *v.* Stephenson, 1 A. K. Marsh. 570; White *v.* Robinson, 1 A. K. Marsh. 569; Jones *v.* Bullock, 3 Bibb 467; Bartlett *v.* Marshall, 2 Bibb 467.

Maine.— Robinson *v.* Sampson, 23 Me. 388; Felch *v.* Hooper, 20 Me. 159.

Maryland.— Reese *v.* Reese, 41 Md. 554; Glen *v.* Glover, 3 Md. 212; Briesch *v.* McCauley, 7 Gill 189; Bevans *v.* Sullivan, 4 Gill 383; Harwood *v.* Jones, 10 Gill & J. 404, 32 Am. Dec. 180; Calwell *v.* Boyer, 8 Gill

it as evidence when there is a privity of estate or interest between defendants,[36] or when some relationship such as that of partnership or agency exists between them;[37] and where admissions of a defendant would be evidence against his co-defendant there his answer is also evidence.[38] And plaintiff may use the answer of one defendant as evidence against a co-defendant when the latter claims through the former,[39] or when the latter refers to or adopts the answer of the former.[40]

(II) *As Evidence For Other Defendants Against Plaintiff.* With respect to the use of the answer of one defendant by a co-defendant as evidence in the latter's favor, the general rule is that the answer of one defendant, when responsive to the bill, is evidence against plaintiff in favor of the other defendants.[41]

d. Answers of Infant Defendants. The answers of infant defendants by

& J. 136; Maccubbin *v.* Cromwell, 7 Gill & J. 157; Stewart *v.* Stone, 3 Gill & J. 510; McKim *v.* Thompson, 1 Bland 150; Glenn *v.* Baker, 1 Md. Ch. 73.

Massachusetts.—Mills *v.* Gore, 20 Pick. 28; Chapin *v.* Coleman, 11 Pick. 331.

New Jersey.— McElroy *v.* Ludlum, 32 N. J. Eq. 828; Vanderveer *v.* Holcomb, 17 N. J. Eq. 547.

New York.— Phœnix *v.* Dey, 5 Johns. 412; Judd *v.* Seaver, 8 Paige 548; Webb *v.* Pell, 3 Paige 368.

North Carolina.— Ellis *v.* Amason, 17 N. C. 273.

Pennsylvania.— Eckman *v.* Eckman, 55 Pa. St. 269.

Tennessee.— Turner *v.* Collier, 4 Heisk. 89.

Vermont.— Blodgett *v.* Hobart, 18 Vt. 414; Conner *v.* Chase, 15 Vt. 764.

Virginia.— Pettit *v.* Jennings, 2 Rob. 676; Dade *v.* Madison, 5 Leigh 401.

United States.— Leeds *v.* Alexandria Mar. Ins. Co., 2 Wheat. 380, 4 L. ed. 266; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*c*, Hempst. 251; Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590.

See 19 Cent. Dig. tit. "Equity," § 707. See also cases cited *infra*, note 43.

Joint answer of husband and wife, signed by both in a suit against them, in relation to the separate estate of the wife, was held to be evidence against her. Dyett *v.* North American Coal Co., 20 Wend. (N. Y.) 570, 32 Am. Dec. 598. See, however, Lewis *v.* Yale, 4 Fla. 418.

36. *Alabama.*— May *v.* Barnard, 20 Ala. 200.

Georgia.— Hickson *v.* Bryan, 75 Ga. 392; Allen *v.* Holden, 32 Ga. 418; Adkins *v.* Paul, 32 Ga. 219; Clayton *v.* Thompson, 13 Ga. 206; Morris *v.* Foote, Ga. Dec., Pt. II, 119.

Illinois.— Pensoneau *v.* Pulliam, 47 Ill. 58.

Indiana.— Townsend *v.* McIntosh, 14 Ind. 57.

Iowa.— Jones *v.* Jones, 13 Iowa 276.

Mississippi.— Lockman *v.* Miller, (1897) 22 So. 822; Fitch *v.* Stamps, 6 How. 487.

United States.— Field *v.* Holland, 6 Cranch 8, 3 L. ed. 136; Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,872, 1 Gall. 630.

See 19 Cent. Dig. tit. "Equity," § 709.

In a suit to charge real estate of an intestate for deficiency of personal assets the answer of the administrator and his accounts settled are *prima facie* evidence against the other defendants, who are without personal knowledge. Hayman *v.* Keally, 11 Fed. Cas. No. 6,265, 3 Cranch C. C. 325.

37. Rust *v.* Mansfield, 25 Ill. 336; Rector *v.* Rector, 8 Ill. 105; Mobley *v.* Dubuque Gaslight, etc., Co., 11 Iowa 71; Williamson *v.* Haycock, 11 Iowa 40; Clark *v.* Van Riemsdyk, 9 Cranch (U. S.) 153, 3 L. ed. 688. But see Moore *v.* Hubbard, 4 Ala. 187; Bevans *v.* Sullivan, 4 Gill (Md.) 383; Chapin *v.* Coleman, 11 Pick. (Mass.) 331; Leeds *v.* Alexandria Mar. Ins. Co., 2 Wheat. (U. S.) 380, 4 L. ed. 266.

38. *Illinois.*— Martin *v.* Dryden, 6 Ill. 187.

Maine.— Gilmore *v.* Patterson, 36 Me. 544.

New York.— Christie *v.* Bishop, 1 Barb. Ch. 105.

Vermont.— Porter *v.* Rutland Bank, 19 Vt. 410.

United States.— Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322; Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,872, 1 Gall. 630.

See 19 Cent. Dig. tit. "Equity," § 707.

39. Emerson *v.* Atwater, 12 Mich. 314; Fitch *v.* Stamps, 6 How. (Miss.) 487; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Field *v.* Holland, 6 Cranch (U. S.) 8, 3 L. ed. 136. But in Winn *v.* Albert, 2 Md. Ch. 169, it was held that the answer of one defendant is not evidence against a co-defendant claiming title under the former, for the reason that the party against whom the answer is proposed to be read would be deprived of the benefit of a cross-examination. And where a defendant in a bill of foreclosure is the original mortgagor and has actual knowledge of the existence and delivery his answer might be regarded as evidence in reference thereto, but could not be regarded as extending to a subsequent encumbrancer who knew nothing of the facts. Woolcy *v.* Chamberlain, 24 Vt. 270.

40. Blakeney *v.* Ferguson, 14 Ark. 640; Chase *v.* Manhardt, 1 Bland (Md.) 333; Dunham *v.* Gates, 3 Barb Ch. (N. Y.) 196.

41. *Delaware.*— Pleasanton *v.* Raughley, 3 Del. Ch. 124.

their guardian *ad litem* or next friend are not evidence against them, and the allegations in the bill must be proved by other means before a decree can pass involving their interests.[42] Nor can the answers of adult co-defendants be used as evidence against them.[43]

e. Answers to Bills to Account. On a bill to account the answer is no evidence of disbursements, as such a bill is no more than a demand on defendant to show his receipts and legal proof of his expenditures, nor is the case varied by a call for the amount of disbursements and debts paid.[44] But where the accounts are open and defendant is called on to disclose in regard to the state of the accounts and the real amount due the answer is evidence as well of credits as of debits and of the balance.[45] Where a bill is brought for an account, and the answer sets up an account, stated in writing, and settled and signed by the parties, and states on oath that such account is just and true, it is a bar to the bill, unless impeached for some fraud, omission, or mistake pointed out.[46] Where a defendant having stated an account in his answer dies during the pendency of the suit and the matters involved in the account are of long standing, if there is evidence tending to support the account, the court may direct that the account be taken as *prima facie* evidence, irrespective of the question whether it is responsive to the bill.[47]

Georgia.— Carithers *v.* Jarrell, 20 Ga. 842; Ligon *v.* Rogers, 12 Ga. 281.

Maryland.— Powles *v.* Dilley, 9 Gill 222; Glenn *v.* Baker, 1 Md. Ch. 73.

Mississippi.— Salmon *v.* Smith, 58 Miss. 399.

New Hampshire.— Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362.

See 19 Cent. Dig. tit. "Equity," § 707.

Where other defendant defaulted.— An allegation in a bill in equity that two of the defendants acted as agents for a third defendant, positively denied by the former in their answers and unsupported by any testimony whatever, was regarded as conclusively disproved by the answers, although a decree *pro confesso* has been taken against the alleged principal upon her failure to answer, the court saying: "If there were no agents there could be no principal." Alhaugh *v.* Litho-Marble Decorating Co., 14 App. Cas. (D. C.) 113. And see Beekman *v.* Gibbs, 8 Paige (N. Y.) 511.

Insufficient reference to answer.— The answer of a defendant, A, so far as it states that he has seen the answer of another defendant, B, and that the same is true, cannot avail A, when no answer of B was on file at the time when that of A was sworn to, and there is nothing to identify the paper afterward sworn to and filed by B with the paper shown to A. Carr *v.* Weld, 19 N. J. Eq. 319.

Answer of formal defendant.— In a suit to enforce a wife's liability for indorsing her husband's note, the husband being made a formal defendant only, and he and his wife filing separate answers, his answer cannot be used as evidence in her favor. Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377.

Defense by confession and avoidance on the part of one defendant does not avail a co-defendant. Larkin's Appeal, 38 Pa. St. 457.

42. Harris *v.* Harris, 6 Gill & J. (Md.) 111; Kent *v.* Taneyhill, 6 Gill & J. (Md.) 1; Stephenson *v.* Stephenson, 6 Paige (N. Y.) 353. And see Watson *v.* Godwin, 4 Md. Ch. 25. Otherwise where the facts admitted were beneficial to the infant. Eaton *v.* Tillinghast, 4 R. I. 276.

W. Va. Code, c. 125, § 36, so far as it relates to taking material allegations of a bill, or material allegations of new matter in an answer constituting a claim for affirmative relief, as true, should be applied strictly if at all to the answers of infant defendants by guardian *ad litem*. Laidley *v.* Kline, 8 W. Va. 218.

43. Campbell *v.* Campbell, 1 Ind. 220, Smith (Ind.) 137; Shirley *v.* Shields, 8 Blackf. (Ind.) 273; Sawyer *v.* Sawyer, 106 Tenn. 597, 61 S. W. 1022. But where a defendant dies after answering a bill, leaving minor children who are thereupon made parties to the suit, complainant may still avail himself of the answer to the same extent as if the defendant were living. Robertson *v.* Parks, 3 Md. Ch. 65.

44. McNeal *v.* Glenn, 4 Md. 87; Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250.

Under the old chancery practice a defendant to a suit in equity when called upon to account might by his oath be discharged from items of debt not exceeding twenty dollars, and in the aggregate not exceeding five hundred dollars; but he must be credible and uncontradicted, and he must swear positively to whom he paid the debt, for what, and when. But he could not by his oath charge complainant in this way. Goodner *v.* Browning, 9 Humphr. (Tenn.) 783 [*following* Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495].

A calculation showing the balance due, annexed to an answer by a guardian to a bill for an account, is not evidence for him. Cartledge *v.* Cutliff, 29 Ga. 758.

45. Roberts *v.* Totten, 13 Ark. 609.

46. Harrison *v.* Bradley, 40 N. C. 136.

47. Bellows *v.* Stone, 18 N. H. 465.

f. Answers to Special Interrogatories. Interrogatories, although not indispensable to a bill in equity, become part of it when founded on any matter contained in the charging part of the bill, and such interrogatories defendant is compelled to answer; and if the answer is responsive to such interrogatories it is evidence for defendant[48] as well as against him,[49] notwithstanding a replication to the answer has been filed;[50] and no presumption will be indulged against evidence furnished by defendant's answers to special interrogatories on account of its being furnished by an interested party.[51] But so much of an answer as is responsive to interrogatories propounded by complainant, as to facts not charged in the bill, and which cannot come in aid of defendant's equity, must be sustained by evidence independent of such answer.[52] The same principles apply to complainant's answers propounded on a cross bill.[53]

g. Weight of Answer as Evidence. An answer in equity, responsive to the bill, and positively denying the facts charged, is entitled to so great weight that when confirmed by testimony even of a kind not the most satisfactory it will countervail a case which on its face is a suspicious one.[54] But the answer as evidence is to be weighed like any other piece of evidence, and has no fictitious weight merely because it is a part of the pleadings.[55] It has often been broadly stated that when an answer is disproved in a material point it loses its weight as evidence.[56] The correctness of the rule, however, thus broadly stated is questionable, and it is doubtless subject to qualification.[57]

48. *Kentucky.*— Ecklar *v.* Galbreath, 5 Bush 617; Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482; Shiddell *v.* Messick, 4 B. Mon. 157.

New York.— Pratt *v.* Adams, 7 Paige 615.

North Carolina.— Chaffin *v.* Chaffin, 22 N. C. 255.

Pennsylvania.— Eberly *v.* Groff, 21 Pa. St. 251.

Tennessee.— Shown *v.* McMackin, 9 Lea 601, 42 Am. Rep. 680; Spurlock *v.* Fulks, 1 Swan 289; Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430.

Virginia.— Shultz *v.* Hansbrough, 33 Gratt. 567.

See 19 Cent. Dig. tit. "Equity," § 692.

Demand constituting interrogatory.—A bill expressly calling upon defendants to show cause why they detain money and notes from the complainant's control is equivalent to a direct interrogatory propounded to them; and the answer to such interrogatory is evidence, and not merely matter in avoidance. Gass *v.* Simpson, 4 Coldw. (Tenn.) 288.

49. Petrie *v.* Wright, 6 Sm. & M. (Miss.) 647; Hughes *v.* Blackwell, 59 N. C. 73.

50. Hughes *v.* Blackwell, 59 N. C. 73.

51. Petrie *v.* Wright, 6 Sm. & M. (Miss.) 647.

52. Roberts *v.* Totten, 13 Ark. 609.

53. Money *v.* Dorsey, 7 Sm. & M. (Miss.) 15.

54. Parker *v.* Phetteplace, 1 Wall. (U. S.) 684, 17 L. ed. 675.

Supported by defendant's testimony.— Where answer under oath was not waived, and the answers so made were responsive to the bill, and were supported by the testimony of defendants, who were called as witnesses by complainant, the force of such testimony is not overthrown by the fact that it is improbable or open to suspicion under the peculiar facts and circumstances of the case; and the facts alleged in the bill can only be established by affirmative evidence, either direct or circumstantial. Coonrod *v.* Kelly, 119 Fed. 841, 56 C. C. A. 353.

But the weight of an answer by a corporation under corporate seal is lessened to a considerable extent, if not wholly destroyed, by not being put in under oath. Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60 [*affirming* 10 Fed. Cas. No. 5,241*a*, 3 Cranch C. C. 233].

55. McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837.

Impeachment of defendant.— But it is not competent for plaintiff to discredit the answer of defendant, or to impair its effect, by impeaching the general character of defendant for truth and veracity. Brown *v.* Bulkley, 14 N. J. Eq. 294.

56. *Alabama.*— Prout *v.* Roberts, 32 Ala. 427; Gunn *v.* Brantley, 21 Ala. 633; Pharis *v.* Leachman, 20 Ala. 662.

Missouri.— Gamble *v.* Johnson, 9 Mo. 605; Roundtree *v.* Gordon, 8 Mo. 19.

New York.— Forsyth *v.* Clark, 3 Wend. 637.

Virginia.— Countz *v.* Geiger, 1 Call 190.

Wisconsin.— Fay *v.* Oatley, 6 Wis. 42.

See 19 Cent. Dig. tit. "Equity," § 695.

57. Thus it has been held that a plaintiff cannot destroy the weight of the whole answer by proving that the answer is false in one respect or several respects; the only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery. Fant *v.* Miller, 17 Gratt. (Va.) 187. See also Broughton *v.* Coffer, 18 Gratt. (Va.) 184.

h. Use of Part of Answer as Evidence. Where the answer is to a bill of discovery only, and plaintiff uses it, he must read the whole of the answer, unless it sets up matter not responsive or which is impertinent. If so such parts should be excluded from consideration.[58] And when the cause is heard on bill and answer, without testimony, defendant's answer must be considered as a whole. Its admissions and denials must be taken together, and due weight must be accorded to the latter.[59] So where an order is prayed for defendant to bring money into court on admissions of the answer, the whole answer must be taken together and as true.[60] Where the bill is for relief and not alone for discovery, and the cause has been put at issue by the filing of a replication or otherwise, plaintiff may read a portion of the answer, and is not bound to read the whole; but he will not be allowed to read a passage from the answer, for the purpose of fixing defendant with an admission, without reading the explanations and qualifications by which the admission may be accompanied.[61] If the passage so read contains a reference to any other passage that must be read also.[62] But plaintiff may take parts of sentences if the sense be not thereby perverted or rendered uncertain.[63] And where the answer, although responsive to the charges of the bill, is contradictory in itself, or absurd in its explanations of admissions of defendant and disproved by one witness, the court may take admissions of the answer without the explanations.[64]

3. Pleas as Evidence. A plea in avoidance of and not responsive to the bill stands for nothing as evidence of the facts stated in it, and where the replication denies all the allegations in the plea it must be supported by evidence.[65] But against the party pleading it may of course be used as evidence at the hearing of another plea or answer in the cause so far as it contains admissions against his interest.[66]

4. Cross Bills as Evidence. If a cross bill is taken as confessed, it may be used as evidence against complainant in the original case on the hearing to the same effect as if he had admitted the same facts in the answer.[67] Where defendant files a cross bill setting out new matter, but does not call on complainant to answer thereto, the allegations will not be taken as true, but defendant will be required to prove them.[68]

5. Answers to Cross Bills as Evidence. When defendants in the original bill take on themselves the affirmative by a cross bill, and submit their rights to the consciences of those originally complaining, they must abide by the response of

58. Chambers *v.* Warren, 13 Ill. 318; Glascock *v.* Hays, 4 Dana (Ky.) 58.

59. Scott *v.* Brassell, 132 Ala. 660, 32 So. 694; Crawford *v.* Kirksey, 50 Ala. 590.

60. Contee *v.* Dawson, 2 Bland (Md.) 264.

61. *Georgia.*— Woodward *v.* Gates, 38 Ga. 205; Davies *v.* Flewellen, 29 Ga. 49; Eastman *v.* McAlpin, 1 Ga. 157.

Maryland.— Davis *v.* Crockett, 88 Md. 249, 41 Atl. 66; Glenn *v.* Randall, 2 Md. Ch. 220.

Michigan.— Durfee *v.* McClurg, 6 Mich. 223.

New Jersey.— Petrick *v.* Ashcroft, 20 N. J. Eq. 198.

New York.— Miller *v.* Avery, 2 Barb. Ch. 582.

Virginia.— Morrison *v.* Grubb, 23 Gratt. 342.

See 19 Cent. Dig. tit. "Equity," § 689.

Charge and discharge.— If the answer sets up one transaction charging defendant, and another distinct one discharging him, it seems that the latter is not evidence in his favor; otherwise if the charge and discharge grow out of one transaction. Cooper *v.* Tappan, 9 Wis. 361.

62. Glenn *v.* Randall, 2 Md. Ch. 220.

63. McDonald *v.* McDonald, 16 Vt. 630.

64. Brown *v.* Brown, 10 Yerg. (Tenn.) 84. And see Smith *v.* Potter, 3 Wis. 432.

65. Gernon *v.* Boccaline, 10 Fed. Cas. No. 5,366, 2 Wash. 199. See also *supra*, XV, A, 4.

66. McNair *v.* Ragland, 16 N. C. 533.

67. Griswold *v.* Simmons, 50 Miss. 137; White *v.* Buloid, 2 Paige (N. Y.) 164.

In Arkansas under Mansf. Dig. § 5072, which provides that "every material allegation of the complaint, . . . and every material allegation of new matter in the answer, constituting a counter-claim or set-off, not specifically controverted by the reply, must, for the purposes of the action, be taken as true," where a cross bill is taken as confessed for want of an answer, the allegations therein will be treated as true. Rudy *v.* Austin, 56 Ark. 73, 19 S. W. 111, 35 Am. St. Rep. 85.

68. Hartfield *v.* Brown, 8 Ark. 283.

complainants, unless by more than equal evidence they disprove the same.[69] Complainant's answer to a cross bill which has been dismissed cannot be read in evidence in his favor.[70] A complainant cannot use his own answer to a cross bill as evidence, unless defendant shall first produce it in evidence.[71] And if defendants have brought a cross bill including as defendants thereto the original complainants and a third person, who is so interested in the subject-matter of controversy on the original bill as not to be a competent witness therein for complainants, the answer of such third person to the cross bill can in no way be used by complainants in the original bill to sustain the case made by them on that bill.[72]

C. Degree of Proof and Weight and Sufficiency of Evidence.[73] While in an equity suit, the party holding the affirmative of the issue may ordinarily establish his case by a preponderance of the evidence,[74] in a few classes of cases this rule is to some extent qualified; and in suits for specific performance,[75] to divest title to realty,[76] or where fraud is involved,[77] or where suits are brought after a long lapse of time, but under circumstances not raising the bar of laches,[78] it is generally stated that the proofs must be clear and satisfactory, and a bare preponderance of the evidence is scarcely enough.[79] If the evidence touching a disputed fact is equally balanced, or if it does not produce a just, rational belief of its existence, or if it leaves the mind in a state of perplexity, the party holding the affirmative as to such fact must fail.[80] While circumstantial evidence is as potent in equity as at law,[81] the court will not be influenced by mere circum-

69. Hutton *v.* Moore, 26 Ark. 382; Pugh *v.* Pugh, 9 Ind. 132.

70. Saffold *v.* Horne, 71 Miss. 762, 15 So. 639.

71. Kidder *v.* Barr, 35 N. H. 235.

72. Blodgett *v.* Hobart, 18 Vt. 414.

73. For more elaborate consideration of these topics see, generally, EVIDENCE.

74. Rice *v.* Rigley, 7 Ida. 115, 61 Pac. 290; Proudfoot *v.* Wightman, 78 Ill. 553. See, however, Marlowe *v.* Benagh, 52 Ala. 112.

75. Rice *v.* Rigley, 7 Ida. 115, 61 Pac. 290. See, generally, SPECIFIC PERFORMANCE.

76. As to degree of proof required to establish implied and resulting trusts see, generally, TRUSTS.

77. As to the degree of proof required to establish allegations of fraud some of the cases apparently require more than a bare preponderance of evidence, but the true rule is probably otherwise; it being understood, however, that a greater amount of evidence than in ordinary cases may be necessary to constitute a preponderance in view of the presumption against fraud which is more or less strong according to circumstances. See, generally, EVIDENCE; FRAUD.

78. Bruce *v.* Child, 11 N. C. 372, 381. A brought his bill to recover the amount due on a bond made thirty years before suit was commenced. It was held that the instrument not being produced, or its absence accounted for, the debt should not be enforced upon loose evidence of the contents of the bond and admissions of defendant's intestate made long before his death. Kennedy *v.* Conn, 3 B. Mon. (Ky.) 321. On the other hand, in consideration of laches, defendant is relieved from the same strictness of proof as he would be under if the transaction involved were recent. Allen *v.* Urquhart, 19 Tex. 480.

Reformation for mistake.— Where a party with knowledge of the facts has suffered several years (in this case twelve) to elapse without taking any steps to reform a deed on the ground of mistake, a bill to correct the mistake must be supported by the most satisfactory evidence. Westbrook *v.* Harbeson, 2 McCord Eq. (S. C.) 112. See also *supra*, II, B, 2, c, (I), (G).

To set aside the deed of a *feme covert* for fraud and surprise in obtaining it, after the lapse of twenty years, the proof must be clear, credible, and satisfactory. Montgomery *v.* Hobson, Meigs (Tenn.) 437.

Absence of prior controversy.— Where, however, general proof is introduced and it is free from suspicion, much less detailed proof will be exacted from plaintiff than if, immediately after the origin of the transaction involved, a controversy in relation to it had arisen. Allender *v.* Trinity Church, 3 Gill (Md.) 166.

79. For consideration of "degree of proof," including the preponderance rule and its explanations, qualifications, and exceptions, see, generally, EVIDENCE.

80. *Alabama.*— Hawes *v.* Brown, 75 Ala. 385; Evans *v.* Winston, 74 Ala. 349; Marlowe *v.* Benagh, 52 Ala. 112; Brandon *v.* Cabiness, 10 Ala. 155.

Illinois.— Selby *v.* Geines, 12 Ill. 69.

Mississippi.— Gee *v.* Gee, 32 Miss. 190.

Missouri.— Sterne *v.* Woods, 11 Mo. 638.

New York.— Rogers *v.* Traders' Ins. Co., 6 Paige 583.

Ohio.— Hargraves *v.* Miller, 16 Ohio 338; Wilson *v.* Delarack, 3 Ohio 290.

See 19 Cent. Dig. tit. "Equity," §§ 726, 728, 729.

81. Orman *v.* Barnard, 5 Fla. 528, 539.

stances to adopt a conjectural conclusion, in a matter susceptible of proof, and will not indulge in presumptions and inferences except as they may be drawn from facts directly proved.[82] And the chancellor in passing on conflicting proofs will follow the probabilities, although they are contrary to the impressions of witnesses of undoubted integrity of purpose.[83] A decree may be rendered on the testimony of a co-defendant if his interest is precisely balanced between the parties to the suit, although he is an indispensable party to the bill.[84] And the testimony of a party taken subject to the test of a cross-examination is sufficient to sustain a decree, in the absence of evidence on the other side.[85] But the evidence of parties who attempt to impose on a court of equity by false statements, manufactured accounts, or like deceptive practices should be rejected.[86] Likewise, where a witness in a suit for relief on the ground of fraud confesses that he was a participant in the fraud, his evidence is not sufficient to support the bill unless corroborated in substantial points.[87] The fact that a witness testifying as an expert is not properly qualified goes to the weight and not to the admissibility of his testimony.[88] A court of equity does not weigh testimony by the number of witnesses alone, as circumstances and known facts may often establish the truth more conclusively than the oaths of the parties or the written depositions.[89] Memoranda from books and written documents when produced in response to a call in the bill are evidence in the cause, but not necessarily conclusive as to the facts which they tend to establish.[90] When the allegations in a case are sustained by the records of the court before which it was tried, and those records are made exhibits in the bill by reference, and are examined by the court, the proof is sufficient.[91] Where funds are in the court of chancery, and a party petitions to have them applied in discharge of his claim, it is the practice of that court to receive the papers on which the claim is founded as *prima facie* evidence, and to act upon them accordingly, unless the testimony is put in issue, and full proof required by the opposite party.[92] Documentary evidence submitted at the hearing by stipulation is to be considered in the same light as evidence taken by deposition.[93]

XVIII. VARIANCE.

A. General Rule Stated. In equity as well as at law the allegations and proofs must set forth and support the same cause of action or defense. A party cannot state one case or defense in his pleading and make a different one by his

82. Orman *v.* Barnard, 5 Fla. 528. See also Nichols *v.* McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; Knapp *v.* White, 23 Conn. 529; Simpson *v.* Wright, 21 Ill. App. 67; Gardner *v.* Greene, 5 R. I. 104; Christian *v.* Lebeschultz, 18 S. C. 602; Turner *v.* Lambeth, 2 Tex. 365.

83. Salisbury *v.* Salisbury, 49 Mich. 306, 13 N. W. 602; Lurch *v.* Holder, (N. J. Ch. 1893) 27 Atl. 81.

84. Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84.

85. Conger *v.* Cotton, 37 Ark. 286.

86. Atkinson *v.* Plumb, 45 W. Va. 626, 32 S. E. 229.

Falsus in uno falsus in omnibus.— As to application of this maxim see, generally, WITNESSES.

87. Kenny *v.* Lembeck, 53 N. J. Eq. 20, 30 Atl. 525. Where a partner who has committed frauds on the firm agrees to indemnify the injured party by an assignment of all the partnership effects, and it appears on a bill by the fraudulent partner for an account that he has destroyed certain books of the firm with a fraudulent purpose, the master may charge him on any evidence which is competent or admissible as proof of the item. He cannot hold the injured partner to such degree of proof as would justify a charge under ordinary circumstances against a customer or partner. Askew *v.* Odenheimer, 2 Fed. Cas. No. 587, Baldw. 380.

88. Stegner *v.* Blake, 36 Fed. 183. As to testimony of experts see, generally, EVIDENCE.

89. Benter *v.* Patch, 7 Mackey (D. C.) 590. And see, generally, EVIDENCE.

90. Tarleton *v.* Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296. Books and papers produced for the purpose of an account by a defendant under the requirement of complainant's bill become evidence against the complainant, and are to be taken as *prima facie* correct. Routen *v.* Bostwick, 59 Ala. 360.

91. Nelson *v.* Pinegar, 30 Ill. 473.

92. Maccubbin *v.* Cromwell, 2 Harr. & G. (Md.) 443. See, generally, DEPOSITS IN COURT, 13 Cyc. 1040.

93. Stone *v.* Welling, 14 Mich. 514.

proofs.[94] It is not enough that the proofs make out an equitable cause of action or defense, however clear the equities may be; for unless the cause of action or defense is that stated in the pleadings, plaintiff or defendant has not shown himself entitled to a decree in his favor.[95]

94. *Alabama.*— Hooper *v.* Strahan, 71 Ala. 75; Winter *v.* Merrick, 69 Ala. 86; Norris *v.* Smith, 41 Ala. 340; Burns *v.* Hudson, 37 Ala. 62; Crothers *v.* Lee, 29 Ala. 337; Machem *v.* Machem, 28 Ala. 374; Freeman *v.* Swan, 22 Ala. 106; Graham *v.* Tankersley, 15 Ala. 634; Morgan *v.* Crabb, 3 Port. 470.

Colorado.— Francis *v.* Wells, 2 Colo. 660.

Florida.— Lyle *v.* Winn, (1903) 34 So. 158.

Georgia.— Keaton *v.* McGwier, 24 Ga. 217.

Illinois.— Morris *v.* Tillson, 81 Ill. 607; Tuck *v.* Downing, 76 Ill. 71; Lloyd *v.* Karnes, 45 Ill. 62; Chaffin *v.* Kimball, 23 Ill. 36; Rowan *v.* Bowles, 21 Ill. 17; White *v.* Morrison, 11 Ill. 361; Fitzpatrick *v.* Beatty, 6 Ill. 454; Odell *v.* Bell, 67 Ill. App. 106; Sangamon County *v.* Deboe, 43 Ill. App. 25; Fountain *v.* Fountain, 23 Ill. App. 529; Waugh *v.* Schlenk, 23 Ill. App. 433; Slocum *v.* Slocum, 9 Ill. App. 142.

Indiana.— Judy *v.* Gilbert, 77 Ind. 96, 40 Am. Rep. 289; Peelman *v.* Peelman, 4 Ind. 612.

Iowa.— Singleton *v.* Scott, 11 Iowa 589.

Kentucky.— Lemaster *v.* Burkhart, 2 Bibb 25.

Maryland.— Small *v.* Owings, 1 Md. Ch. 363.

Michigan.— Elliott *v.* Amazon Ins. Co., 49 Mich. 579, 14 N. W. 554; Ford *v.* Loomis, 33 Mich. 121; Rudd *v.* Rudd, 33 Mich. 101; Harwood *v.* Underwood, 28 Mich. 427; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Warner *v.* Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Smith *v.* Brown, 2 Mich. 161.

Mississippi.— Kidd *v.* Manley, 28 Miss. 156; Pinson *v.* Williams, 23 Miss. 64.

Missouri.— Lenox *v.* Harrison, 88 Mo. 491.

New Hampshire.— Farrar *v.* Crosby, 27 N. H. 9.

New Jersey.— Lehigh Valley R. Co. *v.* McFarlan, 30 N. J. Eq. 180; Midmer *v.* Midmer, 26 N. J. Eq. 299; Parsons *v.* Heston, 11 N. J. Eq. 155; Smith *v.* Axtell, 1 N. J. Eq. 494.

New York.— Kelsey *v.* Western, 2 N. Y. 500; Tripp *v.* Vincent, 3 Barb. Ch. 613; Green *v.* Storm, 3 Sandf. Ch. 305.

North Carolina.— Mallory *v.* Mallory, 45 N. C. 80.

Ohio.— Reynolds *v.* Morris, 7 Ohio St. 310; Dille *v.* Woods, 14 Ohio 122; Paine *v.* French, 4 Ohio 318; Bougher *v.* Miller, Wright 328.

Pennsylvania.— Edwards *v.* Brightly, 44 Leg. Int. 132; Sloan *v.* James, 7 Del. Co. 318; Woods *v.* McMillan, 32 Pittsb. Leg. J. 363.

Tennessee.— Shaw *v.* Patterson, 2 Tenn. Ch. 171.

Vermont.— Barrett *v.* Sargeant, 18 Vt. 365.

Virginia.— Pigg *v.* Corder, 12 Leigh 69.

West Virginia.— Floyd *v.* Jones, 19 W. Va. 359; Baugher *v.* Eichelberger, 11 W. Va. 217.

Wisconsin.— Williams *v.* Starr, 5 Wis. 534; Flint *v.* Jones, 5 Wis. 424.

United States.— Troendle *v.* Van Nortwick, 98 Fed. 785, 39 C. C. A. 286; South Park Com'rs *v.* Kerr, 13 Fed. 502; Bradley *v.* Converse, 3 Fed. Cas. No. 1,775, 4 Cliff. 366; Brooks *v.* Stolley, 4 Fed. Cas. No. 1,963, 4 McLean 275; Surget *v.* Byers, 23 Fed. Cas. No. 13,629, Hempst. 715.

See 19 Cent. Dig. tit. "Equity," § 651.

Discordant theories.— A bill cannot be framed on one theory and a recovery had upon another theory. Hope *v.* Johnston, 28 Fla. 55, 9 So. 830; Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. Rep. 470; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 61 Ill. App. 405 [*affirmed* in 167 Ill. 296, 47 N. E. 513]; Fatheree *v.* Fletcher, 31 Miss. 265; Crane *v.* Ely, 37 N. J. Eq. 564; Pasman *v.* Montague, 30 N. J. Eq. 385.

95. *Alabama.*—Robinson *v.* Cullom, 41 Ala. 693; Evans *v.* Battle, 19 Ala. 398; Clements *v.* Kellogg, 1 Ala. 330.

California.— Tryon *v.* Sutton, 13 Cal. 490.

Illinois.— Ewing *v.* Sandoval Coal, etc., Co., 110 Ill. 290; Barnett *v.* Barnett, 86 Ill. App. 625.

Michigan.— Peckham *v.* Buffam, 11 Mich. 529.

New Jersey.—Andrews *v.* Farnham, 10 N. J. Eq. 91.

North Carolina.— Lindsay *v.* Etheridge, 21 N. C. 36.

Wisconsin.— Kruschke *v.* Stefan, 83 Wis. 373, 53 N. W. 679.

United States.— Piatt *v.* Vattier, 9 Pet. 405, 9 L. ed. 173; Dashiell *v.* Grosvenor, 66 Fed. 334, 13 C. C. A. 593, 27 L. R. A. 67 [*reversing* 62 Fed. 584]; Bradley *v.* Converse, 3 Fed. Cas. No. 1,775, 4 Cliff. 366.

See 19 Cent. Dig. tit. "Equity," § 651.

Different contracts.— Plaintiff in equity cannot set up in his bill of complaint one contract, and obtain the relief he seeks, on the admission or proof of another contract of a different character, even though the relief he seeks would be the appropriate remedy in the case as proved or admitted by defendant. Bellows *v.* Stone, 14 N. H. 175.

Bill charging fraud.— Where a bill sets up a case of actual fraud and makes that the ground of the prayer for relief complainant is not in general entitled to a decree on establishing some one or more of the facts, quite independent of fraud, which may of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated. Hoyt *v.* Hoyt, 27 N. J. Eq. 399. Where a bill of equity is founded on alleged fraudulent business transactions, and the evidence fails to sustain the charge, the bill must be dismissed, although it appears that defendant owes debts growing out of the

B. Limitations and Exceptions to General Rule. But the general rule that proof and pleadings must correspond is to be applied equitably, and where there is enough in the pleadings to warrant relief, and to prevent the adverse party from being taken by surprise, the decree will not be reversed on the ground that the pleadings and proof do not sufficiently agree.[96] Nor will a decree be reversed, if warranted by the pleadings and sustained by the evidence, even though the proof is stronger and broader than that stated in the pleadings, and establishes grounds of relief or defense not contained therein;[97] but the decree under these circumstances must be that warranted by the pleadings, and not that warranted by the stronger and broader proof.[98] Furthermore, the mere fact of variance will not be fatal unless the cause of action or the defense stated and that proved are so materially variant as to prevent a decree in favor of either party,[99] for the general rule that the proof must correspond with the allegations applies only when the evidence discloses a cause of action or a defense essentially different from that set up by the pleadings.[1] A substantial correspondence of the proofs with the allegations is sufficient, and immaterial variances will be disregarded.[2] And in deciding a question of variance the court will bear in mind the general principle that a party is not bound from the nature of the case to use the same particularity in setting forth the rights of the adverse party as he is in setting out his own rights.[3] Nevertheless the qualifications will never be allowed to fritter away the rule itself, and no matter how clear a party's equity may be,

business as to which the fraud is alleged. Babbitt *v.* Dotten, 14 Fed. 19. Where the whole frame of a bill of complaint is based on charges of fraud, and defendants are brought in solely on such charges, and the proofs fail to show any fraud, the bill must be dismissed, even if there be some evidence of an injury because of mistake. Keen *v.* Maple Shade Land, etc., Co., 63 N. J. Eq. 325, 50 Atl. 467, 92 Am. St. Rep. 682 [*reversing* 61 N. J. Eq. 497, 48 Atl. 596]. But it was held in Hood *v.* Smith, 79 Iowa 621, 44 N. W. 903, that where rescission of a contract for exchange of lands is sought on the ground of fraud, the relief may be granted on the ground of mutual mistake.

96. Bass *v.* Taylor, 34 Miss. 342; Weston *v.* Cushing, 45 Vt. 531; Carson *v.* Raisback, 3 Wash. Terr. 168, 13 Pac. 618; Moore *v.* Crawford, 130 U. S. 122, 9 S. Ct. 447, 32 L. ed. 878. And see Hatcher *v.* Hatcher, McMull. Eq. (S. C.) 311.

If defendant is not surprised or injured by a variance it should generally be held immaterial. Offutt *v.* Scott, 47 Ala. 104. See also Crow *v.* Blythe, 3 Hayw. (Tenn.) 236; Crawford *v.* Moore, 28 Fed. 824.

Grounds not set up in terms in the bill are sufficient basis for relief if they come within the facts duly alleged and duly proved. Tufts *v.* Tufts, 24 Fed. Cas. No. 14,233, 3 Woodb. & M. 456.

Allegation of payment.— A party claiming a right in equity under an allegation of payment in full may show a partial payment, especially if he prays for relief in reference to such a state of the case, thus removing the element of surprise. Keaton *v.* Miller, 38 Miss. 630.

A mistake in the date of an instrument, which is the foundation of a bill, will be disregarded if defendant has not been misled thereby; and the variance on the record will not render the claim to relief or the defense bad in substance. Ontario Bank *v.* Schermerhorn, 10 Paige (N. Y.) 109.

Where a bill is to foreclose a mortgage which is alleged to have been created by verbal contract, and intended to secure two distinct debts, and the proof shows that only one of the debts was in fact secured, the variance is not fatal. Morrow *v.* Turney, 35 Ala. 131.

97. Ryerson *v.* Adams, 6 N. J. Eq. 618.

98. Athey *v.* McHenry, 6 B. Mon. (Ky.) 50. But it was held in Davis *v.* Hinchcliffe, 7 Wash. 199, 34 Pac. 915, that in equity cases where evidence is introduced without objection the decision may be based on it without regard to the pleadings.

99. Loewenstein *v.* Rapp, 67 Ill. App. 678.

1. Gilchrist *v.* Gilmer, 9 Ala. 985.

2. *Alabama.*— Eldridge *v.* Turner, 11 Ala. 1049.

Illinois.— Booth *v.* Wiley, 102 Ill. 84.

Kentucky.— Hart *v.* Hawkin, 3 Bibb (Ky.) 502, 6 Am. Dec. 666.

New Jersey.— Hooper *v.* Holmes, 11 N. J. Eq. 122.

Oregon.— Benson *v.* Keller, 37 Oreg. 120, 60 Pac. 918.

Virginia.— Campbell *v.* Bowles, 30 Gratt. 652.

See 19 Cent. Dig. tit. "Equity," §§ 651, 652.

Plea that a bill was "dismissed" is supported by proof that it was "dismissed without prejudice," where the question at issue is merely as to the release of errors by filing the bill to enjoin a judgment alleged to be erroneous. Cooley *v.* Willard, 40 Ill. 88.

Variance between proof and immaterial allegations in the bill constitutes no objection to the decree. Johnston *v.* Glancy, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45.

3. Morgan *v.* Smith, 11 Ill. 194.

if there actually is a material variance between the pleadings and the proof, the general rule applies, and such variance is fatal to the relief asked for or the defense set up.[4]

C. Application and Effect of Principle of Variance. If the court decides that there is a variance, and furthermore decides that such variance does not come within the admitted qualifications to the general rule which have just been stated, then in arriving at its decree it cannot consider that portion of the evidence which constitutes the variance as thus understood, but must confine itself to the evidence which does not vary from the allegations of the pleadings, or which varies only to the extent allowed by the qualifications.[5]

4. Helmetag *v.* Frank, 61 Ala. 67; McCallam *v.* Carswell, 75 Ga. 25. But where a married woman brought a bill by her next friend, and there was a fatal variance between the allegations and the proofs, the bill, although dismissed, was dismissed without prejudice. Burns *v.* Hudson, 37 Ala. 62.

5. Meadors *v.* Askew, 56 Ala. 584; Pollard *v.* Murrell, 6 Ala. 661; Thomas *v.* Mackey, 3 Colo. 390; Hehm *v.* Cantrell, 59 Ill. 524; Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24; Emerson *v.* Atwater, 12 Mich. 314; Bowman *v.* O'Rielly, 31 Miss. 261; Johnson *v.* Luckado, 12 Heisk. (Tenn.) 270; Fite *v.* Wiel, (Tenn. Ch. App. 1898) 46 S. W. 330; Ferguson Contracting Co. *v.* Manhattan Trust Co., 118 Fed. 791, 55 C. C. A. 527; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529. For illustrations of the rule stated in the text see the following cases where the courts have had to determine the question of variance or no variance in order to determine how much of the evidence which had been introduced could be considered in framing its decree.

Allegations of extent or nature of interest in property involved.

Alabama.— Winter *v.* Merrick, 69 Ala. 86; Milhouse *v.* Weeden, 57 Ala. 502; Floyd *v.* Ritter, 56 Ala. 356.

California.— Owen *v.* Frink, 24 Cal. 171.

Florida.— St. Andrews Bay Land Co. *v.* Campbell, 5 Fla. 560.

Illinois.— Bartmess *v.* Fuller, 170 Ill. 193, 48 N. E. 452; Breckenridge *v.* Ostrom, 79 Ill. 71.

New Jersey.— Cleveland *v.* O'Neil, 29 N. J. Eq. 457.

Virginia.— Shirley *v.* Long, 6 Rand. 764.

United States.— McCay *v.* Lamar, 12 Fed. 367, 20 Blatchf. 474; Beard *v.* Bowler, 2 Fed. Cas. No. 1,180, 2 Bond 13.

See 19 Cent. Dig. tit. "Equity," § 652.

Allegations of title.— Meadors *v.* Askew, 56 Ala. 584; Williams *v.* Hatch, 38 Ala. 338; McKinley *v.* Irvine, 13 Ala. 681. Where the bill sets up title under a will, title by codicils thereto, not mentioned in the bill, cannot be shown. Langdon *v.* Goddard, 14 Fed. Cas. No. 8,060, 2 Story 267. But where the relief asked for is justified either on the strength of the title alleged or on the title proved, a variance in this respect is immaterial. Webster *v.* Peet, 97 Mich. 326, 56 N. W. 558; Smith *v.* Portland, 30 Fed. 734.

Allegation of assignment.— Proof of a direct assignment of a patent from a patentee to plaintiff does not constitute a variance, although the bill alleges an assignment from the patentee through two intermediate parties to plaintiff. American Cable R. Co. *v.* New York, 68 Fed. 227. But a bill asserting a right under a bill of sale by defendant to A, and by A assigned to plaintiff, was held not to be sustained by proof of such bill made by defendant to B, by B assigned to C, and by C assigned to plaintiff. Roberts *v.* Jones, 2 Litt. (Ky.) 88.

Allegation of contract.— Williams *v.* Barnes, 28 Ala. 613; Sims *v.* McEwens, 27 Ala. 184; Adams *v.* Garrett, 22 Ala. 602; Duren *v.* Parsons, 5 Port. (Ala.) 345; Kinsey *v.* Grimes, 7 Blackf. (Ind.) 290; Tilton *v.* Tilton, 9 N. H. 385. The rule is the same in equity as at law, that a usurious contract relied on as a defense must be proved as stated in the answer. Mosier *v.* Norton, 83 Ill. 519; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573.

Allegations of fraud.— On a bill for relief on the ground of fraud, it is not necessary to prove the facts precisely as laid, but it is sufficient to prove them in substance. Sacket *v.* Hillhouse, 5 Day (Conn.) 551; Merrill *v.* Allen, 38 Mich. 487. But a bill charging actual fraud is not maintained by evidence of constructive fraud. Eyre *v.* Potter, 15 How. (U. S.) 42, 14 L. ed. 592. And the mere proof of actual fraud is not enough if it was not committed in the manner alleged in the bill. Rakestraw *v.* Brogdon, 56 Ga. 549; Henry *v.* Suttle, 42 Fed. 91. And see, generally, FRAUD.

Allegation of trust.— Proof of a deed of trust will not sustain an allegation of a parol trust. Parker *v.* Beavers, 19 Tex. 406. Nor will proof of an intention to create a trust, never executed, sustain an allegation of an express trust. Lanterman *v.* Abernathy, 47 Ill. 437. And see, generally, TRUSTS.

Allegations of time.— Saum *v.* Stingley, 3 Iowa 514; Bacon *v.* Conn, Sm. & M. Ch. (Miss.) 348; Zane *v.* Zane, 6 Munf. (Va.) 406.

Allegation of purchase-price.— Billingsley *v.* Billingsley, 37 Ala. 425.

Allegation of value.— Allegation of the worth of property in a bill to set aside a deed as having been fraudulently obtained need not necessarily be proved as laid. Lloyd *v.* Higbee, 25 Ill. 603.

XIX. HEARING.

A. Definition. The hearing in equity is equivalent to the trial of an action at law,[6] and has been defined as the examination of the facts in issue.[7]

B. Setting Down For Hearing. Under the chancery practice it was the duty of plaintiff primarily to set the cause down for hearing at the term following that in which publication was passed.[8] The rule still is that plaintiff alone may set the cause down on bill and answer,[9] but it seems that either party may set the cause down on bill, answer, replication, and proof.[10] The notice of the day for hearing was served on the adverse party through a writ called a subpœna to hear judgment.[11] The setting down for hearing is a ministerial act to be performed by the clerk or master and not by the chancellor.[12] Strict regularity was formerly required in the setting down of a cause for hearing, as the proceedings in that regard might be reviewed after decree;[13] but now the formal setting down for hearing may be waived.[14] The method of bringing a cause on for hearing is a matter of practice now so far regulated by local rules as to forbid very general statements.[15]

Matters of description.— Gilmer *v.* Wallace, 75 Ala. 220; Lee *v.* Patten, 34 Fla. 149, 15 So. 775; Dennis *v.* Ray, 9 Ga. 449; Sears *v.* Barnum, Clarke (N. Y.) 139. A bill in equity seeking relief for an obstruction of a way to plaintiff's mill and alleging it to be a public way is not sustained by proof of the existence of a private way. Gurney *v.* Ford, 2 Allen (Mass.) 576.

Mistake as to nature of transaction or instrument.— Jeffery *v.* Robbins, 167 Ill. 375, 47 N. E. 735 [*affirming* 62 Ill. App. 190]. If the bill proceeds on the theory that the transaction or instrument involved in the suit is a mortgage, and the evidence shows a conditional sale, there is a fatal variance. Swift *v.* Swift, 36 Ala. 147; McBrayer *v.* Roberts, 17 N. C. 75. The variance is likewise fatal if the evidence shows a vendor's lien instead of a mortgage. Baker *v.* Updike, 155 Ill. 54, 39 N. E. 587.

Variance between proof and exhibit to plaintiff's bill is not fatal if independently of the exhibit the suit may be maintained, there being no variance between the bill itself and the proof. Andrews *v.* Ford, 106 Ala. 173, 17 So. 446.

6. Bouvier L. Dict.

7. Vannevar *v.* Bryant, 21 Wall. (U. S.) 41, 22 L. ed. 476. See, generally, HEARING. This definition holds good not only as applied to the ordinary hearing on bill, answer, replication, and proof, but also to the hearing on bill and answer, under the theory that plaintiff must always prove his case and that a hearing on bill and answer accepts the answer as containing the sole and sufficient evidence for that purpose. See *supra*, XV, A, 1; XVII, B, 2, a. Where the answer is not under oath, it is merely a pleading, and in the absence of a replication the cause should be set for hearing on bill, answer, and proof. Chambers *v.* Rowe, 36 Ill. 171. The laying before the court of demurrers (see *supra*, VIII, C, 6), pleas, for the determination of their sufficiency (see *supra*, VIII, D, 7, a), and exceptions (see *supra*, VIII, E, 9, c, (v)) is also frequently called a hearing, although such proceedings involve no determination of fact.

8. 2 Daniell Ch. Pr. 603. As to what constitutes publication, see *supra*, XVI, B, 1.

A plea of former suit pending.— On the report of a master, finding the truth of a plea of a former suit pending (see *supra*, VIII, D, 7, c), the burden is on defendant to bring the suit to hearing on the plea and master's report. Hart *v.* Philips, 9 Paige (N. Y.) 293.

9. Alfred Richards Brick Co. *v.* Trott, 16 App. Cas. (D. C.) 293; Somerville *v.* Marbury, 7 Gill & J. (Md.) 275.

U. S. Eq. Rule 66 provides that if plaintiff omits to file his replication within the prescribed period defendant shall be entitled to an order as of course for a dismissal of the suit. If plaintiff allows the time for taking proofs to expire without taking any and thereafter unsuccessfully moves to strike out portions of the answer, there is no error in setting the cause down for hearing on bill and answer. McGorray *v.* O'Connor, 87 Fed. 586, 31 C. C. A. 114.

Under Tenn. Acts (1842), c. 92, § 2, plaintiff may be ruled to reply and the cause set down for hearing if he fails to do so. White *v.* Cahal, 11 Humphr. 253.

10. Somerville *v.* Marbury, 7 Gill & J. (Md.) 275.

11. 2 Daniell Ch. Pr. 607.

12. Lanum *v.* Steel, 11 Humphr. (Tenn.) 280.

13. Page *v.* Page, Moseley 42, 25 Eng. Reprint 259, 2 P. Wms. 489, 24 Eng. Reprint 828, 2 Str. 820.

14. Ferguson *v.* Collins, 8 Ark. 241; Hill *v.* Green, 4 Hen. & M. (Va.) 448; Alford *v.* Moore, 15 W. Va. 597. Where a cause was heard and decided on a question of jurisdiction, it was held that the decree could not be attacked because the cause had not been set for hearing. Lange *v.* Jones, 5 Leigh (Va.) 192.

15. **Necessity of setting down for hearing.** — Where a decree reserves liberty to apply for further direction on the happening of

C. Time of Hearing — 1. In General. The time when a cause may be brought on for hearing depends also on divers practice regulations, but it must be after issue is complete.[16] As a general rule the cause cannot be set for hearing as to one defendant unless it is in condition for hearing as to all,[17] nor can it be set for hearing as to a part only of the case.[18] Ordinarily the cause must stand until after the expiration of the time allotted for taking proof.[19] Plaintiff may,

a certain event, the court will not proceed by petition on the happening of such event, but the cause must be regularly set down for hearing. Butler *v.* Halsey, 4 Sandf. Ch. (N. Y.) 354. See also Ruckman *v.* Decker, 28 N. J. Eq. 5. A cause need not be set down for hearing in order to take a decree *pro confesso* for want of appearance. Warner *v.* Juif, 38 Mich. 662. But see Halderman *v.* Halderman, 11 Fed. Cas. No. 5,908, Hempst. 407; Pendleton *v.* Evans, 19 Fed. Cas. No. 10,920, 4 Wash. 336. The court may consider a demurrer to an answer as an application to set down the cause upon bill and answer. Grether *v.* Wright, 75 Fed. 742, 23 C. C. A. 498. But see Walker *v.* Jack, 88 Fed. 576, 31 C. C. A. 462 [*reversing* 79 Fed. 138]. Whether a general rule setting a cause for hearing can be considered as setting it for hearing as to a special defendant alone *quære*. Myers *v.* Baker, Hard. (Ky.) 544. The English practice of setting down for hearing and issuing a subpœna to hear judgment has never been enforced in Alabama. Hodges *v.* Wise, 16 Ala. 509.

Notice.— Special notice is frequently required of the hearing of the cause. For the construction of local rules of this character see the following cases:

Florida.— Broome *v.* Alston, 8 Fla. 307.

Kentucky.— Yocam *v.* Chapline, 2 Bibb 156.

Maine.— Shepley *v.* Atlantic, etc., R. Co., 57 Me. 22.

Massachusetts.— Charles River Bridge *v.* Warren Bridge, 7 Pick. 344.

Michigan.— People *v.* Judge Detroit Super. Ct., 29 Mich. 228; Kellogg *v.* Putnam, 11 Mich. 344.

Wisconsin.—Hungerford *v.* Cushing, 2 Wis. 411.

See 19 Cent. Dig. tit. "Equity," § 784.

A decree rendered on insufficient notice will be annulled where a rule requires a hearing and it is not complied with. Jenny *v.* O'Flynn, 5 Mich. 215.

16. *Alabama.*— *Ex p.* Hewitt, 40 Ala. 300.

Georgia.— Tedder *v.* Stiles, 16 Ga. 1.

Illinois.— Blair *v.* Reading, 99 Ill. 600.

Indiana.— Ryhn *v.* Cochran, 7 Blackf. 417.

Virginia.— Clarke *v.* Tinsley, 4 Rand. 250.

See 19 Cent. Dig. tit. "Equity," §§ 776, 779.

Where an answer has been lost and leave given to file a new answer within a time which has not yet expired it is irregular to set down a cause for hearing. Byrd *v.* Sabin, 8 Ark. 279.

While a suit is awaiting a master's report it cannot be put on the calendar for hearing, although the report would be in before a hearing could be had. Mix *v.* Mackie, 2 Edw. (N. Y.) 426.

On sustaining exceptions to an answer, if defendant declines to amend he cannot object to the hearing of the cause on the bill and that portion of the answer not excepted to. Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 299.

17. McClain *v.* French, 2 T. B. Mon. (Ky.) 147; Walton *v.* Fretwell, 3 A. K. Marsh. (Ky.) 519; Graham *v.* Elmore, Harr. (Mich.) 265; Hunt *v.* Walker, 40 Miss. 590. If the situation is such that plaintiff might at his election have omitted some of the parties, the cause may be heard as to others before it is ready as to those. Evans *v.* Wait, 5 J. J. Marsh. (Ky.) 110. A cause reported on by auditors before all interested have been brought in may proceed and the new parties be permitted to adduce their testimony at the trial. McLaren *v.* Clerk, 62 Ga. 106. A defendant who agrees that the bill shall be brought in in order that plaintiff may obtain the decree sought cannot object to prematureness, either in filing the bill or in hearing. Cobb *v.* Duke, 36 Miss. 60, 72 Am. Dec. 157.

Where some defendants demur and some answer, the cause cannot be heard on bill and answers until the demurrers are disposed of and answers put in or decree *pro confesso* taken against the demurrants. Hough *v.* Cress, 57 N. C. 295.

Under a statute requiring suits to be brought to trial within a certain time after the filing of the bill, the bill is not considered as filed until all necessary parties have been served with process. McDougald *v.* Dougherty, 14 Ga. 674; Hoxey *v.* Carey, 12 Ga. 534.

18. McLin *v.* McNamara, 21 N. C. 407; Hume *v.* Knoxville Commercial Bank, 1 Lea (Tenn.) 220; Bull *v.* Bell, 4 Wis. 54.

Where demurrer to part of a bill is sustained and plaintiff elects to abide by his bill, defendant is entitled to set down the cause on the questions raised by his answer. Brewster *v.* Cahill, 81 Ill. App. 626.

19. See *supra*, XVI, B. It is error to hear a cause at the term at which the issue is made up. Tedder *v.* Stiles, 16 Ga. 1; Beveridge *v.* Mulford, 62 Ill. 177; Baltzell *v.* Hackley, 4 Litt. (Ky.) 129; Pursley *v.* Davidge, 3 A. K. Marsh. (Ky.) 237. A cause cannot be heard until the second term after replication. Trammell *v.* Ford, 62 N. C. 339; Holmes *v.* Williams, 11 N. C. 371. But see Royster *v.* Chandler, 41 N. C. 291. A cause cannot be heard until the commissions have been returned and remained on file an entire

however, set it for hearing immediately on the filing of the answer, but he thereby consents that the answer may be taken as true.[20] While ordinarily causes should be heard in the order in which they are set for hearing, a considerable discretion is usually reserved to the court in that regard.[21] Irregularities in the setting down for hearing or time of hearing are waived by the consent of the party affected,[22] or by proceeding without objection.[23]

2. Postponements and Continuances. The rules as to postponements of the hearing and continuances of the cause do not vary greatly from those prevailing at law.[24] Applications therefor are addressed to the discretion of the court,[25] and terms may be imposed.[26] Any postponement must be reasonable in point of time,[27] and based on reasonable grounds,[28] such as the necessity of bringing in new parties,[29]

term. Richardson *v.* Stillinger, 12 Gill & J. (Md.) 477. A suit should be set for hearing at one term and heard at the next. Reed *v.* Rawlings, 1 Mo. 753. A decree will be reversed if the cause was set for hearing and a decree entered before the expiration of the regular time. Dalby *v.* Price, 2 Wash. (Va.) 191. But a decree will not be reversed because of a premature hearing had at the instance of defendant, where plaintiff was given all the relief which he could obtain under his bill. Lowe *v.* Lowe, 13 Bush (Ky.) 688.

20. Gruell *v.* Smalley, 1 Duv. (Ky.) 358; Reynolds *v.* Nelson, 41 Miss. 83; Everett *v.* Winn, Sm. & M. Ch. (Miss.) 67. Where a replication is filed and the cause is set for hearing within sixty days it is a waiver of the replication. Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 38 Atl. 338. Where defendant set down a cause for hearing after replication filed, on bill and answer, it cannot be assumed that it was his intention to abandon his answer, and the decree will be reversed on the ground that the case was improvidently set down. Alfred Richards Brick Co. *v.* Trott, 16 App. Cas. (D. C.) 293.

21. Clark *v.* Marfield, 77 Ill. 258; Broaddus *v.* Broaddus, 3 Dana (Ky.) 536; Black *v.* Kelly, 7 Rich. Eq. (S. C.) 248. The court may fix a time for hearing ancillary proceedings. Barker *v.* Wayne Cir. Judge, 117 Mich. 325, 75 N. W. 886.

22. Clark *v.* Carnall, 18 Ark. 209; Tunstall *v.* McClelland, Hard. (Ky.) 519; Robinson *v.* Day, 5 Gratt. (Va.) 55.

23. American Ice Co. *v.* Eastern Trust, etc., Co., 17 App. Cas. (D. C.) 422; Anderson *v.* Moore, 145 Ill. 61, 33 N. E. 848; Durham *v.* Mulkey, 59 Ill. 91; Richardson *v.* Linney, 7 B. Mon. (Ky.) 571; Jones *v.* Chappell, 5 T. B. Mon. (Ky.) 422; Kuhn *v.* Mack, 4 W. Va. 186. Where a party submits his cause without objection to an irregular decree *pro confesso* against another defendant, he cannot thereafter be heard to complain. Mobley *v.* Leophart, 51 Ala. 587. If testimony is taken on a plea after it has been set down for argument, and the case is brought on for final hearing, the decree will not be reversed unless there is error on the merits. Stackpole *v.* Hancock, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814.

24. See, generally, Continuances in Civil Cases, 9 Cyc. 75. Continuances are as at common law. Hoxey *v.* Carey, 12 Ga. 534, construction of equity rule 10.

Continuance after dismissal is void. Elston *v.* Drake, 5 Blackf. (Ind.) 540.

25. Dudley *v.* Witter, 46 Ala. 664; Hahn *v.* Huber, 83 Ill. 243; Reece *v.* Darby, 5 Ill. 159.

Where the parties consent greater liberality will be allowed. Berger *v.* Harrison, 1 Overt. (Tenn.) 483.

In Georgia the bringing on of cases within the third term from the filing of the bill is imperative, but a cause may be continued one term more for very special reasons. Hoxey *v.* Carey, 12 Ga. 534.

26. Rhea *v.* Tucker, 56 Ala. 450; Dudley *v.* Witter, 51 Ala. 456.

Acceptance of the continuance is an acceptance of the terms imposed. Rhea *v.* Tucker, 56 Ala. 450.

27. Campbell *v.* McCahan, 41 Ill. 45.

28. Application must be made and cause shown. Aiken *v.* Connelley, (Va. 1896) 24 S. E. 909.

Absence of one of several counsel is not a sufficient ground. U. S. Bank *v.* Carroll, 4 B. Mon. (Ky.) 40. See also Continuances in Civil Cases, 9 Cyc. 103.

A pending action at law for a different object is not ground for continuance. Carlisle *v.* Cooper, 18 N. J. Eq. 241.

29. *Indiana.*—Park *v.* Ballentine, 6 Blackf. 223; Lindley *v.* Cravens, 2 Blackf. 426.

New Jersey.— McLaughlin *v.* Van Kueren, 21 N. J. Eq. 379.

New York.— O'Brien *v.* Heeney, 2 Edw. 242; Hutchinson *v.* Reed, Hoffm. 316.

North Carolina.— Gordon *v.* Holland, 38 N. C. 362.

Vermont.— Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193.

See 19 Cent. Dig. tit. "Equity," § 786.

Construction of statute.— Where the statute (Code, § 3275) forbade delay in consequence of permitting a defendant to answer, and the answer disclosed that necessary parties were absent, it was held that the want of parties and not the filing of the answer demanded delay, and that a continuance was proper. Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91.

Strong doubt as to plaintiff's right to relief in case new parties are brought in justifies refusal to postpone for that purpose. Mitchell

or substantial amendment of the pleadings.[30] Continuances are of course proper to avoid the consequences of surprise.[31] Even after the hearing has proceeded postponements may be granted on like grounds.[32] Where a defendant comes of age after his guardian *ad litem* has answered, and it appears that he might make a better answer, the cause will be postponed,[33] and on a bill against adults and minors to confirm a title, the adults being willing to confirm the contract relied on, the case was held up until the minors came of age, in order to give them their election.[34]

3. Hearing Causes Together. It is within the discretion of the chancellor[35] to order that two suits be heard together where the parties are the same and the chief matter in controversy is the same in both,[36] or where the whole matter might originally have been embraced in one bill.[37] So causes may be heard together where they are so related that such a course is necessary for the protection of all the parties.[38] The particular rules governing such proceedings are elsewhere treated.[39] Where it is impracticable to hear together causes relating to the same subject-matter, the chancellor may hear first that one involving the principal questions regardless of its order on the docket.[40]

4. Hearing on Bill and Cross Bill. It is the duty of a party filing a cross bill to bring it on for hearing at the same time that the original is heard,[41] and the original cause and cross cause are heard together usually[42] but not necessarily.[43]

v. Lenox, 1 Edw. (N. Y.) 428; Lord *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 46.

Where no testimony is needed time will not be allowed to take testimony, on the bringing in of the new party. Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287.

30. Lewis *v.* Lanphere, 79 Ill. 187; Davis *v.* Davis, 62 Miss. 818. See also Continuances in Civil Cases, 9 Cyc. 122, 123.

A trivial amendment of a bill, requiring no new pleadings by defendant, is not ground for a continuance. Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801.

31. For example the suppression of depositions (Bowen *v.* Bettis, (Tenn. Ch. App. 1898) 48 S. W. 292), or reliance on negotiations for a settlement (Royalty *v.* Deposit Bldg., etc., Assoc., 40 S. W. 455, 19 Ky. L. Rep. 282. But see Brooks *v.* Robinson, 54 Miss. 272).

32. New parties.— Rugely *v.* Robinson, 10 Ala. 702; Russell *v.* Craddock, 4 T. B. Mon. (Ky.) 383.

Necessity of new proof disclosed at the hearing. Latting *v.* Hall, 9 Paige (N. Y.) 383; Desplaces *v.* Goris, 5 Paige (N. Y.) 252; Cogswell *v.* Burtis, Hoffm. (N. Y.) 198. An excuse must be shown for not having made the proof within time. Robbins *v.* Hanbury, 37 Fla. 468, 19 So. 886. The showing must disclose what proof it is expected to make. Slater *v.* Breese, 36 Mich. 77. Where there is reason to suspect the evidence and the case shows that there is better proof available, the cause may be continued even after hearing. Washburn *v.* Holmes, Wright (Ohio) 67.

33. Mason *v.* Debow, 3 N. C. 178.

34. Kemper *v.* Hughes, 7 B. Mon. (Ky.) 255.

35. Beach *v.* Woodyard, 5 W. Va. 231.

36. Evans *v.* Evans, 23 N. J. Eq. 180, where the testimony taken in either suit was ordered to be used in the other on the hearing.

37. Taylor *v.* Watkins, 7 J. J. Marsh. (Ky.) 363; Beach *v.* Woodyard, 5 W. Va. 231.

Consolidation by agreement.—Where a suit in equity was brought by a ward to set aside a settlement with his guardian, objections to the guardian's report filed by another ward were consolidated with the first suit by agreement. Van Rees *v.* Witzenburg, 112 Iowa 30, 83 N. W. 787.

38. Preston *v.* National Exch. Bank, 97 Va. 222, 33 S. E. 546.

39. See, generally, Consolidation and Severance of Actions, 8 Cyc. 589.

40. *Ex p.* Brown, 58 Ala. 536.

41. Reed *v.* Kemp, 16 Ill. 445.

42. Whyte *v.* Arthur, 17 N. J. Eq. 521; Huntington *v.* Moore, 1 N. M. 489; Randolph's Appeal, 66 Pa. St. 178.

Evidence taken on a proper cross bill may be read in the original suit. Draper *v.* Gordon, 4 Sandf. Ch. (N. Y.) 210.

Cross bill will be regarded as abandoned where the record shows that the parties voluntarily went to trial without any action on it. Hungate *v.* Reynolds, 72 Ill. 425.

43. Coleman *v.* Moore, 3 Litt. (Ky.) 355; Sanders *v.* Sanders, 3 Bibb (Ky.) 286.

Where parties fail to prepare the cross suit they cannot complain of a prior trial of the original. Stemmons *v.* King, 8 B. Mon. (Ky.) 559; Taylor *v.* Lyon, 2 Dana (Ky.) 276.

A cross bill, only remotely connected with the original and susceptible of determination without affecting the original, may be heard before the original is ready for hearing. Carroll *v.* Taylor, 102 Tenn. 451, 52 S. W. 139.

Where a cross bill is demurrable and a demurrer is on file, it is not error to hear the original without regard to the cross bill. Crabtree *v.* Levings, 53 Ill. 526.

When the cross plaintiff desires to stay proceedings on the original he must apply on notice for such an order,[44] and cause must be shown to justify the delay of the original.[45] Where the cross bill seeks discovery with relation to the original, the latter cannot be heard until the cross bill is answered.[46] The cross defendant is entitled to time to answer a cross bill attacking his right, and there cannot be a hearing on the original and cross bill immediately on the filing of the latter.[47] A defendant will not be permitted to delay the hearing of the original by unreasonably deferring the filing of a cross bill.[48]

D. Conduct of Hearing — 1. The Regular Order of Hearing. The order of proceedings on a hearing rests within the control of the court,[49] but the ordinary course in chancery was for junior counsel for plaintiff briefly to open the pleadings on each side, after which the leading counsel stated the case and points in issue. Then there was read on behalf of plaintiff so much of the answers and depositions as he saw fit to offer, and then other counsel argued on his behalf. The same course was then taken on behalf of defendant and the hearing was closed by plaintiff's leading counsel.[50]

2. Offering Evidence — a. In General. Any party may offer evidence on an issue in which he is interested, although no affirmative decree could be made affecting him.[51] All evidence to be available must be offered at the hearing, and the court cannot subsequently inject evidence into the record which was not so introduced.[52] With the exception of proof of exhibits,[53] the evidence must be confined to that taken in advance of the hearing and reduced to writing.[54] Evidence taken on a preliminary matter, such as an application for an injunction, cannot be used on final hearing except by order of court.[55]

b. Proof of Exhibits at Hearing. It was the practice in chancery to permit proof *viva voce* at the hearing of the mere execution of an exhibit, not impeached by the pleadings.[56] No proof calling for cross-examination or more than the proof of handwriting could be received.[57] The same practice somewhat extended perhaps is recognized in the United States.[58] Where such proof is required an order

44. Williams *v.* Carle, 10 N. J. Eq. 543.

45. Wiley *v.* Platter, 17 Ill. 538. The order is discretionary. McConnico *v.* Moseley, 4 Call (Va.) 360.

46. Young *v.* Pott, 30 Fed. Cas. No. 18,172, 4 Wash. 521.

Time must be given after the answer is in for the cross plaintiff to controvert it. McConnell *v.* Donnell, Ky. Dec. 314.

47. Norton *v.* Joy, 6 Ill. App. 406.

48. *Illinois.*— Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; Jones *v.* Hillis, 91 Ill. App. 403.

New Jersey.— Williams *v.* Carle, 10 N. J. Eq. 543.

New York.— Sterry *v.* Arden, 1 Johns. Ch. 62.

Tennessee.— Clark *v.* Carlton, 4 Lea 452.

Virginia.— McConnico *v.* Moseley, 4 Call 360.

See 19 Cent. Dig. tit. "Equity," §§ 785, 786. See also *supra*, X, B, J.

49. Evidence in chief may be introduced without error after defendant has rested. Jones *v.* Galbraith, (Tenn. Ch. App. 1900) 59 S. W. 350.

50. 2 Daniell Ch. Pr. 623, 626; Newland Pr. 153.

51. Carey *v.* Giles, 10 Ga. 9.

52. Lake Shore, etc., R. Co. *v.* McMillan, 84 Ill. 208.

53. See *infra*, XIX, D, 2, b.

54. Holdridge *v.* Bailey, 5 Ill. 124; Potter *v.* Wilson, 19 Fed. Cas. No. 11,342. See *supra*, XVI, A.

Even U. S. Eq. Rule 67 (see *supra*, p. 376, note 5) has been confined in its practical application to the proof of documents or other purely formal matters. Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691. The early practice rigidly excluded all other *viva voce* testimony. De Butts *v.* Bacon, 7 Fed. Cas. No. 3,717, 1 Cranch C. C. 569.

55. Warner *v.* Warner, 31 N. J. Eq. 225; Atty.-Gen. *v.* Steward, 21 N. J. Eq. 340.

Affidavits in support of a bill and not taken on notice cannot be used on the hearing except by consent, express or implied. Braxton *v.* Lee, 4 Hen. & M. (Va.) 376.

56. Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316; Lake *v.* Skinner, 1 Jac. & W. 9, 37 Eng. Reprint 278; Barfield *v.* Kelly, 4 Russ. 355, 4 Eng. Ch. 355, 38 Eng. Reprint 839.

57. Lake *v.* Skinner, 1 Jac. & W. 9, 37 Eng. Reprint 278.

58. *Alabama.*— Pierce *v.* Prude, 3 Ala. 65; Levert *v.* Redwood, 9 Port. 79.

Arkansas.— Nick *v.* Rector, 4 Ark. 251.

Indiana.— Foote *v.* Lefavour, 6 Ind. 473; Gafney *v.* Reeves, 6 Ind. 71; Morton *v.* White, 5 Ind. 338.

must first be obtained for that purpose[59] and notice of the application must be given,[60] as the order does not go of course, and a satisfactory excuse must be given for having failed to make the proof in the usual way.[61] Documents set out or distinctly referred to in the pleadings and admitted,[62] or of such a character that they prove themselves,[63] may be read at the hearing without order or further proof; but documents, although they prove themselves, if they be not set out or distinctly referred to in the pleadings, cannot be so read without giving notice of an intention so to do.[64]

3. ARGUMENTS. In general plaintiff has the right to open and close the argument;[65] but it seems that where the cause is heard on bill, answer, and replication and defendant introduces no evidence he has the right to close.[66] On a hearing together of bill and cross bill, each party having material allegations to sustain, plaintiff in the original bill is entitled to open and close.[67] In other cases out of the ordinary course the right has been variously judged.[68] When the arguments have been once concluded no further argument can be heard unless the court so requests.[69] The court is not bound by the theory of counsel,[70] but will look at the case made and notice points not urged.[71] The court may in its discretion set aside a submission before the decision of the case,[72] but in that case a decree can-

Kentucky.— Hughes *v.* Phelps, 3 Bibb 198.

United States.— Wood *v.* Mann, 30 Fed. Cas. No. 17,953, 2 Sumn. 316.

See 19 Cent. Dig. tit. "Equity," §§ 822, 823.

Record.— The proof does not necessarily become a part of the record. Foote *v.* Lefavour, 6 Ind. 473. The record should show that such proof was made. Ward *v.* Kelly, Smith (Ind.) 74.

Evidence to repel authenticity of exhibit cannot be taken on the hearing. Potorf *v.* Fishback, 2 A. K. Marsh. (Ky.) 171.

59. Bachelor *v.* Nelson, Walk. (Mich.) 449; Pardee *v.* De Cala, 7 Paige (N. Y.) 132; Emerson *v.* Berkley, 4 Hen. & M. (Va.) 441; Chandler *v.* Neale, 2 Hen. & M. (Va.) 124; 2 Daniell Ch. Pr. 444. Where a deposition was first objected to on the hearing because of incompetency of the witness, Chancellor Kent permitted *viva voce* proof of the execution of a release, establishing the witness' competency, without notice or previous order. Barrow *v.* Rhinelander, 1 Johns. Ch. (N. Y.) 550.

Under the former Kentucky practice it seems that notice was alone sufficient, without an order. Cosby *v.* Wickliffe, 7 B. Mon. (Ky.) 120.

Objection waived.— Where immediately before the cause was set down defendant filed exhibits and gave notice that he would prove their execution at the hearing, and at the hearing examined witnesses without objection, it was held too late to complain. Cheesbro *v.* Campbell, 8 Blackf. (Ind.) 401.

60. Bachelor *v.* Nelson, Walk. (Mich.) 449; Consequa *v.* Fanning, 2 Johns. Ch. (N. Y.) 481.

61. Bachelor *v.* Nelson, Walk. (Mich.) 449; Consequa *v.* Fanning, 2 Johns. Ch. (N. Y.) 481.

62. Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182.

63. Bachelor *v.* Nelson, Walk. (Mich.) 449; Pardee *v.* De Cala, 7 Paige (N. Y.) 132.

64. Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582; Kellogg *v.* Wood, 4 Paige (N. Y.) 578.

Execution of instruments not pleaded cannot be proved orally at the hearing. Bennett *v.* Welch, 15 Ind. 332; Crist *v.* Brashiers, 3 A. K. Marsh. (Ky.) 170.

65. Dumas *v.* Pepper, 43 Ga. 361; Guerry *v.* Perryman, 6 Ga. 119; Mettert *v.* Hagan, 18 Gratt. (Va.) 231.

On a plea the party holding the affirmative has the right. Vancleave *v.* Beam, 2 Dana (Ky.) 155.

66. Fall *v.* Simmons, 6 Ga. 265.

67. Murphy *v.* Stults, 1 N. J. Eq. 560.

68. Where a cause was reserved on a petitioner's demurrer to the answer and respondent's demurrer to petitioner's replication, it was held that counsel for petitioner should go forward. Stedman *v.* American Mut. L. Ins. Co., 45 Conn. 377. Where a defendant demurred to a bill and pleaded the statute of limitations, it was held that he should go forward. Payne *v.* Hathaway, 3 Vt. 212.

On a bill of interpleader, one claimant of a bond in controversy claiming as assignee and the others as administrators of the deceased obligee, the one claiming as assignee was entitled to open and close. Rowe *v.* Hoagland, 7 N. J. Eq. 131.

Plaintiff in a bill in the nature of interpleader, to obtain directions as to the distribution of a fund, may not be heard in argument. Houghton *v.* Kendall, 7 Allen (Mass.) 72.

69. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

Leave to reargue will not be regranted where there is a remedy by appeal, although some controlling principle of law may have been overlooked. Bolles *v.* Duff, 56 Barb. (N. Y.) 567.

70. Geney *v.* Maynard, 44 Mich. 578, 7 N. W. 173.

71. Geney *v.* Maynard, 44 Mich. 578, 7 N. W. 173; Lyon *v.* Tallmadge, 14 Johns. (N. Y.) 501.

72. Magruder *v.* Campbell, 40 Ala. 611.

not be rendered without a resubmission.[73] A cause may be submitted without argument.[74]

XX. SUBMISSION OF ISSUES TO JURY, AND DIRECTION OF ACTION AT LAW.

A. Discretionary Power of Court — 1. In General. In the absence of statutory modification a jury is no part of the chancery system.[75] In an equity case the court has power to decide all the issues, whether they are issues of law or issues of fact,[76] and neither party is entitled as of right to have an issue of fact tried by a jury,[77] unless he is given that right by statute.[78] It is equally true, however, that the court has power to submit questions of fact to a jury, but whether it shall do so or not rests in its discretion.[79] The exercise of this discre-

73. Aulick *v.* Reed, 104 Ky. 465, 47 S. W. 331, 20 Ky. L. Rep. 653.

74. Ridgely *v.* Carey, 4 Harr. & M. (Md.) 167.

An agreement to submit on the proceedings, where all the averments of the bill stand admitted, presents for decision the legal sufficiency of defendant's pleading to bar plaintiff's claim, without regard to whether such pleading is properly a plea or answer. Tiernan *v.* Poor, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225.

75. See cases cited under the two following notes.

In Georgia a jury is a part of the chancery system. In equity cases the facts are submitted to a special jury, who have the exclusive right to pass upon them, and the court is confined to the determination of questions of law. Brown *v.* Burke, 22 Ga. 547; Mounce *v.* Byars, 11 Ga. 180; Williams *v.* McIntyre, 8 Ga. 34; Hargraves *v.* Lewis, 3 Ga. 162. But see McGowan *v.* Jones, R. M. Charlt. 184.

In North Carolina the court, in Marshall *v.* Marshall, 4 N. C. 318, said: "The Act of Assembly establishing the Court of Equity has provided, that a jury shall form part of the court, and that all matters of fact shall be tried by them." See also Ely *v.* Early, 94 N. C. 1. But see Smith *v.* Bowen, 3 N. C. 483.

76. Detroit Nat. Bank *v.* Blodgett, 115 Mich. 160, 73 N. W. 120, 885 [*following* and *approving* Brown *v.* Kalamazoo Cir. Judge, 75 Mich. 274, 42 N. W. 827, 13 Am. St. Rep. 438, 5 L. R. A. 226, which held among other things that Pub. Acts (1887), No. 267, regulating the practice in chancery courts, is unconstitutional in so far as it assumes to provide a final decision of questions of fact in chancery suits by the verdict of a jury, and the rejection of testimony by the presiding judge as in actions at law]; Nelson *v.* Betts, 21 Mo. App. 219; Field *v.* Holland, 6 Cranch (U. S.) 8, 3 L. ed. 136. See also *In re* Toledo, 73 Fed. 220, 224.

77. *Arizona.*— Cole *v.* Bean, 1 Ariz. 377, 25 Pac. 538.

Florida.— Smith *v.* Croom, 7 Fla. 180.

Indiana.— McBride *v.* Stradley, 103 Ind. 465, 2 N. E. 358.

Iowa.— See State *v.* Orwig, 25 Iowa 280.

Kentucky.— Cornett *v.* Combs, 53 S. W. 32, 21 Ky. L. Rep. 837; White *v.* Boreing, 45 S. W. 242, 20 Ky. L. Rep. 210; Bailey *v.* Nichols, 8 Ky. L. Rep. 64.

Missouri.— Weil *v.* Kume, 49 Mo. 158.

Nebraska.— Sharmer *v.* Johnson, 43 Nebr. 509, 61 N. W. 727; Harral *v.* Gray, 10 Nebr. 186, 4 N. W. 1040.

New York.— Knickerbocker L. Ins. Co. *v.* Nelson, 8 Hun 21; McCarty *v.* Edwards, 24 How. Pr. 236.

Pennsylvania.— Frank's Appeal, 59 Pa. St. 190; Genet *v.* Delaware, etc., Canal Co., 6 Luz. Leg. Reg. 73.

South Carolina.— Lucken *v.* Wichman, 5 S. C. 411.

Virginia.— Pairo *v.* Bethell, 75 W. Va. 825. See 19 Cent. Dig. tit. "Equity," § 788.

Under the New York code of procedure it was held that in an action of an equitable nature a party was not entitled as of right to a trial of issues by a jury, on the ground that the case was one in which courts of equity were formerly accustomed to award issues. Moffat *v.* Moffat, 10 Bosw. (N. Y.) 468, 17 Abb. Pr. (N. Y.) 4.

78. For cases involving a consideration of constitutional provisions and statutes giving the right to a trial by jury in some or all chancery cases or in particular issues in chancery cases see, generally, JURIES.

79. *Alabama.*— Anonymous, 35 Ala. 226.

Arizona.— Henry *v.* Mayer, (1898) 53 Pac. 590.

Colorado.—Abbott *v.* Monti, 3 Colo. 561.

District of Columbia.— Webb *v.* King, 21 App. Cas. 141.

Illinois.— Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692; Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; Tobiason *v.* Wurts, 107 Ill. App. 613.

Indiana.— Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487; Lapreese *v.* Falls, 7 Ind. 692; Ray *v.* Doughty, 4 Blackf. 115.

Iowa.— White *v.* Hampton, 10 Iowa 238. And see Howe Mach. Co. *v.* Woolly, 50 Iowa 549. But for equity cases under Code (1873), § 2740, see Frank *v.* Hollands, 81 Iowa 164, 46 N. W. 979 [*following* Hobart *v.* Hobart, 51 Iowa 512, 1 N. W. 780].

Kansas.— Maclellan *v.* Seim, 57 Kan. 471, 46 Pac. 959; Hixon *v.* George, 18 Kan. 253.

Kentucky.— Blakey *v.* Johnson, 13 Bush 197, 26 Am. Rep. 254; Edelen *v.* Barber, 8 Ky. L. Rep. 268; Bailey *v.* Nichols, 8 Ky. L. Rep. 64. And see Ford *v.* Ellis, 56 S. W. 512, 21 Ky. L. Rep. 1837.

tion will not be disturbed by an appellate court unless the discretion has been abused.[80]

2. Rules Governing Discretion. A burdened condition of the jury calendar should deter the court from unnecessarily sending issues to the jury.[81] An issue will not be directed where the facts can be satisfactorily ascertained by the court, and the proof is clear,[82] nor where there is no conflicting evidence and no question of fact to be determined.[83] And if the issue is a simple one, and the evidence is defective, the case will not be referred on final hearing to a jury, but the taking of further evidence will be ordered.[84] Nor will the court send issues to a jury when they are numerous, difficult, and complicated, and could not be properly passed upon by the jury without frequent instructions from the court on matters involving intricate questions of law.[85] Where the evidence fails as to a matter essential to the equity of plaintiff or to the defense relied on by defendant, it is not the practice to direct an issue,[86] and it is sometimes said that it should not be

Maryland.— Baker *v.* Safe-Deposit, etc., Co., 93 Md. 368, 48 Atl. 920, 49 Atl. 623; Hilleary *v.* Crow, 1 Harr. & J. 542; Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Mississippi.— Carradine *v.* Carradine, 58 Miss. 286, 38 Am. Rep. 324; Pittman *v.* Lamb, 53 Miss. 594.

Missouri.— Ely *v.* Coontz, 167 Mo. 371, 67 S. W. 299; Keithley *v.* Keithley, 85 Mo. 217; McCullough *v.* McCullough, 31 Mo. 226. But for equity cases under Gen. St. (1865) c. 169, §§ 12, 13, see Hunter *v.* Whitehead, 42 Mo. 524.

Nebraska.— Welch *v.* Tipperry, (1902) 92 N. W. 582; Lewis *v.* North, 62 Nebr. 552, 87 N. W. 312.

New Hampshire.— Patrick *v.* Cowles, 45 N. H. 553; Tappan *v.* Evans, 11 N. H. 311.

New Jersey.— Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

New York.— Brinkley *v.* Brinkley, 56 N. Y. 192; Palmer *v.* Lawrence, 5 N. Y. 389; Megrue *v.* United L. Ins. Assoc., 71 Hun 174, 24 N. Y. Suppl. 618; Paul *v.* Parshall, 14 Abb. Pr. N. S. 138; Dale *v.* Roosevelt, 6 Johns. Ch. 255; Smith *v.* Carll, 5 Johns. Ch. 118.

North Carolina.—Moye *v.* Codgell, 66 N. C. 403; Burbank *v.* Wilcy, 66 N. C. 58.

North Dakota.— Packham *v.* Van Bergen, 8 N. D. 595, 80 N. W. 759.

Ohio.— Carlisle *v.* Foster, 10 Ohio St. 198; Goddard *v.* Leach, Wright 476.

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

Pennsylvania.— Frank's Appeal, 59 Pa. St. 190; Ressler *v.* Witmer, 1 Pearson 174; Uhrich *v.* Uhrich, 3 Del. Co. 281.

South Carolina.— Hammond *v.* Foreman, 43 S. C. 264, 21 S. E. 3; Price *v.* Brown, 4 S. C. 144.

Tennessee.— Simmons *v.* Tillery, 1 Overt. 274.

Virginia.— Beverly *v.* Walden, 20 Gratt. 147. And see Ford *v.* Gardner, 1 Hen. & M. 72.

Washington.— Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327; Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709; State *v.* Lichtenberg, 4 Wash. 553, 30 Pac. 659.

Wisconsin.— Waterman *v.* Dutton, 5 Wis. 413.

Wyoming.— Chosen Friends Home, etc., League *v.* Otterson, 7 Wyo. 89, 50 Pac. 194.

See 19 Cent. Dig. tit. "Equity," § 789.

Different juries at different times may be resorted to for advice as to the issues of fact involved. Mitchell *v.* Simpson, 62 Kan. 343, 63 Pac. 440.

The jury may be impaneled immediately where the court in order to inform its conscience directs an issue so to be tried, and it is not necessary that it should be summoned to appear at the succeeding term of the court, unless either party should move on good cause shown to postpone the inquiry to a subsequent term. Ayres *v.* Scott, Ky. Dec. 162.

80. Ford *v.* Ellis, 56 S. W. 512, 21 Ky. L. Rep. 1837; Reese *v.* Youtsey, 113 Ky. 839, 69 S. W. 708, 24 Ky. L. Rep. 603; Neal *v.* Suber, 56 S. C. 298, 33 S. E. 463.

81. Evans *v.* National Broadway Bank, 88 N. Y. App. Div. 549, 85 N. Y. Suppl. 101.

82. Carlisle *v.* Cooper, 18 N. J. Eq. 241; Garwood *v.* Eldridge, 2 N. J. Eq. 290, 34 Am. Dec. 195; Le Guen *v.* Gouverneur, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121; Hurley *v.* Oakley Land, etc., Co., (Va. Sup. 1896) 24 S. E. 237; Pryor *v.* Adams, 1 Call (Va.) 382, 1 Am. Dec. 533; U. S. *v.* Samperyac, 28 Fed. Cas. No. 16,216*a*, Hempst. 118 [*affirmed* in 7 Pet. 222, 8 L. ed. 665].

And where the facts are ascertained by a master whose findings thereon are approved by the court an issue will not be granted when a contrary finding by the jury if made would not be followed. Earle *v.* McCartney, 109 Fed. 13.

83. Carradine *v.* Carradine, 58 Miss. 286, 38 Am. Rep. 324. But where the court directed an issue in a case where the preponderance of the evidence was clearly on one side, it was held that error would not lie, since it was a matter of discretion. Iler *v.* Routh, 3 How. (Miss.) 276.

84. Newark, etc., R. Co. *v.* Newark, 23 N. J. Eq. 515.

85. Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401; Ziegler *v.* Chapin, 14 N. Y. Suppl. 264, 26 Abb. N. Cas. (N. Y.) 317; Blunt *v.* Hibbard, 3 N. Y. Suppl. 121.

86. Kearney *v.* Harrell, 58 N. C. 199; Steffee *v.* Kerr, 2 Woodw. (Pa.) 175; Jones *v.*

ordered until plaintiff has shown enough to shift the burden of proof on defendant.[87] Nevertheless, where the court regards the testimony taken as an insufficient or unsatisfactory basis for a decision, it may of its own motion direct issues to be framed for trial by jury upon evidence to be introduced by the parties, and upon the rendition of the verdict rehear the case upon the testimony taken, the verdict, and such further testimony as the court may desire.[88] And where the evidence is conflicting, contradictory, or confusing, so as to make it doubtful on which side the preponderance lies, it is proper to submit the disputed facts to a jury.[89] Likewise where the credibility of the material witnesses is involved and

Christian, 86 Va. 1017, 11 S. E. 984; Reed *v.* Cline, 9 Gratt. 136; Paynes *v.* Coles, 1 Munf. (Va.) 373; Vangilder *v.* Hoffman, 22 W. Va. 1.

87. Carter *v.* Carter, 82 Va. 624; Beverly *v.* Walden, 20 Gratt. (Va.) 147; Smith *v.* Betty, 11 Gratt. (Va.) 752; Sands *v.* Beardsley, 32 W. Va. 594, 9 S. E. 925.

Before any evidence has been taken the court will not ordinarily submit issues to a jury, and especially not where it is not apparent that such issues will be decisive or even material. Fenno *v.* Primrose, 125 Fed. 635.

Weight of answer.— Issues should never be ordered where the court is of opinion that the answer is entitled to the same weight as two witnesses, or as one witness and corroborating circumstances, as the jury are not to be governed by this technical weight allowed to an answer. Gamble *v.* Johnson, 9 Mo. 605. Where defendant in express terms negatives the allegations in the bill, and the evidence of one person only affirms what has been so negatived, the court will not send the cause to be determined by a trial at law. Bougher *v.* Connecticut, 1 Pa. Co. Ct. 184.

Contest of wills.— Unless it appears to the court that there is evidence sufficient to justify a jury in finding against the validity of a will an issue will not be granted; and a mere scintilla of proof is not enough, nor the vague, loose, and ill-defined opinions of witnesses, nor the apparently unreasonable exclusion of the only child from the benefits of the will. Dyre's Estate, 12 Phila. (Pa.) 156; *In re* Colgate, 12 Phila. (Pa.) 48; *In re* Hardy, 12 Phila. (Pa.) 22. In determining the question of testamentary capacity, the fact that there is a scintilla of evidence to support the contestant's claim will not make it the duty of the court to submit the case to a jury. If the inherent probabilities in favor of the will are such that no verdict against it could properly be sustained, an issue will not be granted. *In re* Burdon, 14 Phila. (Pa.) 332. See, generally, WILLS.

88. Moran *v.* Sullivan, 12 App. Cas. (D. C.) 137. See also Noel *v.* White, 37 Pa. St. 514.

Nuisance.— Where a bill was filed praying to have a nuisance abated, and for an injunction to restrain defendant, and the act complained of was of the character of a nuisance, but the testimony was not sufficient to satisfy the court that it amounted to a nuisance in the particular case, an issue to determine the fact was properly directed. Clark *v.* Lawrence, 59 N. C. 83, 78 Am. Dec. 241.

89. Most of the following cases are cases in which the evidence was conflicting, and an issue was directed; a few, however, are cases where the court held that it was not doubtful on which side the preponderance lay, and consequently refused an issue.

Alabama.—Atwood *v.* Smith, 11 Ala. 894; Johnston *v.* Haincsworth, 6 Ala. 443. And see Adams *v.* Munter, 74 Ala. 338.

Delaware.— McDowell *v.* Wilmington, etc., Bank, 1 Harr. 369.

Illinois.— Russell *v.* Paine, 45 Ill. 350.

Kentucky.— Crabb *v.* Larkin, 9 Bush 154; Lee *v.* Beatty, 8 Dana 204; Newport, etc., R. Co. *v.* Fitzsimmons, 7 S. W. 609, 8 S. W. 209, 9 Ky. L. Rep. 939.

Missouri.— Luce *v.* Barnum, 19 Mo. App. 359.

New Jersey.— Fisler *v.* Porch, 10 N. J. Eq. 243; Hildreth *v.* Schillenger, 10 N. J. Eq. 196; Bassett *v.* Johnson, 3 N. J. Eq. 417.

New York.— O'Brien *v.* Bowes, 4 Bosw. 657, 10 Abb. Pr. 106; Clark *v.* Brooks, 26 How. Pr. 285; Robbins *v.* Lewis, 1 How. Pr. 202; Idley *v.* Bowen, 11 Wend. 227; Townsend *v.* Graves, 3 Paige 453.

North Carolina.— Thornburgh *v.* Mastin, 93 N. C. 258.

Ohio.— Fleming *v.* Fleming, 9 Ohio Dec. (Reprint) 382, 12 Cinc. L. Bul. 261.

Oregon.— See Swegle *v.* Wells, 7 Oreg. 222.

Pennsylvania.— Dougan *v.* Blocher, 24 Pa. St. 28; Armbrust *v.* Kennedy, 7 Kulp 520; Philadelphia Nat. Bank *v.* Henry, 13 Wkly. Notes Cas. 128; Armstrong's Estate, 14 Phila. 320; Janney *v.* Imperial Oil Co., 6 Phila. 261; Perry *v.* Perry, 3 C. Pl. 163.

Virginia.— Jackson *v.* Pleasanton, 95 Va. 654, 29 S. E. 680; Hull *v.* Watts, 95 Va. 10, 27 S. E. 829; Douglass *v.* McChesney, 2 Rand. 109; Knibb *v.* Dixon, 1 Rand. 249; Banks *v.* Booth, 6 Munf. 385; Galt *v.* Carter, 6 Munf. 245; Bullock *v.* Gordon, 4 Munf. 450; Hooe *v.* Marquess, 4 Call 416, 2 Am. Dec. 570. And see Melendy *v.* Barbour, 78 Va. 544.

West Virginia.— Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125; De Vaughn *v.* Hustead, 27 W. Va. 773; Mahnke *v.* Neale, 23 W. Va. 57; Vangilder *v.* Hoffman, 22 W. Va. 1; Setzer *v.* Beale, 19 W. Va. 274; McFarland *v.* Douglass, 11 W. Va. 637; Jarrett *v.* Jarrett, 11 W. Va. 584; Anderson *v.* Cranmer, 11 W. Va. 562; Nease *v.* Capehart, 8 W. Va. 95; Randolph *v.* Adams, 2 W. Va. 519.

United States.— Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,946, 4 McLean 70; Shepley *v.* Rangely, 21 Fed. Cas. No. 12,756, 2 Ware 242.

uncertain.[90] But the court is not bound to direct an issue on the ground that the evidence is conflicting or contradictory, for the court may judge of the weight of the evidence, and if its conscience is satisfied may decide the case without a jury.[91]

B. Proceedings For Submission of Issues — 1. Direction and Framing of Issues — a. In General. When in equity proceedings a jury trial is desired appropriate issues will be made up under the direction of the court.[92] While

See 19 Cent. Dig. tit. "Equity," §§ 792, 793.

90. Munson *v.* Reed, Clarke (N. Y.) 580; McCully *v.* McCully, 78 Va. 159; Williams *v.* Blakey, 76 Va. 254; Howe *v.* Williams, 12 Fed. Cas. No. 6,778, 2 Cliff. 245.

91. Hord *v.* Colbert, 28 Gratt. (Va.) 49; Samuel *v.* Marshall, 3 Leigh (Va.) 567; Nice *v.* Purcell, 1 Hen. & M. (Va.) 372; Arnold *v.* Arnold, 11 W. Va. 449.

The prudent course.— Although a court of equity is not bound to direct an issue to a jury merely because the evidence is contradictory, yet where the proof is so conflicting as to make it difficult to attain a satisfactory conclusion it is prudent if not indispensable to do so. Kennedy *v.* Kennedy, 2 Ala. 571.

92. The court should so condense the issues as to present some proposition which the jury can neither affirm nor deny without finding all the other facts necessary to a conclusion. Barth *v.* Rosenfeld, 36 Md. 604.

An order that an issue be tried by a jury may not only direct the issue but frame it so that no more formal framing is necessary. Dorr *v.* Tremont Nat. Bank, 128 Mass. 349.

An issue to try the validity of a will is the same in fact as an issue to try whether the writing in question is a will or not. Ford *v.* Gardner, 1 Hen. & M. (Va.) 72.

Mental incapacity and undue influence.—A grantor sought to set aside a conveyance, alleging that because of imbecility of mind she was easily imposed upon, and was overreached and deceived by the representations of the grantee, and thereby induced to part with her property. It was held that such allegations being denied the issues should be, Was plaintiff when she executed the conveyance laboring under mental imbecility so as to render her an easy victim to undue influence? and was the conveyance procured through such influence? Gass *v.* Mason, 4 Sneed (Tenn.) 497. See also Bailey *v.* Ryder, 1 Barb. (N. Y.) 74.

Cases governed more or less by local practice.—Three series of questions were submitted to the jury — one prepared by the court, one by plaintiff, and one by defendant — each series covering to a great extent the ground covered by the other series. It was held that the correct practice was to submit but one series of interrogatories covering the material questions in dispute. Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45. Where a court directs a feigned issue to be made, the order directing it should provide that such issue be tried by a jury, unless the parties waive the jury and elect to try it by the court. Russell *v.* Chicago, etc., Electric R. Co., 98 Ill. App. 347. Issues to a jury should be framed and filed at a jury term, and not a law term of this court. Coffin *v.* Easton, 12 Cush. (Mass.) 107. Where upon the report of an auditor either party desires to try the case by jury, and there has not been an issue of fact joined, the proper mode is not to traverse the conclusions of the auditor, but for the party having the affirmative to file an allegation of the facts which he asserts should be traversed by the other party. Brewer *v.* Hyndman, 18 N. H. 9. Upon a reference to a master to settle issues and the place where they are to be tried, affidavits of the materiality and residence of the witnesses, for the purpose of fixing the place of trial, must state the substance of what the deponent expects to prove by each witness. Meach *v.* Chappell, 8 Paige (N. Y.) 135. Demand for an issue should be in writing (Moyer's Estate, 1 Pearson (Pa.) 407), and the form of the issue demanded should accompany the demand (Mealey's Estate, 11 Phila. (Pa.) 161). A case from which all equitable features have been eliminated, reducing it simply to an action to recover real property, is properly triable by jury, and it is not necessary to frame the issues to be submitted. Robertson *v.* Sharpton, 17 S. C. 592. Under Tenn. Code. § 4468 (Shannon Code, § 6285), providing that issues shall be made up by the parties under the direction of the court, defendant has a like privilege as plaintiff to tender issues to the court to be submitted. Green *v.* Huggins, (Ch. App. 1898) 52 S. W. 675. It is error to submit a number of points in evidence tending severally to establish a controlling, controverted fact in as many different issues; such points should be covered by one issue and not submitted separately. Crisman *v.* McMurray, 107 Tenn. 469, 64 S. W. 711. Application for a jury trial must be made by motion in open court and cannot be made by a demand in a replication or other pleading. Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080. Where an issue is directed by the United States circuit court for the third circuit, no declaration of any sort is requisite. The case is put on the trial list, and the jury sworn to try the issue, in the words of the order of issue itself. Wilson *v.* Barnum, 30 Fed. Cas. No. 17,786, 1 Wall. Jr. 342. The motion for jury issues will not in general be granted, where it appears that a trial at law and a hearing in equity have already been had, and that both have resulted in favor of the complainant. Howe *v.* Williams, 12 Fed. Cas. No. 6,778, 2 Cliff. 245.

When the verdict of the jury is merely advisory (see *infra*, XX, D, 1) error cannot be predicated on the form in which the in-

ordinarily a jury trial is not had in equity cases unless the parties themselves apply for it,[93] it is nevertheless well settled that the court may of its own motion submit specific questions of fact to a jury for its own information and enlightenment.[94] Where an issue is ordered, the question whether the order is for an action at law or an issue out of chancery does not depend upon the form in which the issue is framed; but its nature and purpose give it character as the one or the other.[95] The court may direct an issue to be tried without expressly revoking an order of reference to auditors.[96] Where the judge before whom certain issues in equity are tried by a jury acts as chancellor in making the decree, the same proofs being relied on before the jury and the chancellor, a previous order submitting the issues to the jury is unnecessary.[97] It is irregular for the court to submit the whole case to the jury, without specifying the particular object or objects of inquiry,[98] and these should be separately stated so that the jury can answer each

terrogatories to the jury are propounded (W. H. Taggart Mercantile Co. *v.* Clark, (Ariz. 1903) 71 Pac. 925), nor because the court refuses to submit questions requested by a party (Royce *v.* Latshaw, 15 Colo. App. 420, 62 Pac. 627), nor because the court, on motion of plaintiff without notice to defendant, submitted certain issues to the jury, as it may have done so for its own enlightenment (Rynerson *v.* Allison, 28 S. C. 81, 5 S. E. 218).

93. The time when application must be made for the framing of issues is a matter of local practice, usually governed by statutes or rules of court, and not presenting principles of general importance. The following cases explaining these local regulations are generally of value only in the jurisdictions in which they are decided, and no useful purpose would be subserved by treating them at length.

Alabama.— Johnston *v.* Hainesworth, 6 Ala. 443.

Illinois.— Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Hoobler *v.* Hoobler, 128 Ill. 645, 21 N. E. 571.

Massachusetts.— Culbert *v.* Hall, 181 Mass. 24, 62 N. E. 955; Bourke *v.* Callanan, 160 Mass. 195, 35 N. E. 460; Freeland *v.* Wright, 154 Mass. 492, 28 N. E. 678; Stratton *v.* Hernon, 154 Mass. 310, 28 N. E. 269; Blanchard *v.* Cooke, 147 Mass. 215, 17 N. E. 313; Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832; Shaw *v.* Norfolk County R. Co., 16 Gray 407.

New Hampshire.— Bell *v.* Woodward, 47 N. H. 539; Tibbetts *v.* Perkins, 20 N. H. 275; Hoitt *v.* Burleigh, 18 N. H. 389.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.—O'Brien *v.* Bowes, 4 Bosw. 657, 10 Abb. Pr. 106; Paul *v.* Parshall, 14 Abb. Pr. N. S. 138; Clark *v.* Brooks, 26 How. Pr. 285; New-Orleans Gas Light, etc., Co. *v.* Dudley, 8 Paige 452.

Pennsylvania.— Flory *v.* Bangor Water Co., 4 Pa. Dist. 643, 8 Kulp 71; Moyer's Estate, 1 Pearson 407; Hazleton Nat. Bank *v.* Hunter, 10 Kulp 57; Richards *v.* Richards, 5 Luz. Leg. Reg. 237; Vandermark's Estate, 2 Luz. Leg. Reg. 83; Genet *v.* Delaware, etc., Canal Co., 13 Phila. 533; White's Estate, 11 Phila. 100; Hansell's Estate, 11 Phila. 47; Lower *v.* Wightman, 5 Leg. Gaz. 45; Porter *v.* Child, 10 Lanc. Bar 45; Lower's Appeal, 1 Walk. 404.

South Carolina.— Lazarus *v.* Fleming, 1 McCord Eq. 317.

Tennessee.— Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080; Stadler *v.* Hertz, 13 Lea 315; Allen *v.* Saulpaw, 6 Lea 477; Lancaster *v.* Ward, 1 Overt. 430; Duncan *v.* King, 1 Overt. 79; Hamilton *v.* Ritchie, (Ch. App. 1899) 53 S. W. 198.

Wisconsin.— Waterman *v.* Dutton, 5 Wis. 413.

United States.—Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592; Goodyear *v.* Province Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

See 19 Cent. Dig. tit. "Equity," §§ 804–806.

94. *District of Columbia.*— Moran *v.* Sullivan, 12 App. Cas. 137.

Minnesota.— Cobb *v.* Cole, 44 Minn. 278, 46 N. W. 364; Russell *v.* Reed, 32 Minn. 45, 19 N. W. 86.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— Brinkley *v.* Brinkley, 2 Thomps. & C. 501.

South Carolina.— Trimmier *v.* Liles, 58 S. C. 284, 36 S. E. 652.

Virginia.— Meek *v.* Spracher, 87 Va. 162, 12 S. E. 397.

See 19 Cent. Dig. tit. "Equity," § 802.

In South Carolina an order refusing to grant a jury trial in a chancery case, under Code, § 274*a*, even if conclusive as to the right to such trial under that section, does not preclude the court's right to frame for its own enlightenment an issue of fact to be tried by a jury. Land Mortg. Invest., etc., Co. of America *v.* Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203.

95. See *infra*, XX, F.

96. Field *v.* Holland, 6 Cranch (U. S.) 8, 3 L. ed. 136.

97. Wilson *v.* Riddle, 123 U. S. 608, 8 S. Ct. 255, 31 L. ed. 280.

98. *Illinois.*— Milk *v.* Moore, 39 Ill. 584.

Indiana.— Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487.

separately.[99] In other words the issues should be explicit and distinct.[1] But the issues raised need not embrace all the disputed facts, for the court may determine some for itself, and send only the others to the jury.[2] The same issue will not be presented to the jury at the instance of several different parties, unless they are joined as plaintiffs or defendants, so that there shall be but one verdict.[3] And where several defendants set up the same matter in defense, or put in issue the same allegations in the bill, and a replication is filed to all such answers, an issue must be awarded as to all or neither.[4] But if defendants have not a common interest, or if their defenses are distinct, an issue may be awarded as to one defendant, and refused as to the others.[5] When issues have been framed and are being tried, and the testimony brings out other issues a determination of which is necessary to a final decision of the controversy on its merits, additional issues may be framed for the purpose of presenting the whole case together, when doing so will not operate to the prejudice or surprise of the adverse party.[6] Likewise when there is a decree for one of the parties, but before judgment can be entered certain facts must be determined, the court will send the cause to a jury to determine such facts.[7]

b. What Issues Will Be Submitted. To justify the court in awarding a jury trial, there must be a material fact or facts in dispute, and this must appear, not only by allegation,[8] but also by evidence on which the court could sustain a verdict for the demandant.[9] A chancery case which does not involve any important issues of fact, but depends on the application of legal principles to admitted facts, should not be submitted to a jury for an advisory verdict.[10] The issue submitted by the court should be confined to disputed facts[11] which are material to the

Kentucky.— Ayers *v.* Scott, Ky. Dec. 162.
Nevada.— Hulley *v.* Chedic, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729.
Wisconsin.— Gill *v.* Rice, 13 Wis. 549.
See 19 Cent. Dig. tit. "Equity," § 801.

99. Brewster *v.* Bours, 8 Cal. 501; Ayers *v.* Scott, Ky. Dec. 162; Black *v.* Lamb, 12 N. J. Eq. 108.

1. Hall *v.* Doran, 6 Iowa 433; Greene *v.* Harris, 11 R. I. 5.

Submission of issue raised by the pleadings was held sufficiently explicit where the only issue made by the pleadings was as to the liability of defendant to plaintiff for the demand asserted by the latter, and the extent of such liability, if it existed. Cincinnati Sav. Bank *v.* Benton, 2 Metc. (Ky.) 240.

Interrogatories not "plain, terse," etc., as required by a directory statute, do not necessarily vitiate the proceeding where the verdict is merely advisory. W. H. Taggart Mercantile Co. *v.* Clark, (Ariz. 1903) 71 Pac. 925.

2. Pankey *v.* Raum, 51 Ill. 88; Chamberlain *v.* Juppiers, 11 Iowa 513; Besshears *v.* Rowe, 46 Mo. 501; Clark *v.* Nichols, 3 Mont. 372.

3. Pegg *v.* Warford, 4 Md. 385.

Order joining parties and proceedings.— Where different parties, by separate petitions in the orphans' court, were resisting a claim upon the same grounds, and asked for issues to try its validity, it was held proper for the court to order the parties and proceedings to be joined on the trial of the issues sent. Yingling *v.* Hesson, 16 Md. 112.

4. New-Orleans Gas Light, etc., Co. *v.* Dudley, 8 Paige (N. Y.) 452.

5. New-Orleans Gas Light, etc., Co. *v.* Dudley, 8 Paige (N. Y.) 452.

6. Farmers', etc., Bank *v.* Joslyn, 37 N. Y. 353.

7. Ravenscroft *v.* Shelby, 1 Mo. 533. And see Griffith *v.* Griffith, 9 Paige (N. Y.) 315.

8. The rules of variance must be observed in framing issues, and therefore where the pleadings present the question of one particular fraud only an issue whether there was any fraud is not warranted. Brink *v.* Morton, 2 Iowa 411. Where a bill in equity is followed by plea and answer supporting it, and a jury trial is claimed, only the questions raised by the plea are to be submitted as issues to the jury. Greene *v.* Harris, 11 R. I. 5.

9. Shoemaker's Estate, 3 Brewst. (Pa.) 312.

Naked assertion in unsworn answer.— Where a motion for a jury trial was predicated upon the naked assertion of a fact in defendant's answer not under oath, it was held that there was no chancery practice which would require the court to submit a question of fact to a jury, upon the bare assertion of counsel that the fact existed, unsupported by any evidence whatever. Hahn *v.* Huber, 83 Ill. 243. And see Sea Ins. Co. *v.* Day, 9 Paige (N. Y.) 369.

Where an issue is awarded at the hearing, it must be confined, not only to facts put in issue by the pleadings, but to facts concerning which some evidence has previously been introduced and read at the hearing. Dunn *v.* Dunn, 11 Mich. 284.

10. Crosier *v.* McLaughlin, 1 Nev. 348.

11. Landis *v.* Lyon, 71 Pa. St. 473. If by a failure to answer there are no disputed

decree;[12] it is error to direct an issue to try a question of law[13] or a mixed question of law and fact.[14] It is also error for the court to submit to a jury a question of fact the decision of which was necessarily involved in a decree previously rendered.[15] But error in submitting to the jury equitable issues which the court should have determined itself has been held to be cured by the court's passing on the issues notwithstanding the verdict.[16]

2. Objections and Exceptions to Issues. Objections to the order referring issues to a jury should be made before trial, and generally at the time such order is granted;[17] and it is too late to object on appeal that there was no formal order directing an issue, and that the court had without such order considered the finding of the jury.[18] Objections to the form of the issue should also be made before trial,[19] and should be made in the court from which they are sent.[20] When no objection is made at the time to the form of issue, such objection cannot be raised for the first time on appeal.[21] And where a party asks for a jury in the chancery court, it is too late after an appeal to have the case remanded for another jury trial, on the ground that the first issue was not a proper one.[22] A party who has agreed to the issues as submitted to the jury cannot afterward object either to their form or substance.[23]

3. Withdrawal and Modification of Issues. After referring an issue to a jury the court may revoke the order before trial,[24] or it may proceed to a decree without trying the issue or setting aside the order;[25] for the general rule is that an issue may be withdrawn by the court directing it at any time and be decided by the court itself.[26] Even after impaneling the jury, the court, if it be the same which directed the issue, may discharge them and itself find on the evidence.[27]

facts, there is nothing to submit to a jury. Miller *v.* Wilkins, 79 Ga. 675, 4 S. E. 261. Likewise, where the answer denies fraud, but admits all the facts necessary to constitute it, there is no occasion for a jury. Doss *v.* Tyack, 14 How. (U. S.) 297, 14 L. ed. 428. And see Jefferson *v.* Hamilton, 69 Ga. 401; Hettrick *v.* Page, 82 N. C. 65.

In Georgia, however, exceptions of fact to an auditor's or master's report are referred to a jury. For the practice see Phillips *v.* De Bray, 112 Ga. 628, 37 S. E. 887; Stone *v.* Riser, 111 Ga. 809, 35 S. E. 648; Kennedy *v.* Brand, 95 Ga. 539, 20 S. E. 631; Mackenzie *v.* Flannery, 90 Ga. 590, 16 S. E. 710; Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52; Cureton *v.* Wright, 73 Ga. 8; Poullain *v.* Poullain, 72 Ga. 412; Dillard *v.* Ellington, 57 Ga. 567.

12. Comly *v.* Waters, 2 Del. Ch. 72.

13. Landis *v.* Lyon, 71 Pa. St. 473; Thompson's Appeal, 36 Pa. St. 418. And see Wolf *v.* Bollinger, 62 Ill. 368; Philadelphia *v.* Thirteenth, etc., Sts. Pass. R. Co., 1 Leg. Gaz. (Pa.) 156. See also Le Baron *v.* Shepherd, 21 Mich. 263. Although it is improper to submit to the jury a question of law, along with questions of fact, if the facts found by the jury authorize the decree made by the court, the judgment will not be reversed on this ground. Bell *v.* Hutchings, 86 Ga. 562, 12 S. E. 974.

14. Sparks *v.* Farmers' Bank, 3 Del. Ch. 225; Clendaniel's Estate, 11 Phila. (Pa.) 50.

15. Thus where on a bill for an accounting of a partnership the court makes an interlocutory decree ordering defendant to state the account, etc., it would be error subsequently to submit an issue as to whether the partnership existed at the time of the transactions involved in the account defendant is ordered to state. Reybold *v.* Dodd, 1 Harr. (Del.) 401, 26 Am. Dec. 401.

16. McLeod *v.* Robertson, 11 Ky. L. Rep. 904. And see Pfeiffer *v.* Riehn, 13 Cal. 643.

17. Powers *v.* McEachern, 7 S. C. 290. See also Macon *v.* Harris, 75 Ga. 761; Jefferson *v.* Hamilton, 69 Ga. 401; Visage *v.* McKellar, 58 Ga. 140; Pearce *v.* Suggs, 85 Tenn. 724, 4 S. W. 526.

18. Williams *v.* Bishop, 15 Ill. 553.

19. Black *v.* Lamb, 12 N. J. Eq. 108.

20. Bell *v.* Woodward, 47 N. H. 539.

21. Chamberlain *v.* Juppiers, 11 Iowa 513; Miller *v.* Pryse, 49 S. W. 776, 20 Ky. L. Rep. 1544.

22. Gass *v.* Mason, 4 Sneed (Tenn.) 508.

23. Hoobler *v.* Hoobler, 128 Ill. 645, 21 N. E. 571.

24. Pittman *v.* Lamb, 53 Miss. 594.

An order directing an issue is interlocutory only, and may therefore be set aside at a subsequent term. Dabbs *v.* Dabbs, 27 Ala. 646.

25. Field *v.* Holland, 6 Cranch (U. S.) 8, 3 L. ed. 136.

26. Cook *v.* Bay, 4 How. (Miss.) 485. But under Ga. Code, §§ 3097, 4202, 4203, providing that issues of fact in equity shall be decided by a jury where there is a conflict of evidence, although the judge after verdict may at his discretion order a new trial, he cannot before verdict dismiss the case. Frank *v.* Atlanta St. R. Co., 72 Ga. 338.

27. Israel *v.* Jackson, 93 Ind. 543.

Where the evidence is too vague, even if believed, to establish the equity set up, it should be withdrawn by the chancery court

And where the parties by consent withdraw from the jury one of several issues, on which one the jury has been unable to agree, such withdrawal will not operate as a mistrial, but a waiver of jury trial as to that issue, and a tacit consent that it be decided by the court.[28] But neither party can by plea or otherwise change or qualify the issues as submitted.[29]

4. Failure to Demand Issues and Waiver of Right. If a party to a chancery suit desires a jury trial he should apply for one,[30] for, where it is proper to direct an issue, if applied for, but both parties proceed to take testimony and allow the hearing to be brought on without applying therefor, it is the privilege of the court to decide the issue when it can arrive at a satisfactory conclusion from the evidence.[31] This is especially so when there is no conflict in the evidence,[32] but even when the evidence is conflicting the fact that the court did not direct an issue is not error under these circumstances.[33] One's right to a jury trial may be waived by consenting to a reference,[34] or by a failure to object to an order sending the case to a master for a hearing on the merits.[35]

C. Trial of Issues Submitted — 1. Control of Chancery Court Over Trial. Where the chancery court is not required by statute to submit issues of fact to a jury, and does so only for its own enlightenment and to satisfy its own conscience, it may control the conduct of the trial of the issues and the proceedings before the jury in such way as it sees fit so that the purpose of the submission of the issues may be best subserved.[36] The chancery court may direct, not only what shall be tried, but the form of the issue, and who shall be the parties,[37] and which party shall uphold the affirmative of the issue,[38] what shall or shall not be relied on, on each side, as cause of action or defense,[39] and what evidence shall be received at law.[40] Directions may be given as to the use of the chancery pleadings as evidence at the trial,[41] or as to the use of depositions or written evidence

from the jury. Church *v.* Ruland, 64 Pa. St. 432.

28. Faulk *v.* Faulk, 23 Tex. 653.

29. So held when before trial of the issues defendant filed a plea of the statute of limitations. Cook *v.* Carr, 20 Md. 403, 412. As to the right of the trial court to change or modify the issues see St. John *v.* Coates, 9 N. Y. Suppl. 202, 934, 24 Abb. N. Cas. (N. Y.) 158.

30. Faulk *v.* Faulk, 23 Tex. 653. A party who, after being requested to submit in writing statements of such issues as he desires to be submitted to the jury, fails to do so, cannot complain that all the issues made by the pleadings were not submitted. Jefferson *v.* Hamilton, 69 Ga. 401.

31. *Illinois.*— Brown *v.* Miner, 128 Ill. 148, 21 N. E. 223 [*affirming* 21 Ill. App. 60]; Wolf *v.* Bollinger, 62 Ill. 368.

Kentucky.— Greer *v.* Powell, 1 Bush 489; Frazer *v.* Naylor, 1 Metc. 593; Patrick *v.* Langston, 5 J. J. Marsh. 653.

New Jersey.— Denton *v.* Leddell, 23 N. J. Eq. 64.

New York.— Townsend *v.* Graves, 3 Paige 453. And see Steinway *v.* Von Bernuth, 82 N. Y. App. Div. 596, 81 N. Y. Suppl. 883; Mackellar *v.* Rogers, 52 N. Y. Super. Ct. 468; Moffat *v.* Moffat, 10 Bosw. 468, 17 Abb. Pr. 4.

West Virginia.—Powell *v.* Batson, 4 W. Va. 610.

See 19 Cent. Dig. tit. "Equity," § 803.

Legal joined with equitable issues.— But where the allegations in the complaint make out a case for equitable relief, and certain of them make out a case as to some defendant for legal relief, the issues joined as to the first are to be tried by the court without a jury, and if it fails and leaves the issues joined as to some defendants as to the second those should be tried by the jury, even though it was not demanded on the trial of the cause as an equity action. Hennequin *v.* Butterfield, 43 N. Y. Super. Ct. 411.

32. Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 653.

33. Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835.

34. State *v.* Askew, 94 N. C. 194.

35. Parker *v.* Nickerson, 137 Mass. 487.

36. Ringwalt *v.* Ahl, 36 Pa. St. 336. Such orders will be made as are necessary to a fair trial. Hohart *v.* Dovell, 10 N. J. L. J. 49.

37. Ringwalt *v.* Ahl, 36 Pa. St. 336.

38. Trimmier *v.* Liles, 58 S. C. 284, 36 S. E. 652.

39. Moore *v.* Simpson, 5 Litt. (Ky.) 49.

40. Moore *v.* Simpson, 5 Litt. (Ky.) 49; Black *v.* Shreve, 13 N. J. Eq. 455; Thomasson *v.* Kennedy, 3 Rich. Eq. (S. C.) 440. The court may order the parties themselves to be examined. Ringwalt *v.* Ahl, 36 Pa. St. 336.

41. For a discussion of when and how far the chancery court will direct the answer to be read as evidence see Sturtevant *v.* Waterbury, 1 Edw. (N. Y.) 442, and cases cited therein. The answer of defendant cannot be read as evidence in the trial at law, unless

in general.[42] When the chancery court makes an order that certain evidence shall be received at the trial of an issue at law, the judge conducting that trial has nothing to do with the admissibility of the whole or any part of the evidence, and accordingly must receive all of it and cannot reject any part of it; the chancery court by its order becomes responsible for the legality of the evidence.[43] Nor does the court of law have anything to do with the pleadings in equity upon which the issues are framed. Its province is simply to submit to the jury the determination of the issues, without reference to the question whether they were properly presented by the proceedings in the chancery court or not.[44] Nevertheless as issues to the law court are directed by the chancery court for the purpose of informing its conscience, if this purpose is achieved, the chancery court will not narrowly examine the proceedings in the law court; collisions between the two courts should be discouraged, and minute disagreements as to principle or procedure will be overlooked.[45] To the extent that the trial at law is not governed by the order submitting the issue, the proceedings in the law court are regulated by the practice of that court.[46]

2. Instructions to Jury — a. In General. When the verdict of the jury is advisory only,[47] it has been said that neither party has a right to ask the court to instruct the jury, because the court is not in any way controlled by the verdict.[48]

so ordered by the chancery court (Gamble *v.* Johnson, 9 Mo. 605; Black *v.* Lamb, 12 N. J. Eq. 108; Jackson *v.* Spivey, 63 N. C. 261) or read by plaintiff as an admission (Gamble *v.* Johnson, *supra*). It has been held that defendant is not entitled to read in his behalf his answer, which has been replied to, and its allegations disproved by more than one witness. Cartwright *v.* Godfrey, 5 N. C. 422.

In Georgia exceptions to an answer in equity are a part of the pleadings in the case, and as such may be read to the jury. Riggins *v.* Brown, 12 Ga. 271.

In West Virginia, it was held that prior to the adoption of the code, on the trial of an issue, defendant had a right to have his answer read as evidence to the jury, and allegations of fact positively stated in the answer responsive to the bill should have had before the jury the same effect as such answer then should have had when read on the hearing in the chancery cause. Tompkins *v.* Stephens, 10 W. Va. 156.

42. Cincinnati Sav. Bank *v.* Benton, 2 Metc. (Ky.) 240; Talbott *v.* Bedford, 53 S. W. 294, 21 Ky. L. Rep. 897; Clark *v.* Congregational Soc., 44 N. H. 382. But see as to trial of issues upon the validity of a will Carey *v.* Callan, 6 B. Mon. (Ky.) 44. It is the right and usual course, on the trial of an issue out of chancery, to examine witnesses *viva voce*; and it cannot be properly inferred that the answer and depositions were the only evidence on the trial of such issue. On the contrary it should rather appear what written evidence was used, as it is the duty of the chancellor to direct what papers filed in the cause shall be read. Paul *v.* Paul, 2 Hen. & M. (Va.) 525. See also Ford *v.* Gardner, 1 Hen. & M. (Va.) 72; McCall *v.* Graham, 1 Hen. & M. (Va.) 13.

43. Black *v.* Lamb, 12 N. J. Eq. 108; Thomasson *v.* Kennedy, 3 Rich. Eq. (S. C.) 440.

44. Cooke *v.* Cooke, 29 Md. 538.

45. Thomasson *v.* Kennedy, 3 Rich. Eq. (S. C.) 440.

46. Black *v.* Lamb, 12 N. J. Eq. 108. But in Texas, where equitable issues are referred to a jury, it is held that no testimony ought to be admitted which is not of so conclusive a character and tendency as to afford competent evidence upon the issue in a court of chancery. Parker *v.* Beavers, 19 Tex. 406. And it has been held that a defendant on the trial at law of an issue out of chancery cannot be asked a question the answer to which will contradict his answer. Cahoon *v.* Ring, 4 Fed. Cas. No. 2,292, 1 Cliff. 592. Where the motion for a jury trial is not made until after the evidence for the hearing in chancery has been taken, it was held in Marston *v.* Brackett, 9 N. H. 336, that it should be tried upon the same evidence on which it would have been tried in chancery, unless the court, upon cause shown, makes an order permitting the introduction of further evidence.

47. See *infra*, XX, D, 1, a.

48. Danielson *v.* Gude, 11 Colo. 87, 17 Pac. 283; Royce *v.* Latshaw, 15 Colo. App. 420, 62 Pac. 627. And see Freeman *v.* Wilkerson, 50 Mo. 554; Van Vleet *v.* Olin, 4 Nev. 95, 97 Am. Dec. 513. See also Hewlett *v.* Pilcher, 85 Cal. 542, 24 Pac. 781.

Case treated as action at law. — But where an equity case is submitted to a jury and tried as an action at law, and so treated by the court and the parties, it was held that the case should at least be fairly submitted to the jury, and the law correctly stated to them. Van Vleet *v.* Olin, 4 Nev. 95, 97 Am. Dec. 513.

In Georgia, because of the fact that a jury is a necessary part of the chancery system in that state (Brown *v.* Burke, 22 Ga. 574), when requested to do so, it is not only the province but the duty of the court, on the trial of equity causes, to instruct the jury as to what portions of defendant's answer

The court may, however, instruct the jury, but if it does so the instructions should not be general, as in an action at law, and should relate only to the determination of the questions of fact submitted to them.[49] No instructions should be given except those pertinent to the questions of fact submitted, no matter how pertinent they might be to other questions in the case not covered by the issues.[50] Furthermore if the court makes its own findings, whether it adopts the findings of the jury or disregards them, erroneous instructions given to the jury in any particular are not ground for reversing the judgment in the appellate court. The correctness of the decision of the court, and not the propositions of law it laid down for the guidance of the jury, is the question for determination in such cases.[51]

b. Directing Verdict. When the verdict of the jury is advisory only,[52] the same court controlling the case and the trial may direct a verdict for either party,[53] even though the evidence is conflicting.[54] In such cases the court may reject the verdicts general or special of the jury and enter a decree in accordance with its own determination, or what is equivalent it may direct a particular verdict upon the facts as being in accord with its own conclusions.[55]

3. Form and Sufficiency of Verdict. A general verdict in an equity case is insufficient.[56] Every issue presented must be separately passed upon,[57] and the jury in their verdict must answer to each separately.[58] But the fact that the jury return a general verdict is harmless error, where they also report special

are responsive to the allegations in plaintiff's bill, so that the jury may understand from the proper source what is legal evidence for their consideration and what is not. For the practice on this point see Adkins *v.* Hutchings, 79 Ga. 260, 4 S. E. 887; Shiels *v.* Stark, 14 Ga. 429; Webb *v.* Robinson, 14 Ga. 216; Beall *v.* Beall, 10 Ga. 342. See also Doggett *v.* Simms, 79 Ga. 253, 4 S. E. 909; Lake *v.* Hardee, 57 Ga. 459; Dwelle *v.* Roath, 29 Ga. 733.

In North Carolina also a jury is part of the court of equity (Marshall *v.* Marshall, 4 N. C. 318); and the court should be careful to instruct the jury as to the nature of the issue and the application of the evidence produced before them (Ely *v.* Early, 94 N. C. 1).

49. Farmers' Bank *v.* Butterfield, 100 Ind. 229.

50. Stickel *v.* Bender, 37 Kan. 457, 15 Pac. 580; Carlisle *v.* Foster, 10 Ohio St. 198; Perry *v.* Clift, (Tenn. Ch. App. 1899) 54 S. W. 121.

51. *Alabama.*— Marshall *v.* Croom, 60 Ala. 121.

California.— Scheerer *v.* Goodwin, 125 Cal. 154, 57 Pac. 789; Richardson *v.* Eureka, 110 Cal. 441, 42 Pac. 965; Sullivan *v.* Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; Sweetser *v.* Dobbins, 65 Cal. 529, 4 Pac. 540.

Missouri.— Pixlee *v.* Osborn, 48 Mo. 313.

South Carolina.— Frank *v.* Humphreys, 24 S. C. 325.

Wisconsin.— Huse *v.* Washburn, 59 Wis. 414, 18 N. W. 341.

See 19 Cent. Dig. tit. "Equity," § 820.

Rulings on the admission of evidence since the verdict of a jury in a chancery suit is merely advisory cannot be assigned as error. Peabody *v.* Kendall, 145 Ill. 519, 32 N. E. 674.

52. See *infra*, XX, D, 1, a.

53. Robinson *v.* Dryden, 118 Mo. 534, 24 S. W. 448; Hess *v.* Miles, 70 Mo. 203; Baldwin *v.* Taylor, 166 Pa. St. 507, 31 Atl. 250; Pier *v.* Prouty, 67 Wis. 218, 30 N. W. 232.

54. Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172, holding that in this regard the rule in trial of actions at law does not obtain.

55. Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172.

56. Evans *v.* Ross, (Cal. 1885) 8 Pac. 88; Brandt *v.* Wheaton, 52 Cal. 430; Dunn *v.* Dunn, 11 Mich. 284.

57. Dunn *v.* Dunn, 11 Mich. 284.

58. Ayers *v.* Scott, Ky. Dec. 162.

Failure to answer an immaterial question does not vitiate the verdict, when as a whole it supports the judgment properly disposing of the entire case. Columbus Power Co. *v.* City Mills Co., 114 Ga. 558, 40 S. E. 800; Groover *v.* King, 55 Ga. 243. See also Nicholls *v.* Popwell, 80 Ga. 604, 6 S. E. 21.

"Ignoramus" verdict.—Where the jury answered some of the questions specifically, and others by saying, "We do not know," and "Unknown to us," it was held that it was not such a verdict as a decree could be based upon and a new trial was properly allowed. Cooper *v.* Branch, 86 Ga. 234, 12 S. E. 808.

Disagreement as to one issue.— It has been held that where several issues are referred to a jury, and they agree upon one and disagree upon others, the court will not receive the findings upon one issue. The finding must be altogether or not at all. Berry *v.* Wallen, 1 Overt. (Tenn.) 186.

General verdict necessarily covering issues. — Where the issues were whether the alleged contract was made, whether plaintiff was prevented from performing his part of it by the act of defendant, and what were the damages, if any, a verdict, "We the jury find for complainant, and assess damages," etc., was held to be a substantial finding for the complainant on all the issues. State *v.* Farish, 23 Miss. 483.

findings for the same party, which are accepted by the court, and on which judgment is rendered.[59] The verdict must be certain and responsive to the issues presented and the directions given to the jury.[60] When the verdict settles and determines that a party to a suit has no right in the property in controversy, it is ordinarily sufficient, so far as the rights of such party are concerned, without proceeding to determine who in fact has such right.[61]

4. Return of Verdict. After trial of an issue at law the verdict is certified to the chancery court by the presiding judge. He should also state the general character of the evidence offered, such parts as were objected to, and the decision upon such objections, as also his charge to the jury.[62] It is customary for the judge to state in his certificate whether or not he approves of the verdict.[63] Where, as is generally the case in this country, the same court has a law side and a chancery side, and the issue is tried before the same judge who acts as chancellor, it is not necessary for the judge to certify the evidence and the verdict to himself as chancellor.[64]

D. Effect of Verdict on Subsequent Proceedings — 1. When Jury Trial Not a Matter of Right. In a chancery case, where the right to jury trial is not expressly given by statute, the verdict of the jury on issues submitted to them is in most jurisdictions merely advisory, and not binding upon the chancery court. The court may act on the verdict or reject it according as it is or is not satisfied. If the court believes the verdict wrong, it should be disregarded, and the court should have the issue retried or find the issue itself; for the trial is only to satisfy the conscience of the court as to a fact in regard to which the parties differ, and a finding not satisfying the conscience obviously cannot properly be adopted.[65]

59. McCauley *v.* McKeig, 8 Mont. 389, 21 Pac. 22.

60. Cooper *v.* Branch, 86 Ga. 234, 12 S. E. 308; Tift *v.* Hartwell, 57 Ga. 47; Russell *v.* Falls, 3 Harr. & M. (Md.) 457, 1 Am. Dec. 380. And see Watson *v.* Alexander, 1 Wash. (Va.) 340.

Where a verdict is indefinite the court may properly ask the jurors what they mean by their answers, and suggest a particular answer more explicit. Jordan *v.* Downs, 118 Ga. 544, 45 S. E. 439.

61. McDaniel *v.* Marygold, 2 Iowa 500, 65 Am. Dec. 786.

62. Trenton Banking Co. *v.* Rossell, 2 N. J. Eq. 492; Bassett *v.* Johnson, 2 N. J. Eq. 154; Chapin *v.* Thompson, 58 How. Pr. (N. Y.) 46; Saylor's Appeal, 39 Pa. St. 495; Law *v.* Miller, 24 R. I. 14, 51 Atl. 1051.

Certification of verdict.— The certificate of the judge made from memory of the finding of the jury will not be sufficient. Baker *v.* King, 6 Yerg. (Tenn.) 402. The judge making an order at special term directing the issue raised by the pleadings to be tried by a jury at circuit, and the verdict thereon certified to the special term for decree, is not entitled to have the verdict certified to himself. Cuthbert *v.* Ives, 20 N. Y. Suppl. 469. Where a verdict, rendered upon the trial of an issue, is set aside by the law side of the court, and a new trial ordered, and another verdict is rendered therein, which is certified, a decree entered in conformity thereto will not be reversed on appeal because the first verdict was never certified to the chancery side of the court, by which alone it could be set aside, since the decree of the chancellor adopting the second verdict amounts to an affirmation of the action of the law side of the court. Kerr *v.* South Park Com'rs, 117 U. S. 379, 6 S. Ct. 801, 29 L. ed. 924.

Record.— The verdict is properly made a part of the record. Goldman *v.* Rogers, 85 Cal. 574, 24 Pac. 782; Thompson *v.* Thompson, 1 Desauss. (S. C.) 136. Also the facts and the proofs on which the verdict is founded. Bentley *v.* Clark, 3 Dana (Ky.) 564. See further as to use by the chancellor of evidence given on the trial Mathews *v.* Forniss, 91 Ala. 157, 8 So. 661; Prudden *v.* Lindsley, 29 N. J. Eq. 615; Adams *v.* Soule, 33 Vt. 538. Where the verdict is certified and a decree entered an order made at the next succeeding term *nunc pro tunc* permitting a certificate of the evidence on the trial of the issue and the charge to the jury to be filed as part of the record is authorized. Kerr *v.* South Park Com'rs, 117 U. S. 379, 6 S. Ct. 801, 29 L. ed. 924.

63. Dunn *v.* Dunn, 11 Mich. 284; Prudden *v.* Lindsley, 31 N. J. Eq. 436; Grigsby *v.* Weaver, 5 Leigh (Va.) 197.

Where verdict is set aside.— In a chancery cause, where a verdict has been found by a jury supported by the proofs in the case, it is the duty of the judge setting aside the verdict to show of record the cause for setting it aside; and if this be not done the proceedings will be held erroneous. Owens *v.* Owens, Hard. (Ky.) 154.

64. Saylor's Appeal, 39 Pa. St. 495; Lavell *v.* Gold, 25 Gratt. (Va.) 473; Wilson *v.* Riddle, 123 U. S. 608, 8 S. Ct. 255, 31 L. ed. 280.

65. *Alaska.*— Pratt *v.* United Alaska Min. Co., 1 Alaska 95.

But this discretion of the court in approving or disapproving the verdict of the

Arizona.— W. H. Taggart Mercantile Co. *v.* Clack, (1903) 71 Pac. 925; Egan *v.* Estrada, (1899) 56 Pac. 721; Henry *v.* Mayer, (1898) 53 Pac. 590.

Arkansas.— Hinkle *v.* Hinkle, 55 Ark. 583, 18 S. W. 1049.

California.— Diamond Coal Co. *v.* Cook, (1900) 61 Pac. 578; Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Shirley *v.* Shirley, 92 Cal. 44, 27 Pac. 1097; Evans *v.* Ross, (1885) 8 Pac. 88; Haggin *v.* Raymond, 67 Cal. 302, 7 Pac. 721; Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625; Freeman *v.* Stephenson, 63 Cal. 499; Wakefield *v.* Bouton, 55 Cal. 109; Bates *v.* Gage, 49 Cal. 126.

Colorado.— Buckers Irr., etc., Co. *v.* Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49; McDonald *v.* Thompson, 16 Colo. 13, 26 Pac. 146; Hall *v.* Linn, 8 Colo. 264, 5 Pac. 641; McGan *v.* O'Neil, 5 Colo. 58.

Idaho.— Curtis *v.* Kirkpatrick, (1904) 75 Pac. 760; Brady *v.* Yost, 6 Ida. 273, 55 Pac. 542.

Illinois.—Biggerstaff *v.* Biggerstaff, 180 Ill. 407, 54 N. E. 333; Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350; Kelly *v.* Kelly, 126 Ill. 550, 18 N. E. 785; Titcomb *v.* Vantyle, 84 Ill. 371; Meeker *v.* Meeker, 75 Ill. 260; Austin *v.* Bainter, 50 Ill. 308; Farrin *v.* Cox, 47 Ill. App. 273; Kozacek *v.* Kozacek, 105 Ill. App. 180. And see Sibert *v.* McAvoy, 15 Ill. 106.

Indiana.— Seisler *v.* Smith, 150 Ind. 88, 46 N. E. 993; Brundage *v.* Deschler, 131 Ind. 174, 29 N. E. 921; Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Jennings *v.* Durham, 101 Ind. 391; Farmers' Bank *v.* Butterfield, 100 Ind. 229; Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487; Evans *v.* Nealis, 87 Ind. 262; Halstead *v.* Coen, 31 Ind. App. 302, 67 N. E. 957.

Kansas.— Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273; Wood *v.* Turbush, 63 Kan. 779, 66 Pac. 991; Bates *v.* Bates, 61 Kan. 859, 59 Pac. 639; Shorten *v.* Judd, 60 Kan. 73, 55 Pac. 286; Caldwell *v.* Brown, 56 Kan. 566, 44 Pac. 10; Moors *v.* Sanford, 2 Kan. App. 243, 41 Pac. 1064.

Kentucky.— Moore *v.* Payne, 7 Dana 380.

Michigan.— Dunn *v.* Dunn, 11 Mich. 284.

Mississippi.— Pittman *v.* Lamb, 53 Miss. 594.

Missouri.— Snell *v.* Harrison, 83 Mo. 651; Durkee *v.* Chambers, 57 Mo. 575; Burt *v.* Rynex, 48 Mo. 309; Hickey *v.* Drake, 47 Mo. 369. And see Bevin *v.* Powell, 11 Mo. App. 216.

Montana.— Arnold *v.* Sinclair, 12 Mont. 248, 29 Pac. 1124; Mantle *v.* Noyes, 5 Mont. 274, 5 Pac. 856; Gallagher *v.* Basey, 1 Mont. 457 [*affirmed* in 20 Wall. 670, 22 L. ed. 452].

Nebraska.— Stockham Bank *v.* Alter, 61 Nebr. 359, 85 N. W. 300.

New York.— Acker *v.* Leland, 109 N. Y. 5, 15 N. E. 743; Clark *v.* Mosher, 107 N. Y. 118, 14 N. E. 96, 13 N. Y. Civ. Proc. 215, 1 Am. St. Rep. 798; Learned *v.* Tillotson, 97 N. Y. 1, 49 Am. Rep. 508; Carroll *v.* Deimel, 95 N. Y. 252; Vermilyea *v.* Palmer, 52 N. Y. 471; American Primitive Methodist Soc. *v.* Brooklyn El. R. Co., 46 Hun 530; Brown *v.* Clifford, 7 Lans. 46; McKinley *v.* Lamb, 64 Barb. 199; Chapin *v.* Thompson, 58 How. Pr. 46.

Ohio.— Moore *v.* Moulton, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466.

Pennsylvania.— Wilson *v.* Wilson, 142 Pa. St. 572, 21 Atl. 985; Genet *v.* Delaware, etc., Canal Co., 6 Luz. Leg. Reg. 73.

Rhode Island.— Law *v.* Miller, 24 R. I. 14, 51 Atl. 1051.

South Carolina.— Talbott *v.* Sandifer, 27 S. C. 623, 3 S. E. 221; Peake *v.* Peake, 17 S. C. 421; Small *v.* Small, 16 S. C. 64; Ivy *v.* Clawson, 14 S. C. 267; Flinn *v.* Brown, 6 S. C. 209; Kirkpatrick *v.* Atkinson, 11 Rich. Eq. 27.

South Dakota.— F. Meyer Boot, etc., Co. *v.* Shenkberg Co., 11 S. D. 620, 80 N. W. 126; Upton *v.* Hugos, 7 S. D. 476, 64 N. W. 523.

Tennessee.— Lowe *v.* Traynor, 6 Coldw. 633; London *v.* London, 1 Humphr. 1. And see Humphreys *v.* Blevins, 1 Overt. 178.

Utah.— Smith *v.* Richardson, 2 Utah 424.

Virginia.— Hull *v.* Watts, 95 Va. 10, 27 S. E. 829; Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587; Love *v.* Braxton, 5 Call 537.

Wisconsin.— Powers *v.* Large, 75 Wis. 494, 43 N. W. 1120, 17 Am. St. Rep. 195; Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22. And see *In re* Jackman, 26 Wis. 104.

United States.— Kohn *v.* McNulta, 147 U. S. 238, 13 S. Ct. 298, 37 L. ed. 150; Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433; Watt *v.* Starke, 101 U. S. 247, 25 L. ed. 826; Garsed *v.* Beall, 92 U. S. 684, 23 L. ed. 686; Basey *v.* Gallagher, 20 Wall. 670, 22 L. ed. 452; Clyde *v.* Richmond, etc., R. Co., 72 Fed. 121, 18 C. C. A. 467; Allen *v.* Blunt, 1 Fed. Cas. No. 216, 3 Story 742; Day *v.* Hartshorn, 7 Fed. Cas. No. 3,683, 3 Fish. Pat. Cas. 32; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

See 19 Cent. Dig. tit. "Equity," §§ 815, 816.

When verdict necessarily satisfactory.— It is said in Nease *v.* Capehart, 15 W. Va. 299, that while it is true that the object of directing an issue is to satisfy the conscience of the chancellor, nevertheless that conscience must be satisfied with the verdict of the jury upon an issue properly directed, where no errors have been committed during the trial thereof, either by the court or jury to the prejudice of either party.

Advisory in appellate court.— Since the jury's verdict in a court of equity does not finally settle questions submitted to it, the fact that an issue has been awarded and a verdict of the jury rendered thereon on which the chancellor based his decree does not limit the control of the court of errors and appeals over the same. Freeman *v.* Staats, 9 N. J. Eq. 816.

jury is a sound judicial discretion and subject to review by the appellate court.[66] If the court improperly directs an issue, it may on the final hearing disregard the finding of the jury, and enter such decree as to it seems right.[67] Likewise if by reason of the decision on one or more issues other issues which have been sent to a jury become immaterial, the verdict of the jury upon such immaterial issues may be set aside and the decree pronounced as if no trial by jury had been had.[68] Nevertheless, where the issues have been properly submitted to a jury, and they are material, if the trial appears to have been a fair one, and the parties have introduced all their evidence on the issues, the verdict of the jury is entitled to much weight and ought not to be lightly disregarded.[69] But where it is apparent that there was not a fair trial, as when matters are referred to a jury, coupled with other matters immaterial to the issue, and calculated to mislead them, their verdict will be entitled to little or no weight.[70] The chancery court will rarely set aside a verdict when the judge before whom the issue is tried certifies that he is satisfied with the verdict, and that it ought to be regarded as conclusive on the question submitted to the jury.[71] But the court has power to disregard the certificate and set the verdict aside if it is not satisfied with it.[72] On the other hand the court is not bound to set the verdict aside because the judge certifies that it is against evidence, and being satisfied that it is right may decree thereon accordingly notwithstanding the certificate.[73] And although the verdict of the jury is only advisory and may be entirely disregarded by the court, where as a matter of fact it is adopted by the court, it has the conclusive effect of a final adjudication.[74] But where no final decree has been entered in a chancery case, the verdict of the jury upon issues submitted to it is not conclusive upon the parties on the trial of an action at law in which the same question is raised.[75] The parties are entitled to the opinion of the chancery court upon the issues of fact as well as upon the issues of law, even when the issues of fact have been submitted to a jury. It is accordingly error for the chancery court, acting in a merely ministerial capacity, to enter its decree simply on the jury's verdict. On the contrary the decree which the court enters upon the return of the verdict must be its own decree, based upon its own knowledge of the facts, and it can treat the verdict of the jury only as an opinion on the facts which it is at liberty

Discrepancy between pleading and issue.— In an issue in a suit to compel the surrender of a deed alleged to have been fraudulently obtained, where the deed was described as dated May 15, 1872, and in the bill it was described as dated Jan. 15, 1873, it was held that plaintiff would be entitled to a decree on showing that the validity of the deed described in the bill was the question actually tried. Brooks *v.* Howard, 58 N. H. 190.

Where findings are disregarded.— Where in equity submission is made as if the jury were the ultimate triers of the facts, if the court should determine to disregard the findings, it should allow the party against whom such determination is made to be heard before it as a court in all particulars in which a trial to the court differs from a trial to the jury. Vickers *v.* Buck Stove, etc., Co., 65 Kan. 97, 68 Pac. 1081.

66. Miller *v.* Wills, 95 Va. 337, 28 S. E. 337, holding that, where the evidence relating to the particular fact in dispute is contradictory and evenly balanced, it is the peculiar province of the jury to weigh the evidence and decide the issue, and it is error for the lower court to set aside the verdict. See also Peckham *v.* Armstrong, 20 R. I. 539, 40 Atl. 419. On the other hand it has been held that the findings of the jury are entitled to little weight on appeal as against contrary findings made by the court itself. F. Meyer Boot, etc., Co. *v.* Shenkberg Co., 11 S. D. 620, 80 N. W. 126.

67. Smith *v.* Betty, 11 Gratt. (Va.) 752; McFarland *v.* Douglass, 11 W. Va. 637; Jarrett *v.* Jarrett, 11 W. Va. 584; Anderson *v.* Cranmer, 11 W. Va. 562.

68. Nelson *v.* Claybrooke, 4 Lea (Tenn.) 687.

69. Humphrey *v.* Ward, 74 N. C. 784; Orgain *v.* Ramsey, 3 Humphr. (Tenn.) 580. In McDaniel *v.* Marygold, 2 Iowa 500, 65 Am. Dec. 786, it was said that under the circumstances stated in the text the court should abide by the verdict unless it be unconscionable.

70. Whittemore *v.* Stout, 3 Dana (Ky.) 427.

71. Prudden *v.* Lindsley, 31 N. J. Eq. 436.

72. Dunn *v.* Dunn, 11 Mich. 284.

73. Grigsby *v.* Weaver, 5 Leigh (Va.) 197.

74. Clink *v.* Thurston, 47 Cal. 21; Wilson *v.* Ward, 26 Colo. 39, 56 Pac. 573; Kammermeyer *v.* Hilz, 116 Wis. 313, 92 N. W. 1107.

75. Saylor *v.* Hicks, 36 Pa. St. 392.

to consult.[76] When all the issues made by the pleadings are not submitted to the jury, the court should proceed, after their verdict is rendered on the issues which were submitted to them, to try the remaining issues, and it is erroneous for the court to adopt the findings of the jury and enter up judgment on the whole case without doing so.[77] When the jury have decided some of the issues submitted to them, but have been unable to agree upon others, the cause may be decided by the chancery court upon the whole record, including the report of the trial at law, provided such court finds itself able to dispose of the cause satisfactorily upon all the evidence before it.[78]

2. When Jury Trial a Matter of Right. Where the right to a trial by jury in chancery cases is given by statute, and it is not discretionary with the court to direct an issue or refuse it, the verdict of the jury is generally regarded in the same light as the verdict of a jury in a common-law action, and the chancery court is bound by it and cannot disregard it except under the same circumstances as would justify the judge in the law court in setting aside a verdict in a common-law action.[79] And when the chancery court, instead of directing an issue out of chancery, directs an action at law, the result of the action is final, and not a mere issue sent by the court to a jury to inform its conscience.[80]

E. New Trial of Issues — 1. Application Therefor. Where an issue is sent from a court of equity to be tried at law, the motion for a new trial must be made in equity and not at law.[81] The motion must be heard on the merits of such issue

76. Fisher *v.* Carroll, 46 N. C. 27. And see Farmers' Bank *v.* Butterfield, 100 Ind. 229; MacNaughton *v.* Osgood, 114 N. Y. 574, 21 N. E. 1044; Brownlee *v.* Martin, 21 S. C. 392; Peake *v.* Peake, 17 S. C. 421; Sloan *v.* Westfield, 11 S. C. 445; Stahl *v.* Gotzenberger, 45 Wis. 121. The law court simply has the power to certify the verdict to the chancery court, and has no power to enter judgment on the verdict. Kelly *v.* Herb, 3 Pa. Dist. 284, 14 Pa. Co. Ct. 22.

77. Leeper *v.* Lyon, 68 Mo. 216. And see Moore *v.* Jacobs, 182 Mass. 482, 65 N. E. 847; Acker *v.* Leland, 109 N. Y. 5, 15 N. E. 743.

78. Adams *v.* Soule, 33 Vt. 538. And see Shapira *v.* D'Arcy, 180 Mass. 377, 62 N. E. 412.

79. For decisions construing local statutes giving the right to a trial by jury in some or all chancery cases and determining the effect of the verdict therein see the following cases:

Kentucky.— Hill *v.* Phillips, 87 Ky. 169, 7 S. W. 917, 10 Ky. L. Rep. 31; Moore *v.* Shepherd, 2 Duv. 125; *In re* Singleton, 8 Dana 315; Owensboro-Harrison Telephone Co. *v.* Wisdom, 62 S. W. 529, 23 Ky. L. Rep. 97.

Massachusetts.— Franklin *v.* Greene, 2 Allen 519.

Minnesota.— Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369; Marvin *v.* Dutcher, 26 Minn. 391, 4 N. W. 685.

Mississippi.— State *v.* Farish, 23 Miss. 483.

Missouri.— O'Bryan *v.* O'Bryan, 13 Mo. 16, 53 Am. Dec. 128; Cochran *v.* Moss, 10 Mo. 416.

New York.— Cuthbert *v.* Ives, 20 N. Y. Suppl. 469; Griffith *v.* Griffith, 9 Paige 315.

South Carolina.— Williams *v.* Halford, 67 S. C. 296, 45 S. E. 207; Loan, etc., Bank *v.* Peterkin, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900.

Tennessee.— Ragsdale *v.* Gossett, 2 Lea 729; Morris *v.* Swaney, 7 Heisk. 591; James *v.* Brooks, 6 Heisk. 150; Richmond *v.* Richmond, 10 Yerg. 343.

See 19 Cent. Dig. tit. "Equity," §§ 815-817.

Verdict is conclusive only on the issues passed on, and does not preclude the court from considering other material testimony. Dudley *v.* Dudley, 176 Mass. 34, 56 N. E. 1011.

80. Green, etc., St. Pass. R. Co. *v.* Moore, 64 Pa. St. 79. See also *infra*, XX, F.

81. Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144; Doe *v.* Roe, 6 Cow. (N. Y.) 55; Doe *v.* Roe, 1 Cow. (N. Y.) 216; Sloan *v.* Westfield, 11 S. C. 445; Taylor *v.* Mayrant, 4 Desauss. (S. C.) 505; Watt *v.* Starke, 101 U. S. 247, 25 L. ed. 826. A party against whom a jury has found on the trial of an issue will be understood as acquiescing in the finding, unless he applies for a new trial to the court which directed the issue. Fanning *v.* Russell, 94 Ill. 386. On a motion for a new trial the party submitting it must procure for the use of the chancery court notes of the proceedings at the trial and of the evidence given there. Watt *v.* Starke, 101 U. S. 247, 25 L. ed. 826; Clyde *v.* Richmond, etc., R. Co., 72 Fed. 121, 18 C. C. A. 467.

Time for making motion.— The motion should not be made until rendition of judgment. Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381; Bates *v.* Gage, 49 Cal. 126. The court will not entertain a motion for a new trial at the next term after judgment is rendered, after its final decree has been pronounced and recorded, unless there has been some action of the court to stay proceedings, although the counsel gave notice of the application and its grounds. Spann *v.* Fox, Ga. Dec. 1. Where issues are tried by a

alone, and cannot be affected by the equities arising on the bill and answer.[82] The motion may be denied if the affidavit of the moving party, although containing matters affording sufficient ground for a new trial, is contradicted by opposing affidavits.[83] On the hearing of the motion it cannot be objected that the issue was not broad enough and ought to have embraced other inquiries.[84]

2. Grounds For Granting or Refusing New Trial — a. When Jury Trial Not a Matter of Right. The object of an issue in equity, unless modified by statutory provisions, is, not to bind the court, but to satisfy its conscience.[85] It follows that a motion for a new trial is addressed to the conscience of the court which directed the issues,[86] and it may be granted or denied for reasons insufficient in an action at law.[87] Accordingly if the verdict in view of the evidence does not afford satisfaction a new trial may be directed, although there be no fraud, surprise, or miscarriage, and the verdict be one which at common law would not be disturbed.[88] On the other hand if the court is satisfied that substantial justice is done by the verdict, it will not be disturbed on mere technical grounds.[89] Thus a new trial will not be granted merely on the ground that testimony was improperly received or rejected at the trial of the issue, if in view of all the circumstances the court is satisfied that the result ought not to have been different, although a different decision as to the testimony had been made.[90] Nor will a new trial be granted for a misdirection of the judge to the jury, if on the whole the court is satisfied

jury, and after the rendition of the verdict for defendant the case was continued for argument as to what the judgment should be, the trial was before the court, and defendant had, under Nev. Civ. Pr. Act, § 197, ten days after notice of judgment to move for a new trial. Duffy *v.* Moran, 12 Nev. 94. A new trial may be granted on motion at the hearing upon the equity reserved. Van Alst *v.* Hunter, 5 Johns. Ch. (N. Y.) 148. The motion must be disposed of before the cause will be heard on bill and answer. Cohen *v.* Gratz, 6 Fed. Cas. No. 2,963, 3 Wall. Jr. 379.

82. Cohen *v.* Gratz, 6 Fed. Cas. No. 2,963, 3 Wall. Jr. 379, 4 Pa. L. J. Rep. 52, 6 Pa. L. J. 333.

83. Falkner *v.* Hunt, 73 N. C. 571.

84. Bassett *v.* Johnson, 2 N. J. Eq. 154.

85. Larrabee *v.* Grant, 70 Me. 79; Dunn *v.* Dunn, 11 Mich. 284; Moore *v.* Moulton, 2 Cinc. L. Bul. 323, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466. See also *supra*, XX, A, 1; XX, D, 1.

86. Larrabee *v.* Grant, 70 Me. 79; Dunn *v.* Dunn, 11 Mich. 284; Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144.

The court may order new trials of issues until its conscience is satisfied. Williams *v.* Bishop, 15 Ill. 553. And see Gaby *v.* Hankins, 86 Ill. App. 529.

In Georgia the judiciary acts of 1792 and 1797 (see also constitution of 1798) gave a right to a rehearing in equity from the verdict of one special jury to a hearing before another special jury. Pool *v.* Barnett, Dudley 8. And see Nell *v.* Snowden, 5 Ga. 1.

87. Larrabee *v.* Grant, 70 Me. 79; Dunn *v.* Dunn, 11 Mich. 284; Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144; Patterson *v.* Ackerson, 1 Edw. (N. Y.) 96. Among equity cases themselves a new trial may be granted more readily in some than in others. Thus in New York it has been held that in analogy to the provisions of the statute (2 Rev. St. p. 309, § 37) granting a new trial in all cases of ejectment upon terms, courts of equity will grant a new trial of issues in a case where the verdict binds the heir as to the inheritance, or determines the validity of a will of real estate, upon grounds which in other cases might be insufficient. Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144. It has also been held in New York that after a verdict establishing a will, on an issue to try its validity, a new trial will be awarded more readily than when the verdict is against the will. Van Alst *v.* Hunter, 5 Johns. Ch. 148.

88. Moore *v.* Moulton, 2 Cinc. L. Bul. 323, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466.

89. Bassett *v.* Johnson, 2 N. J. Eq. 154. And see Lansing *v.* Russell, 13 Barb. (N. Y.) 510.

90. *Alabama.*— Alexander *v.* Alexander, 5 Ala. 517.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— Apthorp *v.* Comstock, 2 Paige 482; Mulock *v.* Mulock, 1 Edw. 14.

Pennsylvania.— Gray *v.* Simon, 2 Phila. 348.

South Carolina.— Kirkpatrick *v.* Atkinson, 11 Rich. Eq. 27; Lyles *v.* Lyles, 1 Hill Eq. 76.

Virginia.— Meek *v.* Spracher, 87 Va. 162, 12 S. E. 397; Snouffer *v.* Hansbrough, 79 Va. 166.

See 19 Cent. Dig. tit. "Equity," § 818.

Immaterial newly discovered evidence.— A new trial will not be directed because the copy of a copy of a will was read at the trial, and since the trial the original copy had been found, which corresponded with that read. Jones *v.* Zollicoffer, 9 N. C. 492.

that the verdict is right.[91] Where the jury impaneled to try an issue fails to agree, the court may refuse to call another jury, and may decide the case on the evidence heard before the issue was framed.[92] When an issue has been properly directed, and the verdict of the jury is not responsive thereto, the verdict should be set aside and a new trial granted.[93] A new trial may be granted when the verdict of the jury is against the weight of evidence,[94] but it will not be granted on this ground unless preponderance of the evidence is very clear.[95] Where an issue framed and tried does not embrace the object contemplated, the court will direct a new and proper issue.[96] Where the verdict of the jury is without sense and contradictory, the court will not decree upon it, but will direct the issue to be submitted to another jury.[97] After two verdicts for the same party the chancery court is not bound to direct a new trial, although both verdicts were in opposition to the opinions of the judges who presided at the trials and a verdict had originally been rendered for the other party.[98]

b. When Jury Trial a Matter of Right. Where issues have been submitted by virtue of a statute giving a jury trial as a matter of right, the chancery court, in dealing with the verdict of the jury, will be governed by the same rules, and will indulge in the same presumptions in favor of the verdict as in an ordinary action at law.[99]

F. Direction of Action at Law. When plaintiff's right to equitable relief depends upon a legal title, the court in a proper case will retain the bill for a certain period, giving plaintiff in the meantime liberty to bring an action for the purpose of establishing his right at law, in order to found an equitable relief, in which case the bill will stand dismissed, unless the action is brought within the time limited.[1] It is said that the form which an issue at law shall take, whether it shall be an issue out of chancery or whether an action at law shall be instituted, is entirely within the discretion of the court.[2] Whether an order in a chancery cause framing an issue is for an action at law or an issue out of chancery does not depend upon the form of the issue, but upon its nature and purpose.[3] The court should always mold the action to be brought in such a form that the result shall be regarded as conclusive.[4] The parties to the action at law are bound to proceed with reasonable diligence, and are not entitled to suspend the further

91. Trenton Banking Co. *v.* Rossell, 2 N. J. Eq. 511. In South Carolina it is not error for the presiding judge at the trial of an issue to express to the jury his opinion of the evidence, and doing so is therefore no ground for a new trial. Lyles *v.* Lyles, 1 Hill Eq. 76.

92. Hardy *v.* Dyas, 203 Ill. 211, 67 N. E. 852; Keithley *v.* Keithley, 85 Mo. 217.

93. Marshall *v.* Marshall, 18 W. Va. 395. See also *supra*, XX, C, 3.

94. Lansing *v.* Russell, 3 Barb. Ch. (N. Y.) 325. But see Gilmer *v.* Cameron, 1 Ga. Dec. 142.

95. Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,946, 4 McLean 70.

96. Braxton *v.* Willing, 4 Call (Va.) 288. And see Moore *v.* Moulton, 2 Cinc. L. Bul. 323, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466.

97. Kirby *v.* Newsance, 9 N. C. 105.

98. McRae *v.* Woods, Hen. & M. (Va.) 548. And see Stannard *v.* Graves, 2 Call (Va.) 369.

99. Meeker *v.* Meeker, 75 Ill. 260; Bell *v.* Woodward, 48 N. H. 437; Whitted *v.* Fuquay, 127 N. C. 68, 37 S. E. 141. And see Clark *v.* Keene First Cong. Soc., 45 N. H. 331; Peebles *v.* Peebles, 63 N. C. 656.

1. Farnsworth *v.* Arnold, 3 Sneed (Tenn.) 252, 255, where the court said: "It may be laid down as a general rule that wherever the foundation of a claim is a legal demand, and the question whether a new trial should or should not be had can be discussed with more satisfaction in a court of law than in a court of equity, the court of equity will adopt the course of directing an action." In Gibbes *v.* Holmes, 10 Rich. Eq. (S. C.) 484, the court ordered that the question whether a bond was presumed to be paid be tried by an action at law to be instituted as of the date of the beginning of the suit in equity. In Nashua Sav. Bank *v.* Burlington Electric Light Co., 99 Fed. 14, the court directed an action at law to try a question of fraud.

2. American Dock, etc., Co. *v.* Public School Trustees, 36 N. J. Eq. 16.

3. American Dock, etc., Co. *v.* Public School Trustees, 37 N. J. Eq. 266, where the order directing the issue and a recital in the issue directed, showing that his purpose was to retain the trial of the title under his control, it was deemed to be an issue in the chancery cause. See also Fisher *v.* Carroll, 46 N. C. 27.

4. Farnsworth *v.* Arnold, 3 Sneed (Tenn.) 252, 255, where the court said it should be a part of the order that persons equitably in-

action of the chancery court in the cause until the limit of time allowed by the common-law procedure.[5] The action is prosecuted in compliance with the practice and proceeding in ordinary actions at law. Bills of exceptions may be taken at the trial and the proceedings are reviewable by rule to show cause and writ of error in the usual manner, and judgment at law will be entered which will be accepted in the chancery court as a finality.[6] After verdict the cause in chancery should be set down for further directions in the same manner as after the trial of an issue, and in the meantime no proceedings should be taken at law, in consequence of the verdict, except moving for a new trial, etc.[7] The court in the chancery cause ought to direct the final hearing to stand over to await determination of a writ of error if one is being prosecuted in the law court *bona fide* and without delay.[8]

XXI. REFERENCES.

A. Masters and Similar Officers — 1. Nature of Office. There were in the English chancery, and there are still in most American jurisdictions, officers known as masters in chancery, who act as assistants to the court,[9] performing both judicial and ministerial functions.[10] Their powers are usually derived from and confined to the terms of the order of reference,[11] but sometimes general powers are conferred.[12] Duties usually devolving upon masters are in some jurisdictions performed by officers more or less similar in character, but bearing different titles, such as commissioners,[13] committees,[14] or auditors.[15] In so far as such officers perform the duties of masters the difference in title may be disregarded, and the title of master is therefore used generically throughout the following sections.[16]

terested in the estate shall be at liberty to attend the trial by counsel, and to make such defense as they think proper.

For form of order directing an action at law see Decker *v.* Caskey, 1 N. J. Eq. 427, 434.

5. Delaware, etc., R. Co. *v.* Breckenridge, 56 N. J. Eq. 595, 40 Atl. 23. See also Arnold *v.* Thomson, 32 L. J. Ch. 40.

6. Delaware, etc., R. Co. *v.* Breckenridge, 56 N. J. Eq. 595, 40 Atl. 23; American Dock, etc., Co. *v.* Public School Trustees, 37 N. J. Eq. 266; Farnsworth *v.* Arnold, 3 Sneed (Tenn.) 252; Fisher *v.* Carroll, 46 N. C. 27. See also Hagerty *v.* Lee, 48 N. J. Eq. 98, 21 Atl. 933; Trenton Banking Co. *v.* Rossell, 2 N. J. Eq. 492; Apthorp *v.* Comstock, 2 Paige (N. Y.) 482; Hope *v.* Hope, 10 Beav. 581; Smith *v.* Effingham, 10 Beav. 589, 11 Jur. 896; Bootle *v.* Blundell, Coop. 136, 10 Eng. Ch. 136, 1 Meriv. 193, 35 Eng. Reprint 646, 19 Ves. Jr. 494, 34 Eng. Reprint 600, 15 Rev. Rep. 93; *Ex p.* Kensington, Coop. 96, 10 Eng. Ch. 96, 2 Rose 138, 2 Ves. & B. 79, 35 Eng. Reprint 249, 13 Rev. Rep. 32.

7. Farnsworth *v.* Arnold, 3 Sneed (Tenn.) 252, 256.

8. Delaware, etc., R. Co. *v.* Breckenridge, 56 N. J. Eq. 595, 40 Atl. 23; Brown *v.* Cranberry Iron, etc., Co., 72 Fed. 103, 18 C. C. A. 462.

9. Dunlap *v.* Kennedy, 10 Bush (Ky.) 539; Ranck *v.* Rutt, 9 Lanc. Bar (Pa.) 186. The master's office is a branch of the court. Stewart *v.* Turner, 3 Edw. (N. Y.) 458. The master acts as a representative and substitute of the court. Bate Refrigerating Co. *v.* Gillette, 28 Fed. 673.

10. Snyder *v.* Stafford, 11 Paige (N. Y.) 71; Ranck *v.* Rutt, 9 Lanc. Bar (Pa.) 186. The master is a judicial officer (Bate Refrigerating Co. *v.* Gillette, 28 Fed. 673) or a ministerial officer having powers delegated by the court (Hards *v.* Burton, 79 Ill. 504. See also Boston *v.* Nichols, 47 Ill. 353; Ellwood *v.* Walter, 103 Ill. App. 219).

11. Hards *v.* Burton, 79 Ill. 504; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243.

No authority can be conferred by consent of the parties. Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243. But see McCormack *v.* James, 36 Fed. 14, sustaining an allowance for improvements, not embraced in the reference, where witnesses had been examined and the master adopted the result of an arbitration which had been had between the parties. See also *infra*, XXI, C, 5, a.

12. As to grant special injunctions (Aldrich *v.* Kirkland, 8 Rich. (S. C.) 349; Norris *v.* Cobb, 8 Rich. (S. C.) 58), or settle accounts of fiduciaries (Whitehead *v.* Whitehead, 23 Gratt. (Va.) 376).

13. Perrin *v.* Lebus, 18 S. W. 1010, 14 Ky. L. Rep. 26; State *v.* Bird, 2 Rich. (S. C.) 99; Bush *v.* Phillips, 3 Lea (Tenn.) 63; Lyttle *v.* Cozad, 21 W. Va. 183.

14. Windham Cotton Mfg. Co. *v.* Hartford, etc., R. Co., 23 Conn. 373.

15. Townshend *v.* Duncan, 2 Bland (Md.) 45; Falmouth *v.* Falmouth Water Co., 180 Mass. 325, 62 N. E. 255; Malone's Appeal, 79 Pa. St. 481.

16. **A mistake in the title** in the order of reference is immaterial. Roberts *v.* Johns, 24 S. C. 580.

2. Ministerial Duties. The references herein treated are more especially for the performance of judicial acts in the progress of a cause. Besides these various other duties, altogether or chiefly ministerial, are usually performed by masters, such as the sale of property under decree,[17] the execution of conveyances,[18] the examination and approval of bonds,[19] and similar acts.

3. Appointment and Tenure of Office. Special masters are sometimes appointed *pro hac vice*, usually in the decree or order of reference,[20] but there are also usually regular or standing masters attached to a court and appointed for fixed or indefinite terms.[21] In the absence of statute to the contrary the appointment of standing masters as well as special devolves upon the court.[22] The authority of a special master continues in general until his duties are completed,[23] that of a standing master expires with his term of office, and he cannot thereafter proceed in matters already committed to him.[24] It is generally considered that a master may

17. See, generally, Judicial Sales.

18. Welch *v.* Louis, 31 Ill. 446; Johnson *v.* McGilvary, 1 J. J. Marsh. (Ky.) 321.

19. Ten Eick *v.* Simpson, 11 Paige (N. Y.) 177. See also Appeal and Error, 2 Cyc, 843 note 55. And see, generally, various other titles such as Injunctions; Ne Exeat.

20. Gilliam *v.* Baldwin, 96 Ill. App. 323; Palethorp *v.* Palethorp, 184 Pa. St. 585, 39 Atl. 489; Williams *v.* Bowman, 3 Head (Tenn.) 678; Briggs *v.* Neal, 120 Fed. 224, 56 C. C. A. 572 [*reversing* 110 Fed. 477].

21. **In the English chancery** the number of masters was from remote times twelve. Bennett Office Master 1.

U. S. Eq. Rule 82 provides that the circuit courts may appoint standing masters in chancery in their respective districts, and that they may also appoint a master *pro hac vice* in any particular case.

Selection of the standing master to whom a particular case shall be referred sometimes rests with the solicitors in the cause (Watt *v.* Crawford, 11 Paige (N. Y.) 470; Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131), sometimes in the discretion of the court (Pennsylvania Finance Committee *v.* Warren, 82 Fed. 525, 27 C. C. A. 472), and sometimes the references go to the different masters in rotation. The last was the English practice. Practice Reg. 363.

Reference may be changed from one to another master by the chancellor in his discretion. Cook *v.* Houston County Com'rs, 62 Ga. 223. A party who has proceeded before one master cannot transfer the case to another. Bishop *v.* Williams, Walk. (Mich.) 423.

22. Hill *v.* Robertson, 24 Miss. 368; Dale's Estate, 8 Pa. Dist. 683; Van Hook *v.* Pendleton, 28 Fed. Cas. No. 16,852, 2 Blatchf. 85; U. S. Eq. Rule 82.

In England the appointment was by the lord chancellor. Bennett Office Master 1.

Constitutional provisions.— The existence of masters or commissioners being essential to the exercise of the powers of the court, they may be appointed by the court under authority of the legislature, and do not fall within a constitutional provision authorizing the governor to appoint all officers whose appointment is not otherwise provided for. Lewis *v.* Rosler, 19 W. Va. 61.

In Delaware it was held that no authority exists for the appointment of such an officer, or for referring a case. Reybold *v.* Dodd, 1 Harr. 401, 26 Am. Dec. 401.

An agreement between the parties, selecting the master and fixing his compensation in advance, is in disrespect of the court and should not be tolerated. Pennsylvania Finance Committee *v.* Warren, 82 Fed. 525, 27 C. C. A. 472. Under a statute providing that the parties or attorneys may be permitted by the court to select a commissioner, the refusal of the court to appoint a commissioner selected will not be disturbed unless for clear abuse of discretion. McHenry *v.* Winston, 49 S. W. 4, 20 Ky. L. Rep. 1194.

Term of office.— A statute fixing a date for the expiration of the term of office of masters forbids an appointment extending beyond the date so fixed. People *v.* Beach, 77 Ill. 52.

23. Williams *v.* Bowman, 3 Head (Tenn.) 678. Commissioners appointed to ascertain facts have no authority after making their report. Oden *v.* Taul, 2 B. Mon. (Ky.) 45.

24. Lowndes *v.* Pinckney, 1 Rich. Eq. (S. C.) 155; Keith *v.* Gray, Rich. Eq. Cas. (S. C.) 227. In New York a master continued in office for six months after the expiration of his term in order to complete pending references, and his certificate as to proceedings within that period was under his official oath. American Ins. Co. *v.* Simers, 3 Ch. Sent. 70.

A statute abolishing the office of master renders void all subsequent proceedings. Palethorp *v.* Palethorp, 184 Pa. St. 585, 39 Atl. 489; State *v.* Brookover, 22 W. Va. 214.

The power of a commissioner ceases with the existence of the court appointing him. McLaughlin *v.* Janney, 6 Gratt. (Va.) 609.

Where a master's term expired before he had heard the case, and he reported the evidence already taken, the court had power either to refer to another master, or to try the case itself. Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956.

Report under new law.— Where a master was appointed under one law and concluded his hearing thereunder, but filed his report after a different law had been passed, his proceedings were valid. Simmons *v.* Jacobs, 52 Me. 147.

be removed by the court appointing him, as an administrative act, and without judicial proceedings for that purpose.[25]

4. Disqualifications. Where a master acts judicially he should be free from any interest in the suit or connection with the parties which would prevent a a judge from acting;[26] but where the reference is for purely ministerial acts such restrictions are sometimes held not to apply.[27] Proceeding before a master without objecting to a known disqualification is a waiver thereof.[28]

5. Oath and Bond. Masters are uniformly required to take an oath of office,[29] and sometimes to give a bond.[30]

25. People *v.* Welty, 75 Ill. App. 514; Dunlap *v.* Kennedy, 10 Bush (Ky.) 539; *Ex p.* Gray, Bailey Eq. (S. C.) 77. The unlawful removal of a commissioner may be inquired into by a court of law in a proceeding for usurpation against one improperly appointed. Smith *v.* Cochran, 7 Bush (Ky.) 147. In an early South Carolina case it was said that, under the then constitution of that state, a master being in part a judicial officer could be removed by impeachment only. *In re* Gibbes, 1 Desauss. 587. The court refused to remove a master on a motion made long after the facts for a certificate which was untrue, but not intended to mislead the court. Mason *v.* Pewabic Min. Co., 100 Fed. 340.

26. One interested in the result may not act. Windham Cotton Mfg. Co. *v.* Hartford, etc., R. Co., 23 Conn. 373.

When the regular master is a party a special master should be appointed. Gilliam *v.* Baldwin, 96 Ill. App. 323. Where a clerk and master is a party it is improper to appoint his deputy a special master. Horne *v.* Greer, (Tenn. Ch. App. 1897) 43 S. W. 774.

A solicitor in the cause may not act (Wilheit *v.* Pearce, 47 Ill. 413; Bowers *v.* Bowers, 29 Gratt. (Va.) 697), nor may his partner (Brown *v.* Byrne, Walk. (Mich.) 453). In an early case in North Carolina it was held that a master could not act as solicitor in the same court. Anonymous, 1 N. C. 5.

Client of solicitor.—It is not an absolute bar that the person appointed is a client of a solicitor whose fees are to be fixed by the reference. Rogers *v.* Rogers, (Tenn. Ch. App. 1896) 42 S. W. 70.

A former judge may be appointed, although the validity of his own order is in issue. Roberts *v.* Johns, 24 S. C. 580.

Appointment of a master to a judicial office is not sufficient to justify the vacation of the order of reference. Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034.

A commissioner could not act as register in South Carolina. Hunt *v.* Elliott, Bailey Eq. (S. C.) 90.

A vice-chancellor might execute an order of reference in a suit pending before himself in the old New York chancery court. Wetmore *v.* Winans, 8 Paige (N. Y.) 370.

A woman may be appointed master under a statute forbidding the preclusion of any person from any occupation, profession, or employment on account of sex, although she is not an attorney at law. Schuchardt *v.* People, 99 Ill. 501, 39 Am. Rep. 34.

27. Jordan *v.* Jordan, 17 Ala. 466; Snyder *v.* Stafford, 11 Paige (N. Y.) 71; People *v.* Spalding, 2 Paige (N. Y.) 326; New England Mortg. Security Co. *v.* Kinard, 43 S. C. 311, 21 S. E. 113; Goddin *v.* Vaughn, 14 Gratt. (Va.) 102.

In the federal courts it is broadly provided that no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member. 24 U. S. St. at L. 555 [U. S. Comp. St. (1901) p. 579]; 25 U. S. St. at L. 437. Also that no clerk of any district or circuit court or their deputies shall be appointed a receiver or master in any case except where the judge of said court shall determine that special reasons exist therefor to be assigned in the order of appointment. 20 U. S. St. at L. 415 [U. S. Comp. St. (1901) p. 591]. Failure through inadvertence to assign reasons for appointing a deputy clerk as special master is not reversible error. Briggs *v.* Neal, 120 Fed. 224, 56 C. C. A. 572 [*reversing* 110 Fed. 477].

28. Windham Cotton Mfg. Co. *v.* Hartford, etc., R. Co., 23 Conn. 373; Johnson *v.* Swart, 11 Paige (N. Y.) 385.

On collateral attack the appointment is not open to objection. Elgutter *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218; Seaman *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

29. The oath required in the English chancery was quite long and was used at least as early as 18 Edw. III. Its form is given in Bennett Office Master 2.

Failure to take the oath renders proceeding of a special master irregular. Walker *v.* House, 4 Md. Ch. 39. But it has been held that provisions as to the taking and subscription of oaths within a particular time are directory only, and that the master's acts are not invalid for failure to comply (State *v.* Toomer, 7 Rich. (S. C.) 216), and that a report will not be set aside for want of an oath, unless the order of reference expressly directed that the master be sworn (Thompson *v.* Smith, 23 Fed. Cas. No. 13,976, 2 Bond 320).

30. *Illinois.*—McLain *v.* People, 85 Ill. 205.

New York.— *In re* Van Eps, 56 N. Y. 599.

South Carolina.— State *v.* Toomer, 7 Rich. 216.

Tennessee.— Bush *v.* Phillips, 3 Lea 63.

6. **Liability For Official Conduct.** In the performance of ministerial acts a master is liable for misconduct,[31] or mistakes causing loss to others.[32] He is also liable for money in his custody,[33] but only as the agent of the court and not as trustee.[34] Accordingly he is not liable in the case of money properly received and handled, because of depreciation or loss not due to negligence on his part.[35] A master is liable for money paid out, although innocently, to the wrong person,[36] but he is protected if he pays in accordance with an order of court.[37] Where a bond is given the sureties are liable for acts committed during the term of office to which the bond relates.[38]

7. **Compensation.** Statutes or rules commonly fix the compensation of masters for such items of services as are usually performed by them.[39] The fees so fixed

West Virginia.— Lyttle *v.* Cozad, 21 W. Va. 183.

See 19 Cent. Dig. tit. "Equity," § 852. See also *infra*, XXI, A, 6. And see, generally, Officers.

Although not conditioned as required by statute a bond given by a master may be enforced. Perrin *v.* Lebus, 18 S. W. 1010, 14 Ky. L. Rep. 26.

31. **Liability as trustee.**— Where a master appointed to sell agreed with another that the latter should buy the property for their joint interest both were held liable for the profits realized. Chatham *v.* Pointer, 1 Bush (Ky.) 423. So where the master retained purchase-money and used it for his own purposes he was held liable for the sum with interest. Perrin *v.* Lebus, 18 S. W. 1010, 14 Ky. L. Rep. 26. And one who deposited a fund to his individual account and drew on it as his own was charged as a trustee for its earnings. Van Doren *v.* Van Doren, 45 N. J. Eq. 580, 17 Atl. 805.

A master is liable for neglecting to take security when so required. Treasurers *v.* Clowney, 2 McMull. (S. C.) 510; Somerall *v.* Gibbes, 4 McCord (S. C.) 547.

Commissioners to sell land, who receive the purchase-money without authority, are liable to the purchaser for the amount received with interest. Donahue *v.* Fackler, 21 W. Va. 124.

A master, directed to invest a fund in his hands, lent it to his debtor, taking therefrom the amount of his own claim against the latter. The borrower becoming insolvent, the master was held liable for the entire amount with interest. Mulligan *v.* Wallace, 3 Rich. Eq. (S. C.) 111.

A master, ordered to collect money on a sale of land, who took in part payment notes made by solvent men, was held not liable. Turpin *v.* McKee, 7 Dana (Ky.) 301.

32. Wright *v.* Bruschke, 62 Ill. App. 358.

33. Lowndes *v.* Pinckney, 1 Rich. Eq. (S. C.) 155.

34. Pickins *v.* Dwight, 4 S. C. 360.

35. Chalk *v.* Patterson, 5 S. C. 290; Wightman *v.* Gray, 10 Rich. Eq. (S. C.) 518; Polock *v.* Dubose, 7 Rich. Eq. (S. C.) 20; Saunders *v.* Gregory, 3 Heisk. (Tenn.) 567; Davis *v.* Harman, 21 Gratt. (Va.) 194. A master cannot discharge himself on his own affidavit that money in his hands was stolen without negligence on his part. *In re* Bostick, 37 N. C. 227. A master was held not liable for interest where he was ordered in 1861 to collect moneys and hold them for distribution, and the Civil war prevented the holding of another term of court until 1865. Saunders *v.* Gregory, *supra*. A master's liability must be enforced in a court of law. McCauley *v.* Heriot, Riley Eq. (S. C.) 19.

36. *Ex p.* Murdaugh, 58 S. C. 276, 36 S. E. 568; Jackson *v.* McAliley, 5 Rich. Eq. (S. C.) 38; Houseal *v.* Gibbes, Bailey Eq. (S. C.) 482, 23 Am. Dec. 186.

37. Simmons *v.* Simmons, 1 Harp. Eq. (S. C.) 256.

38. Street *v.* Laurens, 5 Rich. Eq. (S. C.) 227; Lowndes *v.* Pinckney, 1 Rich. Eq. (S. C.) 155.

Until demand they are not liable for interest on money received by a master. State *v.* Bird, 2 Rich. (S. C.) 99.

After expiration of term.— A sale made after the expiration of a term of office is not covered by the bond (Lowndes *v.* Pinckney, 1 Rich. Eq. (S. C.) 155), but the sureties are liable for money received after the expiration of the term on a bond taken during the term (State *v.* Bird, 2 Rich. (S. C.) 99).

39. It is impracticable to collate all such regulations. The statutes and rules of the various jurisdictions must be consulted. The following cases construe certain provisions now or formerly existing in the jurisdictions named. McHenry *v.* Winston, 49 S. W. 4, 20 Ky. L. Rep. 1194; Russell *v.* Avritt, 39 S. W. 699, 41 S. W. 769, 19 Ky. L. Rep. 202; Edwards *v.* Bodine, 11 Paige (N. Y.) 223; New York L. Ins., etc., Co. *v.* Davis, 10 Paige (N. Y.) 507; Davenport *v.* Williams, 9 Rich. (S. C.) 401; Guignard *v.* Harley, 11 Rich. Eq. (S. C.) 1; Westbrook *v.* Lanier, Rich. Eq. Cas. (S. C.) 142.

Although the parties employ a stenographer who is paid fifty cents a page for reporting the testimony, the statutory fees for taking testimony may be allowed to the master. Hoops *v.* Fitzgerald, 204 Ill. 325, 68 N. E. 430 [*affirming* 105 Ill. App. 536].

The master must file a statement showing the items of services rendered. Smyth *v.* Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314; Schnadt *v.* Davis, 185 Ill. 476, 57 N. E. 652; Underwood *v.* Dickinson, 8 Bush (Ky.) 337; Garr *v.* Roy, 50 S. W. 25, 20 Ky. L. Rep. 1697; Russell *v.* Avritt, 39

are mandatory and cannot be exceeded.[40] In the absence of such a schedule the fee is to be fixed by the court,[41] having regard to all the circumstances,[42] including the amonnt of money or property passing through the master's hands.[43] Compensation may be allowed for assistance where specially authorized,[44] or where required by the nature of the services.[45] A master will not be allowed compensation for services not required by the order of reference.[46] Sometimes summary methods are provided for the enforcement of payment of the master's fees, and he is not then permitted to withhold his report for their payment.[47] Nor can he demand payment in advance of his fees for services which the statute provides shall be taxed as costs.[48] The party at whose instance services are rendered is primarily liable to the master for such services.[49]

S. W. 699, 41 S. W. 769, 19 Ky. L. Rep. 202.

40. Roby *v.* Chicago Title, etc., Co., 194 Ill. 228, 62 N. E. 544 [*modifying* 94 Ill. App. 379]; Harvey *v.* Harvey, 87 Ill. 54; McDonald *v.* Patterson, 84 Ill. App. 326; McHenry *v.* Winston, 49 S. W. 4, 20 Ky. L. Rep. 1194; Bona *v.* Davant, 2 Hill Eq. (S. C.) 528, Riley Eq. 44; Woodward *v.* Williams, 11 Humphr. (Tenn.) 323.

Extra services.—A schedule of fees applicable only to the ordinary business of standing masters does not restrict compensation for extraordinary services. Claflin *v.* Celley, 48 Vt. 3. In the New York chancery an extra allowance might be made for extra services on application to the vice-chancellor before whom the suit was pending, and on affidavit of the master, stating the time occupied (Woodruff *v.* Straw, 4 Paige 407), but this power was sparingly exercised (Woodruff *v.* Straw, 4 Paige 407; Roseboom *v.* Vedder, Hopk. 228).

41. See U. S. Eq. Rule 82.

The fee should be fixed after completion of the services. Schnadt *v.* Davis, 185 Ill. 476, 57 N. E. 652; Pleasants *v.* Southern R. Co., 93 Fed. 93, 35 C. C. A. 226.

Salary.— An order pending the suit, fixing the compensation at a stated sum per year, does not constitute a contract or adjudication binding upon the parties or court as to future services. Pleasants *v.* Southern R. Co., 93 Fed. 93, 35 C. C. A. 226.

A master is entitled to interest on a fee fixed without objection, during the delay caused by an appeal upon the question as to which party should pay it. Jesup *v.* Wabash, etc., R. Co., 94 Fed. 20.

A master should not take pay without an order fixing his fee, or the consent of parties. *In re* Powel, 163 Pa. St. 349, 30 Atl. 373, 381.

Additional fee.— No fee should be allowed in addition to one previously agreed upon. Green *v.* Hood, 42 Ill. App. 652.

42. **In the federal courts,** see equity rule 82, the standard of judicial salaries is a proper measure for master's fees where his functions are judicial. Middleton *v.* Bankers', etc., Tel. Co., 32 Fed. 524. In ordinary cases the fees prescribed by the state law for similar services may be allowed. Doughty *v.* West, etc., Mfg. Co., 7 Fed. Cas. No. 4,030, 8 Blatchf. 107.

43. Wister *v.* Foulke, 6 Phila. (Pa.) 26; Lombard *v.* Bayard, 15 Fed. Cas. No. 8,469, 1 Wall. Jr. 196.

A master was allowed ten thousand dollars for executing a decree, where stock having a face value of six million dollars and market value of two million dollars passed through his hands. Erie R. Co. *v.* Heath, 8 Fed. Cas. No. 4,516, 10 Blatchf. 214.

A fee beyond two thousand five hundred dollars was held excessive for selling a railroad for two hundred and fifty thousand dollars. Pennsylvania Finance Committee *v.* Warren, 82 Fed. 525, 27 C. C. A. 472.

44. Schnadt *v.* Davis, 185 Ill. 476, 57 N. E. 652; Schmidt *v.* Miller, 16 S. W. 85, 12 Ky. L. Rep. 960; Edgell *v.* Felder, 99 Fed. 324, 39 C. C. A. 540.

45. Gunn *v.* Ewan, 93 Fed. 80, 35 C. C. A. 213.

46. Foster *v.* Ingham Cir. Judge, 128 Mich. 377, 87 N. W. 258; Matter of Hemiup, 3 Paige (N. Y.) 305. But see Special Bank Com'rs *v.* Cranston Sav. Bank, 12 R. I. 497, where compensation was allowed for services performed by a master under a misapprehension as to the scope of his duties.

47. Huddy *v.* Caldwell, 6 Wkly. Notes Cas. (Pa.) 448; Steffee *v.* Kerr, 2 Woodw. (Pa.) 171; U. S. Eq. Rule 82. Where a master has presented a petition asking that a party be ordered to pay his fees, an action to recover them will not lie until the petition has been disposed of. Woodward *v.* Brace, 139 Pa. St. 316, 20 Atl. 1001.

48. Glos *v.* Flanedy, 207 Ill. 230, 69 N. E. 862.

49. **In the taking of testimony** each party must pay in the first instance the costs of taking his own direct, redirect, or cross-examination; if the session is entirely taken up by the testimony of one party the fees for that session must be paid by him; the fees for an adjournment must be paid by the party asking therefor; and compensation for time consumed in considering the case and preparing the report is chargeable equally between the parties. Brickill *v.* New York City, 55 Fed. 565.

A party who has a master appointed is responsible for his fees in the first instance. Wingett's Estate, 6 Pa. Co. Ct. 383.

Costs of reference of exceptions to an answer may be equally divided where they are

B. Power to Refer and Subjects of Reference — 1. Power to Refer Generally. Where the subject is one proper for reference it is generally within the power of the court in its discretion either to refer the cause, even without consent of the parties,[50] or to determine the questions involved without a reference.[51] In the absence of some special rule of practice a reference is not a matter of right,[52] and cannot be entered on the motion of a party as of course,[53] but only on special application,[54] and for good cause shown.[55] It is not competent for the court to abdicate its functions by referring the whole cause to a master to try and determine all the issues,[56] but it may do so by consent of parties.[57] There is no power to refer a judicial question for determination in an unjudicial manner.[58]

in part good and in part bad. Willis *v.* Terry, 98 Fed. 8.

If the losing party fails to pay his charge the winning party should pay and recover from the other. Whitaker's Estate, 40 Leg. Int. (Pa.) 141.

50. Smith *v.* Rowe, 4 Cal. 6; State *v.* Orwig, 25 Iowa 280; State *v.* McIntyre, 53 Me. 214; Nephi Irr. Co. *v.* Jenkins, 8 Utah 369, 31 Pac. 986.

The power of compulsory reference has been greatly restricted by statute in some states. See for example N. Y. Code Civ. Proc. §§ 1013, 1015.

51. *Alabama.*— Levert *v.* Redwood, 9 Port. 79.

Michigan.— Bussey *v.* Bussey, 71 Mich. 504, 39 N. W. 847.

Minnesota.— Goodrich *v.* Parker, 1 Minn. 195, exceptions.

New York.— Powell *v.* Kane, 5 Paige 265, impertinence.

North Carolina.— Fortune *v.* Watkins, 94 N. C. 304.

Ohio.— Goddard *v.* Leech, Wright 476, interpleader.

Pennsylvania.— *In re* Weed, 163 Pa. St. 600, 30 Atl. 278 (attorney's fees); Phillips' Appeal, 68 Pa. St. 130.

Tennessee.—Buchanan *v.* Alwell, 8 Humphr. 516, to investigate title.

United States.— Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14 (scandal and impertinence); Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644 (finding amount due); New York Cent. Trust Co. *v.* Madden, 70 Fed. 451, 17 C. C. A. 236 (intervention).

See 19 Cent. Dig. tit. "Equity," §§ 866, 868.

Account.— As to the necessity of referring a case for the taking of an account see *infra*, XXI, B, 2, e, (II).

Inability of a party to pay the fees has been held a sufficient reason for determining the matter without a reference. Meurer *v.* Meurer, 16 Wkly. Notes Cas. (Pa.) 540.

Very long pendency of a suit is a good reason for the court's computing damages without a reference. Campbell *v.* New York City, 81 Fed. 182.

To ascertain facts which appear from the pleadings a reference is unnecessary. Clark *v.* Hershy, 52 Ark. 473, 12 S. W. 1077; Bullock *v.* Beemis, 3 A. K. Marsh. (Ky.) 285.

52. Manning *v.* Ludington, 6 Ohio Dec. (Reprint) 620, 7 Am. L. Rec. 117.

53. Barnes *v.* Haynes, 16 Gray (Mass.) 34; Faitoute *v.* Haycock, 2 N. J. Eq. 105; Corning *v.* Baster, 6 Paige (N. Y.) 178.

54. Corning *v.* Baxter, 6 Paige (N. Y.) 178.

In Alabama under chancery rule 1 an order of reference may be made out of the regular term. Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229.

55. Manning *v.* Ludington, 6 Ohio Dec. (Reprint) 620, 7 Am. L. Rec. 117. A reference will not be made on the mere speculation of parties that evidence might be offered. Planters' Bank *v.* Stockman, Freem. (Miss.) 502.

On the motion of one not a party and not showing any interest it is error for the court to refer a cause for the investigation of a question. Henderson *v.* Alderson, 7 W. Va. 217.

56. Early Times Distillery Co. *v.* Zeiger, (N. M. 1901) 66 Pac. 532; Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764; Garinger *v.* Palmer, 126 Fed. 906, 61 C. C. A. 436; Walker *v.* Kinnare, 76 Fed. 101, 22 C. C. A. 75. The court may reserve a question involving the construction of an instrument and refer the rest of the case. White *v.* Hampton, 10 Iowa 238. Where the pleadings show that no difficult question of law is involved and that an accounting may be necessary, it is proper to refer all the issues to a master. Green *v.* McCarter, 64 S. C. 290, 42 S. E. 157.

In Pennsylvania a practice until recently prevailed of referring a cause where the testimony was voluminous or complicated, in order that it might be sifted and the facts collated and reported. White *v.* Thielens, 106 Pa. St. 173; Clark's Appeal, 62 Pa. St. 447; Backus' Appeal, 58 Pa. St. 186; Page *v.* Vankirk, 1 Brewst. 282; Bauer *v.* Seeger, 1 Wkly. Notes Cas. 98.

57. Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764; Haggett *v.* Welsh, 1 Sim. 134, 2 Eng. Ch. 134. An agreement to refer, in order to expedite the hearing, does not change the rights of the parties or affect the burden of proof. Patton *v.* Cone, 1 Lea (Tenn.) 14.

58. As by directing an officer to appraise property on inspection instead of through testimony (Brown *v.* Cannon, 10 Ill. 174. See also Hummert *v.* Stempel, 31 Ill. App. 550), or to make a private examination of papers and turn over to plaintiff those belonging to him, to a receiver papers be-

The construction of an instrument is a question for the court to decide, and not one proper for reference.[59] After final decree and the determination of an appeal there can be no reference for an account of rents received after the decree, as such a course, by permitting further appeals, would forever prevent the termination of the case.[60]

2. Subjects of Reference — a. In General. It has been said that there is no question at law or in equity which a master may not have to decide, or respecting which he may not be called upon to report his opinion to the court.[61] It is therefore impossible to enumerate the subjects proper for reference, and only those most frequently presented in the progress of a cause and in which the practice of referring is best settled will here be mentioned.[62]

b. Questions Relating to Pleadings. It is the practice to refer to a master exceptions for scandal and impertinence,[63] and also frequently exceptions to an answer for insufficiency.[64] Interrogatories have also been referred to a master when some of them seemed to call for evidence so clearly irrelevant that it should be rejected at the threshold.[65]

c. Taking Testimony. It is within the discretion of the court after the issues are formed[66] to order a reference to take testimony.[67] This may be done on showing that a large amount of irrelevant testimony was being offered which the examiner had no authority to exclude.[68] It is improper, where a new trial has been awarded, to refer the case to take the testimony *de novo*, as that already taken must stand as a part of the case.[69]

d. Suits For Infants. It was the established practice in chancery, when a suit had been instituted on behalf of an infant, on suggestion that it was not for his benefit, to refer the matter to a master to ascertain that fact, and, where two suits were instituted by different persons as next friend, to refer both in order to determine which was more for the infant's benefit.[70] This practice has received some recognition in the United States.[71]

longing to a corporation and not material to the prosecution, and to reserve papers concerning the corporation's transactions (Potter *v.* Beal, 50 Fed. 860, 2 C. C. A. 60 [*reversing* 49 Fed. 793]).

A decree for an accounting should not restrict the witnesses to certain of the parties, excluding others interested. Damouth *v.* Klock, 29 Mich. 289.

Commissioners appointed to examine books should be authorized to take testimony. Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506.

59. Ancker *v.* Levy, 3 Strobh. Eq. (S. C.) 197. See also White *v.* Hampton, 10 Iowa 238.

60. Bonner *v.* Illinois Land, etc., Co., 96 Ill. 546. After final decree there can be no reference, on motion, to take an account changing the relief. A rehearing is first necessary. Hendricks *v.* Robinson, 2 Johns. Ch. (N. Y.) 484.

61. Bennett Office Master 4.

In Illinois a master cannot be given power to determine a judicial question. De Leuw *v.* Neely, 71 Ill. 473.

62. Reference of plea of another suit pending see Abatement and Revival, 1 Cyc. 45.

63. See *supra*, VII, H, 3. It seems that exceptions for impertinence will be so referred without examination by the court. McKinzie *v.* Smith, 3 N. C. 407.

Where parts of an answer are prima facie scandalous a reference will be ordered without examining to ascertain whether they are material. Mathewson *v.* Mathewson, 1 R. I. 397.

64. See *supra*, VIII, E, 9, c, (v).

65. Zunkel *v.* Litchfield, 21 Fed. 196.

66. Where a case is heard on bill and answer it should be determined thereon and should not be submitted to a master to take testimony and report. Irvine *v.* Epstein, (Fla. 1903) 33 So. 1003.

67. Grob *v.* Cushman, 45 Ill. 119; Davis *v.* Davis, 30 Ill. 180; Barnwell *v.* Marion, 58 S. C. 459, 36 S. E. 818; Farmers' Mut. Ins. Assoc. *v.* Berry, 53 S. C. 129, 31 S. E. 53; McSween *v.* McCown, 21 S. C. 371. Such a reference has been refused where the evidence already taken was exceedingly voluminous and the object was to make it more definite. Gates *v.* Cornett, 72 Mich. 420, 40 N. W. 740. A reference to take proofs is unnecessary when the court can hear them. Carter *v.* Lewis, 29 Ill. 500. An order of reference is unnecessary but harmless, where the officer already has power to take it. Bresee *v.* Bardfield, 99 Va. 331, 38 S. E. 196.

68. Hepworth *v.* Henshall, 11 Pa. Co. Ct. 251.

69. Cooke *v.* Pennington, 9 S. C. 83.

70. Da Costa *v.* Da Costa, 3 P. Wms. 140, 24 Eng. Reprint 1003; Gage *v.* Stafford, 1 Ves. 544, 27 Eng. Reprint 1195.

71. Dow *v.* Jewell, 21 N. H. 470.

e. Determining Particular Facts — (I) *In General.* The most frequent purpose of a reference is to take testimony and report to the court for its information with reference to some fact or groups of facts incidental to the main questions involved, but essential to be determined in order to frame a final decree. Besides the taking of accounts, the assessment of damages, and the determination of titles,[72] many other matters not susceptible of ready classification or even enumeration may be conveniently determined in this way.[73]

(II) *Accounts.* Where it becomes necessary to take an account it is the usual practice and the court has always power to order a reference for that purpose.[74] Indeed it is said that the investigation of accounts is the chief duty of a master,[75] and in some jurisdictions compulsory references are practically limited to that purpose.[76] While in general the court has power as in other cases[77] to pass on an account without the intervention of a master,[78] and may properly do so where the pleadings disclose the amount,[79] or where the matter is simple and free from complications,[80] still where these conditions do not exist it is very generally held that there ought always to be a reference.[81] Whenever it is

Where infants are defendants it is proper and convenient to refer the cause to take the evidence and report the facts. McClay *v.* Norris, 9 Ill. 370.

72. See *infra*, XXI, B, 2, (II), (III), (IV).

73. The determination of the value of the statutory estate and dower interest of a married woman (Barnes *v.* Carson, 59 Ala. 188), on a question of fraud in the transfer of a note, the determination of the value of services constituting the consideration of the transfer (Shute *v.* Sturm, 6 Baxt. (Tenn.) 139); payments of interest in an inquiry as to the existence of usury (Rohrer *v.* Travers, 11 W. Va. 146); the position and condition of land, a conveyance of which is to be compelled (Farmer *v.* Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106); in a suit for infringement of a trade-mark the question whether the public was deceived (Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185); where a house was erected on the land of another a reference in a suit relating thereto in order to determine the relative values of house and land (Stirman *v.* Cravens, 33 Ark. 376); the determination of claims which should be allowed as liens in favor of one against whom a trust is established (Abell *v.* Bradner, 11 N. Y. St. 246).

74. Heard *v.* Russell, 59 Ga. 25; Bolton *v.* Flournoy, R. M. Charlt. (Ga.) 125; Bratt *v.* Bratt, 21 Md. 578; Walker *v.* Joyner, 52 Miss. 789; Bailey *v.* Westcott, 6 Phila. (Pa.) 525.

Ill. St. (1872) c. 22, § 39, providing for references to report evidence, has no relation to references to take accounts. McMannomy *v.* Walker, 63 Ill. App. 259.

Pennsylvania equity rule of 1894, abolishing masters with certain exceptions, leaves it in the discretion of the court to refer an accounting to a master or to call to the aid of the court an accountant or other expert. Com. *v.* Archibald, 195 Pa. St. 317, 47 Atl. 5.

Commissioner cannot be appointed out of the state to settle an account, except by consent of the parties. Anderson *v.* Gest, 2 Hen. & M. (Va.) 26. But in the federal courts it is the universal practice to permit a master to act outside of the territorial jurisdiction of the court. Bate Refrigerating Co. *v.* Gillette, 28 Fed. 673. See also Consolidated Fastener Co. *v.* Columbian Button, etc., Co., 85 Fed. 54.

75. McDougald *v.* Dougherty, 11 Ga. 570.

76. Williams *v.* Benton, 24 Cal. 424; O'Brien *v.* Bowers, 17 Bosw. (N. Y.) 657, 10 Abb. Pr. (N. Y.) 106; Fromer *v.* Ottenberg, 36 Misc. (N. Y.) 631, 74 N. Y. Suppl. 366; Rathbun *v.* Rathbun, 3 How. Pr. (N. Y.) 139. And see, generally, References.

77. See *supra*, XXI, B, 1.

78. Glover *v.* Jones, 95 Me. 303, 49 Atl. 1104.

79. Hix *v.* Hix, 25 W. Va. 481; Weinberg *v.* Rempe, 15 W. Va. 829.

80. May *v.* May, 19 Fla. 373; McGillis *v.* Hogan, 190 Ill. 176, 60 N. E. 91 [*affirming* 85 Ill. App. 194]; Stewart *v.* Duffy, 116 Ill. 47, 6 N. E. 424. A reference is unnecessary to compute the amount due on a note (Thornton *v.* Neal, 49 Ala. 590; Savage *v.* Berry, 3 Ill. 545) or mortgage (Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681).

81. The rule is stated with varying degrees of positiveness.

It is not erroneous, but bad practice, for the chancellor to take the account himself. Bryan *v.* Morgan, 35 Ark. 113.

It is unsafe to litigants and burdensome to the court, and in a doubtful case would necessitate reversal. Robert *v.* Dale, 7 B. Mon. (Ky.) 199.

There ought to be a reference.— Stage *v.* Gorich, 107 Ill. 361; Koon *v.* Hollingsworth, 97 Ill. 52; Daly *v.* St. Patrick's Catholic Church, 97 Ill. 19; Quayle *v.* Guild, 83 Ill. 553; Mosier *v.* Norton, 83 Ill. 519; Stewart *v.* Kirk, 69 Ill. 509; Bressler *v.* McCune, 56 Ill. 475; Blackerby *v.* Holton, 5 Dana (Ky.) 520.

It is reversible error, on finding that a plaintiff is entitled to redeem, for the court to state the account without a reference. Moffett *v.* Hanner, 154 Ill. 649, 39 N. E. 474.

expedient to do so the testimony on which the account is based may be taken before the reference to the master.[82]

(III) *Assessment of Damages.* Where an assessment of damages becomes necessary it is perhaps more usual to submit the issue to a jury[83] than to refer the matter to a master; but the proceeding often merges into an accounting, and a reference is frequently made for the purpose.[84]

(IV) *Determination of Titles.* On a bill for specific performance it was the English practice, where the only question was as to the vendor's title, to direct a reference to report thereon.[85] This practice has been followed in the United States,[86] and has been extended to some analogous cases.[87]

(V) *Main Issues Should Be First Determined.* A reference will not be ordered to inquire with regard to a fact constituting the gist of the controversy.[88] The main issues establishing the general rights of the parties should first be determined,[89] and the order should give definite directions as to the principles by which the master is to be guided and the scope of the matter referred.[90] Accordingly it is improper to order a reference until the time to answer has

Consent of parties cannot impose on the court the labor of making up complicated accounts. French *v.* Gibbs, 105 Ill. 523.

A party who did not ask for a reference cannot complain because none was ordered. Smith *v.* Bayley, 9 Ky. L. Rep. 405.

82. Wofford *v.* Ashcraft, 47 Miss. 641.

83. See *supra*, XX, A, 1.

84. See *supra*, II, C, 2, a.

Rents and profits of land may be ascertained by reference. Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; Roberts *v.* Stanton, 2 Munf. (Va.) 129, 5 Am. Dec. 463. But see Eustace *v.* Gaskins, 1 Wash. (Va.) 188.

85. Paton *v.* Rogers, 1 Ves. & B. 351, 12 Rev. Rep. 183 note, 35 Eng. Reprint 137; Moss *v.* Matthews, 3 Ves. Jr. 279, 30 Eng. Reprint 1010.

86. Willbanks *v.* Duncan, 4 Desauss. (S. C.) 536; Middleton *v.* Selby, 19 W. Va. 167. See, generally, Specific Performance.

Where the question is one of law alone there should be no reference. Goddin *v.* Vaughn, 14 Gratt. (Va.) 102; Jackson *v.* Ligon, 3 Leigh (Va.) 161.

In Tennessee it was held that the question of title to slaves could not be referred. Woodson *v.* Smith, 1 Head 276.

87. As a bill to restrain an action on a note given for the purchase-price, on the ground that the title was defective (Bailey *v.* Jordan, 32 Ala. 50), and a bill to rescind on the same grounds (Frost *v.* Brunson, 6 Yerg. (Tenn.) 36).

88. Lunsford *v.* Bostion, 16 N. C. 483. A reference will not be directed where the evidence failed as to a matter essential to plaintiff's equity. Kearney *v.* Harrell, 58 N. C. 199. An account will not be ordered merely to give plaintiff an opportunity to establish his bill. Ammons *v.* South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004.

89. *Arkansas.*— Byrd *v.* Belding, 18 Ark. 118.

Florida.— Owens *v.* Rhodes, 10 Fla. 319.

Maryland.— Egerton *v.* Reilly, 1 Gill & J. 385.

Tennessee.— Carey *v.* Williams, 1 Lea 51.

West Virginia.— Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794.

United States.— Walker *v.* Kinnare, 76 Fed. 101, 22 C. C. A. 75; Ward *v.* Paducah, etc., R. Co., 4 Fed. 862.

See 19 Cent. Dig. tit. "Equity," §§ 865, 869.

Before an accounting will be ordered there must be sufficient evidence to determine the right thereto. Franklin *v.* Meyer, 36 Ark. 96; Sharp *v.* Morrow, 6 T. B. Mon. (Ky.) 300; Planters' Bank *v.* Stockman, Freem. (Miss.) 502; Baltimore Steam Packet Co. *v.* Williams, 94 Va. 422, 26 S. E. 841; Columbian Equipment Co. *v.* Mercantile Trust, etc., Co., 113 Fed. 23, 51 C. C. A. 33. Where a bill presents a case rendering necessary the taking of an account a reference may properly be made on the pleadings. Neal *v.* Briggs, 120 Fed. 224 [*reversing* 110 Fed. 477]. A reference to take an account before the rights are determined is cured by a decree determining them before the report comes in. Tucker *v.* Hadley, 52 Miss. 414.

90. *Arkansas.*— Franklin *v.* Meyer, 36 Ark. 96.

Florida.— Owens *v.* Rhodes, 10 Fla. 319.

Kentucky.— Kay *v.* Fowler, 7 T. B. Mon. 593; Sharp *v.* Morrow, 6 T. B. Mon. 300.

New York.— Remsen *v.* Remsen, 2 Johns. Ch. 495.

Pennsylvania.— Spring Brook R. Co. *v.* Lehigh Coal, etc., Co., 1 Lack. Leg. N. 31.

Tennessee.— Carey *v.* Williams, 1 Lea 51.

See 19 Cent. Dig. tit. "Equity," § 875.

Allegations and proofs limit the scope of the order. Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 587.

The court may use evidence taken without objection, in giving directions, whether or not it was competent. Hudson *v.* Trenton Locomotive, etc., Mfg. Co., 16 N. J. Eq. 475.

Accounting.— It is not usual to refer accounts with instructions. Clements *v.* Pearson, 39 N. C. 257. Error in directing an account of debits alone may be cured by a subsequent order to take both debits and credits. Stull *v.* Goode, 10 Heisk. (Tenn.) 58.

expired,[91] or, when matter in the nature of a demurrer is incorporated in the answer, until such matter has been passed upon.[92]

3. VALIDATING IRREGULAR REFERENCES. Generally an irregularity in referring a cause is waived by proceeding before the master without objection,[93] and one at whose instance a reference was granted cannot afterward complain.[94] Where, however, the order is a nullity, the objection is not waived by failure to insist thereon;[95] but it has been held that failure to enter an order of reference is cured by entry of a decree based on the report, as the decree raises the inference that the order was in fact made.[96] The order of reference is nevertheless subject to review at a later stage of the case.[97]

C. Proceedings Before Masters — 1. IN GENERAL. The proceedings in the master's office in England were governed by a highly technical and complicated system of procedure which it is not necessary here to set out,[98] as it is largely disused and the proceedings are now conducted under simpler rules.[99] A large discretion is generally reposed in the master as to the regulation of the proceedings before him.[1] A master must perform his duties in person and he cannot delegate his authority.[2] One appointed both examiner and master should first perform his duties as examiner and make his reports separately.[3]

2. DUTY TO PROSECUTE REFERENCE. The duty of prosecuting the reference devolved in chancery upon plaintiff, as the party in most cases interested in forwarding it;[4] but now the duty primarily devolves upon the party obtaining the reference.[5] If he fail to do so the prosecution may be committed to the other

91. Moreland *v.* Metz, 24 W. Va. 119, 49 Am. Rep. 246; Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794.

Without consent of parties a reference cannot be ordered until the cause has been regularly reached for hearing. Wessells *v.* Wessells, 1 Tenn. Ch. 58.

Acquiescence in a premature reference ratifies it. Dunn *v.* Dunn, 8 Ala. 784.

92. Klein *v.* Commercial Nat. Bank, 44 Leg. Int. (Pa.) 144.

93. Dudley *v.* Eastman, 70 N. H. 418, 50 Atl. 101; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691; Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

94. Sweet *v.* Jacocks, 6 Paige (N. Y.) 355, 31 Am. Dec. 252.

95. Johnston *v.* Bloomer, 3 Edw. (N. Y.) 328.

96. Hess *v.* Voss, 52 Ill. 472; Preston *v.* Hodgen, 50 Ill. 56. Error of taking testimony before a master without an order cannot be cured by a *nunc pro tunc* order. Hawley *v.* Simons, 157 Ill. 218, 41 N. E. 616 [*affirming* 53 Ill. App. 287].

97. Fussell *v.* Hennessy, 14 R. I. 550; New England Mortg. Security Co. *v.* Kinard, 43 S. C. 311, 21 S. E. 113.

98. A full description of the procedure is found in 2 Daniell Ch. Pr. (1st ed.) 789 *et seq.* See also Bennett Office Master.

99. The practice of course varies in different jurisdictions, the statutes and rules of which may be consulted.

U. S. Eq. Rules 73–81 relate to proceedings before masters in the federal courts. These rules dispense with the old formalities and establish a system in themselves, rendering a reference to the practice of the court of chancery unnecessary. Hatch *v.* Indianapolis, etc., R. Co., 9 Fed. 856, 11 Biss. 138.

A Michigan statute, directing proceedings involving an accounting, relates only to technical bills for accounting. People *v.* Randall, 37 Mich. 473.

1. U. S. Eq. Rule 77 provides that the master shall regulate all the proceedings in every hearing before him. See Bate Refrigerating Co. *v.* Gillette, 28 Fed. 673. The master should regulate the manner of taking the reference at the return of the first summons, so far as it conveniently can be done. Story *v.* Brown, 4 Paige (N. Y.) 112. A power to regulate proceedings in certain particulars existed in the English chancery. Bennett Office Master 6. Rule 102 of the New York chancery contained a similar provision.

2. Stone *v.* Stone, 28 N. J. Eq. 409.

Assistants.— A report will not be invalidated by the employment, even of a party, as amanuensis, in the absence of improper conduct on his part. Longmire *v.* Fain, 89 Tenn. 393, 18 S. W. 70. And assistants may sometimes be employed. See *supra*, XXI, A, 7.

3. Penn Morocco Co. *v.* Walton, 3 Del. Co. (Pa.) 102.

4. 2 Daniell Ch. Pr. 792.

5. Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343; Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131.

U. S. Eq. Rule 74 provides that the party at whose instance and for whose benefit the reference is made shall cause the same to be presented to the master for hearing on or before the next rule day succeeding the time when the reference was made.

Summons to examine witnesses may be had by any party, the proceedings having been instituted. Fream *v.* Dickinson, 3 Edw. (N. Y.) 300.

party by order made on a showing of the negligence,[6] or sometimes without an order.[7]

3. Presenting Reference to the Master. It was formerly proper for the master to proceed upon the minutes before the order of reference was entered, but this practice was abolished,[8] and the cause is laid before the master by delivering a copy of the title and ordering part of the decree.[9]

4. Notice to Parties. The rule is that the master cannot properly proceed in the absence of notice to all parties of the time and place of hearing.[10] It is unnecessary to give notice of a reference to be determined upon the pleadings, or facts already before the court.[11] A master who has obtained leave to withdraw his report for correction cannot file a new report changing his findings, without notice to the parties of a rehearing.[12] This notice as well as others during the proceedings was in chancery given in the form of warrants subscribed by the master and appointing the time and place for hearing, and the warrants were underwritten with a note indicating the particular purpose of the hearing.[13] In the United States a similar notice, usually called a summons, should be served, fixing the time and place and specifying the nature of the proceedings to be had.[14]

6. Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131; Holley *v.* Glover, 9 Paige (N. Y.) 9; 2 Smith Ch. Pr. 97.

On a reference of exceptions the proper order is to procure the report in a time stated or that the exceptions be dismissed. Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 343.

7. **U. S. Eq. Rule 74** provides that if the party at whose instance the reference was made shall omit to present it to the master, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master at the costs of the party procuring the reference.

8. Bennett Office Master 5. A summons to proceed before actual entry of the order is irregular. Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131.

After a chancery case is remanded with directions to refer the master cannot proceed until an order of reference has been made. Keenan *v.* Strange, 12 Ala. 290.

9. 2 Daniell Ch. Pr. 794. In the absence of other regulations the presentment to the master of a copy of the decree or ordering part thereof is still the customary and proper manner of laying the case before him, but there seems to be an absence of recent reported precedents. On a reference of an account to three auditors or a majority of them it is no objection to the report of two that one was not notified to attend. Davis *v.* Foley, Walk. (Miss.) 43.

10. Ballard *v.* Lippman, 32 Fla. 481, 14 So. 154; Whiteside *v.* Pulliam, 25 Ill. 285; Gaines *v.* Coney, 51 Miss. 323; Douhleday *v.* Newton, 9 How. Pr. (N. Y.) 71. The parties to a proceeding for the benefit of a person incompetent to contract are not entitled to notice of a reference to ascertain the reasonable fee for plaintiff's attorney. Nimmons *v.* Stewart, 13 S. C. 445.

If a party is absent the first day, the master must again notify the parties to appear, and thereafter he may proceed *ex parte.* Smith *v.* Estes, 2 N. C. 158.

11. Michigan Ins. Co. *v.* Whittemore, 12 Mich. 427; Cobb *v.* Duke, 36 Miss. 60, 72 Am. Dec. 157. Notice must be given, although the reference demands only the examination of records. Wardlaw *v.* Erskine, 21 S. C. 359.

12. National Folding-Box, etc., Co. *v.* Dayton Paper-Novelty Co., 91 Fed. 822. But it is unnecessary otherwise to give notice of a consideration to correct an error. Prince *v.* Cutler, 69 Ill. 267.

Where there are repeated sittings to consider the case it is unnecessary to give formal notice each time. Gibson *v.* Broadfoot, 3 Desauss. (S. C.) 584.

13. Bennett Office Master 6, App. 1.

14. Manhattan Co. *v.* Evertson, 4 Paige (N. Y.) 276.

Time fixed for service should be stated or underwritten, but it is unnecessary to serve a copy of the order of reference. Whipple *v.* Stewart, Walk. (Mich.) 357.

A notice directed to be published on account of the large number of parties is sufficient if it gives the style of the suit without naming all the parties. Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 591.

Harmless indefiniteness.— Where a notice fixed the time of hearing for a certain day, "if fair; if not, the first fair day thereafter," but the master proceeded on the day named, and no one was injured, the report was confirmed. White *v.* Drew, 9 W. Va. 695.

Defective proceeding.— Where the notice was to appear before A, and B, another master, returned that defendant did not appear the proceedings were irregular. Whipple *v.* Brown, Harr. (Mich.) 436.

Service on the solicitor is generally sufficient. Bennett Office Master 6. It is sufficient to leave the notice at the solicitor's dwelling in his absence. Taylor *v.* Thomas, 2 N. J. Eq. 106. Service on a solicitor is sufficient if the party is a non-resident and has no known agent. Johnson *v.* Person, 16 N. C. 364.

A recital in the master's report that reasonable notice was given is *prima facie* evidence of sufficient service.[15] In the absence of express rule the length of notice required is left to the discretion of the master, but it must be reasonable under the circumstances.[16] A party waives right to formal notice if he has actual notice and takes part in the reference,[17] at least if he does not object to proceeding.[18]

5. Scope of Inquiry — a. Determined by the Order of Reference. A master derives his authority from the order of reference and cannot extend his inquiry beyond the matters expressly referred.[19] The order will, however, be given a sufficiently liberal construction properly to accomplish the purpose of the reference.[20] The master must decide on all matters referred to him, and cannot

15. State *v.* McIntyre, 53 Me. 214.

16. Bernie *v.* Vandever, 16 Ark. 616; Strang *v.* Allen, 44 Ill. 428; Hallett *v.* Hallett, 2 Paige (N. Y.) 432. Sometimes the rules specify the length of notice and in that case are mandatory. Cowperthwaite *v.* Bruen, 3 Edw. (N. Y.) 339.

17. Prince *v.* Cutler, 69 Ill. 267.

18. Hart *v.* Small, 4 Paige (N. Y.) 288. The objection must be taken in the court below. Sanders *v.* Dowell, 7 Sm. & M. (Miss.) 206.

An affidavit in support of an objection for want of notice must show that neither the party nor his solicitor had notice. Whiteside *v.* Pulliam, 25 Ill. 285.

19. *Alabama.*— Henderson *v.* Huey, 45 Ala. 275.

Georgia.— White *v.* Reviere, 57 Ga. 386.

Maine.— Howe *v.* Russell, 36 Me. 115.

Maryland.— Winn *v.* Albert, 2 Md. Ch. 169.

Pennsylvania.— Burton *v.* Peterson, 4 Wkly. Notes Cas. 526.

South Carolina.— Jones *v.* Massey, 9 S. C. 376.

Tennessee.— Maury *v.* Lewis, 10 Yerg. 115.

Texas.— Ballard *v.* McMillan, 5 Tex. Civ. App. 679, 25 S. W. 327.

United States.— Bate Refrigerating Co. *v.* Gillette, 28 Fed. 673; Taylor *v.* Robertson, 27 Fed. 537; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,608, 2 Story 243; Felch *v.* Hooper, 8 Fed. Cas. No. 4,718, 4 Cliff. 489.

See 19 Cent. Dig. tit. "Equity," § 885.

A report is a nullity in so far as it is not within the scope of the reference (White *v.* Walker, 5 Fla. 478; State *v.* Hyde, 4 Baxt. (Tenn.) 464; Gore *v.* Poteet, (Tenn. Ch. App. 1898) 46 S. W. 1050), and a decree made thereon should be reversed (Saunders *v.* Saunders, Litt. Sel. Cas. (Ky.) 10).

An agreement that an auditor may consider matters not specially referred is revocable until the award is made. Wright *v.* Cobleigh, 21 N. H. 339.

Liberal construction by parties.—Where the reference was to take proof relating to matters necessary or proper to be determined for the purpose of ascertaining the principles upon which an accounting should proceed, but all parties construed the order liberally and full testimony with regard to the accounting was taken, a final decree was rendered on the report. Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859.

Because the master acted under a general mandate a report will not be disturbed if he confined himself to the services intended to be required of him. Burleigh *v.* White, 70 Me. 130.

20. Reference to take and report the evidence means all the evidence. Schumann *v.* Helberg, 62 Ill. App. 218.

Reference to take an account between the parties requires the settlement of all accounts. Harris *v.* Magee, 3 Call (Va.) 502. It includes all items embraced within the fair intent of the order, although not specified. Tolles' Appeal, (Pa. 1888) 14 Atl. 394. Where pending the suit the parties settled their accounts and a new order of reference was made, but the settlement contained errors and was mutilated, the commissioner was permitted to examine the accounts generally. Todd *v.* Bowyer, 1 Munf. (Va.) 447. A master to settle accounts has jurisdiction of every question which goes in charge or discharge, although involving fraud. Lowitz *v.* Alden, 6 R. I. 512, construing Rev. St. c. 164, § 17.

A master, ordered to state necessary improvements, should consider all the circumstances, including improvements unprofitable in themselves but calculated to enhance the value of the whole property. Reed *v.* Jones, 8 Wis. 421.

A direction to distribute a fund among holders of first-mortgage bonds permits the master to entertain a claim by an owner of second-mortgage bonds that he was fraudulently induced to exchange first-mortgage bonds therefor. McElrath *v.* Pittsburgh, etc., R. Co., 28 Leg. Int. (Pa.) 197.

For other instances see Lannan *v.* Clavin, 3 Kan. 17; Heywood *v.* Miner, 102 Mass. 466; Morse *v.* Slason, 16 Vt. 319.

A reference by consent to take proof of the issues joined and to report the same to the court with the master's conclusions as to the amount of damages, if any, plaintiff is entitled to recover, refers the whole case and not merely the question of damages. Walker *v.* Kinnare, 76 Fed. 101, 22 C. C. A. 75. But a consent decree, referring the cause "for hearing and determination on the merits," can only be considered, under the Illinois practice, as a reference to the opinion of the master and preparation of a decree

report back a particular matter for the decision of the court,[21] but he may in some cases report the facts, submitting a question of law essential to the conclusion to the decision of the court.[22]

b. Master Cannot Go Behind the Order. The master cannot go behind the order or decree under which the reference is made; he must accept it as conclusive of all matters embraced therein.[23] Where a bill is taken *pro confesso* and the cause referred, defendant cannot offer before the master matters of defense,[24] nor can the master hear evidence which if it had been before the court would probably have changed the decree.[25] If a deposition was used without objection at the hearing, objection cannot be made to the credibility of the witness when it is offered before the master;[26] but the fact that a document was proved before the chancellor does not preclude an inquiry as to its genuineness by the master, when the chancellor had not acted thereon.[27]

c. Master Cannot Go Beyond the Pleadings. While the master is bound by the order of reference it is to be construed with reference to the pleadings, and the master cannot entertain any claim or decide any matter not embraced within their scope.[28] The master cannot permit an amendment of the pleadings.[29]

subject to the supervision of the court. Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

21. Burroughs *v.* McNeill, 22 N. C. 297.

22. Matter of Hemiup, 3 Paige (N. Y.) 305.

23. *Maine.*—Gilmore *v.* Gilmore, 40 Me. 50.
New Jersey.— Izard *v.* Bodine, 9 N. J. Eq. 309.
Pennsylvania.— McElrath *v.* Pittsburgh, etc., R. Co., 28 Leg. Int. 197.
Rhode Island.— Updike *v.* Doyle, 7 R. I. 446.
South Carolina.— Smith *v.* Swain, 7 Rich. Eq. 112.
Tennessee.— Ellis *v.* Ellis, (Ch. App. 1900) 62 S. W. 51.
United States.— Terry *v.* Robbins, 122 Fed. 725.
See 19 Cent. Dig. tit. "Equity," §§ 884, 885.

Although default of defendant has rendered compliance with instructions impossible the master has no right to depart from them. He should in such case apply for further directions. Frazier *v.* Vaux, 1 Hill Eq. (S. C.) 203.

Foundation for vacating the order of reference cannot be laid by contending before the master that former proceedings had settled the questions referred. Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034.

24. Bauerle *v.* Long, 165 Ill. 340, 46 N. E. 227; Kuhl *v.* Martin, 28 N. J. Eq. 370.

But in a suit for separation, the bill having been taken *pro confesso,* defendant may appear before the master and cross-examine plaintiff's witnesses. Perry *v.* Perry, 2 Barb. Ch. (N. Y.) 285.

25. Maury *v.* Lewis, 10 Yerg. (Tenn.) 115; Deitch *v.* Staub, 115 Fed. 309, 53 C. C. A. 137.

26. Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605.

27. Aday *v.* Echols, 18 Ala. 353, 52 Am. Dec. 225.

28. *Alabama.*— Levert *v.* Redwood, 9 Port. 79.
Georgia.— Mackenzie *v.* Flannery, 90 Ga. 590, 16 S. E. 710.
Massachusetts.— Newton Rubber Works *v.* De Las Casas, 182 Mass. 436, 65 N. E. 816.
Michigan.— Ward *v.* Jewett, Walk. 45.
New York.— Caldwell *v.* Leiber, 7 Paige 483; Torrey *v.* Shaw, 3 Edw. 356.
Pennsylvania.— Morio's Appeal, 4 Pennyp. 398.
Tennessee.— Williams *v.* Bartlett, 4 Lea 620.
See 19 Cent. Dig. tit. "Equity," § 884.

Testimony on an issue not yet made may be taken where the order of reference contemplated that it would be made. Maze *v.* Heckinger, 13 Ky. L. Rep. 541.

Relation of evidence to answer.— On a reference to ascertain the amount of a defendant's claim the master is not bound by the statement of the claim in the answer, but may consider evidence either supporting or contradicting the answer, as to the true extent of the claim. Chickering *v.* Hatch, 5 Fed. Cas. No. 2,671, 1 Story 516. Where a defendant elects to take a reference as to matters in his answer not denied evidence may be introduced as to such matters. Martin *v.* Reese, (Tenn. Ch. App. 1899) 57 S. W. 419.

When departure justified.— When the supreme court has decided that plaintiff is entitled to a full accounting of certain matters, the master taking the account may award a sum in excess of that named in the bill. Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 49 Fed. 774. An item not pleaded may be reported if the parties go into the evidence thereon, without objection. McGuire *v.* Wright, 18 W. Va. 507.

A finding is proper if it conforms in substance, although not in form, to the issues. Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421.

An amendment may be permitted where the master's finding varies from the bill. Garner's Appeal, 1 Walk. (Pa.) 438.

29. Trubee *v.* Trubee, 41 Conn. 36; Ayres *v.* Daly, 56 Ga. 119.

6. EVIDENCE BEFORE MASTER. In the absence of special restrictions the master has power to receive evidence for the proper determination of the matter referred.[30] He must act on the evidence presented and not on his personal knowledge.[31] The evidence may be documentary, by depositions, or *viva voce*.[32] If the testimony is taken orally it must be reduced to writing.[33] It is sometimes expressly provided that all depositions and documents previously read or used in the court may be used before the master.[34] The ordinary rules forbidding a reëxamination[35] apply to hearings before a master, and a witness once examined cannot be reëxamined before the master without an order therefor.[36] The master may be authorized to compel the production of books and papers.[37] It is also a

30. Goodwin *v.* McGehee, 15 Ala. 232.

An auditor appointed to distribute a fund may receive proof that a particular claim has been paid. Cadwalader *v.* Montgomery, 7 Leg. Int. (Pa.) 133.

A re-reference with "power to take further evidence" authorizes the parties to introduce such evidence as they deem requisite. Van Ness *v.* Van Ness, 32 N. J. Eq. 729.

A master may compute the amount due on a note without the intervention of a witness. Dorn *v.* Ross, 177 Ill. 225, 52 N. E. 321.

It is proper to prohibit further proof, in referring the case, where a bill has been pending several years with ample opportunity to introduce evidence. Feige *v.* Babcock, 111 Mich. 538, 70 N. W. 7.

Authority over person in court.— A master may not order a person who has appeared but not taken the stand, to remove her veil so that she may be identified by a witness under examination. Rice *v.* Rice, 47 N. J. Eq. 559, 21 Atl. 286, 11 L. R. A. 591.

31. Bissell *v.* Bozman, 17 N. C. 229.

As to value of an attorney's services he is not bound by the opinion of other lawyers. Taintor *v.* Franklin Nat. Bank, 107 Fed. 825. But see Adams *v.* Fry, 29 Fla. 318, 10 So. 559.

Evidence not filed as required.— He may not, however, disregard evidence on one side because of non-compliance with a rule of the master requiring it to be filed within a certain time. Nutriment Co. *v.* George Green Lumber Co., 195 Ill. 324, 63 N. E. 152 [*reversing* 94 Ill. App. 342].

The master should exercise independent judgment as to the weight of the evidence (Pilkington *v.* Cotten, 55 N. C. 238), but it is not necessarily error to base a finding of an amount on the average of the estimates of witnesses (Walling *v.* Burroughs, 54 N. C. 21; Morrison *v.* McLeod, 37 N. C. 108).

If he gives his own deposition by consent of the parties it is no ground of exception. Mott *v.* Harrington, 15 Vt. 185.

32. Grob *v.* Cushman, 45 Ill. 119; U. S. Eq. Rule 77. See Bennett Office Master 6.

Depositions.— U. S. Eq. Rule 77 permits the master to order the examination of witnesses under a commission. A master may permit commissions to be opened and read at the reference. Leaphart *v.* Leaphart, 1 S. C. 199. The deposition must be signed by the witness. Flavell *v.* Flavell, 20 N. J. Eq. 211. Aged witnesses residing at a distance may be examined on interrogatories. Mason *v.* Roosevelt, 3 Johns. Ch. (N. Y.) 627.

Viva voce.— McDougald *v.* Dougherty, 11 Ga. 570; Taylor *v.* Young, 2 Bush (Ky.) 428; Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200; Foote *v.* Silsby, 9 Fed. Cas. No. 4,920, 3 Blatchf. 507. Where a master is directed to report the testimony together with his opinion, the testimony should be taken in his presence. Schnadt *v.* Davis, 185 Ill. 476, 57 N. E. 652 [*affirming* 84 Ill. App. 669].

A master to take impeaching testimony may, before the introduction of a record of conviction, permit a witness to be asked whether he is the person who was convicted of a certain offense; but the testimony should be stricken out if the record is not afterward introduced. O'Brien *v.* Keefe, 175 Mass. 274, 56 N. E. 588.

33. Brockman *v.* Aulger, 12 Ill. 277; Taylor *v.* Cawthorne, 17 N. C. 221. The parties may insist that the evidence he taken in writing. Lovejoy *v.* Churchill, 29 Vt. 151.

34. R. I. Rule 72; U. S. Eq. Rule 80.

Such testimony must be brought before the master expressly, in order that it may be answered, and it will not do merely to refer to it in argument. Bell *v.* U. S. Stamping Co., 32 Fed. 549.

A printed report of a congressional committee is not a document within the meaning of such a rule. Hazard *v.* Durant, 12 R. I. 99.

35. See *supra*, XVI, C.

36. Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

Testimony taken on one reference stands for use on a subsequent reference (Cooke *v.* Pennington, 9 S. C. 83), and the witness cannot be reëxamined without an order (Pearson *v.* Darrington, 32 Ala. 227).

37. Brockman *v.* Aulger, 12 Ill. 277; Hallett *v.* Hallett, 2 Paige (N. Y.) 432; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 513; Goss Printing-Press Co. *v.* Scott, 119 Fed. 941. U. S. Eq. Rule 77 confers upon the master general authority so to do. It is no objection to the report that the master did not require the production of original books and accounts. Mott *v.* Harrington, 15 Vt. 185.

Where a party producing books seals portions thereof and makes an affidavit that the portions sealed contain nothing material to the reference, the affidavit is *prima facie* evidence of the fact, and the master will not open the books until grounds for so doing are shown. Titus *v.* Cortelyou, 1 Barb. (N. Y.) 444.

Deed.— A master has no power to compel

frequent rule that parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor.[38] It is competent for a master to examine the parties,[39] but a party so examined has a right to demand that the questions be propounded in writing.[40] Such an examination is in the nature of a bill of discovery, and the answers are evidence to the same extent.[41] A party so examined cannot be cross-examined generally by his own counsel, but he may accompany his answer with an explanation.[42] A party who refuses to attend the reference cannot object to an irregularity in the manner of taking testimony.[43] The master has power to rule on objections to the evidence,[44] but unless the evidence is clearly inadmissible the better practice is to receive it subject to the objections, so that it may go into the record and be considered without a re-reference if the court should deem it admissible.[45] An objection should always, however, be made when the evidence is offered, and an exception be taken.[46] In some jurisdictions it is the practice, when the master excludes evidence, to bring the matter at once before the chancellor and obtain his direction;[47] but elsewhere such practice is discountenanced.[48]

7. Adjourning and Reopening Hearing. The granting of adjournments is discretionary with the master, and an adjournment may be denied unless good cause and absence of laches is shown by the party applying therefor.[49] The case must,

the production of a deed. Cartee *v.* Spence, 24 S. C. 550.

38. Myers *v.* Bennett, 3 Lea (Tenn.) 184; Reed *v.* Jones, 8 Wis. 421; U. S. Eq. Rule 79. New York chancery rule 107 required the accounts to be brought before the master in the form of debtor and creditor only after a decree settling the rights of the parties and not on a reference by consent. Story *v.* Brown, 4 Paige 112. An account may be taken either by examination on interrogatories or by bringing in debtor and creditor accounts. Hollister *v.* Barkley, 11 N. H. 501.

The use of books of account after they have been impeached as books of original entry, merely as data for finding other evidence and for considering such entries as are corroborated, is not error. Robinson *v.* Alabama, etc., Mfg. Co., 89 Fed. 218.

39. Hollister *v.* Barkley, 11 N. H. 501. Where a defendant's examination is insufficient, an order may be entered for a further examination. Case *v.* Abeel, 1 Paige (N. Y.) 630. An examination before a master directed by the court has the effect of an answer. Tem-leman *v.* Fauntleroy, 3 Rand. (Va.) 434. Where plaintiff shows himself at the hearing entitled to relief he may have an order to examine defendants as to matter consequential to the relief. French *v.* Rainey, 2 Tenn. Ch. 640.

40. McDougald *v.* Dougherty, 11 Ga. 570; Dougherty *v.* Jones, 11 Ga. 432; Winter *v.* Wheeler, 7 B. Mon. (Ky.) 25.

In New Jersey the practice is said to be universal to examine parties orally. Jackson *v.* Jackson, 3 N. J. Eq. 96.

41. McDougald *v.* Dougherty, 11 Ga. 570; Winter *v.* Wheeler, 7 B. Mon. (Ky.) 25; Hollister *v.* Barkley, 11 N. H. 501. The answers are evidence for the party in so far only as they are responsive. Alexander *v.* Alexander, 8 Ala. 796. Where after a cause was referred the parties filed documents which they called an amended bill and an amended answer, the one containing interrogatories and the other answers thereto, these documents were considered as part of the examination. Hollister *v.* Barkley, 11 N. H. 501.

42. Hollister *v.* Barkley, 11 N. H. 501; Jackson *v.* Jackson, 3 N. J. Eq. 96.

43. State Bank *v.* Rose, 2 Strobh. Eq. (S. C.) 90.

44. Ellwood *v.* Walter, 103 Ill. App. 219; Kohlmeyer *v.* Kohlmeyer, 6 Pa. Co. Ct. 609; O'Malley *v.* O'Malley, 10 Wkly. Notes Cas. (Pa.) 32; Wooster *v.* Gumbirnner, 20 Fed. 167.

He should not reject evidence relevant under the pleadings, because he considers that the issue made by the pleadings is immaterial. Putnam *v.* Ritchie, 6 Paige (N. Y.) 390.

45. Ellwood *v.* Walter, 103 Ill. App. 219; Hann *v.* Barnegat, etc., Imp. Co., (N. J. Ch. 1886) 2 Atl. 928; Kohlmeyer *v.* Kohlmeyer, 6 Pa. Co. Ct. 609; Kansas L. & T. Co. *v.* Sedalia Electric R., etc., Co., 108 Fed. 702.

46. *Alabama.*— Taylor *v.* Kilgore, 33 Ala. 214.

New Mexico.— Williams *v.* Thomas, 3 N. M. 324, 9 Pac. 356.

New York.— Pratt *v.* Adams, 7 Paige 615.

Virginia.— Read *v.* Winston, 4 Hen. & M. 450.

United States.— Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,196, 6 Blatchf. 328.

See 19 Cent. Dig. tit. "Equity," § 891.

The ground of objection should be specified. Marra *v.* Bigelow, 180 Mass. 48, 61 N. E. 275.

47. Dickinson *v.* Torrey, 91 Ill. App. 297; Schwarz *v.* Sears, Walk. (Mich.) 19.

48. Rusling *v.* Bray, 37 N. J. Eq. 174; Dotterer *v.* Saxton, 1 Wkly. Notes Cas. (Pa.) 218; Hoe *v.* Scott, 87 Fed. 220, 1007; Welling *v.* La Bau, 32 Fed. 293, 23 Blatchf. 305; Lull *v.* Clark, 20 Fed. 454.

49. Joplin *v.* Cordrey, 5 S. W. 397, 9 Ky. L. Rep. 445; Philadelphia Third Nat. Bank

however, be continued by adjournments to a fixed time, or else notice given of the resumption of the hearing.[50] When a time is fixed by agreement of the parties for closing the testimony, the taking of testimony after the time so fixed is discretionary with the master.[51] It is said that the master should himself fix a reasonable time and ought not to open the case for further proof after that time without special cause.[52] Even when the court has fixed a time for closing the evidence the parties may waive the limitation and continue the taking of testimony thereafter.[53] After the closing of testimony the master retains discretionary power to reopen the case for further evidence,[54] but this power is generally held to cease when the draft of his report has been submitted to counsel.[55] Until that time the application should be made to the master,[56] but after the report is filed the power of re-referring rests with the court.[57]

D. The Master's Report — 1. Preparation and Filing. By the English practice, when the master was ready to report and had prepared a draft of his report, warrants were issued whereby the parties were permitted to inspect and take copies of such draft, and were heard thereafter by the master on objections submitted, the main purpose of this practice being to require the parties to make all objections in the first instance to the master.[58] After hearing suggestions as to changes in the report, and ruling thereon, the report was prepared for signature and an opportunity given to parties to submit in writing any remaining objections, and then the report was signed and filed.[59] It is in the United States in some jurisdictions necessary and in all perhaps permissible to follow in substance the English practice, but the practice in this respect is largely governed by rule and varies greatly.[60] The report should be filed within whatever time may

v. Chester Valley Nat. Bank, 86 Fed. 852, 30 C. C. A. 436. The master may adjourn for the purpose of taking the testimony of designated witnesses, and on the adjournment confine the testimony to such witnesses. Ashmead *v.* Colby, 26 Conn. 287.

50. Rice *v.* Schofield, 9 N. M. 314, 51 Pac. 673.

51. Messinger's Appeal, (Pa. 1885) 1 Atl. 260.

52. Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

Abuse of discretion.— On a reference to ascertain the amount due on a mortgage, the mortgagor appeared and refused to take part, but after an hour or more and before plaintiff had left offered to make proof of certain payments. The master's refusal to hear the evidence was held error. Schwarz *v.* Sears, Walk. (Mich.) 19.

Those who neglect to proceed where notice of the time for taking testimony has been given and abundant opportunity offered cannot have the case reopened. Gilliam *v.* Baldwin, 96 Ill. App. 323; Sands *v.* Greeley, 83 Fed. 772.

A short time may properly be limited where the circumstances require great expedition. People *v.* Board of Police, 11 N. Y. St. 583.

53. Harding *v.* Harding, 79 Ill. App. 590; Hoofstitler *v.* Hostetter, 172 Pa. St. 575, 33 Atl. 753.

54. Oliver *v.* Wilhite, 201 Ill. 552, 66 N. E. 837; Richardson *v.* Wright, 58 Vt. 367, 5 Atl. 287.

55. Tyler *v.* Simmons, 6 Paige (N. Y.) 127; Burgess *v.* Wilkinson, 7 R. I. 31; New York Cent. Trust Co. *v.* Marietta, etc., G. R. Co., 75 Fed. 41; Piper *v.* Brown, 19 Fed. Cas. No. 11,181, Holmes 196.

In a complicated case in which it is impossible to know what testimony is necessary until the fact is developed by the evidence, a master may in his discretion take depositions after he has made up the draft of his report. Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748.

After he has partly made up his report a master may receive additional testimony. Patterson *v.* Patterson, 2 Pearson (Pa.) 170.

Any time before final settlement of his report a master may admit newly discovered evidence. Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

Material testimony inadvertently omitted may properly be received by reopening the case after submission of a draft report. New York Cent. Trust Co. *v.* Richmond, etc., R. Co., 69 Fed. 761.

56. Whiteside *v.* Pulliam, 25 Ill. 285.

57. National Folding-Box, etc., Co. *v.* Dayton Paper-Novelty Co., 91 Fed. 822. See *infra*, XXI, F, 4.

58. Bennett Office Master 20; 2 Daniell Ch. Pr. 936 *et seq.* See also Hatch *v.* Indianapolis, etc., R. Co., 9 Fed. 856, 11 Biss. 138; and *infra*, XXI, E, 2.

59. 2 Daniell Ch. Pr. 942.

60. A rule requiring notice of the filing of the report is mandatory (State *v.* Hyde, 4 Baxt. (Tenn.) 464), and one not a formal party, who is notified to appear before the master and who participates in the proceedings, is entitled to notice (Platt *v.* Platt, 13 N. Y. St. 403). A report filed the day after the death of a party, without notice to him

be fixed by general rule or the order of reference, but the court may receive a report not filed within proper time,[61] and the parties may by agreement extend the time.[62] If a party wishes to save the benefit of a reference which has expired he should obtain an order reviving it.[63]

2. FORM AND SUFFICIENCY OF REPORT — a. In General. It is the duty of the master to report on all matters submitted to him, and he cannot refuse a finding on the ground that the evidence is insufficient[64] or that the issue is immaterial.[65] A master, directed to find facts, must report his finding of the ultimate facts and not merely the evidence tending to establish them,[66] or mere conclusions of law.[67] A master to take an account should report a full statement of the account and not merely state a balance,[68] or report generally against plaintiff that the bill should be dismissed.[69] The report should not contain matters of argument or reasoning in support of its conclusion,[70] but should disclose, where the matter

in his lifetime or to his executors after his death, cannot found a decree. Boyd *v.* Kaufman, 6 Munf. (Va.) 45. An allowance of fees for giving notice is *prima facie* evidence that the notice was given. Lindsay *v.* Kirk, 95 Md. 50, 51 Atl. 960. In New Jersey the English practice does not prevail and the master may file his report without notice. Van Ness *v.* Van Ness, 32 N. J. Eq. 729.

Objections and corrections.— After the report is prepared it is proper for the master to hear objections and correct his report or report the objections with the evidence relating thereto. Brockman *v.* Aulger, 12 Ill. 277.

U. S. Eq. Rule 83 provides that the master, as soon as his report is ready, shall return the same into the clerk's office, and that the parties shall have one month from the time of filing the report to file exceptions thereto. Under this rule the practice as to submitting a draft of the report as a foundation for objections is not uniform. *Compare* Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 40 Fed. 476; Hatch *v.* Indianapolis, etc., R. Co., 9 Fed. 856, 11 Biss. 138.

61. Harding *v.* Harding, 79 Ill. App. 590.

62. Corning *v.* Cooper, 7 Paige (N. Y.) 587.

63. Sharpless *v.* Warren, (Tenn. Ch. App. 1899) 58 S. W. 407. Where no direction appears to the contrary it is presumed that the master is to report at the term following the reference. State *v.* Hyde, 4 Baxt. (Tenn.) 464.

64. Colding *v.* Badger, 3 Rich. Eq. (S. C.) 368.

Where both parties refused to state their accounts on a reference to ascertain the respective interests of the parties in an estate, the legal presumption of an equality of interests will prevail. Edwards *v.* Edwards, 39 Pa. St. 369.

One who fails to make the amount of his claim reasonably certain cannot object to an adverse report. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 33 Fed. 376.

A master who finds no testimony to sustain the bill as filed should report for a dismissal. Morio's Appeal, 4 Pennyp. (Pa.) 398.

65. Rennell *v.* Kimball, 5 Allen (Mass.) 356.

66. Goodman *v.* Jones, 26 Conn. 264; West *v.* Howard, 20 Conn. 581; Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401; Roberts *v.* Barker, 63 N. H. 332; Ranck *v.* Rutt, 9 Lanc. Bar (Pa.) 186; Penn Morocco Co. *v.* Walton, 3 Del. Co. (Pa.) 102. The master's report should determine the facts to be found from the evidence and the law arising therefrom. Agnew *v.* Whitney, 11 Phila. (Pa.) 298.

Auditors to take partnership accounts have authority to report their conclusions both of fact and of law. Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685.

67. Wolcott *v.* Weaver, 3 How. Pr. (N. Y.) 159; De Treville *v.* Ellis, Bailey Eq. (S. C.) 35, 21 Am. Dec. 518.

68. O'Neill *v.* Perryman, 102 Ala. 522, 14 So. 898; Nims *v.* Nims, 20 Fla. 204. Accounts from which the report is made up should accompany it. Jeffreys *v.* Yarborough, 9 N. C. 307. No decree can be rendered on a report recapitulating portions of the testimony without stating an account. June *v.* Myers, 12 Fla. 310.

Reference to the depositions is not sufficient. Hurdle *v.* Leath, 63 N. C. 366.

An itemized account should be returned. A report showing only an aggregation of items is insufficient. Dewing *v.* Hutton, 40 W. Va. 521, 21 S. E. 780.

An account not stated in detail is not objectionable when the report shows in full the grounds of the master's conclusions, and no books were kept by the parties and the testimony was voluminous. Lannan *v.* Clavin, 3 Kan. 17.

Fractions of a cent should not be reported. Dumont *v.* Nicholson, 2 Barb. Ch. (N. Y.) 71.

69. Blauvelt *v.* Ackerman, 20 N. J. Eq. 141; Hays *v.* Hays, 64 N. C. 59.

70. *Illinois.*— North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

New Jersey.— Jackson *v.* Jackson, 3 N. J. Eq. 96.

New York.— Lawrence *v.* Lawrence, 3 Paige 267.

Pennsylvania.— Penn Morocco Co. *v.* Walton, 3 Del. Co. 102.

Tennessee.— Evans *v.* Evans, 2 Coldw. 143.

See 19 Cent. Dig. tit. "Equity," § 893.

Such statements may not, however, afford any ground of exception. Topliff *v.* Jackson, 12 Gray (Mass.) 565.

would otherwise be doubtful, the basis of such conclusions.[71] The report should be authenticated by the signature of the master and it should be filed.[72]

b. Reporting Evidence. It rests within the discretion of the court to require a master to whom a reference is made requiring the finding of facts to order the master to report the evidence before him.[73] Unless so ordered the master is not required to report all the evidence,[74] but at the request of a party desiring to ground an exception, the master must report so much of the evidence as relates thereto.[75] It is essential that this be done in order to obtain a review of the

71. Frazier *v.* Swain, 36 N. J. Eq. 156.

Evidence disregarded.—Where evidence has been received, incompetent standing alone, under promise of introduction of further evidence to render it competent, it is proper for the master to state that he disregarded such evidence. O'Brien *v.* Keefe, 175 Mass. 274, 56 N. E. 588.

Facts which in themselves would be surplusage may properly be stated as disclosing the basis of a material conclusion. Metropolis Nat. Bank *v.* Sprague, 23 N. J. Eq. 81.

The master's report disclosing two grounds, either of which would justify his conclusion, it was held unnecessary to state on which ground he relied. Nichols *v.* Ela, 124 Mass. 333.

72. Bennett Office Master 22; 2 Daniell Ch. Pr. 944.

Where no objection is made to want of signature, the master's signature to the deposition and certificate of evidence is sufficient to authorize an order permitting the master to sign *nunc pro tunc*. Jocelyn *v.* White, 98 Ill. App. 50.

73. Bowers *v.* Cutler, 165 Mass. 441, 43 N. E. 188; Lovejoy *v.* Churchill, 29 Vt. 151.

It is likewise discretionary to recommit a report after it has been filed for a statement of the evidence. Henderson *v.* Foster, 182 Mass. 447, 65 N. E. 810.

74. *Alabama.*— Vaughan *v.* Smith, 69 Ala. 92; Mahone *v.* Williams, 39 Ala. 202; Kirkman *v.* Vanlier, 7 Ala. 217.

Illinois.— Prince *v.* Cutler, 69 Ill. 267.

Indiana.— McKinney *v.* Pierce, 5 Ind. 422.

Maine.— Simmons *v.* Jacobs, 52 Me. 147; Bailey *v.* Myrick, 52 Me. 132.

New York.— Matter of Hemiup, 3 Paige 305.

Texas.— Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685.

Vermont.— Mott *v.* Harrington, 15 Vt. 185. But see Herrick *v.* Belknap, 27 Vt. 673.

See 19 Cent. Dig. tit. "Equity," § 901.

Contra.— Garner *v.* Beaty, 7 J. J. Marsh. (Ky.) 223; Sibert *v.* Kelly, 5 J. J. Marsh. (Ky.) 81; Faucette *v.* Mangum, 40 N. C. 53, 49 Am. Dec. 432; Mitchell *v.* Walker, 37 N. C. 621.

If a reference is to take and report proofs and conclusions of law and fact, a failure to return the evidence is fatal to the report, where an inspection of the evidence becomes necessary to determine exceptions. Ronan *v.* Bluhm, 173 Ill. 277, 50 N. E. 694. Where a master is ordered to report the proofs, the depositions should be reduced to writing, subscribed by the witnesses and returned with the report. Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495. See also Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551. A master's report of evidence, without the deposition of the witness, is sufficient in the absence of objections. Dean *v.* Ford, 180 Ill. 309, 54 N. E. 417 [*affirming* 79 Ill. App. 237].

In West Virginia the act of 1822, c. 57, § 7, required the master, when exceptions were seasonably filed with him, to report the evidence relating thereto. In the absence of exceptions he was not required to report any evidence unless ordered to do so by the court. Kester *v.* Lyon, 40 W. Va. 161, 20 S. E. 933; Holt *v.* Holt, 37 W. Va. 305, 16 S. E. 675; Anderson *v.* Caraway, 27 W. Va. 385; Chapman *v.* McMillan, 27 W. Va. 220; Thompson *v.* Catlett, 24 W. Va. 524. Under the act of 1895, c. 8, § 7, the master is required, where exceptions are filed, to return all the evidence taken on the execution of the reference, and if no evidence is returned the court will presume that none was taken. Central City Brick Co. *v.* Norfolk, etc., R. Co., 44 W. Va. 286, 28 S. E. 926. In the absence of exceptions the evidence is no part of the report, unless made so by order of the court or by the report itself. Holt *v.* Holt, 37 W. Va. 305, 16 S. E. 675; Anderson *v.* Caraway, 27 W. Va. 385; Chapman *v.* McMillan, 27 W. Va. 220.

In Tennessee it is the duty of the master to refer to the evidence on which he bases his cited facts. Stull *v.* Goode, 10 Heisk. 58.

U. S. Eq. Rule 76 provides that in the report no part of any stated facts, charge, affidavit, deposition, examination, or answer shall be stated or recited, but they shall be identified, specified, and referred to so as to inform the court what was brought in or used. Under this rule the report need not state what facts a commissioner considered true. McCormack *v.* James, 36 Fed. 14.

In Rhode Island there is a rule similar to the U. S. Eq. Rule above given, and the word "examination" therein is held to mean written examination. Clapp *v.* Sherman, 16 R. I. 370, 17 Atl. 130.

In references concerning infants and which are in fact *ex parte*, the testimony should be reported. Bulow *v.* Buckner, Rich. Eq. Cas. (S. C.) 401.

75. Heffron *v.* Gore, 40 Ill. App. 257; East Tennessee Land Co. *v.* Leeson, 183 Mass. 37, 66 N. E. 427; Safford *v.* Old Colony R. Co., 168 Mass. 492, 47 N. E. 417; Parker *v.* Nickerson, 137 Mass. 487; Johnson *v.* Lewis, 2

master's findings.[76] It is the duty of the master to return the decrees, orders, and notices under which he acted, in order that the court may see that the reference was regularly executed.[77]

3. Separate or Partial Reports. The master usually makes a single report embracing the entire reference, but it is competent for the court to direct him to report upon some particular part of the case in advance of his general report.[78]

E. Attacking the Report — 1. Modes of Attack. A party desiring to attack the master's report must according to circumstances proceed either by exceptions or by motion. Exceptions by correct practice and in the absence of statute or rule lie only for errors appearing on the face of the report.[79] A motion to set aside the report, to recommit, or a similar appropriate order must be resorted to in order to take advantage of an irregularity in the proceedings or report,[80] such as the failure of the master to follow directions in the order of reference,[81] the failure to report within the required time,[82] or to give notice of the filing.[83] A

Strobh. Eq. (S. C.) 157; Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186.

Returning evidence after report.— Where the parties are not notified in advance of the filing of the report the master may at the request of one of the parties return evidence thereafter. Williams *v.* Clark, 93 Va. 690, 25 S. E. 1013.

Where the matter is complicated and the evidence correlated so as to render a separation of the pertinent parts impracticable, the master may report the entire evidence (Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401), and the court will in a proper case order him to do so, but at the expense of the applicant (Jaques *v.* Methodist Episcopal Church, 2 Johns. Ch. (N. Y.) 543).

It is sufficient to return copies of papers introduced in evidence unless the originals are required by order of court. Barnwell *v.* Marion, 60 S. C. 314, 38 S. E. 593.

Non-compliance with a request to report testimony is not ground for setting the report aside where the facts in support of the finding are specifically stated and are not claimed to be without evidence. Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37.

76. Arter *v.* Chapman, 4 Ohio Dec. (Reprint) 294, 1 Clev. L. Rep. 226; Williams *v.* Wager, 64 Vt. 326, 24 Atl. 765; Sheffield, etc., Coal, etc., Co. *v.* Gordon, 151 U. S. 285, 14 S. Ct. 343, 38 L. ed. 164. In an early New York case it was intimated that affidavits might be used to disclose the evidence before a master. Schieffelin *v.* Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507. See *infra*, XXI, F, 2.

77. Holt *v.* Holt, 37 W. Va. 305, 16 S. E. 675. It is not proper for the report to state the authority under which it was made. Trigg *v.* Trigg, (Tex. Sup. 1891) 18 S. W. 313.

78. Kennedy *v.* Kennedy, 3 Ala. 434; 2 Daniell Ch. Pr. 935. In England by Order (1828), LXX, the master was permitted to make a separate report from time to time on the application of any party.

79. Rennell *v.* Kimball, 5 Allen (Mass.) 356; Foster *v.* Goddard, 1 Black (U. S.) 506, 17 L. ed. 228.

Only where the conclusion is erroneous on the whole or some part of the evidence is there a proper case for exceptions. Schwarz *v.* Sears, Walk. (Mich.) 19.

The Georgia code provides for two classes of exceptions: errors of law and errors as to the facts found. Camp *v.* Mayer, 47 Ga. 414.

That the master has reported contrary to evidence is proper ground of exception. Haulenbeck *v.* Cronkright, 23 N. J. Eq. 407; Klein *v.* Commercial Nat. Bank, 44 Leg. Int. (Pa.) 144.

Objections based on the findings and not upon misconduct are properly made by exceptions. Hall *v.* Westcott, 17 R. I. 504, 23 Atl. 25.

Improper rejection of a claim is ground of exception. Suydam *v.* Dequindre, Walk. (Mich.) 23.

In California erroneous rulings as to evidence should be presented by exceptions, but error in final conclusions by motion to set aside the report. Branger *v.* Chevalier, 9 Cal. 353.

Finding that a plea is true may be reviewed on exceptions. Wilkes *v.* Henry, 4 Edw. (N. Y.) 672.

A master's report on exceptions to an answer is properly brought before the chancellor by appeal and not by exception. Wheeler *v.* Redmond, 6 N. J. Eq. 153.

80. Suydam *v.* Dequindre, Walk. (Mich.) 23; Tyler *v.* Simmons, 6 Paige (N. Y.) 127; De Mott *v.* Benson, 4 Edw. (N. Y.) 297.

Irregularity is waived by excepting to the report. Tyler *v.* Simmons, 6 Paige (N. Y.) 127.

Irregularity complained of must be pointed out with particularity. Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52.

81. United Shirt, etc., Co. *v.* Pitzile, 66 Ill. App. 475; Gleason, etc., Mfg. Co. *v.* Hoffman, 63 Ill. App. 294; Deimel *v.* Parker, 59 Ill. App. 426; Stevenson *v.* Gregory, 1 Barb. Ch. (N. Y.) 72; Clark *v.* Willoughby, 1 Barb. Ch. (N. Y.) 68; Arnold *v.* Blackwell, 17 N. C. 1.

82. Seymour *v.* Brewster, 2 Ch. Sent. (N. Y.) 63; Green *v.* Brien, 1 Tenn. Ch. 477. *Contra*, Sandy *v.* Randall, 20 W. Va. 244.

83. Lamson *v.* Drake, 105 Mass. 564.

motion and not an exception is also necessary where the master has improperly refused an adjournment,[84] omitted necessary testimony,[85] failed to return the evidence,[86] or rendered a report based on testimony procured by bribery.[87] A motion to set aside the report must be resorted to where one of several commissioners has improperly altered the report.[88] There is a lack of uniformity in the decisions as to the propriety of presenting some questions by way of exception, such as the propriety of the decree of reference,[89] the interposition of a new defense,[90] and especially the admission or rejection of evidence by the master.[91]

2. OBJECTING BEFORE MASTER. In order to lay the foundation for presenting exceptions to the court, a party must make the objection before the master, so that he may have an opportunity to correct his ruling before the report is filed,[92]

84. Douglas *v.* Merceles, 24 N. J. Eq. 25; Davis *v.* Flag, 6 N. J. L. J. 53.

85. Emerson *v.* Atwater, 12 Mich. 314.

86. Miller *v.* Miller, 26 N. J. Eq. 423.

87. Ashmead *v.* Colby, 26 Conn. 287.

88. Ralston *v.* Telfair, 22 N. C. 414.

89. It is generally held that the order of reference cannot be assailed by exceptions to the report.

Massachusetts.— Pingree *v.* Coffin, 12 Gray 288.

Michigan.— Eaton *v.* Truesdail, 40 Mich. 1.

Mississippi.— Davis *v.* Foley, Walk. 43.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 23 N. J. Eq. 81.

New York.—Tyler *v.* Simmons, 6 Paige 127.

See 19 Cent. Dig. tit "Equity," §§ 911, 912.

On the other hand it is said that such an order, being interlocutory, is open to review, and the matters determined thereby may be reëxamined on exceptions to the report. Lang *v.* Brown, 21 Ala. 179, 56 Am. Dec. 244; Pulliam *v.* Pulliam, 10 Fed. 53.

90. Generally a new defense cannot be brought forward on exceptions to a report. Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538; New Orleans *v.* Warner, 180 U. S. 199, 21 S. Ct. 353, 45 L. ed. 493 [*affirming* 101 Fed. 1005, 41 C. C. A. 676].

The statute of limitations may be set up by way of exception to the allowance of a claim, especially if there was no opportunity to plead the defense. Berry *v.* Pierson, 1 Gill (Md.) 234; Conrad *v.* Buck, 21 W. Va. 396.

91. See *supra*, XXI, C, 6. Errors in the admission or exclusion of testimony are not properly the subject of exceptions. Ward *v.* Jewett, Walk. (Mich.) 45; Hall *v.* Westcott, 17 R. I. 504, 23 Atl. 25; American Nicholson Pavement Co. *v.* Elizabeth, 1 Fed. Cas. No. 309, 1 Ban. & A. 439; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,196, 6 Blatchf. 328. *Contra*, Minuse *v.* Cox, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313; Marks *v.* Fox, 18 Fed. 713. Where evidence is reported and the parties stipulate that it is all the evidence and submit it subject to objection as to competency, the question is properly before the court. Powers *v.* Russell, 13 Pick. (Mass.) 69.

92. *Alabama.*— Kirkman *v.* Vanlier, 7 Ala. 217; Lewis *v.* Lewis, Minor 95. *Contra*, Colgin *v.* Cummins, 1 Port. 148.

Illinois.— Whalen *v.* Stephens, 193 Ill. 121, 61 N. E. 921 [*affirming* 92 Ill. App. 235]; Kinsella *v.* Cahn, 185 Ill. 208, 56 N. E. 1119 [*affirming* 85 Ill. App. 382]; Marble *v.* Thomas, 178 Ill. 540, 53 N. E. 354 [*affirming* 77 Ill. App. 111]; Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084 [*affirming* 59 Ill. App. 434]; Pennell *v.* Lamar Ins. Co., 73 Ill. 303; Prince *v.* Cutler, 69 Ill. 267.

Kansas.— Lannan *v.* Clavin, 3 Kan. 17.

Massachusetts.— Copeland *v.* Crane, 9 Pick. 73.

Mississippi.— Davis *v.* Foley, Walk. 43.

New York.— Slee *v.* Bloom, 7 Johns. Ch. 137; Methodist Episcopal Church *v.* Jacques, 3 Johns. Ch. 77.

Pennsylvania.— Dalzell *v.* Crawford, 1 Pa. L. J. Rep. 155, 2 Pa. L. J. 16.

South Carolina.— State Bank *v.* Rose, 2 Strobh. Eq. 90.

Tennessee.— McKarsie *v.* Citizens' Bldg., etc., Assoc., (Ch. App. 1899) 53 S. W. 1007.

Vermont.— Winship *v.* Waterman, 56 Vt. 181; Greenleaf *v.* Leach, 20 Vt. 281.

Virginia.— Iaege *v.* Bossieux, 15 Gratt. 83, 76 Am. Dec. 189; Beckwith *v.* Butler, 1 Wash. 224.

United States.— Gray *v.* New York Nat. Bldg., etc., Assoc., 125 Fed. 512; Gay Mfg. Co. *v.* Camp, 68 Fed. 67, 15 C. C. A. 226.

See 19 Cent. Dig. tit. "Equity," § 907.

Conclusions of law may be excepted to, although none were filed before the master. Home Land, etc., Co. *v.* McNamara, 111 Fed. 822, 49 C. C. A. 642.

That the master disobeyed instructions of the court is not an objection that need be taken before him. Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93.

On reference of exceptions to an answer the report cannot be objected to unless the parties argued the questions presented before the master. Byington *v.* Wood, 1 Paige (N. Y.) 145.

A party who neglects to examine a witness as to an item cannot except to the master's report adverse to him as to such item. Barrow *v.* Rhinelander, 3 Johns. Ch. 614.

Insufficiency of notice to produce testimony will not sustain an exception where the draft report was in the possession of counsel long enough to give an opportunity to call for another meeting to correct errors or introduce new matter, the draft itself granting leave to do so. Fox *v.* Weckerly, 1 Phila. (Pa.) 320.

and the practice of submitting a draft report permits a rigorous enforcement of this rule.[93] No objection need be made to a principal finding of the master based on all the evidence, since that would amount only to a request that the master change his entire finding.[94] Under special circumstances exceptions have been considered, although no objection was made before the master.[95]

3. EXCEPTIONS — a. When Necessary. As a general proposition it is held that in order to obtain a review of the findings or recommendations of a master specific exceptions to his report must be filed.[96] The rule is uniform that in the absence of exceptions the court will accept as true all findings of fact,[97] but errors of law appearing on the face of the report may be suggested on the motion to confirm or on the hearing without exception.[98] An objection that the report is

Questions arising on objections made during the hearing should be embraced in the objections filed to the draft report, or they will be deemed waived. Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,196, 6 Blatchf. 328.

Tennessee rule 28 requires counsel to bring exceptions based on evidence to the notice of the master, who is then required to make a supplemental report if he deems them well taken. Gleaves *v.* Ferguson, 2 Tenn. Ch. 589.

93. Jewell *v.* Rock River Paper Co., 101 Ill. 57; Byington *v.* Wood, 1 Paige (N. Y.) 145; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; Teoli *v.* Nardolillo, 23 R. I. 87, 49 Atl. 489; McNamara *v.* Home Land, etc., Co., 105 Fed. 202.

Where verbal objections were made to the draft report, and the exceptions afterward filed conformed thereto, the party was permitted to reduce the objections to writing and file them with the master *nunc pro tunc*. Fischer *v.* Hayes, 16 Fed. 469.

In New Jersey the rule that objections to an account stated must be made before the master is not recognized, except where a draft of the account was served. Mechanics' Bank *v.* New Brunswick Bank, 3 N. J. Eq. 437.

94. Jennings *v.* Dolan, 29 Fed. 861.

95. In Illinois it is said that the failure to object before the master will be excused only for accident or surprise. Prince *v.* Cutler, 69 Ill. 267; Julin *v.* Ristow Poths Mfg. Co., 54 Ill. App. 460; Mechanics', etc., Sav., etc., Assoc. *v.* Farmington Sav. Bank, 41 Ill. App. 32. In a federal case the court considered exceptions, in the absence of objections before the master, where the exceptions were of great importance and counsel on both sides had acted under a misapprehension of the rule requiring objections before the master. Gaines *v.* New Orleans, 9 Fed. Cas. No. 5,177, 1 Woods 104.

96. *Kentucky.*— Patrick *v.* McClure, 1 Bibb 52.

Massachusetts.— Moore *v.* Rawson, 185 Mass. 264, 70 N. E. 64; Whitworth *v.* Lowell, 178 Mass. 43, 59 N. E. 760.

Mississippi.— Sanders *v.* Dowell, 7 Sm. & M. 206.

New York.— Wilkes *v.* Rogers, 6 Johns. 566; Frith *v.* Lawrence, 1 Paige 435.

North Carolina.— Clements *v.* Pearson, 39 N. C. 257.

Pennsylvania.— Patterson *v.* Patterson, 2 Pearson 170.

Tennessee.— Musgrove *v.* Lusk, 2 Tenn. Ch. 576.

West Virginia.— Wyatt *v.* Thompson, 10 W. Va. 645.

See 19 Cent. Dig. tit. "Equity," §§ 905, 908, 914.

97. *Alabama.*— Darrington *v.* Borland, 3 Port. 9.

Illinois.— McMannomy *v.* Walker, 63 Ill. App. 259; Owen *v.* Occidental Bldg., etc., Assoc., 55 Ill. App. 347.

Michigan.— Thorne *v.* Hilliker, 12 Mich. 215.

New York.— Dickinson *v.* Codwise, 4 Edw. 341.

North Carolina.— Dozier *v.* Sprouse, 54 N. C. 152.

South Carolina.— Hendrix *v.* Holden, 58 S. C. 495, 36 S. E. 1010; Lorick *v.* McCreery, 20 S. C. 424.

Vermont.— Greenleaf *v.* Leach, 20 Vt. 281.

Virginia.— Penn *v.* Spencer, 17 Gratt. 85, 91 Am. Dec. 375.

West Virginia.— Baltimore, etc., R. Co. *v.* Vanderwerker, 44 W. Va. 229, 28 S. E. 829; Ward *v.* Ward, 21 W. Va. 262.

United States.— Harding *v.* Handy, 11 Wheat. 103, 6 L. ed. 429.

See 19 Cent. Dig. tit. "Equity," §§ 905, 907, 914.

Where exceptions are taken to parts of a report the remainder is admitted to be correct. Taylor *v.* Young, 2 Bush (Ky.) 428; Kester *v.* Lyon, 40 W. Va. 161, 20 S. E. 933; Chapman *v.* McMillan, 27 W. Va. 220; Chapman *v.* Pittsburg, etc., R. Co., 18 W. Va. 184; Sanders *v.* Riverside, 118 Fed. 720, 55 C. C. A. 240.

Objection at hearing.— A master's report, not excepted to, cannot be impeached at the hearing on grounds which may be affected by extraneous evidence. Poling *v.* Huffman, 48 W. Va. 639, 37 S. E. 526; Gay *v.* Lockridge, 43 W. Va. 267, 27 S. E. 306; Lynch *v.* Henry, 25 W. Va. 416; Thompson *v.* Catlett, 24 W. Va. 524.

98. *Alabama.*— Levert *v.* Redwood, 9 Port. 79.

Illinois.— Williams *v.* Spitzer, 203 Ill. 505, 68 N. E. 49; Von Tobel *v.* Ostrander, 158 Ill. 499, 42 N. E. 152; Hurd *v.* Goodrich, 59 Ill. 450; McMannomy *v.* Walker, 63 Ill. App. 259; Monahan *v.* Fitzgerald, 62 Ill. App. 192.

not sufficiently specific will not be considered without exceptions.[99] Where a master's report is excepted to and there is a recommittal to the master and a second report, the exceptions must in general be renewed in order to be preserved.[1] No objection can be made on appeal unless made in the lower court.[2]

b. Right and Time to Except. Any party aggrieved by the master's report may except thereto.[3] The time within which exceptions may be filed is a matter governed by local practice.[4] Time from the filing of the report runs only from

Mississippi.— Fowler *v.* Payne, 52 Miss. 210.

West Virginia.— Windon *v.* Stewart, 48 W. Va. 488, 37 S. E. 603; McCarty *v.* Chalfant, 14 W. Va. 531; Ogle *v.* Adams, 12 W. Va. 213; Hyman *v.* Smith, 10 W. Va. 298.

United States.— Gordon *v.* Lewis, 12 Fed. Cas. No. 5,613, 2 Sumn. 143.

See 19 Cent. Dig. tit. "Equity," § 905.

A decree is erroneous which follows a master's report allowing debts not charged in the bill and omitting those charged, although no exceptions were filed to the report. McGowan *v.* Mobile Branch Bank, 7 Ala. 823.

An error in computation, apparent on the face of the report, may be corrected without exceptions. Bogert *v.* Furman, 10 Paige (N. Y.) 496. *Contra,* Lyles *v.* Hatton, 6 Gill & J. (Md.) 122, construing a statute. If the master fails to allow annual rests in calculating interest, and the report is confirmed without exceptions having been filed, the objection cannot be made at final hearing. Smith *v.* Smith, 4 Johns. Ch. (N. Y.) 445.

99. Whalen *v.* Stephens, 193 Ill. 121, 61 N. E. 921.

1. Kee *v.* Kee, 2 Gratt. (Va.) 116; Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433.

When renewed or further exceptions unnecessary.— Where an exception to the allowance of an item is overruled it need not be renewed on a restatement of the account. Moore *v.* Randolph, 70 Ala. 575. Where an exception to an item was sustained and the account sent back for modification and the master again reported the item, but also reported facts on which a modification could be made, it was held that the item might be corrected without further exception. Lippincott *v.* Bechtold, 54 N. J. Eq. 407, 34 Atl. 1079. The rule requiring exceptions to the second report does not apply to matters fully adjudicated by the court and not entering into the second report. Hopkins *v.* Prichard, 51 W. Va. 385, 41 S. E. 347. It is irregular to present by exceptions to an amended report the same questions which have been decided upon exceptions to the original. Clark *v.* Willoughby, 1 Barb. Ch. (N. Y.) 68.

2. Coffeen *v.* Thomas, 65 Ill. App. 117.

3. Prince *v.* Cutler, 69 Ill. 267. On a reference to ascertain debts secured by a deed of trust, any trust creditor may except to the report as to the claims of any other creditor. Feamster *v.* Withrow, 9 W. Va. 296. It is error to direct a master to apportion the sums to be paid among those liable and to issue execution therefor, as this deprives such persons of the right to except to the apportionment. McCartney *v.* Calhoun, 11 Ala. 110.

4. **In Alabama** the court may set aside a submission for final decree at the same term at which it is made and allow exceptions to be filed. Jones *v.* White, 112 Ala. 449, 20 So. 527.

In Florida exceptions cannot be taken after an appeal from an order based on the report. Sanderson *v.* Sanderson, 20 Fla. 292.

In Georgia even errors of law cannot be objected to after an unopposed order accepting the report. Anderson *v.* Usher, 59 Ga. 567.

In the Indian Territory, the statute, providing that exceptions must be made within four days after the first day of the term at which the report is filed, is construed to permit exceptions within four days after the filing of the report when the latter is filed after the first day of the term. Hampton *v.* Mayes, 3 Indian Terr. 65, 53 S. W. 483.

In Kentucky exceptions cannot be filed at a term subsequent to that at which the report is confirmed. Cox *v.* Doty, 45 S. W. 1044, 20 Ky. L. Rep. 287. They must be taken in the court below. Slaughter *v.* Slaughter, 8 B. Mon. 482.

In New Jersey and New York the regular time is eight days, after a rule to confirm *nisi.* Weber *v.* Weitling, 18 N. J. Eq. 39; Taylor *v.* Thomas, 2 N. J. Eq. 106; Champlin *v.* Champlin, 2 Edw. (N. Y.) 328. But in the New York chancery no precise time was fixed for filing exceptions to a report not requiring confirmation. Myers *v.* Bradford, 4 Johns. Ch. 434.

In Virginia the court may receive exceptions so long as the cause is retained on the docket (Wooding *v.* Bradley, 76 Va. 614), but an exception for want of notice, taken six years after the report was filed, was disregarded (Miller *v.* Holcombe, 9 Gratt. 665). It is error to pronounce a final decree on a master's report following a decree *pro confesso,* where the report was not returned thirty days before the term at which the cause was heard. Gray *v.* Dickenson, 4 Gratt. (Va.) 87.

In West Virginia the master must hold his report for ten days after its completion for the filing of exceptions, and he is required to certify to the court the exceptions and the evidence. Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

U. S. Eq. Rule 83 gives one month from the time of filing the report to file exceptions thereto. This means a calendar month. Gasquet *v.* Crescent City Brewing Co., 49 Fed. 493. See also Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372.

the time when the report is so filed as to be accessible.[5] The filing of exceptions will not be permitted after expiration of the regular time, except for accident, mistake, or surprise.[6] Where there has been a re-reference, matters not excepted to before cannot be presented in the guise of exceptions to the new report.[7]

c. Form and Sufficiency. Exceptions are entitled in the cause and in such a manner as to show the character of the instrument, the party excepting, and the report to which exceptions are taken. They regularly conclude with a general statement that the party excepts to the report and appeals therefrom to the judgment of the court.[8] The exceptions should be stated separately and must point out definitely in each instance the part of the report excepted to,[9] and must not merely challenge the report or a specified part thereof as erroneous, but must point out specifically the particular error upon which the excepting party relies.[10]

5. A report is not filed when it is returned into court sealed and indorsed, "Fees to be paid before opening." Donaldson *v.* Johnson, 16 R. I. 346, 16 Atl. 140.

6. Foote *v.* Van Ranst, 1 Hill Eq. (S. C.) 185; Gasquet *v.* Crescent City Brewing Co., 49 Fed. 493. Exceptions may be entertained where the party failed to file them because of an agreement between the solicitors. Hoppock *v.* Ramsey, 28 N. J. Eq. 166. Amended exceptions will be overruled if not filed within the time prescribed. Syz *v.* Redfield, 11 Fed. 799. A party prejudiced by an irregularity should have an opportunity to except, although he permitted the master's report to be filed and several terms to elapse, where he was ignorant of the irregularity. Hart *v.* Small, 4 Paige (N. Y.) 288. Further time will not be granted merely because counsel did not know that the report had been filed. Clapp *v.* Sherman, 16 R. I. 370, 17 Atl. 130.

7. Bannon *v.* Overton, 1 Tenn. Ch. 528. See also Nebbett *v.* Cunningham, 27 Miss. 292.

8. See form in Bennett Office Master, App. 1.

An answer not referring to a report will not be regarded as an exception thereto. Simmons *v.* Simmons, 33 Gratt. (Va.) 451.

9. *Alabama.*— Vaughan *v.* Smith, 69 Ala. 92; Mahone *v.* Williams, 39 Ala. 202; Foster *v.* Gressett, 29 Ala. 393.

Arkansas.— Ferguson *v.* Collins, 8 Ark. 241.

District of Columbia.— York *v.* Tyler, 21 D. C. 265.

Illinois.— Springer *v.* Kroeschell, 59 Ill. App. 434 [*affirmed* in 161 Ill. 358, 43 N. E. 1084]; Huling *v.* Farwell, 33 Ill. App. 238.

Iowa.— White *v.* Hampton, 10 Iowa 238.

Maryland.— Scrivener *v.* Scrivener, 1 Harr. & J. 743.

Pennsylvania.— Reeside *v.* Reeside, 6 Phila. 507.

South Carolina.— Bivingsville Cotton Mfg. Co. *v.* Bivings, 7 Rich. Eq. 455.

Tennessee.— Rader *v.* Yeargin, 85 Tenn. 486, 3 S. W. 178; Ridley *v.* Ridley, 1 Coldw. 323.

Virginia.— Robinett *v.* Robinett, (1894) 19 S. E. 845; Nickels *v.* Kane, 82 Va. 309.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438; Chapman *v.* Pittsburgh R. Co., 18 W. Va. 184.

United States.— Foster *v.* Goddard, 1 Black 506, 17 L. ed. 228; Story *v.* Livingston, 13 Pet. 359, 10 L. ed. 200; Harding *v.* Handy, 11 Wheat. 103, 6 L. ed. 429.

See 19 Cent. Dig. tit. "Equity," § 910.

Exceptions to an account should point out the particular item objected to, but this rule cannot apply where no items are given in the report. Potter *v.* Wilson, 13 Ky. L. Rep. 783.

10. *Alabama.*— Powers *v.* Dickie, 49 Ala. 81; Alexander *v.* Alexander, 8 Ala. 796.

District of Columbia.— Richardson *v.* Van Auken, 5 App. Cas. 209.

Georgia.— Mohr-Weil Lumber Co. *v.* Russell, 109 Ga. 579, 34 S. E. 1005.

Illinois.— Williams *v.* Lindblom, 163 Ill. 346, 45 N. E. 245 [*affirming* 60 Ill. App. 465]; Rittenhouse, etc., Co. *v.* Barry, 98 Ill. App. 548; Lebkuechner *v.* Moore, 88 Ill. App. 16; Dorn *v.* Farr, 79 Ill. App. 226; Gleason, etc., Mfg. Co. *v.* Hoffman, 63 Ill. App. 294; McMannomy *v.* Walker, 63 Ill. App. 259; Comstock-Castle Stove Co. *v.* Baldwin, 63 Ill. App. 255.

Maine.— Mitchell *v.* Burnham, 57 Me. 314.

Massachusetts.— Whitworth *v.* Lowell, 178 Mass. 43, 59 N. E. 760.

Michigan.— Crawford *v.* Osmun, 90 Mich. 77, 51 N. W. 356.

New Jersey.— Hoagland *v.* Saul, (Ch. 1902) 53 Atl. 704.

North Carolina.— Young *v.* Kennedy, 95 N. C. 265.

Tennessee.—Crowley *v.* Robinson, (Ch. App. 1898) 46 S. W. 461; Bannon *v.* Overton, 1 Tenn. Ch. 528.

Texas.— Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685.

United States.— Sheffield, etc., Coal, etc., Co. *v.* Gordon, 151 U. S. 285, 14 S. Ct. 343, 38 L. ed. 164; Neal *v.* Briggs, 110 Fed. 477; Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; Gaines *v.* New Orleans, 9 Fed. Cas. No. 5,177, 1 Woods 104; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506.

See 19 Cent. Dig. tit. "Equity," § 910.

Similarity to special demurrer.—It has even been said that an exception is analogous to a special demurrer and must have like particularity (O'Reilly *v.* Brady, 28 Ala. 530; Stewart *v.* Stewart, 40 W. Va. 65, 20 S. E.

Inaccurate or general exceptions will not be considered.[11] An exception calling for an examination of evidence must refer to and point out the particular evidence relied upon for its support.[12] If an exception is too broad, and includes any matter not properly open thereto, it may be overruled altogether.[13]

d. Additional and Amended Exceptions. It is within the discretion of the court to allow additional exceptions to be filed,[14] but leave will be given only where good cause is shown, such as accident or surprise.[15] Where exceptions are insufficient, as by being too general, the court may in its discretion permit them to be amended, if no prejudice will result.[16]

e. Setting Exceptions Down For Hearing. In the absence of rules to the contrary exceptions are brought to the attention of the court by setting the case

862), but this very strict rule has been denied (Foster *v.* Goddard, 1 Black (U. S.) 506, 17 L. ed. 228).

Under special circumstances an exception was considered, where it showed the manner in which an account should be taken, and stated the substance of the report that the party desired. New York M. E. Church *v.* Jaques, Hopk. (N. Y.) 453.

Unconstitutional statute.—Where a claim is given priority under an unconstitutional statute it is unnecessary for the exception to allege the unconstitutionality of the act. Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372.

An exception, although inartistically drawn, is sufficient if it points out distinctly the finding of facts or the conclusion of law complained of. Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200; Central Trust Co. *v.* Wabash, etc., R. Co., 57 Fed. 441.

In Massachusetts the party excepting must point out in his brief the particular in which the ruling complained of is prejudicial to him. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740.

11. Inaccurate exceptions.— An exception to the allowance of interest will not raise the point that interest was allowed for too long a period. The time from which interest should have been computed must be stated. Graham *v.* Chrystal, 1 Abb. Pr. N. S. (N. Y.) 121. Nor can the rate of interest allowed be called in question under such an exception. Baker *v.* Mayo, 129 Mass. 517.

An exception is too general, when it is that a finding is not "supported by the proofs" (Haller *v.* Clark, 21 D. C. 128), or that the findings, and each of them, are not warranted by the evidence (Waska *v.* Klaisner, 43 Ill. App. 611), or that the report is contrary to the law and the evidence (Winslow *v.* Mulchey, (Tenn. Ch. App. 1895) 35 S. W. 762). So an exception is bad where it is that the master did not find, "upon the whole testimony and the law," and as a conclusion of law on the findings of fact that plaintiff was entitled to recover. Falls of Neuse Mfg. Co. *v.* Brooks, 106 N. C. 107, 11 S. E. 456. It is too general to state that the master alowed a certain sum when he should have allowed a larger sum or a smaller. Emerson *v.* Atwater, 12 Mich. 314; Poling *v.* Huffman, 48 W. Va. 639, 37 S. E. 526. An exception "for other reasons apparent on the face of the report" is too general. Young *v.* Omohundro, 69 Md. 424, 16 Atl. 120; Hartley *v.* Roffe, 12 W. Va. 401.

12. Pruitt *v.* McWhorter, 74 Ala. 315; Crump *v.* Crump, 69 Ala. 156; Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*reversing* 61 Ill. App. 310]; McGuiness *v.* McGuiness, 60 Ill. App. 563; Minchrod *v.* Ullman, 60 Ill. App. 400; Wolcott *v.* Lake View Bldg., etc., Assoc., 59 Ill. App. 415; Friedman *v.* Schoengen, 59 Ill. App. 376; Jaffrey *v.* Brown, 29 Fed. 476; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186.

Exceptions need not set out the evidence, but are sufficient if they point out the specific matter of objection. Inter-State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529.

Where exceptions make no allusion to the evidence and are not supported by the master's statement the report should be confirmed if the statement is sufficient to sustain the conclusions. Cutting *v.* Florida R., etc., Co., 43 Fed. 473.

Exception for disregarding evidence.— An exception on the ground that the master did not report or consider any of defendant's evidence need not set out the evidence so disregarded. Schnadt *v.* Davis, 185 Ill. 476, 57 N. E. 652 [*affirming* 84 Ill. App. 669].

13. Thompson *v.* Maddux, 117 Ala. 468, 23 So. 157; Warren *v.* Lawson, 117 Ala. 339, 23 So. 65; Brantley *v.* Gunn, 29 Ala. 387; McDougald *v.* Dougherty, 11 Ga. 570; Higbie *v.* Brown, 1 Barb. Ch. (N. Y.) 320; Buloid *v.* Miller, 4 Paige (N. Y.) 473; Franklin *v.* Keeler, 4 Paige (N. Y.) 382; Candler *v.* Pettit, 1 Paige (N. Y.) 427; Noble *v.* Wilson, 1 Paige (N. Y.) 164; Wyckoff *v.* Sniffen, 2 Edw. (N. Y.) 581; Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37.

14. Mohr-Weil Lumber Co. *v.* Russell, 109 Ga. 579, 34 S. E. 1005; Brenmerman *v.* Jennings, 101 Ind. 253.

15. Lane *v.* Macon, etc., R. Co., 96 Ga. 630, 24 S. E. 157; Potts *v.* Trotter, 17 N. C. 281.

In a suit for specific performance where a master reports that good title can be made and exceptions to the report are overruled no further objection can be made to the title. Dubose *v.* James, McMull. Eq. (S. C.) 55.

16. Jones *v.* Lamar, 39 Fed. 585.

Exceptions are not pleadings within the meaning of a statute giving a general right to amend. Suttles *v.* Smith, 75 Ga. 830.

down for hearing thereon.[17] Exceptions and a motion to set aside the report cannot be heard at the same time,[18] and it is said that a second hearing of exceptions will not be allowed.[19]

4. WAIVER OF OBJECTIONS TO REPORT. A party is precluded from objecting to the action of the court, based on a master's report, by failing to file exceptions, where exceptions are necessary,[20] by failing to bring them before the court for a ruling thereon,[21] or by other conduct inconsistent with the interposition of objection.[22] A waiver of exceptions to a report, finding the amount of damages in controversy, concedes only the correctness of such amount and not the correctness of the final decree adjudicating the right to recover it.[23]

F. Action of Court on Report — 1. WEIGHT OF REPORT. The report of a master or a similar officer is not conclusive, even as to facts found, but is subject to review by the court.[24] It is difficult to state any precise rule for determining what weight should be given the report. It is generally held that the report of a master is presumptively correct, and that his conclusions will not be disturbed unless error is made affirmatively to appear.[25] At least as to findings of fact there

17. Morris *v.* Taylor, 23 N. J. Eq. 131; 2 Daniell Ch. Pr. 331, 958.

The party excepting is not bound to set down the exceptions for argument. Stafford *v.* Rogers, Hopk. (N. Y.) 98.

U. S. Eq. Rule 83 provides that if exceptions are filed they shall stand for hearing, before the court, if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

18. Tyler *v.* Simmons, 6 Paige (N. Y.) 127.

19. Felch *v.* Hopper, 8 Fed. Cas. No. 4,718, 4 Cliff. 489.

20. See *supra*, XXI, E, 3, a.

21. Barnebee *v.* Beckley, 43 Mich. 613, 5 N. W. 976; Longmire *v.* Fain, 89 Tenn. 393, 18 S. W. 70; Carter *v.* McBroom, 85 Tenn. 377, 2 S. W. 803; Hall *v.* Hall, (Tenn. Ch. App. 1896) 39 S. W. 535.

22. **One in contempt** cannot complain of a premature confirmation. Butler *v.* Butler, 11 Ala. 668.

When the parties consented to a re-reference to new auditors and a decree was rendered on their report, neither party could complain that the first report had not been disposed of. Neely *v.* Neely, 1 Litt. (Ky.) 292.

Other conduct constituting waiver.— Where a master was ordered to report the evidence, and instead he found the facts, and plaintiff moved for action upon the findings, he thereby waived his right to object to their correctness. Borchus *v.* Sayler, 90 Ind. 439. Where counsel examined a draft report and caused amendments to be made, and made no objection to the report as filed, he could not afterward complain that he received no copy of the report, until after it was filed. Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534. One who does not appeal from a decree dismissing an attachment bill cannot except to the report of a master ascertaining the damages from the attachment. Macheca *v.* Panesi, 4 Lea (Tenn.) 544.

23. Porter *v.* Banks, 144 U. S. 407, 12 S. Ct. 650, 36 L. ed. 484; Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479; Waterman *v.* Waterman, 27 Fed. 827.

24. *Illinois.*— Ennesser *v.* Hudek, 169 Ill. 494, 48 N. E. 673 [*affirming* 66 Ill. App. 609]. See also Maas *v.* Bonesz, 107 Ill. App. 299.

Indiana.— Bremmerman *v.* Jennings, 101 Ind. 253.

Kentucky.— Honore *v.* Colmesnil, 1 J. J. Marsh. 506.

Michigan.— Near *v.* Lowe, 56 Mich. 632, 23 N. W. 448.

New Mexico.— Early Times Distillery Co. *v.* Zeigler, (1901) 66 Pac. 532.

New York.— Burhans *v.* Van Zandt, 7 Barb. 91.

North Carolina.— McMillan *v.* McNeill, 69 N. C. 129.

Pennsylvania.— Phillips' Appeal, 68 Pa. St. 130.

South Carolina.—Thorpe *v.* Thorpe, 12 S. C. 154; Pool *v.* Dial, 10 S. C. 440.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438.

United States.— Field *v.* Holland, 6 Cranch 8, 3 L. ed. 136; Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497.

See 19 Cent. Dig. tit. "Equity," §§ 920, 921.

Under Vt. Act (1878), No. 17, it is held that a special master is substituted for the court and that his findings of fact upon legal evidence are conclusive. Hathaway *v.* Hagan, 64 Vt. 135, 24 Atl. 131.

25. *Alabama.*— Ward *v.* Abbeville, 130 Ala. 597, 30 So. 341; Kinsey *v.* Kinsey, 37 Ala. 393.

Illinois.— Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419.

Maine.— Pierce *v.* Faunce, 53 Me. 351; Howe *v.* Russell, 36 Me. 115.

Massachusetts.— Pratt *v.* Lamson, 6 Allen 457.

New Jersey.— Eckerson *v.* McCulloh, (Ch. 1895) 1 Atl. 700; Metropolis Nat. Bank *v.* Sprague, 23 N. J. Eq. 81.

Pennsylvania.— Clendaniel's Estate, 12 Phila. 53; Clarkson *v.* Norton, 31 Leg. Int. 277, 6 Leg. Gaz. 69.

is a strong presumption of correctness which can be overcome only by a clear showing of error,[26] and a finding on conflicting evidence will very rarely be disturbed.[27] If there is testimony to sustain the finding of the master it will not be disturbed merely because the court entertains a different view as to the weight of the evidence.[28] It is sometimes said that a finding of fact on conflicting evidence is entitled to the same weight as the verdict of a jury,[29] but this doctrine is some-

Vermont.— McDaniels *v.* Harbour, 43 Vt. 460.

United States.— Metsker *v.* Bonebrake, 108 U. S. 66, 2 S. Ct. 351, 27 L. ed. 654; Central Trust Co. *v.* East Tennessee Land Co., 79 Fed. 19; Stanton *v.* Alabama, etc., R. Co., 31 Fed. 585; Jaffrey *v.* Brown, 29 Fed. 476; Lockhart *v.* Horn, 15 Fed. Cas. No. 8,446, 3 Woods 542.

See 19 Cent. Dig. tit. "Equity," §§ 920, 921, 923.

Where all matters in controversy were referred to the master, the court refused to disturb his report, the transactions involved being family matters and stale. Arden *v.* Arden, 1 Johns. Ch. (N. Y.) 313.

26. *Alabama.*— Munden *v.* Bailey, 70 Ala. 63.

Illinois.— Williams *v.* Lindblom, 163 Ill. 346, 45 N. E. 245.

Kentucky.— Singleton *v.* Lewis, 1 Litt. 412.

Massachusetts.— Pray *v.* Brigham, 174 Mass. 129, 54 N. E. 338; Trow *v.* Berry, 113 Mass. 139; Dean *v.* Emerson, 102 Mass. 480.

New Jersey.— Holmes *v.* Holmes, 18 N. J. Eq. 141; Sinnickson *v.* Brucre, 9 N. J. Eq. 659; Izard *v.* Bodine, 9 N. J. Eq. 309.

New Mexico.— Gentile *v.* Kennedy, 8 N. M. 347, 45 Pac. 879; De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526.

Pennsylvania.—Millspaugh's Appeal, (1885) 1 Atl. 277; Messenger's Appeal, 43 Leg. Int. 101; Walton *v.* Whann, 8 Leg. Gaz. 82; Lower *v.* Wightman, 5 Leg. Gaz. 45; Reid *v.* Anderson, 6 Lanc. L. Rev. 26; Spohn *v.* Stein, 1 Leg. Rec. 229; Rinehart *v.* Pitfield, 5 Leg. & Ins. 108; Winton *v.* Mott, 4 Luz. Leg. Reg. 71.

Vermont.— *In re* Merrill, 54 Vt. 200; Rowan *v.* State Bank, 45 Vt. 160; Bigelow *v.* Middletown Cong. Soc., 15 Vt. 370.

West Virginia.— Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753; Stewart *v.* Stewart, 40 W. Va. 65, 20 S. E. 862; Handy *v.* Scott, 26 W. Va. 710; Graham *v.* Graham, 21 W. Va. 698; McGuire *v.* Wright, 18 W. Va. 507; Boyd *v.* Gunnison, 14 W. Va. 1.

United States.— Camden *v.* Stuart, 144 U. S. 104, 12 S. Ct. 585, 36 L. ed. 363; Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; Murphy *v.* Southern R. Co., 99 Fed. 469; Kilgour *v.* Port Jervis Nat. Bank, 97 Fed. 693; Chandler *v.* Pomeroy, 87 Fed. 262; Mason *v.* Crosby, 16 Fed. Cas. No. 9,236, 3 Woodb. & M. 258.

See 19 Cent. Dig. tit. "Equity," § 922.

In the absence of clear error or mistake a finding of fact will not be set aside. Girard L. Ins., etc., Co. *v.* Cooper, 162 U. S. 529, 16 S. Ct. 879, 40 L. ed. 1062; Camden *v.* Stuart, 144 U. S. 104, 12 S. Ct. 585, 36 L ed. 363.

A finding that an alleged fraud does not exist will be sustained unless there is full proof to the contrary. Crowell *v.* James, 2 Wkly. Notes Cas. (Pa.) 176.

The court will not verify each interest calculation on exceptions. Chandler *v.* Pomeroy, 87 Fed. 262.

A finding of the amount of damages will be allowed to stand unless it is so inadequate or excessive as to be unreasonable. Murphy *v.* Southern R. Co., 99 Fed. 469.

An appellate tribunal will not accord to the master's finding the same weight as it will accord those of the chancellor where he has heard the witnesses. Brueggestradt *v.* Ludwig, 82 Ill. App. 435.

27. McVey *v.* Walls, 52 Ill. App. 290; Gentile *v.* Kennedy, 8 N. M. 347, 45 Pac. 879; Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810; Clyde *v.* Richmond, etc., R. Co., 69 Fed. 673; New York Cent. Trust Co. *v.* Wabash, etc., R. Co., 31 Fed. 246; Bridges *v.* Sheldon, 7 Fed. 17, 18 Blatchf. 295, 507.

In the absence of a clear showing of error or mistake such a finding will not be disturbed. Hubbard *v.* Hubbard, 79 Ill. App. 217; De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664; Lake Erie, etc., R. Co. *v.* Fremont, 92 Fed. 721, 34 C. C. A. 625. It must be manifestly erroneous (Reading Ins. Co. *v.* Egelhoff, 115 Fed. 393) or unwarranted by any reasonable view of the evidence (Haymond *v.* Camden, 48 W. Va. 463, 37 S. E. 642).

Where the questions decided are inferences from clearly proved facts, the report has not the same weight as where the testimony is conflicting. Sproull's Appeal, 71 Pa. St. 137.

28. Grubb *v.* Grubb, 30 Leg. Int. (Pa.) 241; Jaffrey *v.* Brown, 29 Fed. 476; Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,462, 5 Biss. 237, estimate of value.

29. *Alabama.*— Vaughan *v.* Smith, 69 Ala. 92.

Illinois.— Ricardi Apartment House Co. *v.* Beaudet, 64 Ill. App. 261; Whitcomb *v.* Duell, 54 Ill. App. 650.

Indiana.— McKinney *v.* Pierce, 5 Ind. 422.

Maine.— Cary *v.* Herrin, 62 Me. 16.

New Mexico.—Wells, etc., Express *v.* Walker, 9 N. M. 456, 54 Pac. 875; Givens *v.* Veeder, 9 N. M. 256, 50 Pac. 316; Field *v.* Romero, 7 N. M. 630, 41 Pac. 517.

Pennsylvania.— Reed *v.* McArthur, 3 Pa. Dist. 682, 15 Pa. Co. Ct. 136; McCay *v.* Black, 36 Leg. Int. 471; Patterson's Appeal, 11 Leg. Int. 150.

South Carolina.— Perry *v.* Sullivan Mfg. Co., 6 S. C. 310.

times also expressly repudiated,[30] and it is said that the master's findings are merely advisory,[31] that it is the duty of the court to examine the testimony and review the master's conclusions,[32] and that it may disregard the finding, and consider the evidence irrespective thereof.[33] The radically different doctrines just stated are in part accounted for by the distinction between evidence actually conflicting as to the primary facts, and evidence clearly establishing such facts, but affording ground for different reasonable inferences and deductions therefrom.[34] A very important distinction has also been made, especially by the federal courts and in recent years, between a report in pursuance of a reference imposed upon some of the parties and one made by consent, the cases holding that where the order of reference is involuntary as to some of the parties the report is advisory only, and that the court must act ultimately on its own judgment;[35] but that where the reference is by consent the findings are presumptively correct and reviewable only under the reservation in the consent and order entered thereon, and for manifest error in the consideration given to evidence or in the application of the law.[36]

2. MATTERS CONSIDERED ON EXCEPTIONS. The court will not notice exceptions

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289.

See 19 Cent. Dig. tit. "Equity," §§ 921–923.

In the federal courts this doctrine is nearly always stated with some modification. The finding should be as conclusive as the verdict of a jury, where there is such a conflict that some testimony must be rejected as untruthful (Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 33 Fed. 803), or where the question required for its decision the examination of many scientific and other witnesses (Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249). Where the question referred is of such a nature that it would ordinarily be tried to a jury the finding will not be set aside if there is sufficient evidence to sustain it. New York Cent. Trust Co. *v.* Texas, etc., R. Co., 32 Fed. 448.

The doctrine applies only where the evidence is conflicting and not where the findings are deductions from uncontroverted facts. McConomy *v.* Reed, 152 Pa. St. 42, 25 Atl. 176.

The conclusion of an auditing judge is entitled to equal if not greater consideration than the verdict of a jury. Bradley's Estate, 39 Leg. Int. (Pa.) 265.

30. Holmes *v.* Holmes, 18 N. J. Eq. 141; Stewart *v.* Stewart, 40 W. Va. 65, 20 S. E. 862; Handy *v.* Scott, 26 W. Va. 710.

In New Jersey the rule is stated to be that the conclusions of the master are entitled to great respect, and, if supported by competent witnesses who are unimpeached, will not be set aside because of conflicting testimony, unless it clearly appears from the weight and nature of such testimony that the master has erred. Haulenbeck *v.* Cronkright, 23 N. J. Eq. 407.

31. Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419; Boesch *v.* Graff, 133 U. S. 697, 10 S. Ct. 378, 33 L. ed. 787.

32. Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458.

33. *Indiana.*— Bremmerman *v.* Jennings, 101 Ind. 253.

New Jersey.— Holmes *v.* Holmes, 18 N. J. Eq. 141.

New Mexico.— Medler *v.* Albuquerque Hotel, etc., Co., 6 N. M. 331, 28 Pac. 551.

North Carolina.— McMillan *v.* McNeill, 69 N. C. 129.

Virginia.— Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458.

United States.— Boesch *v.* Graff, 133 U. S. 697, 10 S. Ct. 378, 33 L. ed. 787.

See 19 Cent. Dig. tit. "Equity," §§ 921, 922.

It is the duty of the court, when exceptions are filed, to approve or disregard the master's conclusions as they appear to be in accordance with or against the weight of evidence. Ennesser *v.* Hudek, 169 Ill. 494, 48 N. E. 673 [*affirming* 66 Ill. App. 609].

Report based on papers inadmissible in evidence may be disregarded. James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53.

34. McConomy *v.* Reed, 152 Pa. St. 42, 25 Atl. 176; Sproull's Appeal, 71 Pa. St. 137.

35. Bosworth *v.* Hook, 77 Fed. 686, 23 C. C. A. 404; Blythe *v.* Thomas, 45 Fed. 784.

36. Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764. This rule has been followed with greater or less strictness in Albuquerque First Nat. Bank *v.* McClellan, 9 N. M. 636, 58 Pac. 347; Wells, etc., Express *v.* Walker, 9 N. M. 170, 50 Pac. 353, 923, 9 N. M. 456, 54 Pac. 875; Western Union Tel. Co. *v.* American Bell Tel. Co., 105 Fed. 684; Philadelphia Third Nat. Bank *v.* Chester Valley Nat. Bank, 86 Fed. 852, 30 C. C. A. 436; Walker *v.* Kinnare, 76 Fed. 101, 22 C. C. A. 75; Farrar *v.* Bernheim, 75 Fed. 136, 21 C. C. A. 264; Walters *v.* Western, etc., R. Co., 69 Fed. 706.

In an early Virginia case it was held that where the parties agreed to refer an issue, the decision of the referees was to be considered as an award. Pleasants *v.* Ross, 1 Wash. 156, 1 Am. Dec. 449.

The federal rule is inapplicable to the interpretation of documents by the master. U. S. Trust Co. *v.* Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427 [*affirming* 80 Fed. 18]. Where there is a reference by consent

based merely upon assertions of counsel,[37] or the truth of which does not appear in the record.[38] Exceptions will be regarded so far only as they are supported by the special statements of the master or by evidence brought before the court by reference to the particular testimony relied upon.[39] No evidence will be considered which was not before the master,[40] and returned with his report.[41]

3. HARMLESS ERROR. A master's report will not be disturbed for errors working no material prejudice to the party excepting.[42]

4. RECOMMITTAL TO MASTER. A motion to recommit is addressed to the discretion of the court, and ordinarily will not be granted in the absence of special reason therefor.[43] It is competent for the court to recommit the case to the master when it is found that he has committed an error,[44] has refused to hear counsel in argument,[45] or has failed to find on all matters referred to him and

to pass upon accounts and to report thereon, and the master passes on the whole controversy, the fact that he did so without objection does not make his report presumptively correct. Oteri *v.* Scalzo, 145 U. S. 578, 12 S. Ct. 895, 36 L. ed. 824.

37. O'Brien *v.* Keefe, 175 Mass. 274, 56 N. E. 588. It is not error to overrule exceptions based on a misapprehension of the facts disclosed. Jackson *v.* Jones, 9 W. Va. 1.

38. Pearson *v.* Darrington, 32 Ala. 227; Thompson *v.* O'Daniel, 9 N. C. 307.

39. McMannomy *v.* Walker, 63 Ill. App. 259; Miller *v.* Whittier, 36 Me. 577; Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400; Farrar *v.* Bernheim, 75 Fed. 136, 21 C. C. A. 264; Farrar *v.* Bernheim, 74 Fed. 435, 20 C. C. A. 496; Jones *v.* Lamar, 39 Fed. 585; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,858, 2 Sumn. 108.

A party cannot set out the evidence for the purpose of showing that the commissioners have not come to a correct result. Holabird *v.* Burr, 17 Conn. 556.

If all the evidence is reported neither party can be compelled to submit to a hearing on only a part thereof. Safford *v.* Old Colony Iron Co., 168 Mass. 492, 47 N. E. 417.

40. *Alabama.*— Barnes *v.* Carson, 59 Ala. 188.

Illinois.— Prince *v.* Cutler, 69 Ill. 267; Brueggestradt *v.* Ludwig, 82 Ill. App. 435; Schumann *v.* Helberg, 62 Ill. App. 218; Smith *v.* Billings, 62 Ill. App. 77.

New York.— Byington *v.* Wood, 1 Paige 145; Minuse *v.* Cox, 5 Johns. Ch. 441, 9 Am. Dec. 313.

North Carolina.— Nash *v.* Taylor, 3 N. C. 174.

South Carolina.— State Bank *v.* Rose, 1 Strobh. Eq. 257.

Tennessee.— White *v.* Cox, 4 Hayw. 213.

United States.— Philadelphia Third Nat. Bank *v.* Chester Valley Nat. Bank, 86 Fed. 852, 30 C. C. A. 436.

See 19 Cent. Dig. tit. "Equity," § 918.

Facts reported "not proved," may be established by evidence upon a hearing for the purpose of ascertaining facts in addition to those found by a committee. Converse *v.* Hartley, 31 Conn. 372.

Requiring production of cumulative evidence is not error where the decree rendered is the same as the master recommended. Wall *v.* Stapleton, 177 Ill. 357, 52 N. E. 477.

After the overruling of exceptions in a cause referred to take and report the evidence and the master's conclusions, evidence to sustain the answer cannot be introduced. Smith *v.* Billings, 170 Ill. 543, 49 N. E. 212 [*affirming* 62 Ill. App. 77].

Exceptions to a charge in an account stated by a master, founded on a statement presented to the master, may be allowed upon clear evidence of a mistake in the statement. Marlatt *v.* Smith, 23 N. J. Eq. 56.

41. Kilpatrick *v.* Henson, 81 Ala. 464, 1 So. 188; Sparhawk *v.* Wills, 5 Gray (Mass.) 423.

Depositions taken by the auditor and returned into court, but not attached to or forming a part of his report, cannot be used on the trial of the cause. Beard *v.* Spalding, 12 Mich. 309.

A report will be taken to be correct where the decree did not direct a return of the evidence and steps are not taken to place the evidence before the court. Maddock *v.* Skinker, 93 Va. 479, 25 S. E. 535.

42. *Connecticut.*— Tyler *v.* Todd, 36 Conn. 218.

Georgia.— McDougald *v.* Dougherty, 11 Ga. 570.

New Jersey.— Blauvelt *v.* Ackerman, 23 N. J. Eq. 495.

North Carolina.— Phelan *v.* Hutchison, 62 N. C. 116, 93 Am. Dec. 602; Shutt *v.* Carloss, 36 N. C. 232.

Pennsylvania.— Hully *v.* Havens, 3 Luz. Leg. Reg. 185.

Tennessee.— Pitman *v.* England, (Ch. App. 1898) 46 S. W. 464.

United States.— McElroy *v.* Swope, 47 Fed. 380; Gottfried *v.* Crescent Brewing Co., 22 Fed. 433; Mason *v.* Crosby, 16 Fed. Cas. No. 9,236, 3 Woodb. & M. 258.

See 19 Cent. Dig. tit. "Equity," §§ 919, 928, 931.

A finding on a matter not in issue is erroneous if prejudicial. Newton Rubber Works *v.* De las Casas, 182 Mass. 436, 65 N. E. 816.

43. Henderson *v.* Foster, 182 Mass. 447, 65 N. E. 810.

44. Brokaw *v.* McDougall, 20 Fla. 212; Laswell *v.* Robbins, 39 Ill. 219; Bolware *v.* Bolware, 1 Litt. (Ky.) 124; Carman *v.* Hurd, 1 Pinn. (Wis.) 619.

45. Whiteside *v.* Pulliam, 25 Ill. 285.

material to the case.[46] A matter may be recommitted, in the discretion of the court, where its proper disposition calls for the introduction of further evidence.[47] A recommital has been made under various circumstances appealing to the conscience of the chancellor.[48] A recommittal will not ordinarily be granted at the instance of a party whose own negligence has created the occasion therefor.[49] There will be no recommittal for the correction of small errors,[50] for the statement of a conceded fact,[51] for the proof of a defense not pleaded,[52] to enable a party to interpose an objection before the master,[53] to obtain further findings not

46. Forest Hill Bldg., etc., Assoc. *v.* McEvoy, 66 S. W. 1031, 24 Ky. L. Rep. 161; Freehold Dutch Church *v.* Smock, 1 N. J. Eq. 148; Jones *v.* Byrne, 94 Va. 751, 27 S. E. 591; King *v.* Burdett, 44 W. Va. 561, 29 S. E. 1010; White *v.* Drew, 9 W. Va. 695.

On report that there is not sufficient evidence to enable the master to fix the amount of damages, a second reference for that purpose rests in discretion. Powers-Taylor Drug Co. *v.* Wafford, (Tenn. Ch. App. 1899) 53 S. W. 243.

Where the report is vague and defective it should be recommitted. Bolware *v.* Bolware, 4 Litt. (Ky.) 256.

47. *Alabama.*— Nunn *v.* Nunn, 66 Ala. 35.

Florida.— Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Kentucky.— Honore *v.* Colmesnil, 1 J. J. Marsh. 506.

Maryland.— Worthington *v.* Hiss, 70 Md. 172, 16 Atl. 534, 17 Atl. 1026; Dixon *v.* Dixon, 1 Md. Ch. 271.

Virginia.— Williams *v.* Donaghe, 1 Rand. 300.

United States.— Magic Ruffle Co. *v.* Elm City Co., 16 Fed. Cas. No. 8,950, 14 Blatchf. 109.

See 19 Cent. Dig. tit. "Equity," § 924.

Except for newly discovered evidence a further inquiry will not be directed where an issue has been distinctly made and testimony taken. Morton *v.* Hudson, Hoffm. (N. Y.) 312.

When necessary for ascertainment of the true merits the power to remand for further proof should always be exercised. Beard *v.* Green, 51 Miss. 856.

Amendment of the bill may require recommittal for a report in conformity to new issues or with regard to the rights of new parties. Mears *v.* Dole, 135 Mass. 508; Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19.

If a master without authority presents a second report disclosing new facts, which would probably produce a different result, a recommittal is proper in order to obtain a regular report thereon. Oden *v.* Taul, 2 B. Mon. (Ky.) 45; Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242.

Where the master has erroneously rejected testimony the proper practice is to refer the cause back with directions to receive the testimony. Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419 [*affirming* 82 Ill. App. 435].

On petition for rehearing.— Where a suit is referred with power to fix the form of a final decree and after the report a petition for rehearing is presented on the ground of newly discovered evidence, the court may recommit with power to hear the evidence and vary the decree. Asp *v.* Warren, 108 Mass. 587.

Where a report was set aside as to one party for irregularity the master was directed to allow the other parties to take testimony as to the rights between them and the party complaining, but not as to the rights among themselves. Manhattan Co. *v.* Evertson, 4 Paige (N. Y.) 276.

Where a report was returned before defendant's evidence was in and defendant on exceptions excused his delay, a recommittal was ordered to receive his evidence. Thomas *v.* Dawson, 9 Gratt. (Va.) 531.

48. Although a report is in exact conformity with the order it is competent to reject it and order another on different principles. Peyton *v.* Ayres, 2 Md. Ch. 64.

Reports by different masters.—Where a bill and supplemental bill were referred to different masters, and the reports left it doubtful as to what periods were covered by each, the whole matter was referred *de novo* to another master. Waterman *v.* Buck, 63 Vt. 544, 22 Atl. 15.

Where a commissioner lost part of the evidence on which his report was founded the cause was recommitted. Williams *v.* Clark, 93 Va. 690, 25 S. E. 1013.

A report made after dismissal of the bill was recommitted, after the cause was reinstated. Williamson *v.* Childress, 4 Hen. & M. (Va.) 449.

49. Gould *v.* Elgin City Banking Co., 136 Ill. 60, 26 N. E. 497 [*affirming* 36 Ill. App. 390]; Slaughter *v.* Slaughter, 8 B. Mon. (Ky.) 482; Sowles *v.* Sartwell, (Vt. 1903) 56 Atl. 282; Reading Ins. Co. *v.* Egelhoff, 115 Fed. 393; Cimiotti Unhairing Co. *v.* Browsky, 113 Fed. 699; New York Cent. Trust Co. *v.* Georgia Pac. R. Co., 83 Fed. 386. The power to remand should be exercised in order to reach the merits, even where the necessity arises from the carelessness or ignorance of counsel. Beard *v.* Green, 51 Miss. 856. While an auditor's account will not be opened, at the instance of a party in default, still where it is remanded on other grounds, such party may produce its evidence. Barnum *v.* Barnum, 42 Md. 251. See also Grantham *v.* Lucas, 24 W. Va. 231.

50. Taylor *v.* Robertson, 27 Fed. 537.

51. Jennings *v.* Dolan, 29 Fed. 861.

52. Lemon *v.* Rogge, (Miss. 1892) 11 So. 470.

53. Vandermark's Estate, 2 Luz. Leg. Reg. (Pa.) 83.

required by the original order but which would tend to support exceptions,[54] or to reëxamine a witness, except in case of a clear mistake or omission.[55] A report may be confirmed in part and recommitted in part,[56] or after a reference to two commissioners and a report by one alone there may be a recommital to that one.[57] An application to recommit for further evidence should name the witnesses and state the character of the evidence.[58] The court will receive evidence of extrinsic facts in support of an application to recommit.[59] A recommittal for a specific purpose does not open the case generally for review,[60] and the master must confine himself to the order of recommittal.[61] No notice to the parties is necessary on a recommittal to correct a report where no new evidence is to be taken.[62] Without recommittal the master may be permitted to amend his report in small matters, as by correcting a computation,[63] or by making it conform to the facts.[64] An error may be corrected, after confirmation,[65] but not after a decree founded thereon, without setting aside the decree.[66]

5. Correction by Court Without Recommittal. Upon the discovery of error in the master's report it is not essential that the cause be recommitted, but the court may itself make findings and determine the questions upon the testimony reported by the master,[67] or from the facts in the case aside from the evidence before the master.[68] The court may in like manner find additional facts where the report is incomplete,[69] and may find ultimate facts and draw conclusions from specific facts reported.[70] A witness before the master has even been permitted to correct his testimony in open court on a preliminary showing of mistake.[71] Where, however, a master died after an order of recommittal and before any further pro-

54. Cawley *v.* Cawley, 181 Mass. 451, 63 N. E. 1070. See also Van Ness *v.* Van Ness, 32 N. J. Eq. 669.

55. Nece *v.* Pruden, 8 Phila. (Pa.) 350.

56. Callender *v.* Colegrove, 17 Conn. 1.

The court may reserve authority on recommittal to determine itself some of the matters. Mitchell *v.* McKinny, 6 Heisk. (Tenn.) 83.

Report of evidence.— Where the original order did not require a report of the evidence, an order of recommittal need not do so. Freeland *v.* Wright, 154 Mass. 492, 28 N. E. 678.

57. Poindexter *v.* La Roche, 7 Sm. & M. (Miss.) 699.

58. Rouss *v.* Kendrick, (Tenn. Ch. App. 1897) 41 S. W. 1074.

59. Peck *v.* Metcalf, 8 R. I. 386.

60. Clark *v.* Willoughby, 1 Barb. Ch. (N. Y.) 68; Everhart *v.* Everhart, 2 Kulp (Pa.) 358.

61. Harris *v.* Ferris, 18 Fla. 84; *In re* Emig, 186 Pa. St. 409, 40 Atl. 522.

Where there is a discrepancy between the opinion on the report and the decree recommitting the master should follow the decree. Taylor *v.* Kilgore, 33 Ala. 214.

62. Prince *v.* Cutler, 69 Ill. 267.

63. Howe *v.* Russell, 36 Me. 115.

64. Heywood *v.* Miner, 102 Mass. 466; Laing *v.* Byrne, 34 N. J. Eq. 52.

65. Cochran *v.* Lynah, Bailey Eq. (S. C.) 514.

66. Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573.

67. *Alabama.*— American Freehold Land Mortg. Co. *v.* Pollard, 132 Ala. 155, 32 So. 630.

California.— McHenry *v.* Moore, 5 Cal. 90.

Mississippi.— Davis *v.* Roberts, Sm. & M. Ch. 543.

New York.— Taylor *v.* Read, 4 Paige 561.

Pennsylvania.— Gaines *v.* Brockerhoff, 136 Pa. St. 175, 19 Atl. 958.

Texas.— Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685.

See 19 Cent. Dig. tit. "Equity," § 927.

Contra.— Poling *v.* Huffman, 48 W. Va. 639, 37 S. E. 526; Baltimore, etc., R. Co. *v.* Vanderwerker, 44 W. Va. 229, 28 S. E. 829; Ward *v.* Ward, 21 W. Va. 262.

Where an account was taken under final decree with no equity reserved an error may be corrected by the court without referring the account back to the master. Huston *v.* Cassidy, 14 N. J. Eq. 320.

The court may not alter the master's report. Miller *v.* People's Lumber Co., 98 Ill. App. 468.

68. Witters *v.* Sowles, 43 Fed. 405.

69. Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Wolfe *v.* Bradberry, 140 Ill. 578, 30 N. E. 665; Johnson *v.* Gallagos, 10 N. M. 1, 60 Pac. 71. But the court cannot pass upon evidence which has once served to enable the committee to find facts. Knapp *v.* White, 23 Conn. 529.

70. *Connecticut.*— Callender *v.* Colegrove, 17 Conn. 1.

Illinois.— Haworth *v.* Huling, 87 Ill. 23.

Kentucky.—Moore *v.* Beauchamp, 4 B. Mon. 71.

New York.— Carpenter *v.* Schermerhorn, 2 Barb. Ch. 314.

Pennsylvania.— Wagner *v.* Goodwin Gas Stove, etc., Co., 2 Pa. Co. Ct. 113; McCay *v.* Black, 14 Phila. 635.

See 19 Cent. Dig. tit. "Equity," § 927.

71. Barnum *v.* Barnum, 42 Md. 251.

ceedings were taken by him it was held that the chancellor should not ignore the order and himself make a decree.[72]

6. Confirmation of Report. While the matter is affected to some extent by statute and rule, the chancery practice otherwise prevails, requiring that any report to which exceptions might lie must be confirmed before further action can be based thereon.[73] The practice as to obtaining a confirmation by the court varies. Under the chancery practice a rule was entered of course that the report stand confirmed unless within eight days the adverse party should show cause to the contrary.[74] A similar practice exists in some American jurisdictions.[75] Elsewhere there are general practice rules, taking the place of the special rule *nisi*, whereby the report stands confirmed unless exceptions are filed within a time fixed by the rule.[76] An order of confirmation made before expiration of the time to file exceptions is premature and should be set aside,[77] but thereafter the report may at any time be confirmed.[78] A confirmation is sometimes implied, as from an order overruling exceptions,[79] or from entering a decree based upon the report.[80] An order of confirmation is interlocutory only and subject to modification; it is not an adjudication.[81] The confirmation may be set aside for cause.[82]

72. Randall *v.* Randall, 55 Vt. 214.

73. Dorsey *v.* Hammond, 1 Bland (Md.) 463; Champlin *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 683; Scott *v.* Livesey, 2 Sim. & St. 300, 1 Eng. Ch. 300; 2 Daniell Ch. Pr. 944.

A certificate as to insufficiency of an examination requires no confirmation but becomes absolute if not excepted to in eight days. Case *v.* Abeel, 1 Paige (N. Y.) 630. See also 2 Daniell Ch. Pr. 944.

74. Bennett Office Master 23; 2 Daniell Ch. Pr. 947.

75. Suydam *v.* Dequindre, Walk. (Mich.) 23; Weber *v.* Weitling, 18 N. J. Eq. 39; Brundage *v.* Goodfellow, 8 N. J. Eq. 513; Clark *v.* Willoughby, 1 Barb. Ch. (N. Y.) 68.

Where some exceptions are allowed and others overruled, the further order as to the exceptions allowed and the confirmation of the residue may be embraced in the same order or may be separate. New York F. Ins. Co. *v.* Lawrence, 6 Paige (N. Y.) 511.

76. U. S. Eq. Rule 83 provides that if no exceptions are filed within one month from the time of filing the report, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed and formally withdrawn upon the order book, and in a paper filed, the report will stand confirmed as if no exceptions had been filed. Gasquet *v.* Crescent City Brewing Co., 49 Fed. 493.

77. Tindal *v.* Tindal, 1 S. C. 111.

78. Taylor *v.* Roberts, 3 Ala. 83; Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370; Coates *v.* Muse, 5 Fed. Cas. No. 2,916, 1 Brock. 529.

Pendency of trustee process attaching funds of plaintiff in the hands of defendant will not prevent the acceptance of a master's report, although it might delay a decree. Rennell *v.* Kimball, 5 Allen (Mass.) 356.

Nunc pro tunc.— A report will not be confirmed *nunc pro tunc* except on terms protecting others interested. Rochester Bank *v.* Emerson, 10 Paige (N. Y.) 359.

79. White *v.* Hampton, 10 Iowa 238.

80. Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121; Portoues *v.* Holmes, 33 Ill. App. 312. *Contra,* where the court decrees in favor of plaintiff on the points covered by his exceptions, he cannot complain that they were not formally sustained. Anderson *v.* Henderson, 124 Ill. 164, 16 N. E. 232. See also Prewett *v.* Prewett, 4 Bibb (Ky.) 266.

81. *Alabama.*— Rust *v.* Mobile Electric Lighting Co., 124 Ala. 202, 27 So. 262.

Kentucky.— Adkisson *v.* Dent, 88 Ky. 628, 11 S. W. 950, 11 Ky. L. Rep. 85.

Maine.— Pitman *v.* Thornton, 65 Me. 95.

Massachusetts.— Nash *v.* Hunt, 116 Mass. 237.

West Virginia.— Huntington First Nat. Bank *v.* Simms, 49 W. Va. 442, 38 S. E. 525.

Confirmation of report stating an account before replication and hearing upon the main issues is not an adjudication of the merits. Carter *v.* Privatt, 56 N. C. 345.

Confirmation of report without a decree does not so establish its truth as to estop the parties from showing the contrary. Cruger *v.* Daniel, McMull. Eq. (S. C.) 157. And see King *v.* Burdett, 44 W. Va. 561, 29 S. E. 1010.

Same as verdict.— A confirmed report at best stands in relation to the decree the same as a verdict to a judgment. Kingsbury *v.* Kingsbury, 20 Mich. 212.

Acceptance of committee's report is a finding of the facts reported. Lavette *v.* Sage, 29 Conn. 577.

Re-reference for final account.— A reference to report upon the distribution of a fund, followed by a re-reference to state a final account and to exclude all claims not sufficiently proved, when confirmed, concludes all the parties. Dixon *v.* Dixon, 1 Md. Ch. 271.

82. Maccubbin *v.* Cromwell, 2 Harr. & G. (Md.) 443; Seigle *v.* Seigle, 36 N. J. Eq. 397. But not after affirmance by an appellate court. Utica F. Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573. After the second

A master's report is not evidence before confirmation,[83] but is admissible as such after exceptions have been overruled.[84] An appellate court is reluctant to disturb a master's findings when they have been confirmed below.[85]

XXII. DISMISSALS.

A. Voluntary Dismissals — 1. Plaintiff's Right to Dismiss. In the English chancery plaintiff might as a matter of course move to dismiss his bill at any time before decree,[86] and this is often stated as the general rule in the United States.[87] An order of the court must, however, be obtained to effect the dismissal,[88] and in the United States there is a decided tendency to regard the application as resting in the discretion of the court, to be exercised with regard

term following the confirmation the order cannot be revised for fraud not affecting the obtaining of the order of confirmation. Thruston *v.* Devecmon, 30 Md. 210.

83. Diffenderffer *v.* Winder, 3 Gill & J. (Md.) 311; San Antonio, etc., R. Co. *v.* Ryan, (Tex. Civ. App. 1898) 47 S. W. 749.

84. Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685.

85. Warren *v.* Lawson, 117 Ala. 339, 23 So. 65; Cranston *v.* State Bank, 112 Ga. 617, 37 S. E. 875; Trexler *v.* Mennig, 33 Leg. Int. (Pa.) 321.

Where there is a variance between the rulings of the trial court on exceptions and the final decree, the rulings on the exceptions must stand. Hollingsworth *v.* Koon, 117 Ill. 511, 6 N. E. 148, 8 N. E. 193.

An appeal from an order of confirmation presents the case to the appellate court on the exceptions to the report, just as it was heard below. Broadwell *v.* Dudry, 2 Ohio Dec. (Reprint) 388, 2 West. L. Month. 581.

Pro forma order and decree.— In order to save long and expensive proceedings consequent on a report, the court, in order to obtain the opinion of the appellate court on the questions presented, may *pro forma* sustain exceptions and dismiss the bill. McCready *v.* Hart, 30 Leg. Int. (Pa.) 52.

86. 2 Daniell Ch. Pr. 355.

87. *Georgia.*— Cook *v.* Walker, 24 Ga. 331.

Illinois.— Langlois *v.* Matthiessen, 155 Ill. 230, 40 N. E. 496; Reilly *v.* Reilly, 139 Ill. 180, 26 N. E. 604, 28 N. E. 960; Dorn *v.* Geuder, 85 Ill. App. 521.

Indiana.— Elderkin *v.* Fitch, 2 Ind. 90.

Massachusetts.— Kempton *v.* Burgess, 136 Mass. 192.

Missouri.— Hesse *v.* Mississippi State Mut. F. & M. Ins. Co., 21 Mo. 93.

North Carolina.— Springs *v.* Wilson, 17 N. C. 385.

Pennsylvania.— Kreider *v.* Mehaffy, 10 Pa. Co. Ct. 412.

Washington.— Somerville *v.* Johnson, 3 Wash. 140, 28 Pac. 373.

United States.— Lowenstein *v.* Glidenwell, 15 Fed. Cas. No. 8,575, 5 Dill. 325.

See 19 Cent. Dig. tit. "Equity," §§ 749–751.

Such a dismissal is not an adjudication. Sayls *v.* Tibbitts, 5 R. I. 79; Mabry *v.* Churchwell, 1 Lea (Tenn.) 416. But see Phillips *v.* Wormley, 58 Miss. 398; Jenkins *v.* Bell, 2 Rich. Eq. (S. C.) 144.

Refusal of court to dismiss without prejudice on motion by plaintiff, before proof taken and where it is not manifest that defendant is entitled to a decree, is an abuse of discretion. Bates *v.* Skidmore, 170 Ill. 233, 48 N. E. 962.

After rehearing granted to defendant served by publication, there is a pending suit which plaintiff has a right to dismiss. Belcher *v.* Wilkerson, 54 Miss. 677.

After motion to withdraw answer.— Plaintiff may dismiss upon payment of costs, notwithstanding a rule to show cause why defendant should not be allowed to withdraw his answer and suffer the bill to be taken as confessed. Kreider *v.* Mahaffy, 10 Pa. Co. Ct. 412.

After decree there can be no dismissal except by consent. Picabia *v.* Everard, 2 Code Rep. (N. Y.) 69; Guilbert *v.* Hawles, 1 Ch. Cas. 40, 22 Eng. Reprint 684.

A cross bill for discovery may be dismissed after an answer, which cross plaintiff does not choose to use as evidence. Kidder *v.* Barr, 35 N. H. 235.

While plaintiff in contempt may not dismiss, failure to comply with an interlocutory decree is not such a contempt (Smith *v.* Smith, 2 Blackf. (Ind.) 232), nor is the failure to reply within time (Sea Ins. Co. *v.* Day, 9 Paige (N. Y.) 247).

88. Newark *v.* Newark, 22 Mich. 292; Newcomb *v.* White, 5 N. M. 435, 23 Pac. 671; French *v.* French, 8 Ohio 214, 31 Am. Dec. 441; American Zylonite Co. *v.* Celluloid Mfg. Co., 32 Fed. 809.

Consent and order for discontinuance are in effect a dismissal. Pictet Artificial Ice Co. *v.* New York Ice Mach. Co., 12 Fed. 816.

Statutes sometimes permit plaintiff to dismiss without an order. If this be done jurisdiction ceases except to render judgment for costs and make orders necessary to give effect to the dismissal. Sharpe *v.* Allen, 11 Lea (Tenn.) 518. If the act authorizes a dismissal upon paying costs or securing their payment an entry of a dismissal without paying or securing costs is ineffectual. Ladner *v.* Ogden, 31 Miss. 332.

A written statement by plaintiff filed with the papers that certain defendants were not brought in, because found to be without in-

to the rights of both parties.[89] Accordingly it is held that there may be no dismissal without prejudice, on motion of plaintiff, where the dismissal would operate to the prejudice of other parties.[90] Thus the right to dismiss without prejudice has been confined to cases where no order has been taken affecting the merits,[91] or where nothing has occurred to entitle defendant to a decree,[92] and has been denied, when the cause has remained a long time at issue.[93] It has been held too late to dismiss after the court has announced its decision,[94] after demurrer sustained and leave to amend not availed of,[95] after verdict for defendant on an issue to a jury,[96] and after an adverse report by a master.[97] Plaintiff cannot dismiss after an interlocutory decree, adjudicating the merits in part,[98] or so as to deprive defendant of an offer of equity, after plaintiff has obtained orders upon the bill containing the offer.[99] Where defendant may be protected thereby, a dismissal may be ordered conditioned upon terms which will afford such protection.[1] In some jurisdictions a plaintiff may not dismiss without prejudice after a cross bill has been filed,[2] or after an answer in the nature of a cross

terest, is a dismissal as to them. Pipkin *v.* Haun, Freem. (Miss.) 254.

89. Ebner *v.* Zimmerly, 118 Fed. 818, 55 C. C. A. 430.

90. *Ex p.* Jones, 133 Ala. 212, 32 So. 643; State *v.* Hemingway, 69 Miss. 491, 10 So. 575; Ward *v.* Whitfield, 64 Miss. 754, 2 So. 493; State Bank *v.* Rose, 1 Rich. Eq. (S. C.) 292; Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33; Detroit *v.* Detroit City R. Co., 55 Fed. 569. See also Forrest *v.* Charleston, 65 S. C. 500, 43 S. E. 952; Pennsylvania Globe Gaslight Co. *v.* Globe Gaslight Co., 121 Fed. 1015. A dismissal will not be allowed, unless the circumstances are such that the court would on final hearing permit the bill to be dismissed without prejudice. Stevens *v.* Railroad Co., 4 Fed. 97.

91. Howard *v.* Bugbee, 25 Ala. 548.

92. Forrest *v.* Charleston, 65 S. C. 500, 43 S. E. 952.

After reversal of a decree the court may refuse to dismiss without prejudice. Lanier *v.* Hill, 30 Ala. 111.

93. Welsbach Light Co. *v.* Mahler, 88 Fed. 427. See also Da Costa *v.* Dibble, 40 Fla. 418, 24 So. 911, where dismissal after issue was held to be on the merits.

94. McCurdy *v.* Mather, Kirby (Conn.) 273; Clackson *v.* Scrogins, 2 T. B. Mon. (Ky.) 52; Phillips *v.* Wormley, 58 Miss. 398.

95. Osborne *v.* Hollenback, 3 Kulp (Pa.) 138. Under such circumstances there may be a dismissal without prejudice after plaintiff declines to amend but before the entry of the order of absolute dismissal. Bomar *v.* Parker, 68 Tex. 435, 4 S. W. 599.

96. Saylor's Appeal, 39 Pa. St. 495.

97. Moriarty *v.* Mason, 47 Conn. 436; Bethia *v.* McKay, Cheves Eq. (S. C.) 93 [*overruling* Bossard *v.* Lester, 2 McCord Eq. (S. C.) 419]; Hathaway *v.* Hagan, 64 Vt. 135, 24 Atl. 131.

After reference by consent to a master to hear the parties and report the facts and his rulings on any question of law arising in a case, plaintiff cannot dismiss without prejudice. American Bell Telephone Co. *v.* Western Union Tel. Co., 69 Fed. 666, 16 C. C. A. 367 [*reversing* 50 Fed. 662].

98. *Maryland.*—Hall *v.* McPherson, 3 Bland 529.

Michigan.— Seymour *v.* Jerome, Walk. 356.

New Jersey.— Collins *v.* Taylor, 4 N. J. Eq. 163.

Rhode Island.— Cozzens *v.* Sisson, 5 R. I. 489.

United States.— Chicago, etc., R. Co. *v.* Union Rolling-Mill Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. ed. 1081; Garner *v.* Providence Second Nat. Bank, 67 Fed. 833, 16 C. C. A. 86; Hershberger *v.* Blewett, 55 Fed. 170.

See 19 Cent. Dig. tit. "Equity," § 751.

After interlocutory decree directing a sale, as prayed by plaintiff, but before the sale, plaintiff may dismiss. Nunn *v.* Givhan, 45 Ala. 370.

99. Pullman's Palace-Car Co. *v.* Central Transp. Co., 171 U. S. 138, 18 S. Ct. 808, 43 L. ed. 108 [*reversing* 76 Fed. 401, 22 C. C. A. 246].

An offer may be stricken out before its acceptance. Hammond *v.* Houston, 20 Ga. 29.

1. Stokes *v.* Little, 65 Ill. App. 255; American Zylonite Co. *v.* Celluloid Mfg. Co., 32 Fed. 809. And see Hollingsworth, etc., Co. *v.* Foxborough Water-Supply Dist., 171 Mass. 450, 50 N. E. 1037.

2. Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Tift *v.* Keaton, 78 Ga. 235, 2 S. E. 690; Langlois *v.* Matthiessen, 155 Ill. 230, 40 N. E. 496; Dorn *v.* Geuder, 85 Ill. App. 521. A bill cannot be dismissed after a decree sustaining the cross bill (Chicago, etc., R. Co. *v.* Union Rolling-Mill Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. ed. 1081) or where the rights of plaintiff in the cross bill would thereby be impaired (Detroit *v.* Detroit City R. Co., 55 Fed. 569; Pullman's Palace-Car Co. *v.* Central Transp. Co., 49 Fed. 261).

A plaintiff on withdrawing a part of his bill may not have instruments delivered up to him, on which that part of the bill was based, where a cross bill alleges their invalidity and seeks relief against them. Clark *v.* Des Moines, 20 Iowa 454.

Where cross bill has no equity on its face the original may be dismissed. Jacoway *v.* McGarrah, 21 Ark. 347.

bill.[3] It is said that one of several plaintiffs may dismiss as to himself,[4] but only on terms protecting the other plaintiffs from injury.[5] It has been also held that a plaintiff may dismiss as to one of several defendants,[6] but this rule seems subject to qualifications.[7] A plaintiff may not dismiss a part of his bill, his remedy being by a motion for leave to amend.[8]

2. Costs on Dismissal. As a general rule a dismissal on plaintiff's motion must be with costs,[9] but under exceptional circumstances costs have not been imposed.[10]

3. Reinstatement. The power to reinstate a cause, after it has been voluntarily dismissed, is frequently denied,[11] except for fraud.[12] On the other hand it is held that defendant may have the cause reinstated, for the purpose of having an order made in the progress of the suit reversed,[13] and that even plaintiff may move to reinstate.[14] An order giving leave to dismiss as to one defendant, but reserving the rights of others, may be revoked.[15] There can be no reinstatement without leave of court.[16]

B. Involuntary Dismissals — 1. Before Hearing — a. Grounds of Dismissal — (1) *Want of Prosecution.* A bill will be dismissed before hearing on motion

A statute forbidding dismissal after the filing of a cross bill does not prevent a dismissal as to a defendant who is not a party to the cross bill (Blair *v.* Reading, 99 Ill. 600), nor does it prevent a dismissal after the cross bill has been dismissed (Ogle *v.* Koerner, 140 Ill. 170, 29 N. E. 563 [*affirming* 41 Ill. App. 452].

3. Allen *v.* Allen, 14 Ark. 666; Purdy *v.* Henslee, 97 Ill. 389; McCarren *v.* Coogan, 50 N. J. Eq. 268, 24 Atl. 1033. A bill cannot be dismissed, as of right, after an answer showing that defendant is entitled to relief. Hat-Sweat Mfg. Co. *v.* Waring, 46 Fed. 87.

An answer asking for damages arising from the filing of the original bill is not a cross bill preventing dismissal. Dorn *v.* Geuder, 85 Ill. App. 521.

All steps necessary to perfect an answer as a cross bill must be taken before it can have that effect. Moore *v.* Tillman, 106 Tenn. 361, 61 S. W. 61.

4. Langdale *v.* Langdale, 13 Ves. Jr. 167, 33 Eng. Reprint 258.

Where the bill is by husband and wife, they must join in a motion to dismiss. Pryor *v.* Pryor, 5 Kulp (Pa.) 25.

5. Holkirk *v.* Holkirk, 4 Madd. 50. One of several plaintiffs may not dismiss to the prejudice of a purchaser of his interest. Blakey *v.* Blakey, 3 J. J. Marsh. (Ky.) 674.

6. Coston *v.* Coston, 66 Ga. 382; Bradley *v.* Merrill, 88 Me. 319, 34 Atl. 160.

7. Dismissing as to answering defendant and taking a decree against one who does not answer has been held not erroneous. Evans *v.* Menefee, 1 Mo. 442.

Plaintiff may dismiss as to defendants not served, without obtaining the consent of other defendants who have not answered. Harbeson *v.* Gano, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 396.

Disclaiming defendant.— It is not error, in the absence of objection, to dismiss as to a defendant who disclaims and against whom no relief is sought. Sawyer *v.* Campbell, 130 Ill. 186, 22 N. E. 458.

Dismissing as to an essential defendant destroys the entire suit. Willard *v.* Wood, 1 App. Cas. (D. C.) 44; Moore *v.* Simpson, 5 Litt. (Ky.) 49.

In the federal courts there is no absolute right to dismiss and an order dismissing as to one defendant may be revoked. Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33.

8. Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 69. In Lyster *v.* Stickney, 12 Fed. 609, 4 McCrary 109, a plaintiff was permitted to dismiss a part of his bill, but the case had been removed from the court of a state having a code of procedure, and the bill contained several distinct causes of action; the dismissal being as to two of these.

9. Whitten *v.* Whitten, 5 Cush. (Mass.) 42; Cummins *v.* Bennett, 8 Paige (N. Y.) 79; 2 Daniell Ch. Pr. 355.

Amendment by striking out a defendant must be on condition of paying his costs. Chase *v.* Dunham, 1 Paige (N. Y.) 572.

If costs are not claimed by defendant a dismissal may be without costs. Bradley *v.* Merrill, 88 Me. 319, 34 Atl. 160; Mason *v.* York, etc., R. Co., 52 Me. 82.

10. As where on a creditor's bill the property sought to be reached was taken, pending the suit, under a superior lien. Leggett *v.* Boorum, 2 Edw. (N. Y.) 630.

11. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 121 Ala. 672, 25 So. 720; Conquest *v.* Brunswick Nat. Bank, 97 Ga. 500, 25 S. E. 343; Harris *v.* Hines, 59 Ga. 427.

At a subsequent term there can be no reinstatement. Parker *v.* Anderson, 5 T. B. Mon. (Ky.) 445.

12. Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 372.

13. Clark *v.* Pigeon Roost Min. Co., 29 Ga. 29. A defendant's motion to reinstate may be denied where plaintiffs consent to accord him an equivalent remedy. Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140.

14. Warner *v.* Graves, 25 Ga. 369.

15. Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33.

16. Willard *v.* Wood, 164 U. S. 502, 17 S. Ct. 176, 41 L. ed. 531.

A defendant once dismissed cannot answer without some proceedings authorizing him

of defendant where plaintiff unreasonably delays the prosecution of the case;[17] but not where the situation of the case is such that the next step should be taken by the party seeking the dismissal,[18] or that he might himself expedite the case by bringing it on for hearing.[19] It will not be dismissed pending a motion by plaintiff to fix a time for hearing,[20] or where after notice of the motion plaintiff expedites the case,[21] or after the case has been reached and submitted.[22] A cause may be dismissed for failure to present a reference to the master within the time fixed by rule,[23] but ordinarily not while the case is before the master.[24] The pendency of negotiations for a settlement will not prevent a dismissal for want of prosecution in the absence of an agreement to suspend proceedings.[25] A defendant may

to do so. Masterson *v.* Craig, 5 Litt. (Ky.) 39.

17. *Kentucky.*— Morgan *v.* Currie, 3 A. K. Marsh. 293.

Maryland.— Whelan *v.* Cook, 29 Md. 1.

Mississippi.— Doyle *v.* Devane, Freem. 345.

New Jersey.— Lang *v.* Belloff, 53 N. J. Eq. 298, 31 Atl. 604; Sebring *v.* Sebring, 43 N. J. Eq. 59, 10 Atl. 193; Dey *v.* Hathaway Printing, etc., Co., 41 N. J. Eq. 419, 4 Atl. 675; West *v.* Paige, 9 N. J. Eq. 203.

New York.— De Luze *v.* Loder, 3 Edw. 419; Vermillya *v.* Odell, 1 Edw. 617.

North Carolina.— Holmes *v.* Williams, 11 N. C. 371.

South Carolina.— Black *v.* Kelly, 7 Rich. Eq. 248.

United States.— Mackaye *v.* Mallory, 80 Fed. 256.

See 19 Cent. Dig. tit. "Equity," § 760.

Failure to proceed against other parties is ground for dismissal on motion of a defendant as to whom the cause is at issue (Vermilyea *v.* Odell, 4 Paige (N. Y.) 121; Hastings *v.* Palmer, Clarke (N. Y.) 52; Gilbert *v.* Van Arman, 10 Fed. Cas. No. 5,414, 1 Flipp. 421), but only where plaintiff has been negligent (Hoxey *v.* Carey, 12 Ga. 534).

The delay must be unreasonable.— McLean *v.* Letchford, 60 Miss. 169. Inaction for a year is not sufficient to justify a dismissal where defendant is not prejudiced. Wilson *v.* Rusling, 13 Phila. (Pa.) 48. Where the impounding of rents through a receivership was the sole object of a bill, it was dismissed at the second term for failure to ask for the appointment of a receiver. Rose *v.* West, 50 Ga. 474. A case will be dismissed upon the hearing of exceptions to a master's report where the parties have been in court many years, the master has died, and part of the testimony has been lost. Gordon *v.* Berger, 17 Phila. (Pa.) 106. A bill will not be dismissed for failure for several terms to issue an alias subpœna, after the return of the original unexecuted. Litton *v.* Armstead, 9 Baxt. (Tenn.) 514; Ford *v.* Bartlett, 3 Baxt. (Tenn.) 20.

Amendment of a bill requiring an answer forbids a dismissal before the expiration of the time to reply to such answer. Graham *v.* Cook, 6 Yerg. (Tenn.) 404.

An ancillary bill cannot be dismissed by itself. If there is a failure to prosecute thereon the main bill should be dismissed. Draughon *v.* French, 4 Port. (Ala.) 352.

U. S. Eq. Rule 38 provides that if plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, his bill shall be dismissed as of course unless a judge of the court shall allow him further time for the purpose. This rule applies only to technical pleas and demurrers. Poultney *v.* Lafayette, 3 How. (U. S.) 81, 11 L. ed. 503. The court may in its discretion refuse to dismiss. Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397. This rule cannot be enforced where the practice of the court is to treat all days in term-time as rule days. Electrolibration Co. *v.* Jackson, 52 Fed. 773.

U. S. Eq. Rule 69, allowing three months to take testimony, does not justify a dismissal of the bill for failure to take proof within that time. Sargeant *v.* Easton First Nat. Bank, 21 Fed. Cas. No. 12,359, 6 Wkly. Notes Cas. (Pa.) 370.

In Maryland the rules permit a dismissal for failure to take testimony. Whelan *v.* Cook, 29 Md. 1.

18. Mackaye *v.* Mallory, 80 Fed. 256.

19. McVickar *v.* Filer, 24 Mich. 241; Whitney *v.* New York, 1 Paige (N. Y.) 548; Lee *v.* Brush, 3 Code Rep. (N. Y.) 220; Marshall *v.* Marshall, 4 N. C. 318.

20. Becker *v.* Lebanon, etc., St. R. Co., 4 Pa. Super. Ct. 372, 40 Wkly. Notes Cas. (Pa.) 238. A bill cannot be dismissed for failure to reply in time where plaintiff has set the cause down for hearing on bill and answer. Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed. 733.

21. Tingle *v.* Parten, 3 Edw. (N. Y.) 228.

22. Miller *v.* Hemphill, 9 Ark. 488.

23. Smith *v.* Smith, 132 Ala. 138, 31 So. 359.

24. Warren *v.* Shaw, 43 Me. 429; Lewis *v.* Laidley, 39 W. Va. 422, 19 S. E. 378; Millbank *v.* Ingersoll, 29 W. Va. 396, 1 S. E. 575.

Where the master refused to report because the evidence was too obscure, and plaintiff took no steps to compel a report, the case was dismissed. Colding *v.* Badger, 3 Rich. Eq. (S. C.) 368.

25. Orphan Asylum *v.* McCartee, Hopk. (N. Y.) 106; Norton *v.* Kosboth, Hopk. (N. Y.) 101.

But failure to take testimony is excused by the pendency of overtures for a settlement submitted to clients abroad, under the assumption of counsel without warrant there-

by his tardiness or other conduct waive the right to insist on a dismissal for want of prosecution.[26]

(II) *Failure to Bring in Necessary Parties.* A bill will not be dismissed in the first instance for want of necessary parties,[27] but an opportunity will first be given to bring them in and the bill will be dismissed if the plaintiff then neglects to do so.[28] If, however, an indispensable party is lacking and it is impossible to bring him in the bill will be at once dismissed.[29]

(III) *Want of Equity.* In some jurisdictions it is the practice to entertain before the hearing a motion to dismiss the bill for want of equity appearing on its face.[30] A bill will not be dismissed if it presents a case for any

for that proceedings were to be suspended. Beirne *v.* Wadsworth, 36 Fed. 614.

26. Home Ins. Co. *v.* Howell, 24 N. J. Eq. 238; Buchanan *v.* King, 22 Gratt. (Va.) 414.

27. *Alabama.*— Colbert *v.* Daniel, 32 Ala. 314; Rugely *v.* Robinson, 10 Ala. 702.

Connecticut.— Potter *v.* Holden, 31 Conn. 385; New London Bank *v.* Lee, 11 Conn. 112, 27 Am. Dec. 713; Nash *v.* Smith, 6 Conn. 421.

Georgia.— Hightower *v.* Mustian, 8 Ga. 506.

Illinois.— Thomas *v.* Adams, 30 Ill. 37; Geist *v.* Rothschild, 90 Ill. App. 324.

Indiana.— Dart *v.* McQuilty, 6 Ind. 391.

Virginia.— Allen *v.* Smith, 1 Leigh 231.

Wisconsin.— Orton *v.* Knab, 3 Wis. 576.

United States.— Milligan *v.* Milledge, 3 Cranch 220, 2 L. ed. 417; Blanchard *v.* Bigelow, 109 Fed. 275; Picquet *v.* Swan, 19 Fed. Cas. No. 11,135, 5 Mason 561.

See 19 Cent. Dig. tit. "Equity," § 759. See also *supra*, V, 1.

If a plea or demurrer for want of parties is allowed the bill will be dismissed unless plaintiff obtains leave to amend. Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516.

A bill dismissed for an insufficient reason will be reinstated on appeal, although there is a defect of parties. Grimshaw *v.* Walker, 12 Ala. 101.

28. Andrews *v.* Hobson, 23 Ala. 219; Goodman *v.* Benham, 16 Ala. 625; Singleton *v.* Gayle, 8 Port. (Ala.) 270; Hunt *v.* Wickliffe, 2 Pet. (U. S.) 201, 7 L. ed. 397; Greenleaf *v.* Queen, 1 Pet. (U. S.) 138, 7 L. ed. 85; Jones *v.* Brittan, 13 Fed. Cas. No. 7,455, 1 Woods 667. *Compare* Lusk *v.* Thatcher, 102 Ill. 60, holding that the court is not bound to retain the bill so that necessary parties may be brought in.

29. Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; New York City Fourth Nat. Bank *v.* New Orleans, etc., R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Picquet *v.* Swan, 19 Fed. Cas. No. 11,135, 5 Mason 561.

Where the court has no jurisdiction of defendant as shown by the return of process, the bill will be dismissed on motion. Parker *v.* Porter, 4 Yerg. (Tenn.) 81.

Allegations of the bill are accepted as true for the purposes of the motion. Stack *v.* O'Hara, 5 Leg. Gaz. (Pa.) 97.

30. Tait *v.* American Freehold Land Mortg. Co., 132 Ala. 193, 31 So. 623; Blackburn *v.* Fitzgerald, 130 Ala. 584, 30 So. 568; Gardner *v.* Knight, 124 Ala. 273, 27 So. 298; Rucker *v.* Morgan, 122 Ala. 308, 25 So. 242; Haughy *v.* Strang, 2 Port. (Ala.) 177, 27 Am. Dec. 648; Bryant *v.* Peters, 3 Ala. 160; Smith *v.* Bryan, 34 Ga. 53; Emerson *v.* Western Union R. Co., 75 Ill. 176; Fisher *v.* Stone, 4 Ill. 68; Edwards *v.* Beaird, 1 Ill. 70; Shaw *v.* Patterson, 2 Tenn. Ch. 171. *Contra*, Dupuy *v.* Gibson, 36 Ill. 197.

Time for motion.— It is said that such a motion may be made at any stage (Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394), and on the other hand that it may only be made on final hearing (Fuller *v.* Metropolitan L. Ins. Co., 31 Fed. 696, 24 Blatchf. 548; La Vega *v.* Lapsley, 14 Fed. Cas. No. 8,123, 1 Woods 428). A motion to dismiss because of the existence of an adequate remedy at law will be denied when not made until many years after the bill was filed. May *v.* Goodwin, 27 Ga. 352; Hargraves *v.* Jones, 27 Ga. 233. After a report in pursuance of an interlocutory decree it is too late to move. Dickens *v.* Ashe, 3 N. C. 176. In Alabama a motion to dismiss for want of equity cannot be entertained after a demurrer has been filed on the same ground. Taylor *v.* Harwell, 54 Ala. 596; Calhoun *v.* Powell, 42 Ala. 645.

Defendant in contempt for want of an answer may nevertheless move to dismiss. Smith *v.* Robinson, 11 Ala. 840.

The motion should be made to the court and not to the master. Smith *v.* Rock, 59 Vt. 232, 9 Atl. 551. A motion to dismiss made before the master should be renewed before the court. Smith *v.* Rock, 59 Vt. 232, 9 Atl. 551.

On hearing of the motion such a motion amounts to a general demurrer. Clark *v.* Ewing, 93 Ill. 472. The bill will be construed so as to sustain rather than defeat it. Thompson *v.* Paul, 8 Humphr. (Tenn.) 114. All the allegations of the bill will be taken as true.

Alabama.— Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515; Coleman *v.* Butt, 130 Ala. 266, 30 So. 364; Treadwell *v.* Torbert, 122 Ala. 297, 25 So. 216; Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729; Trammell *v.* Pennington, 45 Ala. 673; Cox *v.* Mobile, etc., R. Co., 44 Ala. 611; Bryant *v.* Peters, 3 Ala. 160.

Illinois.— Grimes *v.* Grimes, 143 Ill. 550, 32 N. E. 847; Emerson *v.* Western Union R. Co., 75 Ill. 176; Hickey *v.* Stone, 60 Ill. 458; Vieley *v.* Thompson, 44 Ill. 9; Fisher *v.* Stone, 4 Ill. 68.

relief,[31] or where the bill is defective in such a way that it might be cured by amendment.[32] Where it appears on an interlocutory application, as to dissolve an injunction, that plaintiff is not entitled to any relief the bill may be dismissed.[33]

(IV) *Other Grounds.* A bill will be dismissed where plaintiff disregards interlocutory orders,[34] for want of prayer,[35] on a showing that plaintiff has parted with his entire interest,[36] or that the bill was filed by one not authorized to act as solicitor in the court.[37] A bill has also been dismissed because after striking out improper matter what remained was unintelligible.[38] A bill will not be dismissed before the hearing because it can only be proved by witnesses at the time disqualified.[39] The defense of a former adjudication cannot be raised by motion to dismiss.[40] A statute prescribing grounds for dismissing on motion is exclusive.[41]

b. Dismissal on Bill and Answer. Ordinarily it is improper to dismiss a bill, in advance of the hearing, upon the bill and answer.[42]

Michigan.— Atty.-Gen. *v.* Lake County, 33 Mich. 289.

North Carolina.— Jones *v.* Person, 9 N. C. 269.

Pennsylvania.— Kessler's Case, 1 Lehigh Val. L. Rep. 153.

United States.— Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394.

See 19 Cent. Dig. tit. "Equity," § 766.

31. Hogan *v.* Smith, 16 Ala. 600; Polhemus *v.* Emson, 29 N. J. Eq. 583. A bill will not be dismissed on motion unless the want of right is very clear, either from the bill or from admissions of the parties. Holman *v.* Holman, 3 Desauss. (S. C.) 210.

32. *Alabama.*— West *v.* Louisville, etc., R. Co., 137 Ala. 568, 34 So. 852; Taylor *v.* Dwyer, 131 Ala. 91, 32 So. 509; Lehman-Durr Co. *v.* Griel Bros. Co., 119 Ala. 262, 24 So. 49; Brown *v.* Mize, 119 Ala. 10, 24 So. 453; Hendricks *v.* Hughes, 117 Ala. 591, 23 So. 637; South Alabama, etc., R. Co. *v.* Highland Ave., etc., R. Co., 117 Ala. 395, 23 So. 973; Jackson County *v.* Derrick, 117 Ala. 348, 23 So. 193; Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552; Hooper *v.* Savannah, etc., R. Co., 69 Ala. 529; Wyatt *v.* Greer, 4 Stew. & P. 318.

North Carolina.— Ferguson *v.* Hass, 62 N. C. 113.

Tennessee.—Anderson *v.* Mullenix, 5 Lea 287; Henderson *v.* Mathews, 1 Lea 34; Tyne *v.* Dougherty, 3 Tenn. Ch. 49; Quinn *v.* Leake, 1 Tenn. Ch. 67.

Virginia.— Smith *v.* Smith, 4 Rand. 95.

West Virginia.— McKay *v.* McKay, 28 W. Va. 514; Welton *v.* Hutton, 9 W. Va. 339.

See 19 Cent. Dig. tit. "Equity," § 759.

33. American Livestock Commission Co. *v.* Chicago Livestock Exch., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190 [*affirming* 41 Ill. App. 149]; Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434; Springer *v.* Walters, 37 Ill. App. 326; Mayse *v.* Biggs, 3 Head (Tenn.) 36. Not on the dissolution of an injunction on motion of a part of defendants (Duncan *v.* State Bank, 2 Ill. 262), nor where any ground of equity remains (Curan *v.* Colbert, 3 Ga. 239, 46 Am. Dec. 427; Wistar *v.* McManes, 54 Pa. St. 318, 93 Am. Dec. 700).

Injunction granted on condition.— On bill to stay proceedings at law an injunction was granted on condition of plaintiff's confessing judgment in the law action. It was held improper to dismiss the bill on dissolving the injunction without requiring plaintiff at law to vacate the judgment. Miller *v.* Miller, 25 W. Va. 495.

On motion merely to dissolve an injunction a bill cannot be dismissed. Walters *v.* Fredericks, 11 Iowa 181; Goodrich *v.* Moore, 2 Minn. 61, 72 Am. Dec. 74; Lyndall *v.* High School Committee, 19 Pa. Super. Ct. 232.

34. Clement *v.* Wheeler, 25 N. H. 361. For failing to substitute pleadings (Glover *v.* Rainey, 2 Ala. 727), or to amend as a condition of retaining the bill (Carter *v.* Thompson, 41 Ala. 375).

Failure to pay money into court is not ground for dismissal when equities are presented aside from that calling for the payment. Mabry *v.* Churchwell, 2 Coldw. (Tenn.) 63.

Formal non-compliance with a rule of court where the mistake was innocent and speedily corrected is not cause for dismissal. Buffalo, etc., R. Co. *v.* Philadelphia, etc., R. Co., 174 Pa. St. 263, 34 Atl. 561.

Waiver or laches.— A defendant may by conduct waive the right to move for a dismissal (Higgins *v.* Carpenter, Harr. (Mich.) 256), or may lose it by laches (Cooper *v.* Jones, 24 Ga. 473; Pottsville Water Co. *v.* Schuylkill Nav. Co., 11 Pa. Co. Ct. 635).

35. New Orleans, etc., R. Co. *v.* Louisiana Constr., etc., Co., 49 La. Ann. 49, 21 So. 171. It is too late to move to dismiss for want of a prayer for process when defendant has answered, invoked the action of the court, taken proofs and the cause is ready for hearing. Airs *v.* Billops, 57 N. C. 17.

36. Brewer *v.* Dodge, 28 Mich. 359.

37. Anonymous, 1 N. C. 5.

38. Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108.

39. Calloway *v.* McElroy, 3 Ala. 406.

40. Majors *v.* Majors, 58 Miss. 806; Desert King Min. Co. *v.* Wedekind, 110 Fed. 873.

If the bill shows another suit pending it will be dismissed. Turnipseed *v.* Crook, 8 Ala. 897.

41. Ford *v.* Bartlett, 3 Baxt. (Tenn.) 20.

42. *Florida.*— Gary *v.* Mickler, 21 Fla. 539.

Georgia.— Van Dyke *v.* Martin, 53 Ga. 221.

Iowa.— Fitch *v.* Richardson, Morr. 245.

Michigan.— Hewlett *v.* Shaw, 9 Mich. 346.

c. Dismissals in Part. Any party may insist upon a dismissal as to another party having no interest.[43] A bill may also be dismissed as to parties over whom the court has no jurisdiction,[44] and it then stands as if they had not been named as parties at all.[45] A defendant brought in for the purpose of discovery will be dismissed on a demurrer successfully resisting the discovery.[46] A misjoinder of defendants is no ground, however, for dismissing the entire bill.[47] An original bill cannot be dismissed and a bill supplemental thereto retained.[48]

d. Notice of Motion. A motion to dismiss must in the absence of rule to the contrary be made on notice,[49] and the particular objection must be pointed out.[50]

e. Finality of Order. After an order dismissing the bill, no further order can be made in the cause until the bill is reinstated.[51] This it is held generally may be done upon prompt application therefor,[52] but it is sometimes held that the order of dismissal deprives the court of its jurisdiction.[53] The overruling of a motion to dismiss for want of equity does not prevent a later dismissal for the same cause.[54] A dismissal annuls a prior order requiring the performance of an act.[55] A dismissal of a bill on appeal, the record not disclosing an amended and supplemental bill on file, does not dismiss the bill as amended.[56]

2. At the Hearing. The grounds for dismissing a bill at the hearing are of course practically as broad as those upon which plaintiff may be in any way defeated.[57] The bill will then be dismissed if it is without equity on its face,[58]

South Carolina.— Hawkins *v.* Sumter, 4 Desauss. 102.

Virginia.— Bates *v.* Brown, 80 Va. 126.

United States.— Betts *v.* Lewis, 19 How. 72, 15 L. ed. 576.

See 19 Cent. Dig. tit. "Equity," §§ 757, 758, 764, 767.

A bill will be dismissed on an answer robbing it of all equity (Harbert *v.* Mershon, 64 Ill. App. 297; Browne *v.* French, 11 Atl. (N. J. Ch. 1887) 606), but not where plaintiff remains entitled to be heard on any question (Albion Malleable Iron Co. *v.* Albion First Nat. Bank, 116 Mich. 218, 74 N. W. 515). A bill will be dismissed as to defendants over whom the answer shows the court to be without jurisdiction. Austin *v.* Richardson, 1 Gratt. (Va.) 310.

43. Johnson *v.* Miller, 50 Ill. App. 60.

44. Adair *v.* Feder, 133 Ala. 620, 32 So. 165; Miller *v.* Furse, Bailey Eq. (S. C.) 187; Vattier *v.* Hinde, 7 Pet. (U. S.) 252, 8 L. ed. 675 [*reversing* 12 Fed. Cas. No. 6,512, 1 McLean 110]; Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647.

45. Rucker *v.* Morgan, 122 Ala. 308, 25 So. 242.

46. Patterson *v.* Patterson, 2 N. C. 167.

47. Fulton *v.* Smith, 27 Ga. 413; Bugbee *v.* Sargent, 23 Me. 269.

48. Butchers', etc., Bank *v.* Willis, 1 Edw. (N. Y.) 645.

49. Hoxey *v.* Carey, 12 Ga. 534; Becker *v.* Lebanon, etc., St. R. Co., 4 Pa. Super. Ct. 372, 40 Wkly. Notes Cas. (Pa.) 238; Rogers *v.* Toole, 11 Paige (N. Y.) 212; Vermillya *v.* Odell, 1 Edw. (N. Y.) 617; Kain *v.* Ross, 1 Lea (Tenn.) 76.

Dismissal provided for by U. S. Eq. Rule 66, for failure to reply, goes of course without any application to the judge. Robinson *v.* Satterlee, 20 Fed. Cas. No. 11,967, 3 Sawy. 134.

50. Judson *v.* Stephens, 75 Ill. 255.

51. Allen *v.* Rogers, 30 Ark. 529.

52. Warner *v.* Graves, 25 Ga. 369; Smith *v.* Brittenham, 98 Ill. 188; Jones *v.* Kenny, 2 Bibb (Ky.) 303; Tarpley *v.* Wilson, 33 Miss. 467.

Laches may be ground for denying the application. Houston *v.* Jennings, 12 Tex. 487; Robinson *v.* Satterlee, 20 Fed. Cas. No. 11,967, 3 Sawy. 134.

53. Moore *v.* Murrah, 40 Ala. 573; Hill *v.* Richards, 11 Sm. & M. (Miss.) 194.

With expiration of the term at which an order of dismissal was made the control of the court over the order generally ceases. Miller *v.* Hemphill, 9 Ark. 488; Byrd *v.* McDaniel, 26 Ala. 582; Jackson *v.* Ashton, 10 Pet. (U. S.) 480, 9 L. ed. 502. Where, however, a cause is reinstated at a subsequent term of the court and defendant thereafter takes part in the defense he waives objection to the reinstatement. Byrd *v.* McDaniel, 26 Ala. 582.

54. Shaw *v.* Patterson, 2 Tenn. Ch. 171.

55. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 121 Ala. 672, 25 So. 720.

56. Berliner Gramophone Co. *v.* Seaman, 113 Fed. 750, 51 C. C. A. 440.

An order dismissing an amended bill will be construed as dismissing the bill as amended. Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332.

57. However, it is held that where a master has reported findings varying from the allegations of the bill, dismissal is improper, although the bill is not amended. There should be a decree making record evidence of plaintiff's rights. Garner's Appeal, 1 Walk. (Pa.) 438.

58. *Alabama.*— Kilgore *v.* Redmill, 121 Ala. 485, 25 So. 766; Jackson *v.* Knox, 119 Ala. 320, 24 So. 724; Lockard *v.* Lockard, 16 Ala. 423.

Georgia.— Findley *v.* McBurnett, 60 Ga. 627.

even though a demurrer has been overruled.[59] The bill will be dismissed if plaintiff fails to make out his case by the proof,[60] or where pleading and proof are too inharmonious to entitle plaintiff to a decree,[61] or where the proof is too uncertain to found a specific and just decree.[62] Where the answer saves the right there may be a dismissal at the hearing on the ground that plaintiff has an adequate remedy at law.[63] A bill will also be dismissed where relief is impracticable.[64] Where defect of parties appears at the hearing the bill will not be dismissed without an opportunity to bring them in.[65] It has been said that a bill will not be dismissed because prematurely filed, if at the hearing it appears that plaintiff is entitled to relief.[66]

3. Dismissal on Court's Own Motion. The court may of its own motion and at any stage of the proceedings dismiss a bill upon its appearing that there is an entire lack of equity jurisdiction,[67] or even that there is an adequate remedy at

Illinois.— Winkler *v.* Winkler, 40 Ill. 179; Wilson *v.* Derrwaldt, 100 Ill. App. 396.

Mississippi.— Semple *v.* McGatagan, 10 Sm. & M. 98.

Virginia.— Salamone *v.* Keiley, 80 Va. 86.

West Virginia.—Willis *v.* Willis, 42 W. Va. 522, 26 S. E. 515.

See also 19 Cent. Dig. tit. "Equity," §§ 757, 764, 827. See also *supra*, II, G, 1.

Mistaken ground for relief.— The fact that plaintiffs claimed relief under a statute when they are entitled thereto on general equitable grounds does not justify a dismissal. Adams *v.* Kehlor Milling Co., 36 Fed. 212.

59. Farmers' Bank *v.* Gilpin, 1 Harr. (Del.) 561.

60. *Georgia.*— Mounce *v.* Byars, 11 Ga. 180.

Illinois.— Tanton *v.* Boomgarden, 79 Ill. App. 551; Fred W. Wolf Co. *v.* Wodrich, 66 Ill. App. 610.

Missouri.— Leeper *v.* Bates, 85 Mo. 224.

Nebraska.— Anthes *v.* Schroeder, 3 Nebr. (Unoff.) 604, 92 N. W. 196.

New York.— Judd *v.* Seaver, 8 Paige 548.

Pennsylvania.—Buchanan *v.* Noel, 12 Phila. 431.

Virginia.— Jones *v.* Bradshaw, 16 Gratt. 355.

Washington.— O'Neile *v.* Ternes, 32 Wash. 528, 73 Pac. 692, dismissal proper, although statutory nonsuit does not apply to suits in equity.

See 19 Cent. Dig. tit. "Equity," § 827.

Where evidence tends to support the allegations of the bill, it is error to strike out plaintiff's evidence and dismiss the bill. Heiderich *v.* Heiderich, 18 Ill. App. 142.

A case for the entire relief asked need not be made out in order to prevent dismissal. Cutter *v.* Thompson, 51 Ill. 531.

A creditor's bill may be dismissed when it appears that the judgment on which it is founded has been set aside, although there is a supplemental bill setting up another and valid judgment. Butchers', etc., Bank *v.* Willis, 1 Edw. (N. Y.) 645.

61. Westbrook *v.* Hayes, 137 Ala. 572, 34 So. 622, bill properly dismissed in vacation without giving plaintiff an opportunity to amend.

62. Marvin *v.* Hampton, 18 Fla. 131; Field *v.* Oppenstein, 98 Ill. 68; Vermillion *v.* Bailey, 27 Ill. 230; Atty.-Gen. *v.* Carver, 34 N. C. 231.

63. Meux *v.* Anthony, 11 Ark. 411, 52 Am. Dec. 274; Thiefes *v.* Mason, 55 N. J. Eq. 456, 37 Atl. 455.

On a bill alleging equities it is error to dismiss without any finding except that there was a remedy at law. Cairns *v.* Ingram, 8 Pa. Super. Ct. 514, 43 Wkly. Notes Cas. (Pa.) 210.

As to the waiver of this defense see *supra*, II, G, 2.

64. As where events subsequent to the filing of the bill have removed the occasion for relief and there would be nothing whereon the decree could operate. Horner *v.* Keene, 177 Ill. 390, 52 N. E. 492; Booth *v.* Gaither, 58 Ill. App. 263.

65. Thruston *v.* Masterson, 4 Dana (Ky.) 126; Winter *v.* Ludlow, 30 Fed. Cas. No. 17,891, 3 Phila. (Pa.) 464. See also *supra*, V, I. A bill to compel the surrender of stock will be dismissed where it appears that the stock had been sold to a *bona fide* purchaser, who is not a party to the suit. Lamb Knit-Goods Co. *v.* Lamb, 119 Mich. 568, 78 N. W. 646.

66. Funk *v.* Leachman, 4 Dana (Ky.) 24.

67. *Alabama.*— Johnston *v.* Shaw, 31 Ala. 592.

Illinois.— Richards *v.* Lake Shore, etc., R. Co., 124 Ill. 516, 16 N. E. 909 [*affirming* 25 Ill. App. 344]; Gage *v.* Schmidt, 104 Ill. 106; Kimball *v.* Walker, 30 Ill. 482.

Maryland.— Dunnock *v.* Dunnock, 3 Md. Ch. 140.

Oregon.— Small *v.* Lutz, 34 Oreg. 131, 55 Pac. 529, 58 Pac. 645.

South Carolina.— Charleston Ins. Co. *v.* Potter, 3 Desauss. 6.

Tennessee.— Earles *v.* Earles, 3 Head 366.

See 19 Cent. Dig. tit. "Equity," § 767.

A bill which shows no right to relief will be dismissed by the court on its own motion. Fougeres *v.* Jones, 66 Fed. 316.

Waiver of objection.— It is error to dismiss an equitable petition for failure to state a cause of action, where defendants answer and proceed to trial and do not make the objection. Magwire *v.* Tyler, 25 Mo. 484.

Plaintiff claiming under unconstitutional statute.— The court will not in advance of the hearing dismiss a bill because plaintiff

law.[68] The court will rarely of its own motion dismiss a bill for multifariousness.[69] But it may in its discretion do so.[70]

C. Effect on Cross Bill of Dismissing the Original. Dismissal of the original bill does not necessarily carry with it a cross bill.[71] If the cross bill is defensive merely, dismissal of the original dismisses the cross bill,[72] but if the cross bill sets up new facts and prays for affirmative relief against plaintiffs in the original the cross bill remains for disposition.[73] A cross bill presenting no independent equity falls with the dismissal of the original.[74] When the action taken on the

claims under statutes which have been declared unconstitutional, the record not disclosing such facts. Parks *v.* Jones, 2 Coldw. (Tenn.) 172.

68. *Connecticut.*— Hine *v.* New Haven, 40 Conn. 478.

Illinois.— Harris *v.* Galbraith, 43 Ill. 309; Allison *v.* Maley, 39 Ill. App. 85.

Maine.— Denison Paper Mfg. Co. *v.* Robinson Mfg. Co., 74 Me. 116.

New Jersey.— Cutting *v.* Dana, 25 N. J. Eq. 265.

United States.— Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black 545, 17 L. ed. 333; McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Dumont *v.* Fry, 12 Fed. 21.

See 19 Cent. Dig. tit. "Equity," § 767. See also *supra*, II, G, 3.

69. Bean *v.* Bean, 37 Ala. 17. It will not do so after the incurring of trouble and expense which would have been saved by a demurrer. Chew *v.* Baltimore Bank, 14 Md. 299. The court will only act *sua sponte* where it is impracticable to make a proper decree. Wales *v.* Newbould, 9 Mich. 45.

70. Gilbert *v.* Sutliff, 3 Ohio St. 129; Rutherford *v.* Alyea, 54 N. J. Eq. 411, 34 Atl. 1078.

See also *supra*, VII, G, 8.

71. Abels *v.* Planters', etc., Ins. Co., 92 Ala. 382, 9 So. 423; Worrell *v.* Wade, 17 Iowa 96; Sharp *v.* Pike, 5 B. Mon. (Ky.) 155; Dawson *v.* Amey, 40 N. J. Eq. 494, 4 Atl. 442. *Contra*, Holzner *v.* Holzner, 48 Ind. 151; Stoner *v.* Stoner, 9 Ind. 505; Elderkin *v.* Fitch, 2 Ind. 90.

Dismissal of original for want of jurisdiction carries with it a cross bill. Loomis *v.* Freer, 4 Ill. App. 547.

72. *Kentucky.*— Murdock *v.* Grant, 5 J. J. Marsh. 254.

Mississippi.— Ladner *v.* Ogden, 31 Miss. 332.

Vermont.— Slason *v.* Wright, 14 Vt. 208.

Washington.— Waite *v.* Wingate, 4 Wash. 324, 30 Pac. 81.

United States.— Lowenstein *v.* Glidewell, 15 Fed. Cas. No. 8,575, 5 Dill. 325.

See 19 Cent. Dig. tit. "Equity," §§ 774, 829.

Defendant cannot have permanent relief on his answer after he has abandoned his bill. Grote *v.* Grote, (N. J. Ch. 1886) 2 Atl. 23.

73. *Alabama.*— Wilkinson *v.* Roper, 74 Ala. 140.

Florida.— Price *v.* Stratton, (1903) 33 So. 644; Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327.

Georgia.— Ray *v.* Home, etc., Invest., etc., Co., 106 Ga. 492, 32 S. E. 603; Ryan *v.* Fulghum, 96 Ga. 234, 22 S. E. 940; Evans *v.* Sheldon, 69 Ga. 100; Jones *v.* Thacker, 61 Ga. 329.

Illinois.— Ralls *v.* Ralls, 82 Ill. 243; McConnel *v.* Smith, 23 Ill. 611; French *v.* Bellows Falls Sav. Inst., 67 Ill. App. 179.

Iowa.— Cramer *v.* Clow, 81 Iowa 255, 47 N. W. 59, 9 L. R. A. 772.

Kentucky.— Wickliffe *v.* Clay, 1 Dana 585; Wilson *v.* Bodley, 2 Litt. 55.

Michigan.— Griffin *v.* Griffin, 118 Mich. 446, 76 N. W. 974.

New Jersey.— Nation Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 555, 30 Atl. 580; Coogan *v.* McCarron, 50 N. J. Eq. 611, 25 Atl. 330.

Rhode Island.— Wetmore *v.* Fiske, 15 R. I. 354, 5 Atl. 375, 10 Atl. 627, 629.

Virginia.— Ragland *v.* Broadnax, 29 Gratt. 401.

West Virginia.— Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

United States.— Small *v.* Peters, 104 Fed. 401; Jackson *v.* Simmons, 98 Fed. 768, 39 C. C. A. 514; San Diego Flume Co. *v.* Souther, 90 Fed. 164, 32 C. C. A. 548; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483; Markell *v.* Kasson, 31 Fed. 104; Barnard *v.* Hartford, etc., R. Co., 2 Fed. Cas. No. 1,003; Lowenstein *v.* Glidewell, 15 Fed. Cas. No. 8,575, 5 Dill. 325.

See 19 Cent. Dig. tit. "Equity," §§ 774, 829.

In Mississippi the dismissal of a bill carries with it generally a cross bill, although the latter prays relief (Blewett *v.* Blewett, (1892) 12 So. 249; Belcher *v.* Wilkerson, 54 Miss. 677; Thomason *v.* Neeley, 50 Miss. 310), but not where it demanded equitable relief essential to the protection of cross plaintiff (Gilmer *v.* Felhour, 45 Miss. 627).

Dismissal of a bill to set aside fraudulent conveyance does not dismiss the petition of another creditor seeking the same relief. Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199.

74. *Ex p.* Jones, 133 Ala. 212, 32 So. 643; McGlathery *v.* Richardson, 129 Ala. 653, 29 So. 665; Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 121 Ala. 672, 25 So. 720; Wachter *v.* Blowney, 104 Ill. 610; Gilmer *v.* Felhour, 45 Miss. 627. Where a bill asked the cancellation of a note on a ground not established by the proof, and a cross bill seeking to enforce the note disclosed an-

original bill disposes of the subject-matter of a cross bill, the latter may be dismissed.[75] Where the cross bill does not fall with the original it may be retained as an original bill,[76] or as an original bill in the nature of a cross bill.[77]

D. Dismissals Without Prejudice. A dismissal without prejudice merely prevents the operation of the order or decree as a bar to a new suit, leaving to the parties the same rights of prosecution and defense as if the new suit were the first instituted.[78] The dismissal will not be made without prejudice when it is the result of a full hearing and determination of the merits,[79] but such an order is proper where the defect is formal.[80] A dismissal without prejudice is generally proper wherever the case has been disposed of for a reason not reaching the merits, and it is probable that plaintiff might be able to make out a good case; as where he has mistaken his remedy,[81] where the bill is defective merely and plaintiff not without equity,[82] or where there is an omission of merely formal proofs,[83] or an accidental failure of proof.[84] The dismissal should be without prejudice when it is the result of a defense in abatement,[85] for multifariousness,[86] or for want of parties.[87] A dismissal may also be ordered without prejudice

other defense thereto, both bill and cross bill were dismissed. Bang *v.* Phelps, etc., Windmill Co., 96 Tenn. 361, 34 S. W. 516.

75. New Memphis Gaslight Co. *v.* Rawlings, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880; U. S. *v.* California, etc., Land Co., 192 U. S. 355, 24 S. Ct. 266, 44 L. ed. 476. No formal dismissal is in such a case necessary. Ross *v.* Clore, 3 Dana (Ky.) 189.

76. Sigman *v.* Lundy, 66 Miss. 522, 6 So. 245.

77. Coogan *v.* McCarren, 50 N. J. Eq. 611, 25 Atl. 330.

78. Nevitt *v.* Bacon, 32 Miss. 212, 66 Am. Dec. 609.

79. Doggett *v.* Lane, 12 Mo. 215; Martin *v.* Reese, (Tenn. Ch. App. 1899) 57 S. W. 419; Lake St. El. R. Co. *v.* Ziegler, 99 Fed. 114, 39 C. C. A. 431.

Where plaintiff has had ample opportunity to prepare his case upon the merits, a bill will not be dismissed without prejudice. Rumbly *v.* Stainton, 24 Ala. 712.

A code provision enumerating causes for dismissal without prejudice forbids such a dismissal except for those causes. Forsyth *v.* McMurty, 59 Iowa 162, 12 N. W. 76.

80. De Witt *v.* Chandler, 11 Abb. Pr. (N. Y.) 459; Crosier *v.* Acer, 7 Paige (N. Y.) 137.

81. *Illinois.*— Sheldon *v.* Harding, 44 Ill. 68.

Maryland.— Benscotter *v.* Green, 60 Md. 327.

New Jersey.— Codington *v.* Mott, 14 N. J. Eq. 430, 82 Am. Dec. 258.

Tennessee.— Grubb *v.* Browder, 11 Heisk. 299.

Virginia.— Beatty *v.* Barley, 97 Va. 11, 32 S. E. 794; Hurt *v.* Jones, 75 Va. 341.

Where plaintiff was a married woman suing by next friend, the bill was dismissed without prejudice because of a variance. Burns *v.* Hudson, 37 Ala. 62.

82. *Alabama.*— Danforth *v.* Herbert, 33 Ala. 497; Cameron *v.* Abbott, 30 Ala. 416; Harris *v.* Carter, 3 Stew. 233.

Arkansas.— Palmer *v.* Rankins, 30 Ark. 771; Phelps *v.* Jackson, 27 Ark. 585; Buckner *v.* Sessions, 27 Ark. 219.

Kentucky.— Blanchard *v.* Moore, 4 J. J. Marsh. 471; Steel *v.* McDowell, 2 Bibb 123.

Maine.— Cobb *v.* Baker, 95 Me. 89, 49 Atl. 425.

Michigan.— Wilson *v.* Eggleston, 27 Mich. 257; Curtis *v.* Goodenow, 24 Mich. 18.

United States.— House *v.* Mullen, 22 Wall. 42, 22 L. ed. 838.

See 19 Cent. Dig. tit. "Equity," §§ 769, 828.

Dismissal for want of an affidavit required under the circumstances to support the bill should be without prejudice. Brown *v.* Woods, 6 J. J. Marsh. (Ky.) 11.

A bill asserting inconsistent rights is properly dismissed without prejudice. Williams *v.* Jones, 79 Ala. 119.

83. Robbins *v.* Hanbury, 37 Fla. 468, 19 So. 886; Evans *v.* Wells, 7 Humphr. (Tenn.) 559.

84. Stewart *v.* Duvall, 7 Gill & J. (Md.) 179; Union Pac. R. Co. *v.* Harmon, 54 Fed. 29, 4 C. C. A. 165.

Insufficient evidence is no reason for a qualified dismissal. Clackson *v.* Scrogins, 2 T. B. Mon. (Ky.) 52.

85. Coleman *v.* Cross, 4 B. Mon. (Ky.) 268.

86. Wilson *v.* Wilson, 23 Md. 162; Wilkson *v.* Blackwell, 4 Mo. 428.

87. *Alabama.*— Daniel *v.* Stough, 73 Ala. 379.

Arkansas.— Boyd *v.* Jones, 44 Ark. 314; Benjamin *v.* Loughborough, 31 Ark. 210; Eddins *v.* Buck, 23 Ark. 507; Kirkpatrick *v.* Buford, 21 Ark. 268, 76 Am. Dec. 363.

Georgia.—Ledsigner *v.* Central Line Steamers, 79 Ga. 716, 5 S. E. 197.

Kentucky.— Pindell *v.* Vimont, 14 B. Mon. 400; Patrick *v.* White, 6 B. Mon. 330; Cooper *v.* Gunn, 4 B. Mon. 594; Beauchamp *v.* Handley, 1 B. Mon. 135; Peeble *v.* Estill, 7 J. J. Marsh. 408; Pogue *v.* Richardson, 7 J. J. Marsh. 240; Royse *v.* Tarrant, 6 J. J. Marsh. 566; Churchill *v.* Triplett, 6 J. J. Marsh. 517; Griffing *v.* Huddleson. 6 J. J. Marsh. 443; Breeding *v.* Finley, 6 J. J. Marsh. 371; Wal-

where the court is without jurisdiction,[88] or, where equity otherwise appears, if the dismissal is for the absence of a fact prerequisite to the enforcement of the equity.[89] Bills are dismissed without prejudice for want of prosecution,[90] for failure to comply with orders,[91] or to comply with conditions upon which relief depends.[92] The premature submission of a cause has been held to justify a dismissal without prejudice.[93] When originally or in the progress of the suit plaintiff's remedy at law was or becomes adequate, a dismissal for that reason must be without prejudice to an action at law.[94] The dismissal may be made absolute where another proceeding would be unavailing.[95] While a general order of dismissal is usually a bar,[96] it is only in doubtful cases that it is essential expressly to reserve the right to sue again,[97] as where the record discloses that the merits

lace *v.* Hanley, 4 J. J. Marsh. 622; Lewis *v.* Forbis, 4 J. J. Marsh. 189; Mims *v.* Mims, 3 J. J. Marsh. 103; Wolford *v.* Phelps, 2 J. J. Marsh. 31; Rowland *v.* Garman, 1 J. J. Marsh. 76, 19 Am. Dec. 54; Galloway *v.* Hamilton, 3 T. B. Mon. 270; Steele *v.* Lewis, 1 T. B. Mon. 43; Huston *v.* McClarty, 3 Litt. 274; Caldwell *v.* Hawkins, 1 Litt. 212; Barry *v.* Rogers, 2 Bibb 314.

Maine.— Beals *v.* Cobb, 51 Me. 348.

New York.— Miller *v.* McCan, 7 Paige 451.

Tennessee.— Mitchell *v.* Adams, (Ch. App. 1898) 52 S. W. 316.

Virginia.— Lockridge *v.* Sharrot, 5 Leigh 376; Stott *v.* Baskerville, 6 Munf. 20.

West Virginia.—Shaffer *v.* Fetty, 30 W. Va. 248, 4 S. E. 278.

United States.— Kendig *v.* Dean, 97 U. S. 423, 24 L. ed. 1061; House *v.* Mullen, 22 Wall. 42, 22 L. ed. 838; Barney *v.* Baltimore, 6 Wall. 280, 18 L. ed. 825; Young *v.* Cushing, 30 Fed. Cas. No. 18,156, 4 Biss. 456.

After reversal because the dismissal was absolute the lower court may dismiss without prejudice. Johnson *v.* Fox, 5 J. J. Marsh. (Ky.) 647.

88. Adams *v.* Arnold, 4 J. J. Marsh. (Ky.) 208; Krolik *v.* Bulkley, 58 Mich. 407, 29 N. E. 205.

It is error to dismiss absolutely and without stating that as to a legal cause of action joined with an equitable the dismissal was for want of jurisdiction. Sprinkle *v.* Duty, 54 W. Va. 559, 46 S. E. 557.

89. As for the failure of plaintiff in a bill to remove a cloud to show that he was in possession (Christian *v.* Vance, 41 W. Va. 754, 24 S. E. 596), or where, having an equitable title, he has failed to perfect his legal title (Stansberry *v.* Pope, 2 A. K. Marsh. (Ky.) 486).

90. Cleaver *v.* Smith, 114 Ill. 114, 29 N. E. 682; McClain *v.* French, 2 T. B. Mon. (Ky.) 147; Moseby *v.* Lewis, 4 Litt. (Ky.) 159; McDowell *v.* Logsdon, 3 Bibb (Ky.) 229; Ellis *v.* Baird, 6 Munf. (Va.) 456; State *v.* Larrabee, 3 Pinn. (Wis.) 166, 3 Chandl. (Wis.) 179. The dismissal should be absolute when the cause is regularly reached and submitted and plaintiff without excuse has failed to prepare his case. Reed *v.* Welsh, 11 Bush (Ky.) 450; Ducker *v.* Belt, 3 Md. Ch. 13.

91. Williams *v.* Woods, 121 Ala. 536, 25 So. 619; Timmons *v.* Chouteau, 13 Mo. 223.

92. Conn *v.* Penn, 5 Wheat. (U. S.) 424, 5 L. ed. 125.

93. Moore *v.* Murrah, 40 Ala. 573; Wright *v.* May, 40 Ala. 550; Commonwealth Bank *v.* Milton, 12 B. Mon. (Ky.) 340. It has been held that the cause should under such circumstances be remanded for further proceedings. Key *v.* Hord, 4 Munf. (Va.) 485.

94. *Illinois.*— Barrett *v.* Short, 41 Ill. App. 25.

Indian Territory.— Crowell *v.* Young, (1901) 64 S. W. 607.

Kentucky.— Turpin *v.* Turpin, 7 J. J. Marsh. 33; Hawkins *v.* Lowry, 6 J. J. Marsh. 55.

Maine.— Gamage *v.* Harris, 79 Me. 531, 11 Atl. 422.

New York.— Clarke *v.* Sawyer, 2 Barb. Ch. 411.

Oregon.— Helmick *v.* Davidson, 18 Oreg. 456, 23 Pac. 244.

West Virginia.— Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694.

Wisconsin.— Richards *v.* Allis, 82 Wis. 509, 52 N. W. 593.

United States.— Lacassagne *v.* Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. ed. 368; Horsburg *v.* Baker, 1 Pet. 232, 7 L. ed. 125; Auer *v.* Lombard, 72 Fed. 209, 19 C. C. A. 72; Sanders *v.* Devereux, 60 Fed. 311, 8 C. C. A. 629.

See 19 Cent. Dig. tit. "Equity," § 771.

Not only should the decree save plaintiff's right to sue at law, but it should refrain from adjudicating any question involved in the legal right. Smith *v.* Adams, 24 Wend. (N. Y.) 585.

Subject-matter abolished.— Where, pending a bill to rescind for fraud a deed for a slave, the slave was emancipated by act of law, the bill was dismissed without prejudice. Kidd *v.* Morrison, 62 N. C. 31.

95. Anthony *v.* Peay, 18 Ark. 24; Gale *v.* Gould, 40 Mich. 515.

If the amount involved is trifling permission to sue again may be denied. Gamble *v.* East Saginaw, 43 Mich. 367, 5 N. W. 416.

96. De Witt *v.* Chandler, 11 Abb. Pr. (N. Y.) 459. *Contra*, Moore *v.* Grubbs, 3 B. Mon. (Ky.) 77.

97. Marshalltown *v.* Forney, 64 Iowa 664, 21 N. W. 128.

were not considered, the dismissal will operate without prejudice, in the absence of such reservation.[98]

XXIII. DECREES.

A. Nature and Classification — **1. Definition.** A decree is the judgment or sentence of a court of equity.[99] It is pronounced on the hearing of issues and determines the rights of the parties to the suit.[1] An order made upon motion or petition for the furtherance of the suit, without settling any right or liability pertaining to the substance of the controversy, is properly a decretal order rather than a decree.[2]

2. Interlocutory and Final Decrees. A decree is final when it decides and disposes of the whole merits of the case, reserving no further questions or directions for the future judgment of the court.[3] It is interlocutory when it reserves any question for future judicial consideration and determination.[4] A decree is final where it dismisses the bill,[5] although subsequent directions are given as to costs.[6]

98. Cross *v.* Cohen, 3 Gill (Md.) 257. And see Peters *v.* Hansen, 55 Mich. 276, 21 N. W. 342. In Marshalltown *v.* Forney, 64 Iowa 664, 21 N. W. 128, it was held erroneous expressly to dismiss without prejudice, on the ground that the effect of the decree in that respect could only be determined upon a plea of former adjudication in a later suit.

99. Loyd *v.* Hicks, 31 Ga. 140; Bouvier L. Dict.

1. 2 Daniell Ch. Pr. 631.

2. Haines *v.* Haines, 35 Mich. 138; 2 Daniell Ch. Pr. 637.

3. *Arkansas.*— *Ex p.* Crittenden, 10 Ark. 333.

Florida.— State *v.* White, 40 Fla. 297, 24 So. 160.

Mississippi.— Humphreys *v.* Stafford, 71 Miss. 135, 13 So. 865.

New York.— Mills *v.* Hoag, 7 Paige 18, 31 Am. Dec. 271; Travis *v.* Waters, 1 Johns. Ch. 85 [*affirmed* in 12 Johns. 500].

North Carolina.— Flemming *v.* Roberts, 84 N. C. 532.

Virginia.— Parker *v.* Logan, 82 Va. 376, 4 S. E. 613; Tennent *v.* Pattons, 6 Leigh 196.

West Virginia.— McKinney *v.* Kirk, 9 W. Va. 26.

See 19 Cent. Dig. tit. "Equity," § 947.

A decretal order on which execution may be taken out is a final decree. Haskell *v.* Raoul, 1 McCord Eq. (S. C.) 22.

A final decree must be rendered when the cause is completely adjudicated, not one which is apparently interlocutory. Russell *v.* Stewart, 204 Pa. St. 211, 53 Atl. 771.

When final decree is improper.— The court should retain the cause so long as any judicial question is undetermined, and it is improper to render a final decree leaving such questions to be determined by the parties or by officers charged with the execution of the decree. Anderson *v.* Reed, 11 Iowa 177; Banton *v.* Campbell, 2 Dana (Ky.) 421; Hancock *v.* Hancock, 1 T. B. Mon. (Ky.) 121, 15 Am. Dec. 92; Farmer *v.* Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; Codwise *v.* Taylor, 4 Sneed (Tenn.) 346; Greenleaf *v.* Queen, 1 Pet. (U. S.) 138, 7 L. ed. 85. A final decree cannot be entered after a reference until the report comes in (Ogilvie *v.* Knox Ins. Co., 2 Black (U. S.) 539, 17 L. ed. 349), or usually until after expiration of the time for exceptions to be filed (Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960; Prescott *v.* Prescott, 175 Mass. 64, 55 N. E. 805). A decree on the report before that period expires is entered at the risk of the party. Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. 514. A decree may be entered against a defendant in default the same day that the report is filed. Price *v.* Boden, 39 Fla. 218, 22 So. 657. If a cause is set down for hearing on the first day of the term and exceptions remain to be disposed of, plaintiff may move for final decree at once upon the overruling of the exceptions later in the term. Morris *v.* Taylor, 23 N. J. Eq. 131. Where pleadings are lost or destroyed, a final decree should not be entered until they are supplied. Groch *v.* Stenger, 65 Ill. 481; Hughs *v.* Washington, 65 Ill. 245.

Final decree may be rendered upon voluntary appearance of defendant and waiver of notice. Shaw *v.* Mt. Pleasant Nat. State Bank, 49 Iowa 179.

4. *Arkansas.*— *Ex p.* Crittenden, 10 Ark. 333.

Kentucky.— Lewis *v.* Outton, 3 B. Mon. 453.

Michigan.— Patterson *v.* Hopkins, 23 Mich. 541.

New York.—Stone *v.* Morgan, 10 Paige 615; Johnson *v.* Everett, 9 Paige 636.

Ohio.— Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

Vermont.— Flint *v.* Babbitt, 59 Vt. 190, 9 Atl. 364.

Virginia.— Gunnell *v.* Dixon, 101 Va. 174, 43 S. E. 340; Noel *v.* Noel, 86 Va. 109, 9 S. E. 584; Wright *v.* Strother, 76 Va. 857; Cocke *v.* Gilpin, 1 Rob. 20.

United States.— Coates *v.* Muse, 5 Fed. Cas. No. 2,916, 1 Brock. 529.

See 19 Cent. Dig. tit. "Equity," § 947.

5. Cochran *v.* Couper, 2 Del. Ch. 27.

6. Pace *v.* Ficklin, 76 Va. 292.

Failure to adjudicate the costs does not affect the finality of the decree. Peterson *v.* Vann, 83 N. C. 118.

It is interlocutory if it merely dismisses a cross bill.[7] It is also interlocutory if it merely determines a demurrer,[8] confirms a master's report,[9] directs the payment of money into court, or delivery of property to a receiver,[10] or directs some act to be done before the decree can be effectual.[11] It is interlocutory if it leaves an amount to be paid to be ascertained in the future,[12] or if its finality is conditioned upon the performance of some act in the future.[13] With regard to decrees settling the rights of the parties in substance, but referring the cause to a master for some particular purpose, the cases are not altogether reconcilable upon their particular facts, but the principle running through them is that such a decree is interlocutory if any further judicial action will be requisite upon the coming in of the master's report,[14] and final, if all the consequential directions depending upon the result of the report are contained in the decree, so that no further decree will be necessary on the confirmation of the report.[15] A decree ordering a sale and reserving the question of distribution of the proceeds is interlocutory,[16] but where the sale is merely an execution of the decree and no further judicial action is required the decree is final.[17] Sometimes the character of the decree as final or interlocutory may be affected by what the decree itself declares in this regard, as indicating the purpose of the court with respect to further proceedings;[18] but if the decree is in its effect necessarily interlocutory, it cannot be made final by any phraseology or style tending to so characterize it.[19] A decree may be in part final and in part interlocutory, as where it adjudicates a part of the subject-matter and reserves independent questions,[20] or where it finally dis-

7. Ayres *v.* Carver, 7 How. (U. S.) 591, 15 L. ed. 179.

8. Warner *v.* Tomlinson, 1 Root (Conn.) 201.

9. Newport *v.* Longsdale Iron Co., 13 Ky. L. Rep. 300; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

10. Bellamy *v.* Bellamy, 4 Fla. 242. Where it appears from an answer that defendant admits a specific sum to be due, he will be ordered to pay it in without waiting for final decree. Rutherford *v.* Jones, 26 Ga. 150; Clarkson *v.* De Peyster, Hopk. Ch. (N. Y.) 274.

11. Hays *v.* May, 1 J. J. Marsh. (Ky.) 497; Purdie *v.* Jones, 32 Gratt. (Va.) 827.

12. Tuggle *v.* Gilbert, 1 Duv. (Ky.) 340.

13. *Ex p.* McLendon, 33 Ala. 276; Turner *v.* Crebill, 1 Ohio 372; Camden *v.* Haymond, 9 W. Va. 680; Warren *v.* Syme, 7 W. Va. 474.

14. *Maryland.*— Owings *v.* Rhodes, 65 Md. 408, 9 Atl. 903.

Mississippi.— Cook *v.* Bay, 4 How. 485.

New York.— Kane *v.* Whittick, 8 Wend. 219; Jacques *v.* New York M. E. Church, 17 Johns. 548, 8 Am. Dec. 447; Johnson *v.* Everett, 9 Paige 636.

Ohio.— Kelley *v.* Stanbery, 13 Ohio 408.

South Carolina.— Barrett *v.* James, 30 S. C. 329, 9 S. E. 263; Price *v.* Nesbit, 1 Hill Eq. 445.

Virginia.— Ryan *v.* McLeod, 32 Gratt. 367; Summers *v.* Darne, 31 Gratt. 791; Mackey *v.* Bell, 2 Munf. 523.

See 19 Cent. Dig. tit. "Equity," § 949.

15. *Alabama.*— Cochran *v.* Miller, 74 Ala. 50; McKinley *v.* Irvine, 13 Ala. 681.

Kentucky.— Larue *v.* Larue, 2 Litt. 258.

Mississippi.—Cromwell *v.* Craft, 47 Miss. 44.

New York.— Mills *v.* Hoag, 7 Paige 18, 31 Am. Dec. 271.

Texas.— McFarland *v.* Hall, 17 Tex. 676; Cannon *v.* Hemphill, 7 Tex. 184.

Virginia.— Harvey *v.* Branson, 1 Leigh 108.

United States.— Scott *v.* Hore, 21 Fed. Cas. No. 12,535, 1 Hughes 163.

See 19 Cent. Dig. tit. "Equity," § 949.

Although exceptions to the report might bring the matter again before the court, a decree of this character is final. Cook *v.* Bay, 4 How. (Miss.) 485; Bates *v.* Delavan, 5 Paige (N. Y.) 299.

16. Story *v.* Hawkins, 8 Dana (Ky.) 12; Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762; Goodwin *v.* Miller, 2 Munf. (Va.) 42; Knox *v.* Columbia Liberty Iron Co., 42 Fed. 378. A decree ordering a sale of land fraudulently conveyed, in order to satisfy a judgment, is interlocutory until the sale is made and the proceeds disbursed. Epperson *v.* Robertson, 91 Tenn. 407, 19 S. W. 230.

17. Field *v.* Ross, 1 T. B. Mon. (Ky.) 133; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 17 C. C. A. 310; Hoffman *v.* Knox, 50 Fed. 484, 1 C. C. A. 535 [*reversing* 42 Fed. 378]. A decree is final which orders a sale of land for the payment of a debt, but suspends further action pending the result of another suit. Cain *v.* Jennings, 2 Tenn. Cas. 209. And see Fleming *v.* Bolling, 8 Gratt. (Va.) 292.

18. Thompson *v.* Peebles, 6 Dana (Ky.) 387; Thompson *v.* Brooke, 76 Va. 160.

19. Owings *v.* Rhodes, 65 Md. 408, 9 Atl. 903; Ward *v.* Funsten, 86 Va. 359, 10 S. E. 415. A final decree is not rendered interlocutory by retaining the cause on the docket and rendering a subsequent decree. Nelson *v.* Jennings, 2 Pat. & H. (Va.) 369.

20. Mead *v.* Christian, 50 Ala. 561; Blackerby *v.* Holton, 5 Dana (Ky.) 520; Merle *v.* Andrews, 4 Tex. 200.

poses of a case as to some of the parties alone.[21] An interlocutory decree remains until final decree subject to the control of the court and open to reconsideration and revision;[22] a final decree terminates the litigation and, unless vacated or modified within the regular time,[23] precludes the court from any further proceedings beyond its mere enforcement.[24]

3. CONSENT DECREES. Parties not laboring under any disability may by their express consent authorize the rendition of a decree which will bind them and which cannot be questioned.[25] Such a decree binds only the parties to the agreement, and is valid only so far as the parties to be affected thereby are before the court and give their consent.[26] In order to give a decree the effect of one by consent there must be an express and clear consent thereto.[27]

4. PRO FORMA DECREES. Where new and difficult questions of law are presented the practice has been to a limited extent recognized of entering a formal decree, avowedly without full consideration, in order to facilitate a speedy trial

A decree dismissing so much of a bill as relates to one of two separate matters, and directing an account to be taken as to the other, is not final in any part as to the parties retained in court. Templeman *v.* Steptoe, 1 Munf. (Va.) 339.

21. Gray *v.* Cook, 24 How. Pr. (N. Y.) 432; Royall *v.* Johnson, 1 Rand. (Va.) 421; Dick *v.* Robinson, 19 W. Va. 159.

Final decree ought not to be rendered as to some of the necessary parties, without disposing of the case as to all. Lee *v.* Wickliffe, 1 T. B. Mon. (Ky.) 110; Malone *v.* Shamokin Valley, etc., R. Co., 31 Leg. Int. (Pa.) 260. A failure to decree against formal parties is no valid objection. Ligget *v.* Wall, 2 A. K. Marsh. (Ky.) 149.

22. See *infra*, XXIV, C.

23. See *infra*, XXIV, D, 2, b.

24. *Georgia.*— Whatley *v.* Slaton, 36 Ga. 653.

Illinois.— Mulvey *v.* Carpenter, 78 Ill. 580; Warren *v.* McCarthy, 25 Ill. 95.

Iowa.— Brooks *v.* Cutler, 18 Iowa 433.

Kentucky.— Bobb *v.* Bobb, 2 A. K. Marsh. 240.

Virginia.— Johnson *v.* Anderson, 76 Va. 766; Battaile *v.* Maryland Insane Hospital, 76 Va. 63.

West Virginia.— Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603; Ruhl *v.* Ruhl, 24 W. Va. 279.

United States.— Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,269, 1 Woodb. & M. 61; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

See 19 Cent. Dig. tit. "Equity," § 951.

No order can be made inconsistent with the decree. Lang *v.* Brown, 21 Ala. 179, 56 Am. Dec. 244; Walker *v.* Chicago Courier Co., 9 Ill. App. 418.

25. Frank *v.* Bruck, 4 Ill. App. 627; Harrison *v.* Rumsey, 2 Ves. 488, 28 Eng. Reprint 312. The distinction between a consent decree and a stipulation is that the sanction of the court is essential to give the agreement the effect of a decree. Roemer *v.* Neumann, 26 Fed. 332; Foster *v.* Foster, 126 Ala. 257, 28 So. 624. Where the parties stipulate that a decree may be rendered at the same term according to the case made by the pleadings, neither party may proceed inconsistently with such stipulation. Coultas *v.* Greene, 43 Ill. 277.

A consent decree must be justified by the bill (Iglehart *v.* Armiger, 1 Bland (Md.) 519), but it need not precisely conform to the pleadings or accord with the facts (Schermerhorn *v.* Mahaffie, 34 Kan. 108, 8 Pac. 198).

26. Coleman *v.* Woolley, 3 Dana (Ky.) 486; Dibrell *v.* Carlisle, 51 Miss. 785; Bristol *v.* Bristol & Warren Waterworks, 53 W. Va. 173, 44 S. E. 542. A consent decree is not void as to the parties consenting because others should have been made parties. Schermerhorn *v.* Mahaffie, 34 Kan. 108, 8 Pac. 199.

27. Consent will not be inferred from a mere failure to object (Hershee *v.* Hershey, 15 Iowa 185), or because the decree is indorsed, "submitted to us" (Gibson *v.* Burgess, 82 Va. 650), or from obedience to the order (Hall *v.* Taylor, 18 W. Va. 544), or from giving bail (Day *v.* Phelps, 7 Fed. Cas. No. 3,689).

Authority of counsel who consented to a decree on behalf of a party may be assumed by other parties to the suit. Wilson *v.* Wilson, 25 R. I. 446, 56 Atl. 773.

Decree rendered by court of its own motion is not a consent decree. Burney *v.* Ludeling, 41 La. Ann. 627, 6 So. 248.

The stipulation will be strictly construed and extend to no part of the decree not clearly covered thereby. Lee *v.* Lee, 77 Ala. 412; Rigby *v.* Lefevre, 58 Miss. 639. And see Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762. A recital that the cause came on for final hearing upon the stipulation of the parties does not show that the decree was rendered by consent. American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48. But a recital that by agreement of counsel of both parties "the following decree is rendered" repels the presumption that it was made on evidence. Mitchel *v.* Hardie, 84 Ala. 349, 4 So. 182.

A consent to take testimony after stipulation for a decree waives the right to a decree under the stipulation. Sharpless *v.* Warren, (Tenn Ch. App. 1899) 58 S. W. 407.

and thus save time and expense by a prompt determination on appeal of the questions involved.[28]

5. DECREES PRO CONFESSO. These decrees are governed by rules peculiar to themselves and are separately treated.[29]

6. DECREES ON DEFAULT. Where a defendant answers but does not appear at the hearing the decree is sometimes distinguished as one on default, but there is little difference between such decrees and ordinary decrees rendered on full hearing.[30] In the English chancery such a decree was called a decree *nisi* because it was entered not so much as the judgment of the court as that of plaintiff, and became absolute only on failure of defendant to respond to a rule to show cause against it.[31]

B. Preparation, Form, and Entry — 1. PREPARATION. In England the decree was drawn by the registrar from minutes of the court's directions, and passed and entered after rather complicated proceedings.[32] In the United States the general practice is for the solicitors, usually the solicitor for the successful party, to draw the decree,[33] and it is usual, but it seems not necessary, to submit the draft to the adverse solicitor, for his approval or objections.[34]

2. SIGNING. In the English chancery the decree when settled was formerly, in cases of difficulty, signed by the lord chancellor, but ordinarily by the registrar; the enrolment was signed by the lord chancellor.[35] In the United States the signature of the judge is in some jurisdictions essential;[36] in others if the degree appears of record the signature of the judge is not essential to its validity.[37]

3. ENTRY AND ENROLMENT. By the English practice a decree was entered, after being signed by the registrar, by filing it and entering a copy in the books.[38] While it was then effective for certain purposes, it was still open to rehearing and did not become strictly a record until enrolled,[39] which was accomplished by

28. McCready *v.* Hart, 30 Leg. Int. (Pa.) 52; Hyndman *v.* Hyndman, 19 Vt. 9, 46 Am. Dec. 171.

A statement by the trial judge that he has not time to discuss and examine all the matters in detail, and his characterization of the decree as *pro forma*, do not indicate that he did not consider the questions, but merely that he had not time to state his reasons in detail. Ahl's Appeal, 129 Pa. St. 26, 18 Atl. 471.

Consent of party.— A party cannot object that a decree *pro forma* was entered without his consent to that course when he consented as solicitor for another party, and the case was fully heard on appeal and the decree was correct as to him. Owens *v.* Barroll, 88 Md. 204, 40 Atl. 880.

In some jurisdictions the practice of rendering *pro forma* decrees is forbidden. State *v.* Wilson, 2 Lea (Tenn.) 204.

29. See *infra*, XXIII, D.

30. 2 Daniell Ch. Pr. 646. The practice is described in Hoffman Ch. Pr. 557.

31. 2 Daniell Ch. Pr. 622, 646.

32. See 2 Daniell Ch. Pr. 669.

33. It seems that either party may do so. Coleman *v.* Coleman, 2 Pearson (Pa.) 516; Stepp *v.* National L., etc., Assoc., 37 S. C. 417, 16 S. E. 134.

In the New York chancery it was primarily the duty of the successful party, and if he failed the unsuccessful party might apply to the registrar to draft it. Whitney *v.* Belden, 4 Paige 140.

By appellant.— It is the duty of a party desiring the allowance of an appeal to prepare the decree. Hubbell *v.* Lankenau, 63 Fed. 881.

34. In the New York chancery this was required by rule, but it is not so under the code. People *v.* Church, 2 Lans. 459. It is not error to fail to submit a decree to adverse counsel, if the decree is correct and is adopted by the court. Rankin *v.* Bancroft, 114 Ill. 441, 3 N. E. 97. It is not necessary to submit the decree to opposing counsel. Brooks *v.* James, 16 Wash. 335, 47 Pac. 751. Notice of the entry of the decree should be given to the parties according to good practice so that they may be heard on its settlement. Detroit F. & M. Ins. Co. *v.* Renz, 33 Mich. 298.

35. 2 Daniell Ch. Pr. 670, 680.

36. Sloan *v.* Cooper, 54 Ga. 486; Morton *v.* Beach, 56 N. J. Eq. 791, 41 Atl. 214; Fraker *v.* Brazelton, 12 Lea (Tenn.) 278.

37. Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64; Matthews *v.* Joyce, 85 N. C. 258; Cannon *v.* Hemphill, 7 Tex. 184.

If the decree is signed it is valid, although the entry of the decree on the record is not signed. Smith *v.* Baldwin, 85 Iowa 570, 52 N. W. 495; Traer *v.* Whitman, 56 Iowa 443, 9 N. W. 339.

Until it is signed and enrolled a decree cannot be pleaded as an adjudication, but it may be availed of on demurrer to a bill which sets it forth. Davoue *v.* Fanning, 4 Johns. Ch. (N. Y.) 199.

38. 2 Daniell Ch. Pr. 670.

39. 2 Daniell Ch. Pr. 674.

engrossing, not only the ordering part, but all the pleadings and proceedings and obtaining the signature of the lord chancellor.[40] In America it is often practicable to distinguish between the entry of the decree, through the filing and minuting thereof by the clerk, from its enrolment by transcribing it upon permanent books of record, but the practice in these matters has become widely varied.[41] An actual enrolment is in some jurisdictions requisite in order that the decree may be for all purposes effectual, and the mere filing of the decree is insufficient.[42] Sometimes a decree is deemed enrolled when it is signed and filed,[43] and sometimes at the expiration of the term at which it is made.[44] An enrolment relates back to the time of the decree.[45] Any subsequent decree should be enrolled by a continuance of the same record.[46] Before enrolment the decree is subject to rehearing, amendment, and modification,[47] and it may be used in evidence,[48] but it seems that if it be a final decree its execution cannot be enforced.[49] It may not be pleaded as an adjudication,[50] nor does it charge strangers with notice.[51]

4. ENTRY NUNC PRO TUNC. Where after the submission of a cause a party dies, a revivor may be obviated by entering a decree *nunc pro tunc* as of the date of the hearing.[52] It has also been held that where a judge dies after the preparation

40. 2 Daniell Ch. Pr. 680.

41. **The clerk may often enter a decree** of record basing his action on the judge's minutes. Smith *v.* Cumins, 52 Iowa 143, 2 N. W. 1041; Lee *v.* Willis, 99 Va. 16, 37 S. E. 826; Seymour *v.* Laycock, 47 Wis. 272, 2 N. W. 297.

If no objection is made to the entry it will be presumed regular. Campbell *v.* Weakley, 7 B. Mon. (Ky.) 22.

An irregularity in entering is waived by obtaining a stay of execution. Ruckman *v.* Decker, 28 N. J. Eq. 5.

42. Hudson *v.* Hudson, 20 Ala. 364, 56 Am. Dec. 200; Hall *v.* Hudson, 20 Ala. 284; Taylor *v.* Gladwin, 40 Mich. 232; Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

In Michigan the enrolment is by attaching the papers together, obtaining thereto the certificate of the registrar under the seal of the court, and filing them. Low *v.* Mills, 61 Mich. 35, 27 N. W. 877. The omission of cost bills does not affect the enrolment, as they may be added. Mickle *v.* Maxfield, 42 Mich. 304, 3 N. W. 961. An entry in the chancery record is sufficient, although no decree is filed. Spaulding *v.* O'Connor, 119 Mich. 45, 77 N. W. 323.

An unsigned paper not marked filed, but found among the files, cannot be established as a decree. Raymond *v.* Smith, 1 Metc. (Ky.) 65, 71 Am. Dec. 458.

An order adjudicating no rights need not be enrolled, although it dismisses the case. Consolidated Store-Service Co. *v.* Dettenthaler, 93 Fed. 307.

43. Hollingsworth *v.* McDonald, 2 Harr. & J. (Md.) 230, 3 Am. Dec. 545; Sagory *v.* Bayless, 13 Sm. & M. (Miss.) 153.

If the proceedings have not been recorded at length, the original papers may be used as constituting the record. U. S. Bank *v.* Benning, 2 Fed. Cas. No. 908, 4 Cranch C. C. 81.

44. Ansley *v.* Robinson, 16 Ala. 793; Fries *v.* Fries, 1 MacArthur 291; Tabler *v.* Castle, 12 Md. 144; Burch *v.* Scott, 1 Gill & J. 393; Nowland *v.* Glenn, 2 Md. Ch. 368; Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303.

45. Goelet *v.* Lansing, 6 Johns. Ch. (N. Y.) 75.

46. Minthorne *v.* Tompkins, 2 Paige (N. Y.) 102.

47. See *infra*, XXIV, D.

48. Bates *v.* Delavan, 5 Paige (N. Y.) 299; Lunn *v.* Scarborough, (Tex. Civ. App. 1896) 35 S. W. 508.

49. Taylor *v.* Gladwin, 40 Mich. 232; Minthorne *v.* Tompkins, 2 Paige (N. Y.) 102. For most purposes a decree is operative from the time of its rendition (Powe *v.* McLeod, 76 Ala. 418; Butler *v.* Lee, 1 Abb. Dec. (N. Y.) 279, 3 Keyes (N. Y.) 70, 33 How. Pr. (N. Y.) 251), unless it depends upon a condition precedent, when it is of no force until the condition is performed (Sparhawk *v.* Buell, 9 Vt. 41). Statutes may of course change the rule. Keatts *v.* Rector, 1 Ark. 391; Hook *v.* Richeson, 106 Ill. 392, 115 Ill. 431, 5 N. E. 98; Pace *v.* Ficklin, 76 Va. 292.

50. Davoue *v.* Fanning, 4 Johns. Ch. (N. Y.) 199; 2 Daniell Ch. Pr. 674.

51. Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64; Johnson *v.* National Exch. Bank, 33 Gratt. (Va.) 473.

Death of defendant before enrolment.— A decree entered before defendant's death may be enrolled thereafter and will bind those claiming under him. Harrison *v.* Simons, 3 Edw. (N. Y.) 394.

52. *Iowa.*— Flock *v.* Wyatt, 49 Iowa 466.

Michigan.— Gunderman *v.* Gunnison, 39 Mich. 313.

New Jersey.— Burnham *v.* Dalling, 16 N. J. Eq. 310.

New York.— Wood *v.* Keyes, 6 Paige 478; Campbell *v.* Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438.

See 19 Cent. Dig. tit. "Equity," § 1019.

of the decree and before its entry the decree may still be entered,[53] but not where his term of office expires in the interval.[54] Where there has been a failure to enter a decree through accident or inadvertence of the court the decree may be entered as of the time when it should have been entered,[55] but this may be done only to make the record conform to the proceedings actually had. The expedient cannot be resorted to for the purpose of validating a proceeding which was void at the time it was had,[56] nor will it be permitted to affect the intervening rights of third parties.[57]

5. Form of Decrees — a. In General. In the English chancery the enrolled decree was almost a complete record of the cause, and consisted normally of three parts: (1) the date and title; (2) recitals of the pleadings, proceedings, and in general language, the evidence; (3) the ordering or mandatory part of the decree. The ordering part was sometimes prefaced by a declaration of the rights of the parties.[58] In the United States the decree should have a title, setting forth the names of the parties[59] and the time of rendering the decree.[60] The recitals are in the United States much abbreviated, and usually do not set forth the proceedings at length,[61] but it is sometimes required that the decree recite the premises on which it is predicated.[62] In some cases it is necessary for the protection of the party that the decree should declare the grounds or reasons for the order made.[63] Mere informalities do not vitiate a decree.[64]

b. Findings of Fact. It is sometimes held that the decree must contain findings of all the material facts necessary to sustain it,[65] but in some jurisdictions no

53. Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

54. Russell *v.* Sargent, 7 Ill. App. 98.

55. Newland *v.* Gaines, 1 Heisk. (Tenn.) 720; Brignardello *v.* Gray, 1 Wall. (U. S.) 627, 17 L. ed. 692.

56. Eslow *v.* Albion Tp., 32 Mich. 193; Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 75.

57. Dawson *v.* Scriven, 1 Hill Eq. (S. C.) 177.

58. Barton Suit Eq. 198; 2 Daniell Ch. Pr. 653. The most complete discussion of the frame of decrees is found in Seton Decrees, pt. 1, c. 1.

59. Where the parties are shown in the title their names need not be set out in the body of the decree. Campbell *v.* Ayres, 6 Iowa 339.

60. The caption should correspond with the time the decree is actually entered. Barclay *v.* Brown, 7 Paige (N. Y.) 245.

A recital of the term at which the decree is rendered is sufficient. Campbell *v.* Ayres, 6 Iowa 339.

The caption of an order is not a necessary part of the record. Jones *v.* Janes, 6 Leigh (Va.) 167.

61. U. S. Eq. Rule 86 forbids such recitals and prescribes the following form: "This cause came on to be heard . . . at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows." See also Saunders *v.* Smith, 3 Ga. 121.

62. Hartfield *v.* Brown, 8 Ark. 283. A recital that the cause was heard on bill, answer, and depositions, is sufficient, without mentioning exhibits used. Foote *v.* Lefavour, 6 Ind. 473. It is better practice to recite that the cause was regularly matured for hearing. Riggs *v.* Lockwood, 12 W. Va. 133.

In West Virginia, while it is customary to recite generally that the cause came on to be heard on "the papers heretofore read" it is not error to specify the papers. Linsey *v.* McGannon, 9 W. Va. 154.

In North Carolina the decree must show that issues of fact were tried to a jury. Taylor *v.* Person, 9 N. C. 298.

Depositions.— It is unnecessary to recite that the decree is based on depositions when that fact appears from the record. Day *v.* Hale, 22 Gratt. (Va.) 146. But see Shumate *v.* Dunbar, 6 Munf. (Va.) 430.

63. As where a bill to cancel a deed is dismissed because the deed is on its face inoperative. Pillow *v.* Wade, 31 Ark. 678; Peirsoll *v.* Elliott, 6 Pet. (U. S.) 95, 8 L. ed. 332.

64. Harland *v.* Eastland, Hard. (Ky.) 599.

A decree for the payment of money, so long as its meaning is clear, need not follow the technical language of a judgment at law or that established by usage for decrees in equity. Johnson *v.* Miller, 55 Ill. App. 168; Lindley *v.* Payne, 3 Litt. (Ky.) 299.

A decree in effect disposing of a demurrer is not erroneous, although it does not in terms pass upon the demurrer. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

A mere opinion on file has been treated as a decree after twelve years' acquiescence. Hubbell *v.* Lankenau, 63 Fed. 881.

65. *Connecticut.*— Weeden *v.* Hawes, 10 Conn. 50; Samson *v.* Hunt, 1 Root 207, 521.

Nebraska.— Farrell *v.* Bouck, 60 Nebr. 771, 84 N. W. 260.

North Carolina.— Burbank *v.* Wiley, 66 N. C. 58.

Tennessee.— Burdine *v.* Shelton, 10 Yerg. 41.

findings of fact are necessary.[66] Where as is usual an issue is directed to a jury merely to inform the conscience of the court and is not binding, a decree based directly on the verdict is bad. There must be independent findings by the court.[67] The confirmation of a master's report is a sufficient finding of the facts reported,[68] but the decree should then strictly conform to the report.[69]

c. Certainty Required. A decree must be certain in its terms. It must specify the persons in whose favor and against whom relief is granted.[70] It must definitely fix and state amounts,[71] and specifically describe property that is to be

Virginia.— Repass *v.* Moore, 98 Va. 377, 30 S. E. 458.

See 19 Cent. Dig. tit. "Equity," § 938.

What the court decided must be shown on the face of the decree. Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506.

Only material facts need be found. Synnott *v.* Shaughnessy, 130 U. S. 572, 9 S. Ct. 609, 32 L. ed. 1038.

Every issue put to the court must be answered. Russell *v.* Cornwell, 2 Root (Conn.) 68.

Where fraud depends upon intent, the court should in terms find fraud; but where the fraud is an inference of law, it is sufficient to find facts from which the inference follows. Lavete *v.* Sage, 29 Conn. 577.

The decree should state merely the conclusions of law and fact. Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182.

A decree on the pleadings may find facts stated in an intervening petition and not denied. Rumsey *v.* People's R. Co., 144 Mo. 175, 46 S. W. 144.

On a general finding for plaintiff it will be presumed that the material facts were found. Buckers Irr., etc., Co. *v.* Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49.

Formal issues of fact need not be presented to the chancellor. Toomey *v.* Atyoe, 95 Tenn. 373, 32 S. W. 254.

66. Mason *v.* Daly, 117 Mass. 403; Judge *v.* Booge, 47 Mo. 544; Kilroy *v.* Mitchell, 2 Wash. 407, 26 Pac. 865; Dousman *v.* Hooe, 3 Wis. 466.

It is not usual for a decree to state the conclusions of fact (Whiting *v.* U. S. Bank, 13 Pet. (U. S.) 6, 10 L. ed. 33), but it is proper for it to do so (Putnam *v.* Day, 22 Wall. (U. S.) 60, 22 L. ed. 764).

Presumption.— A decree will be presumed to have been entered on proof of the necessary facts. Campbell *v.* Ayres, 6 Iowa 339.

In Illinois it is sufficient if the evidence is in some way preserved in the record. Baird *v.* Powers, 131 Ill. 66, 22 N. E. 796; Driscoll *v.* Tannock, 76 Ill. 154; Eaton *v.* Sanders, 43 Ill. 435; Waugh *v.* Robbins, 33 Ill. 181; Trenchard *v.* Warner, 18 Ill. 142. It is sufficient if either the facts be found in the decree (Axtell *v.* Pulsifer, 155 Ill. 141, 39 N. E. 615; Durham *v.* Mulkey, 59 Ill. 91; Moore *v.* Township No. 3 School Trustees, 19 Ill. 83; Nichols *v.* Thornton, 16 Ill. 113; Hovorka *v.* Hemmer, 107 Ill. App. 312), or if, in depositions, exhibits, or in the report of the master, the evidence is preserved in the record (Eaton *v.* Sanders, 43 Ill. 435; Seymour *v.* Edwards, 31 Ill. App. 50; Bonnell *v.* Lewis, 3 Ill. App. 283). But either the facts must be so found or the evidence so preserved. Campbell *v.* Campbell, 63 Ill. 502; Grob *v.* Cushman, 45 Ill. 119; Chapman *v.* Kane, 97 Ill. App. 567; Adamski *v.* Wiezorek, 93 Ill. App. 357; Ricketts *v.* Chicago Permanent Bldg., etc., Assoc., 67 Ill. App. 71; Alexander *v.* Alexander, 45 Ill. App. 211; Updike *v.* Parker, 11 Ill. App. 356. Where the evidence is oral the facts proved may be stated in the decree. Gorman *v.* Mullins, 172 Ill. 349, 50 N. E. 222; Walker *v.* Carey, 53 Ill. 470. Facts, not conclusions, must be stated. Drennan *v.* Huskey, 31 Ill. App. 208. No evidence need be set forth where the decree is based on admissions by demurrer. Heacock *v.* Hosmer, 109 Ill. 245.

67. Goldman *v.* Rogers, 85 Cal. 574, 24 Pac. 782; Learned *v.* Castle, 67 Cal. 41, 7 Pac. 34; Creighton *v.* Hershfield, 1 Mont. 639; Rynerson *v.* Allison, 28 S. C. 81, 5 S. E. 218; Charlotte, etc., R. Co. *v.* Earle, 12 S. C. 53; Gadsden *v.* Whaley, 9 S. C. 147. And see *supra*, XX, D, 1, b.

The court must find issues not covered by the verdict. Warring *v.* Freear, 64 Cal. 54, 28 Pac. 115.

A decree adopting and following the verdict of a jury is proper. Hayden *v.* Anderson, 57 Ga. 378; Epping *v.* Tunstall, 57 Ga. 267.

The evidence need not be preserved if the court follows the verdict. *Aliter* if the court decrees contrary to the verdict. Bonnell *v.* Lewis, 3 Ill. App. 283.

68. Moore *v.* Hubbard, 4 Ala. 187; Ruckman *v.* Decker, 28 N. J. Eq. 5.

If the decree recites that certain facts are found by a master, it is sufficient, although the reference, report, and confirmation do not appear in the record. Brooks *v.* Robinson, 54 Miss. 272; Smith *v.* Pattison, 45 Miss. 619.

69. Farley *v.* Ward, 1 Tex. 646. An additional claim may be found and added to the decree confirming the report. McCandlish *v.* Edloe, 3 Gratt. (Va.) 330.

70. Turner *v.* Dupree, 19 Ala. 198; Arnold *v.* Arnold, 11 B. Mon. (Ky.) 81.

A decree for or against "the owners" of certain property, without determining who such owners are, is erroneous. De Wolf *v.* Long, 7 Ill. 679; Church *v.* Chambers, 3 Dana (Ky.) 274.

The term "defendants" will be held to comprise all the parties defendant. Dousman *v.* Hooe, 3 Wis. 466.

71. Smith *v.* Trimble, 27 Ill. 152; Frye *v.* State Bank, 10 Ill. 332; Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305; Clark *v.*

affected.[72] A decree must be specific in its directions,[73] but no more so than the circumstances of the case require.[74] A decree is at least erroneous if it is inconsistent in its different parts.[75] It has been held that a decree is sufficiently certain when amounts, descriptions, or the like are ascertained by reference to other portions of the record.[76] Uncertainty in an interlocutory decree is not ground for reversal, where it may be removed by subsequent proceedings.[77]

C. Nature of Relief Granted — 1. In General. Equitable relief may be adapted to the circumstances of the case. There is no limit to the variety of decrees in this regard.[78] While certain equitable remedies are called for with sufficient frequency to create definite rules for framing the decrees in such cases, in order to accord the appropriate relief,[79] these categorical remedies do not limit the scope of decrees. While equity will not do that which is only a hardship to defendant and of no benefit to plaintiff,[80] still where plaintiff clearly establishes his right, the court must award the appropriate relief without considering inconvenience to defendant.[81] It is of course impossible to specify what relief may be awarded outside of the well defined and common equitable remedies; but it may be said in general that the court will adjust the relief in such a way as to afford

Bell, 4 Dana (Ky.) 15; Banton *v.* Campbell, 2 Dana (Ky.) 421; Noland *v.* Richards, 1 J. J. Marsh. (Ky.) 582; White *v.* Guthrie, 1 J. J. Marsh. (Ky.) 503.

Decree fixing the principal and data for computing interest is sufficiently certain. Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241; Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801. But see Barstow *v.* McLachlan, 5 Ill. App. 96.

A decree for "seven hundred dollars and upwards" will be sustained as a decree for seven hundred dollars alone. Carter *v.* Lewis, 29 Ill. 500.

72. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Jones *v.* Minogue, 29 Ark. 637; Elliott *v.* Waring, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69.

In establishing the ownership of bonds, a decree is erroneous which does not find the number of bonds belonging to each claimant, and does not indicate with certainty the particular bonds referred to. Rumsey *v.* People's R. Co., 144 Mo. 175, 46 S. W. 144.

A description of land by well known abbreviations is sufficient. Citizens' Sav. Bank *v.* Stewart, 90 Iowa 467, 57 N. W. 957. A mistake in description is immaterial where it may be rejected as surplusage and enough remain to identify the premises. Thain *v.* Rudisill, 126 Ind. 272, 26 N. E. 46; Laverty *v.* Moore, 33 N. Y. 658. See also Broxson *v.* McDougal, 63 Tex. 193. Where plaintiff was entitled to six hundred acres of land, and the decree described the land by courses and distances so as to embrace more, the decree was held erroneous. Kennedy *v.* Duncan, Hard. (Ky.) 365.

A decree declaring a bill of sale void was held bad where no bill of sale between the parties was referred to in the record. Mudd *v.* Carrico, 4 Litt. (Ky.) 16.

Written instruments need not be set out *in hæc verba*. Levert *v.* Redwood, 9 Port. (Ala.) 79.

73. If it provides that it shall be executed by a special master it should designate the master. Alexander *v.* Wolley, 4 Ill. App. 225.

If it grants relief on condition, it should fix a time for performing the condition. Clark *v.* Bell, 4 Dana (Ky.) 15; Match *v.* Hunt, 38 Mich. 1.

74. If it makes no difference which of two notes directed to be paid is paid first, defendant cannot object that the decree did not order the one first due to be first paid. Pogue *v.* Clark, 25 Ill. 351.

Decree directing the building of a bridge for certain purposes need not specify the character of the bridge more particularly than that it shall be proper and safe for such purposes. Carpenter *v.* Easton, etc., R. Co., 28 N. J. Eq. 390.

"Expenditures reasonably necessary for her . . . and her children" was held to include the expenses of carrying on a farm on which the parties lived. Berry *v.* Turner, 77 Ga. 58.

75. Welch *v.* Louis, 31 Ill. 446; Whitesides *v.* Lackey, 1 Litt. (Ky.) 80; Runnion *v.* Ramsay, 80 N. C. 60; Sims *v.* Redding, 20 Tex. 386.

76. State *v.* White, 40 Fla. 297, 24 So. 160; Redhead *v.* Baker, 86 Iowa 251, 53 N. W. 114; Jones *v.* Belt, 2 Gill (Md.) 106. *Contra*, as to an amount directed to be paid. Spoor *v.* Tilson, 97 Va. 279, 33 S. E. 609.

A decree for the sale of lands "mentioned in the petition" does not estop the parties as to any particular land, where none is described in the petition. Morrison *v.* Laughter, 47 N. C. 354.

77. Birchett *v.* Bolling, 5 Munf. (Va.) 442.

78. Robinson *v.* Clark, 76 Me. 493.

79. See Accounts and Accounting, 1 Cyc. 446 *et seq.*; Cancellation of Instruments, 6 Cyc. 338 *et seq.*; and other topics relating to equitable remedies.

80. Seeger *v.* Mueller, 133 Ill. 86, 24 N. E. 513 [*affirming* 28 Ill. App. 28].

81. Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753. See also Sutherland *v.* Rose, 47 Barb. (N. Y.) 144.

fair protection to the rights of all parties.[82] In accordance with principles already stated,[83] the decree should be so framed as to adjust all rights in controversy and make the relief complete.[84]

2. TIME TO WHICH RELIEF SHOULD RELATE. In general equity adapts its relief to the state of facts existing, not at the beginning, but at the close, of litigation.[85] Matters occurring after the filing of the bill cannot be embraced within the decree, however, until brought into the case by supplemental pleading.[86] The court will award relief to plaintiff without noticing interests acquired from defendant pending the suit.[87]

3. RELIEF IN RELATION TO PARTIES — a. Decree Must Affect Parties Alone. The decree must be confined to the interests of the parties before the court.[88] In the

82. For instances of decrees devised under unusual circumstances to work out this result see the following cases:

Alabama.— Walker *v.* Miller, 11 Ala. 1067.

Arkansas.— Stirman *v.* Cravens, 33 Ark. 376.

Michigan.— Briggs *v.* Withey, 24 Mich. 136.

New Jersey.— McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445.

Tennessee.— Bradford *v.* Cherry, 1 Coldw. 57.

Vermont.— Smith *v.* Onion, 19 Vt. 427.

Virginia.— Roberts *v.* Jordans, 3 Munf. 488.

See 19 Cent. Dig. tit. "Equity," § 986.

83. See *supra*, II, A, 4, f; II, C.

84. *Arkansas.*— McGaughey *v.* Brown, 46 Ark. 25.

California.— Kraft *v.* De Forest, 53 Cal. 656.

Kentucky.— Waller *v.* Logan, 5 B. Mon. 515.

Michigan.— Fitzhugh *v.* Barnard, 12 Mich. 104.

Missouri.—Ames *v.* Gilmore, 59 Mo. 537.

New Jersey.— Tate *v.* Field, 56 N. J. Eq. 35, 37 Atl. 440.

Pennsylvania.— Wilson *v.* Getty, 57 Pa. St. 266.

South Dakota.— Grewing *v.* Minneapolis Threshing-Mach. Co., 12 S. D. 127, 80 N. W. 176.

Tennessee.— Leverton *v.* Waters, 7 Coldw. 20.

Texas.— Smith *v.* Doak, 3 Tex. 215.

Wisconsin.— Winslow *v.* Crowell, 32 Wis. 639.

See 19 Cent. Dig. tit. "Equity," § 988.

In decreeing a sale of land it is not usual to direct that the purchaser be put in possession but such an order does not vitiate the decree. Vicksburg, etc., R. Co. *v.* McCutchen, 52 Miss. 645.

In general a void estate will merely be declared void, but a conveyance may be ordered. Russel *v.* Stinson, 3 Hayw. (Tenn.) 1.

Granting merely incidental relief without adjudicating the main question is error. Peck *v.* Ayers, etc., Tie Co., 116 Fed. 273, 53 C. C. A. 551.

Omitting incidental relief.— Defendants cannot complain that the court failed to award partition which had been prayed merely as incidental to main relief, where they did not seek it, and were not independently entitled thereto. Ragor *v.* Brenock, 175 Ill. 494, 51 N. E. 888.

85. *Georgia.*— Ross *v.* Stokes, 64 Ga. 758.

Illinois.— Pennsylvania Co. *v.* Bond, 99 Ill. App. 535.

New Hampshire.—Ashuelot R. Co. *v.* Cheshire R. Co., 60 N. H. 356.

New York.— Peck *v.* Goodberlett, 109 N. Y. 180, 16 N. E. 350; Dyer *v.* Dyer, 17 Misc. 421, 41 N. Y. Suppl. 198.

Ohio.— Drake *v.* Brackett, 1 Ohio Dec. (Reprint) 56, 1 West. L. J. 395.

United States.— Randel *v.* Brown, 2 How. 406, 11 L. ed. 318.

See 19 Cent. Dig. tit. "Equity," § 990.

On bill to recover interest on a legacy the decree cannot be made for the principal falling due after commencement of the suit. Jordan *v.* Clark, 16 N. J. Eq. 243.

86. Downer *v.* Wilson, 33 Vt. 1. See also *supra*, XII. If the allegations of the bill refer to the condition of things at the time the bill is filed the relief must be accordingly limited. Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.

87. Alexandria Mechanics' Bank *v.* Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

88. Murphy *v.* Orr, 32 Ill. 489; Woodruff *v.* Cook, 2 Edw. (N. Y.) 259; Boyd *v.* American Carbon Black Co., 182 Pa. St. 206, 37 Atl. 937; Hartman *v.* Pennsylvania Range Boiler Co., 9 Pa. Dist. 560, 24 Pa. Co. Ct. 324; New York Fourth Nat. Bank *v.* New Orleans, etc., R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Hagan *v.* Walker, 14 How. (U. S.) 29, 14 L. ed. 312; Collins Mfg. Co. *v.* Ferguson, 54 Fed. 721; Hamilton *v.* Savannah, etc., R. Co., 49 Fed. 412; Young *v.* Cushing, 30 Fed. Cas. No. 18,156, 4 Biss. 456.

Decree against heirs unknown was held valid under Chase Laws Ohio, p. 1279, § 14. Sullivant *v.* Weaver, 10 Ohio 275.

Decree in favor of a fictitious person is a mere nullity. Sampeyreac *v.* U. S., 7 Pet. (U. S.) 222, 8 L. ed. 665 [*affirming* 27 Fed. Cas. No. 16,216*a*, Hempst. 118].

Decree in favor of person who died *pendente lite* is void. Keith *v.* Willingham, Ga. Dec., Pt. II, 151; Hooe *v.* Barber, 4 Hen. & M. (Va.) 439. But see *supra*, XXIII, B, 4. But if the court is satisfied that plaintiff's death has been suggested by defendant without any knowledge on his part that he is

absence of indispensable parties no decree whatever can be rendered.[89] But when the absent parties are not indispensable parties, a decree may be rendered restricted to the rights of those before the court and saving the rights of the others.[90] The decree can affect the rights only of those who are named in the bill as parties,[91] and charged in it with an interest or liability and facts sufficient to call for relief,[92] and who have appeared or been summoned.[93]

b. Relief Among Plaintiffs. As already stated the general rule is that if all plaintiffs are not entitled to relief none is,[94] but this rule is sometimes denied or qualified.[95] It seems that where plaintiffs have several interests the decree should be in accordance with such interests, notwithstanding their joinder.[96] After

really dead, and only for delay, the court may render a final decree in the cause then ready for such action, and disregard such suggestion. Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

When partner not bound.— Where an issue, transferred for trial to chancery, is whether defendant has an interest in certain property as his father's partner, a decree that all the property belongs to the father is too broad, there being another claimant, a party to the suit, but not to this issue, and he is not bound by it. McReynolds *v.* McReynolds, 74 Iowa 89, 36 N. W. 903.

Class suit.— A suit by a creditor, in behalf of himself and others of the same class, should provide for the relief of all. Wabash, etc., Canal Co. *v.* Beers, 2 Black (U. S.) 448, 17 L. ed. 327. But a plaintiff, suing on behalf of himself and others claiming separate tracts under the same source of title, cannot complain that relief was given to him alone. Gibbons *v.* Peralta, 21 Cal. 629.

89. *Alabama.*— Southern Home Bldg., etc., Assoc. *v.* Riddle, 129 Ala. 562, 29 So. 667.

Arkansas.— Anthony *v.* Shannon, 8 Ark. 52.

Illinois.— Hopkins *v.* Roseclare Lead Co., 72 Ill. 373.

Iowa.— Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

Kentucky.— Muldrow *v.* Muldrow, 2 Dana 386.

Michigan.— Walker *v.* Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187.

United States.— Barney *v.* Baltimore, 6 Wall. 280, 18 L. ed. 825; Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271.

See 19 Cent. Dig. tit. "Equity," § 934.

So held in the case of an interlocutory decree also which decided to a great extent the merits of the cause. Conn *v.* Penn, 5 Wheat. (U. S.) 424, 5 L. ed. 125.

Allegations not proved.— Where the answer alleges that the property in controversy had been sold by defendant to a third person, but there is no evidence thereof, it is not error to render a decree against defendant which does not affect such third person. Leuders *v.* Thomas, 35 Fla. 518, 17 So. 633, 48 Am. St. Rep. 255.

90. *Arkansas.*— Apperson *v.* Burgett, 33 Ark. 328.

Colorado.— Buck *v.* Webb, 7 Colo. 212, 3 Pac. 211.

Georgia.— Carey *v.* Hoxey, 11 Ga. 645.

Iowa.— White *v.* Hampton, 10 Iowa 238.

United States.—Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,990, 1 Sawy. 685.

See 19 Cent. Dig. tit. "Equity," §§ 993, 996. See also *supra*, V, C, 4, a.

91. Robinson *v.* Dix, 18 W. Va. 528.

92. *Alabama.*— Thomason *v.* Smithson, 7 Port. 144.

Iowa.— McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298; Mobley *v.* Dubuque Gas Light, etc., Co., 11 Iowa 71.

New York.—Livingston *v.* Freeland, 3 Barb. Ch. 510.

Virginia.— Cronise *v.* Carper, 80 Va. 678; Moseley *v.* Cocke, 7 Leigh 224.

West Virginia.—Shaffer *v.* Fetty, 30 W. Va. 248, 4 S. E. 278.

United States.— Andrews *v.* Solomon, 1 Fed. Cas. No. 378, Pet. C. C. 356.

See 19 Cent. Dig. tit. "Equity," § 993.

A bill charging one as an executor does not authorize a decree against him personally, although he be chargeable personally for the cause of action pleaded. Cloud *v.* Whiteman, 2 Harr. (Del.) 401.

93. Grider *v.* Payne, 9 Dana (Ky.) 188; Beasley *v.* Doty, 3 Dana (Ky.) 32; Morgan *v.* Morgan, 42 W. Va. 542, 26 S. E. 294.

94. See *supra*, V, F, II, c. See also Richter *v.* Noll, 128 Ala. 198, 30 So. 740; Gamble *v.* Jordan, 54 Ala. 432.

95. Rule denied in Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303.

Where the bill alleges joint ownership in plaintiffs, and the proof shows title in one alone, they are entitled to a joint decree. Cunningham *v.* Wood, 4 Humphr. (Tenn.) 417.

Where several and not joint relief is prayed one plaintiff may obtain it, although the hearing discloses want of interest in the other. Henderson *v.* Peck, 3 Humphr. (Tenn.) 247.

Suit partly unauthorized.— Where only one of several plaintiffs is entitled to relief it will be refused him where he did not authorize the suit and manifests no desire for protection. Dussaume *v.* Burnett, 5 Iowa 95.

96. Quarles *v.* Quarles, 2 Munf. (Va.) 321.

A decree may be made between plaintiffs. Haskell *v.* Raoul, 2 Treadw. (S. C.) 852.

On a bill by husband and wife it is erroneous to direct payment of a fund, bequeathed for the sole and separate use of the wife, to be made to both. Clagett *v.* Hall, 9 Gill & J. (Md.) 80.

affording plaintiffs relief in common the court will not, however, proceed to adjust an independent controversy among them with respect to the subject-matter.[97]

c. Relief Against Particular Defendants. Where the liability of defendants is several, the relief should be against each severally, according to his liability,[98] but where the liability is joint, the decree must be against all not showing a personal discharge.[99] If the liability of defendants is several and may be established without affecting the rights of others, a final decree may be made against one, retaining the cause as to the others.[1] Where two are jointly charged, one admitting the liability and the other not denying, the decree may go against both,[2] and where one admits and the other denies, and the proof fails against the latter, relief may be given against the former personally upon his admission.[3] Where the parties are before the court and their order of liability ascertained, the liability will be imposed immediately upon him who is ultimately liable.[4]

d. Relief Among Defendants. As it is the aim of equity to make a complete adjustment of the subject-matter among all interested, regardless of their position on the record,[5] the decree will grant relief between co-defendants based upon the pleadings and proofs between plaintiffs and defendants,[6] but not without cross

A defendant cannot object that he was ordered to pay to plaintiffs jointly, instead of to each his share. Handly *v.* Snodgrass, 9 Leigh (Va.) 484.

97. Emerson *v.* Pierce, (N. J. Ch. 1888) 11 Atl. 745, holding that, after quieting title in plaintiffs, partition would not be made among them.

98. Frink *v.* Cole, 10 Ill. 339; Mason *v.* Peter, 1 Munf. (Va.) 437.

Where plaintiff's right to relief is not questioned, it will be granted at once and the adjustment of liabilities among defendants reserved. Baltimore *v.* Ketchum, 57 Md. 23.

Plaintiff may at the hearing waive relief against a particular defendant. Austin *v.* Winston, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583.

99. Mandeville *v.* Riggs, 2 Pet. (U. S.) 482, 7 L. ed. 493 [*reversing* 20 Fed. Cas. No. 11,831, 3 Cranch C. C. 183].

Where defendants claim under the same title, it is proper to decree a joint surrender. Brand *v.* Webb, 2 A. K. Marsh. (Ky.) 574.

1. Munger *v.* Jacobson, 99 Ill. 349; Dougherty *v.* Walters, 1 Ohio St. 201.

A defendant whose claim has been decreed void may be dismissed pending further proceedings against the other defendant. Morse *v.* Slason, 16 Vt. 319.

2. Jones *v.* Poston, 55 N. C. 184.

3. Roby *v.* Sharp, 6 T. B. Mon. (Ky.) 375; Fanning *v.* Pritchett, 6 T. B. Mon. (Ky.) 79; Turner *v.* Holman, 5 T. B. Mon. (Ky.) 410.

4. Smith *v.* Peace, 1 Lea (Tenn.) 586; Sparhawk *v.* Buell, 9 Vt. 41; Cocke *v.* Harrison, 3 Rand. (Va.) 494; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308. See also *supra*, II, B, 1, b, (II). In like manner a fund will be decreed in the first instance to those ultimately entitled thereto. Thomson *v.* Bradford, 23 Fed. Cas. No. 13,981, 7 Biss. 351. Under the old practice if a plaintiff chose to examine a defendant primarily liable, he could not have a decree against another secondarily liable. Ragan *v.* Echols, 5 Ga. 71.

5. *California.*— McPherson *v.* Parker, 30 Cal. 455, 89 Am. Dec. 129.

Georgia.— Cleghorn *v.* Love, 24 Ga. 590.

Illinois.— Shields *v.* Bush, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474.

Kentucky.— Shelton *v.* Gardner, 5 Litt. 8.

Maine.— Bailey *v.* Myrick, 36 Me. 50.

Maryland.— Hurtt *v.* Crane, 36 Md. 29.

Tennessee.— Allen *v.* Baugus, 1 Swan 404.

United States.— Foote *v.* Linck, 9 Fed. Cas. No. 4,913, 5 McLean 616; Piatt *v.* Oliver, 19 Fed. Cas. No. 11,116, 3 McLean 27 [*affirmed* in 3 How. 333, 11 L. ed. 622].

See 19 Cent. Dig. tit. "Equity," § 996. See also *supra*, II, C; V, F, 1.

6. *California.*— Miller *v.* Thompson, 139 Cal. 643, 73 Pac. 583.

Maryland.— Hanson *v.* Worthington, 12 Md. 418; Contee *v.* Dawson, 2 Bland 264.

Michigan.— Thurston *v.* Prentiss, 1 Mich. 193.

Missouri.— Browning *v.* Chrisman, 30 Mo. 353.

New Jersey.— Vanderveer *v.* Holcomb, 17 N. J. Eq. 87; Shannon *v.* Marselis, 1 N. J. Eq. 413.

New York.— Jones *v.* Grant, 10 Paige 348; Elliott *v.* Pell, 1 Paige 263.

North Carolina.— Hulbert *v.* Douglas, 94 N. C. 128; Tyson *v.* Harrington, 41 N. C. 329; Tyson *v.* Tyson, 37 N. C. 137.

South Carolina.— Motte *v.* Schult, 1 Hill Eq. 146, 26 Am. Dec. 194; Henderson *v.* McClure, 2 McCord Eq. 466.

Tennessee.— Ingram *v.* Smith, 1 Head 411.

Virginia.— Crawford *v.* McDaniel, 1 Rob. 448; Yerby *v.* Grigsby, 9 Leigh 387; Morris *v.* Terrell, 2 Rand. 6.

West Virginia.— Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423; Tavenner *v.* Barrett, 21 W. Va. 656; Worthington *v.* Staunton, 16 W. Va. 208; Vance *v.* Evans, 11 W. Va. 342.

See 19 Cent. Dig. tit. "Equity," § 1000.

A defendant entitled to the same relief as plaintiff, according to the averments of the bill, may have such relief in the decree. Davis *v.* Reaves, 7 Lea (Tenn.) 585.

bill upon matters outside of such pleadings and proofs.[7] Such relief is merely incidental to the granting of relief to plaintiff,[8] and if plaintiff be denied relief none can without cross bill be given between defendants.[9] The equities between defendants will not be adjusted where that course would cause serious delay or expense to plaintiff or prejudice his rights,[10] and it is sometimes said that such equities will be adjusted only when they are plain or admitted.[11] No decree will be made between defendants having adverse interest who are represented by the same solicitor.[12]

e. Decree on Bill and Cross Bill. It very frequently happens that defendant, instead of merely defending against plaintiff's demand, interposes by cross bill a counter demand with reference to the subject-matter against plaintiff. In such case the bill and cross bill being regularly heard together,[13] it is the duty of the court to dispose of the issues raised in both,[14] and make an affirmative decree in favor of one party or the other as the equities demand.[15] If the controversy takes such shape that a determination of all rights may be had on the lines of the cross bill, it seems that the decree may be based on the cross bill alone.[16] So far as the cross bill is concerned plaintiff therein stands generally in the position of a plaintiff in an original suit,[17] but plaintiff in the original bill, who has filed it in a jurisdiction in which he does not reside, cannot object to the jurisdiction of a cross bill on the ground of his own non-residence.[18]

Although plaintiff has no interest in the controversy between defendants relief may be given. Vanderveer *v.* Holcomb, 17 N. J. Eq. 547.

7. Trapnall *v.* Byrd, 22 Ark. 10; Vandyke *v.* Walters, 88 Ill. 444; Glenn *v.* Clark, 21 Gratt. (Va.) 35; Steed *v.* Baker, 13 Gratt. (Va.) 380; Allen *v.* Morgan, 8 Gratt. (Va.) 60; Radcliff *v.* Corrothers, 33 W. Va. 682, 11 S. E. 228; Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483; Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70; Hoffman *v.* Ryan, 21 W. Va. 415; Worthington *v.* Staunton, 16 W. Va. 208; Ruffner *v.* Hewitt, 14 W. Va. 737; Vance *v.* Evans, 11 W. Va. 342.

Relief must be founded upon the subject-matter in litigation between plaintiff and one or more defendants. Gibson *v.* McCormick, 10 Gill & J. (Md.) 65.

There must be a pleading whereon to found the relief. Parsons *v.* Smith, 46 W. Va. 728, 34 S. E. 922.

New defendants not charged in the bill will not be decreed against in favor of defendants answering and asking no relief against them. Commercial Bank *v.* Buckingham, 12 Ohio St. 402.

The court will not extend the practice of decreeing between co-defendants. Law *v.* Sutherland, 5 Gratt. (Va.) 357.

8. Arnold *v.* Miller, 26 Miss. 152; Mount *v.* Potts, 23 N. J. Eq. 188. The court may decree for one defendant against another when the decree at the same time operates in favor of plaintiff. McNiel *v.* Baird, 6 Munf. (Va.) 316. It is no objection to a decree that it is nominally in favor of one defendant against another if it is substantially in favor of plaintiff. West *v.* Belches, 5 Munf. (Va.) 187.

9. Risher *v.* Adams, 9 Rich. Eq. 247; Ould *v.* Myers, 23 Gratt. (Va.) 383; Hubbard *v.* Goodwin, 3 Leigh (Va.) 492; Kennewig Co. *v.* Moore, 49 W. Va. 323, 38 S. E. 558; Western Lunatic Asylum *v.* Miller, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644; Watson *v.* Wigginton, 28 W. Va. 533; Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70.

10. Hyatt *v.* McBurney, 15 S. C. 393; Ogden *v.* Glidden, 9 Wis. 46.

11. Walker *v.* Byers, 14 Ark. 246; Blackwood *v.* Jones, 57 N. C. 54; Ingram *v.* Smith, 1 Head (Tenn.) 411.

12. Reed *v.* Warner, 5 Paige (N. Y.) 650; Ford *v.* Whedbee, 21 N. C. 16.

13. See *supra*, XIX, C, 4.

14. Lash *v.* Hardin, 6 J. J. Marsh. (Ky.) 451; Moore *v.* Huntington, 17 Wall. (U. S.) 417, 21 L. ed. 642.

A decree will be presumed to have been rendered in view of all the allegations in bill, cross bill, and answers thereto. Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288.

15. *California.*—Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786; Taylor *v.* McLain, 64 Cal. 513, 2 Pac. 399, 401.

Illinois.— Paige *v.* Hieronymus, 192 Ill. 546, 61 N. E. 832; Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786.

New Hampshire.— Clark *v.* Clark, 62 N. H. 267.

Washington.— Baxter *v.* Seattle, 3 Wash. 352, 28 Pac. 537.

United States.— Missouri *v.* Iowa, 7 How. 660, 12 L. ed. 861; La Dow *v.* Bement, 66 Fed. 198.

See 19 Cent. Dig. tit. "Equity," § 999.

On bill and cross bill involving a title, defendant may have a decree quieting title for all the land claimed in the cross bill, although it is greater in quantity than claimed in the bill. Pearson *v.* Boyd, 62 Tex. 541.

16. Kadish *v.* Garden City Equitable Loan, etc., Assoc., 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256 [*affirming* 47 Ill. App. 602; Blythe *v.* Hinckley, 84 Fed. 228].

17. Hicks *v.* Jackson, 85 Mo. 283.

18. Ray *v.* Home, etc., Invest., etc., Co., 106 Ga. 492, 32 S. E. 603.

f. Relief by Imposing Conditions on Plaintiff. While specific affirmative relief cannot be granted against plaintiff except upon a cross bill or equivalent pleading,[19] relief may be given indirectly by imposing upon plaintiff the doing of equity as a condition of affording him relief against defendant.[20] The condition so imposed need not go so far as to afford defendant complete relief, but only so far as to place him in the position he equitably should occupy in view of the relief accorded plaintiff.[21] Moreover the decree is not a peremptory decree against plaintiff, but merely a condition without the performance of which he will himself take nothing.[22] The facts upon which the condition rests must be definitely established[23] and must be pleaded.[24] It must not be left to plaintiff to determine when he shall perform the condition or whether he has performed it, and therefore that question should be reserved and a time for performance should be fixed.[25]

4. Relief in Relation to Pleadings — a. Conformity to Facts Alleged. The relief afforded by the decree must conform to the case made out by the pleadings as well as to the proofs.[26] Neither unproved allegations nor proof of matters not

19. Ferry *v.* Miltimore, 64 Ill. App. 557; Farmers' L. & T. Co. *v.* Denver, etc., R. Co., 126 Fed. 46, 60 C. C. A. 588; Interstate Bldg., etc., Assoc. *v.* Edgefield Hotel Co., 120 Fed. 422; Hill *v.* Ryan Grocery Co., 78 Fed. 21, 23 C. C. A. 624. See also *supra*, X, A, 2, a. Such relief can be given only so far as a refusal of relief to plaintiff amounts thereto. Edwards *v.* Helm, 5 Ill. 142.

Under the codes this rule is not always observed. House *v.* Lockwood, 137 N. Y. 259, 33 N. E. 595; Brighton, etc., Irr. Co. *v.* Little, 14 Utah 42, 46 Pac. 268.

Bills of account present an apparent but not a true exception to the rule. Vierra *v.* Fontes, 135 Cal. 126, 66 Pac. 241; Kraker *v.* Shields, 20 Gratt. (Va.) 377. See also *supra*, X, A, 2, a, d.

20. *Illinois.*— Farmers' L. & T. Co. *v.* Denver, etc., R. Co., 126 Fed. 46, 60 C. C. A. 588.

Kentucky.— Craig *v.* McMullin, 9 Dana 311; Shalley *v.* Gore, 5 Dana 449.

Missouri.— Clark *v.* Drake, 63 Mo. 354.

North Carolina.— Daughtry *v.* Reddick, 40 N. C. 261.

Pennsylvania.— Zahn *v.* McMillin, 198 Pa. St. 20, 47 Atl. 976.

United States.— Walden *v.* Bodley, 14 Pet. 156, 10 L. ed. 398.

See 19 Cent. Dig. tit. "Equity," § 992. See also *supra*, III, M.

21. Neblett *v.* Macfarland, 92 U. S. 101, 23 L. ed. 471.

22. Rowan *v.* Sharps' Rifle Mfg. Co., 33 Conn. 1.

23. Sanchez *v.* McMahon, 35 Cal. 218.

24. Burke *v.* Davis, 81 Fed. 907, 26 C. C. A. 675. But see Anderson *v.* Binford, 2 Baxt. (Tenn.) 310.

25. Jarman *v.* Davis, 4 T. B. Mon. (Ky.) 115; Terril *v.* Arnold, 4 Litt. (Ky.) 300; Farmer *v.* Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106. An unreasonably long time should not be permitted. Fitzhugh *v.* Franco-Texan Land Co., 81 Tex. 306, 16 S. W. 1078. A plaintiff who is given relief as a matter of grace cannot complain of the shortness of time allowed to perform a condition. Elley *v.* Caldwell, 158 Mo. 372, 59 S. W. 111.

26. *Alabama.*— Winter *v.* Merrick, 69 Ala. 86; Copeland *v.* Kehoe, 57 Ala. 246; Flanagan *v.* State Bank, 32 Ala. 508; Cameron *v.* Abbott, 30 Ala. 416; Spoor *v.* Phillips, 27 Ala. 193; Sandford *v.* Ochtalomi, 23 Ala. 669; Paulding *v.* Lee, 20 Ala. 753; Ansley *v.* Robinson, 16 Ala. 793; Graham *v.* Tankersley, 15 Ala. 634; Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60; Gibson *v.* Carson, 3 Ala. 421; Maury *v.* Mason, 8 Port. 211; Bozman *v.* Draughan, 3 Stew. 243.

Arkansas.— Rogers *v.* Brooks, 30 Ark. 612; Barraque *v.* Manuel, 7 Ark. 516.

California.— Bachman *v.* Sepulveda, 39 Cal. 688.

Connecticut.— Gaylord *v.* Couch, 5 Day 223.

Delaware.— Cloud *v.* Whiteman, 2 Harr. 401.

Illinois.— Pinneo *v.* Goodspeed, 104 Ill. 184; Marvin *v.* Collins, 98 Ill. 510; Heath *v.* Hurless, 73 Ill. 323; Price *v.* Blackmore, 65 Ill. 386; Waugh *v.* Robbins, 33 Ill. 181; Burger *v.* Potter, 32 Ill. 66; Ohling *v.* Luitjens, 32 Ill. 23; Curlett *v.* Curlett, 106 Ill. App. 81; Robinson *v.* Robinson, 50 Ill. App. 414; Gutsch Brewing Co. *v.* Fischbeck, 41 Ill. App. 400; Quinn *v.* McMahan, 40 Ill. App. 593.

Kentucky.— Shelby *v.* Shelby, 1 B. Mon. 266; Dickerson *v.* Morgan, 8 Dana 130; Underwood *v.* Brockman, 4 Dana 309, 29 Am. Dec. 407; Price *v.* Boyd, 1 Dana 434; Withers *v.* Thompson, 4 T. B. Mon. 323; Handley *v.* Young, 4 Bibb 376; Harland *v.* Eastland, Hard. 590.

Maine.— Stover *v.* Poole, 67 Me. 217; Scudder *v.* Young, 25 Me. 153.

Maryland.— Hilleary *v.* Hurdle, 6 Gill 105; Berry *v.* Pierson, 1 Gill 234; Ringgold *v.* Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250; Contee *v.* Dawson, 2 Bland 264; Townsend *v.* Duncan, 2 Bland 45; Lingan *v.* Henderson, 1 Bland 236.

Michigan.— Andrus *v.* Scudder, 120 Mich. 502, 79 N. W. 794; Walker *v.* Detroit Tran-

alleged can be made a basis for equitable relief.[27] Every fact essential to entitle plaintiff to the relief which he seeks must be averred in his bill; and relief cannot be granted for matters not alleged,[28] even though they may be apparent from

sit R. Co., 47 Mich. 338, 11 N. W. 187; Smith *v.* Rumsey, 33 Mich. 183; Moran *v.* Palmer, 13 Mich. 367; Thayer *v.* Lane, Walk. 200.

Mississippi.—Phelps *v.* Commodore, (1887) 1 So. 833; Salmon *v.* Smith, 58 Miss. 399; Spears *v.* Cheatham, 44 Miss. 64; Lyon *v.* Sanders, 23 Miss. 530; Green *v.* McDonald, 13 Sm. & M. 445.

Missouri.— Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155; Rumsey *v.* People's R. Co., 144 Mo. 175, 46 S. W. 144; Miltenberger *v.* Morrison, 39 Mo. 71; Evans *v.* Gibson, 29 Mo. 223, 77 Am. Dec. 565; McKnight *v.* Bright, 2 Mo. 110.

Nebraska.— Ross *v.* Sumner, 57 Nebr. 588, 78 N. W. 264.

New Jersey.— Munday *v.* Vail, 34 N. J. L. 418; Jones *v.* Davenport, 45 N. J. Eq. 77, 17 Atl. 570; Watkins *v.* Milligan, 37 N. J. Eq. 435; Hoyt *v.* Hoyt, 27 N. J. Eq. 399; Marshman *v.* Conklin, 21 N. J. Eq. 546; Howell *v.* Sebring, 14 N. J. Eq. 84; Plume *v.* Small, 5 N. J. Eq. 460; Hopper *v.* Sisco, 5 N. J. Eq. 343.

New York.— Campbell *v.* Consalus, 25 N. Y. 613; Bailey *v.* Ryder, 10 N. Y. 363; Rome Exch. Bank *v.* Eames, 4 Abb. Dec. 83, 1 Keyes 588; Livingston *v.* Van Rensselaer, 6 Wend. 63; Stuart *v.* Mechanics', etc., Bank, 19 Johns. 496; James *v.* McKernon, 6 Johns. 543; Tripp *v.* Vincent, 3 Barb. Ch. 613.

North Carolina.— Russ *v.* Hawes, 40 N. C. 18; Smith *v.* Smith, 36 N. C. 83; Lindsay *v.* Etheridge, 21 N. C. 36.

Ohio.— Dille *v.* Woods, 14 Ohio 122; St. Clair *v.* Smith, 3 Ohio 355.

Pennsylvania.— Morio's Appeal, 4 Pennyp. 398; Edwards *v.* Brightly, 19 Phila. 251; Updegraff *v.* Cooke, 8 Phila. 336.

South Carolina.— Miller *v.* Furse, Bailey Eq. 187.

Tennessee.— McClung *v.* Colwell, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961; Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208; Griffith *v.* Security Home Bldg., etc., Assoc., 100 Tenn. 410, 45 S. W. 670; Meredith *v.* Little, 6 Lea 517; Robertson *v.* Wilburn, 1 Lea 633; Hume *v.* Commercial Bank, 1 Lea 220; Merriman *v.* Lacefield, 4 Heisk. 209; W. V. Davidson Lumber Co. *v.* Jones, (Ch. App. 1901) 62 S. W. 386.

Texas.— Parker *v.* Beavers, 19 Tex. 406.

Vermont.— Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58; White *v.* Yaw, 7 Vt. 357.

Virginia.— Steadman *v.* Handy, 102 Va. 382, 46 S. E. 380; Kent *v.* Kent, 82 Va. 205; Mundy *v.* Vawter, 3 Gratt. 518; Swope *v.* Chambers, 2 Gratt. 319.

West Virginia.— Fadely *v.* Tomlinson, 41 W. Va. 606, 24 S. E. 645.

United States.— Carneal *v.* Banks, 10 Wheat. 181, 6 L. ed. 297.

See 19 Cent. Dig. tit. "Equity," § 1001.

Degree of strictness.— In Bedford *v.* Williams, 5 Coldw. (Tenn.) 202, it was said that the rule is not applied with the same strictness in equity as it is at law.

Decree not based on the pleadings is void even when invoked in the courts of another jurisdiction. Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305.

A finding on a matter not in issue is not conclusive. Niday *v.* Harvey, 9 Gratt. (Va.) 454. But see Buffalow *v.* Buffalow, 37 N. C. 113; Adams *v.* Soule, 33 Vt. 538.

Decree on bill and answer disregarding replication will be reversed. Armstrong *v.* Grafton, 23 W. Va. 50.

But a claim so far as admitted by the answer may found a decree. Jackson *v.* New Idrian C. M. Co., 10 Oreg. 157.

A dismissal is warranted if the answer does not admit the material allegations of the bill, so far as the pleadings alone are considered. Dwyer *v.* Bratkoysky, 170 Mass. 502, 49 N. E. 915.

27. Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580; Hunter *v.* Hunter, 10 W. Va. 321. Evidence given in an equity case, but not being within any issue framed by the parties, must be disregarded on the hearing, although it may have been received without objection; and a decree founded on evidence of that character will be reversed. Thomas *v.* Austin, 4 Barb. (N. Y.) 265.

28. *Alabama.*— Freeman *v.* Pullen, 130 Ala. 653, 31 So. 451; Montgomery First Nat. Bank *v.* Acme White Lead, etc., Co., 123 Ala. 344, 26 So. 354; Alston *v.* Marshall, 112 Ala. 638, 20 So. 850; Billingslea *v.* Ware, 32 Ala. 415; Charles *v.* Dubose, 29 Ala. 367; Borland *v.* Phillips, 3 Ala. 718.

Connecticut.— Skinner *v.* Bailey, 7 Conn. 496.

District of Columbia.— Offutt *v.* King, 1 MacArthur 312.

Florida.— Lyle *v.* Winn, (1903) 34 So. 158.

Illinois.— Fuller *v.* John S. Davis' Sons Co., 184 Ill. 505, 56 N. E. 791; Richards *v.* Greene, 73 Ill. 54; Dodge *v.* Wright, 48 Ill. 382; Winnetka *v.* Chicago, etc., Electric R. Co., 107 Ill. App. 117 [*affirmed* in 204 Ill. 297, 68 N. E. 407]; Ball *v.* Serum, 85 Ill. App. 560; McLean *v.* Thomas, 52 Ill. App. 161; Booth *v.* Smith, 15 Ill. App. 91.

Kentucky.— Brown *v.* Heard, 3 A. K. Marsh. 390.

Missouri.— Newham *v.* Kenton, 79 Mo. 382.

New York.— Colton *v.* Ross, 2 Paige 396, 22 Am. Dec. 648.

Oregon.— Coughanour *v.* Hutchinson, 41 Oreg. 419, 69 Pac. 68.

Pennsylvania.— Nolde *v.* Madlem, 4 Lanc. L. Rev. 347.

Vermont.— Bartlett *v.* Walker, 65 Vt. 594, 27 Atl. 496.

West Virginia.— Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924; Burley *v.* Weller, 14 W. Va. 264.

other parts of the pleadings and proofs.[29] But in the application of this rule an exact and absolute correspondence between bill and proofs is not required; if the facts found as the basis of the decree are substantially the same as those alleged in the bill, it is not a ground of error in the decree that they vary in some unimportant particulars.[30] It follows from the principles just stated that where plaintiff not only makes out the case stated in his bill but by the proofs shows himself entitled to additional equitable relief, this additional relief cannot be granted him, for the decree cannot go beyond the scope of the bill.[31] Furthermore, it is not enough that the proofs show that plaintiff is entitled to some relief; for unless that is the relief warranted by the allegations in the bill, plaintiff has failed to make out his case.[32] And if plaintiff has framed his bill to adapt it to a certain theory on which he bases his right to recover, the proofs must be such as to warrant a decree in conformity to this theory; and it is not enough that the proofs are sufficient to justify a decree in conformity to some other theory.[33]

United States.— Hill *v.* Phelps, 101 Fed. 650, 41 C. C. A. 569; Burke *v.* Davis, 81 Fed. 907, 26 C. C. A. 675.

See 19 Cent. Dig. tit. "Equity," §§ 1001, 1003.

29. Land *v.* Cowan, 19 Ala. 297; Brodie *v.* Skelton, 11 Ark. 120; Hilleary *v.* Hurdle, 6 Gill (Md.) 105; Rome Exch. Bank *v.* Eames, 4 Abb. Dec. (N. Y.) 83, 1 Keyes (N. Y.) 588; Boardman *v.* Davidson, 7 Abb. Pr. N. S. (N. Y.) 439.

Although the answer admits a right thereto relief not warranted by the bill cannot be given. Browning *v.* Pratt, 17 N. C. 44.

In Tennessee, however, it has been held that where a bill prays for general relief, but fails to make out a case for equitable relief for plaintiff, which is disclosed in the answer and proof, the court of equity will grant such relief, as if the right had appeared in the bill. Cox *v.* Waggoner, 5 Sneed 542. Also that where in the statement of the answer a case is made demanding the interposition of a court of equity to relieve plaintiff, a decree may be entered, although the case stated in the bill is different and is unsupported by the proof. Rose *v.* Mynatt, 7 Yerg. 30. See also Cross *v.* Cross, 4 Gratt. (Va.) 257.

30. Beers *v.* Botsford, 13 Conn. 146; Campbell *v.* Ayres, 6 Iowa 339; Jeannerett *v.* Radford, Rich. Eq. Cas. (S. C.) 469; Synnott *v.* Shaughnessy, 130 U. S. 572, 9 S. Ct. 609, 32 L. ed. 1038.

It is unnecessary to amend a bill where its charges are substantially proved in order to make it conform in detail to the proof. Kline *v.* Triplett, (Va. 1896) 25 S. E. 886.

31. Athey *v.* McHenry, 6 B. Mon. (Ky.) 50; McKinnon *v.* McKinnon, 46 Fed. 713.

Estimate of value.— But where a party in chancery shows himself entitled to property, and estimates its value in his answer at a certain sum, but states that he has no means of ascertaining its value, it is erroneous to restrict him to that estimate, and he should be allowed what the proof shows the property to be worth. Ward *v.* Grayson, 9 Dana (Ky.) 280.

32. *Illinois.*—Clinnin *v.* Raugh, 88 Ill. App. 371; Inter Ocean Pub. Co. *v.* Associated Press, 83 Ill. App. 377 [decree *reversed* on other grounds in 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568].

New Jersey.— McFarlan *v.* Morris Canal, etc., Co., 34 N. J. Eq. 369.

North Carolina.— Craige *v.* Craige, 41 N. C. 191.

Pennsylvania.— Woods *v.* McMillan, 32 Pittsb. Leg. J. 363.

West Virginia.—Evans *v.* Kelley, 49 W. Va. 181, 38 S. E. 497.

See 19 Cent. Dig. tit. "Equity," §§ 1003, 1004.

Legal relief.— Where, on the hearing of a bill in equity, the evidence sustains none of the averments of the bill, the fact that it discloses a cause of action at law against one of defendants, which is not suggested in the bill, does not give the court jurisdiction to proceed with that cause of action. Ahl's Appeal, 129 Pa. St. 49, 18 Atl. 477.

Relief for different reason.— But in Harriman Imp. Co. *v.* McNutt, (Tenn. Ch. App. 1896) 37 S. W. 396, it was held that where a bill seeks to enjoin proceedings by a back-tax attorney to enforce payment of a fee allowed by statute for preparing an abstract of delinquent property, on the ground that such abstract as the law required has not been made, and the court finds such to be the case, it may grant the relief prayed for, although it holds the abstract furnished by the attorney to be insufficient for another reason than that presented in the pleadings.

33. *Alabama.*—Douglass *v.* Moody, 80 Ala. 61.

Illinois.— McKay *v.* Bissett, 10 Ill. 499.

Missouri.— Cox *v.* Esteb, 68 Mo. 110; Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694.

New Jersey.— Marshman *v.* Conklin, 21 N. J. Eq. 546.

North Carolina.— Howard *v.* Jones, 40 N. C. 75.

Tennessee.— Mayfield *v.* Stephenson, 6 Baxt. 397.

United States.— Rejall *v.* Greenhood, 92 Fed. 945, 35 C. C. A. 97.

See 19 Cent. Dig. tit. "Equity," § 1004.

When rule inapplicable.— But in Stockton *v.* Lockwood, 82 Ind. 158, it was held that a

The same rules hold good in general as applied to the establishing of defenses set up in an answer.[34]

b. Relief as Affected by Prayer — (1) *Generally Confined to That Prayed.* The relief granted must conform to the prayer of the bill and cannot extend beyond that prayed.[35] Accordingly relief cannot be given for a greater

suit for an injunction against apprehended injuries to real estate may be treated as a suit to quiet title if the averments are proper and sufficient, and relief decreed accordingly although not specially demanded. And in Jackson *v.* Tatebo, 3 Wash. 456, 28 Pac. 916, where the facts in the complaint showed that it was not an action to remove a cloud on plaintiff's title as therein stated, but an action in equity to obtain relief from fraud, it was held that it was in the power of the court of equity to grant such relief as the facts in the case required. See also Ridgely *v.* Bond, 18 Md. 433; Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235.

Theory of fraud.— Where a bill in equity is framed on the theory that there was fraud entitling plaintiff to relief, it must be proved as laid in order to warrant a decree in plaintiff's favor; and the proof of other facts, although included in the charge of fraud, and sufficient under some circumstances to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed.

Alabama.— Elyton Land Co. *v.* Iron City Steam Bottling Works, 109 Ala. 602, 20 So. 51.

Illinois.— Vennum *v.* Vennum, 61 Ill. 331.

New York.— McMichael *v.* Kilmer, 76 N. Y. 36.

Pennsylvania.— Edwards *v.* Brightly, 44 Leg. Int. 132 [*affirmed* in (1888) 12 Atl. 91].

Rhode Island.— Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510; Mt. Vernon Bank *v.* Stone, 2 R. I. 129, 57 Am. Dec. 709.

United States.— Britton *v.* Brewster, 2 Fed. 160; Fisher *v.* Boody, 9 Fed. Cas. No. 4,814, 1 Curt. 206.

See 19 Cent. Dig. tit. "Equity," § 1003.

Where the bill charges actual fraud, plaintiff is not entitled to relief on proof of constructive fraud. Brown *v.* Bulkley, 14 N. J. Eq. 451. But it was held in Read *v.* Cramer, 2 N. J. Eq. 277, 34 Am. Dec. 204, that, on a bill filed for relief on the ground of fraud, relief may be granted on the ground of mistake. *Contra,* McMichael *v.* Kilmer, 76 N. Y. 36; Edwards *v.* Brightly, 44 Leg. Int. (Pa.) 132 [*affirmed* in (1888) 12 Atl. 91]. And where a subscriber to the stock of a corporation formed for the purchase of land as an investment sued in equity to rescind the contract of subscription and recover the payments made by him, and made the promoters of the scheme and the corporation defendants, as jointly liable for fraud, whereby the promoters, by misrepresenting the price to be paid for the land, procured its conveyance at a much lower figure, and made a profit of the difference between the actual and ostensible purchase-prices, and it was proved that the corporation was without fault, the cause was retained, although the contract could not be rescinded; it being held that plaintiff on the same bill could recover a *pro rata* share of the profits fraudulently retained by the promoters. Franey *v.* Warner, 96 Wis. 222, 71 N. W. 81.

Secondary ground for relief.— A plaintiff who fails as to his principal equity may nevertheless prevail on a secondary ground for relief, consistent with the principal equity and based on allegations in the bill. Whitfield *v.* Cates, 59 N. C. 136.

34. Chandler *v.* Herrick, 11 N. J. Eq. 497. See also *supra,* VIII, E, 1, c.

Although an answer is evasive in its denials the bill will be dismissed if it is clearly disproved. Campbell *v.* Smith, 54 N. C. 156.

Illegality of a contract relied on requires the dismissal of the bill, although the facts do not appear in the pleadings. Watson *v.* Fletcher, 7 Gratt. (Va.) 1. See also *supra,* III, N.

If proof shows there is no subject-matter for the decree to operate upon the bill will be dismissed. Bush *v.* White, 3 T. B. Mon. (Ky.) 100.

35. *California.*— Chapman *v.* State Bank, 97 Cal. 155, 31 Pac. 896.

Illinois.— Makeel *v.* Hotchkiss, 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131 [*affirming* 87 Ill. App. 623]; Harms *v.* Jacobs, 158 Ill. 505, 41 N. E. 1071; Kimball *v.* Tooke, 64 Ill. 380; Ward *v.* Enders, 29 Ill. 519; Barrett *v.* Short, 41 Ill. App. 25; Johnson *v.* Foreman, 16 Ill. App. 632.

Kentucky.— Dixon *v.* Campbell, 3 Dana 603.

Maryland.— Fox *v.* Reynolds, 50 Md. 564.

Massachusetts.— Low *v.* Low, 177 Mass. 306, 59 N. E. 57.

Mississippi.— Weeks *v.* Thrasher, 52 Miss. 142.

Missouri.— Gamble *v.* Daugherty, 71 Mo. 599.

Pennsylvania.— Potter *v.* Hoppin, 10 Phila. 396.

Tennessee.— Gibson *v.* Compton, 3 Baxt. 220.

Virginia.— Marks *v.* Morris, 2 Munf. 407, 5 Am. Dec. 481.

See 19 Cent. Dig. tit. "Equity," § 1005.

Substantial conformity.— A decree restraining the sale of "matrices" is not variant from a prayer to restrain the sale of a "matrix," both words being used to designate a single species of matrices. Stratton *v.* Seaverns, 163 Mass. 73, 39 N. E. 779.

Where the statute prescribes the relief, it should be granted without respect to the prayer. Hipp *v.* Huchett, 4 Tex. 20. The

amount than asked for in the bill,[36] and where specific relief alone is prayed no relief can be granted unless it be that specifically asked.[37] The fact that plaintiff has prayed for more relief than he is entitled to forms no objection to awarding such part thereof as is warranted by the pleadings and proof.[38] It seems that a decree not founded upon a prayer, while erroneous, is not void,[39] and if all parties for a long time proceed in the cause as if it were for a particular purpose they cannot object that the court so dealt with it, although the decree rendered was not in conformity to the prayer of the original bill.[40]

(II) *Effect of Prayer For General Relief.* The rules just stated are much moderated by the practice of praying general relief in connection with the special prayers.[41] Under the prayer for general relief it is broadly held that any decree may be made which is warranted by the allegations of the bill.[42] In this

general prayer authorizes such relief. Powers *v.* McEachern, 7 S. C. 290.

Under the codes it is very generally provided that after answer the court may grant any relief consistent with the case made by the complaint and embraced within the issue. It follows from this provision that after answer the relief need not be restricted to the prayer.

Idaho.— Burke Land, etc., Co. *v.* Wells, 7 Ida. 42, 60 Pac. 87.

Indiana.— Humphrey *v.* Thorn, 63 Ind. 296; Hunter *v.* McCoy, 14 Ind. 528.

Iowa.— Hogueland *v.* Arts, 113 Iowa 634, 85 N. W. 818.

Missouri.— Sharkey *v.* McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270.

Montana.— State *v.* Tooker, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315.

New York.— Coleman *v.* Ryan, 33 Misc. 715, 68 N. Y. Suppl. 253; Jones *v.* Butler, 20 How. Pr. 189.

Oregon.— Gilmore *v.* Burch, 7 Oreg. 374, 33 Am. Rep. 710.

South Carolina.— Sheppard *v.* Green, 48 S. C. 165, 26 S. E. 224.

See 19 Cent. Dig. tit. "Equity," § 1005.

Legal relief.— Still it is often held that legal relief is not consistent with the case made by a complaint seeking equitable relief alone, and that no relief not equitable in character can be granted under such a complaint. Reese *v.* Shepherdson, 95 Iowa 431, 64 N. W. 286; Dougherty *v.* Adkins, 81 Mo. 411; Hawes *v.* Dobbs, 137 N. Y. 465, 33 N. E. 560 [*affirming* 18 N. Y. Suppl. 123]; Wheelock *v.* Lee, 74 N. Y. 495; Bradley *v.* Aldrich, 40 N. Y. 504, 100 Am. Dec. 528; Van Zandt *v.* New York, 8 Bosw. (N. Y.) 375; Towle *v.* Jones, 19 Abb. Pr. (N. Y.) 449. *Contra*, Leonard *v.* Rogan, 20 Wis. 540.

36. *Colorado.*—Clear Creek, etc., Gold, etc., Min. Co. *v.* Root, 1 Colo. 374.

Illinois.—Fergus *v.* Tinkham, 38 Ill. 407; Ohling *v.* Luitjens, 32 Ill. 23; Carter *v.* Lewis, 29 Ill. 500; Hubbard *v.* Stapp, 32 Ill. App. 541.

Iowa.— Blake *v.* Blake, 13 Iowa 40.

Pennsylvania.—Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

United States.— Simms *v.* Guthrie, 9 Cranch 19, 3 L. ed. 642.

Contra, Trabue *v.* North, 2 A. K. Marsh. (Ky.) 361.

See 19 Cent. Dig. tit. "Equity," § 1006.

Decree within the aggregate amount prayed is not open to this objection, although the computation is on a different basis. Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340.

37. *Alabama.*—Driver *v.* Fortner, 5 Port. 9.

Kentucky.— Jarman *v.* Davis, 4 T. B. Mon. 115.

Maine.— Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059, 85 Am. St. Rep. 418.

New Jersey.— Halsted *v.* Meeker, 18 N. J. Eq. 136.

Pennsylvania.— Thomas *v.* Ellmaker, 2 Pa. L. J. Rep. 502, 3 Pa. L. J. 190.

Texas.— Nowlin *v.* Hughes, 2 Tex. App. Civ. Cas. § 313.

West Virginia.— Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

Wisconsin.— Laird *v.* Boyle, 2 Wis. 431.

See 19 Cent. Dig. tit. "Equity," § 1013.

38. *Alabama.*— Bogan *v.* Daughdrill, 51 Ala. 312.

Colorado.— McClure *v.* La Plata County Com'rs, 23 Colo. 130, 46 Pac. 677.

Illinois.— Street *v.* Chicago Wharfing, etc., Co., 157 Ill. 605, 41 N. E. 1108.

Iowa.— Walker *v.* Ayres, 1 Iowa 449.

Kentucky.— Lytle *v.* Pope, 11 B. Mon. 297.

Maryland.— Graham *v.* Yates, 6 Harr. & J. 229.

Michigan.— Wight *v.* Roethlisberger, 116 Mich. 241, 74 N. W. 474.

Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

Pennsylvania.— Garner's Appeal, 1 Walk. 438.

Tennessee.— Workingman's Bldg., etc., Assoc. *v.* Williams, (Ch. App. 1896) 37 S. W. 1019.

See 19 Cent. Dig. tit. "Equity," § 1007.

Relief against part of defendants.— Under a prayer that defendants be required to convey where the bill has been dismissed as to two, the remaining defendants may be required to convey. Brooks *v.* Carpenter, 53 Cal. 287.

39. Monti *v.* Bishop, 3 Colo. 605.

40. Bound *v.* South Carolina R. Co., 58 Fed. 473, 7 C. C. A. 322.

41. See *supra*, VII, B, 9.

42. *Alabama.*— Rice *v.* Eiseman, 122 Ala. 343, 25 So. 214; Mutual Bldg., etc., Assoc. *v.* Wyeth, 105 Ala. 639, 17 So. 45; Shelby *v.*

way plaintiff may not only have the relief specially prayed, and relief incidental to that prayed, in order to make his remedy complete,[43] but where he fails to establish his right to the relief prayed he may be given other relief to which his bill and proofs show him entitled.[44] No relief can, however, be granted under the general prayer unless it is consistent with the main theory and purpose of the

Tardy, 84 Ala. 327, 4 So. 276; Kelly *v.* Payne, 18 Ala. 371.

Arkansas.— Dews *v.* Cornish, 20 Ark. 332.

California.— Truebody *v.* Jacobson, 2 Cal. 269.

Illinois.— Walker *v.* Converse, 148 Ill. 622, 36 N. E. 202; Beaver *v.* Slanker, 94 Ill. 175; Dalton *v.* Roach, 89 Ill. 85; Stanley *v.* Valentine, 79 Ill. 544; Vansant *v.* Allmon, 23 Ill. 30; Winnetka *v.* Chicago, etc., Electric R. Co., 107 Ill. App. 117 [*affirmed* in 204 Ill. 297, 68 N. E. 407].

Indiana.— Shotts *v.* Boyd, 77 Ind. 223; Spivey *v.* Frazee, 7 Ind. 661.

Iowa.— Hoskins *v.* Rowe, 61 Iowa 180, 16 N. W. 78; Pond *v.* Waterloo Agricultural Works, 50 Iowa 596; Paton *v.* Lancaster, 38 Iowa 494; Wilson *v.* Horr, 15 Iowa 489; Simplot *v.* Simplot, 14 Iowa 449.

Maryland.— Crain *v.* Barnes, 1 Md. Ch. 151.

Mississippi.— Dodge *v.* Evans, 43 Miss. 570.

Missouri.— Bevin *v.* Powell, 83 Mo. 365 [*affirming* 11 Mo. App. 216].

New Hampshire.— Treadwell *v.* Brown, 44 N. H. 551.

New Jersey.— Coggswell, etc., Co. *v.* Coggswell, (Ch. 1898) 40 Atl. 213; Annin *v.* Annin, 24 N. J. Eq. 184; Graham *v.* Berryman, 19 N. J. Eq. 29; Belleville Mut. Ins. Co. *v.* Van Winkle, 12 N. J. Eq. 333; Hill *v.* Beach, 12 N. J. Eq. 31.

New York.— Bailey *v.* Burton, 8 Wend. 339; Bebee *v.* State Bank, 1 Johns. 529, 3 Am. Dec. 353.

South Carolina.— Brown *v.* McDonald, 1 Hill Eq. 297.

Tennessee.— Galloway *v.* Galloway, 2 Baxt. 328; Dodd *v.* Benthal, 4 Heisk. 601; Cox *v.* Waggoner, 5 Sneed 542.

Vermont.— Coffrin *v.* Cole, 67 Vt. 226, 31 Atl. 313; Danforth *v.* Smith, 23 Vt. 247.

Virginia.— Raper *v.* Sanders, 21 Gratt. 60.

West Virginia.— Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

See 19 Cent. Dig. tit. "Equity," § 1009.

If an injunction or other special order is required pending the suit, it must be specially prayed and cannot be granted under a prayer for general relief. Thomas *v.* Boswell, 14 Phila. (Pa.) 197; Chicago, etc., R. Co. *v.* Macomb, 2 Fed. 18; U. S. Eq. Rule 21.

43. *Alabama.*— Gonzales *v.* Hukil, 49 Ala. 260, 20 Am. Rep. 282.

Georgia.— Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655.

Illinois.— Isaacs *v.* Steel, 4 Ill. 97.

Kentucky.— Campbell *v.* Trosper, 108 Ky. 602, 57 S. W. 245, 22 Ky. L. Rep. 277; Oldham *v.* Woods, 3 T. B. Mon. 47; Stephenson *v.* Stephenson, 72 S. W. 742, 24 Ky. L. Rep. 1873.

Louisiana.— Newton *v.* Gray, 10 La. Ann. 67.

Maine.— Burleigh *v.* White, 70 Me. 130.

Maryland.— Bentley *v.* Cowman, 6 Gill & J. 152.

Massachusetts.— Thompson *v.* Heywood, 129 Mass. 401; Franklin *v.* Greene, 2 Allen 519.

Michigan.— Merrill *v.* Wilson, 96 Mich. 232, 33 N. W. 716.

Mississippi.— Hull *v.* Clark, 14 Sm. & M. 187.

Missouri.— Hutcherson *v.* Briscoe, 77 Mo. 373.

New Jersey.— Chambers *v.* Kunzman, (Ch. 1900) 45 Atl. 599.

New York.— Wood *v.* Brown, 34 N. Y. 337.

Ohio.— Webster *v.* Harris, 16 Ohio 490; Miami Exporting Co. *v.* U. S. Bank, Wright 249.

Tennessee.— Talbott *v.* Manard, 106 Tenn. 60, 59 S. W. 340.

Texas.— De Prez *v.* Everett, 73 Tex. 431, 11 S. W. 388; Lander *v.* Rounsaville, 12 Tex. 195; Swope *v.* Missouri Trust Co., 26 Tex. Civ. App. 133, 62 S. W. 947; Morris *v.* Holland, 10 Tex. Civ. App. 474, 31 S. W. 690.

West Virginia.— Woods *v.* Fisher, 3 W. Va. 536.

United States.— Walden *v.* Bodley, 14 Pet. 156, 10 L. ed. 398; Boon *v.* Chiles, 8 Pet. 532, 8 L. ed. 1034. See also Loudon, etc., Bank *v.* Dexter, 126 Fed. 593, 61 C. C. A. 515.

England.— Rocke *v.* Morgell, 2 Sch. & Lef. 721.

See 19 Cent. Dig. tit. "Equity," § 1010.

A personal decree for money may be rendered under the general prayer in a bill for foreclosure of a lien. American Trading & Storage Co. *v.* Gottstein, (Iowa 1904) 98 N. W. 770.

44. *Alabama.*— May *v.* Lewis, 22 Ala. 646; Strange *v.* Watson, 11 Ala. 324.

Arkansas.— Rogers *v.* Brooks, 30 Ark. 612.

California.— Mock *v.* Santa Rosa, 129 Cal. 330, 58 Pac. 826; Oliver *v.* Blair, (1885) 8 Pac. 612.

Colorado.— Hamill *v.* Thompson, 3 Colo. 518.

Delaware.— Jones *v.* Bush, 4 Harr. 1.

Florida.— Lee *v.* Patten, 34 Fla. 149, 15 So. 775; Pensacola, etc., R. Co. *v.* Spratt, 12 Fla. 26, 91 Am. Dec. 747.

Georgia.— Butler *v.* Durham, 2 Ga. 413.

Illinois.— Gibbs *v.* Davies, 168 Ill. 205, 48 N. E. 120; Miller *v.* Whelan, 158 Ill. 544, 42 N. E. 59; Hopkins *v.* Snedaker, 71 Ill. 449; Penn *v.* Fogler, 77 Ill. App. 365 [*reversed* on other grounds in 182 Ill. 76, 55 N. E. 192]; Merchants' Nat. Bank *v.* Hogle, 25 Ill. App. 543; Holden *v.* Holden, 24 Ill. App. 106.

Kentucky.— Repplier *v.* Buck, 5 B. Mon. 96.

bill and supported by its allegations,[45] and it is often held that no relief can be granted unless it is consistent with that specially prayed.[46] Furthermore relief

Maryland.— Dunnock *v.* Dunnock, 3 Md. Ch. 140; Wootten *v.* Burch, 2 Md. Ch. 190.
Massachusetts.— Mason *v.* Daly, 117 Mass. 403.
Mississippi.— Barnett *v.* Nichols, 56 Miss. 622; Dease *v.* Moody, 31 Miss. 617.
Missouri.— Holland *v.* Anderson, 38 Mo. 55.
New Hampshire.— Stone *v.* Anderson, 26 N. H. 506.
New Jersey.— Junior Order Bldg., etc., Assoc. *v.* Sharpe, 63 N. J. Eq. 500, 52 Atl. 832; Camden Horse R. Co. *v.* Citizens' Coach Co., 31 N. J. Eq. 525; Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.
New York.— Grafton *v.* Remsen, 16 How. Pr. 32; Bailey *v.* Burton, 8 Wend. 339; Pearsall *v.* Kingsland, 3 Edw. 195; Dowdall *v.* Lenox, 2 Edw. 267.
Pennsylvania.—Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Slemmer's Appeal, 58 Pa. St. 155, 98 Am. Dec. 248.
South Carolina.— Barr *v.* Haseldon, 10 Rich. Eq. 53; Nix *v.* Harley, 3 Rich. Eq. 379.
Tennessee.— Tennessee Ice Co. *v.* Raine, 107 Tenn. 151, 64 S. W. 29; Scott *v.* Fowlkes, 12 Heisk. 700; Bartee *v.* Tompkins, 4 Sneed 623.
Texas.— Silberberg *v.* Pearson, 75 Tex. 287, 12 S. W. 850; Kempner *v.* Ivory, (Civ. App. 1895) 29 S. W. 538.
Washington.— MacKay *v.* Smith, 27 Wash. 442, 67 Pac. 982.
West Virginia.— Hall *v.* Pierce, 4 W. Va. 107.
See 19 Cent. Dig. tit. "Equity," § 1011.
Damages may be allowed when the main relief is denied. Graves *v.* Graves, 3 Metc. (Ky.) 167; Omaha Horse R. Co. *v.* Cable Tramway Co., 32 Fed. 727. *Contra*, Schmitt *v.* Schneider, 109 Ga. 628, 35 S. E. 145; Hurt *v.* Jones, 75 Va. 341.
Prayer for general relief in the conjunctive instead of disjunctive does not vary the rule. Burnet *v.* Boyd, 60 Miss. 627. A conjunctive prayer will be given less scope than one in the disjunctive. *Ex p.* Branch, 53 Ala. 140.
Where there is no obstruction to the special relief plaintiff may not abandon it and ask a different decree under the general prayer. Allen *v.* Coffman, 1 Bibb (Ky.) 469.
45. *Alabama.*— Wiley *v.* Knight, 27 Ala. 336; Strange *v.* Watson, 11 Ala. 324.
Arkansas.—Cook *v.* Bronaugh, 13 Ark. 183; Moore *v.* Madden, 7 Ark. 530, 46 Am. Dec. 298.
California.— Carpentier *v.* Brenham, 50 Cal. 549.
Delaware.— Jones *v.* Bush, 4 Harr. 1.
Georgia.— Hickson *v.* Mobley, 80 Ga. 314, 5 S. E. 495; Peek *v.* Wright, 65 Ga. 638.
Illinois.— Ellis *v.* Hill, 162 Ill. 557, 44 N. E. 858; Redden *v.* Potter, 16 Ill. App. 265.
Iowa.— Casady *v.* Woodbury County, 13 Iowa 113.
Kentucky.— Crow *v.* Owensboro, etc., R. Co., 82 Ky. 134.
Louisiana.— Erwin *v.* Kentucky Bank, 5 La. Ann. 1.
Maine.— Scudder *v.* Young, 25 Me. 153.
Maryland.— Hilleary *v.* Hurdle, 6 Gill 105; Gibson *v.* McCormick, 10 Gill & J. 65; Chalmers *v.* Chambers, 6 Harr. & J. 29; Lingan *v.* Henderson, 1 Bland 236.
Missouri.— McNair *v.* Biddle, 8 Mo. 257; McCray *v.* Lowry, 25 Mo. App. 247.
New Hampshire.—Pennock *v.* Ela, 41 N. H. 189.
New Jersey.— Francis *v.* Bertrand, 26 N. J. Eq. 213; Walker *v.* Hill, 21 N. J. Eq. 191.
North Carolina.— Smith *v.* Smith, 36 N. C. 83.
Pennsylvania.—Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131.
Tennessee.— James *v.* Kennedy, 10 Heisk. 607; Hall *v.* Fowlkes, 9 Heisk. 745; Lee *v.* Cone, 4 Coldw. 392.
Texas.— Trammell *v.* Watson, 25 Tex. Suppl. 210; Crawford *v.* Stevens, (Civ. App. 1895) 31 S. W. 79.
Virginia.— James *v.* Bird, 8 Leigh 510, 31 Am. Dec. 668; Rootes *v.* Holliday, 6 Munf. 251; Sheppard *v.* Starke, 3 Munf. 29.
West Virginia.— Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622.
Wisconsin.— Fairchild *v.* Rasdall, 9 Wis. 379.
United States.— Hobson *v.* McArthur, 16 Pet. 182, 10 L. ed. 930; English *v.* Foxall, 2 Pet. 595, 7 L. ed. 531; Curry *v.* Lloyd, 22 Fed. 258; Connolly *v.* Belt, 6 Fed. Cas. No. 3,117, 5 Cranch C. C. 405.
See 19 Cent. Dig. tit. "Equity," § 1012.
If the bill charges fraud in fact and the proof fails the prayer for general relief is unavailing. Bailor *v.* Daly, 18 D. C. 175.
46. *Alabama.*— Simmons *v.* Williams, 27 Ala. 507; Driver *v.* Fortner, 5 Port. 9.
Florida.— Pensacola, etc., R. Co. *v.* Spratt, 12 Fla. 26, 91 Am. Dec. 747.
Georgia.— Marine, etc., Ins. Bank *v.* Early, R. M. Charlt. 279.
Mississippi.— Pleasants *v.* Glasscock, Sm. & M. Ch. 17.
New Hampshire.— Busby *v.* Littlefield, 31 N. H. 193.
New Jersey.— Rennie *v.* Crombie, 12 N. J. Eq. 457.
New York.— Wiltshire *v.* Marfleet, 1 Edw. 654; Wilkins *v.* Wilkins, 1 Johns. Ch. 111.
North Carolina.— Barnes *v.* Strong, 54 N. C. 100; Foster *v.* Cook, 8 N. C. 509.
Pennsylvania.— Passyunk Bldg. Assoc.'s Appeal, 83 Pa. St. 441; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218; Williamson *v.* Smith, 4 Pa. Dist. 307; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. 98.
South Carolina.— Clifton *v.* Haig, 4 Desauss. 330.
West Virginia.—Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553.
See 19 Cent. Dig. tit. "Equity," § 1013.

will not be granted so variant from that specially prayed as to surprise defendant and preclude him from fairly defending against it.[47]

D. Decrees Pro Confesso — 1. Nature. As already shown[48] modern practice permits, in lieu of compulsory process to enforce an appearance and answer, the treatment of defendant's default in appearance or pleading as a confession of the facts charged in the bill. A decree entered on such confession is generally called a decree *pro confesso*.[49]

2. When Bill Can Be Taken Pro Confesso — a. Necessity of Service or Appearance. In order that a bill may be taken *pro confesso* it is essential that defendant against whom it is so taken shall either have been duly served with process,[50] or shall have entered an appearance.[51] In cases where constructive service is authorized it is essential that it be made affirmatively to appear in the record that the statutory requirements have been strictly pursued.[52]

Contra.— Kelly *v.* McGuire, 15 Ark. 555; Crumbaugh *v.* Smock, 1 Blackf. (Ind.) 305.

Where prayer for general relief is in the disjunctive, relief may be given inconsistent with the special prayer. Wiltshire *v.* Marfleet, 1 Edw. (N. Y.) 654.

Inconsistent relief can be given only where plaintiff is an infant. Kornegay *v.* Carroway, 17 N. C. 403.

47. *Arkansas.*—Ross *v.* Davis, 17 Ark. 113; Cook *v.* Bronaugh, 13 Ark. 183.

Louisiana.— Richardson *v.* Weiner, 5 La. Ann. 646.

Minnesota.— Landis *v.* Olds, 9 Minn. 90

New Jersey.— Rennie *v.* Crombie, 12 N. J. Eq. 457; Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505.

Texas.— Denison *v.* League, 16 Tex. 399.

See 19 Cent. Dig. tit. "Equity," §§ 1010, 1012.

Entirely distinct and independent relief may not be granted. Thomason *v.* Smithson, 7 Port. (Ala.) 144; Brown *v.* Wylie, 2 W. Va. 502, 98 Am. Dec. 781.

48. See *supra*, VI, A, B.

49. 1 Daniell Ch. Pr. 679. There is some confusion in the use of the term arising from its application in some cases to the order or interlocutory decree declaring defendant's default and its effect. and in others to the final decree rendered in consequence thereof. Strictly speaking of course it is the bill which is taken *pro confesso*, and the decree in such case is not a decree *pro confesso*, but a decree upon a bill taken *pro confesso*.

50. *Alabama.*— Hurter *v.* Robbins, 21 Ala. 585.

Illinois.— Bruschke *v.* Der Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417.

Indiana.— Shipley *v.* Mitchell, 7 Blackf. 472; Reed *v.* Glover, 6 Blackf. 345.

Kentucky.— Chambers *v.* Warren, 6 B. Mon. 244; Taylor *v.* Watkins, 4 B. Mon. 561; Dawson *v.* Clay, 1 J. J. Marsh. 165; Gale *v.* Clark, 4 Bibb 415.

Louisiana.— Morris *v.* Bailey, 15 La. Ann. 2.

Michigan.— Outhwite *v.* Porter, 13 Mich. 533.

Mississippi.— Chewning *v.* Nichols, Sm. & M. Ch. 122.

New York.— Evarts *v.* Becker, 8 Paige 506.

Tennessee.— Blanton *v.* Hall, 2 Heisk. 423.

Virginia.— Frazier *v.* Frazier, 2 Leigh 642.

West Virginia.— Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

United States.— Non-Magnetic Watch Co. *v.* Association Horlogere Suisse, 45 Fed. 210.

See 19 Cent. Dig. tit. "Equity," § 954.

Service upon part of defendants will not sustain a decree *pro confesso* against all. Robertson *v.* Crawford, 1 A. K. Marsh. (Ky.) 449; Fuqua *v.* Tindall, 11 Sm. & M. (Miss.) 465; Tripp *v.* Vincent, 8 Paige (N. Y.) 176.

One defendant a non-resident.—Where residence or service of one defendant within the county is requisite in order to authorize service on other defendants without the county, the voluntary appearance of a non-resident defendant will not render effectual service upon others without the county. Kennedy *v.* Davenport, 13 B. Mon. (Ky.) 167.

A subpœna issued to a corporation president personally will not sustain a judgment *pro confesso* against his corporation where the process prayed was that a corporation be made a party by service upon the president. Walker *v.* Hallett, 1 Ala. 379.

An impossible date inserted in the subpœna by mistake does not invalidate a decree *pro confesso*. Roberts *v.* Brooks, 71 Fed. 914.

51. Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Gordon *v.* Church, 11 Ark. 118; Keil *v.* West, 21 Fla. 508; McCall's Succession, 28 La. Ann. 713.

If appearance is entered without authority of defendant, the decree is a nullity. Woods *v.* Dickinson, 18 D. C. 301. But an appearance entered by the plaintiff's solicitor for an administrator *ad prosequendum*, who is served, is sufficient. Roberts *v.* Brooks, 71 Fed. 914.

A motion to dissolve an injunction is not an appearance justifying a decree *pro confesso*. Chewning *v.* Nichols, Sm. & M. Ch. (Miss.) 122.

52. *Alabama.*— Cook *v.* Rogers, 64 Ala. 406; Mobley *v.* Leophart, 47 Ala. 257; Hanson *v.* Patterson, 17 Ala. 738; Butler *v.* Butler, 11 Ala. 668; Moore *v.* Wright, 4 Stew. & P. 84.

b. Proof of Service or Appearance. In order to found a decree *pro confesso* on defendant's failure to appear, the return of the subpœna must show that it was served in strict compliance with the law.[53] A recital in the decree of due service is generally deemed at least *prima facie* evidence of the fact,[54] but sometimes where the service is constructive the decree must state all the facts showing that it was regular.[55] A recital of a defendant's appearance is sufficient evidence of that fact.[56]

c. When Defendant Is Deemed in Default. The time when a defendant becomes in default so that a decree *pro confesso* may be ordered depends of course on the varying statutes and rules of different jurisdictions.[57] An order

Arkansas.— Saffold *v.* Saffold, 14 Ark. 408.

Florida.— Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770.

Kentucky.—Benningfield *v.* Reed, 8 B. Mon. 102; Beasley *v.* Doty, 3 Dana 32; Coleman *v.* Kenton, 5 J. J. Marsh. 44; Brown *v.* Humphreys, 1 J. J. Marsh. 392.

Maryland.— Frederick Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Michigan.— King *v.* Harrington, 14 Mich. 532.

New York.— Brisbane *v.* Peabody, 3 How. Pr. 109.

Tennessee.— Bains *v.* Perry, 1 Lea 37; Grewar *v.* Henderson, 1 Tenn. Ch. 76.

West Virginia.—McCoy *v.* McCoy, 9 W. Va. 443.

United States.— Meyer *v.* Kuhn, 65 Fed. 705, 13 C. C. A. 298.

See 19 Cent. Dig. tit. "Equity," § 955.

Weight as evidence.— A decree *pro confesso* on service by publication is no evidence of the truth of the bill when offered in a collateral proceeding. Cobb *v.* Thompson, 1 A. K. Marsh. (Ky.) 507; Danforth *v.* Woods, 11 Paige (N. Y.) 9.

When rendered against a citizen of another state a decree on such service was held void. Cobb *v.* Haynes, 8 B. Mon. (Ky.) 137.

Such a decree cannot be entered of course but must be signed by the judge. Rushing *v.* Thompson, 20 Fla. 583.

Affidavit of publication.— It was held not to be a fatal objection to the decree that the affidavit of publication was not entitled in the cause, when the order published was so entitled. King *v.* Harrington, 14 Mich. 532. See, generally, PROCESS.

In the New York chancery a bill could be taken *pro confesso* only after personal service. Sawyer *v.* Sawyer, 3 Paige 263.

It is quite general to require proof of the bill as against defendants served otherwise than personally, and although the form of proceeding may be that of taking the bill *pro confesso* such is not its effect. See *infra*, XXIII, D, 3, g.

53. Gibbens *v.* Pickett, 31 Fla. 147, 12 So. 17, 19 L. R. A. 177; Tompkins *v.* Wiltberger, 56 Ill. 385.

If service of a copy of the bill is required the return must show not only that the subpœna was served but that a copy of the bill was also delivered. Johnston *v.* MacConnell, 3 Bibb (Ky.) 1; Taylor *v.* Jackson, 2 Bibb (Ky.) 572; Bradley *v.* Lamb, Hard. (Ky.) 527; Ayers *v.* Scott, Ky. Dec. 162. But see Avery *v.* Warren, 12 Heisk. (Tenn.) 559.

A contradictory or ambiguous return will not sustain a decree. Pegg *v.* Capp, 2 Blackf. (Ind.) 257.

54. *Arkansas.*— Hale *v.* Warner, 36 Ark. 217.

Illinois.— Burke *v.* Donnovan, 60 Ill. App. 241.

Iowa.— Harrison *v.* Kramer, 3 Iowa 543.

Maryland.— Fitzhugh *v.* McPherson, 9 Gill & J. 51.

Tennessee.— Gilliland *v.* Cullum, 6 Lea 521.

Virginia.— Moore *v.* Green, 90 Va. 181, 17 S. E. 872.

See 19 Cent. Dig. tit. "Equity," § 968. See also *supra*, VI, A, 3, c, (III).

A bona fide purchaser will be protected by such a recital, although the record contains no other evidence of service. Reddick *v.* State Bank, 27 Ill. 145.

Under the former Minnesota law, there was a presumption of due service from the fact that a decree was rendered, although the record disclosed irregularities in the process. Smith *v.* Valentine, 19 Minn. 452.

55. Chilton *v.* Alabama Gold L. Ins. Co., 74 Ala. 290; Holly *v.* Bass, 63 Ala. 387; Keiffer *v.* Barney, 31 Ala. 192; Beavers *v.* Davis, 19 Ala. 82; Hartley *v.* Bloodgood, 16 Ala. 233. Where the statute directs that proof of service by publication must be made to the satisfaction of the chancellor, the latter's order declaring that such publication has been made to his satisfaction is conclusive in favor of a purchaser under the decree. McCahill *v.* U. S. Equitable L. Assur. Soc., 26 N. J. Eq. 531.

56. Hunt *v.* Ellison, 32 Ala. 173. But where one party was served by publication, a recital in an order setting aside a decree *pro confesso* that "the parties" consented thereto was insufficient to bind the absent defendant by subsequent proceedings. Holly *v.* Bass, 63 Ala. 387.

57. The following cases construe the statutes and rules of the respective jurisdictions:

Alabama.— Madden *v.* Floyd, 69 Ala. 221; Keiffer *v.* Barney, 31 Ala. 192; Pitfield *v.* Gazzam, 2 Ala. 325; Levert *v.* Redmond, 9 Port. 79.

Florida.— Johnson *v.* Johnson, 23 Fla. 413, 2 So. 834; Lente *v.* Clarke, 22 Fla. 515, 1 So. 149; Stribling *v.* Hart, 20 Fla. 235.

Georgia.— Carter *v.* Jordan, 15 Ga. 76;

prematurely entered will not be deemed irregular if defendant never appears,[58] and if defendant appears after an order *pro confesso* and makes a motion without objecting to irregularities in taking the order he thereby waives such irregularities.[59] An order *pro confesso* is usually entered by the clerk on a rule day and cannot be entered at any other time, at least without order of a judge.[60] A bill cannot be taken *pro confesso* when a plea has been filed thereto and has not been disposed of,[61] and it has also been held that the pendency of a motion attacking the bill will have a like effect.[62] Where a demurrer has been overruled, defendant must first be ruled to answer,[63] and if he fails to do so the bill may then be taken as confessed.[64] Failure of a defendant to prosecute a reference before a master has been held to justify a decree against him.[65] As a general replication does not traverse a cross bill, the filing thereof does not prevent a decree *pro confesso* on the cross bill.[66] After exceptions to an answer have been sustained and defendant ruled to answer further, if he fails to do so the general rule is that the entire bill may be taken as confessed.[67] As no process is in gen-

Dougherty *v.* Jones, 11 Ga. 431; Guerry *v.* Durham, 11 Ga. 9.

Indiana.— Elston *v.* Drake, 5 Blackf. 540.

Kentucky.— Bedford *v.* Duly, 1 A. K. Marsh. 220; Ayers *v.* Scott, Ky. Dec. 162.

New York.— Hoxie *v.* Scott, Clarke 457.

Rhode Island.— Burlingame *v.* Emerson, 5 R. I. 62.

West Virginia.— Wilson *v.* Winchester, etc., R. Co., 82 Fed. 15, construing W. Va. Code, c. 125, §§ 5, 44.

See 19 Cent. Dig. tit. "Equity," § 960.

U. S. Eq. Rule 18 provides that, unless the time shall be enlarged, defendant shall file his plea, demurrer, or answer on the rule day next succeeding that of entering his appearance. In default thereof plaintiff may enter an order as of course in the order book that the bill be taken *pro confesso*. A decree *pro confesso* cannot be taken before the expiration of the time to answer. Fellows *v.* Hall, 8 Fed. Cas. No. 4,723, 3 McLean 487. Formerly it might be taken on default of appearance. Grayson *v.* Virginia, 3 Dall. (U. S.) 320, 1 L. ed. 619. A defendant must be allowed to answer on terms if he offers his answer when the decree is applied for. Halderman *v.* Halderman, 11 Fed. Cas. No. 5,908, Hempst. 407.

58. Alley *v.* Quinter, MacArthur & M. (D. C.) 390; Roberts *v.* Brooks, 71 Fed. 914.

59. St. Mary's Bank *v.* St. John, 25 Ala. 566.

60. Ropes *v.* McCabe, 40 Fla. 388, 25 So. 273; Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327; Lanum *v.* Steel, 10 Humphr. (Tenn.) 280; Seay *v.* Seay, 1 Tenn. Ch. 2.

61. Sampson *v.* Hendricks, 8 Blackf. (Ind.) 288; Jordan *v.* Jordan, 16 Ga. 446; Smith *v.* Cozart, 45 Miss. 698; Handy *v.* Cobb, 44 Miss. 699.

Where the plea is manifestly frivolous, it may be set aside and the bill be taken as confessed. Smith *v.* Cozart, 45 Miss. 698.

If the plea is not properly verified, it may in the federal courts be disregarded. U. S. Eq. Rule 31. See *supra*, XIV. B. 3. But an order should be obtained setting the plea aside. Ewing *v.* Blight, 8 Fed. Cas. No. 4,589, 3 Wall. Jr. 134. Under a similar rule it has been held that the defect may be cured before decree *pro confesso* has been taken. Wilson *v.* Mitchell, 43 Fla. 107, 30 So. 703.

62. Coffin *v.* Kemp, 4 Greene (Iowa) 119; Lannert *v.* Pies, 4 Ohio Dec. (Reprint) 282, 1 Clev. L. Rep. 210.

Affidavits in resistance of a preliminary application will not prevent a decree *pro confesso*. Friedman *v.* Rehm, 43 Fla. 330, 31 So. 234.

As to effect of affidavit of merits under the former New York practice see Worthington *v.* Pierson, 3 Edw. (N. Y.) 297.

63. Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76.

64. Ray *v.* Frank, 44 Fla. 681, 32 So. 925; American Steel, etc., Co. *v.* Wire Drawers, etc., Unions Nos. 1 & 3, 90 Fed. 608.

Where defendant takes no action on the demurrer and is therefor ruled to answer the same result follows. Crawford *v.* Cook, 55 Ill. App. 351.

Where an answer is served after the rule day, and the costs of the demurrer paid, plaintiff cannot retain the costs and ask for a decree *pro confesso*. Hoxie *v.* Scott, Clarke (N. Y.) 457.

Under a statute requiring the rule to specify the day for answer if it does not do so a decree upon the merits cannot be taken even at a subsequent term. Moore *v.* Smith, 26 W. Va. 379.

65. Murdock *v.* Holland, 3 Blackf. (Ind.) 114.

66. Coach *v.* Kent Cir. Judge, 97 Mich. 563, 56 N. W. 937.

67. Bauerle *v.* Long, 165 Ill. 340, 46 N. E. 227; Buckingham *v.* Peddicord, 2 Bland (Md.) 447; Mayer *v.* Tyson, 1 Bland (Md.) 559; Lea *v.* Vanbibber, 6 Humphr. (Tenn.) 18.

The whole bill may be taken as confessed, if what remains after the exceptions presents no material issue. Yates *v.* Continental Ins. Co., 207 Ill. 512, 69 N. E. 779; Work *v.* Hall, 79 Ill. 196.

That part of the bill the answer to which is insufficient may be taken as confessed. Pegg

eral necessary upon an amended bill,[68] an order *pro confesso* can usually be taken on the original subpœna, although the bill has been amended,[69] and the same is true where after the order *pro confesso* there is an amendment purely formal,[70] or not affecting the rights of defendant in question.[71] The introduction of supplemental matter usually does not in the United States require new process before the bill can be taken *pro confesso*.[72] If defendant fails to answer a distinct part of the bill, plaintiff if he chooses may take that part as confessed.[73] While ordinarily a bill cannot be taken as confessed when an answer is on file,[74] a defendant who has answered may by express consent or by implication authorize such a decree.[75]

3. Proceedings in Taking Bill Pro Confesso — a. In General. The practice of taking bills *pro confesso* in the English chancery was to carry out the process so far as to issue a writ of sequestration, and then on motion or petition to obtain an order for taking the bill *pro confesso*, which was in effect an order to set down the cause for hearing on the bill alone. On the hearing the court would render such a decree as the bill, assuming its truth, might justify.[76] In the United States the practice is in general substantially the same, varying, however, much in detail in different jurisdictions, and requiring no process beyond the subpœna as a foundation for the order.[77]

b. Notice. Notice of the application for the order taking the bill *pro confesso* is not usually required,[78] but it is sometimes required when defendant has appeared and has failed to answer,[79] or where special circumstances exist rendering such notice equitably necessary.[80] Neither is notice after the order *pro confesso* of the application for a final decree in general necessary.[81]

c. Rule to Answer. It is sometimes required that defendant be specially ruled to answer before the bill can be taken as confessed.[82]

v. Davis, 2 Blackf. (Ind.) 281; Weaver *v.* Livingston, Hopk. (N. Y.) 595.

Where defendant dies before expiration of the time to answer further the bill will not be taken as confessed. Jordan *v.* Faircloth, 27 Ga. 372.

On exceptions to master's report.— A decree *pro confesso* cannot be taken on a rule to answer made without any order on exceptions to the master's report. New York F. Ins. Co. *v.* Lawrence, 6 Paige (N. Y.) 511.

68. See *supra*, VI, A, 2, b.

69. Real Estate Bank *v.* Bozeman, 15 Ark. 316; Bond *v.* Howell, 11 Paige (N. Y.) 233.

Where the original bill has been answered, and the amendment is immaterial, it is error to take the amended bill as confessed. Black *v.* Lusk, 69 Ill. 70.

Notice of the amendment is sometimes required. Harris *v.* Deitrich, 29 Mich. 366; Albright *v.* Texas, etc., R. Co., 8 N. M. 422, 46 Pac. 448.

70. Clason *v.* Corley, 5 Sandf. (N. Y.) 454.

71. Reno *v.* Harper, 23 Miss. 154.

An irregular amendment does not vitiate the decree. Totten *v.* Stuyvesant, 3 Edw. (N. Y.) 500; Shefficld Furnace Co. *v.* Witherow, 149 U. S. 574, 13 S. Ct. 936, 37 L. ed. 853.

Notice must be given of a material amendment. Reno *v.* Harper, 23 Miss. 154.

72. Mix *v.* Beach, 46 Ill. 311. See *supra*, VI, A, 2, c. *Contra*, Brown *v.* Thompson, 29 Mich. 72.

73. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; Thompson *v.* Strode, 2 Hen. & M. (Va.) 19.

74. Griswold *v.* Brock, 29 Ill. App. 423. Even if the answer be filed after time. Maxwell *v.* Jarvis, 14 Wis. 506.

75. Young *v.* Young, 17 N. J. Eq. 161. Where one defendant agrees that the confession of a co-defendant by his failure to answer may be taken against him as evidence, he thereby admits the bill to be true. Nantz *v.* McPherson, 7 T. B. Mon. (Ky.) 597, 18 Am. Dec. 216.

76. 1 Daniell Ch. Pr. 680, 695.

77. See *supra*, XXIII, D, 2, c.

78. Harrison *v.* Morton, 87 Md. 671, 40 Atl. 897; Oakley *v.* O'Neill, 2 N. J. Eq. 287; U. S. Eq. Rule 18.

79. Wampler *v.* Wolfinger, 13 Md. 337.

80. Oakley *v.* O'Neill, 2 N. J. Eq. 287. As where it is based on an order striking out a plea (Eldridge *v.* Wightman, 20 Fla. 687), or disregarding a demurrer as frivolous (Bowman *v.* Marshall, 9 Paige (N. Y.) 78. See also Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 664).

81. Price *v.* Boden, 39 Fla. 218, 22 So. 657; Stribling *v.* Hart, 20 Fla. 235; Glover *v.* Jones, 95 Me. 303, 49 Atl. 1104; Rose *v.* Woodruff, 4 Johns. Ch. (N. Y.) 547; U. S. Bank *v.* White, 8 Pet. (U. S.) 262, 8 L. ed. 938; Austin *v.* Riley, 55 Fed. 833. *Contra*, Legrand *v.* Francisco, 3 Munf. (Va.) 83. A defendant who has appeared is entitled to notice for the purpose of being heard upon the form and extent of the decree. Southern Pac. R. Co. *v.* Temple, 59 Fed. 17.

82. Dunning *v.* Stanton, 9 Port. (Ala.)

d. Affidavit of Regularity. In some jurisdictions it is essential that an affidavit be filed to the effect that the proceedings have been regular and that a default has occurred.[83]

e. Refunding Bond. It is a requirement in some jurisdictions on obtaining a decree *pro confesso* against absent defendants who have not been personally served and who have not appeared, that plaintiff shall give bond to make restitution to such defendants if they should be let in to defend after the execution of the decree.[84] It seems that the court has a general power to require security.[85]

f. Effect of Order Pro Confesso. The order to take the bill *pro confesso* is not in itself an adjudication,[86] nor does it entitle plaintiff to a decree as of course.[87] It operates to preclude defendant from taking advantage of affirmative defenses and from offering evidence in defense,[88] and establishes an admission of the truth of all definite and certain allegations of the bill,[89] but such allegations as are

513; Germain *v.* Beach, 9 Paige (N. Y.) 232; Caines *v.* Fisher, 1 Johns. Ch. (N. Y.) 8; Sterling *v.* Ashton, 12 Phila. (Pa.) 227; Ingersoll *v.* Notman, 1 Phila. (Pa.) 291; Halderman *v.* Halderman, 11 Fed. Cas. No. 5,908, Hempst. 407; Pendleton *v.* Evans, 19 Fed. Cas. No. 10,920, 4 Wash. 336. But as holding that no rule to answer is necessary see Michael *v.* Mace, 137 Ill. 485, 27 N. E. 694; Grob *v.* Cushman, 45 Ill. 119; Roach *v.* Chapin, 27 Ill. 194. It is necessary, however, as to cross bills. Michael *v.* Mace, *supra*.

An order to plead signed by plaintiff's solicitor is a substantial compliance with this requirement. Person *v.* Merrick, 5 Wis. 231.

83. Ireland *v.* Woolman, 15 Mich. 253; Nott *v.* Hill, 6 Paige (N. Y.) 9. Failure to file the affidavit until three days after the order *pro confesso* had been entered is an irregularity only, and where proper proof was subsequently filed before the decree the latter will not be treated as void for want of jurisdiction. Torrans *v.* Hicks, 32 Mich. 307. It is desirable, but not essential, to file an affidavit of non-appearance before proceeding to enter defendant's non-appearance and taking the bill as confessed. Low *v.* Mills, 61 Mich. 35, 27 N. W. 877; Eaton *v.* Eaton, 33 Mich. 305.

Sufficiency of affidavit.— An affidavit for the purpose of obtaining an order to take the bill as confessed on the ground of failure to answer, which is founded on the belief of the deponent only, is insufficient to authorize such decree. Quincy *v.* Foot, 1 Barb. Ch. (N. Y.) 496.

84. Beavers *v.* Davis, 19 Ala. 82; Rowland *v.* Day, 17 Ala. 681; Cowart *v.* Harrod, 12 Ala. 265; Butler *v.* Butler, 11 Ala. 668; Hanna *v.* Spotts, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; Klinefelter *v.* Blaine, 3 Dana (Ky.) 467. Such bond is not required where absent defendants are represented or submit themselves to the jurisdiction. Hanson *v.* Patterson, 17 Ala. 738; Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84; Davenport *v.* Bartlett, 9 Ala. 179.

Failure to require such a bond affects only the execution of the decree it seems and does not in itself demand a reversal. Holly *v.* Bass, 63 Ala. 387; Hurt *v.* Blount, 63 Ala. 327. And see Ross *v.* Austin, 4 Hen. & M. (Va.) 502.

85. Grant *v.* Stewart, 1 Desauss. (S. C.) 136.

86. Russell *v.* Lathrop, 122 Mass. 300; Lockhart *v.* Horn, 15 Fed. Cas. No. 8,446, 3 Woods 542.

It cannot be used as evidence of an admission of the facts alleged if the bill be afterward dismissed. Garret *v.* Ricketts, 9 Ala. 529.

87. *Alabama.*— Singleton *v.* Gayle, 8 Port. 270.

Florida.— Price *v.* Boden, 39 Fla. 218, 22 So. 657.

Illinois.— Lynch *v.* Naylor, 63 Ill. App. 107.

Tennessee.— Doak *v.* Stahlman, (Ch. App. 1899) 58 S. W. 741.

United States.— Andrews *v.* Cole, 20 Fed. 410.

See 19 Cent. Dig. tit. "Equity," § 967.

88. Patterson *v.* Ingraham, 23 Miss. 87. Gibbes *v.* Elliott, 5 Rich. Eq. (S. C.) 327. Under Md. Act (1820), c. 161, defendant might offer proof before final decree. Benson *v.* Ketchum, 14 Md. 331. The bill was not under that act really taken as confessed. Grove *v.* Fresh, 9 Gill & J. (Md.) 280.

89. *Alabama.*— Baker *v.* Young, 90 Ala. 426, 8 So. 59; Carradine *v.* O'Connor, 21 Ala. 573; Hartley *v.* Bloodgood, 16 Ala. 233; Cowart *v.* Harrod, 12 Ala. 265; Butler *v.* Butler, 11 Ala. 668; Wellborn *v.* Tiller, 10 Ala. 305; Arnold *v.* Sheppard, 6 Ala. 299.

Illinois.— Mason *v.* Patterson, 74 Ill. 191; Boston *v.* Nichols, 47 Ill. 353; Harmon *v.* Campbell, 30 Ill. 25; Johnson *v.* Donnell, 15 Ill. 97; Farnsworth *v.* Strasler, 12 Ill. 482; Manchester *v.* McKee, 9 Ill. 511; Henry *v.* Seager, 80 Ill. App. 172; Armstrong *v.* Douglas Park Bldg. Assoc., 60 Ill. App. 318; Parke *v.* Brown, 12 Ill. App. 291.

Iowa.— Humphreys *v.* Darlington, 3 Greene 588.

Kentucky.— Atterberry *v.* Knox, 8 Dana 282; Baltzell *v.* Hall, 1 Litt. 97; Craig *v.* Horine, 1 Bibb 113.

Michigan.— Ward *v.* Jewett, Walk. 45.

North Carolina.— Atty.-Gen. *v.* Carver, 34 N. C. 231.

Tennessee.— Schoenpflug *v.* Ketcham, (Ch. App. 1898) 52 S. W. 666; Phillips *v.* Hollis-

indefinite and uncertain will not sustain a final decree *pro confesso* unless they are supplemented by an adequate amount of proof.[90]

g. Proof After Order Pro Confesso. As by the order *pro confesso* defendant admits the certain allegations of the bill, he has no right to demand proof thereof, but proof must be made as to uncertain allegations.[91] The court may, however, in its discretion require proof.[92] Proof is, however, required as against infant defendants,[93] and against non-residents served constructively and who do not appear.[94] Where proof is taken the decree should depend thereon and not on the bill alone.[95]

h. Necessity of Interlocutory Order or Decree. It is in general necessary before a final decree can be taken that an order or interlocutory decree taking the bill as confessed be first entered;[96] but failure to do this is merely an irregularity

ter, 2 Coldw. 269; Stone *v.* Duncan, 1 Head 103; Koen *v.* White, Meigs 358; Douglass *v.* Evans, 1 Overt. 82; Jackson *v.* Honeycut, 1 Overt. 30.

Virginia.— Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91; Pullen *v.* Mullen, 12 Leigh 434.

See 19 Cent. Dig. tit. "Equity," § 967.

90. *District of Columbia.*—Davis *v.* Speiden, 3 MacArthur 283.

Indiana.— Laney *v.* Laney, 4 Ind. 149; Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505; Close *v.* Hunt, 8 Blackf. 254; Fellows *v.* Shelmire, 5 Blackf. 48; Platt *v.* Judson, 3 Blackf. 235; Pegg *v.* Davis, 2 Blackf. 281.

Iowa.— Bolander *v.* Atwell, 14 Iowa 35; Atkins *v.* Faulkner, 11 Iowa 326; Harrison *v.* Kramer, 3 Iowa 543.

Michigan.— Ward *v.* Jewett, Walk. 45.

New York.— Williams *v.* Corwin, Hopk. 471.

West Virginia.— Campbell *v.* Lynch, 6 W. Va. 17.

United States.— U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118 [*affirmed* in 7 Pet. 222, 8 L. ed. 665].

See 19 Cent. Dig. tit. "Equity," § 967.

91. See *supra*, notes 89, 90. In some jurisdictions proof of the bill, or at least of documents relied on therein, must be made. Wilkins *v.* Wilkins, 4 Port. (Ala.) 245; Pierson *v.* David, 4 Iowa 410; Anonymous, 4 Hen. & M. (Va.) 476.

Production of a record charged in the bill is sufficient to found a decree based thereon. Stark *v.* Murphy, (Tenn. Ch. App. 1899) 52 S. W. 736.

92. Cronan *v.* Frizell, 42 Ill. 319; Moore *v.* Titman, 33 Ill. 358; Stephens *v.* Bichnell, 27 Ill. 444, 81 Am. Dec. 242; Smith *v.* Trimble, 27 Ill. 152; Manchester *v.* McKee, 9 Ill. 511; Ferguson *v.* Sutphen, 8 Ill. 547; Jackson Union Telephone Co. *v.* Ava, etc., Telephone Co., 100 Ill. App. 535; Bowman *v.* Hall, 2 Ind. 206.

Viva voce evidence may be taken. McClay *v.* Norris, 9 Ill. 370.

Less proof is required than where there is an answer. Oliver *v.* Palmer, 11 Gill & J. (Md.) 426.

If plaintiff volunteers evidence he will be subjected to costs. Covell *v.* Cole, 16 Mich. 223.

Reference to master.— There may be a reference to a master to take an account of the amount due, and there need be no notice to defendant of the hearing on such reference.

Alabama.— Mussina *v.* Bartlett, 8 Port. 277.

Colorado.— Buck *v.* Fischer, 2 Colo. 182.

Illinois.— Moore *v.* Titman, 33 Ill. 358; Armstrong *v.* Douglas Park Bldg. Assoc., 60 Ill. App. 318.

Mississippi.— Chapman *v.* Evans, 44 Miss. 113.

New Jersey.— Newell *v.* Camden, 40 N. J. Eq. 499, 4 Atl. 644 [*affirmed* in 40 N. J. Eq. 728, 4 Atl. 645].

See 19 Cent. Dig. tit. "Equity," § 966.

Such a reference is required in some instances. Freeman *v.* Ledbetter, 43 Miss. 165.

Defendant may attend and examine witnesses. Bernie *v.* Vandever, 16 Ark. 616; Hazard *v.* Durant, 12 R. I. 99.

93. Hamilton *v.* Gilman, 12 Ill. 260; Wolcott *v.* Weaver, 3 How. Pr. (N. Y.) 159.

94. *Arkansas.*— Henry *v.* Blackburn, 32 Ark. 445.

Indiana.— Trimble *v.* White, 2 Ind. 205.

New York.— Wolcott *v.* Weaver, 3 How. Pr. 159; Corning *v.* Baxter, 6 Paige 178; Aymer *v.* Gault, 2 Paige 284; Southwick *v.* Van Bussum, 1 Paige 648.

Tennessee.— Scovel *v.* Absten, 1 Tenn. Ch. 73.

Virginia.— Platt *v.* Howland, 10 Leigh 507.

See 19 Cent. Dig. tit. "Equity," § 967.

95. Cook *v.* Woodbury County, 13 Iowa 21; Atkins *v.* Faulkner, 11 Iowa 326; Purviance *v.* Barton, 2 Gill & J. (Md.) 311.

96. *Florida.*— Rushing *v.* Thompson, 20 Fla. 583.

Georgia.— Groce *v.* Field, 13 Ga. 24.

Illinois.— Wilson *v.* Spring, 64 Ill. 14; Western Union Tel. Co. *v.* Pacific, etc., Tel. Co., 49 Ill. 90.

Kentucky.— Shields *v.* Bryant, 3 Bibb 525.

Mississippi.— Mezeix *v.* McGraw, 44 Miss. 100; Beville *v.* McIntosh, 41 Miss. 516; Carman *v.* Watson, 1 How. 333.

Missouri.— Evans *v.* State, 1 Mo. 492.

United States.— U. S. Eq. Rules 18, 19.

See 19 Cent. Dig. tit. "Equity," § 961.

Validity of the decree does not it seems depend on the entry of a formal order. Davenport *v.* Bartlett, 9 Ala. 179; Savage *v.* Berry, 3 Ill. 545; Cole *v.* Johnson, 53 Miss. 94; Linder *v.* Lewis, 1 Fed. 378.

which may be waived by defendant,[97] and in some jurisdictions no preliminary order is necessary.[98]

i. When Final Decree May Be Taken. The rules of course vary much as to the time which must be allowed after the order or decree taking the bill *pro confesso*, before a final decree can be taken.[99] Where defendants are united in interests, a final decree should not be taken before the case is in condition for decree as to all;[1] but it seems this rule does not apply where the interests are separate and a decree against one in default would not prejudice others.[2] It will be presumed that the decree was regularly rendered.[3]

4. Nature of Final Decree — a. In General. The theory upon which *pro confesso* decrees are taken being, not that defendant by his default subjects himself to the decree sought by plaintiff, but that he merely confesses the truth of the facts alleged with certainty in the bill and permits the case to be brought on for hearing upon the bill alone,[4] no decree can be taken unless the bill charges sufficient facts and with sufficient certainty to warrant a decree.[5] No relief can be granted except such as is within a fair scope of both allegations and prayer of the

Plaintiff must prove his case if he brings it to hearing without an interlocutory decree. Albright *v.* Texas, etc., R. Co., 8 N. M. 422, 46 Pac. 448.

Before a hearing can be had the interlocutory order must be made absolute. Brachen *v.* Colquhoun, 11 N. C. 410.

97. Harris *v.* Schilling, 108 Ill. App. 116.

98. Miller *v.* Wilkins, 79 Ga. 675, 4 S. E. 261; Lumpkin *v.* Silliman, 79 Tex. 165, 15 S. W. 231.

99. Usually some time must be allowed. The final decree cannot be taken on the same day as the order *pro confesso*. McGowan *v.* James, 12 Sm. & M. (Miss.) 445; Reinbold *v.* Laufer, 6 Northam. Co. Rep. (Pa.) 351. A reasonable time must be allowed. Oliver *v.* Palmer, 11 Gill & J. (Md.) 426. The time fixed by the order cannot be anticipated. Fitzhugh *v.* McPherson, 9 Gill & J. (Md.) 51. The decree may be taken at the same term. Sanders *v.* Dowell, 7 Sm. & M. (Miss.) 206; Scott *v.* Davis, 9 Rich. Eq. (S. C.) 38. In the New York chancery if defendant had appeared the case could not be taken up until regularly called except on special notice. Anonymous, 3 Edw. 136. In some jurisdictions the decree can be taken immediately (Platt *v.* Judson, 3 Blackf. (Ind.) 235; Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555; Stark *v.* Murphy, (Tenn. Ch. App. 1899) 52 S. W. 736) and at the appearance term (Wessells *v.* Wessells, 1 Tenn. Ch. 60).

U. S. Eq. Rules 18 and 19 now provide that the court may proceed to a decree at any time after the expiration of thirty days after the entry of the order to take the bill *pro confesso*. This rule in its present form was adopted in 1878 (97 U. S. viii). Prior to that time the decree could not be taken until the following term. O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840; Consolidated Fruit-Jar Co. *v.* Strong, 6 Fed. Cas. No. 3,130; Pendleton *v.* Evans. 19 Fed. Cas. No. 10,921, 4 Wash. 391. The decree then rendered does not become absolute, until the end of the term. Pendleton *v.* Evans, 19 Fed. Cas. No. 10.920, 4 Wash. 336; Stewart *v.* Smith, 23 Fed. Cas. No. 13,436, 2 Cranch C. C. 615; Walz *v.* Brookville Nat. Bank, 29 Fed. Cas. No. 17,137; U. S. Eq. Rule 19.

1. *Iowa.*— Jenkin *v.* McCully, Morr. 447.

Kentucky.— Alexander *v.* Quigley, 2 Duv. 399.

Maryland.— Hoyle *v.* Penn, 1 Bland 28.

Vermont.— Kopper *v.* Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

United States.— Frow *v.* De la Vega, 15 Wall. 552, 21 L. ed. 60.

2. Adams *v.* Stevens, 49 Me. 362. And see Small *v.* Wicks, 82 Iowa 744, 47 N. W. 1031.

3. Grubb *v.* Crane, 5 Ill. 153; Emery *v.* Downing, 13 N. J. Eq. 59.

4. See *supra*, XXIII, D, 3, f.

5. *Arkansas.*— Clarke *v.* Strong, 13 Ark. 491.

Florida.— Orlando *v.* Equitable Bldg., etc., Assoc., (1903) 33 So. 986.

Georgia.—Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863.

Iowa.— Fejervary *v.* Langer, 9 Iowa 159.

Kentucky.— Gould *v.* Bonds, 1 Bush 189; Neale *v.* Keele, 2 B. Mon. 31; Marshall *v.* Tenant, 2 J. J. Marsh. 155, 19 Am. Dec. 126; Steel *v.* McDowell, 2 Bibb 123.

Michigan.— Hardwick *v.* Bassett, 25 Mich. 149.

Mississippi.— West Feliciana R. Co. *v.* Stockett, 27 Miss. 739; Garland *v.* Hull, 13 Sm. & M. 76, 51 Am. Dec. 140.

Tennessee.— Ross *v.* Ramsey, 3 Head 15.

United States.— Wong Him *v.* Callahan, 119 Fed. 381.

See 19 Cent. Dig. tit. "Equity," § 958.

Defendant is not concluded as to matters not alleged in the bill. Curlett *v.* Curlett, 106 Ill. App. 81.

Where a statute requires a note to the bill specifying what statements and interrogatories are to be answered, a decree *pro confesso* cannot be taken on a bill without such note. O'Neal *v.* Robinson, 45 Ala. 526.

Interrogatories not founded upon charges in the bill cannot be taken as confessed. White *v.* White, 3 Dana (Ky.) 374.

Filing exhibits.— A bill may be taken as confessed without first filing the exhibits. Gwin *v.* Stone, Sm. & M. Ch. (Miss.) 124.

bill.[6] Defendant may show that the bill does not warrant the decree sought,[7] but he cannot go behind the averments of the bill.[8] No personal decree can be rendered against a defendant constructively served who does not appear.[9]

b. Where Other Defendants Answer. Failure of one defendant to answer and a decree *pro confesso* against him do not entitle plaintiff to take the allegations of his bill as true against him who has answered.[10] A final decree on the merits cannot then be entered, either against the defaulting defendant or against those not in default, without proof of the material allegations of the bill.[11] And even where a decree *pro confesso* has been entered against a defaulting defendant, if upon issue joined by a co-defendant and trial had it turns out that the bill ought not to be sustained as to either defendant, it will be dismissed as to the defaulting defendant as well as to defendant not in default.[12] This rule of course does not apply where the allegations in the bill against the defaulting defendants and the

Sufficiency of pleading.— It is sometimes held that a bill taken *pro confesso* must be strictly construed (Brodie *v.* Skelton, 11 Ark. 120; Breckinridge *v.* Waters, 4 Dana (Ky.) 620); but on the other hand decrees can be rendered on bills somewhat defective in statement (Sallade *v.* Lykens Tp. School Directors, 2 Pearson (Pa.) 51; Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296). Where the decree was for failure to make further answer, it was allowed, although the matter was not charged to be within defendant's knowledge. Philips *v.* Coons, 4 Bibb (Ky.) 247.

Collusion.— A decree will not be made on an order *pro confesso*, when it appears to have been collusively taken. Ash *v.* Bowen, 10 Phila. (Pa.) 68.

6. *Alabama.*— Johnson *v.* Kelly, 80 Ala. 135; McDonald *v.* Mobile L. Ins. Co., 56 Ala. 468.

Florida.—Lyle *v.* Winn, (1903) 34 So. 158; Marks *v.* Baker, 20 Fla. 920.

Illinois.— Wing *v.* Cropper, 35 Ill. 256; Forquer *v.* Forquer, 21 Ill. 294; Gold *v.* Ryan, 14 Ill. 53; Adams *v.* Payson, 11 Ill. 26.

Iowa.— Bottorff *v.* Lewis, 121 Iowa 27, 95 N. W. 262.

Kentucky.— Higgins *v.* Conner, 3 Dana 1; White *v.* Lewis, 2 A. K. Marsh. 123.

Michigan.— Covell *v.* Cole, 16 Mich. 223.

Tennessee.— Chadwell *v.* McCall, 1 Tenn. Ch. 640.

See 19 Cent. Dig. tit. "Equity," § 969.

Amount.— A bill charging that at least a certain amount is due, a decree may pass for that amount. Neal *v.* Keel, 4 T. B. Mon. (Ky.) 162.

Regardless of the prayer the appropriate decree will be rendered. Hendrickson *v.* Winne, 3 How. Pr. (N. Y.) 127.

7. Madden *v.* Floyd, 69 Ala. 221; Gault *v.* Hoagland, 25 Ill. 266; Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83.

Answering defendant not regarded.—Where the bill seeks distinct relief against two defendants, one who answers has no right to be heard upon the form of the decree against the other. Millard *v.* Tripp, 2 R. I. 543.

8. Dunfee *v.* Mutual Bldg., etc., Assoc., 101 Ill. App. 477; Roby *v.* Chicago Title, etc., Co., 94 Ill. App. 379 [decree *affirmed* on this point but modified on others in 194 Ill. 228, 62 N. E. 544]; Masterson *v.* Howard, 18 Wall. (U. S.) 99, 21 L. ed. 764.

9. Mattingly *v.* Corbit, 7 B. Mon. (Ky.) 376; Graham *v.* Sublett, 6 J. J. Marsh. (Ky.) 44; Lytle *v.* Breckenridge, 3 J. J. Marsh. (Ky.) 663; McGavock *v.* Clark, 93 Va. 810, 22 S. E. 864; Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220; Coleman *v.* Waters, 13 W. Va. 278. The statutory rights of such a defendant need not be expressly reserved. Meriwether *v.* Hite, 2 A. K. Marsh. (Ky.) 181. Such a decree is as valid and effectual for all local purposes as one rendered on personal service. Mutual L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184. For the effect of such decrees under different statutes see the following cases:

Michigan.— King *v.* Harrington, 14 Mich. 532.

New York.— Davoue *v.* Fanning, 4 Johns. Ch. 199.

North Carolina.— McCaskill *v.* McBryde, 37 N. C. 52.

South Carolina.— Watlington *v.* Howley, 1 Desauss. 167.

Tennessee.— Scovel *v.* Absten, 1 Tenn. Ch. 73.

Virginia.— Rootes *v.* Tompkins, 3 Gratt. 94.

See 19 Cent. Dig. tit. "Equity," § 970.

10. Holloway *v.* Moore, 4 Sm. & M. (Miss.) 594; Petty *v.* Hannum, 2 Humphr. (Tenn.) 102, 36 Am. Dec. 303. And see Fulton *v.* Woodman, 54 Miss. 158.

Under some circumstances a confession so made by one defendant may be evidence against another. Johnson *v.* McGilvary, 1 J. J. Marsh. (Ky.) 321.

11. Jordan *v.* Brunough, 11 Ark. 702; Comley *v.* Hendricks, 8 Blackf. (Ind.) 189; Pierson *v.* David, 4 Iowa 410; Ross *v.* Daviess, 4 J. J. Marsh. (Ky.) 383; Nall *v.* Combs, 1 J. J. Marsh. (Ky.) 323; Cunningham *v.* Steele, 1 Litt. (Ky.) 52. Evidence on the issue taken as to the answering defendants is proof against those who have defaulted and against whom the bill has been taken as confessed. Michigan Ins. Co. *v.* Whittemore, 12 Mich. 427.

12. *Arkansas.*— Aikin *v.* Harrington, 12 Ark. 391.

Delaware.— Farmers' Bank *v.* Gilpin, 1 Harr. 561.

defenses of the answering defendants have no necessary connection, so that upon the trial it turns out that a final decree upon the merits against the defaulting defendants is not inconsistent with a decree dismissing the bill as against defendants not in default.[13]

E. Construction and Effect of Decrees — 1. In General. In construing a decree the intent of the court granting it will be looked to,[14] and provisions may accordingly be sometimes implied.[15] The decree will be construed and restricted in accordance with the pleadings,[16] and even with reference to other parts of the record.[17] A liability for money under a decree is joint and several and so to declare it is surplusage.[18]

2. Decrees Relating to Title. A decree establishing an existing title operates of itself and carries with it the right of possession,[19] but as equity has in the absence of statute no power to create or transfer title, a decree for that purpose must direct the making of a conveyance, and the title passes by virtue of the conveyance and not by virtue of the decree alone.[20] Frequently, however, statutes create exceptions to this rule, but the provisions of such statutes vary.[21]

Kentucky.— Curts *v.* Hill, 3 Bibb 463; Harrison *v.* Deremiah, 2 Bibb 349.

Maryland.— Walsh *v.* Smyth, 3 Bland 9; Lingan *v.* Henderson, 1 Bland 236.

Michigan.— Buchoz *v.* Lecour, 9 Mich. 234.

Mississippi.— Kelly *v.* Brooks, 57 Miss. 225; Hargrove *v.* Martin, 6 Sm. & M. 61; Minor *v.* Stewart, 2 How. 912.

New York.— Clason *v.* Morris, 10 Johns. 524.

North Carolina.— Andres *v.* Lee, 21 N. C. 318.

Tennessee.— Butler *v.* Kinzie, 90 Tenn. 31, 15 S. W. 1068; McDaniel *v.* Goodall, 2 Coldw. 391; Hennessee *v.* Ford, 8 Humphr. 499.

Vermont.— Kopper *v.* Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

Virginia.— Aiken *v.* Connelley, (1896) 24 S. E. 909; Ashby *v.* Bell, 80 Va. 811; Cartigne *v.* Raymond, 4 Leigh 579. And see Terry *v.* Fountaine, 83 Va. 451, 2 S. E. 743.

See 19 Cent. Dig. tit. "Equity," § 959.

13. Ramsdell *v.* Eaton, 12 Mich. 117; State *v.* Columbia, 12 S. C. 370; Simpson *v.* Moore, 5 Lea (Tenn.) 372. And see Lingan *v.* Henderson, 1 Bland (Md.) 236. Where the bill is sufficient, and contains a prayer for general relief, and decrees *pro confesso* are entered against some of the defendants, it is error to dismiss the bill as to them on final hearing, although the evidence is insufficient to support the bill as to the answering defendants. Ft. Payne Bank *v.* Alabama Sanitarium, 103 Ala. 358, 15 So. 618.

14. Doscher *v.* Blackiston, 7 Oreg. 403. A decree that defendant "removed the dam so as not to overflow the plaintiff's land" does not necessarily direct the removal of the whole dam. Thornton *v.* Webb, 13 Minn. 498. A decree for the payments of debts in due course of administration means in accordance with their legal priorities. Ainslie *v.* Radcliff, 7 Paige (N. Y.) 439.

15. Overruling demurrer.— A decree on a bill will be deemed to overrule a demurrer thereto. Miller *v.* Black Rock Springs Imp. Co., 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924; Fluharty *v.* Mills, 49 W. Va. 446, 38 S. E. 521.

Implied dismissal.— Where after final hearing the court decrees for defendant for costs it will be taken to dismiss the bill. Carver *v.* Lasater, 36 Ill. 182.

16. Stockton *v.* Knock, 73 Cal. 425, 15 Pac. 51; Woodgate *v.* Fleet, 9 Abb. Pr. (N. Y.) 222; Graham *v.* La Crosse, etc., R. Co., 3 Wall. (U. S.) 704, 18 L. ed. 247.

Only in case of doubt may this be done. Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475; Walker *v.* Page, 21 Gratt. (Va.) 636.

If the decree refers to the record of another suit as an exhibit, it makes it a part of the record to which reference may be made. Craig *v.* Sebrell, 9 Gratt. (Va.) 131.

17. As the opinion of the court (Philadelphia Third Reformed Dutch Church *v.* Fox, 12 Phila. (Pa.) 296; New Orleans, etc., R. Co. *v.* New Orleans, 14 Fed. 373) or a stipulation on file (Thayer *v.* McGee, 20 Mich. 195).

An interlocutory and a final decree will be construed together to determine the effect of the latter. McLemore *v.* Nuckolls, 37 Ala. 662.

18. Thorn *v.* Tyler, 3 Blackf. (Ind.) 504.

19. Root *v.* Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. ed. 1123.

A decree annulling a deed confirms the title of the grantor. Macklin *v.* Schmidt, 104 Mo. 361, 16 S. W. 241.

20. Prewitt *v.* Ashford, 90 Ala. 294, 7 So. 831; Mummy *v.* Johnston, 3 A. K. Marsh. (Ky.) 220; Wallis *v.* Wilson, 34 Miss. 357; Tardy *v.* Morgan, 23 Fed. Cas. No. 13,752, 3 McLean 358. *Contra*, as to personal property. Banks *v.* Wilks, 1 Humphr. (Tenn.) 279. The decree is only for the conveyance of such title as the person ordered to make the conveyance has (Burden *v.* McElmoyle, Bailey Eq. (S. C.) 375) or that of grantees *pendente lite* (Walter *v.* Riehl, 38 Md. 211).

A consent decree is in itself in effect a conveyance. Rollins *v.* Henry, 78 N. C. 342.

21. For the construction and effect of various statutes of this class see the following cases:

Connecticut.— King *v.* Bill, 28 Conn. 593.

Missouri.— Macklin *v.* Schmidt, 104 Mo. 361, 16 S. W. 241; Macklin *v.* Allenberg, 100

F. Enforcing Decrees — 1. In General. As equity acts primarily *in personam*,[22] the general method of enforcing a decree which is not self-executing is by contempt proceedings against the party refusing to obey it.[23] In the English chancery the foundation for such proceedings was laid by the service of a writ of execution, requiring obedience to the ordering part of the decree as recited in the writ.[24] The jurisdiction of the court continues for the purpose of enforcing and controlling the execution of the decree.[25] The court may often still proceed by attachment or similar process against the person,[26] or in an appropriate case by writ of sequestration.[27] More direct methods are, however, now usually available, such as executions analogous to those used at law, for the purpose of enforcing the payment of money.[28] On a decree awarding land to plaintiff, or after a sale of land, the purchaser will be put in possession by a writ of assistance or other writ having the same effect.[29] It is familiar practice, authorized now in most jurisdictions, where the court directs a conveyance of land, to appoint a commis-

Mo. 337, 13 S. W. 350; Gitt *v.* Watson, 18 Mo. 274.

New Jersey.— Stellmacher *v.* Kloepping, 36 N. J. L. 176; Price *v.* Sisson, 13 N. J. Eq. 168.

North Carolina.— Morris *v.* White, 96 N. C. 91, 2 S. E. 254.

Ohio.— Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603.

United States.— Langdon *v.* Sherwood, 124 U. S. 74, 8 S. Ct. 429, 31 L. ed. 344.

See 19 Cent. Dig. tit. "Equity," § 1050.

22. See *supra*, III, D.

23. See, generally, Contempt, 9 Cyc. 1.

24. 2 Daniell Ch. Pr. 702.

25. *Kentucky.*— Wickliffe *v.* Lee, 6 B. Mon. 543.

Mississippi.— Goff *v.* Robins, 33 Miss. 153.

New York.— Ludlow *v.* Lansing, Hopk. 231.

Tennessee.—Deaderick *v.* Smith, 6 Humphr. 138.

Virginia.— Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766.

West Virginia.— Trimble *v.* Patton, 5 W. Va. 432.

See 19 Cent. Dig. tit. "Equity," § 1054.

Dishursement of money.— The court may appoint a commissioner to receive money ordered to be paid, supervise the disbursement, and see that proper releases are given. National Waterworks Co. *v.* Kansas City, 65 Fed. 691.

Counsel and officers having a right to fees may obtain a rule requiring the prevailing party to enforce his decree. Cain *v.* Farmer, 74 Ga. 38.

Order for enforcement going beyond the decree is void. Groce *v.* Field, 13 Ga. 24.

26. Whalen *v.* Billings, 104 Ill. App. 281; Scott *v.* Jailer, 1 Grant (Pa.) 237; Leslie *v.* Mahoning R. Co., 22 Pa. Co. Ct. 300; Horton *v.* Horton, 4 Hen. & M. (Va.) 403.

On decree against one as a representative an execution against the person cannot be had. *In re* Hugg, 1 Pa. L. J. Rep. 237.

27. *Delaware.*— Hayes *v.* Hayes, 4 Del. Ch. 20; Wollaston *v.* Phillips, 1 Del. Ch. 271.

Maryland.— Keighler *v.* Ward, 8 Md. 254.

Massachusetts.— Grew *v.* Breed, 12 Metc. 363, 46 Am. Dec. 687.

New Jersey.— National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 167, 33 Atl. 936.

New York.— Hosack *v.* Rogers, 11 Paige 603; White *v.* Geraerdt, 1 Edw. 336.

See 19 Cent. Dig. tit. "Equity," § 1057. And see, generally, Sequestration.

28. *Alabama.*— McLemore *v.* Nuckolls, 37 Ala. 662; Stapler *v.* Hurt, 16 Ala. 799.

Georgia.— Coulter *v.* Lumpkin, 94 Ga. 225, 21 S. E. 461.

Illinois.— Whalen *v.* Billings, 104 Ill. App. 281; Durbin *v.* Durbin, 71 Ill. App. 51.

New York.— Otis *v.* Forman, 1 Barb. Ch. 30.

Pennsylvania.— Hart *v.* Homiller, 23 Pa. St. 39; Scholl *v.* Schoener, 1 Woodw. 134.

Vermont.— Hall *v.* Dana, 2 Aik. 381.

See 19 Cent. Dig. tit. "Equity," § 1055. And see, generally, Executions.

Proceedings supplementary to execution may be based on a money decree in a suit in equity. Sage *v.* St. Paul, etc., R. Co., 47 Fed. 3.

The court has control of the execution and may quash one regularly issued. Windrum *v.* Parker, 2 Leigh (Va.) 361.

An execution will not lie to enforce a decree ordering money to be paid into court (United Lines Tel. Co. *v.* Stevens, 67 Md. 156, 8 Atl. 908), or an interlocutory decree (Schmidt *v.* Haas, 8 Del. Co. (Pa.) 133).

Alternative decree.— Where the decree is for the payment of money, or if not paid the sale of land, there can be no execution without order of court. Shackelford *v.* Apperson, 6 Gratt. (Va.) 451.

As to whether a money decree becomes dormant so as to prevent execution in the same time as a judgment at law see State *v.* Mobile, 24 Ala. 701; Duff *v.* Combs, 8 B. Mon. (Ky.) 386.

29. *Illinois.*— Oberein *v.* Wells, 163 Ill. 101, 45 N. E. 294.

Iowa.— White *v.* Hampton, 13 Iowa 259.

Maryland.— Oliver *v.* Caton, 2 Md. Ch. 297.

New York.— Valentine *v.* Teller, Hopk. 422; Devaucene *v.* Devaucene, 1 Edw. 272.

United States.— Oneale *v.* Caldwell, 18 Fed. Cas. No. 10,515, 3 Cranch C. C. 312.

sioner or master to execute the conveyance if the party directed to make it refuses or is incompetent to do so.[30]

2. STAYING ENFORCEMENT AND ENLARGING TIME. The court may when equitable circumstances require stay or suspend the execution of a decree,[31] or may enlarge the time allowed for its performance.[32]

3. NECESSITY OF REVIVOR. It is sometimes necessary in order that a decree may be carried into effect that it be revived, as where a party thereto has died,[33] or where by lapse of time a presumption of performance has arisen.[34] A decree may be revived pending a suit to vacate it.[35] A decree in equity must be revived by a bill of revivor and not by scire facias.[36] Want of jurisdiction to render the decree is a defense to the bill of revivor,[37] but error in the original proceedings is not.[38]

4. BILLS TO ENFORCE DECREES. Where a decree has remained unexecuted until it is necessary to have an adjudication to settle rights which have become embarrassed by subsequent events, a bill will lie to ascertain and settle such rights and

See 19 Cent. Dig. tit. "Equity," § 1054. And see, generally, ASSISTANCE, WRIT OF, 4 Cyc. 289.

A writ of possession will not ordinarily be issued, and never where the party in possession may defend. Flowers *v.* Brown, 21 Ill. 270. See also Starke *v.* Lewis, 23 Miss. 151. On application for writ of possession oral testimony may be taken. Trimble *v.* Patton, 5 W. Va. 432.

30. Owings' Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Goodwin *v.* McCluer, 3 Gratt. (Va.) 291. And see, generally, SPECIFIC PERFORMANCE.

Where a decree is void as to some defendants, the deed will of course not pass their title. Downing *v.* Ford, 9 Dana (Ky.) 391.

If a commissioner's deed contains an erroneous description he may correct it by a subsequent deed. Guinn *v.* Bowers, 44 W. Va. 507, 29 S. E. 1027.

Improperly to direct such a conveyance is harmless error, so far as defendant is concerned, where the decree properly declares his title void. Hager *v.* Shindler, 29 Cal. 47.

31. *New Jersey.*— Woodbury Heights Land Co. *v.* Loudenslager, 60 N. J. Eq. 403, 45 Atl. 630.

North Carolina.— Greenlee *v.* McDowell, 39 N. C. 481.

South Carolina.— Spann *v.* Spann, 2 Hill Eq. 152.

Tennessee.— *In re* Chadwell, 7 Heisk. 630.

West Virginia.— Smith *v.* McLain, 11 W. Va. 654.

United States.— Witters *v.* Sowles, 32 Fed. 765, 766.

See 19 Cent. Dig. tit. "Equity," § 1053.

Even one not a party may it seems obtain such an order. Wright *v.* Phillips, 56 Ala. 69.

Execution of a decree of the same court may be restrained in the same manner as judgments of other courts. Montgomery *v.* Whitworth, 1 Tenn. Ch. 174.

If the decree is satisfied an execution will be arrested on motion. Molyneaux *v.* Marsh, 17 Fed. Cas. No. 9,703, 1 Woods 452.

A consent decree will not be stayed. Anderson *v.* Jacksonville, etc., R. Co., 1 Fed. Cas. No. 358, 2 Woods 628.

Subsequent showing of equities between defendants is not sufficient ground for staying a decree. Proudfit *v.* Picket, 7 Coldw. (Tenn.) 563.

32. Cadotte *v.* Cadotte, 120 Mich. 667, 79 N. W. 932; Baird *v.* Shepherd, 2 Ohio 261; Lawrence *v.* Staigg, 10 R. I. 581.

33. *Kentucky.*— Morton *v.* Long, 3 A. K. Marsh. 414.

Maryland.— Glenn *v.* Clapp, 11 Gill & J. 1; Allen *v.* Burke, 1 Bland 544; Owings' Case, 1 Bland 370, 17 Am. Dec. 311.

Michigan.— De Mill *v.* Port Huron Dry Dock Co., 30 Mich. 38.

New York.— Washington Ins. Co. *v.* Slee, 2 Paige 365; Livingston *v.* Woolsey, 4 Johns. Ch. 365.

Ohio.— Cist *v.* Beresford, 1 Ohio Cir. Ct. 32, 1 Ohio Cir. Dec. 19.

See 19 Cent. Dig. tit. "Equity," § 1062.

It is not necessary to revive a decree against defendant's administrator in order to enforce its lien against the land of the decedent. Burbridge *v.* Higgins, 6 Gratt. (Va.) 119.

Under the codes a revivor is not generally necessary. Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064 [*affirming* 5 N. Y. Suppl. 550]; Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657; Trenholm *v.* Wilson, 13 S. C. 174.

34. Franklin *v.* Franklin, 1 Md. Ch. 342. An entry on the docket "ended" does not preclude a revivor. Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

35. Cannon *v.* Hemphill, 7 Tex. 184.

36. Curtis *v.* Hawn, 14 Ohio 185. See also *supra*, XIII, A, 1. Where it is necessary to revive against a purchaser, it must be by original bill in the nature of a supplemental bill and bill of revivor. Tallman *v.* Varick, 5 Barb. (N. Y.) 277. The bill must be filed in the court in which the decree was rendered. Arnold *v.* Styles, 2 Blackf. (Ind.) 391.

37. Green *v.* Breckinridge, 4 T. B. Mon. (Ky.) 541.

38. Breckinridge *v.* Taylor, 1 B. Mon. (Ky.) 263; Carr *v.* Green, Rich. Eq. Cas. (S. C.) 405.

enforce the decree,[39] and a bill will also lie to carry out the decree according to its object, where further orders are necessary in order to effectuate it and give it complete force.[40] So too a bill in the nature of a creditor's bill will lie to subject property which cannot be directly reached to the satisfaction of the decree.[41] An original bill is necessary to enforce the decree of a court which has ceased to exist, if other provision has not been made for that purpose.[42] Any cause which may exist against the enforcement of the decree must be shown by answer to the second bill.[43] Want of jurisdiction of the person of defendant in the first suit is a defense to the bill,[44] but mere error or irregularity is not.[45] It is generally held that defendant cannot show by way of defense fraud in procuring the decree.[46] It is, however, held that on such a bill the court will refuse to enforce the original decree, if found to be inequitable and unjust.[47]

XXIV. PROCEEDINGS TO CORRECT OR VACATE DECREES.

A. Introductory Statement. The power of the court to correct errors and to modify or vacate decrees and the proceedings to accomplish those objects depend upon the character of the decree, the character of the error or defect, and the time when the application is made. It may be laid down as a broad general proposition that the power of correcting and changing findings and orders exists, unimpaired by any limitation, as long as the cause remains open and within the jurisdiction of the court.[48] The application ought and in most cases must be made to the judge who granted the decree.[49] The whole matter is now sometimes con-

39. *Alabama.*— Griffin *v.* Spence, 69 Ala. 393; Hogan *v.* Davis, 3 Ala. 70.

California.— McFadden *v.* McFadden, 44 Cal. 306.

Indiana.— Linton *v.* Potts, 5 Blackf. 396.

North Carolina.— Wright *v.* Bowden, 54 N. C. 15, 59 Am. Dec. 600.

Pennsylvania.— Winton's Appeal, 97 Pa. St. 385.

See 19 Cent. Dig. tit. "Equity," § 1058.

A petition and not a new bill is the proper remedy where the parties remain amenable and no new rights have arisen, in case any application is necessary. Raft River Land, etc., Co. *v.* Langford, 5 Ida. 62, 46 Pac. 1024; Ray *v.* Ray, 1 Ida. 566; Frieze *v.* Glenn, 2 Md. Ch. 361; Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117.

A pleading in a case requiring a separate suit may be treated as instituting such separate suit, where the adverse party appears, although it was filed in the original case. Haynie *v.* McAnally, (Tex. Civ. App. 1894) 27 S. W. 431.

40. Wadhams *v.* Gay, 73 Ill. 415; Williams' Appeal, 1 Mona. (Pa.) 274; Root *v.* Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. ed. 1123.

41. Farnsworth *v.* Strasler, 12 Ill. 482; Mummys *v.* Morgan, 3 Litt. (Ky.) 295; Grew *v.* Breed, 12 Metc. (Mass.) 363, 46 Am. Dec. 687; White *v.* Geraerdt, 1 Edw. (N. Y.) 336.

42. Yocam *v.* Chapline, 2 Bibb (Ky.) 156.

43. Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117; Tallman *v.* Varick, 5 Barb. (N. Y.) 277.

44. Rutledge *v.* Waldo, 94 Fed. 265.

45. Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364; Greenup *v.* Rennix, Hard. (Ky.) 594; Tomlinson *v.* McKaig, 5 Gill (Md.) 256. On a bill to enforce a decree the court will not as a rule change the original decree. Hampson *v.* Sumner, 18 Ohio 444. If the record discloses sufficient to justify an amendment of the original it will be treated as amended. State *v.* Mobile, 24 Ala. 701.

46. Burch *v.* Scott, 1 Bland (Md.) 112; Wright *v.* Miller, 1 Sandf. Ch. (N. Y.) 103; Caldwell *v.* Giles, 2 Hill Eq. (S. C.) 548. *Contra*, Carneal *v.* Wilson, 3 Litt. (Ky.) 80.

47. Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813; Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397. Only under special circumstances will the court do so. Este *v.* Strong, 2 Ohio 401.

The issues in the first suit will not be relitigated. Dunlap *v.* McIlvoy, 3 Litt. (Ky.) 269.

48. Long *v.* Cole, 72 N. C. 20; Tindal *v.* Tindal, 1 S. C. 111; Keep *v.* Sanderson, 12 Wis. 352; Journeycake *v.* Cherokee Nation, 30 Ct. Cl. 172.

Before the decree is recorded the power is certainly plenary. Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Witters *v.* Sowles, 32 Fed. 130, 2 Blatchf. 550.

49. Baldwin *v.* Latson, 2 Barb. Ch. (N. Y.) 306; Cowman *v.* Lovett, 10 Paige (N. Y.) 559; Russell *v.* Kinney, 10 Paige (N. Y.) 315; Jeannerett *v.* Radford, Rich. Eq. Cas. (S. C.) 469; Hicklin *v.* Marco, 64 Fed. 609.

A decision in banc cannot be disturbed by a single judge. Carlisle *v.* McDonald, 7 Ohio 267; Quidnick Co. *v.* Chafee, 13 R. I. 367.

After decree by an appellate court the court below cannot alter a decree except as it may be remanded for that particular purpose. Canerdy *v.* Baker, 55 Vt. 578; Price *v.* Campbell, 5 Call (Va.) 115; White *v.* Atkinson, 2 Call (Va.) 376; Pierce *v.* Kneeland, 9 Wis. 23; Hill *v.* Hoover, 9 Wis. 15.

trolled by statutes the provisions of which vary too much for specific statement.[50] An original bill to set aside a decree cannot be maintained on the ground of irregularities and errors which might have been corrected on appeal or by a bill of review.[51]

B. Consent Decrees. A decree entered by consent cannot be amended or vacated, nor will a rehearing be allowed thereon, except by like consent.[52] The rule applies, however, only where the decree is entered in accordance with the free consent of the parties. Therefore a decree will be reformed, if as entered it does not express the true intention of the parties,[53] or vacated for reasons sufficient to justify setting aside the consent.[54]

A judge other than the one who presided may amend a decree to show the true amount due. Palmer *v.* Harris, 100 Ill. 276.

Decisions of a vice-chancellor will be reheard by the chancellor only where special reasons exist. Pullen *v.* Pullen, 41 N. J. Eq. 417, 5 Atl. 658.

The death of a judge after announcing a decree is neither an objection nor a ground for a rehearing. Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

50. The following cases construe particular provisions of the statutes of the jurisdictions named:

Alabama.— *Ex p.* Gresham, 82 Ala. 359, 2 So. 486; Bingham *v.* Montgomery, 59 Ala. 334.

Arkansas.— Turner *v.* Vaughan, 33 Ark. 454.

Connecticut.— Samis *v.* King, 40 Conn. 298.

Florida.— Friedman *v.* Rehm, 43 Fla. 330, 31 So. 234.

Georgia.— Coston *v.* Dudley, 65 Ga. 252.

Illinois.— Koehler *v.* Ernst Toseti Brewing Co., 101 Ill. App. 339 [*affirmed* in 200 Ill. 369, 65 N. E. 636].

Indiana.— McGregor *v.* Axe, 10 Ind. 362.

Kentucky.— McLean *v.* Nixon, 18 B. Mon. 768.

Mississippi.— McAllister *v.* Plant, 49 Miss. 628; Foy *v.* Foy, 25 Miss. 207.

Montana.— Power *v.* Lenoir, 22 Mont. 169, 56 Pac. 106.

Nebraska.— Jennings *v.* Simpson, 12 Nebr. 558, 11 N. W. 880.

New York.— Schermerhorn *v.* New York, 3 How. Pr. 254; Crane *v.* Crane, 1 Code Rep. 92; Sheldon *v.* Barnard, 1 Code Rep. 82.

North Carolina.— Thaxton *v.* Williamson, 72 N. C. 125.

Ohio.— Corry *v.* Campbell, 34 Ohio St. 204; Hittell *v.* Smith, 4 Ohio Dec. (Reprint) 217, 1 Clev. L. Rep. 124.

Tennessee.— Myers *v.* James, 4 Lea 370; Burns *v.* Edgefield, 3 Tenn. Ch. 137.

Utah.— Sidney Stevens Implement Co. *v.* South Ogden Land, etc., Co., 20 Utah 267, 58 Pac. 843.

Vermont.— Slason *v.* Cannon, 19 Vt. 219.

Virginia.— Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458; Saunders *v.* Griggs, 81 Va. 506; Dillard *v.* Dillard, 77 Va. 820.

West Virginia.— Schumate *v.* Crockett, 43 W. Va. 491, 27 S. E. 240; Rader *v.* Adamson, 37 W. Va. 582, 16 S. E. 808; Shipman *v.* Bailey, 20 W. Va. 140.

Wisconsin.— *In re* Jackman, 26 Wis. 104; Ætna L. Ins. Co. *v.* McCormick, 20 Wis. 265.

51. Cocke *v.* Copenhaver, 126 Fed. 145, 61 C. C. A. 211.

52. *Arkansas.*— Peay *v.* Tannehill, 27 Ark. 114.

Florida.— White *v.* Walker, 5 Fla. 478.

Illinois.— Armstrong *v.* Cooper, 11 Ill. 540.

Michigan.— Hodges *v.* McDuff, 76 Mich. 303, 43 N. W. 428; Hammond *v.* Place, Harr. 438.

Mississippi.— Pipkin *v.* Haun, Freem. 254.

New York.— Monell *v.* Lawrence, 12 Johns. 521; Leitch *v.* Cumpston, 4 Paige 476; Coster *v.* Clarke, 3 Edw. 405.

Rhode Island.— Bristol *v.* Bristol, etc., Waterworks, 19 R. I. 631, 35 Atl. 884, 25 R. I. 189, 55 Atl. 710.

West Virginia.— Morris *v.* Peyton, 29 W. Va. 201, 11 S. E. 954.

See 19 Cent. Dig. tit. "Equity," §§ 1028, 1039.

Interlocutory decrees are governed by the same principle. Edney *v.* Edney, 81 N. C. 1. But where the interlocutory decree, although consented to, is based on a former decree made *in invitum*, either party may apply for a rehearing. Wilcox *v.* Wilcox, 36 N. C. 36.

If the adverse party consents conditionally to correcting the decree, the party applying must consent to the condition in order to obtain the correction. Leitch *v.* Cumpston, 4 Paige (N. Y.) 476.

A decree entered in vacation, without the knowledge of the chancellor but in conformity with a stipulation of the parties, will not be set aside on motion. If any one is injured he must bring the entire case before the court on its merits. Bayerque *v.* Jackson Water Co., 2 Fed. Cas. No. 1,136, 1 McAll. 85.

53. *North Carolina.*—Kerchner *v.* McEachern, 93 N. C. 447.

South Carolina.— Edgerton *v.* Muse, 2 Hill Eq. 51.

Tennessee.— Jones *v.* Goodlett, (Ch. App. 1897) 39 S. W. 539.

West Virginia.— Zane *v.* Fink, 18 W. Va. 693; Manion *v.* Fahy, 11 W. Va. 482.

United States.— U. S. *v.* Castro, 25 Fed. Cas. No. 14,754, 5 Sawy. 625.

See 19 Cent. Dig. tit. "Equity," §§ 1028, 1039.

54. *Ex p.* Gresham, 82 Ala. 359, 2 So. 486.

Consent of an unauthorized attorney is such a reason. Jones *v.* Williamson, 5 Coldw.

C. Interlocutory Decrees. An interlocutory decree remains subject to the control of the court throughout the remainder of the proceedings and may at any time be amended [55] or vacated.[56] This power of revision may be exercised on motion [57] or petition,[58] or by rendering on final hearing a different decree.[59] An interlocutory decree will not, however, be disturbed, except in the exercise of sound discretion, and for mistake of law or fact.[60] A decree merely confirming

(Tenn.) 371; Terry *v.* Alabama Commercial Bank, 92 U. S. 454, 23 L. ed. 620.

Fraud or mistake.— Fraud and undue influence afford grounds for setting aside a consent decree (Monell *v.* Lawrence, 12 Johns. (N. Y.) 521; Rollins *v.* Henry, 78 N. C. 342; Watson *v.* Smith, 7 Oreg. 448), and so does mistake, but after the term at which the decree was entered relief for mistake or fraud must be sought by original bill (Armstrong *v.* Wilson, 19 W. Va. 108; Rose *v.* Brown, 17 W. Va. 649; Manion *v.* Fahey, 11 W. Va. 482), and with reasonable promptness (*In re* Pentlarge, 19 Fed. Cas. No. 10,962, 4 Ban. & A. 607, 17 Blatchf. 306). The proof must be clear. Yonge *v.* Hooper, 73 Ala. 119; Charles *v.* Miller, 36 Ala. 141.

55. *Alabama.*— *Ex p.* McLendon, 33 Ala. 276.

Illinois.— Jeffery *v.* Robbins, 167 Ill. 375, 47 N. E. 725 [*affirming* 62 Ill. App. 190]; Brush *v.* Seguin, 24 Ill. 254.

Maryland.— Wilhelm *v.* Caylor, 32 Md. 151; Ridgely *v.* Bond, 18 Md. 433.

Massachusetts.— Park *v.* Johnson, 7 Allen 378; White *v.* Gove, 183 Mass. 333, 67 N. E. 359.

Mississippi.— Kimball *v.* Alcorn, 45 Miss. 145; Pattison *v.* Josselyn, 43 Miss. 373; Cook *v.* Bay, 4 How. 485.

Missouri.— Warren *v.* Williams, 25 Mo. App. 22.

North Carolina.— Miller *v.* Justice, 86 N. C. 26; Ashe *v.* Moore, 6 N. C. 383.

South Carolina.— *Ex p.* Dunn, 8 S. C. 207.

Vermont.— Flint *v.* Johnson, 59 Vt. 190, 9 Atl. 364.

Virginia.— Wright *v.* Strother, 76 Va. 857; McCandlish *v.* Edloe, 3 Gratt. 330.

United States.— Wooster *v.* Handy, 21 Fed. 51; Clark *v.* Blair, 14 Fed. 812, 4 McCrary 311; De Florez *v.* Raynolds, 8 Fed. 434, 17 Blatchf. 436; Linder *v.* Lewis, 4 Fed. 318; Coates *v.* Muse, 5 Fed. Cas. No. 2,916, 1 Brock. 529; Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,462, 5 Biss. 237; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,661, 2 Ban. & A. 256.

See 19 Cent. Dig. tit. "Equity," §§ 1027, 1040.

Verbal errors may be corrected before entering a final decree. Pingree *v.* Coffin, 12 Gray (Mass.) 288.

Ten years' acquiescence in an interlocutory decree was under special circumstances held no bar for a rehearing thereon. Todd *v.* McFall, 96 Va. 754, 32 S. E. 472.

A motion to set aside an order should be made not later than the following term. Keeney *v.* Lyon, 21 Iowa 277; N. K. Fairbank Co. *v.* Windsor, 124 Fed. 200, 61 C. C. A. 233 [*reversing* 118 Fed. 96].

56. *Alabama.*— Pinkard *v.* Allen, 75 Ala. 73.

Arkansas.— Miller *v.* Hemphill, 9 Ark. 488.

Illinois.— Yarnell *v.* Brown, 65 Ill. App. 83; Jeffery *v.* Robbins, 62 Ill. App. 190.

Maryland.— Waring *v.* Turton, 44 Md. 535; Barth *v.* Rosenfield, 36 Md. 604.

Mississippi.— Davis *v.* Roberts, Sm. & M. Ch. 543.

New Mexico.— Bent *v.* Miranda, 8 N. M. 78, 42 Pac. 91.

New York.— Hubbard *v.* Eames, 22 Barb. 597.

Virginia.— Repass *v.* Moore, 96 Va. 147, 30 S. E. 458; Sims *v.* Sims, 94 Va. 580. 27 S. E. 436, 64 Am. St. Rep. 772; Roberts *v.* Cocke, 1 Rand. 121; Lindsay *v.* Campbell, 4 Hen. & M. 505; Com. *v.* Beaumarchais, 3 Call 122.

See 19 Cent. Dig. tit. "Equity," § 1040.

After final decree based on an interlocutory decree, the latter will not be set aside for irregularity. Longfellow *v.* Longfellow, Clarke (N. Y.) 344.

Cause may be shown against a decree nisi at any time during the term at which it is made absolute. Allen *v.* Thomas, 1 Fed. Cas. No. 239, 1 Cranch C. C. 294.

57. Sheppard *v.* Starke, 3 Munf. (Va.) 29; Iowa *v.* Illinois, 151 U. S. 238, 14 S. Ct. 333, 38 L. ed. 145; Spring *v.* Domestic Sewing-Mach. Co., 13 Fed. 446.

58. Purdie *v.* Jones, 32 Gratt. (Va.) 827; Kendrick *v.* Whitney, 28 Gratt. (Va.) 646; Hyman *v.* Smith, 10 W. Va. 298.

A petition to rehear a decree, where the error complained of was in an interlocutory order, may be treated as a motion to set aside that order. Eason *v.* Billups, 65 N. C. 216.

59. *California.*— Thompson *v.* White, 76 Cal. 381, 18 Pac. 399.

Kentucky.— Brand *v.* Webb, 2 A. K. Marsh. 574.

Mississippi.— Topp *v.* Pollard, 24 Miss. 682.

Ohio.— Kelley *v.* Stanbery, 13 Ohio 408.

United States.— Fourniquet *v.* Perkins, 16 How. 82, 14 L. ed. 854; Steam Stone-Cutter Co. *v.* Sheldons, 21 Fed. 875.

See 19 Cent. Dig. tit. "Equity," § 1027.

Contra.— Kendrick *v.* Dallum, 1 Overt. (Tenn.) 489; Davis *v.* Demming, 12 W. Va. 246.

A decretal order cannot as a matter of course be reheard on final hearing. Hulbut *v.* Hutton, 42 N. J. Eq. 15, 6 Atl. 286.

60. Hunter *v.* Carmichael, 12 Sm. & M. (Miss.) 726; A. B. Dick Co. *v.* Wickelman, 77 Fed. 853; Coupe *v.* Weatherhead, 37 Fed. 16; Hop Bitters Mfg. Co. *v.* Warner, 28 Fed.

a report is generally interlocutory within the rules governing revision,[61] but is treated as final if it is conclusive as to the rights of the parties.[62] Indeed a decree, although interlocutory, is often held conclusive in so far as it adjudicates substantial rights, so that its provisions may not in subsequent proceedings be materially varied.[63] When the matter of an original bill has been adjudicated it cannot be reheard on hearing of a cross bill.[64]

D. Final Decrees — 1. Clerical and Formal Errors and Omissions. Mere clerical errors, errors of form or mistakes in the drafting of a decree, as distinguished from judicial errors, may be corrected on petition or motion.[65] This may be done without the formality of a rehearing,[66] and by a correction of the original degree or its enrolment, without entering a new decree.[67] The power to amend such errors continues after the enrolment of the decree and the adjournment of the term at which it was entered;[68] but the right of a party to move for such amendment may be lost by negligence,[69] or by unreasonable delay in making the application.[70]

2. Matters of Substance — a. Rehearing Generally Necessary. If the defect

577. An interlocutory decree will not be opened because another court has rendered a decision on the facts of a character which neither party sought when the interlocutory decree was made. Ingersoll *v.* Benham, 13 Fed. Cas. No. 7,036, 3 Ban. & A. 179, 14 Blatchf. 262.

61. Newport *v.* Longsdale Iron Co., 13 Ky. L. Rep. 300; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

62. Barroll *v.* Forman, 88 Md. 188, 40 Atl. 883; Contee *v.* Dawson, 2 Bland (Md.) 264; Davis *v.* Crews, 1 Gratt. (Va.) 407; Halsted *v.* Forest Hill Co., 109 Fed. 820.

63. *Alabama.*— Adams *v.* Sayre, 76 Ala. 509.

Kentucky.— Portwood *v.* Outton, 3 B. Mon. 247.

Nebraska.— Younkin *v.* Younkin, 44 Nebr. 729, 63 N. W. 31.

New Jersey.— Morris *v.* Taylor, 23 N. J. Eq. 131.

New York.— Gardner *v.* Dering, 2 Edw. 131.

Tennessee.— Campbell *v.* Crutcher, 3 Tenn. Ch. 253.

See 19 Cent. Dig. tit. "Equity," §§ 947, 1040.

64. Barker *v.* Belnap, 39 Vt. 168.

65. *Iowa.*— Cooper *v.* Cook, 108 Iowa 301, 79 N. W. 71.

Michigan.— Bates *v.* Garrison, Harr. 221.

New Jersey.— Day *v.* Argus Printing Co., 47 N. J. Eq. 594, 22 Atl. 1056.

New York.— American Ins. Co. *v.* Oakley, 9 Paige 496, 38 Am. Dec. 561; Clark *v.* Hall, 7 Paige 382; Hunt *v.* Wallis, 6 Paige 371; De Caters *v.* Le Ray de Chaumont, 3 Paige 178; Lawrence *v.* Cornell, 4 Johns. Ch. 545.

Oregon.— Smith *v.* Butler, 11 Oreg. 46, 4 Pac. 517.

South Carolina.— Knox *v.* Moore, 41 S. C. 355, 19 S. E. 683; Gowan *v.* Gentry, 32 S. C. 369, 11 S. E. 82.

Tennessee.— Spencer *v.* Armstrong, 12 Heisk. 707.

Vermont.— Porter *v.* Vaughan, 22 Vt. 269; Peaslee *v.* Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

See 19 Cent. Dig. tit. "Equity," § 1022.

Description of defendant.—A decree against "The administrator of A B," who is shown by the record to be C D, is amendable, and may be treated as amended so as to become a good decree against C D. Thomas *v.* Sterns, 33 Ala. 137.

After the court of errors had remitted a cause, but before the transcript had been received by the court of chancery, the court of errors held that it retained sufficient control to correct any inadvertence. Murray *v.* Blatchford, 2 Wend. (N. Y.) 221.

A decree entered against one not a party to the bill may be corrected on motion. Boggess *v.* Robinson, 5 W. Va. 402.

If it appears that a defendant was not served the decree may be set aside. Pindle *v.* Pennsylvania, etc., R. Co., 1 Lehigh Val. L. Rep. (Pa.) 201.

66. Clark *v.* Hall, 7 Paige (N. Y.) 382; U. S. Eq. Rule 85.

67. Lovejoy *v.* Irelan, 19 Md. 56.

68. *Georgia.*— Sloan *v.* Cooper, 54 Ga. 486.

Illinois.— Davenport *v.* Kirkland, 156 Ill. 169, 40 N. E. 304; Lilly *v.* Shaw, 59 Ill. 72.

Kentucky.— Hendrix *v.* Clay, 2 A. K. Marsh. 462.

Mississippi.— Guise *v.* Middleton, Sm. & M. Ch. 89.

New Jersey.— Lynde *v.* Lynde, 54 N. J. Eq. 473, 35 Atl. 641.

Virginia.— Marr *v.* Miller, 1 Hen. & M. 204.

United States.— Robinson *v.* Rudkins, 28 Fed. 8; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,573.

See 19 Cent. Dig. tit. "Equity," § 1025.

69. Lyon *v.* Brunson, 48 Mich. 194, 12 N. W. 32; Whitman *v.* Brotherton, 2 Tenn. Ch. 393. Although a decree falsely recites that plaintiff appeared at the hearing, the irregularity is waived if he appeared at the settlement of the decree and did not object to the recital. Chemung Canal Bank *v.* Judson, 8 N. Y. 254.

70. Chapman *v.* Wilbur, 5 Oreg. 299; Gunn *v.* Black, 60 Fed. 151, 8 C. C. A. 534.

in the decree be other than of the class just referred to, that is, if it be sought to vacate the decree or to modify it in matter of substance, this can generally not be done on motion, but only upon rehearing in pursuance of a petition for that purpose.[71] Without a rehearing, however, the court will make an amendment which would have been inserted of course at the time of the decree,[72] or it will correct an admitted error.[73]

b. Time For Making Application. In most jurisdictions the control of the court over the decree, for the purpose of vacating or modifying it, continues throughout the term at which the decree is entered;[74] but no power remains to make any substantial change after the expiration of the term, except by bill of review.[75] This is the practical rule, although technically it is the enrolment of

71. Hawkins *v.* Taber, 47 Ill. 459; Picabia *v.* Everard, 4 How. Pr. (N. Y.) 113, 2 Code Rep. (N. Y.) 69; Bennett *v.* Winter, 2 Johns. Ch. (N. Y.) 205; Ray *v.* Connor, 3 Edw. (N. Y.) 478; Long *v.* Cole, 66 N. C. 381; Herd *v.* Bewley, 1 Heisk. (Tenn.) 524; Prater *v.* Hoover, 1 Coldw. (Tenn.) 544; 2 Daniell Ch. Pr. 687. A petition is necessary in order to set aside a decree for surprise. Radley *v.* Shaver, 1 Johns. Ch. (N. Y.) 200. A final decree cannot be changed or reversed except by bill or petition in the same court or an appellate court. Deeds *v.* Deeds, 1 Greene (Iowa) 394. No modification can be made unless based on an appropriate pleading setting up the right. May *v.* Duke, 61 Ala. 53; Means *v.* Means, 42 Ill. 50.

72. Dorsheimer *v.* Rorback, 24 N. J. Eq. 33; Gardner *v.* Dering, 2 Edw. (N. Y.) 131.

An obvious miscalculation in the amount of a decree may be corrected by entering a credit on the decree for the excess. Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41.

Error in quantity.— Where it was evident from the record that the quantity of land had been estimated, the true quantity as ascertained by survey was inserted. Baines *v.* Clarke, 111 U. S. 789, 4 S. Ct. 671, 28 L. ed. 599.

73. McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823; McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65.

74. *California.*— Gronfier *v.* Minturn, 5 Cal. 492.

Illinois.— Frink *v.* King, 4 Ill. 144.

Kentucky.— Worthington *v.* Campbell, 1 S. W. 714, 8 Ky. L. Rep. 416.

Maryland.— Burch *v.* Scott, 1 Bland 112.

Mississippi.— Pattison *v.* Josselyn, 43 Miss. 373.

Tennessee.— Abbott *v.* Fagg, 1 Heisk. 742; Timmons *v.* Garrison, 4 Humphr. 148; Smith *v.* Sneed, Cooke 190.

West Virginia.— Mathews *v.* Tyree, 53 W. Va. 298, 44 S. E. 526.

United States.— Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. ed. 332; Doss *v.* Tyack, 14 How. 297, 14 L. ed. 428; Tilton *v.* Barrell, 17 Fed. 59, 9 Sawy. 84; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,661, 2 Ban. & A. 256.

See 19 Cent. Dig. tit. "Equity," §§ 1024, 1037.

There are cases implying an earlier termination of the court's control. Deere *v.* Nelson, 73 Iowa 186, 34 N. W. 809; Fraker *v.* Brazelton, 12 Lea (Tenn.) 278; Elliot *v* Cochran, 1 Coldw. (Tenn.) 389.

75. *Alabama.*— McQueen *v.* Whetstone, 127 Ala. 417, 30 So. 548; Marshall *v.* McPhillips, 79 Ala. 145; *Ex p.* Robinson, 72 Ala. 389; *Ex p.* Cresswell, 60 Ala. 378.

Arkansas.— Brady *v.* Hamlett, 33 Ark. 105; State *v.* Shall, 23 Ark. 601.

District of Columbia.— Schwartz *v.* Costello, 11 App. Cas. 553; Fries *v.* Fries, 1 MacArthur 291.

Florida.— Finlayson *v.* Lipscomb, 15 Fla. 558.

Georgia.— Clements *v.* Empire Lumber Co., 96 Ga. 319, 22 S. E. 987; Stapler *v.* Hardeman, 91 Ga. 127, 16 S. E. 657.

Illinois.— Hurd *v.* Goodrich, 59 Ill. 450; Koehler *v.* Ernst Tosetti Brewing Co., 101 Ill. App. 339 [*affirmed* in 200 Ill. 369, 65 N. E. 636]; Kihlholz *v.* Wolff, 8 Ill. App. 371.

Kentucky.— Brooks *v.* Love, 3 Dana 7; Baker *v.* Madison, 4 J. J. Marsh. 390.

Louisiana.— State *v.* Atchafalaya R., etc., Co., 7 Rob. 447; Balio *v.* Wilson, 12 Mart. 358, 12 Am. Dec. 376.

Maryland.— Williams *v.* Banks, 19 Md. 524; *In re* Young, 3 Md. Ch. 461; Burch *v.* Scott, 1 Bland 112; Hitch *v.* Davis, 3 Md. Ch. 266.

Mississippi.— Commercial Bank *v.* Lewis, 13 Sm. & M. 226.

Pennsylvania.— Weigley *v.* Coffman, 23 Wkly. Notes Cas. 27.

Tennessee.— State *v.* Bank of Commerce, 96 Tenn. 591, 36 S. W. 719; Bomar *v.* Hagler, 7 Lea 85; Tipton *v.* State Bank, 11 Heisk. 141; Allen *v.* Barksdale, 1 Head 238.

Virginia.— Commonwealth Bank *v.* Craig, 6 Leigh 399.

West Virginia.— Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603; Snyder *v.* Middle States Loan, etc., Co., 52 W. Va. 655, 44 S. E. 250.

United States.— Cameron *v.* McRoberts, 3 Wheat. 591, 4 L. ed. 467; McGregor *v.* Vermont L. & T. Co., 104 Fed. 709, 44 C. C. A. 146; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 17 C. C. A. 310; Omaha *v.* Redick, 63 Fed. 1, 11 C. C. A. 1; Allen *v.* Wilson, 21 Fed. 881; Linder *v.* Lewis, 1 Fed. 378; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,269, 1 Woodb. & M. 61; Scott *v.* Blaine, 21

the decree which places it beyond the control of the court,[76] the rule stated being usually worked out by treating the decree as enrolled at the end of the term.[77] A decree may, however, after enrolment be vacated by consent,[78] for false representation inducing the judge to sign it,[79] or in pursuance of statutory authority.[80] A decree may be amended after enrolment to insert matter inadvertently omitted,[81] and the enrolment itself may be vacated for irregularity in obtaining it.[82] As the power of the court continues for the purpose of carrying the decree into execution,[83] the limitation of the court's control to the term at which the decree was rendered does not apply to provisions inserted for the purpose of carrying the decree into effect, and such provisions may be amended or inserted at any time.[84] Because of the general limitation upon the power of the court to interfere with its decree, a rehearing may be allowed upon application made before the end of the term[85] or before enrolment,[86] but cannot be granted thereafter.[87] Other

Fed. Cas. No. 12,525, Baldw. 287; Scott *v.* Hore, 21 Fed. Cas. No. 12,535, 1 Hughes 163.

See 19 Cent. Dig. tit. "Equity," §§ 1025, 1038.

Adjournment of the term terminates the power of the court (Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616); but as in some jurisdictions a term is held open until the opening of the next term, it is there sufficient to apply before the commencement of the following term (Nowland *v.* Glenn, 2 Md. Ch. 368; Leach *v.* Jones, 11 R. I. 386; Plattsmouth First Nat. Bank *v.* Woodrum, 86 Fed. 1004).

Filing petition.— It is not sufficient to file the petition within time, but it must also be called to the attention of the court. Graham *v.* Swayne, 109 Fed. 366, 48 C. C. A. 411. Where the petition is filed during the term the court may pass upon it at a later term. Giant Powder Co. *v.* California Vigorit Powder Co., 5 Fed. 197, 6 Sawy. 527. See also Aulbach *v.* Read, 77 S. W. 204, 25 Ky. L. Rep. 1130. It is sufficient to present the petition within time, without giving notice. James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53.

Unless the decree is absolutely void it cannot be set aside at a subsequent term. Farmers' L. & T. Co. *v.* Iowa Water Co., 80 Fed. 467.

A nunc pro tunc order cannot be resorted to in order to effect a substantial amendment after the term. Owen *v.* Bankhead, 82 Ala. 399, 3 So. 97; Kemp *v.* Lyon, 76 Ala. 212. By such means the record may be amended so as to speak the truth, as by showing that the case was heard on oral evidence. Hershy *v.* Baer, 45 Ark. 240. But see Adams *v.* Gill, 158 Ill. 190, 41 N. E. 738.

76. 2 Daniell Ch. Pr. 682. See also Trayhern *v.* National Mechanics' Bank, 57 Md. 590; Downes *v.* Friel, 57 Md. 531; Williams *v.* Banks, 19 Md. 524; Lovejoy *v.* Irelan, 19 Md. 56; Guise *v.* Middleton, Sm. & M. Ch. (Miss.) 89; Goodhue *v.* Churchman, 1 Barb. Ch. (N. Y.) 596. The rule is not inexorable. Pfeaff *v.* Jones, 50 Md. 263; Stewart *v.* Beard, 3 Md. Ch. 227.

77. See *supra*, XXIII, B, 3.

78. Allen *v.* Allen, 48 S. C. 566, 26 S. E. 786.

79. Fisher *v.* Simon, 67 Fed. 387, 14 C. C. A. 443; U. S. *v.* Williams, 67 Fed. 384, 14 C. C. A. 440.

80. Gullett *v.* Housh, 5 Blackf. (Ind.) 33; *In re* Kensington, etc., Turnpike Road Co., 12 Phila. (Pa.) 611 [*reversed* on the merits 97 Pa. St. 260]; Bond *v.* Greenwald, 7 Baxt. (Tenn.) 466.

81. Oliver Finnie Grocery Co. *v.* Bodenheimer, 77 Miss. 415, 27 So. 613; Jarmon *v.* Wiswall, 24 N. J. Eq. 68; Sprague *v.* Jones, 9 Paige (N. Y.) 395. See also *supra*, XXIV, D, 1.

82. Barry *v.* Barry, 1 Md. Ch. 20; Pickett *v.* Loggon, 5 Ves. Jr. 702, 31 Eng. Reprint 814.

Intervening rights will be protected in such a case. Cawley *v.* Leonard, 28 N. J. Eq. 467.

83. See *supra*, XXIII, F, 1.

84. Dawes *v.* Thomas, 4 Gill (Md.) 333; Cadotte *v.* Cadotte, 120 Mich. 667, 79 N. W. 932; Dorsheimer *v.* Rorback, 24 N. J. Eq. 33; Mootry *v.* Grayson, 104 Fed. 613, 44 C. C. A. 83. Such further direction consequential upon the decree should be made by distinct order without altering the decree. Clark *v.* Hall, 7 Paige (N. Y.) 382.

85. Dawes *v.* Thomas, 4 Gill (Md.), 333; Planters' Bank *v.* Neely, 7 How. (Miss.) 80, 40 Am. Dec. 51; Carper *v.* Hawkins, 8 W. Va. 291. Where an opinion was rendered but no decree entered a rehearing was allowed many years thereafter. U. S. *v.* Garcia, 25 Fed. Cas. No. 15,186, 1 Sawy. 383.

86. Coleman *v.* Franklin, 26 Ga. 368; Brumagim *v.* Chew, 19 N. J. Eq. 337.

87. *Illinois.*— Delahay *v.* McConnel, 5 Ill. 156.

Maryland.— Pfeltz *v.* Pfeltz, 1 Md. Ch. 455.

Massachusetts.— Thompson *v.* Goulding, 5 Allen 81; Clapp *v.* Thaxter, 7 Gray 384.

North Carolina.— Simms *v.* Thompson, 16 N. C. 197.

Tennessee.— Overton *v.* Bigelow, 10 Yerg. 48; Haywood *v.* Marsh, 6 Yerg. 69; Dunn *v.* Dunn, (Ch. App. 1899) 51 S. W. 119.

Virginia.— Parker *v.* Logan, 82 Va. 376, 4 S. E. 613; Hodges *v.* Davis, 4 Hen. & M. 400.

West Virginia.— Crim *v.* Davisson, 6 W. Va. 465.

United States.— Lewisburg Bank *v.* Sheffey, 140 U. S. 445, 11 S. Ct. 755, 35 L. ed. 493 [*affirming* 33 Fed. 315]; Brooks *v.* Bur-

periods generally dependent upon statute or rule are, however, sometimes fixed.[88] After expiration of the time for a rehearing no substantial change can be made except by bill of review, or bill in the nature thereof.[89]

c. The Application — (I) *NOTICE.* A decree may not be altered except upon notice,[90] and notice of a petition for rehearing is also required.[91]

(II) *WHO MAY APPLY.* The general rule is that an application to open a decree or for a rehearing will not be entertained on behalf of one not a party to the suit.[92] Nor will a decree final in its character be disturbed upon application

lington, etc., R. Co., 102 U. S. 107, 26 L. ed. 91; Roemer *v.* Simon, 91 U. S. 149, 23 L. ed. 267; Glenn *v.* Dimmock, 43 Fed. 550; Clarke *v.* Threlkeld, 5 Fed. Cas. No. 2,865, 2 Cranch C. C. 408; Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305.

See 19 Cent. Dig. tit. "Equity," § 841.

88. **During the time permitted for appeal** a rehearing may be allowed (Warner *v.* Juif, 38 Mich. 662; Benedict *v.* Thompson, Walk. (Mich.) 446; Jeannerett *v.* Radford, Rich. Eq. Cas. (S. C.) 469; Craig *v.* Buchanan, 1 Yerg. (Tenn.) 141), but not after an appeal (Dunn *v.* Dunn, (Tenn. Ch. App. 1899) 51 S. W. 119. See also Henry *v.* Travelers' Ins. Co., 34 Fed. 258).

A decree ordered by the supreme court, but entered in a court below, is a decree of the latter court and subject to rehearing there. Benzien *v.* Lenior, 11 N. C. 403.

Where the right to appeal has been lost an order cannot be set aside for irregularity. Megary *v.* Shipley, 72 Md. 33, 19 Atl. 151.

Signing and entering of the decree terminates the power of the court in some cases. Robinson *v.* Lewis, 55 N. C. 25; Hellams *v.* Prior, 64 S. C. 543, 43 S. E. 25; Haskell *v.* Raoul, 2 Treadw. (S. C.) 852; Simpson *v.* Downs, 5 Rich. Eq. (S. C.) 421; Burn *v.* Poang, 3 Desauss. (S. C.) 596.

A decree entered but not signed may be reheard. Cochran *v.* Couper, 2 Del. Ch. 27.

After the decision is pronounced it is too late to arrest the decree for want of preparation. Craig *v.* Craig, 6 J. J. Marsh. (Ky.) 171.

Where an order is made keeping a decree open for revision at the next term, no rehearing will be allowed after such term. Campbell *v.* Rice, 10 Yerg. (Tenn.) 199.

After refusal of injunction upon terms the performance of the act sought to be restrained in violation of the terms does not prevent a rehearing. Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 487.

In cases of hardship a rehearing may be granted after the term. Roberts *v.* Edmundson, 4 Sm. & M. (Miss.) 730. And see Kendrick *v.* Whitney, 28 Gratt. (Va.) 646.

U. S. Eq. Rule 88 provides that if no appeal lies to the supreme court a petition for rehearing may be admitted, in the discretion of the court, at any time before the end of the term next following that at which the final decree shall have been entered and recorded. For cases enforcing this rule see Moelle *v.* Sherwood, 148 U. S. 21, 13 S. Ct. 426, 37 L. ed. 350; Easton *v.* Houston, etc., R. Co., 44 Fed. 7; Sheffey *v.* Lewisburg Bank, 33 Fed. 315; Newman *v.* Moody, 19 Fed. 858; Barker *v.* Stowe, 2 Fed. Cas. No. 995, 4 Ban. & A. 485. The word "admitted" in the rule is synonymous with "granted" (Glenn *v.* Dimmock, 43 Fed. 550; Glenn *v.* Noonan, 43 Fed. 403); but it seems nevertheless that if the petition is filed and entertained within time it may be granted subsequently. Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986.

Other limitations. — *Ex p.* Gresham, 82 Ala. 359, 2 So. 486 (decree rendered in vacation, petition for rehearing second day of next term); Cherbonnier *v.* Goodwin, 79 Md. 55, 28 Atl. 894 (thirty days after rendition); Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273 (before enrolment and within six months); Randall *v.* Peckham, 11 R. I. 600; Hodges *v.* New England Screw Co., 3 R. I. 9 (one year); Canerdy *v.* Baker, 55 Vt. 578; French *v.* Chittenden, 10 Vt. 127 (twenty days from the rising of court); Woodson *v.* Leyburn, 83 Va. 843, 3 S. E. 873 (five years).

89. See *infra*, XXIV, F, 1.

90. Clements *v.* Empire Lumber Co., 96 Ga. 319, 22 S. E. 987; Keeney *v.* Lyon, 21 Iowa 277; Throckmorton *v.* Stout, 3 Iowa 580; Berry *v.* Innes, 35 Mich. 189; Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

A material amendment at a subsequent term without notice is erroneous. Bryant *v.* Vix, 83 Ill. 11. It has been held that such an amendment if made on defective notice is absolutely void. Swift *v.* Allen, 55 Ill. 303. *Contra*, De Pedrorena *v.* San Diego County Super. Ct., 80 Cal. 144, 22 Pac. 71.

Where the amendment lessens the amount defendant cannot complain that he had no notice thereof. Palmer *v.* Harris, 100 Ill. 276.

An amendment made without notice may be set aside on motion at the next term. Clements *v.* Empire Lumber Co., 96 Ga. 319, 22 S. E. 987.

91. Burch *v.* Newberry, 3 How. Pr. (N. Y.) 271, 1 Code Rep. (N. Y.) 41; Howard *v.* McKenzie, 54 Tex. 171.

A notice of appeal cannot be converted into a notice of rehearing if not served within proper time for the latter purpose. Wilson *v.* Onderdonk, 3 How. Pr. (N. Y.) 319, 1 Code Rep. (N. Y.) 64.

A notice of motion to correct a decree may if otherwise sufficient be treated as notice of a petition for rehearing. Kendrick *v.* Whitney, 28 Gratt. (Va.) 646.

92. *Illinois.* — Hall *v.* Davis, 44 Ill. 494.

of one who has no interest affected by it.[93] If a decree is rendered against defendants jointly, they should all be joined in the application.[94] The court may before the decree is filed order a rehearing of its own motion.[95]

(III) *The Petition.* There must be an application in due form and in accordance with established practice to entitle one to a rehearing,[96] and the regular method of making application is by petition.[97] The petition must state by whom it is presented, the interest of the petitioner,[98] and the grounds on which the rehearing is asked.[99] It must be signed by counsel.[1] The English practice requires a certificate of two counsel that they conceive the cause proper to be reheard,[2] and the same practice has prevailed to a certain extent in the United States.[3] If the petition rests upon matter not appearing on the record it must be verified by oath.[4]

d. Under What Circumstances Rehearing Allowed — (I) *In General.* While it has been said that the granting of a rehearing is almost of course,[5] and while in the English chancery the cause was generally set down to be reheard upon the mere certificate of two counsel, as required by the practice,[6] still the rule is in the United States that the granting of a rehearing is discretionary.[7] A rehearing will

North Carolina.— Hinton *v.* Hinton, 70 N. C. 730; Thompson *v.* Cox, 53 N. C. 311.

Rhode Island.— *In re* Doyle, 14 R. I. 55.

Tennessee.— Pettit *v.* Cooper, 9 Lea 21.

Virginia.— Roanoke Nat. Bank *v.* Farmers' Nat. Bank, 84 Va. 603, 5 S. E. 682.

United States.— Washburn, etc., Mfg. Co. *v.* Colwell Steel Barb Fence Co., 1 Fed. 225. See also Ring Refrigerator, etc., Co. *v.* St. Louis Ice Mfg., etc., Co., 67 Fed. 535.

See 19 Cent. Dig. tit. "Equity," §§ 834, 1042.

Collusive decree.— If the petition of strangers shows that a decree was obtained collusively it will be annulled. Barker *v.* Todd, 15 Fed. 265.

93. Boykin *v.* Kernochan, 24 Ala. 697; Newell *v.* Newell, 9 Sm. & M. (Miss.) 56; Riely *v.* Kinzel, 85 Va. 480, 7 S. E. 907. If plaintiff has no title to property involved a defendant against whom the decree is made may have it reversed, although he has himself no title. Trible *v.* Fryer, 5 J. J. Marsh. (Ky.) 179.

94. Davis *v.* Bentley, 2 Dana (Ky.) 247; Bradley *v.* Catlet, 7 J. J. Marsh. (Ky.) 121.

95. Hughs *v.* Washington, 65 Ill. 245.

96. Gardner *v.* Dering, 2 Edw. (N. Y.) 131.

97. Boucher *v.* Boucher, 3 MacArthur (D. C.) 453; Hughes *v.* Jones, 2 Md. Ch. 289; Wilcox *v.* McLain, 3 N. C. 175; Taylor *v.* Boyd, 6 Heisk. (Tenn.) 611.

Informal papers possessing the substantial requisite may be treated as petitions for rehearing. Spilman *v.* Gilpin, 93 Va. 698, 25 S. E. 1004; Staples *v.* Staples, 85 Va. 76, 7 S. E. 199; Barger *v.* Buckland, 28 Gratt. (Va.) 850; Ambrouse *v.* Kellar, 22 Gratt. (Va.) 769.

Objection that the proceeding was by motion cannot be first made on appeal. Peck *v.* Spencer, 26 Fla. 23, 7 So. 642.

Petition to rehear decree of appellate court for error of fact in an interlocutory order is not strictly a petition to rehear. Eason *v.* Billups, 65 N. C. 216.

Rehearing by federal supreme court justice.— Where a case was heard by a supreme court justice on circuit the petition for rehearing must not be heard before him *ex parte* at Washington, but must be filed and a rule to show cause against it issued. Giant Powder Co. *v.* California Vigorit Powder Co., 5 Fed. 197, 6 Sawy. 527.

Petition for rehearing before final decree should ask leave to file a supplemental bill setting forth the new matter. Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,661, 2 Ban. & A. 256.

98. Heermans *v.* Montague, (Va. 1890) 20 S. E. 899.

99. Wiser *v.* Blachly, 2 Johns. Ch. (N. Y.) 488; Hill *v.* Maury, 21 W. Va. 162. The grounds must be stated in detail. Harman *v.* Lewis, 24 Fed. 530; Tufts *v.* Tufts, 24 Fed. Cas. No. 14,232, 3 Woodb. & M. 426. The petition must show that injustice will be suffered if the decree be allowed to stand (Bradley's Estate, 15 Phila. (Pa.) 562), and that the petitioner has not been guilty of laches (Walsh *v.* Smyth, 3 Bland (Md.) 9).

1. Allis *v.* Stowell, 85 Fed. 481.

2. 3 Daniell Ch. Pr. 120.

3. Cotton *v.* Parker, Sm. & M. Ch. (Miss.) 125; New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 14 N. J. Eq. 308; *Ex p.* Terry, Rice Eq. (S. C.) 1.

4. Eveland *v.* Stephenson, 45 Mich. 394, 8 N. W. 62; Gyger's Estate, 2 Lanc. Bar (Pa.) May 6, 1871; Woodson *v.* Leyburn, 83 Va. 843, 3 S. E. 873; U. S. Eq. Rule 88.

Affidavits in support of the petition must be made a part thereof. Allis *v.* Stowell, 85 Fed. 481.

5. Wilcox *v.* Wilcox, 36 N. C. 36.

6. Cunyngham *v.* Cunyngham, Ambl. 89, 27 Eng. Reprint 55, Dick. 145, 21 Eng. Reprint 224. So also in Mississippi (Handy *v.* Andrews, 52 Miss. 626), but not in the federal court (Emerson *v.* Davies, 8 Fed. Cas. No. 4,437, 1 Woodb. & M. 21).

7. *Alabama.*— *Ex p.* Gresham, 82 Ala. 359, 2 So. 486.

not be allowed without the suggestion of some matter not previously presented or considered,[8] nor will it be granted for merely technical errors.[9] A probability must be shown of some error reaching the merits.[10] There are, however, no very definite rules except that the court will look into all the circumstances and act as justice requires.[11] A rehearing will not be granted because of a mistake of law or judgment on the part of counsel,[12] but a rehearing may be allowed where the attorney acted under a mistake of fact.[13] There seems to be no absolute rule

Maryland.— Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858; Waring *v.* Turton, 44 Md. 535.

Michigan.— Barnes *v.* Kent Cir. Judge, 97 Mich. 212, 56 N. W. 599.

Mississippi.— Hoggatt *v.* Hunt, Walk. 216.

New Hampshire.— Brooks *v.* Howard, 58 N. H. 91.

New Jersey.— Brumagim *v.* Chew, 19 N. J. Eq. 337; New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 14 N. J. Eq. 308.

Rhode Island.— Hodges *v.* New England Screw Co., 3 R. I. 9.

United States.— Railway Register Mfg. Co. *v.* North Hudson County R. Co., 26 Fed. 411; American Diamond Rock-Boring Co. *v.* Sheldon, 1 Fed. 870, 18 Blatchf. 50; Daniel *v.* Mitchell, 6 Fed. Cas. No. 3,563, 1 Story 198.

See 19 Cent. Dig. tit. "Equity," § 836.

8. Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817; Rogers *v.* Riessner, 34 Fed. 270; Martindale *v.* Waas, 11 Fed. 551, 3 McCrary 637; Coburn *v.* Schroeder, 11 Fed. 425, 20 Blatchf. 392; Tufts *v.* Tufts, 24 Fed. Cas. No. 14,232, 3 Woodb. & M. 426. Where a cause was fully argued and submitted on all questions, dismissed for want of jurisdiction, and that order set aside, defendant was not permitted to reargue the case on the other questions involved. Maffet *v.* Quine, 95 Fed. 199.

9. Seay *v.* Treadwell, 43 Ga. 564.

10. Atty.-Gen. *v.* New York, etc., R. Co., 24 N. J. Eq. 59; New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 14 N. J. Eq. 308; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,267, 3 Story 299.

A defendant seeking a rehearing must show that he has a meritorious defense, or at least that a different conclusion might be reached on the evidence after argument. Blair *v.* Silver Peak Mines, 93 Fed. 332.

Rehearing merely to agitate costs will not generally be allowed. Travis *v.* Waters, 1 Johns. Ch. (N. Y.) 48; 3 Daniell Ch. Pr. 100.

11. Simms *v.* Smith, 11 Ga. 195; Hughes *v.* Jones, 2 Md. Ch. 289; Gyger's Estate, 2 Lanc. Bar (Pa.) May 6, 1871; Shepard *v.* Taylor, 16 R. I. 166, 13 Atl. 105.

A rehearing will be allowed where there is a material amendment of the bill after the hearing (Spencer *v.* Otis, 96 Ill. 570) to inquire into a charge of fraud against a counsel (Rudderow *v.* Rudderow, (N. J. Ch. 1886) 3 Atl. 880), or because a feigned issue presented plaintiff's title alone and not that of defendant (Nicoll *v.* Huntington, 1 Johns. Ch. (N. Y.) 166). Whatever after the term would sustain a bill of review will ground a rehearing during the term. Robertson *v.* *v.* Brotherton, 2 Tenn. Ch. 393. A rehearing should be allowed only for reasons sufficient to justify a new trial at law. Bentley *v.* Phelps, 3 Fed. Cas. No. 1,332, 3 Woodb. & M. 403; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168. The grounds on which rehearings are ordinarily granted are: (1) Upon allegation that any question decisive of the case and submitted by counsel has been overlooked by the court; and (2) that the decision is in conflict with an express statute or a controlling decision. Railway Register Mfg. Co. *v.* North Hudson County R. Co., 26 Fed. 411.

A rehearing will not be granted for a supposed error in an inference drawn from doubtful evidence (Johnson *v.* Lewis, 1 Rich. Eq. (S. C.) 390), or where the evidence is not preserved (Jeannerett *v.* Radford, Rich. Eq. Cas. (S. C.) 469), or to raise a question of jurisdiction which was earlier raised by the other party and successfully resisted by the applicant (Southern Development Co. *v.* Silva, 89 Fed. 418), or on the ground that a defense was not fully presented (Railway Register Mfg. Co. *v.* North Hudson County R. Co., 26 Fed. 411. *Contra*, Parker's Estate, 6 Pa. Dist. 519, 19 Pa. Co. Ct. 606). A rehearing was denied where a party acting as his own solicitor was at the time of the hearing engaged in another court. Whitman *v.* Brotherton, 2 Tenn. Ch. 393. A rehearing will not be allowed on the ground of surprise where the surprise was not justifiable. Perkins *v.* Hendryx, 31 Fed. 522; Everest *v.* Buffalo Lubricating Oil Co., 22 Fed. 252, 22 Blatchf. 524.

12. *Florida.*— Friedman *v.* Rehm, 43 Fla. 330, 31 So. 234.

Kentucky.— Cleland *v.* Gray, 1 Bibb 38.

Maine.— Robinson *v.* Sampson, 26 Me. 11.

Maryland.— Herbert *v.* Rowles, 30 Md. 271.

New Jersey.— Patterson *v.* Read, 43 N. J. Eq. 18, 10 Atl. 807; McDowell *v.* Perrine, 36 N. J. Eq. 632; Perrine *v.* White, 36 N. J. Eq. 1; Warner *v.* Warner, 31 N. J. Eq. 549.

New York.—Decarters *v.* La Farge, 1 Paige 574; Rogers *v.* Rogers, 1 Paige 188.

United States.— Witters *v.* Sowles, 31 Fed. 5, 24 Blatchf. 359; Baker *v.* Whiting, 2 Fed. Cas. No. 786, 1 Story 218; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168.

See 19 Cent. Dig. tit. "Equity," § 845.

A married woman was allowed a rehearing because of the negligence of her solicitor. Day *v.* Allaire, 31 N. J. Eq. 303.

13. As where he neglected to introduce certain evidence because he understood the court to exclude it (Hulsizer *v.* Opdyke, (N. J. Ch. 1888) 14 Atl. 644), and where he sub-

forbidding the court to grant a second application for a rehearing upon good cause shown therefor.[14]

(II) *Newly Discovered Evidence.* A rehearing will not be granted to let in evidence where no reason is shown why it was not available at the original hearing,[15] but newly discovered evidence is ground for a rehearing.[16] Such a petition must be sworn to,[17] and its requisites are essentially the same as those of a bill of review for like cause.[18] It must name the witnesses and set forth the substance of the evidence which the party desires to introduce,[19] and must show that the testimony was unknown in time to use at the hearing, and that the party was not negligent in failing to discover it earlier.[20] A rehearing will not be

mitted the cause erroneously believing that a replication had been filed (Gaskill *v.* Sine, 13 N. J. Eq. 130. But see Casey, etc., Mfg. Co. *v.* Weatherly, 101 Tenn. 318, 47 S. W. 432).

14. Wilcox *v.* Wilkinson, 5 N. C. 11. A rehearing may be allowed on a second application when the first was denied for want of parties. Bleight *v.* McIlvoy, 4 T. B. Mon. (Ky.) 142. A second rehearing may be had on behalf of another party. Land *v.* Wickham, 1 Paige (N. Y.) 256; Noel *v.* Noel, 86 Va. 109, 9 S. E. 584.

15. Gould *v.* Stanton, 17 Conn. 377; Burrows *v.* Wene, (N. J. Ch. 1893) 26 Atl. 890; Pickett *v.* Gore, (Tenn. Ch. App. 1900) 58 S. W. 402. See also Rudgear *v.* U. S. Leather Co., 206 Ill. 74, 69 N. E. 30 [*affirming* 108 Ill. App. 227]; South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732.

16. *Florida.*— Owens *v.* Love, 9 Fla. 325.

Maryland.— Hughes *v.* Jones, 2 Md. Ch. 289.

Michigan.— Sheldon *v.* Hawes, 15 Mich. 519.

New Jersey.— Mulock *v.* Mulock, 28 N. J. Eq. 15.

Pennsylvania.— Green's Appeal, 59 Pa. St. 235.

See 19 Cent. Dig. tit. "Equity," § 846.

Newly discovered oral evidence is not a ground for rehearing. Hinson *v.* Pickett, 2 Hill Eq. (S. C.) 351.

In Vermont the right to a rehearing on the ground of newly discovered evidence has been denied. Mead *v.* Arms, 3 Vt. 148, 21 Am. Dec. 581.

17. Corey *v.* Moore, 86 Va. 721, 11 S. E. 114; Armstead *v.* Bailey, 83 Va. 242, 2 S. E. 38.

18. Willimantic Linen Co. *v.* Clark Thread Co., 24 Fed. 799; Baker *v.* Whiting, 2 Fed. Cas. No. 786, 1 Story 218; Daniel *v.* Mitchell, 6 Fed. Cas. No. 3,562, 1 Story 172. As to bills of review, see *infra*, XXIV, F, 9, b. The requirements are not so stringent as in ordinary applications for rehearing. Campbell Printing-Press, etc., Co. *v.* Marden, 70 Fed. 339.

19. Corey *v.* Moore, 86 Va. 721, 11 S. E. 114; Armstead *v.* Bailey, 83 Va. 242, 2 S. E. 38; Hale *v.* Pack, 10 W. Va. 145; Allis *v.* Stowell, 85 Fed. 481; McLeod *v.* Albany, 66 Fed. 378, 13 C. C. A. 525.

20. *Iowa.*— Baker *v.* Jamison, 73 Iowa 698, 36 N. W. 647.

Maine.— Robinson *v.* Sampson, 26 Me. 11.

Maryland.— Hughes *v.* Jones, 2 Md. Ch. 289.

Michigan.— *In re* Johnson, 104 Mich. 65, 62 N. W. 294; Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

New York.— Bogardus *v.* Trinity Church, 4 Sandf. Ch. 369.

Pennsylvania.— Reeves *v.* Keystone Bridge Co., 11 Phila. 498.

Tennessee.— Kelley *v.* McKinney, 5 Lea 164; Mays *v.* Wherry, 3 Tenn. Ch. 219.

Virginia.— Corey *v.* Moore, 86 Va. 721, 11 S. E. 114; Armstead *v.* Bailey, 83 Va. 242, 2 S. E. 38.

West Virginia.— White *v.* Drew, 9 W. Va. 695.

United States.— Prevost *v.* Gratz, 6 Wheat. 481, 5 L. ed. 311 [*reversing* 19 Fed. Cas. No. 11,406, Pet. C. C. 364]; Hostetter Co. *v.* Comerford, 99 Fed. 834 [*denying* rehearing 97 Fed. 585]; Acme Flexible Clasp Co. *v.* Cary Mfg. Co., 99 Fed. 500 [*denying* rehearing 96 Fed. 344]; New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 91 Fed. 212; McLeod *v.* New Albany, 66 Fed. 378, 13 C. C. A. 525; Pittsburg Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 64 Fed. 125; Witters *v.* Sowles, 31 Fed. 5, 24 Blatchf. 359; Willimantic Linen Co. *v.* Clark Thread Co., 24 Fed. 799; Rentoul *v.* New York Cent., etc., R. Co., 20 Fed. 313; Hicks *v.* Ferdinand, 20 Fed. 111; Colgate *v.* Western Union Tel. Co., 19 Fed. 828; Vermont Farm Mach. Co. *v.* Converse, 10 Fed. 825; Baker *v.* Whiting, 2 Fed. Cas. No. 786, 1 Story 218; Barker *v.* Stowe, 2 Fed. Cas. No. 995, 4 Ban. & A. 485; Bentley *v.* Phelps, 3 Fed. Cas. No. 1,332, 3 Woodb. & M. 403; Hitchcock *v.* Tremaine, 12 Fed. Cas. No. 6,540, 9 Blatchf. 550, 5 Fish. Pat. Cas. 537; Reeves *v.* Keystone Bridge Co., 20 Fed. Cas. No. 11,661, 2 Ban. & A. 256.

See 19 Cent. Dig. tit. "Equity," § 847.

A general averment of diligence is insufficient, the facts and circumstances showing that the party was diligent must be set forth. Hicks *v.* Otto, 85 Fed. 728; Gillette *v.* Bate Refrigerating Co., 12 Fed. 108; Page *v.* Holmes Burglar Alarm Tel. Co., 2 Fed. 330, 18 Blatchf. 118.

For reëxamination of witness.— A rehearing will not be granted to let in the testimony of one who has already been examined and cross-examined. Diffendal *v.* Virginia Midland R. Co., 86 Va. 459, 10 S. E. 536.

granted unless the evidence would have been material if it had been offered at the proper time,[21] and would be sufficient materially to change the result.[22] A rehearing will not be granted to admit impeaching testimony,[23] or testimony which is merely cumulative.[24] A rehearing will not be allowed because of confessions made by plaintiff after the decree, unless such confessions are full, direct, and unambiguous, and proved by disinterested testimony.[25]

e. Proceedings on Rehearing. On a rehearing, except for newly discovered evidence, no evidence can be heard except such as was used on the hearing or which was taken and might have been then used.[26] The rehearing should regularly be before the judge who heard the case before,[27] and the party objecting to the decree has the right to open and close.[28] The entire case is open for reconsideration.[29] The granting of the rehearing does not of itself stay proceedings on the decree.[30]

On the question of diligence, the physical and pecuniary condition of the party, his knowledge of the facts and the difficulty of proving them are all elements proper to be considered. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430. The granting of the rehearing is an adjudication upon the question of diligence. Adams County *v.* Burlington, etc., R. Co., 55 Iowa 94, 2 N. W. 1054, 7 N. W. 471.

21. Larue *v.* Hays, 7 Bush (Ky.) 50; Reeves *v.* Keystone Bridge Co., 11 Phila. (Pa.) 498. A party will not on rehearing be permitted to testify to facts which he was incompetent to testify to originally, although a statute has made him competent. Berry *v.* Lisherness, 50 Me. 118.

22. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430; Morris *v.* Hinchman, 32 N. J. Eq. 204; Zickefoose *v.* Kuykendall, 12 W. Va. 23; Hayes *v.* Dayton, 20 Fed. 690; Munson *v.* New York, 11 Fed. 72, 20 Blatchf. 358; McCloskey *v.* Du Bois, 9 Fed. 38, 20 Blatchf. 7; Collins Co. *v.* Coes, 8 Fed. 517; Adair *v.* Thayer, 7 Fed. 920; Bentley *v.* Phelps, 3 Fed. Cas. No. 1,332, 3 Woodb. & M. 403.

On the question of a grantor's capacity to make a deed, it is not enough to show new evidence of impairment of the grantor's health, the existence of brain disease, and impairment of the mind. The degree of mental impairment must be shown. Dennett *v.* Dennett, 44 N. H. 531, 84 Am. Dec. 97.

23. Adamski *v.* Wieczorek, 93 Ill. App. 357; Rishel *v.* Crouse, 162 Pa. St. 3, 29 Atl. 123. A decree was vacated on petition of a wife, where it was procured by false testimony given by her husband, the character of the evidence not being discovered until after decree and the means of knowledge concealed from the wife. McMurray *v.* McMurray, 67 Tex. 665, 4 S. W. 357.

24. *Mississippi.*— Moody *v.* Farr, 27 Miss. 788.

New Jersey.—McDowell *v.* Perrine, 36 N. J. Eq. 632.

New York.— Dunham *v.* Winans, 2 Paige 24.

Tennessee.— Kelley *v.* McKinney, 5 Lea 164.

West Virginia.— Powell *v.* Batson, 4 W. Va. 610.

United States.— Witters *v.* Sowles, 32 Fed. 765, 766; Pfanschmidt *v.* Kelly Mercantile Co., 32 Fed. 667; Rogers *v.* Marshall, 13 Fed. 59, 3 McCrary 87; Baker *v.* Whiting, 2 Fed. Cas. No. 786, 1 Story 218.

See 19 Cent. Dig. tit. "Equity," § 846.

A rehearing may be allowed on the discovery of cumulative evidence, where the defense was originally imperfectly made out for want of distinct proof. Ocean Ins. Co. *v.* Fields, 18 Fed. Cas. No. 10,406, 2 Story 59.

25. Daniel *v.* Mitchell, 6 Fed. Cas. No. 3,563, 1 Story 198.

26. Brumagim *v.* Chew, 19 N. J. Eq. 337; Scales *v.* Nichols, 2 Yerg. (Tenn.) 140; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,267, 3 Story 299.

The voluntary affidavit of a witness cannot be read to correct a mistake in his former testimony. Gray *v.* Murray, 4 Johns. Ch. (N. Y.) 412.

Matters provable viva voce.— A party may be permitted to use papers not used before which may be proved *viva voce,* or to prove the incompetency of a witness. Dale *v.* Roosevelt, 6 Johns. Ch. (N. Y.) 255.

27. Butler *v.* Lee, 1 Abb. Dec. (N. Y.) 279, 3 Keyes (N. Y.) 70, 33 How. Pr. (N. Y.) 251.

28. Sills *v.* Brown, 1 Johns. Ch. (N. Y.) 444.

29. Glover *v.* Hedges, 1 N. J. Eq. 113; Badgely *v.* Badgely, 2 Wkly. L. Bul. 247, 5 Ohio Dec. (Reprint) 495, 6 Am. L. Rec. 286; Sparhawk *v.* Buell, 9 Vt. 41. As to the party complaining only the matters complained of are open, but as to the other party the entire case. Ferguson *v.* Kimball, 3 Barb. Ch. (N. Y.) 616; Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 587.

30. Vose *v.* Internal Imp. Fund. 28 Fed. Cas. No. 17,008, 2 Woods 647. See also Sage *v.* Iowa Cent. R. Co., 93 U. S. 412, 23 L. ed. 933. *Contra,* in the New York chancery. Finchly *v.* Mills, 1 Code Rep. (N. Y.) 83; Harrison *v.* Hull, Hopk. (N. Y.) 112.

Execution of an interlocutory decree will be stayed as of course where the delay would be slight. Rogers *v.* Marshall, 12 Fed. 614.

It is proper to set aside the decree until the case is again heard in a case when a rehearing is allowed because the court doubts the original correctness of the decree. Rogers *v.* Marshall, 15 Fed. 193, 4 McCrary 307.

f. Under What Circumstances Decree Will Be Vacated. The court does not look with favor upon efforts to vacate a decree.[31] If the defect in the decree could be remedied on motion the decree will not be vacated.[32] It will be vacated if it was made unjustly against a party whose right has not been protected,[33] but only where enforcement of the decree would be inequitable.[34] It will not be vacated because of defects in procedure alone,[35] or where the same result in substance must be reached by another decree,[36] or where rights have been acquired in good faith under it.[37] It has been said that a decree will not be vacated because it is void, as it is then harmless.[38] It will not be vacated because plaintiff has parted with his interest,[39] or because one of two defendants, held jointly liable, died before the hearing.[40] A decree will not be opened to let in matter which the party neglected to present without excuse at the proper time,[41] nor will it be opened where he has been otherwise guilty of laches.[42]

31. Lockwood *v.* Cleveland, 20 Fed. 164.

Reason for vacating must be affirmatively shown. Saum *v.* Stingley, 3 Iowa 514.

The unsupported affidavit of defendant as to a verbal stipulation is not sufficient to open a decree. Marsh *v.* Lasher, 13 N. J. Eq. 253.

A decree establishing a lost mortgage will not be altered merely on the finding of the mortgage canceled in the hands of a stranger. Lilly *v.* Quick, 2 N. J. Eq. 97.

32. Pipkin *v.* Haun, Freem. (Miss.) 254.

33. Vanderpoel *v.* Knight, 102 Ill. App. 596; Cawley *v.* Leonard, 28 N. J. Eq. 467; Brinkerhoff *v.* Franklin, 21 N. J. Eq. 334.

34. Mailhouse *v.* Frazier, 25 Md. 96; Terhune *v.* Colton, 12 N. J. Eq. 312; Allen *v.* New York City, 7 Fed. 483, 18 Blatchf. 239; *In re* Morris, 17 Fed. Cas. No. 9,825, Crabbe 70.

A decree founded on an immaterial issue will be vacated. Hall *v.* Doran, 6 Iowa 433.

Decree covering matter not sustained by testimony will be accordingly modified. Edwards *v.* Thom, 25 Fla. 222, 5 So. 707.

35. Cochran *v.* Miller, 74 Ala. 50; Brown *v.* Bennett, 55 Ga. 189; Gay *v.* Gay, 10 Paige (N. Y.) 369.

Injury to the party complaining by the irregularity must be made to appear. Michigan Ins. Co. *v.* Whittemore, 12 Mich. 427.

36. Hurlburd *v.* Freelove, 3 Wis. 537. The words "without prejudice" will not be added if the decree as it stands is not a bar. Somers *v.* Cresse, (N. J. Ch. 1889) 17 Atl. 629.

37. Curtiss *v.* Brown, 29 Ill. 201; Kercheval *v.* Berry, 6 J. J. Marsh. (Ky.) 508; Amos *v.* Stockton, 5 J. J. Marsh. (Ky.) 638.

38. Hurlburd *v.* Freelove, 3 Wis. 537. But see Osgood *v.* Joslin, 3 Paige (N. Y.) 195.

39. Munn *v.* Worrall, 16 Barb. (N. Y.) 221.

40. Scott *v.* Blaine, 21 Fed. Cas. No. 12,525, Baldw. 287.

41. *Connecticut.*— Gould *v.* Stanton, 17 Conn. 377.

Kentucky.— Edrington *v.* Harper, 5 J. J. Marsh. 293.

Maryland.— Hitch *v.* Fenby, 4 Md. Ch. 190.

Michigan.— Roelofs *v.* Wever, 119 Mich. 334, 78 N. W. 136.

Nebraska.— Wilhelmson *v.* Bentley, 27 Nebr. 658, 43 N. W. 397.

New Hampshire.— Cummings *v.* Parker, 63 N. H. 198.

New York.— Dunham *v.* Winans, 2 Paige 24.

North Carolina.— Buffalow *v.* Buffalow, 37 N. C. 113.

Tennessee.— Cock *v.* Evans, 9 Yerg. 287.

West Virginia.— Hunter *v.* Kennedy, 20 W. Va. 343; Tompkins *v.* Stephens, 10 W. Va. 156.

See 19 Cent. Dig. tit. "Equity," § 1041.

Ignorance of practice does not excuse the failure. Carpenter *v.* Muchmore, 15 N. J. Eq. 123; Smith *v.* Patton, 12 W. Va. 541.

Unjustifiable ignorance of fact is no excuse. Stewart *v.* Beard, 3 Md. Ch. 227.

Neglect to offer available evidence is no excuse. Maryland Home F. Ins. Co. *v.* Kimmell, 89 Md. 437, 43 Atl. 764; Main *v.* Main, 50 N. J. Eq. 712, 25 Atl. 372; Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388; U. S. *v.* Gunning, 23 Fed. 668.

42. *Kentucky.*— Harrison *v.* Meredith, 3 J. J. Marsh. 219; Brooks *v.* Clay, 2 Bibb 499.

Maryland.— Hitch *v.* Fenby, 6 Md. 218; Barry *v.* Barry, 1 Md. Ch. 20.

Massachusetts.—Holbrook *v.* Holbrook, 114 Mass. 568.

New Jersey.— Embury *v.* Klemm, 30 N. J. Eq. 517; Boynton *v.* Sandford, 28 N. J. Eq. 184 [*affirmed* in 28 N. J. Eq. 592].

United States.— Kennedy *v.* Georgia Bank, 8 How. 586, 12 L. ed. 1209; Schieffelin *v.* U. S., 8 Ct. Cl. 359; Doubleday *v.* Sherman, 7 Fed. Cas. No. 4,019, 6 Blatchf. 513.

See 19 Cent. Dig. tit. "Equity," § 1035.

Pecuniary inability to make the application promptly is no excuse. Robertson *v.* Miller, 3 N. J. Eq. 451.

Discretion of court — The determination of the effect of delay rests in the discretion of the trial court. Gibson *v.* Crehore, 5 Pick. (Mass.) 146. One who has unduly delayed his application may be let in on terms. Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 364.

One not made a party because she failed to record her deed may be heard to apply to open the decree where circumstances show

E. Decrees Pro Confesso — 1. Power of Court to Vacate. With regard to *pro confesso* decrees the power of the court is generally more extensive than in the case of decrees rendered after hearing both parties, and the circumstances calling for the exercise of such power are different. Of course the order to take the bill *pro confesso* being interlocutory the power of the court to admit defendant to answer exists until final decree,[43] but the right of defendant to be let in is not absolute.[44] Power also exists as in other cases to set aside the decree before enrolment or before the end of the term.[45] The power is, however, generally held to extend beyond this and to permit the setting aside on motion or petition of a decree *pro confesso*, even after enrolment and at a subsequent term, in order to let in a meritorious defense,[46] and to prevent fraud or mistake.[47] Power to set aside a decree *pro confesso* after the term, except by bill for that purpose, is, however, in some jurisdictions denied.[48]

2. Exercise of Power Discretionary. As long as the power to set aside a decree *pro confesso* exists its exercise rests in discretion,[49] and the application will

the neglect to be immaterial. Cawley *v.* Leonard, 28 N. J. Eq. 467.

43. See *supra*, XXIV, C. See also U. S. Eq. Rules 18, 19.

44. In default of appearance plaintiff is entitled to a decree *pro confesso*, although an appearance is entered immediately thereafter. Miller *v.* Moore, 1 Aik. (Vt.) 216.

Defendant may contest the decree on the merits of the bill for want of equity, but not for want of parties. Thornton *v.* Neal, 49 Ala. 590.

Upon filing a full answer defendant has an absolute right to have the order set aside. Pond *v.* Lockwood, 11 Ala. 567.

An answer filed after the order and without setting it aside will be stricken out. Pickering *v.* Townsend, 118 Ala. 351, 23 So. 703.

Where every right of defendant has been preserved in an interlocutory decree a default will not be opened. Post *v.* Simmons, 1 N. Y. Suppl. 572.

On terms.— If defendant tenders his answer when the bill is taken for confessed he must be let in, but terms may be imposed. Halderman *v.* Halderman, 11 Fed. Cas. No. 5,908, Hempst. 407.

45. Williamson *v.* Sykes, 13 N. J. Eq. 182; Kelty *v.* High, 29 W. Va. 381, 1 S. E. 561. Defendant must be let in on tender of answer within fifteen days. Royalty *v.* Deposit Bldg., etc., Assoc., 40 S. W. 455, 19 Ky. L. Rep. 282. The decree may be set aside even though third persons have purchased in reliance thereon. Benedict *v.* Auditor-Gen., 104 Mich. 269, 62 N. W. 364.

46. *Maryland.*— Washington City First Nat. Bank *v.* Eccleston, 48 Md. 145.

New Jersey.— Mutual L. Ins. Co. *v.* Sturges, 32 N. J. Eq. 678.

New York.— Millspaugh *v.* McBride, 7 Paige 509, 34 Am. Dec. 360; Beekman *v.* Peck, 3 Johns. Ch. 415.

Vermont.— Hall *v.* Lamb, 28 Vt. 85.

Virginia.— Erwin *v.* Vint, 6 Munf. 267.

See 19 Cent. Dig. tit. "Equity," §§ 973, 974, 977.

Application of statute.— A decree on failure to answer after demurrer overruled is a decree *pro confesso* within a statute providing for its reversal on motion (Steenrod *v.* Wheeling, etc., R. Co., 25 W. Va. 133), but a decree after answer seeking directions from the court is not (Bell *v.* List, 6 W. Va. 469).

A mistake of a master in finding an amount due may be corrected. Williamson *v.* Sykes, 13 N. J. Eq. 182; Miller *v.* Rushforth, 4 N. J. Eq. 174.

Striking out party.— But a decree cannot be amended by striking out the name of the person found liable, merely on proof of the judge's minutes. Gladden *v.* American Mortg. Co., 80 Ala. 270.

Extension of time to answer.— Under a statute allowing a *pro confesso* decree to be vacated at the second term, and answer then filed, the time to answer may be extended. Collins *v.* Crotty, 65 Ill. 545.

47. Consolidated Electric Storage Co. *v.* Atlantic Trust Co., 50 N. J. Eq. 93, 24 Atl. 229.

48. *Alabama.*— New England Mortg. Security Co. *v.* Davis, 122 Ala. 555, 25 So. 42.

Arkansas.— Kizer Lumber Co. *v.* Mosley, 56 Ark. 544, 20 S. W. 409.

Florida.— Marks *v.* Baker, 20 Fla. 920.

Michigan.— Maynard *v.* Pereault, 30 Mich. 160.

Missouri.— Divers *v.* Marks, 3 Mo. 81.

Tennessee.— Johnson *v.* Tomlinson, 13 Lea 604.

West Virginia.— Gates *v.* Cragg, 11 W. Va. 300.

United States.—Stuart *v.* St. Paul, 63 Fed. 644; Austin *v.* Riley, 55 Fed. 833.

See 19 Cent. Dig. tit. "Equity," § 979.

Decree nisi and rule to show cause.— This rule is usually influenced by provisions whereby the decree is at first *nisi*, and becomes absolute if cause is not shown against it within a time fixed by rule. U. S. Eq. Rule 19. See also Stribling *v.* Hart, 20 Fla. 235. Nevertheless a former South Carolina rule providing generally for a day to show cause against a decree was held not to apply to a decree *pro confesso*. Southern Steam Packet Co. *v.* Roger, Cheves Eq. (S. C.) 48.

49. *Illinois.*— Powell *v.* Clement, 78 Ill. 20.

Michigan.— Brewer *v.* Dodge, 28 Mich. 359.

in general be granted when no injurious delay will result, and the applicant has not been guilty of great negligence.[50]

3. Grounds For Vacating Decree — a. Irregular Proceedings. A mere irregularity in service of process, if it was sufficient to give defendant notice, will not in itself require a setting aside of the decree;[51] but he must also show that substantial injustice has been done.[52] The court will vacate a decree if it was prematurely taken[53] or collusively obtained,[54] or if want of jurisdiction appears.[55]

b. Excusing Default. It is in general necessary, in order to vacate a default decree regularly entered, that defendant should show some reasonable excuse for his failure to appear or answer.[56] Promptness in making the application and a consideration of the rights of the adverse party have much to do in determining the sufficiency of the excuse.[57] It is said that if the application be promptly made defendant on payment of costs will be permitted to answer on showing any reasonable ground for indulgence.[58] Surprise, accident, and mistake afford proper grounds for relief,[59] and mental debility has been held an excuse.[60] It is not an excuse that defendant forgot,[61] or that he was ignorant of the procedure.[62] It is

Mississippi.— Williams *v.* Duncan, 44 Miss. 375.

New York.— Parker *v.* Grant, 1 Johns. Ch. 630.

United States.— Dean *v.* Mason, 20 How. 198, 15 L. ed. 876.

See 19 Cent. Dig. tit. "Equity," § 974.

Improper refusal to open a decree will be reversed on appeal. McGowan *v.* James, 20 Miss. 445.

Laches, etc.—A motion to vacate a final decree *pro confesso* not made until several months after entry of the decree, unsupported by affidavits and not brought to hearing within reasonable time, under the circumstances, will be treated as abandoned. Horner *v.* White, (Fla. 1903) 35 So. 662.

50. Carter *v.* Torrance, 11 Ga. 654; Graham *v.* Elmore, Harr. (Mich.) 265; Russell *v.* Waite, Walk. (Mich.) 31; Hart *v.* Lindsay, Walk. (Mich.) 72; Gwin *v.* Harris, Sm. & M. Ch. (Miss.) 528.

51. Gould *v.* Castel, 47 Mich. 604, 11 N. W. 403; Mulford *v.* Reilly, 32 N. J. Eq. 419; Cain *v.* Jennings, 2 Tenn. Cas. 209. Where there has been irregularity in the service which would tend to excuse defendant's failure to appear, the court may in its discretion vacate the decree on payment of costs. Southern Steam Packet Co. *v.* Roger, Cheves Eq. (S. C.) 48. If one applies, giving an excuse for not appearing, he waives irregularity. Stark *v.* Murphy, (Tenn. Ch. App. 1899) 52 S. W. 736.

52. Jermain *v.* Langdon, 8 Paige (N. Y.) 41; Day *v.* Phelps, 7 Fed. Cas. No. 3,689.

53. Fellows *v.* Hall, 8 Fed. Cas. No. 4,722, 3 McLean 281.

A verbal agreement of counsel cannot be considered to show that the default was irregular, the fact that a party relied thereon is to be considered as a circumstance of excuse in setting aside a decree upon the merits. Wager *v.* Stickle, 3 Paige (N. Y.) 407. The affidavit of one of the solicitors is not in itself sufficient to establish such an agreement. Kitchins *v.* Harrall, 54 Miss. 474.

54. Ash *v.* Bowen, 10 Phila. (Pa.) 68.

55. Eldred *v.* New Jersey American Palace-Car Co., 103 Fed. 209.

56. Stribling *v.* Hart, 20 Fla. 235; Frishee *v.* Timanus, 12 Fla. 300; Milier *v.* Hild, 11 N. J. Eq. 25; Wayne *v.* Washington Mut. Ins. Co., 1 Ohio Dec. (Reprint) 181, 3 West. L. J. 305; Campbell *v.* Atwood, (Tenn. Ch. App. 1897) 47 S. W. 168; Cook *v.* Dews, 2 Tenn. Ch. 496.

Employment of counsel who dies before filing an answer does not excuse a default not taken for nearly two years thereafter. Callaway *v.* Alexander, 8 Leigh (Va.) 114, 31 Am. Dec. 640.

57. Where plaintiff admitted a substantial error, and it did not appear that he had lost any evidence, the decree was opened, apparently without showing of diligence. Burch *v.* Scott, 1 Bland (Md.) 112.

Mere inadvertence may justify vacating the decree where no injury results to plaintiff. Yost *v.* Alderson, 58 Miss. 40.

After the death of witnesses a very strong showing of diligence is required. Wooster *v.* Woodhull, 1 Johns. Ch. (N. Y.) 539; Buchanan *v.* McManus, 3 Humphr. (Tenn.) 449.

58. Emery *v.* Downing, 13 N. J. Eq. 59.

59. Stribling *v.* Hart, 20 Fla. 235; Miller *v.* Wright, 25 N. J. Eq. 340; Van Deventer *v.* Stiger, 25 N. J. Eq. 224; Rogan *v.* Walker, 1 Wis. 631.

Reliance upon assurances by a co-defendant that one's interest will not be affected has been held sufficient before decree to let in the answer (Moore *v.* Moore, 5 Dana (Ky.) 464), but a mere supposition that his rights will be protected is insufficient (Babcock *v.* Perry, 4 Wis. 31).

60. Haywood *v.* Coman, 4 N. C. 204.

61. Wilkinson *v.* Kneeland, 125 Mich. 261, 84 N. W. 142.

62. Read *v.* Walker, 18 Ala. 323. That defendant because of limited knowledge of English did not understand the proceeding was held insufficient where there had been a full argument on an application for an injunction and a violation of the injunction. Ulshafer's Appeal, 1 Walk. (Pa.) 457.

generally held that a defendant is not excused by the neglect of his counsel[63] or of his agent.[64] One who suffers a decree *pro confesso* and then attends a sale thereunder cannot have it opened without good excuse for such conduct.[65]

c. Showing Meritorious Defense. In addition to showing a sufficient excuse for the default, defendant, in order to have a decree *pro confesso* set aside, must show that he has a meritorious defense.[66] Defendant, in addition to swearing that he has a good defense on the merits, must state definitely the facts constituting such defense, or state its substance or nature;[67] or he must produce the sworn answer which he proposes to put in.[68] Likewise, if defendant makes the application on petition, the petition must state the nature of his defense and it must be sworn to.[69] Although the submission of an answer is not an indispensable requirement unless made so by statute,[70] it is nevertheless the most natural

63. Grosvenor *v.* Doyle, 50 Ill. App. 47; Rust *v.* Lynch, 54 Md. 636; Scott *v.* Hore, 21 Fed. Cas. No. 12,535, 1 Hughes 163. *Contra*, Graham *v.* Elmore, Harr. (Mich.) 265; Trust, etc., Ins. Co. *v.* Jenkins, 8 Paige (N. Y.) 589.

Unauthorized waiver of an order to answer by a solicitor is no reason for setting aside a decree to which plaintiff was entitled without such order. Hoffmire *v.* Hoffmire, 7 Paige (N. Y.) 60.

That counsel was prevented by engagements elsewhere or press of business is no excuse. Kelly *v.* Roane Iron Co., (Tenn. Ch. App. 1899) 53 S. W. 1102; Cook *v.* Dews, 2 Tenn. Ch. 496.

64. Stark *v.* Murphy, (Tenn. Ch. App. 1899) 52 S. W. 736. *Contra*, Wayne *v.* Washington Mut. Ins. Co., 1 Ohio Dec. (Reprint) 181, 3 West. L. J. 305.

65. Hall *v.* Urquhart, 11 N. J. Eq. 318.

66. *Florida.*— Keil *v.* West, 21 Fla. 508. See also Horner *v.* White, (1903) 35 So. 662.

Illinois.— Terry *v.* Eureka College, 70 Ill. 236; Grubb *v.* Crane, 5 Ill. 153.

Indiana.— West *v.* Miller, 125 Ind. 70, 25 N. E. 143.

Kentucky.— Dunlap *v.* McIlvoy, 3 Litt. 269.

Mississippi.— Biloxi City R. Co. *v.* Maloney, (1896) 19 So. 832.

New Jersey.— Emery *v.* Downing, 13 N. J. Eq. 59.

Tennessee.— Lewis *v.* Simonton, 8 Humphr. 185; Cain *v.* Jennings, 2 Tenn. Cas. 209; Totten *v.* Nance, 3 Tenn. Ch. 264.

Wisconsin.— Mowry *v.* Hill, 11 Wis. 146; Babcock *v.* Perry, 4 Wis. 31.

United States.— Ozark Land Co. *v.* Leonard, 24 Fed. 660.

See 19 Cent. Dig. tit. "Equity," § 978.

Defendant already heard.— It is proper to refuse to set aside the decree when defendant had been permitted to take part in the proceedings and to be heard on his own behalf. White *v.* White, 169 Mass. 52, 47 N. E. 499.

67. Goodhue *v.* Churchman, 1 Barb. Ch. (N. Y.) 596; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173; Hunt *v.* Wallis, 6 Paige (N. Y.) 371; Schofield *v.* Horse Springs Cattle Co., 65 Fed. 433. The affidavit of merits should be made by defendant himself, or if made by counsel sufficient reason should be shown for its not being made by the party. State Bank *v.* Williams, Harr. (Mich.) 219.

68. Goodhue *v.* Churchman, 1 Barb. Ch. (N. Y.) 596; Hunt *v.* Wallis, 6 Paige (N. Y.) 371; Schofield *v.* Horse Springs Cattle Co., 65 Fed. 433.

An unsworn answer, unsupported by affidavits, will not entitle defendant to have the default opened on the ground that he has a valid defense to the merits. Sprague *v.* Jones, 9 Paige (N. Y.) 252.

69. Hart *v.* Lindsay, Walk. (Mich.) 72; Hunt *v.* Wallis, 6 Paige (N. Y.) 371.

70. In Tennessee the statute (Shannon Code, § 6185) authorizes the setting aside of *pro confesso* decrees only "upon good cause shown and the filing of a sufficient answer." Under this statute a demurrer is not sufficient to support the application. Stark *v.* Murphy, (Ch. App. 1899) 52 S. W. 736. Where the answer thus filed does not show a clear and cogent defense to the action the decree will not be opened. Kelly *v.* Roane Iron Co., (Ch. App. 1899) 53 S. W. 1102. The affidavit showing cause must be made by defendant himself unless the facts relied on are peculiarly within the knowledge of some other person making the affidavit, and where there are several defendants, ordinarily an affidavit made by one of them is insufficient. Cook *v.* Dews, 2 Tenn. Ch. 496. Defendant must not only show a good cause, but must so set it out as to enable the court to determine what it really is. Wilson *v.* Waters, 7 Coldw. 323. The affidavit of the party himself showing diligence is necessary. That of his solicitor alone is ordinarily insufficient. Totten *v.* Nance, 3 Tenn. Ch. 264. But where the application is by petition, inasmuch as the petition is for leave to answer, it need not be accompanied by an answer. Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640. And see Metcalf *v.* Landers, 3 Baxt. 35.

In Mississippi it is by statute made the duty of the court to vacate a *pro confesso* decree for "good cause shown, supported by the affidavit of the party, or his solicitor." It was held that when defendant makes application he must exhibit his answer or must show cause why he cannot do so and ask for further time; and if he does neither he will not be considered as showing good cause for relief. Pittman *v.* McClellan, 55 Miss. 299.

way of presenting to the court the merits of defendant's contention; and a sworn answer should ordinarily be tendered and the court may require it.[71] The decree will not be set aside on a general affidavit of merits.[72] A decree will not be opened to let in a defense which is technical merely,[73] or which is inequitable.[74] The merits which must be shown need not depend on new facts, but may consist of matter of law.[75]

4. Proceedings on Application. Plaintiff may resist the application by a counter showing.[76] The mere filing of an answer or giving leave to answer does not operate to vacate the decree. There must be a direct order to that end to ground further proceedings.[77] The order vacating the decree is conclusive and the propriety of the action cannot be raised in the subsequent proceedings.[78] The decree may be opened in a proper case as to one defendant alone.[79] If on opening the decree leave is given to answer, that form of defense alone may be resorted to;[80] but unless restricted by the order, any defense may be interposed which may be established by answer.[81] Defendant may be required to submit to terms.[82] Vacating the opening order restores the original decree.[83]

5. Decrees Based on Constructive Service. In connection with the statutes authorizing service by publication in certain cases against non-residents,[84] there are statutory provisions allowing a defendant so served to appear and make his defense after decree. These statutes vary greatly as to the time permitted, the

Where full answer is required by statute a decree will not be set aside to let in a plea. St. Mary's Bank *v.* St. John, 25 Ala. 566.

71. *Illinois.*— Dunn *v.* Keegin, 4 Ill. 292.

Michigan.— Hart *v.* Lindsay, Walk. 72.

New York.— Goodhue *v.* Churchman, 1 Barb. Ch. 596; Hunt *v.* Wallis, 6 Paige 371; Wells *v.* Cruger, 5 Paige 164.

Wisconsin.— Babcock *v.* Perry, 4 Wis. 31.

United States.— Schofield *v.* Horse Springs Cattle Co., 65 Fed. 433.

See 19 Cent. Dig. tit. "Equity," § 980.

Statute of limitations.— Where defendant has been permitted to answer a bill after an order *pro confesso* has been taken, he is not precluded by reason of such order from relying on the statute of limitations as a defense. Belt *v.* Bowie, 65 Md. 350, 4 Atl. 295.

The answer must meet the case made by the bill. Mills *v.* McLeod, 86 Mich. 290, 49 N. W. 134.

Probability that the answer is true must appear. Ferussac *v.* Thorn, 1 Barb. (N. Y.) 42.

72. Stockton *v.* Williams, Harr. (Mich.) 241; Goodhue *v.* Churchman, 1 Barb. Ch. (N. Y.) 596; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173; Schofield *v.* Horse Springs Cattle Co., 65 Fed. 433.

73. Freeman *v.* Warren, 3 Barb. Ch. (N. Y.) 635; Gay *v.* Gay, 10 Paige (N. Y.) 369.

74. King *v.* Merchants' Exch. Co., 2 Sandf. (N. Y.) 693 [*affirmed* in 5 N. Y. 547]; Baxter *v.* Lansing, 7 Paige (N. Y.) 350.

Where the defense is usury defendant will be required to waive the forfeiture. Watt *v.* Watt, 2 Barb. Ch. (N. Y.) 371; Quincy *v.* Foot, 1 Barb. Ch. (N. Y.) 496.

Waiver of statute of limitations will not be required of defendant unless under special circumstances. Douglas *v.* Douglas, 3 Edw. (N. Y.) 390.

Waiver of a legal right of action against a third person will not be exacted. Mumford *v.* Sprague, 11 Paige (N. Y.) 438.

75. Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640. The averments of the bill should be considered. Ronan *v.* Bluhm, 173 Ill. 277, 50 N. E. 694. If the bill lacks jurisdictional averments the decree should be opened. Nelson *v.* Eaton, 66 Fed. 376, 13 C. C. A. 523.

76. Wilson *v.* Waters, 7 Coldw. (Tenn.) 323.

77. Carter *v.* Torrance, 11 Ga. 654; Barnes *v.* Lee, 1 Bibb (Ky.) 526; Cook's Appeal, (Pa. 1888) 15 Atl. 870.

Granting leave to answer does not vacate a previous order of reference or report. Grob *v.* Cushman, 45 Ill. 119.

78. Kinney *v.* Bauer, 6 Ill. App. 267. See also Southern Bank *v.* Humphreys, 47 Ill. 227. If plaintiff materially amends his bill after the vacating of the order, he waives the right to have the order reviewed. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356.

79. Moody *v.* McDuff, 58 Miss. 751. A defendant cannot object to setting aside a *pro confesso* order against a co-defendant. Bristol Bank *v.* Bradley, 15 Lea (Tenn.) 279.

80. Allen *v.* Baugus, 1 Swan (Tenn.) 404.

81. Stone *v.* Welling, 14 Mich. 514.

82. Generally defendant will not be permitted to retard the hearing. Wilson *v.* Waterman, 6 Rich. Eq. (S. C.) 255; Gardner *v.* Landcraft, 6 W. Va. 36. Payment of costs will be made a condition of opening the decree where the proceedings have been regular. Oram *v.* Dennison, 13 N. J. Eq. 438; Lorton *v.* Seaman, 9 Paige (N. Y.) 609.

Answer contrary to agreement.— Where a decree was set aside on an agreement to admit certain allegations an answer denying them was stricken from the files. Pearce *v.* Daughdrill, 54 Ala. 456.

83. Hurt *v.* Blount, 63 Ala. 327.

84. See *supra*, VI, A, 4.

method of proceeding, and the conditions, where any exist, under which the defense may be interposed.[85] Sometimes the decree is vacated in the first instance,[86] and sometimes defendant is merely permitted to be heard and the decree stands unless set aside on final hearing.[87]

F. Bills of Review — 1. Nature and Functions — a. Definition. A bill of review is one filed to procure an examination and reversal of a decree after its enrolment.[88] It is not a part of the original cause but an independent proceeding,[89] and is the only proper method by which the court rendering a decree can review it for error after the time for rehearing has expired.[90]

b. Bills in the Nature of Bills of Review. A bill in the nature of a bill of review is a term properly applied to a bill to obtain relief against a decree,

85. See, generally, Judgments. For construction of the statutes of the jurisdictions named, with reference to suits in equity, see the following cases:

Alabama.— Lehman *v.* Collins, 69 Ala. 127; Colomb *v.* Mobile Branch Bank, 18 Ala. 454.

Arkansas.— Porter *v.* Hanson, 36 Ark. 591.

Illinois.— Methodist Episcopal Church *v.* Field, 135 Ill. 112, 25 N. E. 667; Wellington *v.* Heermans, 110 Ill. 564; Sale *v.* Fike, 54 Ill. 292.

Kentucky.— Larue *v.* Larue, 3 J. J. Marsh. 156; Dunlap *v.* McIlvoy, 3 Litt. 269.

Michigan.— Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117.

Minnesota.— Smith *v.* Valentine, 19 Minn. 452.

Mississippi.— Rodney *v.* Seelye, 54 Miss. 537; Hebron *v.* Kelly, 77 Miss. 48, 23 So. 641, 25 So. 877; Head *v.* Wash, 31 Miss. 358.

New Jersey.— Consolidated Electric Storage Co. *v.* Atlantic Trust Co., 50 N. J. Eq. 93, 24 Atl. 229.

New York.— Gerard *v.* Gerard, 2 Barb. Ch. 73.

Tennessee.— Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; Cain *v.* Jennings, 2 Tenn. Cas. 209; Cain *v.* Jennings, 3 Tenn. Ch. 131.

Virginia.— Rootes *v.* Tompkins, 3 Gratt. 98; Hooe *v.* Barber, 4 Hen. & M. 439.

United States.— American Freehold Land-Mortg. Co. *v.* Thomas, 71 Fed. 782, 18 C. C. A. 327.

See 19 Cent. Dig. tit. "Equity," §§ 973, 978, 984.

86. Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488.

87. Bruner *v.* Battell, 83 Ill. 317; Baker *v.* Backus, 32 Ill. 79.

When the decree is set aside all rights obtained thereunder are annulled. Martin *v.* Gilmore, 72 Ill. 193.

88. *Illinois.*— Mathias *v.* Mathias, 104 Ill. App. 344.

Iowa.— McGregor *v.* Gardner, 16 Iowa 538.

Kentucky.— Peak *v.* Percifull, 3 Bush 218; Singleton *v.* Singleton, 8 B. Mon. 340.

New York.— Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 20, 51 N. Y. Suppl. 27, 34.

Pennsylvania.— Fidelity Ins., etc., Co.'s Appeal, 3 Walk. 185.

West Virginia.—Hyman *v.* Smith, 10 W. Va. 298, 312.

United States.— Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33.

See 19 Cent. Dig. tit. "Equity," §§ 1065, 1067; Mitford Eq. Pl. 78.

Informal bills of review.— If a bill has the object of a bill of review, it will be so treated regardless of the title which may have been given it (Basye *v.* Beard, 12 B. Mon. (Ky.) 581; Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340; West *v.* Shaw, 32 W. Va. 195, 9 S. E. 81), but only where it possesses the requisites of such a bill (Diamond State Iron Co. *v.* Alex. K. Rarig Co., 93 Va. 595, 25 S. E. 894). A petition for rehearing may be so treated. Heermans *v.* Montague, (Va. 1890) 20 S. E. 899; Knox *v.* Columbia Liberty Iron Co., 42 Fed. 378. *Contra,* Fries *v.* Frics, 1 MacArthur (D. C.) 291.

89. Cole *v.* Miller, 32 Miss. 89. It is a continuation of the original suit. Goolsby *v.* St. John, 25 Gratt. (Va.) 146.

90. *Kentucky.*— Breckinridge *v.* Taylor, 1 B. Mon. 263; Garner *v.* Strode, 5 Litt. 314; Bramblet *v.* Pickett, 2 A. K. Marsh. 10, 12 Am. Dec. 350.

Maryland.— Thruston *v.* Devecmon, 30 Md. 210; Hollingsworth *v.* McDonald, 2 Harr. & J. 230, 3 Am. Dec. 545.

Tennessee.— Frazer *v.* Sypert, 5 Sneed 100.

Vermont.— Mead *v.* Arms, 3 Vt. 148, 21 Am. Dec. 581.

West Virginia.— Keck *v.* Allender, 37 W. Va. 201, 16 S. E. 520.

United States.— Dunlevy *v.* Dunlevy, 38 Fed. 459; Robinson *v.* Rudkins, 28 Fed. 8.

See 19 Cent. Dig. tit. "Equity," § 1065.

Where a rehearing is available a bill of review will not lie. Stallworth *v.* Blum, 50 Ala. 46; Central Georgia Bank *v.* Iverson, 73 Ga. 19.

Statutes authorizing other proceedings to vacate or modify decrees are usually held not to abolish bills of review unless they do so expressly. Jacks *v.* Adair, 33 Ark. 161; Eaton *v.* Dickinson, 3 Sneed (Tenn.) 397; Gallatin Land, etc., Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747. The Oregon and Wisconsin statutes abolish bills of review. Hilts *v.* Ladd, 35 Oreg. 237, 58 Pac. 32; Crowns *v.* Forest Land Co., 102 Wis. 97, 78 N. W. 433. In California the statute providing for appeals seems to be exclusive as to the grounds covered. San Francisco Sav., etc., Soc. *v.* Thompson, 34 Cal. 76. N. H. Gen. St. c. 215,

brought by or against one not a party to the original bill.[91] The term is sometimes applied to other bills having the general purpose of a bill of review but not being technically such.[92]

c. Supplemental Bills in the Nature of Bills of Review. A supplemental bill in the nature of a bill of review is one filed before enrolment to bring in matter discovered since the decree.[93]

2. What Decrees May Be Reviewed. A bill of review will not lie upon an interlocutory decree,[94] but only after final decree.[95] A decree by consent is not ordinarily subject to a bill of review,[96] nor can such a bill be filed to a decree

does not apply to suits in equity. Brooks *v.* Howard, 55 N. H. 69.

91. Mitford Eq. Pl. 34, 83. And see Guerry *v.* Durham, 11 Ga. 9; Alexander *v.* Slavens, 7 B. Mon. (Ky.) 351; Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 16, 41 Atl. 217; Thompson *v.* Schenectady R. Co., 119 Fed. 634.

92. As a bill to impeach a decree for fraud (Dunklin *v.* Harvey, 56 Ala. 177), a bill to review an interlocutory decree (Hyman *v.* Smith, 10 W. Va. 298), or a bill to review a decree not enrolled (Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303).

93. Mitford Eq. Pl. 81, and the following cases:

Kentucky.— Singleton *v.* Singleton, 8 B. Mon. 340.

Maryland.— Burch *v.* Scott, 1 Gill & J. 393; Hollingsworth *v.* McDonald, 2 Harr. & J. 230, 3 Am. Dec. 545; Ridgeway *v.* Toram, 2 Md. Ch. 303.

Michigan.— Noeker *v.* Howry, 119 Mich. 626, 78 N. W. 669.

Mississippi.— Iler *v.* Routh, 3 How. 276.

New York.— Wiser *v.* Blachly, 2 Johns. Ch. 488; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. 70.

West Virginia.— Hyman *v.* Smith, 10 W. Va. 298.

Wisconsin.— Dousman *v.* Hooe, 3 Wis. 466.

See 19 Cent. Dig. tit. "Equity," §§ 1068, 1069.

For reviewing an interlocutory decree a supplemental bill in the nature of a bill of review is the appropriate method. Putman *v.* Lewis, 1 Fla. 455; Laidley *v.* Merrifield, 7 Leigh (Va.) 346.

94. *Arkansas.*— Price *v.* Notrebe, 17 Ark. 45.

Illinois.— Bates *v.* Great Western Tel. Co., 35 Ill. App. 254 [*affirmed* in 134 Ill. 536, 25 N. E. 421].

Mississippi.— Murray *v.* Murphy, 39 Miss. 214; Cook *v.* Bay, 4 How. 485.

New York.— Field *v.* Williamson, 4 Sandf. Ch. 613.

Tennessee.— Clark *v.* Garrett, 6 Lea 262; Johnson *v.* Hanner, 2 Lea 8.

Virginia.—Ellzey *v.* Lane, 2 Hen. & M. 589; Banks *v.* Anderson, 2 Hen. & M. 20; Bowyer *v.* Lewis, 1 Hen. & M. 553. See also Vanmeter *v.* Vanmeter, 3 Gratt. 148.

See 19 Cent. Dig. tit. "Equity," § 1073. See also *supra*, XXIV, F, 2.

Where new parties must be brought in, and much new matter, the court may entertain a new bill in the nature of a bill of review to set aside an interlocutory decree. Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891.

95. Savage *v.* Johnson, 125 Ala. 673, 28 So. 547; Franklin Electric Light Co. *v.* Ft. Wayne Electric Corp., 58 N. J. Eq. 579, 43 Atl. 1098 [*affirming* 57 N. J. Eq. 7, 41 Atl. 666]; Read *v.* Franklin, (Tenn. Ch. App. 1900) 60 S. W. 215.

What is a final decree, within the meaning of the rule, is sometimes a difficult question. Where the decree settles all the rights it is final, although much may remain to be done before the decree can be carried into effect. Core *v.* Strickler, 24 W. Va. 689. A decree ordering the sale of mortgaged premises is final and can be reviewed by bill, but the order confirming the sale cannot. Whiting *v.* U. S. Bank, 29 Fed. Cas. No. 17,576, 1 McLean 249 [*affirmed* in 13 Pet. 6, 10 L. ed. 33]. A decree ordering a sale unless the debt be paid is not final. Spoor *v.* Tilson, 97 Va. 279, 33 S. E. 609; Dellinger *v.* Foltz, 93 Va. 729, 25 S. E. 998. A decree in the alternative is final. McGowan *v.* Collins, 10 N. C. 420. An order conditionally dismissing is not final, although the condition is not performed. Plaisted *v.* Cooke, 181 Mass. 118, 63 N. E. 132. A decree directing the payment of money, although the amount is not ascertained, is final if all consequential directions are given. Coithe *v.* Crane, 1 Barb. Ch. (N. Y.) 21. An award confirmed by the court is a final decree. Handy *v.* Cobb, 44 Miss. 699. A final decree may be set aside although void. Mathews *v.* Massey, 4 Baxt. (Tenn.) 450.

96. *Alabama.*— Adler *v.* Van Kirk Land, etc., Co., 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133.

Georgia.—Murphy *v.* Savannah, 73 Ga. 263; Cunningham *v.* Schley, 68 Ga. 105; Hargraves *v.* Lewis, 7 Ga. 110.

Illinois.— Watts *v.* Rice, 192 Ill. 123, 61 N. E. 337; Armstrong *v.* Cooper, 11 Ill. 540; Turner *v.* Berry, 8 Ill. 541.

Indiana.— Indianapolis, etc., R. Co. *v.* Sands, 133 Ind. 433, 32 N. E. 722.

Ohio.— Cooch *v.* Cooch, 18 Ohio 146.

Tennessee.— Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208.

United States.— Thompson *v.* Maxwell Land Grant, etc., Co., 95 U. S. 391, 24 L. ed. 481; Kennedy *v.* Georgia Bank, 8 How. 586, 12 L. ed. 1209.

See 19 Cent. Dig. tit. "Equity," § 1075.

pro confesso;[97] but it seems this rule does not apply as to errors apparent on the face of the record.[98] A release of error in a decree bars a bill of review to reverse it.[99] Where an appeal vacates a decree a bill of review will not lie after the appeal is perfected.[1] After affirmance by a higher court a bill of review will not lie,[2] unless the right is reserved in the decree above or permission thereafter given by the appellate court,[3] or unless the bill be founded on evidence discovered after the affirmance.[4] Where jurisdiction of the appellate court is appellate solely, it cannot itself entertain a bill to review its own decree.[5]

Vacating decree.— A consent decree may be vacated for mistake. Flagler *v.* Crow, 40 Ill. 414; Vincent *v.* Matthews, 15 R. I. 509, 8 Atl. 704. See *supra*, XXIV, B. A consent decree will not be vacated because of a later decision announcing the law contrary to what counsel supposed it to be. Ingles *v.* Bryant, 117 Mich. 113, 75 N. W. 442.

Dismissal on motion of plaintiff cannot be reviewed by him. Jones *v.* Zollicoffer, 4 N. C. 45.

97. McDaniel *v.* James, 23 Ill. 407; Gullett *v.* Housh, 7 Blackf. (Ind.) 52; Camden *v.* Ferrell, 50 W. Va. 119, 40 S. E. 368. One who suffers default on the erroneous advice of counsel cannot obtain a bill of review. *Ex p.* Monteith, 1 S. C. 227. A defendant cannot review a decree *pro confesso* without first exhausting his remedy under a statute. McKinney *v.* Hammett, 26 W. Va. 628.

98. Prentiss *v.* Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640; Creed *v.* Lancaster Bank, 1 Ohio St. 1.

99. Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187.

1. Fuller *v.* Jackson, (Tenn. Ch. App. 1901) 62 S. W. 274.

Allowance of an appeal not prosecuted does not preclude a bill of review. Gilchrist *v.* Buie, 21 N. C. 346.

2. *Alabama.*— Stallworth *v.* Blum, 50 Ala. 46.

Georgia.— Inman *v.* Foster, 72 Ga. 79; Watkins *v.* Lawton, 69 Ga. 671; Rice *v.* Carey, 4 Ga. 558.

Iowa.— McGregor *v.* Gardner, 16 Iowa 538.

Kentucky.— Mitchell *v.* Berry, 1 Metc. 602.

Maryland.— Pinkney *v.* Jay, 12 Gill & J. 69.

Pennsylvania.— Dennison *v.* Goehring, 6 Pa. St. 402.

Tennessee.— Morton *v.* Sneed, (Ch. App. 1897) 39 S. W. 736.

United States.— Kingsburg *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047; Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, 4 C. C. A. 55 [*reversing* 50 Fed. 289].

See 19 Cent. Dig. tit. "Equity," § 1072.

Contra, under special circumstances. Karr *v.* Freeman, 166 Ill. 299, 46 N. E. 717.

Matters which might have been reviewed on appeal cannot thereafter be raised by bill of review. Mitchell *v.* Berry, 1 Metc. (Ky.) 602; Brewer *v.* Bowman, 3 J. J. Marsh. (Ky.) 492, 20 Am. Dec. 158.

After dismissal of a writ of error there can be no review. Hall *v.* Huff, 76 Ga. 337.

Questions merely referred to appellate court.— Where under the local practice questions are referred to the supreme court but the decree is entered in the court below it may be reviewed in the latter court. Benzien *v.* Lenior, 11 N. C. 403.

Jurisdiction of the court cannot be questioned after decree on appeal. Brown *v.* Haines, 12 Ohio 1.

3. Reynolds *v.* Florida Cent., etc., R. Co., 42 Fla. 387, 28 So. 861; Southard *v.* Russell, 16 How. (U. S.) 547, 14 L. ed. 1052; Kissinger-Ison Co. *v.* Gradford Belting Co., 123 Fed. 91, 59 C. C. A. 221; Shakers' Soc. *v.* Watson, 77 Fed. 512, 23 C. C. A. 263. If formal permission be given objections may be renewed in the court below. Frankfort *v.* Frankfort Deposit Bank, 120 Fed. 165 [*affirmed* in 124 Fed. 18, 59 C. C. A. 538]. Permission will be given where the issues raised are such that if sustained they require a reversal. Boston, etc., Electric St. R. Co. *v.* Bemis Car-Box Co., 98 Fed. 121, 38 C. C. A. 661. See also Seymour *v.* White County, 92 Fed. 115, 34 C. C. A. 240.

4. McLean *v.* Nixon, 18 B. Mon. (Ky.) 768; Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340; Carr *v.* Green, Rich. Eq. Cas. (S. C.) 405; Shepherd *v.* Chapman, (Va. 1895) 21 S. E. 468. The general principle is that the decision of a higher court cannot be reviewed by the court below. Felty *v.* Calhoon, 147 Pa. St. 27, 23 Atl. 438. Therefore it applies to matters covered by a decree of reversal as well as affirmance. Costen's Appeal, 13 Pa. St. 292; Henry *v.* Davis, 13 W. Va. 230. It will not be allowed to present matter which might have been presented in the earlier proceedings. McLean *v.* Nixon, 18 B. Mon. (Ky.) 768. Matter which might have been and was not litigated in the first instance cannot be considered on appeal, but only by bill of review. Burt *v.* Thomas, 49 Mich. 462, 12 N. W. 911, 13 N. W. 818. A bill of review will not be allowed to revise the judgment of the appellate court on the ground that the decree was performed in ignorance of the appeal. Costen's Appeal, 13 Pa. St. 292. Even for newly discovered evidence, the right to file a bill must be granted by the appellate court. Stafford *v.* Bryan, 2 Paige (N. Y.) 45. It has been held that a bill grounded on newly discovered evidence will not lie after decree by the appellate court. Cox *v.* Hartsville Bank, (Tenn. Ch. App. 1900) 63 S. W. 237; Saunders *v.* Savage, (Tenn. Ch. App. 1900) 63 S. W. 218.

5. *Illinois.*— Schaefer *v.* Wunderle, 154 Ill. 577, 39 N. E. 693.

Iowa.— McGregor *v.* Gardner, 16 Iowa 538

3. In What Court Brought. The rule is uniform that the court which rendered the decree, and that court alone, has jurisdiction of a bill to review the decree.[6] Where a court is abolished and its jurisdiction transferred to another court the latter has power to review a decree of the former.[7] Whether courts of probate possess the power of entertaining bills of review in like manner as courts of general chancery jurisdiction is a question depending largely upon the construction of statutes.[8] Consent cannot confer jurisdiction.[9]

4. Parties — a. Generally. The general rule is that all parties to the original bill must be parties to the bill of review,[10] and that only such as were parties to the original bill should be brought in.[11] It is said, however, that only necessary parties interested in the decree need be brought in.[12] One who is out of the jurisdiction need not be made a party if his presence is not indispensable.[13] A voluntary purchaser from the successful party need not be brought in,[14] but a purchaser at a sale under the decree should be.[15] The parties should be ranged according to their interest in the matter to be reviewed.[16]

North Carolina.—American Bible Soc. *v.* Hollister, 54 N. C. 10.

Tennessee.— Cox *v.* Breedlove, 2 Yerg. 499.

Vermont.— Slason *v.* Cannon, 19 Vt. 219.

See 19 Cent. Dig. tit. "Equity," §§ 1071, 1072.

Permission should be obtained from the appellate court, but the bill should be filed in the court below. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 107 Fed. 781, 46 C. C. A. 639, 109 Fed. 279, 48 C. C. A. 362.

In Ohio the supreme court was held to have power to review its own decrees. Longworth *v.* Sturges, 4 Ohio St. 690.

6. *Illinois.*— Mathias *v.* Mathias, 202 Ill. 125, 66 N. E. 1042 [*affirming* 104 Ill. App. 344]; Moore *v.* Bracken, 27 Ill. 23.

Maryland.—Pinkney *v.* Jay, 12 Gill & J. 69.

Massachusetts.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 169 Mass. 157, 47 N. E. 606.

Michigan.— Ryerson *v.* Eldred, 18 Mich. 490.

Mississippi.— Hall *v.* Waddill, 78 Miss. 16, 27 So. 936, 28 So. 831.

New Jersey.— Putnam *v.* Clark, 35 N. J. Eq. 145.

Tennessee.— Murphy *v.* Johnson, 107 Tenn. 552, 64 S. W. 894.

Virginia.— Hancock *v.* Hutcherson, 76 Va. 609; Vanmeter *v.* Vanmeter, 3 Gratt. 148.

Wisconsin.—Parish *v.* Marvin, 15 Wis. 247.

United States.— Camp Mfg. Co. *v.* Parker, 121 Fed. 195; Graver *v.* Faurot, 64 Fed. 241.

See 19 Cent. Dig. tit. "Equity," § 1098.

The bill should be brought in the county where the decree was rendered. Lester *v.* Mathews, 58 Ga. 403.

7. Davis *v.* Watson, 54 Miss. 679. Much, however, depends upon the language of the law effecting the change. See Cole *v.* Miller, 32 Miss. 89.

8. *Compare* Heistand *v.* Kuns, 6 Blackf. (Ind.) 95; Stewart *v.* Davidson, 10 Sm. & M. (Miss.) 351; Washburn *v.* Phillips, 5 Sm. & M. (Miss.) 600; Farmers', etc., Bank *v.* Tappan, 5 Sm. & M. (Miss.) 112; Cowden *v.* Dobyns, 5 Sm. & M. (Miss.) 82; Heath *v.* Layne, 62 Tex. 686; Fortson *v.* Alford, 62 Tex. 576; Kelsey *v.* Trisler, (Tex. Civ. App. 1903) 74 S. W. 64.

9. Rohn *v.* Dunbar, 13 Ohio St. 572.

10. *Georgia.*— Lester *v.* Mathews, 58 Ga. 403.

Indiana.—Concannon *v.* Noble, 96 Ind. 326.

Mississippi.—Armistead *v.* Barber, 82 Miss. 788, 35 So. 199; Friley *v.* Hendricks, 27 Miss. 412.

Ohio.— Sturges *v.* Longworth, 1 Ohio St. 544.

West Virginia.—Amiss *v.* McGinnis, 12 W. Va. 371.

United States.— U. S. Bank *v.* White, 8 Pet. 262, 8 L. ed. 938.

See 19 Cent. Dig. tit. "Equity," § 1099.

A wife may bring the bill without joining her husband if he has lost his right by laches. Winchester *v.* Winchester, 1 Head (Tenn.) 460.

A supplemental bill may be allowed in case a party has died. Grant *v.* Ludlow, 8 Ohio St. 1.

11. Cochran *v.* Couper, 2 Del. Ch. 27.

Simple contract creditors cannot come in as plaintiffs. Horner *v.* Zimmerman, 45 Ill. 14.

An executor's surety may be made a party for cause shown. Smith's Estate, 12 Phila. (Pa.) 87.

If a bill brings in new parties it may be retained as a supplemental bill in a proper case therefor. Ludlow *v.* Kidd, 2 Ohio 372.

12. Turner *v.* Berry, 8 Ill. 541; Munnikhuysen *v.* Magraw, 57 Md. 172; Grant *v.* Ludlow, 8 Ohio St. 1; King *v.* Dundee Mortg., etc., Invest. Co., 28 Fed. 33. This is true only of original bills in the nature of bills of review. Maxwell Land Grant, etc., Co. *v.* Thompson, 1 N. M. 603.

13. Perkins *v.* Hendryx, 127 Fed. 448, nonresident personal representatives of deceased partner not indispensable. See also *supra*, V, C, 4, b, (III).

14. Clark *v.* Farrow, 10 B. Mon. (Ky.) 446, 52 Am. Dec. 552; Debell *v.* Foxworthy, 9 B. Mon. (Ky.) 228.

15. Heermans *v.* Montague, (Va. 1890) 20 S. E. 899.

A purchaser at an execution sale to satisfy a personal decree rendered is not a proper party. Gies *v.* Green, 42 Mich. 107, 3 N. W. 283.

16. Sloan *v.* Whiteman, 6 Ind. 434.

b. Plaintiffs. No one can maintain a bill of review unless he shows an interest injuriously affected by the decree.[17] In accordance with the general rule it is usually said that the bill lies only in favor of a party to the original decree or his privies;[18] but a trustee may file a bill for the benefit of the *cestuis que trustent*,[19] and one represented, but not a technical party, may file the bill.[20] An assignee of a party cannot become a plaintiff.[21] All parties having an interest in the reversal of the decree may join as plaintiffs.[22]

5. Within What Time Bill May Be Filed. Courts of equity adopt with reference to bills of review the analogy of the statute of limitations.[23] A bill of review being in the nature of a writ of error, the English chancery, following the common-law rule with reference to such writs, held that a bill of review might be brought within twenty years of the decree,[24] and this limitation has been adopted in a few cases in the United States.[25] For the most part, however, the American courts have followed the principle rather than the limitation recognized in England, and permit bills of review only within the time which is allowed for an appeal or writ of error within the particular jurisdiction.[26] Generally, however,

Where the decree is against two jointly, one may join the other as co-plaintiff without obtaining his consent. Hargraves *v.* Lewis, 6 Ga. 207.

17. *Alabama.*— Allgood *v.* Piedmont Bank, 130 Ala. 237, 29 So. 855.

Arkansas.— Harris *v.* Hanie, 37 Ark. 348.

Illinois.—Horner *v.* Zimmerman, 45 Ill. 14.

Kentucky.—Kennedy *v.* Ball, Litt. Sel. Cas. 125.

Maine.— Glover *v.* Jones, 95 Me. 303, 49 Atl. 1104.

New York.— Webb *v.* Pell, 3 Paige 368.

Ohio.— Tremper *v.* Barton, 18 Ohio 418; Cooch *v.* Cooch, 18 Ohio 146.

West Virginia.— Chancellor *v.* Spencer, 40 W. Va. 337, 21 S. E. 1011; Riggs *v.* Huffman, 33 W. Va. 426, 10 S. E. 795; Hall *v.* Lowther, 22 W. Va. 570.

United States.— Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33; Freeman *v.* Clay, 52 Fed. 1, 2 C. C. A. 587; Brown *v.* White, 16 Fed. 900, 4 Woods 614.

See 19 Cent. Dig. tit. "Equity," §§ 1095, 1099.

One in whose favor a decree was rendered may file a bill of review if the decree contained provisions unjustly affecting him. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303.

A party who has accepted the benefits of a decree is thereby estopped from reviewing it, or from escaping from its burdens. Hill *v.* Phelps, 101 Fed. 650, 41 C. C. A. 569.

18. *Mississippi.*—Neilson *v.* Holmes, Walk. 261.

North Carolina.—Thompson *v.* Cox, 53 N. C. 311.

Rhode Island.— Doyle *v.* New York, etc., R. Co., 14 R. I. 55.

Virginia.— Heermans *v.* Montague, (1890) 20 S. E. 899.

United States.— Continental Trust Co. *v.* Toledo, etc., R. Co., 99 Fed. 171; Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305.

See 19 Cent. Dig. tit. "Equity," § 1095.

Contra.— Paul *v.* Frierson, 21 Fla. 529; Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256; Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340; Clarkson *v.* Morgan, 6 B. Mon. (Ky.) 441.

A decree establishing a will concludes all interested therein and any one so interested may file a bill in the nature of a bill of review. Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340; Connolly *v.* Connolly, 32 Gratt. (Va.) 657.

19. Hodges *v.* Mullikin, 1 Bland (Md.) 503. One cannot sue on allegations that he represents unnamed persons. Laidley *v.* Kline, 25 W. Va. 208.

20. Wright *v.* Gay, 101 Ill. 233; Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208. One with a substantial interest under a consent decree may sue, although technically not a party. Lester *v.* Mathews, 58 Ga. 403.

Bond-holders represented by trustees cannot file a bill of review, at least without charging misconduct on the part of the trustees. Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757.

21. Moorer *v.* Moorer, 84 Ala. 353, 4 So. 234; Gibson *v.* Green, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888; Hopkins *v.* Baker, 2 Patt. & H. (Va.) 110; Thompson *v.* Maxwell Land Grant, etc., Co., 95 U. S. 391, 24 L. ed. 481.

22. Creed *v.* Lancaster Bank, 1 Ohio St. 1.

One whose right to file a bill is barred cannot join as plaintiff with one whose right continues. Brewer *v.* Bowman, 3 J. J. Marsh. (Ky.) 492, 20 Am. Dec. 158.

23. Gullett *v.* Housh, 7 Blackf. (Ind.) 52; Thomas *v.* Brockenbrough, 10 Wheat. (U. S.) 146, 6 L. ed. 287; U. S. *v.* Samperyac, 21 Fed. Cas. No. 16,216*a*, Hempst. 118.

In Texas, however, the general statutes of limitations do not apply. Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130.

24. Mitford Eq. Pl. 79.

25. Guerry *v.* Durham, 11 Ga. 9; Barnum *v.* McDaniels, 6 Vt. 177.

26. *California.*— Steen *v.* March, 132 Cal. 616, 64 Pac. 994; Allen *v.* Currey, 41 Cal. 318.

Idaho.— McMillan *v.* Wooley, 6 Ida. 36, 51 Pac. 1029.

Illinois.— Cole *v.* Littledale, 164 Ill. 630, 45 N. E. 969; Dolton *v.* Erb, 53 Ill. 289.

this period applies only to bills for error apparent on the record, and there is no arbitrary bar to a bill based on new matter.[27] Sometimes the period is fixed by express statute.[28] The time generally begins to run from the time when the final decree is rendered;[29] but, where time runs against a bill based on newly-discovered evidence, it is to be computed from the time of discovery.[30] The time when the proceeding is deemed commenced is a question on which the decisions are not in harmony.[31] The usual exceptions are made in favor of persons under disabilities.[32] Besides the limitation arising from lapse of time the court will apply the ordinary rules denying relief where plaintiff has been guilty of laches.[33] A cross

Kentucky.— Mitchell *v.* Berry, 1 Metc. 602; Buckner *v.* Forker, 7 Dana 50.

Maryland.— Presstman *v.* Mason, 68 Md. 78, 11 Atl. 764; Contee *v.* Pratt, 9 Md. 67; Pfeltz *v.* Pfeltz, 1 Md. Ch. 455.

Michigan.— Sandford *v.* Haines, 71 Mich. 116, 38 N. W. 777.

Missouri.— Creath *v.* Smith, 20 Mo. 113.

Oregon.— George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1.

Pennsylvania.— Lindsay's Estate, 14 Phila. 244; Bauers' Estate, 13 Phila. 391.

Virginia.— Shepherd *v.* Larue, 6 Munf. 529.

United States.— Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33; Thomas *v.* Brockenbrough, 10 Wheat. 146, 6 L. ed. 287; Cocke *v.* Copenhaver, 126 Fed. 145, 61 C. C. A. 211; Chamberlain *v.* Peoria, etc., R. Co., 118 Fed. 32, 55 C. C. A. 54; Halsted *v.* Forest Hill Co., 109 Fed. 820; Copeland *v.* Bruning, 104 Fed. 169; Reed *v.* Stanley, 97 Fed. 521, 38 C. C. A. 331; McDonald *v.* Whitney, 39 Fed. 466; Dunlevy *v.* Dunlevy, 38 Fed. 459; U. S. *v.* Samperyac, 21 Fed. Cas. No. 16,216*a*, Hempst. 118 [*affirmed* in 7 Pet. 222, 8 L. ed. 665].

See 19 Cent. Dig. tit. "Equity," § 1104.

This time may be extended for special reasons, but they must be cogent. Sloan *v.* Sloan, 102 Ill. 581; Rector *v.* Fitzgerald, 59 Fed. 808, 8 C. C. A. 277.

A bill filed too late may be treated as a bill properly to enforce the decree if it has the requisites thereof. Buckner *v.* Forker, 7 Dana (Ky.) 50. But the court will not permit the bar to be evaded by treating the bill as a statutory application to correct errors. Amiss *v.* McGinnis, 12 W. Va. 371.

27. Jacks *v.* Adair, 33 Ark. 161; Jenkins *v.* Prewitt, 5 Blackf. (Ind.) 7, 6 Blackf. (Ind.) 237; Benson *v.* Outten, 5 J. J. Marsh. (Ky.) 609; Camp Mfg. Co. *v.* Parker, 121 Fed. 195.

28. *District of Columbia.*— Killian *v.* Clark, 3 MacArthur 379, two years.

Georgia.— Crawford *v.* Watkins, 118 Ga. 631, 45 S. E. 482, three years.

Maryland.— Luckett *v.* White, 10 Gill & J. 480, eighteen months.

Mississippi.— Martin *v.* Gilleylen, 70 Miss. 324, 12 So. 254, two years.

Pennsylvania.— Jones' Appeal, 99 Pa. St. 124, five years.

Rhode Island.— Williams *v.* Starkweather, 24 R. I. 512, 53 Atl. 870, one year.

Tennessee.— Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208 (three years); Winchester *v.* Winchester, 1 Head 460 (three years).

West Virginia.— Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102, three years.

See 19 Cent. Dig. tit. "Equity," § 1103.

29. Nolan *v.* Urmston, 17 Ohio 170; Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189; Beach *v.* Mosgrove, 16 Fed. 305, 4 McCrary 50.

When the decree is at first nisi, time runs from the time when it becomes absolute. Lyon *v.* Robbins, 46 Ill. 276.

The time runs from final decree and not from the time of a subsequent order. Nelson *v.* Jennings, 2 Pat. & H. (Va.) 369.

A decree of partition settling the rights of the parties is the final decree. Jackson *v.* Jackson, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427. *Contra,* Murray *v.* Yates, 73 Mo. 13.

A void order purporting to set aside a decree does not suspend the running of time. Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 10 S. Ct. 736, 34 L. ed. 97.

Time during which an appeal was pending, afterward dismissed, is not to be counted. Ensminger *v.* Powers, 108 U. S. 292, 2 S. Ct. 643, 27 L. ed. 732. See also Ruley *v.* Foley, 54 W. Va. 493, 46 S. E. 348. *Contra,* Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130.

An ineffectual attempt to appeal does not suspend the running of time. Blythe Co. *v.* Hinckley, 111 Fed. 827, 49 C. C. A. 647.

30. Jenkins *v.* Prewitt, 5 Blackf. (Ind.) 7, 6 Blackf. (Ind.) 237; Talbott *v.* Todd, 5 Dana (Ky.) 190.

31. It is commenced with the application for leave to file the bill (Mitchel *v.* Hardie, 84 Ala. 349, 4 So. 182), with the actual granting of leave where the bill is filed before leave obtained (Camp Mfg. Co. *v.* Parker, 121 Fed. 195), and with the issuing of a subpœna on the bill of review (Webb *v.* Pell, 1 Paige (N. Y.) 564).

32. Allison *v.* Drake, 145 Ill. 500, 32 N. E. 537; Jackson *v.* Jackson, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427; Long *v.* Mulford, 17 Ohio St. 484, 93 Am. Dec. 638; Kay *v.* Watson, 17 Ohio 27; Winchester *v.* Winchester, 1 Head (Tenn.) 460; Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130.

The privilege is personal and will not extend the time of other parties not under disability, unless necessary to protect those under such disabilities. Trimble *v.* Longworth, 13 Ohio St. 431.

33. *Illinois.*— Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Manufacturers' Paper Co. *v.* Lindblom, 68 Ill. App. 539.

Maryland.— Hitch *v.* Fenby, 6 Md. 218.

Michigan.— Thomas *v.* Burt, 52 Mich. 489,

bill in the nature of a bill of review is too late when an original bill would be so treated.[34] The question of diligence is to be first determined on the application for leave to file, where such leave is required; but it may be again raised,[35] and should ordinarily be presented by demurrer or answer.[36]

6. Leave to File and Application Therefor. It is not necessary to obtain leave of the court to file a bill of review to correct an error of law apparent on the face of the record;[37] but such leave is necessary when the bill is founded on new matter, or newly discovered evidence.[38] The granting of such leave is not a matter of right, but rests in the sound discretion of the court, subject to review by the appellate court for abuse of discretion;[39] and in granting leave terms may be

18 N. W. 231; Johnson *v.* Shepard, 35 Mich. 115.

Pennsylvania.— Buck *v.* Buck, 195 Pa. St. 373, 45 Atl. 1075; George's Appeal, 12 Pa. St. 260; Kachline's Estate, 7 Pa. Super. Ct. 163; Wainwright's Estate, 16 Phila. 266; Wistar's Estate, 15 Phila. 563; Wetherill's Estate, 8 Wkly. Notes Cas. 238.

Texas.— Myers *v.* Pickett, 81 Tex. 53, 16 S. W. 643.

Virginia.— Nelson *v.* Kownslar, 79 Va. 468.

West Virginia.— Bodkin *v.* Rollyson, 48 W. Va. 453, 37 S. E. 617; Chancellor *v.* Spencer, 40 W. Va. 337, 21 S. E. 1011.

United States.— Sampeyreac *v.* U. S., 7 Pet. 222, 8 L. ed. 665; Hendryx *v.* Perkins, 114 Fed. 801, 52 C. C. A. 435; Boston, etc., R. Co. *v.* Bemis Car-Box Co., 98 Fed. 121, 38 C. C. A. 661; Hoffman *v.* Knox, 50 Fed. 484, 1 C. C. A. 535; Tilghman *v.* Werk, 39 Fed. 680; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,530, 6 Fish. Pat. Cas. 434.

See 19 Cent. Dig. tit. "Equity," § 1107. See also *supra*, IV.

Ignorance of a party is no excuse when the attorney knew the facts. Presstman *v.* Mason, 68 Md. 78, 11 Atl. 764.

If the other party suffers no disadvantage plaintiff will not be charged with laches. Williams *v.* Starkweather, 24 R. I. 512, 53 Atl. 870.

Delay within the ordinary period of limitations is not laches in the absence of other circumstances. Bruschke *v.* Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417; Chicago Bldg. Soc. *v.* Haas, 111 Ill. 176.

34. Pestel *v.* Primm, 109 Ill. 353.

35. Jenkins *v.* Prewitt, 5 Blackf. (Ind.) 7.

36. Copeland *v.* Bruning, 104 Fed. 169.

37. *Arkansas.*— Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 127.

Kentucky.— Berry *v.* Stockwell, 10 B. Mon. 299.

Mississippi.— Denson *v.* Denson, 33 Miss. 560.

New Jersey.— Buckingham *v.* Corning, 29 N. J. Eq. 238.

New York.— Webb *v.* Pell, 1 Paige 564.

North Carolina.— Kenon *v.* Williamson, 2 N. C. 350.

Ohio.— St. Clair *v.* Piatt, Wright 532.

Pennsylvania.— Priestley's Appeal, 127 Pa. St. 420, 17 Atl. 1084, 4 L. R. A. 503; Fidelity Ins., etc., Co.'s Appeal, 3 Walk. 185.

Tennessee.— Puryear *v.* Puryear, 5 Baxt. 640; Colville *v.* Colville, 9 Humphr. 524.

Vermont.— Barnum *v.* McDaniels, 6 Vt. 177.

West Virginia.— Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102.

United States.— Copeland *v.* Bruning, 104 Fed. 169; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41; Ross *v.* Prentiss, 20 Fed. Cas. No. 12,078, 4 McLean 106.

See 19 Cent. Dig. tit. "Equity," § 1110.

38. *Alabama.*— Caller *v.* Shields, 2 Stew. & P. 417.

Arkansas.— Webster *v.* Diamond, 36 Ark. 532.

District of Columbia.— Johnson *v.* Offutt, 2 MacArthur 168.

Illinois.— Cole *v.* Littledale, 164 Ill. 630, 45 N. E. 969.

Maryland.— Burch *v.* Scott, 1 Gill & J. 393.

Mississippi.— Vaughan *v.* Cutrer, 49 Miss. 782.

New Jersey.— Buckingham *v.* Corning, 29 N. J. Eq. 238.

New York.— Pendleton *v.* Fay, 3 Paige 204.

Pennsylvania.— Fidelity Ins., etc., Co.'s Appeal, 3 Walk. 185; Fidelity Ins., etc., Co. *v.* Gould, 12 Wkly. Notes Cas. 63.

Tennessee.— Finley *v.* Taylor, 8 Baxt. 237; Proudfit *v.* Picket, 7 Coldw. 563; Winchester *v.* Winchester, 1 Head 460; Colville *v.* Colville, 9 Humphr. 524; Knight *v.* Atkisson, 2 Tenn. Ch. 384; Saunders *v.* Savage, (Ch. App. 1900) 63 S. W. 218.

Virginia.— Heermans *v.* Montague, (1890) 20 S. E. 899; Hatcher *v.* Hatcher, 77 Va. 600; Hill *v.* Bowyer, 18 Gratt. 364.

West Virginia.— Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102.

United States.—Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672; Camp Mfg. Co. *v.* Parker, 121 Fed. 195; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41; Ross *v.* Prentiss, 20 Fed. Cas. No. 12,078, 4 McLean 106.

See 19 Cent. Dig. tit. "Equity," § 1110.

39. *Alabama.*— Murrell *v.* Smith, 51 Ala. 301; Planters, etc., Bank *v.* Dundas, 10 Ala. 661.

Arkansas.— Jacks *v.* Adair, 33 Ark. 161.

Florida.— Reynolds *v.* Florida Cent., etc., R. Co., 42 Fla. 387, 28 So. 861.

Idaho.— Hyde *v.* Lamberson, 1 Ida. 539.

Illinois.— Elzas *v.* Elzas, 183 Ill. 132, 55 N. E. 673; Cole *v.* Littledale, 164 Ill. 630, 45 N. E. 969.

Maryland.— Hollingsworth *v.* McDonald, 2

imposed.[40] The petition for leave must set forth the grounds on which it is based and ask permission to file the bill.[41] It must be upon notice to the adverse party to show cause against the application.[42] Counter affidavits may be introduced denying the allegations of the petition or the moving affidavits.[43] The findings of the court on the application for leave to file a bill of review are not conclusive on the court at the subsequent hearing on the bill.[44] When the bill of review has been improperly filed, the proper mode of objecting is by motion to strike it from the files, and not by demurrer.[45] By demurring to the bill the right to claim that it was filed without leave is waived.[46]

7. Performance of Decree. The general rule is that a party is not entitled to bring a bill of review until he has obeyed and performed the decree.[47] Non-

Harr. & J. 230, 3 Am. Dec. 545; Pfeltz *v.* Pfeltz, 1 Md. Ch. 455.

Michigan.— Stockley *v.* Stockley, 93 Mich. 307, 53 N. W. 523.

Tennessee.— Winchester *v.* Winchester, 1 Head 460.

West Virginia.— Davis Sewing-Mach. Co. *v.* Dunbar, 32 W. Va. 335, 9 S. E. 237; Nichols *v.* Nichols, 8 W. Va. 174.

United States.— Ricker *v.* Powell, 100 U. S. 104, 25 L. ed. 527; Thomas *v.* Brockenbrough, 10 Wheat. 146, 6 L. ed. 287; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41.

See 19 Cent. Dig. tit. "Equity," § 1111.

If part of the bill requires leave to file it, and part does not require leave, the bill cannot be separated and leave granted as to part of the grounds and refused as to the others. Armes *v.* Kimberly, 136 U. S. 629, 10 S. Ct. 1064, 34 L. ed. 557.

40. Singleton *v.* Singleton, 8 B. Mon. (Ky.) 340.

41. *Kentucky.*— Tilman *v.* Tilman, 4 J. J. Marsh. 117.

Massachusetts.—Elliott *v.* Balcom, 11 Gray 286.

Pennsylvania.— Cassidy's Estate, 6 Pa. Co. Ct. 627.

Tennessee.— Colville *v.* Colville, 9 Humphr. 524.

United States.—Tilghman *v.* Werk, 39 Fed. 680; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41.

See 19 Cent. Dig. tit. "Equity," § 1112.

The petition for leave must be verified positively or be supported by affidavit. Elzas *v.* Elzas, 183 Ill. 132, 55 N. E. 673; Schaefer *v.* Wunderle, 154 Ill. 577, 39 N. E. 623.

Newly discovered evidence.— When leave is asked on the ground of newly discovered evidence it must be shown that there really is evidence capable of being produced (Schaefer *v.* Wunderle, 154 Ill. 577, 39 N. E. 623), its nature must be set forth (Nichols *v.* Nichols, 8 W. Va. 174), and it must be stated with sufficient distinctness to enable the court to judge of its materiality and effect (Long *v.* Granberry, 2 Tenn. Ch. 85). Counter affidavits are admissible, in so far as they aid the court in determining the materiality of the new evidence. Long *v.* Granberry, *supra*. It must also be shown that the evidence claimed to be new could not have been secured at the hearing or before the decree, and that due diligence has been exercised in securing it thereafter. Puryear *v.* Puryear, 5 Baxt. (Tenn.) 640; Boston, etc., Electric St. R. Co. *v.* Bemis Car-Box Co., 98 Fed. 121, 38 C. C. A. 661; Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305.

Supplemental bill.— When leave is asked to file a supplemental bill in the nature of a bill of review the same requisites apply. Hyman *v.* Smith, 10 W. Va. 298.

42. People *v.* Huron Cir. Judge, 40 Mich. 166; Love *v.* Blewit, 21 N. C. 108.

Bill in nature of bill of review.— Whether notice shall be given of an application to file a supplemental bill in the nature of a bill of review is discretionary with the court. Thompson *v.* Schenectady R. Co., 119 Fed. 634.

43. Loth *v.* Loth, 116 Mich. 634, 74 N. W. 1046; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,530, 6 Fish. Pat. Cas. 434; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303. *Contra*, Davis *v.* Morris, 76 Va. 21.

44. Elliott *v.* Balcom, 11 Gray (Mass.) 286; Quick *v.* Lilly, 3 N. J. Eq. 255. But where the application is on the ground of newly discovered evidence, the question whether the evidence is newly discovered or not should be decided on such application and not left open until the hearing on the bill. Hodges *v.* Mullikin, 1 Bland (Md.) 503.

45. Webster *v.* Diamond, 36 Ark. 532; Fidelity Ins., etc., Co. *v.* Gould, 12 Wkly. Notes Cas. (Pa.) 63. The bill will be ordered to be taken from the files where the case made thereby is different from and broader than that which leave was asked to make. Buckingham *v.* Corning, 29 N. J. Eq. 238.

46. Griggs *v.* Gear, 8 Ill. 2; Manufacturers' Paper Co. *v.* Lindblom, 68 Ill. App. 539.

Objection for want of notice of the motion is waived by answer. Mitchell *v.* Hardie, 84 Ala. 349, 4 So. 182.

47. *Illinois.*— Cole *v.* Littledale, 164 Ill. 630, 45 N. E. 969; Kuttner *v.* Haines, 135 Ill. 382, 25 N. E. 752, 25 Am. St. Rep. 370; Horner *v.* Zimmerman, 45 Ill. 14; Griggs *v.* Gear, 8 Ill. 2.

New Jersey.— Partridge *v.* Perkins, 32 N. J. Eq. 399.

New York.— Wiser *v.* Blachly, 2 Johns. Ch. 488.

United States.— Burley *v.* Flint, 105 U. S. 247, 26 L. ed. 986; Ricker *v.* Powell, 100 U. S.

performance of the decree does not, however, exclude the jurisdiction of the court, which undoubtedly has power to entertain a bill of review even though the decree has not been performed.[48] It is well settled that the rule does not operate when defendant can show to the satisfaction of the court that he cannot perform the decree,[49] or when the performance of the decree would extinguish some right which the party had at law.[50]

8. FRAME OF BILL. A bill of review must set out the former bill and the proceedings thereon, including the decree,[51] but not the evidence in the original cause.[52] It must state specifically the grounds upon which it is based,[53] and if

104, 25 L. ed. 527; Hoffman *v.* Knox, 50 Fed. 484, 1 C. C. A. 535; Miller *v.* Clark, 47 Fed. 850; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41; Swan *v.* Wright, 23 Fed. Cas. No. 13,670, 3 Woods 587.

England.— Williams *v.* Mellish, 1 Vern. Ch. 117, 23 Eng. Reprint 354.

See 19 Cent. Dig. tit. "Equity," § 1097.

Substantial compliance.— Placing the amount of the decree in the hands of the master is a substantial compliance with the order of the court and will authorize a bill of review. Taylor *v.* Person, 9 N. C. 298.

Performance after filing bill.— Plaintiff in a bill of review had leave of the court to file his bill, and had performed all things required by the decree up to the time of filing his bill of review, but had failed to perform matters required by the decree to be performed after the date of filing the bill of review. It was held proper that he would be ordered by the court, on motion of defendant, to perform by a certain day, those matters as to which he was in default, on penalty of having his bill of review dismissed. Swan *v.* Wright, 23 Fed. Cas. No. 13,670, 3 Woods 587.

48. Judson *v.* Stephens, 75 Ill. 255; Davis *v.* Speiden, 104 U. S. 83, 26 L. ed. 660; Phillips *v.* Mariner, 19 Fed. Cas. No. 11,105, 5 Biss. 26.

Application for leave to proceed without performing the decree should be made on petition and notice. Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 19 Sawy. 643.

Staying proceedings.— The court in which a bill of review is filed (Way *v.* Hillier, 16 Ohio 105) may stay a decree pending the bill (Cochran *v.* Rison, 20 Ala. 463; Bennett *v.* Brown, 56 Ga. 216), by order alone without injunction (Manufacturers' Paper Co. *v.* Lindblom, 68 Ill. App. 539), but should require security (Denson *v.* Denson, 33 Miss. 560). The bill does not of itself stay the decree. Burch *v.* Scott, 1 Bland (Md.) 112. The stay ceases to operate if the bill of review is dismissed. Hogan *v.* Davis, 3 Ala. 70.

49. *Illinois.*— Griggs *v.* Gear, 8 Ill. 2.

New York.— Livingston *v.* Hubbs, 3 Johns. Ch. 124; Wiser *v.* Blachly, 2 Johns. Ch. 488.

North Carolina.— Stallings *v.* Goodloe, 7 N. C. 159.

United States.—Davis *v.* Speiden, 104 U. S. 83, 26 L. ed. 660.

England.— Williams *v.* Mellish, 1 Vern. Ch. 117, 23 Eng. Reprint 354.

See 19 Cent. Dig. tit. "Equity," § 1097.

50. Griggs *v.* Gear, 8 Ill. 2; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41.

51. *Alabama.*— Goldsby *v.* Goldsby, 67 Ala. 560.

Georgia.— Miller *v.* Saunders, 18 Ga. 492.

Illinois.— Cole *v.* Littledale, 164 Ill. 630, 45 N. E. 969; Judson *v.* Stephens, 75 Ill. 255; Gardner *v.* Emerson, 40 Ill. 296; Turner *v.* Berry, 8 Ill. 541.

Maine.— Glover *v.* Jones, 95 Me. 303, 49 Atl. 1104.

Massachusetts.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 169 Mass. 157, 47 N. E. 606.

Michigan.— People *v.* Huron Cir. Judge, 40 Mich. 166.

North Carolina.—Gilchrist *v.* Buie, 21 N. C. 346.

Texas.— Randon *v.* Cartwright, 3 Tex. 267.

Virginia.—Hatcher *v.* Hatcher, 77 Va. 600; Keran *v.* Trice, 75 Va. 690.

West Virginia.— Dunn *v.* Renick, 40 W. Va. 349, 22 S. E. 66; Amiss *v.* McGinnis, 12 W. Va. 371.

United States.— Kellom *v.* Easley, 14 Fed. Cas. No. 7,668, 2 Abb. 559, 1 Dill. 281 [*affirmed* in 14 Wall. 279, 20 L. ed. 890].

See 19 Cent. Dig. tit. "Equity," § 117.

These must be set out in full. Cox *v.* Lynn, 138 Ill. 195, 29 N. E. 857; Kuttner *v.* Haines, 135 Ill. 382, 25 N. E. 752, 25 Am. St. Rep. 370; Aholtz *v.* Durfee, 122 Ill. 286, 13 N. E. 645; Murphy *v.* Branaman, 156 Ind. 77, 59 N. E. 274.

The former decree must be brought before the court (Dougherty *v.* Morgan, 6 T. B. Mon. (Ky.) 151), and a mere reference to the record is insufficient for that purpose (Groce *v.* Field, 13 Ga. 24).

A copy of an instrument set out prevails as against an allegation as to its character. Cleveland *v.* Martin, 2 Head (Tenn.) 128.

52. Bruschke *v.* Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417; Buffington *v.* Harvey, 95 U. S. 99, 24 L. ed. 381.

53. *Florida.*— Reynolds *v.* Florida Cent., etc., R. Co., 42 Fla. 387, 28 So. 861.

Georgia.— Jones *v.* Robson, 30 Ga. 826.

Illinois.— Wilkinson *v.* Gage, 40 Ill. App. 603.

Kentucky.— Hendrix *v.* Clay, 2 A. K. Marsh. 462.

North Carolina.— Mebane *v.* Mebane, 36 N. C. 403; Gilchrist *v.* Buie, 21 N. C. 346.

Pennsylvania.— Cremer's Estate, 13 Phila. 253.

Tennessee.— Rodgers *v.* Dibrell, 6 Lea 69; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw.

based on newly discovered evidence must state the nature of the testimony,[54] the time and manner of its discovery, and diligence on the part of plaintiff.[55] It must also show affirmatively that it is exhibited within time,[56] and aver performance of the decree or an excuse for non-performance.[57] The prayer is that the decree may be reviewed and reversed upon the point complained of, and also if the decree has been performed that plaintiff be restored to his former position.[58] A bill of review must be signed by counsel[59] and verified by oath.[60]

9. Grounds of Review — a. Error Apparent on Face of the Record. A bill of review will lie for errors of law appearing on the face of the record.[61] In

420; Heiskell *v.* Galhraith, (Ch. App. 1900) 59 S. W. 346; Morton *v.* Sneed, (Ch. App. 1897) 39 S. W. 736.

Texas.— Nichols *v.* Dibrell, 61 Tex. 539.

United States.—Nickle *v.* Stuart, 111 U. S. 776, 4 S. Ct. 700, 28 L. ed. 599.

See 19 Cent. Dig. tit. "Equity," §§ 1117, 1118.

Multifariousness.— A bill is not multifarious because based both on error apparent on the record and new matter. Winchester *v.* Winchester, 1 Head (Tenn.) 460; Colville *v.* Colville, 9 Humphr. (Tenn.) 524. A bill of review may be combined with one for relief against a fraudulent decree. Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,366, 1 Woods 368.

54. Greer *v.* Turner, 47 Ark. 17, 14 S. W. 383; Gardner *v.* Emerson, 40 Ill. 296; Livingston *v.* Noe, 1 Lea (Tenn.) 55; Burson *v.* Dosser, 1 Heisk. (Tenn.) 754; Griffith *v.* Griffith, (Tenn. Ch. App. 1898) 46 S. W. 340; Norfolk Trust Co. *v.* Foster, 78 Va. 413; Whitten *v.* Saunders, 75 Va. 563.

If the allegations are vague the bill cannot be sustained. Caller *v.* Shields, 2 Stew. & P. (Ala.) 417.

The bill cannot serve the purpose of an amendment to the original bill. Snyder *v.* Botkin, 37 W. Va. 355, 16 S. E. 591.

55. Greer *v.* Turner, 47 Ark. 17, 14 S. W. 383; Jenkins *v.* Prewitt, 5 Blackf. (Ind.) 7; Mitchell *v.* Berry, 1 Metc. (Ky.) 602; Livingston *v.* Noe, 1 Lea (Tenn.) 55; Burson *v.* Dosser, 1 Heisk. (Tenn.) 754; Berdanatti *v.* Sexton, 2 Tenn. Ch. 699.

56. Hitch *v.* Fenby, 4 Md. Ch. 190; Shepherd *v.* Larue, 6 Munf. (Va.) 529.

57. People *v.* Huron Cir. Judge, 40 Mich. 166; Armes *v.* Kimberly, 136 U. S. 629, 10 S. Ct. 1064, 34 L. ed. 557 [*affirming* 40 Fed. 548].

58. Mitford Eq. Pl. 80.

Bill for new matter.— A prayer for restitution to plaintiff's original situation is improper on a bill founded on newly discovered evidence. The prayer should be for a retrial. Allgood *v.* Piedmont Bank, 130 Ala. 237, 29 So. 855.

59. See *supra*, XIV, A, 1. It need not be signed by two counsel. Gilchrist *v.* Buie, 21 N. C. 346.

60. Biscoe *v.* Morrison, 11 Ark. 114; Sanford *v.* Haines, 71 Mich. 116, 38 N. W. 777; Berdanatti *v.* Sexton, 2 Tenn. Ch. 699.

A bill for newly discovered evidence must be accompanied by the affidavit of the witness or its absence accounted for. Aholtz *v.* Durfee, 25 Ill. App. 43 [*affirmed* in 122 Ill. 286, 13 N. E. 645].

61. *Alabama.*— Taylor *v.* Crook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26; Smyth *v.* Fitzsimmons, 97 Ala. 451, 12 So. 48; Planters', etc., Bank *v.* Dundas, 10 Ala. 661; Caller *v.* Shields, 2 Stew. & P. 417.

Arkansas.— White *v.* Holman, 32 Ark. 753; Cornish *v.* Keesee, 21 Ark. 528.

Delaware.— Cochran *v.* Couper, 2 Del. Ch. 27.

Florida.— Mattair *v.* Card, 19 Fla. 455; Thompson *v.* Maxwell, 16 Fla. 773.

Illinois.— Judson *v.* Stephens, 75 Ill. 255.

Indiana.— Kemp *v.* Mitchell, 29 Ind. 163; Gullett *v.* Housh, 7 Blackf. 52.

Kentucky.— Mitchell *v.* Berry, 1 Metc. 602; Ringo *v.* Warder, 6 B. Mon. 514; Edmonson *v.* Marshall, 6 J. J. Marsh. 448; Field *v.* Ross, 1 T. B. Mon. 133.

Maine.— Crooker *v.* Houghton, 61 Me. 337.

Maryland.— Pinkney *v.* Jay, 12 Gill & J. 69.

Massachusetts.—Elliott *v.* Balcom, 11 Gray 286.

Michigan.— Murray *v.* Ingersoll, 100 Mich. 286, 59 N. W. 140; Mickle *v.* Maxfield, 42 Mich. 304, 3 N. W. 961.

Mississippi.—Mayo *v.* Clancy, 57 Miss. 674; Vaughan *v.* Cutrer, 49 Miss. 782; Handy *v.* Cobb, 44 Miss. 699; Foy *v.* Foy, 25 Miss. 207; James *v.* Fisk, 9 Sm. & M. 144, 47 Am. Dec. 111; Stark *v.* Mercer, 3 How. 377; Iler *v.* Routh, 3 How. 276.

New Jersey.— Jones *v.* Fayerweather, 46 N. J. Eq. 237, 19 Atl. 22.

New York.— Wiser *v.* Blachly, 2 Johns. Ch. 488.

Oregon.— Campbell *v.* Snyder, 27 Oreg. 249, 41 Pac. 659.

Pennsylvania.— Scott's Appeal, 112 Pa. St. 427, 5 Atl. 671; Yeager's Appeal, 34 Pa. St. 173; *In re* Riddle, 19 Pa. St. 431; Kennedy's Estate, 3 Pa. Dist. 795, 15 Pa. Co. Ct. 494, 35 Wkly. Notes Cas. 544; Cresson's Estate, 3 Pa. Co. Ct. 419; Earp's Estate, 6 Phila. 138; Christman's Estate, 1 Woodw. 187; Rittenhouse's Estate, 1 Pars. Eq. Cas. 313.

South Carolina.— Haskell *v.* Raoul, 1 McCord Eq. 22; Irby *v.* McCrae, 4 Desauss. 422; Burn *v.* Poaug, 3 Desauss. 596.

Tennessee.— Finley *v.* Taylor, 8 Baxt. 237; Burts *v.* Beard, 11 Heisk. 472; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. 420; Randall *v.* Payne, 1 Tenn. Ch. 137, 452.

Virginia.— Heermans *v.* Montague, (1890) 20 S. E. 899; Kern v. Wyatt, 89 Va. 885, 17 S. E. 549; Booth *v.* McJilton, 82 Va. 827, 1

England the rule is stated to be that the error of law must appear on the face of the decree. But the rule there and in the United States is the same in legal effect, for the decree in England recites substantially what appears in the record in this country.[62] But the error of law must be substantial. Errors not affecting material rights will be disregarded.[63] It cannot be based on errors of fact,[64] or on errors

S. E. 137; Battaile *v.* Maryland Insane Hospital, 76 Va. 63; Campbell *v.* Campbell, 22 Gratt. 649; Suckley *v.* Rotchford, 12 Gratt. 60, 65 Am. Dec. 240; Dunbar *v.* Woodcock, 10 Leigh 628; Quarrier *v.* Carter, 4 Hen. & M. 242; McCall *v.* Graham, 1 Hen. & M. 13; Triplett *v.* Wilson, 6 Call 47.

West Virginia.— Davis Sewing-Mach. Co. *v.* Dunbar, 32 W. Va. 335, 9 S. E. 237; Thompson *v.* Edwards, 3 W. Va. 659.

Wisconsin.— Dousman *v.* Hooe, 3 Wis. 466.

United States.—Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 20 S. Ct. 860, 44 L. ed. 961 [*affirming* 76 Fed. 319]; Purcell *v.* Coleman, 4 Wall. 519, 18 L. ed. 459; Kennedy *v.* Georgia Bank, 8 How. 586, 12 L. ed. 1209; Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33; Camp Mfg. Co. *v.* Parker, 121 Fed. 195; Hill *v.* Phelps, 101 Fed. 650, 41 C. C. A. 569; Bush *v.* U. S., 13 Fed. 625, 8 Sawy. 322; Irwin *v.* Meyrose, 7 Fed. 533, 2 McCrary 244; Barker *v.* Barker, 2 Fed. Cas. No. 987, 2 Woods 241; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41; Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305; United States *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118; Yerrington *v.* Putman, 30 Fed. Cas. No. 18,137, 2 Ban. & A. 601.

See 19 Cent. Dig. tit. "Equity," § 1079.

In Texas the right to review on this ground has been denied. Schleuning *v.* Duffy, 37 Tex. 527; Lewis *v.* San Antonio, 26 Tex. 316; Yturri *v.* McLeod, 26 Tex. 84; Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117; Larson *v.* Moore, 1 Tex. 22; Talbert *v.* Barbour, 16 Tex. Civ. App. 63, 40 S. W. 187; Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838. But see under present statute Miller *v.* Miller, 21 Tex. Civ. App. 382, 53 S. W. 362.

62. In Whiting *v.* U. S. Bank, 13 Pet. (U. S.) 6, 13, 10 L. ed. 33, the court said: "It has also been suggested at the bar, that no bill of review lies for errors of law, except where such errors are apparent on the face of the decree of the court. That is true in the sense in which the language is used in the English practice. In England, the decree always recites the substance of the bill and answer and pleadings, and also the facts on which the court founds its decree. But in America the decree does not ordinarily recite either the bill, or answer, or pleadings; and generally not the facts on which the decree is founded. But with us the bill, answer, and other pleadings, together with the decree, constitute what is properly considered as the record. And, therefore, in truth, the rule in each country is precisely the same, in legal effect; although expressed in different language." For extended discussion of the practice in England and the United States in this respect see McDougald *v.* Dougherty, 39 Ala. 409.

The pleadings are as much a part of the record as the decree complained of. Sharp *v.* Shenandoah Furnace Co., 100 Va. 27, 40 S. E. 103. And see Burts *v.* Beard, 11 Heisk. (Tenn.) 472.

An omission in a decree rendering it incomplete is not ground for a bill of review, where the deficiency is supplied by the register's report which is referred to by the decree. Ashford *v.* Patton, 70 Ala. 479.

The record referred to in the statement of the rule is the record in the trial court. Cresswell *v.* Jones, 68 Ala. 420.

63. *Alabama.*— McCall *v.* McCurdy, 69 Ala. 65.

Arkansas.— Woodall *v.* Moore, 55 Ark. 22, 17 S. W. 268.

Iowa.— Campbell *v.* Ayres, 6 Iowa 339; Saum *v.* Stingley, 3 Iowa 514.

Kentucky.— Todd *v.* Laughlin, 3 A. K. Marsh. 535.

Michigan.— Donovan *v.* Dwyer, 62 Mich. 249, 28 N. W. 843.

Ohio.— Gary *v.* May, 16 Ohio 66.

Tennessee.— Halliburton *v.* Brooks, 7 Baxt. 318; Wright *v.* Wilson, 2 Yerg. 294.

United States.— Shelton *v.* Van Kleeck, 106 U. S. 532, 1 S. Ct. 491, 27 L. ed. 269; Burley *v.* Flint, 105 U. S. 247, 26 L. ed. 986 [*affirming* 4 Fed. Cas. No. 2,168, 9 Biss. 204]; Hill *v.* Phelps, 101 Fed. 650, 41 C. C. A. 569; Farmer's L. & T. Co. *v.* Green Bay, etc., R. Co., 6 Fed. 100, 10 Biss. 203.

See 19 Cent. Dig. tit. "Equity," §§ 1081, 1083, 1086.

The entire equities will be considered and there will be no reversal which is contrary to equity, or which would not result in a different decree. Hargraves *v.* Lewis, 7 Ga. 110; Wilson's Appeal, (Pa. 1885) 3 Atl. 447; Whelen's Appeal, 70 Pa. St. 410; Stevenson's Appeal, 32 Pa. St. 318; Saunders *v.* Savage, (Tenn. Ch. App. 1900) 63 S. W. 218; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 805, 19 L. ed. 828.

Non-prejudicial errors.— A bill will not lie for errors which might have been rectified by proper diligence (Sharp *v.* Loyless, 39 Ga. 678; Simms *v.* Thompson, 16 N. C. 197), for errors which the adverse party and court have consented to correct (Simmons *v.* Conklin, 129 Mich. 190, 88 N. W. 625), or for errors removed by subsequent proceeding (Winchester *v.* Winchester, 1 Head (Tenn.) 460).

Going to trial unprepared is not ground for bill of review unless a continuance was asked and denied. Calmes *v.* Ament, 1 A. K. Marsh. (Ky.) 459; Speight *v.* Adams, Freem. (Miss.) 318.

64. *District of Columbia.*— Contee *v.* Lyons, 19 D. C. 207.

Pennsylvania.— Green's Appeal, 3 Brewst. 66.

in the regularity of the proceedings.[65] Nor can it be based on errors resulting merely from a misconception of the evidence or in reaching a wrong conclusion therefrom,[66] or on the ground that the proofs fail to establish the facts on which the decree is founded.[67] The court is bound by the facts as found in the decree,[68] and cannot examine the evidence to ascertain whether it is sufficient to support the decree,[69] for it is well settled that the only questions open for examination on

Tennessee.— Winchester *v.* Winchester, 1 Head 460.

Virginia.— Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549.

United States.— Freeman *v.* Clay, 52 Fed. 1, 2 C. C. A. 587.

See 19 Cent. Dig. tit. "Equity," §§ 1080, 1081.

65. Jordan *v.* Hardie, 131 Ala. 72, 31 So. 504; Ward *v.* Kent, 6 Lea (Tenn.) 128; Winston *v.* Johnson, 2 Munf. (Va.) 305.

Want of notice of interlocutory proceedings is usually not sufficient in itself to sustain a bill. George *v.* George, 67 Ala. 192; Head *v.* Perry, 1 T. B. Mon. (Ky.) 253; Galloway *v.* Galloway, 2 Baxt. (Tenn.) 328; Loftis *v.* Butler, (Tenn. Ch. App. 1900) 58 S. W. 886. Otherwise where substantial rights have been affected. Peak *v.* Percifull, 3 Bush (Ky.) 218; Braxton *v.* Lee, 4 Hen. & M. (Va.) 376. See also Kinsel *v.* Kinsel, 126 Mich. 693, 86 N. W. 121. An affidavit is insufficient to contradict a sheriff's return showing service of notice. *Ex p.* Cotten, 62 N. C. 79.

An unauthorized act by a solicitor to the prejudice of his client may be ground for review. Smith *v.* Bossard, 2 McCord Eq. (S. C.) 406.

66. *Alabama.*— Jordan *v.* Hardie, 131 Ala. 72, 31 So. 504.

District of Columbia.— Contee *v.* Lyons, 19 D. C. 207.

Tennessee.— Ward *v.* Kent, 6 Lea 128; Young *v.* Henderson, 4 Hayw. 189.

Virginia.— Rawlings *v.* Rawlings, 75 Va. 76.

West Virginia.— Wethered *v.* Elliott, 45 W. Va. 436, 32 S. E. 209.

United States.— Armes *v.* Kimberly, 136 U. S. 629, 10 S. Ct. 1064, 34 L. ed. 557; Jourolmon *v.* Ewing, 85 Fed. 103, 29 C. C. A. 41.

See 19 Cent. Dig. tit. "Equity," §§ 1079, 1081.

67. *Alabama.*— Taylor *v.* Crook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26; Ashford *v.* Patton, 70 Ala. 479.

Mississippi.— Enochs *v.* Harrelson, 57 Miss. 465.

New Hampshire.— Bartlett *v.* Fifield, 45 N. H. 81.

New York.— Webb *v.* Pell, 3 Paige 368.

Vermont.— Barnum *v.* McDaniels, 6 Vt. 177.

See 19 Cent. Dig. tit. "Equity," § 1084.

68. *Alabama.*— Banks *v.* Long, 79 Ala. 319; Caller *v.* Shields, 2 Stew. & P. 417.

Illinois.— Garrett *v.* Moss, 22 Ill. 363.

Iowa.— Barnes *v.* Anderson, 19 Iowa 70.

New Jersey.— Bergholz *v.* Ruckman, 41 N. J. Eq. 134, 3 Atl. 684.

North Carolina.— Ivey *v.* McKinnon, 84 N. C. 651.

Ohio.— Nolan *v.* Urmston, 18 Ohio 273; Sea *v.* Carpenter, 16 Ohio 412.

Tennessee.— Winchester *v.* Winchester, 1 Head 460.

See 19 Cent. Dig. tit. "Equity," §§ 1079, 1081, 1134, 1137.

If the decree recites the facts an erroneous conclusion therefrom will be corrected. Jackson *v.* Jackson, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427.

If the decree finds no facts and the bill is sufficient there can be no review. Evans *v.* Parrott, 26 Ark. 600.

69. *Alabama.*— McDougald *v.* Dougherty, 39 Ala. 409.

Illinois.— Getzler *v.* Saroni, 18 Ill. 511; Evans *v.* Clement, 14 Ill. 203.

Maryland.— Bell *v.* Gosnell, 31 Md. 568.

Pennsylvania.— Cassidy's Estate, 6 Pa. Co. Ct. 627; Heckman's Estate, 2 Woodw. 165.

Tennessee.— Galloway *v.* Galloway, 2 Baxt. 328; Drake *v.* Drake, 12 Heisk. 704; Fuller *v.* McFarland, 6 Heisk. 79; Burson *v.* Dosser, 1 Heisk. 754; Proudfit *v.* Picket, 7 Coldw. 563.

Texas.— Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117.

Virginia.— Beatty *v.* Barley, 97 Va. 11, 32 S. E. 794; Thomson *v.* Brooke, 76 Va. 160; Miller *v.* Jones, 9 Gratt. 584.

West Virginia.— Lorentz *v.* Lorentz, 32 W. Va. 556, 9 S. E. 886.

United States.— Shelton *v.* Van Kleeck, 106 U. S. 532, 1 S. Ct. 491, 27 L. ed. 269; Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33; Brown *v.* White, 16 Fed. 900, 4 Woods 614.

See 19 Cent. Dig. tit. "Equity," §§ 1033, 1034.

In Ohio, if the decree does not find the facts, the court will examine the evidence (McLouth *v.* Rathbone, 19 Ohio 21; Stevens *v.* Hey, 15 Ohio 313), but only where the evidence is of record (Holman *v.* Riddle, 8 Ohio St. 384), and will not reverse merely because of a difference of opinion as to the weight of the evidence (Medina County Mut. F. Ins. Co. *v.* Palm, 5 Ohio St. 107; Gazley *v.* Huber, 3 Ohio St. 399; Tracey *v.* Sacket, 1 Ohio St. 54, 59 Am. Dec. 610; Buckley *v.* Gilmore, 12 Ohio 63), but will reverse where there is no evidence (Medina County Mut. F. Ins. Co. *v.* Palm, *supra*). A dismissal will not be set aside where there was a material variance and no application for leave to amend. Reynolds *v.* Morris, 7 Ohio St. 310. A finding that publication was duly made is not conclusive. Trimble *v.* Longworth, 13 Ohio St. 431.

In Wisconsin the evidence was formerly reviewed. Felch *v.* Lee, 15 Wis. 265.

a bill of review are such as arise upon the pleadings, proceedings, and decree, without reference to the evidence.[70] The entire record will, however, be considered,[71] but only to examine for errors specified in the bill of review.[72] It is said that the error upon the face of the record which will sustain a bill of review must consist of the violation of some statute or rule of law or equity, and not merely an impropriety in the decree,[73] and accordingly a mere erroneous decision, such as may be reviewed by appeal or error, is said to be insufficient to support the bill.[74] A bill of review assumes that the court had power to act, and therefore want of jurisdiction which renders the decree void is not ground for the bill.[75] It is good ground that the bill is not sufficient to warrant relief,[76] that the bill was dismissed on an answer not denying the fraud charged and presenting no defense,[77] or that the decree was based on an unwarranted admission of a guardian *ad litem*.[78] The bill relates to the decree, and errors in the execution thereof are not available.[79] The court will not on a bill of review, consider a ruling resting in the discretion of the chancellor.[80]

70. *Illinois.*— Fellers *v.* Rainey, 82 Ill. 114.

New Hampshire.— Bartlett *v.* Fifield, 45 N. H. 81.

Oregon.— Garbade *v.* Frazier, 42 Oreg. 384, 71 Pac. 136.

Tennessee.— Livingston *v.* Noe, 1 Lea 55; Burson *v.* Dosser, 1 Heisk. 754; Eaton *v.* Dickinson, 3 Sneed 397; Robertson *v.* McCollum, (Ch. App. 1900) 60 S. W. 170; Loftis *v.* Butler, (Ch. App. 1900) 58 S. W. 886.

Virginia.— Shepherd *v.* Chapman, (1895) 21 S. E. 468.

United States.— Whiting *v.* U. S. Bank, 13 Pet. 6, 10 L. ed. 33; Reed *v.* Stanly, 89 Fed. 430; Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 9 Sawy. 643; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303.

See 19 Cent. Dig. tit. "Equity," §§ 1080, 1082, 1084, 1137.

Other statements of rule.— The error must be apparent from a comparison of the decree with the pleadings or findings. Evans *v.* Parrott, 26 Ark. 600. A bill of review does not lie to reverse a decree on matter of fact not appearing by the record. Thompson *v.* Maxwell Land Grant, etc., Co., 95 U. S. 391, 24 L. ed. 481. The errors must be such as appear on the face of the decree, orders, and proceedings in the case, arising on facts either admitted by the pleadings or stated as facts in the decree; but if the errors be those of judgment in the determination of facts, such errors cannot be corrected by bill of review. Beatty *v.* Barley, 97 Va. 11, 32 S. E. 794; Rawlings *v.* Rawlings, 75 Va. 76.

71. *Arkansas.*— Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 157.

District of Columbia.— Davis *v.* Speiden, 3 MacArthur 283.

Iowa.— Saum *v.* Stingley, 3 Iowa 514.

Maryland.— Tomlinson *v.* McKaig, 5 Gill 256.

Mississippi.— Knowland *v.* Sartorious, 46 Miss. 45.

Tennessee.— Drake *v.* Drake, 12 Heisk. 704.

Virginia.— Pracht *v.* Lange, 81 Va. 711; Parker *v.* Dillard, 75 Va. 418.

See 19 Cent. Dig. tit. "Equity," §§ 1133, 1134.

Where the parties consent that the case shall be decided on the pleadings both bill and answer must be considered. Walker *v.* Walker, 44 Ga. 142.

72. Burgess *v.* Pope, 92 Ill. 255; Glover *v.* Jones, 95 Me. 303, 49 Atl. 1104; Billingslea *v.* Baldwin, 23 Md. 85; Livingston *v.* Noe, 1 Lea (Tenn.) 55.

In Ohio, under the former practice, the entire case was open for investigation. Grant *v.* Ludlow, 8 Ohio St. 1; Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Ludlow *v.* Kidd, 2 Ohio 372.

73. Hill *v.* Phelps, 101 Fed. 650, 41 C. C. A. 569. And see Hardy *v.* Miller, 89 Ind. 440.

74. Tankersly *v.* Pettis, 61 Ala. 354; Noble *v.* Hallonquist, 53 Ala. 229; Caller *v.* Shields, 2 Stew. & P. (Ala.) 417; Boswell's Estate, 6 Pa. Dist. 352; Tilghman *v.* Werk, 39 Fed. 680. And see Hoffman *v.* Knox, 50 Fed. 484, 1 C. C. A. 535 [*reversing* 42 Fed. 378]. A bill of review cannot be used as a substitute for a new trial (Brower *v.* Cothran, 75 Ga. 9), or on appeal (Simmons *v.* Conklin, 129 Mich. 190, 88 N. W. 625; Duffield *v.* Owen, (Tenn. Ch. App. 1897) 42 S. W. 691).

Failure to appeal is no ground for a bill of review. Murphy *v.* Schoder, 126 Mich. 607, 85 N. W. 1080.

75. Donaldson *v.* Nealis, 108 Tenn. 638, 69 S. W. 732; Berdanatti *v.* Sexton, 2 Tenn. Ch. 699, 703.

76. Bennett *v.* Brown, 56 Ga. 216; Griggs *v.* Gear, 8 Ill. 2; Berkshire *v.* Young, 45 Ind. 461.

77. Thomas *v.* Hite, 5 B. Mon. (Ky.) 590.

78. Hooper *v.* Hardie, 80 Ala. 114.

79. Conover *v.* Musgrave, 68 Ill. 58; Winchester *v.* Winchester, 1 Head (Tenn.) 460. But see Nelson *v.* Suddarth, 1 Hen. & M. (Va.) 350. The bill cannot be made to serve the purpose of a bill to enlarge the decree and extend the relief. Helms *v.* Rizer, 98 Tenn. 414, 39 S. W. 718.

Taxation of costs cannot be reviewed by bill. Young *v.* Henderson, 4 Hayw. (Tenn.) 189.

80. Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665; Grigsby *v.* Weaver, 5 Leigh (Va.) 197; Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433.

b. Newly Discovered Evidence. A bill of review lies for newly discovered evidence.[81] A review on this ground cannot be had as a matter of grace.[82] It will not lie where the new evidence is merely cumulative,[83] or for evidence known in time for use before the decree,[84] or which was then accessible and might have

81. *Alabama.*— Cochran *v.* Rison, 20 Ala. 463; Caller *v.* Shields, 2 Stew. & P. 417.
Arkansas.— White *v.* Holman, 32 Ark. 753; Cornish *v.* Keesee, 21 Ark. 528.
Delaware.— Cochran *v.* Couper, 2 Del. Ch. 27.
Florida.— Mattair *v.* Card, 19 Fla. 455.
Illinois.— Judson *v.* Stephens, 75 Ill. 255.
Indiana.— Kemp *v.* Mitchell, 29 Ind. 163; Gullett *v.* Housh, 7 Blackf. 52.
Kentucky.— Mitchell *v.* Berry, 1 Metc. 602; McLean *v.* Nixon, 18 B. Mon. 768; Bush *v.* Madeira, 14 B. Mon. 212; Brunk *v.* Means, 11 B. Mon. 214.
Maine.— Crooker *v.* Houghton, 61 Me. 337.
Maryland.— Pinkney *v.* Jay, 12 Gill & J. 69.
Michigan.— Mosher *v.* Mosher, 108 Mich. 612, 66 N. W. 486.
Mississippi.— Mayo *v.* Clancy, 57 Miss. 674; Vaughan *v.* Cutrer, 49 Miss. 782; Handy *v.* Cobb, 44 Miss. 699; Foy *v.* Foy, 25 Miss 207; Stark *v.* Mercer, 3 How. 377; Iler *v.* Routh, 3 How. 276.
New York.— Livingston *v.* Hubbs, 3 Johns. Ch. 124; Wiser *v.* Blachly, 2 Johns. Ch. 488.
Ohio.— Stevens *v.* Hey, 15 Ohio 313.
Pennsylvania.— Scott's Appeal, 112 Pa. St. 427, 5 Atl. 671; Yeager's Appeal, 34 Pa. St. 173; *In re* Riddle, 19 Pa. St. 431; Kennedy's Estate, 3 Pa. Dist. 795, 15 Pa. Co. Ct. 494, 35 Wkly. Notes Cas. 544; Earp's Estate, 6 Phila. 138; Rittenhouse's Estate, 1 Pars. Eq. Cas. 313; Christman's Estate, 1 Woodw. 187.
Rhode Island.— Doyle *v.* New York, etc., R. Co., 14 R. I. 55.
South Carolina.— *Ex p.* Vandersmissen, 5 Rich. Eq. 519, 60 Am. Dec. 102; Haskell *v.* Raoul, 1 McCord Eq. 22; Burn *v.* Poaug, 3 Desauss. 596.
Tennessee.— Burts *v.* Beard, 11 Heisk. 472; Huffacre *v.* Green, 4 Hayw. 51.
Texas.— Lewis *v.* San Antonio, 26 Tex. 316; Larson *v.* Moore, 1 Tex. 22.
Vermont.— Barnum *v.* McDaniels, 6 Vt. 177.
Virginia.— Heermans *v.* Montague, (1890) 20 S. E. 899; Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549; Reynolds *v.* Reynolds, 88 Va. 149, 13 S. E. 395, 598; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137; Campbell *v.* Campbell, 22 Gratt. 649; Dunbar *v.* Woodcock, 10 Leigh 628; Quarrier *v.* Carter, 4 Hen. & M. 242; McCall *v.* Graham, 1 Hen. & M. 13; Triplett *v.* Wilson, 6 Call 47.
West Virginia.— Dingess *v.* Marcum, 41 W. Va. 757, 24 S. E. 624; Davis Sewing-Mach. Co. *v.* Dunbar, 32 W. Va. 335, 9 S. E. 237.
Wisconsin.— Dousman *v.* Hooe, 3 Wis. 466.
United States.— Purcell *v.* Coleman, 4 Wall. 519, 18 L. ed. 459; Kennedy *v.* Georgia Bank, 8 How. 586, 12 L. ed. 1209; Sampeyreac *v.* U. S., 7 Pet. 222, 8 L. ed. 665; Irwin *v.* Meyrose, 7 Fed. 533, 2 McCrary 244; Massie *v.* Graham, 16 Fed. Cas. No. 9,263, 3 McLean 41; Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305; Yerrington *v.* Putnam, 30 Fed. Cas. No. 18,137, 2 Ban. & A. 601.
See 19 Cent. Dig. tit. "Equity," § 1091.

82. Priestly's Appeal, 127 Pa. St. 420, 17 Atl. 1084, 4 L. R. A. 503.

83. *Alabama.*— McDougald *v.* Dougherty, 39 Ala. 409.
Illinois.— Elzas *v.* Elzas, 183 Ill. 132, 55 N. E. 673; Aholtz *v.* Durfee, 122 Ill. 286, 13 N. E. 645; Adamski *v.* Wieczorek, 93 Ill. App. 357.
Iowa.— Kinsell *v.* Feldman, 28 Iowa 497.
Michigan.— Taylor *v.* Boardman, 25 Mich. 527.
Mississippi.— Moody *v.* Farr, 27 Miss. 788.
New York.— Livingston *v.* Hubbs, 3 Johns. Ch. 124.
Oregon.— Hilts *v.* Ladd, 35 Oreg. 237, 58 Pac. 32.
Tennessee.— Burson *v.* Dosser, 1 Heisk. 754.
Virginia.— Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549; Douglass *v.* Stephenson, 75 Va. 747; Randolph *v.* Randolph, 1 Hen. & M. 181.
West Virginia.— Wethered *v.* Elliott, 45 W. Va. 436, 32 S. E. 209; Davis Sewing-Mach. Co. *v.* Dunbar, 32 W. Va. 335, 9 S. E. 237; Bloss *v.* Hull, 27 W. Va. 503.
United States.— Kissinger-Ison Co. *v.* Bradford Belting Co., 123 Fed. 91, 59 C. C. A. 221; Shakers' Soc. *v.* Watson, 77 Fed. 512, 23 C. C. A. 263; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,530, 6 Fish. Pat. Cas. 434; U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118.
See 19 Cent. Dig. tit. "Equity," § 1092.
If it is decisive in its character, cumulative evidence may be sufficient. Nichols *v.* Nichols, 8 W. Va. 174; Shakers' Soc. *v.* Watson, 77 Fed. 512, 23 C. C. A. 263.
Impeaching evidence is insufficient. Southard *v.* Russell, 16 How. (U. S.) 547, 14 L. ed. 1052; Shakers' Soc. *v.* Watson, 77 Fed. 512, 23 C. C. A. 263.
Objection waived.— Where a bill of review is granted on the ground of newly discovered evidence, and the objection is not taken below that the new evidence is cumulative merely, it cannot afterward be taken by appeal. Iler *v.* Routh, 3 How. (Miss.) 276.

84. *Alabama.*— Banks *v.* Long, 79 Ala. 319.
Arkansas.— Nevada County *v.* Hicks, 48 Ark. 515, 3 S. W. 524.
Illinois.— Hood *v.* Green, 42 Ill. App. 664.
Kentucky.— Mitchell *v.* Berry, 1 Metc. 602; Basye *v.* Beard, 12 B. Mon. 581; Tharp

been discovered by reasonable diligence.[85] The knowledge of a representative will be imputed to the person represented.[86] The new evidence must be relevant and material to the rights of the party complaining,[87] of such a character as to

v. Cotton, 7 B. Mon. 636; McCrackin *v.* Finley, 1 Bibb 455.

Maryland.— Pinkney *v.* Jay, 12 Gill & J. 69.

Tennessee.— Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208; Proudfit *v.* Picket, 7 Coldw. 563.

Vermont.— Stevens *v.* Dewey, 27 Vt. 638.

Virginia.— Winston *v.* Johnson, 2 Munf. 305.

United States.— Camp Mfg. Co. *v.* Parker, 121 Fed. 195.

See 19 Cent. Dig. tit. " Equity," §§ 1091, 1092.

Too late for amendment.— It must have been discovered too late to bring in by amendment or supplemental bill. Barnes *v.* Dickinson, 16 N. C. 326.

Failure of officer to return a deposition in time for use is not a ground for a bill of review. Niday *v.* Harvey, 9 Gratt. (Va.) 454.

A defense known but not availed of cannot be made the basis of a bill of review. George *v.* George, 67 Ala. 192; Moran *v.* Woodyard, 8 B. Mon. (Ky.) 537; Gary *v.* May, 16 Ohio 66; McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209. See also Allen *v.* Foster, (Tex. Civ. App. 1903) 74 S. W. 800. This rule is not absolute. Boston, etc., R. Co. *v.* Bemis Car-Box Co., 98 Fed. 121, 38 C. C. A. 661.

85. *Alabama.*— Adler *v.* Van Kirk Land, etc., Co., 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133; Thorington *v.* Thorington, 111 Ala. 237, 20 So. 407, 36 L. R. A. 385; Murrell *v.* Smith, 51 Ala. 301.

Arkansas.— Bartlett *v.* Gregory, 60 Ark. 453, 30 S. W. 1043.

Colorado.— Warren *v.* Adams, 26 Colo. 404, 60 Pac. 632.

District of Columbia.— Johnson *v.* Offutt, 2 MacArthur 168.

Florida.— Reynolds *v.* Florida Cent., etc., R. Co., 42 Fla. 387, 28 So. 861; Finlayson *v.* Lipscomb, 16 Fla. 751.

Georgia.— Murphy *v.* Savannah, 73 Ga. 263.

Illinois.— Lewis *v.* Topsico, 201 Ill. 320, 66 N. E. 276; Watts *v.* Rice, 192 Ill. 123, 61 N. E. 337.

Indiana.— Jenkins *v.* Prewitt, 7 Blackf. 329.

Kentucky.—Mitchell *v.* Berry, 1 Metc. 602; Gentry *v.* Thornberry, 3 Dana 500; Respass *v.* McClanahan, 2 A. K. Marsh. 577.

Maine.— Atkinson *v.* Conner, 56 Me. 546.

Maryland.— Hodges *v.* Mullikin, 1 Bland 503; Hitch *v.* Fenby, 4 Md. Ch. 190; Ridgeway *v.* Toram, 2 Md. Ch. 303; Hughes *v.* Jones, 2 Md. Ch. 289.

Mississippi.— West Feliciana R. Co. *v.* Stockett, 27 Miss. 739.

New Jersey.— Ft. Wayne El. Corp. *v.* Franklin El. Light Co., 57 N. J. Eq. 16, 41 Atl. 217; Perkins *v.* Partridge, 30 N. J. Eq. 559.

New York.— Lansing *v.* Albany Ins. Co., Hopk. 102.

Pennsylvania.— Kachline's Estate, 7 Pa. Super. Ct. 163.

South Carolina.— Simpson *v.* Watts, 6 Rich. Eq. 364, 62 Am. Dec. 392; Harvey *v.* Murrell, Harp. Eq. 257.

Tennessee.— McDowell *v.* Morrell, 5 Lea 278; Winchester *v.* Winchester, 1 Head 460; Fuller *v.* Jackson, (Ch. App. 1901) 62 S. W. 274.

Virginia.— Baker *v.* Watts, 101 Va. 702, 44 S. E. 929; Sanders *v.* Burk, (1895) 22 S. E. 516; Hatcher *v.* Hatcher, 77 Va. 600.

United States.— Dumont *v.* Des Moines Valley R. Co., 131 U. S. appendix clx, 25 L. ed. 520; Provident Rubber Co. *v.* Goodyear, 9 Wall. 805, 19 L. ed. 828; Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305.

See 19 Cent. Dig. tit. " Equity," § 1094.

Extreme diligence is not required. Harris *v.* Edmonson, 3 Tenn. Ch. 211.

If the fact was known a decree will not be reversed for the discovery of new evidence of the fact, not shown to be the only available evidence. Gullett *v.* Housh, 7 Blackf. 52; Nichols *v.* Nichols, 8 W. Va. 174.

Absence of a known witness, or even ignorance of his whereabouts, is insufficient to ground a bill of review. Putnam *v.* Clark, 36 N. J. Eq. 647 [*affirming* 36 N. J. Eq. 33]; Greene's Appeal, 3 Brewst. (Pa.) 66.

Testimony of a witness already examined is not new evidence. Evans *v.* Parrott, 26 Ark. 600.

If documents are known to exist and their contents might have been proved by secondary evidence, a bill of review will not lie upon the discovery of the originals. Conrad *v.* Conrad, 9 Phila. (Pa.) 510; Wethered *v.* Elliott, 45 W. Va. 436, 32 S. E. 209; Davis Sewing-Mach. Co. *v.* Dunbar, 32 W. Va. 335, 9 S. E. 237; Shakers' Soc. *v.* Watson, 77 Fed. 512, 23 C. C. A. 263. But see Caller *v.* Shields, 2 Stew. & P. (Ala.) 417.

86. Woodall *v.* Moore, 55 Ark. 22, 17 S. W. 268; Wiser *v.* Blachly, 2 Johns. Ch. (N. Y.) 488; Greenlee *v.* McDowell, 39 N. C. 481; Winchester *v.* Winchester, 1 Head (Tenn.) 460.

87. *Illinois.*— Walker *v.* Douglas, 89 Ill. 425; Boyden *v.* Reed, 55 Ill. 458.

Kentucky.— Mitchell *v.* Berry, 1 Metc. 602.

Michigan.— Ryerson *v.* Eldred, 23 Mich. 537.

New York.— Livingston *v.* Hubbs, 3 Johns. Ch. 124.

South Carolina.— Harvey *v.* Murrell, Harp. Eq. 257.

Tennessee.— Winchester *v.* Winchester, 1 Head 460; Young *v.* Henderson, 4 Hayw. 189; Fuller *v.* Jackson, (Ch. App. 1901) 62 S. W. 274.

make the original decree substantially inequitable,[88] and sufficiently cogent that if it were uncontradicted it would change the result or at least present a close question.[89] It must relate to the decree and not to proceedings in the execution of the decree.[90]

c. Matters Newly Arising. A bill of review lies for new matter arising after the decree was rendered.[91]

d. No Other Grounds Exist. A bill of review proper can be founded on no ground other than error apparent on the face of the record, newly discovered evidence, or new matter arising after the decree.[92] Bills to impeach decrees for fraud or other like causes, while partaking in some respects of the nature of bills of review, are original bills, governed by general equitable principles.[93]

Virginia.— Harman *v.* McMullin, 85 Va. 187, 7 S. E. 349; Hatcher *v.* Hatcher, 77 Va. 600; Douglass *v.* Stephenson, 75 Va. 747.

West Virginia.— Lorentz *v.* Lorentz, 32 W. Va. 556, 9 S. E. 886; Sayre *v.* King, 17 W. Va. 562.

United States.— Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305.

See 19 Cent. Dig. tit. "Equity," § 1093.

88. Keith *v.* Alger, 124 Fed. 32, 59 C. C. A. 552.

89. *Illinois.*— Lewis *v.* Topsico, 201 Ill. 320, 66 N. E. 276.

New Jersey.— Quick *v.* Lilly, 3 N. J. Eq. 255.

South Carolina.— Simpson *v.* Watts, 6 Rich. Eq. 364, 62 Am. Dec. 392.

Tennessee.— Harris *v.* Edmondson, 3 Tenn. Ch. 211.

Virginia.— Hatcher *v.* Hatcher, 77 Va. 600.

West Virginia.— Brown *v.* Nutter, 54 W. Va. 82, 46 S. E. 375; Shaffer *v.* Shaffer, 51 W. Va. 126, 41 S. E. 166.

United States.— Keith *v.* Alger, 124 Fed. 32, 59 C. C. A. 552; Jourolmon *v.* Ewing, 85 Fed. 103, 29 C. C. A. 41.

See 19 Cent. Dig. tit. "Equity," § 1093.

90. Shelton *v.* Van Kleeck, 106 U. S. 532, 1 S. Ct. 491, 27 L. ed. 269.

91. Camp Mfg. Co. *v.* Parker, 121 Fed. 195; Hill *v.* Phelps, 101 Fed. 650, 41 C. C. A. 569. But see Cole *v.* Cole, 89 Mo. App. 228; Bledsoe *v.* Carr, 10 Yerg. (Tenn.) 55. The formal setting aside of a void collateral decree, in evidence on the original hearing, is not new matter arising, for such decree is no less operative after its vacation than before. Vetterlein *v.* Barker, 45 Fed. 741. Matters accruing after the former decree which alone do not justify a resort to equity are insufficient. Knight *v.* Atkisson, 2 Tenn. Ch. 384.

92. Hill *v.* Phelps, 101 Fed. 650, 41 C. C. A. 569; Bacon Ord. 1. See also Price *v.* Notrebe, 17 Ark. 45; Whelan *v.* Cook, 29 Md. 1; Rittenhouse's Estate, 1 Pars. Eq. Cas. (Pa.) 313.

Statutes may of course extend the remedy. Pinkney *v.* Jay, 12 Gill & J. (Md.) 69; Sampeyreac *v.* U. S., 7 Pet. (U. S.) 222, 8 L. ed. 665 [*affirming* 27 Fed. Cas. No. 16,216*a*, Hempst. 118].

Absence or mistake of counsel is not ground of review.

Arkansas.— Price *v.* Notrebe, 17 Ark. 45.

South Carolina.— Smith *v.* Bossard, 2 McCord Eq. 406.

Tennessee.— Holmes *v.* Roth, (Ch. App. 1899) 57 S. W. 405 [*affirmed* orally by the supreme court, March 17, 1900].

Virginia.— Jones *v.* Pilcher, 6 Munf. 425; Franklin *v.* Wilkinson, 3 Munf. 112.

United States.— Cocke *v.* Copenhaver, 126 Fed. 145, 61 C. C. A. 211; Tilghman *v.* Werk, 39 Fed. 680.

See 19 Cent. Dig. tit. "Equity," §§ 1087, 1088.

93. *Alabama.*— Mitchell *v.* Rice, 132 Ala. 120, 31 So. 498; Newlin *v.* McAfee, 64 Ala. 357; Stallworth *v.* Blum, 50 Ala. 46.

Georgia.— Hargroves *v.* Nix, 14 Ga. 316; Keith *v.* Willingham, Ga. Dec., Pt. II, 151.

Illinois.— Axtell *v.* Pulsifer, 155 Ill. 141, 39 N. E. 615; Schaefer *v.* Wunderle, 154 Ill. 577, 39 N. E. 623; Mitchell *v.* Shaneberg, 149 Ill. 420, 37 N. E. 576; Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342; Allen *v.* Hawley, 66 Ill. 164; Johnson *v.* Johnson, 30 Ill. 215; Griggs *v.* Gear, 8 Ill. 2.

Indiana.— Hinesley *v.* Shetts, (App. 1897) 46 N. E. 94.

Kentucky.— Jeffrey *v.* Hand, 7 Dana 89; Edmondson *v.* Mosely, 4 J. J. Marsh. 497.

Maryland.— United Lines Tel. Co. *v.* Stevens, 67 Md. 156, 8 Atl. 908; Gregory *v.* Lenning, 54 Md. 51; Burch *v.* Scott, 1 Gill & J. 393.

Massachusetts.— Evans *v.* Bacon, 99 Mass. 213.

Michigan.— Dodge *v.* Northrop, 85 Mich. 243, 48 N. W. 505; Adair *v.* Cummin, 48 Mich. 375, 12 N. W. 495.

Mississippi.— Person *v.* Nevitt, 32 Miss. 180; James *v.* Fisk, 9 Sm. & M. 144, 47 Am. Dec. 111.

New York.— Loomer *v.* Wheelwright, 3 Sandf. Ch. 135; Wright *v.* Miller, 1 Sandf. Ch. 103.

Ohio.— Lockwood *v.* Mitchell, 19 Ohio 448, 53 Am. Dec. 438; Cooch *v.* Cooch, 18 Ohio 146.

South Carolina.— Reid *v.* Clark, Speers Eq. 343; Caldwell *v.* Giles, 2 Hill Eq. 548.

Tennessee.— Frazer *v.* Sypert, 5 Sneed 100; Butler *v.* Peyton, 4 Hayw. 88; Cox *v.* Hartsville Bank, (Ch. App. 1900) 63 S. W. 237.

Virginia.— Kernan *v.* Trice, 75 Va. 690.

West Virginia.— Silman *v.* Stump, 47

10. Defenses. If defendant in a bill of review suffers the bill to be taken *pro confesso*, it will like other bills be taken as true.[94] Defendant may demur to the bill,[95] and the demurrer, when the bill is for error apparent, raises only the assignments of error specified in the bill.[96] It does not raise any question going merely to the propriety of permitting the bill to be filed.[97] Nor does it reach the failure to aver payment of costs[98] or performance of the decree.[99] Answering to the merits also waives non-performance of the decree sought to be reviewed.[1] Overruling a demurrer to a bill for error apparent opens the original decree.[2] A plea that a writ of error has been dismissed need not set out the entire record.[3] Defendant may by plea or answer show that the decree complained of was taken by consent,[4] or that the new evidence sought to be offered was not newly discovered.[5] New facts cannot be introduced by answer to a bill for error apparent.[6] It is not necessary to plead the original decree in defense.[7] Failure of plaintiff to give security will not justify a peremptory dismissal of the bill after defendant has allowed the case to proceed.[8]

11. Hearing and Determination. Upon the hearing of a bill of review all the presumptions are in favor of correctness of the decree sought to be reviewed and of regularity of the proceedings in connection therewith.[9] Where the bill of

W. Va. 641, 35 S. E. 833. See also Law *v.* Law, (1904) 46 S. E. 697.

United States.— Ritchie *v.* Burke, 109 Fed. 16; Cutter *v.* Iowa Water Co., 96 Fed. 777; Dunlevy *v.* Dunlevy, 38 Fed. 459; Northern Illinois Coal, etc., Co. *v.* Young, 12 Fed. 809, 11 Biss. 331.

See 19 Cent. Dig. tit. "Equity," § 1090.

Amending bill of review.— After demurrer to a bill of review to set aside a decree for fraud is sustained, it is error to refuse leave to amend so as to make it an original bill for the purpose designed if it would then be sufficient. Law *v.* Law, (W. Va. 1904) 46 S. E. 697.

Bill in nature of bill of review.— Any matter clearly showing that a decree is improper, although not obtained by fraud, collusion, or surprise, may be made the ground for impeaching the decree by an original bill in the nature of a bill of review. Gregory *v.* Lenning, 54 Md. 51; Arnold *v.* Moyers, 1 Lea (Tenn.) 308.

94. U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118.

95. De Louis *v.* Meek, 2 Greene (Iowa) 55, 50 Am. Dec. 491; McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209; Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968.

Defeat of parties is ground for demurrer. Fuller *v.* McFarland, 6 Heisk. (Tenn.) 79.

Answer is equivalent to demurrer when it admits the record as pleaded. Randall *v.* Payne, 1 Tenn. Ch. 452.

Where no answer is put in to the bill of review, but by agreement of counsel it is argued as upon demurrer, the court will treat the case as if the record were duly made up and demurrer had actually been filed. Heckman's Estate, 2 Woodw. (Pa.) 165.

A bill not filed in time as appears affirmatively on its face is demurrable. Crawford *v.* Watkins, 118 Ga. 631, 45 S. E. 482.

96. Brown *v.* Severson, 12 Heisk. (Tenn.) 381.

A general demurrer to the bill of review should be overruled where the bill shows any substantial error in the record. Buffington *v.* Harvey, 95 U. S. 99, 24 L. ed. 381.

97. Tallmadge *v.* Lovett, 3 Edw. (N. Y.) 563. See also *supra*, XXIV, F, 6. It waives irregularity in filing the bill. Dance *v.* McGregor, 5 Humphr. (Tenn.) 428. It waives objection that bill was filed too late. Hyde *v.* Lamberson, 1 Ida. 539.

98. Miller *v.* Clark, 47 Fed. 850.

99. Cochran *v.* Rison, 20 Ala. 463; Bruschke *v.* Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417. It waives non-performance. Forman *v.* Stickney, 77 Ill. 575. The objection that a bill of review was filed before performance of the original decree must be raised by defendant's moving the court on his first appearance to strike the same from the files or to dismiss the suit. Forman *v.* Stickney, *supra*.

1. Horner *v.* Zimmerman, 45 Ill. 14.

2. Guerry *v.* Perryman, 12 Ga. 14; Carey *v.* Giles, 10 Ga. 9.

3. Rice *v.* Carey, 4 Ga. 558.

4. Turner *v.* Berry, 8 Ill. 541.

5. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303.

6. Edmonson *v.* Marshall, 6 J. J. Marsh. (Ky.) 448; Enochs *v.* Harrelson, 57 Miss. 465; Thornton *v.* Stewart, 7 Leigh (Va.) 128.

7. Webb *v.* Pell, 3 Paige (N. Y.) 368.

8. Swan *v.* Wright, 23 Fed. Cas. No. 13,670, 3 Woods 587.

9. *Alabama.*— Glover *v.* Hembree, 82 Ala. 324, 8 So. 251; Martin *v.* Mobile Branch Bank, 10 Ala. 182.

Iowa.— Harrison *v.* Kramer, 3 Iowa 543.

Ohio.— Buchanan *v.* Roy, 2 Ohio St. 251.

Oregon.— Garbade *v.* Frazier, 42 Oreg. 384, 71 Pac. 136.

Tennessee.— Robertson *v.* Winchester, 85 Tenn. 171, 1 S. W. 781.

Virginia.— Quarrier *v.* Carter, 4 Hen. & M. 242.

Wisconsin.—Remington *v.* Willard, 15 Wis. 583.

review is for errors apparent on the record the proceedings are similar to those at a hearing on a writ of error.[10] Issues of fact may be referred to a jury.[11] The burden of proof is on plaintiff in the bill of review.[12] The general rules relating to the weight of a responsive answer in equity as evidence apply to the answer to a bill of review.[13] Introduction of newly discovered evidence to prove facts in issue on the former hearing may be allowed; but this allowance rests in the sound discretion of the court, and is to be exercised cautiously and sparingly, and only under circumstances which render it indispensable to the merits and justice of the cause.[14] Upon a bill of review the former decree will not be absolutely annulled, except for some error going to the whole ground of the decree,[15] but will be reversed or corrected only to the extent that it injuriously affects the interest of the party rightfully complaining.[16] In other respects the former decree will remain in full force and effect, for the sustaining of the bill of review will not be allowed to operate in favor of other parties to the former decree not entitled to review it.[17] Nor can the former decree be modified so as to prejudice the rights of third parties interested under it.[18] If the bill of review attacks the former decree on the ground that it is void, this ground failing, the decree cannot be corrected.[19] The findings of the court should point out distinctly the parts of the former decree found incorrect, and should state clearly the several corrections and revisions to be made.[20]

12. SECOND REVIEW. While a decree on a bill of review may within proper time be reheard on petition,[21] a second bill of review will not be entertained after the affirmance of the original decree.[22]

EQUITY OF REDEMPTION. See MORTGAGES.

EQUIVALENT. As good as;[1] equally good.[2] (Equivalent: In Patent Law, see PATENTS.)

ERASE. To cross out;[3] to blot out by razure.[4]

ERASURE. A scraping, scratching, or rubbing out; removal of a word or

United States.— Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 9 Sawy. 643.

See 19 Cent. Dig. tit. "Equity," § 1135.

10. Payne *v.* Beech, 2 Tenn. Ch. 708.

11. Elliott *v.* Balcom, 11 Gray (Mass.), 286.

12. Barnett *v.* Smith, 5 Call (Va.) 98.

13. Kachline's Estate, 7 Pa. Super. Ct. 163. See *supra*, XVII, B, 2.

14. Craig *v.* Smith, 100 U. S. 226, 25 L. ed. 577.

15. Waugh *v.* Mitchell, 21 N. C. 510.

16. Mitchell *v.* Hardie, 84 Ala. 349, 4 So. 182; McCall *v.* McCurdy, 69 Ala. 65; Leech *v.* Perry, 77 Ind. 422; Mercer *v.* Stark, Sm. & M. Ch. (Miss.) 479; Waugh *v.* Mitchell, 21 N. C. 510.

17. Mitchell *v.* Hardie, 84 Ala. 349, 4 So. 182.

18. Friley *v.* Hendricks, 27 Miss. 412; Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603; Donaldson *v.* Nealis, 103 Tenn. 638, 69 S. W. 732; Winchester *v.* Winchester, 1 Head (Tenn.) 460.

19. Smith *v.* Butler, 15 App. Cas. (D. C.) 345.

20. Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222.

21. Jones *v.* Zollicoffer, 4 N. C. 45.

22. Respass *v.* McClanahan, Hard. (Ky.) 342; Strader *v.* Byrd, 7 Ohio 184; Huntington *v.* Little Rock, etc., R. Co., 16 Fed. 906, 3 McCrary 581.

1. Kellogg *v.* Muller, 68 Tex. 182, 184, 4 S. W. 361.

2. Matheson *v.* Campbell, 69 Fed. 597, 602; Tyler *v.* Boston, 7 Wall. (U. S.) 327, 330, 19 L. ed. 93. And *compare* State *v.* Smith, 49 Conn. 376, 385 (testimony of two witnesses, or that which is "equivalent" thereto); Darlington Wagon Co. *v.* Harding, [1891] 1 Q. B. 245, 247, 60 L. J. Q. B. 110, 64 L. T. Rep. N. S. 409, 39 Wkly. Rep. 167; Longman *v.* East, 3 C. P. D. 142, 155, 47 L. J. C. P. 211, 38 L. T. Rep. N. S. 11, 26 Wkly. Rep. 183 ("equivalent to the verdict of a Jury").

"Its equivalent" see Holt *v.* Given, 43 Ala. 612, 616; Hassard-Short *v.* Hardison, 117 N. C. 60, 64, 23 S. E. 96; Ogden *v.* Slade, 1 Tex. 13, 14; Paup *v.* Drew, 10 How. (U. S.) 218, 223, 13 L. ed. 394; Robinson *v.* Noble, 8 Pet. (U. S.) 181, 199, 8 L. ed. 910; Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10.

3. Webster Dict. [*quoted* in Vallier *v.* Brakke, 7 S. D. 343, 357, 64 N. W. 180, opinion of Corson, P. J.].

4. Johnson Dict. [*quoted* in Cloud *v.* Hewitt, 5 Fed. Cas. No. 2,904, 3 Cranch C. C. 199]. See also Rex *v.* Bigg, 3 P. Wms. 419, 435, 24 Eng. Reprint 1132.

part of a word from a writing, by any means; obliteration.[5] (Erasure: In Deed, see DEEDS. In Instrument, in General, see ALTERATIONS OF INSTRUMENTS. In Note, see COMMERCIAL PAPER. In Will, see WILLS. Of Indorsement, see COMMERCIAL PAPER. Of Judgment, see JUDGMENTS. Of Mark on Ballot, see ELECTIONS. Of Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Of Obligor Before Delivery, see BONDS. Of Record, see RECORDS. Of Subscription to Stock, see CORPORATIONS.)

ERECT. To build;[6] to build up, to construct;[7] to raise and set up in an upright or perpendicular position; to set up; raise up; to raise;[8] to found and form, as well as to build or raise and set up;[9] to set up or found or establish or institute, according to the context.[10]

ERECTED. Actually constructed; built; COMPLETED,[11] *q. v.* (See, generally, FIXTURES; MECHANICS' LIENS.)

ERIGERE. As applied to corporations, a word used in the sense of constitute.[12] (See, generally, CORPORATIONS.)

EROSION. A gradual eating away of the soil by the operation of currents or tides.[13] (See NAVIGABLE WATERS; WATERS.)

ERRONEOUS. Deviating from the law;[14] inequitable.[15] (Erroneous: Assessment, see CERTIORARI; TAXATION. Judgment, see COURTS; JUDGMENTS.)

ERROR. A mistake in judgment or deviation from the truth in matters of fact, and from the law in matters of judgment;[16] misstatement or misdescription

5. Burrill L. Dict.

6. Port Huron, etc., R. Co. *v.* Richards, 90 Mich. 577, 579, 51 N. W. 680; McGary *v.* People, 45 N. Y. 153, 161; Carroll *v.* Lynchburg, 84 Va. 803, 804, 6 S. E. 133; Anderson L. Dict. [*quoted* in Eichleay *v.* Wilson, 42 Wkly. Notes Cas. (Pa.) 525, 527]. See also Com. *v.* Horrigan, 2 Allen (Mass.) 159; Carroll *v.* Lynchburg, 84 Va. 803, 804, 6 S. E. 133; Baird *v.* Tunbridge Wells, [1894] 2 Q. B. 867, 884, 59 J. P. 36, 64 L. J. Q. B. 145, 71 L. T. Rep. N. S. 211, 9 Reports 479 [*affirmed* in [1896] A. C. 434, 60 J. P. 788, 65 L. J. Q. B. 451, 74 L. T. Rep. N. S. 385].

7. Anderson L. Dict. [*quoted* in Eichleay *v.* Wilson, 42 Wkly. Notes Cas. (Pa.) 525, 527]. See also State *v.* Brown, 16 Conn. 54, 57 ("erect any buildings thereon"); Barker *v.* Floyd, 32 Misc. (N. Y.) 474, 477, 66 N. Y. Suppl. 216 ("erect and construct"); Ott *v.* Sweatman, 166 Pa. St. 217, 228, 31 Atl. 102 ("construct and erect"); Brown *v.* Graham, 58 Tex. 254, 256; Wendon *v.* London County Council, [1894] 1 Q. B. 812, 815, 58 J. P. 606, 63 L. J. M. C. 117, 70 L. T. Rep. N. S. 440, 9 Reports 292, 42 Wkly. Rep. 370; Smith *v.* Stokes, 4 B. & S. 84, 88, 32 L. J. M. C. 199, 8 L. T. Rep. N. S. 425, 11 Wkly. Rep. 753, 116 E. C. L. 84 ("erect" a steam-engine); London County Council *v.* Cross, 56 J. P. 550, 61 L. J. M. C. 160, 165.

8. Century Dict. [*quoted* in Favro *v.* State, 39 Tex. Cr. 452, 454, 46 S. W. 932, 73 Am. St. Rep. 950].

9. City Sewage Utilization Co. *v.* Davis, 8 Phila. (Pa.) 625, 626. See also Atty.-Gen. *v.* Hyde, Ambl. 751, 753, 27 Eng. Reprint 484; Foy *v.* Foy, 1 Cox Ch. 163, 165. And see Atty.-Gen. *v.* Parsons, 8 Ves. Jr. 186, 191, 7 Rev. Rep. 22, 32 Eng. Reprint 325.

10. Port Huron, etc., R. Co. *v.* Richards, 90 Mich. 577, 579, 51 N. W. 680.

11. McGary *v.* People, 45 N. Y. 153, 161. See also 3 Cyc. 990 note 53. But see Johnston *v.* Ewing Female University, 35 Ill. 518, 529, where it is said: "There is a great difference between erecting a building and completing one."

"Erected or built" used in reference to a county as to a bridge see Rex *v.* Devon, 5 B. & Ad. 383, 388, 27 E. C. L. 165; Rex *v.* Lancashire, 2 B. & Ad. 813, 816, 22 E. C. L. 342.

12. Philpott *v.* St. George's Hospital, 6 H. L. Cas. 338, 356, 3 Jur. N. S. 1269, 10 Eng. Reprint 1326 [*citing* Atty.-Gen. *v.* Parsons, 8 Ves. Jr. 186, 191, 7 Rev. Rep. 22, 32 Eng. Reprint 325].

13. Mulry *v.* Norton, 100 N. Y. 424, 433, 3 N. E. 581, 53 Am. Rep. 206, where the term is distinguished from "submergence."

14. Thompson *v.* Doty, 72 Ind. 336, 338.

Distinguished from "illegal" see Ford *v.* McGregor, 20 Nev. 446, 23 Pac. 508.

Distinguished from "irregular" see Wolfe *v.* Davis, 74 N. C. 597, 599; Paine *v.* Ely, N. Chipm. (Vt.) 14, 24. *Compare* Thompson *v.* Phillips, 23 Fed. Cas. No. 13,974, Baldw. 246.

Distinguished from "void" see Kelly *v.* People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; People *v.* Liscomb, 60 N. Y. 559, 568, 19 Am. Rep. 211.

15. People *v.* Molloy, 35 N. Y. App. Div. 136, 140, 54 N. Y. Suppl. 1084.

16. Bouvier L. Dict.

"Error of judgment" distinguished from negligence see McDonald *v.* The Tom Lysle, 48 Fed. 690, 693. As used in connection with taxation proceedings see Smith *v.* McQuiston, 108 Iowa 363, 366, 79 N. W. 130.

Distinguished from "fault" see The Manitoba, 104 Fed. 145, 154.

Distinguished from "irregularity" see Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 170, 16 Atl. 506 [*citing* Macnamara Nullities, p. 3].

Distinguished from "latent ambiguity" see Donehoo *v.* Johnson, 120 Ala. 438, 445, 24 So. 888.

erroneously and not wilfully introduced;[17] unintentional misdescription;[18] excess.[19] (Error: In Extremis, see COLLISION. Of Fact, see APPEAL AND ERROR; ERROR OF FACT. Of Law, see APPEAL AND ERROR; ERROR OF LAW. Writ of, see APPEAL AND ERROR.)

ERRORES AD SUA PRINCIPIA REFERRE, EST REFELLERE. A maxim meaning "To refer errors to their principles, is to refute them."[20]

ERRORES SCRIBENTIS NOCERE NON DEBENT. A maxim meaning "The mistakes of the writer ought not to harm."[21]

ERROR FUCATUS NUDÂ VERITATE IN MULTIS EST PROBABILIOR; ET SÆPENUMERO RATIONIBUS VINCIT VERITATEM ERROR. A maxim meaning "Varnished error is in many things more probable than naked truth; and very frequently error conquers truth by reasoning."[22]

ERROR JURIS NOCET. A maxim meaning "Error of law is injurious."[23]

ERROR NOMINIS NUNQUAM NOCET, SI DE IDENTITATE REI CONSTAT. A maxim meaning "An error in the name of a thing is never prejudicial, if it be clear as to the identity of the thing itself, *i. e.* where the intention is clearly known."[24]

ERROR OF FACT. That error which proceeds either from ignorance of that which clearly exists, or from a mistaken belief in the existence of that which has none.[25]

ERROR OF LAW. The term includes the ignorance of legal consequences of the known existence or non-existence of facts.[26]

ERROR PLACITANDI ÆQUITATEM NON TOLLIT. A maxim meaning "A clerical error does not take away equity."[27]

ERROR QUI NON RESISTITUR, APPROBATUR. A maxim meaning "An error which is not resisted is approved."[28]

ERUBESCIT LEX FILIOS CASTIGARE PARENTES. A maxim meaning "The law blushes when children correct their parents."[29]

ERYSIPELAS. The result of some specific poison, which enters the system through the exposure of a wound.[30]

Distinguished from "negligence" see Sanford *v.* Housatonic R. Co., 11 Cush. (Mass.) 155, 157.

Distinguished from "waste" see Sanford *v.* Housatonic R. Co., 11 Cush. (Mass.) 155, 157.

17. Taylor *v.* Bullen, 5 Exch. 779, 784, 20 L. J. Exch. 21 [*citing* Norfolk *v.* Worthy, 1 Campb. 337, 340, 10 Rev. Rep. 749; Wright *v.* Wilson, 1 M. & Rob. 207].

18. Taylor *v.* Bullen, 5 Exch. 779, 784, 20 L. J. Exch. 21.

19. Rankin *v.* Pitkin, 50 Iowa 313, 314.

20. Wharton L. Lex. [*citing* 3 Inst. 15].

21. Wharton L. Lex. [*citing* Jenkins Cent. 324].

22. Wharton L. Lex.

Applied in Cromwel's Case, 2 Coke 69*a*, 73*a*.

23. Bouvier L. Dict. [*citing* 1 Story Eq. Jur. § 139 note].

24. Adams Gloss. [*citing* Duer Ins. 171].

25. Delongy *v.* Her Creditors, 48 La. Ann. 488, 490, 19 So. 614; La. Civ. Code (1900), art. 1821. See also Norton *v.* Marden, 15 Me. 45, 46, 32 Am. Dec. 132; Wheadon *v.* Olds, 20 Wend. (N. Y.) 174, 176; Mowatt *v.* Wright, 1 Wend. (N. Y.) 355, 360, 19 Am. Dec. 508.

26. Mowatt *v.* Wright, 1 Wend. (N. Y.) 355, 360, 19 Am. Dec. 508. See also La. Civ. Code (1900), art. 1822.

27. Adams Gloss. [*citing* Lofft Max. 577].

28. Adams Gloss.

29. Wharton L. Lex.

Applied in Bonham's Case, 8 Coke 114*a*, 116*a*.

30. Dickson *v.* Hollister, 123 Pa. St. 421, 430, 16 Atl. 484, 10 Am. St. Rep. 533, where it is said: "But the nature of this poison and the conditions under which it operates, are not well understood."

ESCAPE

By S. R. Wrightington
Editor of "The Green Bag"

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CROSS-REFERENCES

For Matters Relating to:

Delivery of Prisoners From Custody, see RESCUE.

Escape:

Action For, see EXECUTIONS; PRISONS; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.

Arrest After, see ARREST.

As Evidence, see CRIMINAL LAW.

Of Accused, see CRIMINAL LAW.

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Of Several Defendants, see CRIMINAL LAW.

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Obstructing Arrest, see OBSTRUCTING JUSTICE.

Rearrest, see ARREST.

Resisting Arrest, see OBSTRUCTING JUSTICE.

Second Arrest, see ARREST.

I. THE OFFENSE.

A. Definitions[1] — **1. ESCAPE — a. Loss of Custody.** Escape may be defined as the loss, before discharge by due process of law, of the lawful custody of a prisoner, whether voluntarily or negligently suffered.[2]

b. Departure From Custody. It may also be defined as departure by a prisoner from lawful custody before he is discharged by due process of law.[3]

2. AIDING ESCAPE. Aiding an escape may be described as any overt act which is intended to assist, and which may be useful to assist, an attempted or completed departure of a prisoner from lawful custody before he is discharged by due process of law.[4]

B. Elements of Offense — 1. ESCAPE — a. Loss of Custody — (I) *WHAT CONSTITUTES LOSS OF CUSTODY.* Any loss of physical control even temporarily is a loss of custody,[5] but a discharge which is authorized by law is of course no escape.[6]

1. These crimes have now been generally defined by statute, and modern cases must be examined with reference to local legislation, but such statutes are frequently merely additional to the common law. Hodges *v.* State, 8 Ala. 55; Com. *v.* Farrell, 5 Allen (Mass.) 130; State *v.* Brown, 82 N. C. 585.

2. This, an early authority says, "is properly an escape." 1 Hale P. C. 590.

"A voluntary escape is when any person having a felon lawfully in his custody voluntarily permits him to escape from it or go at large." 1 Hale P. C. 590.

Admitting to bail where bail not authorized.— Where two justices, under the habeas corpus act, admitted a person to bail who was charged with murder in the warrant, it was held that they were guilty of an escape and might very properly be indicted. State *v.* Arthur, 1 McMull. (S. C.) 456. See also 1 Hale P. C. 596.

3. Bouvier L. Dict.

Other definitions are: "When one who is arrested gains his liberty before he is delivered in due course of law." 1 Russell Crimes 467 [*quoted* in State *v.* Ritchie, 107 N. C. 857, 858, 12 S. E. 251; State *v.* Johnson, 94 N. C. 924, 926].

"The departure of a prisoner from custody." 2 Wharton Cr. L. § 2606 [*quoted* in State *v.* Ritchie, 107 N. C. 857, 858, 12 S. E. 251; State *v.* Johnson, 94 N. C. 924, 926].

4. See *infra*, I, B, 2.

It is not clear whether at common law there was any such offense distinct from the acts which in general made one an accessory to crime. See 2 Bishop Cr. L. § 1102 [*quoting* 1 Gabbett Cr. L. pp. 297–303]; 2 Hawkins P. C. c. 17, § 1; c. 29, § 26. The offense has, however, been so generally and so uniformly defined by statute and made a principal as distinguished from an accessorial offense that it may be properly defined and treated as such. Wilson *v.* State, 61 Ala. 151; Peeler *v.* State, 3 Tex. App. 533.

Distinguished from rescue.— Robinson *v.* State, 82 Ga. 535, 544, 9 S. E. 528.

A prisoner imprisoned in the county jail at the time of his aiding the escape of other prisoners confined therein is liable to the penalty prescribed in Wis. Rev. St. c. 167, § 12, for aiding in such escapes. Oleson *v.* State, 20 Wis. 58.

5. Nall *v.* State, 34 Ala. 262; 1 Hale P. C. 597, 602.

6. Discharge on bail.— The release of an

(II) *LAWFULNESS OF CUSTODY.*[7] Defendant must have been at the time of the escape charged by law with the immediate responsibility for the safe-keeping of the prisoner,[8] but it is sufficient that he was an officer *de facto*.[9] On the other hand if the custody of an officer *de jure* be unlawful, in the sense that it is void, not merely voidable, he is not liable for an escape.[10] Since one may be lawfully detained in custody pending a determination of guilt, the innocence or subsequent acquittal of the prisoner is not material in determining the officer's liability.[11] Until a lawful transfer of custody the original custodian is responsible.[12]

(III) *INTENT*—(A) *Voluntary Escape.* Voluntary escape means wilful loss of custody, and by the better view requires the existence of a specific intent to save the prisoner from punishment,[13] although this view is not universal.[14]

imprisoned debtor pending his application for discharge, under Ill. Rev. St. c. 72, § 8, authorizing the county court to permit him to give bond which shall contain a provision that he will surrender himself to the officer in whose custody he was when it was given, does not amount to an escape, voluntarily or negligently. People *v.* Hanchett, 111 Ill. 90.

7. See also *infra*, I, B, 1, b, (II); I, B, 2, d.

8. **Act of subordinate.**— A sheriff is not criminally liable for escapes by his deputies or jailers (Nall *v.* State, 34 Ala. 262; Watts *v.* Com., 99 Va. 872, 39 S. E. 706; Com. *v.* Lewis, 4 Leigh (Va.) 716; Barthelow *v.* State, 26 Tex. 175), unless himself at fault (Watts *v.* Com., 99 Va. 872, 39 S. E. 706. See also *infra*, I, B, 1, a, (III), (B)), but formerly the sheriff was liable to fine as for a negligent escape for any escape by a jailer (1 Hale P. C. 597).

Mere servants of the custodian are not liable for escapes. State *v.* Errickson, 32 N. J. L. 421.

Guard or hirer of convicts.— A guard in charge of convicts employed on public works (State *v.* Johnson, 94 N. C. 924; State *v.* Sneed, 94 N. C. 806) or one who hires convicts (Porter *v.* State, 34 Tex. Cr. 364, 30 S. W. 791) may be liable.

9. Thus, although his tenure of office be terminated (1 Hale P. C. 594), although he has not qualified for office (Pentecost *v.* State, 107 Ala. 81, 18 So. 146; State *v.* Maberry, 3 Strobh. (S. C.) 144), or although he be only temporarily employed as deputy (Kavanaugh *v.* State, 41 Ala. 399) he is a lawful custodian.

Even a private individual who arrests a known felon may be liable. 1 Hale P. C. 595.

10. **A defect of jurisdiction,** such as an unauthorized warrant, will make the custody unlawful, although the warrant was regular on its face. Housh *v.* People, 75 Ill. 487.

A mere informality in the form of a warrant, however, does not make it void. Martin *v.* State, 32 Ark. 124.

An error of law in the conduct of a trial does not make the custody void. State *v.* Garrell, 82 N. C. 580.

An officer cannot set up his own neglect of duty to show that his custody was unlawful. Pentecost *v.* State, 107 Ala. 81, 18 So. 146; Garver *v.* Territory, 5 Okla. 342, 49 Pac. 470.

11. Weaver *v.* Com., 29 Pa. St. 445; Com. *v.* Miller, 2 Ashm. (Pa.) 61.

The old law on this point is complicated by the severity of punishment of felons. This may account for some apparent exceptions suggested in 1 Hale P. C. 611, 612.

12. 1 Hale P. C. 594.

After arrest.— An officer's custody of a prisoner whom he has arrested upon a warrant and brought before a court for trial does not cease until the prisoner has been discharged or a warrant of commitment made out. Com. *v.* Morihan, 4 Allen (Mass.) 585. But where a person who is not a regular officer, but is specially deputed, under the statute, to serve a criminal warrant, makes an arrest, and returns the warrant to a justice of the peace, who acts upon the case, his authority is at an end. State *v.* Dean, 48 N. C. 393.

During trial.— A person on trial for a criminal offense is by operation of law in the custody of the sheriff, although no special or general order be made to that effect; and hence the sheriff is criminally responsible for accused's escape during trial. Hodges *v.* State, 8 Ala. 55.

After conviction.— It is the duty of a sheriff, on conviction of a defendant who is present at the trial for a misdemeanor, to retain him in custody, and, if the fine and costs be not immediately paid, to hire him out as directed by the judgment; and, if he voluntarily permits him to go at large, he is guilty of a misdemeanor. Griffin *v.* State, 37 Ark. 437. See also Luckey *v.* State, 14 Tex. 400.

13. 1 Hale P. C. 596.

A jailer who discharged a prisoner on a written discharge of a magistrate believing it to be legal was held not guilty of the crime of voluntary escape, but of the lesser crime of negligent escape. Meehan *v.* State, 46 N. J. L. 355.

Proof of an act of a deputy, which the sheriff might have known of if acting with due care, was held not enough to sustain a charge of wilfully permitting an escape. Barthelow *v.* State, 26 Tex. 175.

14. *In re* Bucks County Prison, 15 Pa. Co. Ct. 569 (where the fact that a jailer was acting under the orders of a sheriff in permitting prisoners to go at large was held no defense); State *v.* Manley, 1 Overt. (Tenn.)

(B) *Negligent Escape.* Although styled in the old common law "negligent escape" it seems that no excuse was recognized, at least in case of escape from confinement, except act of God or the public enemies;[15] and this rule has been sustained in some modern cases of escapes from confinement.[16] On the other hand negligence has been held in other cases to be as usual a question of fact on all the circumstances,[17] and this is frequently so by statute.[18]

b. Departure From Custody — (I) *What Constitutes Departure.* To constitute this form of escape there must be an actual departure from custody,[19] but the use of force or violence is not a necessary element.[20] The offense must be committed by departure before discharge by due process of law,[21] but such discharge, although for a temporary purpose only, is of course a defense.[22]

(II) *Lawfulness and Nature of Custody.*[23] It is not a crime to escape from custody, the authority for which is void in law,[24] although the warrant under

428 (where the fact that a sheriff acted on advice of the committing magistrate in permitting an escape was held no defense). See also a *dictum* to this effect in Bass *v.* State, 29 Ark. 142.

15. 1 Hale P. C. 596.

16. Shattuck *v.* State, 51 Miss. 575; State *v.* Johnson, 94 N. C. 924; State *v.* Halford, 6 Rich. (S. C.) 58.

17. Garver *v.* Territory, 5 Okla. 342, 49 Pac. 470; Watts *v.* Com., 99 Va. 872, 39 S. E. 706. See also Nall *v.* State, 34 Ala. 262.

18. State *v.* Lewis, 113 N. C. 622, 18 S. E. 69; State *v.* Hunter, 94 N. C. 829; Com. *v.* Medland, 5 Pa. Co. Ct. 233.

19. A convict "farmed out" who is merely refractory or refuses to work does not escape. Carter *v.* State, 29 Tex. App. 5, 14 S. W. 350.

Mere breach of promise by a prisoner on parol is not sufficient. Mills *v.* State, 41 Tex. Cr. 447, 53 S. W. 107, 55 S. W. 338; Simmons *v.* State, (Tex. Cr. App. 1897) 40 S. W. 968; Porter *v.* State, 34 Tex. Cr. App. 364, 30 S. W. 791. See also Scottsboro Corporate Authorities *v.* Johnston, 121 Ala. 397, 25 So. 809. *Contra,* Jenks *v.* State, 63 Ark. 312, 39 S. W. 361.

20. *Connecticut.*— Riley *v.* State, 16 Conn. 475; State *v.* Doud, 7 Conn. 384.

Massachusetts.— Com. *v.* Farrell, 5 Allen 130.

Missouri.— State *v.* Whalen, 98 Mo. 222, 11 S. W. 576.

Nevada.— State *v.* Davis, 14 Nev. 439, 33 Am. Rep. 563.

New York.— People *v.* Johnson, 46 Hun 667.

North Carolina.— State *v.* Brown, 82 N. C. 585.

Pennsylvania.— Com. *v.* Adams, 3 Pa. Super Ct. 167.

Texas.— Carter *v.* State, 29 Tex. App. 5, 14 S. W. 350.

See 19 Cent. Dig. tit. "Escape," § 3.

Accidentally throwing down loose bricks placed at the top of a prison wall to impede escape and give alarm is sufficient force. Rex *v.* Haswell, R. & R. 340.

When accomplished by violence, this is styled "prison breach" (1 Hale P. C. 590. See also State *v.* Doud, 7 Conn. 384; State *v.* Brown, 82 N. C. 585; Rex *v.* Haswell, R. & R. 340), but many cases limit the use of this term to escapes from places of confinement (Com. *v.* Adams, 3 Pa. Super. Ct. 167). Under statutes at least it has been held that prison breach might be committed by an overt act attempting escape from jail, although unsuccessful. See Com. *v.* Homer, 5 Metc. (Mass.) 555.

Where a prisoner being in the corridor of a jail unlocked a door between the corridor and one of the cells and thence escaped, it was held an actual breaking on the analogy of decisions in cases of burglary. Randall *v.* State, 53 N. J. L. 488, 22 Atl. 46. On the other hand, where a convict who was taken with others to work in a stone quarry two miles from the prison made his escape by dropping unseen into a natural crevice in the rock, the opening to which was covered by a companion, which covering was removed by defendant on his departure, it was held not a breaking, since it was accomplished by stratagem and not by force. State *v.* King, 114 Iowa 413, 87 N. W. 282, 54 L. R. A. 853.

21. But note the reasoning of one case, which seems opposed to the above statement, that since the time for which one was sentenced had expired before rearrest he could not be rearrested as an escaped prisoner. The facts, however, distinguish the use. Scottsboro Corporate Authorities *v.* Johnston, 121 Ala. 397, 25 So. 809.

22. Com. *v.* Alden, 14 Mass. 388.

23. See *supra,* I, B, 1, a, (II); and *infra,* I, B, 2, d.

24. State *v.* Leach, 7 Conn. 452, 18 Am. Dec. 113; Housh *v.* People, 75 Ill. 487; State *v.* Williams, 10 N. J. L. J. 293.

Contingent warrant.— Pending the execution of a search warrant on defendant's premises defendant was detained by the officers but escaped. The warrant authorized his arrest only if opium was found. None was found and it was held that he was not in lawful custody and hence not liable to indictment for escape under Hawaiian Pen. Code, c. 29, § 3. Rex *v.* Sin Fook, 8 Hawaii 185.

Prisoner surrendered by bail.—Where a person at liberty on bail is surrendered to the sheriff by his sureties with the prisoner's consent, the sheriff, without having a copy of the recognizance, cannot lawfully hold him

which the prisoner is arrested is fair on its face;[25] but departure from mere custody, if lawful, is sufficient,[26] unless by statute the escape must be from a place of confinement,[27] or from a specified class of confinement.[28] A mere informality in process, however, does not render the custody unlawful,[29] and since one may be lawfully detained in custody pending a determination of guilt,[30] conviction of the original offense is not a condition precedent to a conviction of the escape,[31] and an acquittal on trial for the original offense is no defense to an indictment for the escape, for such custody, although voidable, is not void.[32] A commitment to a state jail under authority of the government of the United States is lawful custody, departure from which is indictable in the state courts.[33]

(III) *INTENT.* It would seem that there must be a criminal intent to evade the due course of justice.[34] There is accordingly some authority for the proposition that necessity may be considered as an excuse for an escape.[35] Consent

in custody; and hence his escape constitutes no offense. State *v.* Beebe, 13 Kan. 589, 19 Am. Rep. 93. But a person who has been lawfully arrested on mesne process, admitted to bail, and afterward surrendered by his bail to the keeper of the jail, was held lawfully imprisoned within Mass. Gen. St. c. 178, § 46. Com. *v.* Barker, 133 Mass. 399.

Repealed statute.— A warrant issued under a statute previously repealed is void, and it was held that one confined thereunder might lawfully liberate himself, using no more force than was necessary to accomplish this object. State *v.* Leach, 7 Conn. 452, 18 Am. Dec. 113.

25. Housh *v.* People, 75 Ill. 487.

26. Com. *v.* Farrell, 5 Allen (Mass.) 130; Com. *v.* Adams, 3 Pa. Super. Ct. 167; 1 Hale P. C. 609. *Compare* Hinkle *v.* Com., 66 S. W. 816, 23 Ky. L. Rep. 1988.

27. McClintic *v.* Lockridge, 11 Leigh (Va.) 253.

A chain gang is not a place of confinement under Ga. Pen. Code, § 314. Daniel *v.* State, 114 Ga. 533, 40 S. E. 805.

A yard suitably fenced and protected and wholly appropriated to the uses of the main institution was held within Mass. Gen. St. c. 178, §§ 6, 7, providing against escapes from a house of correction or yard adjoining or appurtenant thereto, although the yard was not immediately connected with the building. Com. *v.* Curley, 101 Mass. 24.

A jail was held a prison within the meaning of N. Y. Pen. Code, §§ 85, 92. People *v.* Johnson, 46 Hun (N. Y.) 667. See also Irvington *v.* State, (Tex. Cr. App. 1904) 78 S. W. 928.

The breaking open of a jail for the purpose of escape by a prisoner therein is within Vt. Comp. St. c. 106, § 11, p. 555. State *v.* Fletcher, 32 Vt. 427.

A village lockup is a jail within Vt. St. § 5094. State *v.* Dohney, 72 Vt. 260, 47 Atl. 785.

28. **A commitment pending trial** was held not within the meaning of Mass. Rev. St. § 51 (Com. *v.* Homer, 5 Metc. (Mass.) 555), but an additional sentence was held such imprisonment (Com. *v.* Briggs, 5 Metc. (Mass.) 559).

An indefinite term of imprisonment imposed for non-payment of a fine for violation of a city ordinance is not within Kan. Comp. Laws (1881), c. 31, §§ 179, 182, punishing any person confined in a place of confinement for any term less than life who shall break such prison or custody. State *v.* Chapman, 33 Kan. 134, 5 Pac. 768.

29. State *v.* Nauerth, (Kan. Sup. 1901) 64 Pac. 69; State *v.* Murray, 15 Me. 100.

30. Com. *v.* Ramsey, 1 Brewst. (Pa.) 422; Reg. *v.* Waters, 12 Cox C. C. 390.

31. *Ex p.* Ah Ban, 10 Nev. 264; Com. *v.* Miller, 2 Ashm. (Pa.) 61; 1 Hale P. C. 611.

32. State *v.* Lewis, 19 Kan. 260, 27 Am. Rep. 113.

The opposite view in case of escapes of prisoners arrested for felony who were subsequently acquitted on the original charge was advocated by Lord Hale (1 Hale P. C. 611, 612), and in modern times was thought of sufficient authority to require distinguishing (Reg. *v.* Waters, 12 Cox C. C. 390).

33. Com. *v.* Ramsey, 1 Brewst. (Pa.) 422. But see *contra*, Trammel *v.* State, 111 Ala. 77, 20 So. 631.

34. Thus it has been held no escape where a convict "farmed out" has been placed by his hirer in charge of a third person with whom he remained and worked till the institution of the prosecution (Mills *v.* State, 41 Tex. Cr. 447, 53 S. W. 107, 55 S. W. 338), or went into another state with the knowledge of his hirer to earn money to pay his hirer (Peoples *v.* State, (Tex. Cr. App. 1890) 14 S. W. 352), or left the premises temporarily and without objection by his hirer (Carter *v.* State, 29 Tex. App. 5, 14 S. W. 350). It should be noted, however, that the preceding cases may be rested on lack of real custody and possibly on local statutes. See also the dissenting opinion of Church, J., in Riley *v.* State, 16 Conn. 47, the decision in which seems not really opposed to the foregoing proposition.

35. See 1 Hale P. C. 611, where it is said: "If a prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony." But *compare* State *v.* Davis, 14 Nev. 439, 444, 33 Am. Rep. 563.

Fear of violence from a third person was held no excuse for retaining a pistol against the will of an arresting officer and by use thereof leaving his custody, since it must be

of the jailer, keeper, or other custodian, however, does not operate to negative this intent.[36]

2. AIDING ESCAPE — a. Overt Act. To constitute the offense of aiding escape some active assistance to the prisoner must be rendered,[37] and defendant's act must have been useful for the purpose intended.[38]

b. Intent. Defendant's intent to assist a departure from lawful custody must be proved,[39] even where this offense has been defined by statute without any express provision that such intent is essential.[40] Knowledge of the lawfulness of the custody of the prisoner, or good reason to believe it lawful, has been held essential as a means of showing intent.[41]

c. Attempt by Prisoner. Defendant's offense must be connected with some effort at escape on the part of the prisoner.[42]

d. Lawfulness of Custody.[43] It is not a crime to assist an escape from custody, the authority for which is void in law,[44] and where the statute so requires the assistance must be given to one actually in confinement,[45] or as it is sometimes provided to one who is lawfully detained in the custody of an officer on an accusation for a misdemeanor.[46] A mere informality in process, however, does not

presumed that the officer would have protected him from violence. Hinkle *v.* Com., 66 S. W. 816, 23 Ky. L. Rep. 1988.

36. Riley *v.* State, 16 Conn. 47; State *v.* Doud, 7 Conn. 384; Hobert *v.* Stroud, Cro. Car. 209. But see Provisional Government *v.* Meyer, 9 Hawaii 363, which seems to depend on a local statute.

37. Setting fire to a jail (Luke *v.* State, 49 Ala. 30, 20 Am. Rep. 269), holding or obstructing a posse in hot pursuit (Perry *v.* State, 63 Ga. 402), and delivering a crow-bar (Reg. *v.* Payne, L. R. 1 C. C. 27, 10 Cox C. C. 231, 12 Jur. N. S. 476, 35 L. J. M. C. 170, 14 L. T. Rep. N. S. 416, 14 Wkly. Rep. 661) have been deemed enough.

Delivering a writing informing the prisoner that he had a friend and could be released from confinement was held not enough. Hughes *v.* State, 6 Ark. 131.

38. Hughes *v.* State, 6 Ark. 131; Newberry *v.* State, 15 Ohio Cir. Ct. 208, 7 Ohio Cir. Dec. 622.

39. Hurst *v.* State, 79 Ala. 55; State *v.* Leach, 7 Conn. 452, 18 Am. Dec. 113, where a person confined by virtue of a void warrant who lawfully liberated himself by breaking the prison was held not guilty of a crime or misdemeanor because other persons lawfully confined for atrocious crimes, in the same room with him, in consequence of such prison breach, made their escape. But see People *v.* Rose, 12 Johns. (N. Y.) 339 [*commented* on in Luke *v.* State, 49 Ala. 30, 20 Am. Rep. 269].

40. State *v.* Lawrence, 43 Kan. 125, 23 Pac. 157; Com. *v.* Filburn, 119 Mass. 297; Vaughan *v.* State, 9 Tex. App. 563.

41. Habersham *v.* State, 56 Ga. 61.

42. Robinson *v.* State, 82 Ga. 535, 9 S. E. 528. Thus a pretended escape for the purpose of detecting defendant made by a prisoner acting in concert with those in charge of him was held not suffieient to make defendant's assistance to him a crime. Rex *v.* Martin, R. & R. 146. So, although Ala. Code (1876), § 4130, does not require an overt act by the prisoner, yet it has been held that the offense of aiding escape cannot be committed against the will of the prisoner. Hurst *v.* State, 79 Ala. 55.

Necessity of actual escape.— The statute 16 Geo. II, c. 31, which made it a felony to aid or assist any prisoner "to attempt to make his escape from any gaol, although no escape be actually made," was held not to apply to a case of such aiding when escape ensued. The offense of assisting a felon in making an actual escape was felony before, and therefore did not seem to fall within the view or intention of the legislature when they made this statute. Rex *v.* Tilley, 2 Leach C. C. 759, 770.

43. See *supra*, I, B, 1, a, (II); I, B, 1, b, (II).

44. *California.*— People *v.* Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190.

Florida.— King *v.* State, 42 Fla. 260, 28 So. 206.

Indiana.— Redman *v.* State, 28 Ind. 205.

Kansas.— State *v.* Beebe, 13 Kan. 589, 19 Am. Rep. 93.

New York.— People *v.* Hochstim, 76 N. Y. App. Div. 25, 78 N. Y. Suppl. 638, 986.

England.— Reg. *v.* Allan, C. & M. 295, 5 Jur. 296, 41 E. C. L. 164; Rex *v.* Shaw, R. & R. 392.

45. People *v.* Thompson, 9 Johns. (N. Y.) 70.

A prisoner temporarily out of jail, but in the custody of the sheriff, is confined in the jail within Ohio Rev. St. § 6902, prohibiting articles useful in effecting escape to be furnished to such prisoners. Newberry *v.* State, 15 Ohio Cir. Ct. 208, 7 Ohio Cir. Dec. 622.

A building used as a jail, and in which a prisoner is confined for a violation of law, is within the protection of the statute punishing jail deliveries, although it is not situated in an incorporated town and is not the property of the county. Irvington *v.* State, (Tex. Cr. App. 1904) 78 S. W. 928.

46. Brannon *v.* State, 44 Tex. Cr. 399, 72 S. W. 184.

render the custody unlawful,[47] nor does the fact that the custodian was merely an officer *de facto*.[48] The prisoner's guilt or innocence of the original offense is not material.[49]

II. THE PROSECUTION.

A. Jurisdiction. Jurisdiction over the place where the offense was committed gives authority to prosecute regardless of the jurisdiction by which the prisoner was sentenced to his original confinement.[50]

B. Indictment or Information[51]— **1. In General.** The indictment must charge every necessary ingredient of the offense with reasonable certainty.[52] An indictment following the language of the statute defining the offense is usually sufficient,[53] but it has been held not sufficient where the statute obviously assumed, but did not specify, certain essential elements which should be set forth in the indictment.[54] Where general terms are defined by statute, the use of such general terms is sufficient without adding the details comprised in that definition.[55] The words "feloniously or unlawfully" are not necessary in the absence of those terms from a statute defining the offense.[56]

2. For Escape — a. Essential Averments — (I) *Lawfulness of Custody.* Although it has been held otherwise,[57] an indictment or information for escape should aver facts from which the lawfulness of the custody of the prisoner may

47. Com. *v.* Morihan, 4 Allen (Mass.) 585; Newberry *v.* State, 15 Ohio Cir. Ct. 208, 7 Ohio Cir. Dec. 622.

48. Robinson *v.* State, 82 Ga. 535, 9 S. E. 528; State *v.* Bates, 23 Iowa 96.

49. Habersham *v.* State, 56 Ga. 61; State *v.* Bates, 23 Iowa 96; Holland *v.* State, 60 Miss. 939; State *v.* Daly, 41 Oreg. 515, 70 Pac. 706.

To assist one in escaping when held for having threatened to commit a public offense is as much a violation of the statute prohibiting assistance to one held upon "any criminal charge" as though he stood charged with its actual commission. State *v.* Bates, 23 Iowa 96. But under a New York statute making it an offense for aiding a prisoner detained for a felony to escape, no offense is committed by aiding and assisting a person committed "on suspicion of having been accessory to the breaking of the house of S., with intent to commit a felony," such committal not being a distinct and certain charge of felony. People *v.* Washburn, 10 Johns. 160.

50. Thus a prisoner escaping from a state jail may be indicted therefor in the state court, although in custody under a commitment from United States authorities. Com. *v.* Ramsey, 1 Brewst. (Pa.) 422. See also People *v.* Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190. *Contra*, Trammel *v.* State, 111 Ala. 77, 20 So. 631.

51. Indictment or information generally see Indictments and Informations.

Whether indictment or information.— The provision of N. Y. Const. art. 1, § 6, that "no person shall be held to answer for a capital or other infamous crime . . . unless on presentment or indictment of a grand jury," was held not to affect the remedy by information to enforce punishment already due under sentence. Haggerty *v.* People, 6 Lans. 332, 346, 347. But under 1 Va. Rev. Code 629, prescribing a punishment for convicts escaping from prison, the proceedings must be by indictment not by information. Com. *v.* Ryan, 2 Va. Cas. 467.

52. Smith *v.* State, 81 Ala. 74, 1 So. 83. See also State *v.* Daly, 41 Oreg. 515, 70 Pac. 706.

Duplicity.— It has been held that an indictment setting forth facts enough to charge the offense defined in one statute is not bad for duplicity, since the offense defined in another statute was equally well described. Stewart *v.* State, 111 Ind. 554, 13 N. E. 959. An indictment charging that an employee of the penitentiary "did aid, assist and suffer" an escape, was held to charge only one offense, since the words "aid" and "assist" might be rejected as surplusage. Clemons *v.* State, 4 Lea (Tenn.) 23.

53. *Alabama.*— Hurst *v.* State, 79 Ala. 55; Smith *v.* State, 76 Ala. 69.

Kentucky.— Hinkle *v.* Com., 66 S. W. 816, 23 Ky. L. Rep. 1988.

Michigan.— People *v.* Murray, 57 Mich. 396, 24 N. W. 118.

Missouri.— De Soto *v.* Brown, 44 Mo. App. 148.

Nevada.— State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080.

Texas.— State *v.* Hedrick, 35 Tex. 485; Barthelow *v.* State, 26 Tex. 17*b*.

"Breaking out of" is equivalent to "breaking prison." Randall *v.* State, 53 N. J. L. 488, 22 Atl. 46.

"Breaking from jail" does not necessarily mean a completed escape. State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080.

54. King *v.* State, 42 Fla. 260, 28 So. 206; State *v.* Lawrence, 43 Kan. 125, 23 Pac. 157; Com. *v.* Filburn, 119 Mass. 297; Vaughan *v.* State, 9 Tex. App. 563.

55. Porter *v.* State, 34 Tex. Cr. 364, 30 S. W. 791.

56. Randall *v.* State, 53 N. J. L. 488, 22 Atl. 46.

57. Com. *v.* Ramsey, 1 Brewst. (Pa.) 422.

appear, but general averments that the prisoner was "duly committed" to custody[58] or "unlawfully" escaped[59] have been held sufficient. It has been held unnecessary to allege that the custodian was an officer[60] or received the prisoner in his capacity as jailer;[61] that the prisoner was in custody by virtue of a warrant;[62] the particulars of the crime, arrest, or trial of the prisoner;[63] the jurisdiction of the court which convicted;[64] the term for which he was convicted, or the cause for which a convict was out under guard;[65] that a copy of the judgment had been handed to the warden of the prison;[66] or, in case of convicts "farmed out," that the term of hire had not expired[67] or that he was hired to remain in the county.[68]

(II) *Intent.* Since voluntary and negligent escapes are distinct offenses, an indictment for wilfully and negligently permitting an escape is bad for duplicity,[69] and an indictment charging that defendant "did lawfully, voluntarily, and unjustly permit" the prisoner to escape is insufficient allegation of a voluntary escape;[70] but an indictment charging that the escape was unlawfully and negligently permitted by defendant is a sufficient indictment for a negligent escape.[71] A conviction for negligent escape has been allowed under an indictment for voluntary escape, on the ground that the latter offense included the former, but it was questioned whether the reverse could be permitted.[72] An allegation that the custodian knew the prisoner's guilt has been deemed unnecessary.[73] An information alleging that an escape of a convict "farmed out" was unlawfully and wilfully made is sufficient without adding that it was without the consent of the hirer.[74]

b. Surplusage. It is unnecessary to aver, in an indictment alleging that a constable permitted a prisoner to escape and go at large, that the prisoner did escape and go at large.[75]

3. For Aiding Escape — a. Lawfulness of Custody. Enough must be set forth to show that the prisoner was in lawful custody,[76] but the original indictment need not be set forth;[77] and the particular felony with which the prisoner was charged,[78] and the particular court in which he was convicted[79] have been held immaterial. Where the punishment for aiding an escape depends on the gravity of the offense for which the prisoner was confined, it is necessary to allege the nature of that offense.[80]

58. Com. *v.* Mitchell, 3 Bush (Ky.) 30; State *v.* Baldwin, 80 N. C. 390.

59. Daniel *v.* State, 114 Ga. 533, 40 S. E. 805.

60. Smith *v.* State, 76 Ala. 69.

61. Weaver *v.* Com., 29 Pa. St. 445.

62. State *v.* Sparks, 78 Ind. 166, also holding that it was unnecessary to set out the warrant.

63. State *v.* Johnson, 93 Mo. 317, 6 S. W. 77; State *v.* Hedrick, 35 Tex. 485.

Although the return of the grand jury differed from the form of indictment drawn by the solicitor it was held proper to follow the former in describing the offense for which defendant was in custody. State *v.* McLain, 104 N. C. 894, 10 S. E. 518.

64. Daniel *v.* State, 114 Ga. 533, 40 S. E. 805 (where the jurisdiction was defined by statute); State *v.* Whalen, 98 Mo. 222, 11 S. W. 576. But see Martin *v.* State, 32 Ark. 124, where it was held that enough must be set forth to show the authority of the magistrate to issue warrants of arrest for crime.

65. Harris *v.* Com., 64 S. W. 434, 23 Ky. L. Rep. 775.

66. State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080. *Contra*, State *v.* Hollon, 22 Kan. 580.

67. Carter *v.* State, 29 Tex. App. 5, 14 S. W. 350.

68. Carter *v.* State, 29 Tex. App. 5, 14 S. W. 350.

But under Ala. Acts (1882–1883), p. 166, the requisite formalities of the contract of hire must be sufficiently set forth. Smith *v.* State, 81 Ala. 74, 1 So. 83.

69. State *v.* Dorsett, 21 Tex. 656.

70. Barthelow *v.* State, 26 Tex. 175.

71. State *v.* McLain, 104 N. C. 894, 10 S. E. 518.

72. Kavanaugh *v.* State, 41 Ala. 399; Nall *v.* State, 34 Ala. 262.

73. Weaver *v.* Com., 29 Pa. St. 445.

74. Carter *v.* State, 29 Tex. App. 5, 14 S. W. 350.

75. State *v.* Maberry, 3 Strobh. (S. C.) 144.

76. State *v.* Jones, 78 N. C. 420. *Compare* State *v.* Daly, 41 Oreg. 515, 70 Pac. 706. And see King *v.* State, 42 Fla. 260, 28 So. 206.

77. Gunyon *v.* State, 68 Ind. 79.

78. State *v.* Addcock, 65 Mo. 590.

79. De Soto *v.* Brown, 44 Mo. App. 148.

80. Trammel *v.* State, 111 Ala. 77, 20 So.

b. Description of Means Employed. Under some statutes it has been held that means employed need not be set out,[81] and an indictment for assisting an escape by holding one of the officer's posse sufficiently describes the means without giving the names of the individuals held.[82] On the other hand it has been held that it must be alleged that defendant's acts were useful to assist the prisoner in escape,[83] unless this sufficiently appears from the acts set forth.[84] Such allegation has, however, been dispensed with where it was not obvious that the acts alleged were useful, although proof of it was deemed essential.[85] Where statutes limit the offense to "conveying into jail" allegations that certain articles were conveyed "unto" the jail[86] or were "furnished" the prisoner[87] were held insufficient. Where the statute makes separate offenses of attempting to set a prisoner at liberty and conveying into a jail any tool adapted to aid his escape, an attempt to do the latter was held not indictable under the former section.[88]

c. Attempt of Prisoner. While it should appear that the prisoner made an attempt himself, an allegation that defendant aided an attempt to escape sufficiently implies that there was such attempt.[89]

d. Intent. Defendant's knowledge that the prisoner was in lawful custody should be alleged to show criminal intent,[90] but this is implied from an allegation that he was in the custody of a public officer.[91] Under some statutes, however, this allegation has been held immaterial.[92] An allegation that defendant intentionally assisted a prisoner to escape by drilling a hole is enough without averring that the drilling was done with intent to facilitate an escape.[93]

C. Evidence — 1. Burden of Proof and Presumptions. Negligence of a custodian, it has been held, is implied from the fact of an escape, and defendant has in that case the burden of showing that the escape was not negligent.[94] There is no presumption of guilty knowledge in a prosecution for voluntary escape.[95]

2. Admissibility. Subject to the general rules of evidence governing and relating to competency and relevancy[96] in prosecutions of this character evidence has been held to be admissible which tends to establish or show any of the essential elements of the offense, such as the identity of defendant,[97]

631; Kyle *v.* State, 10 Ala. 236. See also Oleson *v.* State, 20 Wis. 58.

81. Holloway *v.* Reg., 17 Q. B. 317, 2 Den. C. C. 287, 15 Jur. 825, 79 E. C. L. 317, under 4 Geo. IV, c. 64, § 43.

82. Perry *v.* State, 63 Ga. 402.

83. Walker *v.* State, 91 Ala. 32, 10 So. 30; Hurst *v.* State, 79 Ala. 55; Ramsey *v.* State, 43 Ala. 404.

84. This did not sufficiently appear when opening doors and windows in jail (Walker *v.* State, 91 Ala. 32, 10 So. 30) or placing and igniting dynamite in the wall of a jail (Hurst *v.* State, 79 Ala. 55) was alleged.

85. Newberry *v.* State, 15 Ohio Cir. Ct. 208, 7 Ohio Cir. Dec. 622.

86. People *v.* Rathbun, 105 Mich. 699, 63 N. W. 973.

87. Francis *v.* State, 21 Tex. 280.

88. Patrick *v.* People, 132 Ill. 529, 24 N. E. 619.

89. Rex *v.* Tilley, 2 Leach C. C. 759.

An allegation that defendant unlawfully and feloniously assisted the prisoner "in an attempt to escape from jail," etc., was held to sufficiently allege the prisoner's intent to escape. State *v.* Daly, 41 Oreg. 515, 70 Pac. 706, under Hill Annot. Laws, § 1833, prohibiting any person by any means whatever from aiding or assisting any prisoner "in an attempt to escape."

90. King *v.* State, 42 Fla. 260, 28 So. 206; State *v.* Lawrence, 43 Kan. 125, 23 Pac. 157; Com. *v.* Filburn, 119 Mass. 297; Vaughan *v.* State, 9 Tex. App. 563.

91. Newberry *v.* State, 15 Ohio Cir. Ct. 208, 7 Ohio Cir. Dec. 622. *Contra*, State *v.* Lawrence, 43 Kan. 125, 23 Pac. 157.

92. Ala. Code (1876), § 4130, as to aiding escape of a felon creates a new offense substantive and not accessorial, and hence it was held that the indictment need not allege that defendant knew the prisoner was confined on a charge of felony. Wilson *v.* State, 61 Ala. 151. See also Rex *v.* Shaw, R. & R. 392.

93. Marshal *v.* State, 120 Ala. 390, 25 So. 208.

94. Shattuck *v.* State, 51 Miss. 575; State *v.* Hunter, 94 N. C. 829.

95. Barthelow *v.* State, 26 Tex. 175.

96. Competency and relevancy of evidence generally see Criminal Law, 12 Cyc. 70; and, generally, Evidence.

97. The identity of defendant with the person originally committed may be shown by the testimony of the sheriff. State *v.* Whalen, 98 Mo. 222, 11 S. W. 576.

Weight and sufficiency.— The identity of the escaped convict may be proved by circumstantial evidence. State *v.* Murphy, 10 Ark. 74.

his intent,[98] or the lawfulness of the custody.[99] So evidence is admissible to show the means employed in aiding one to escape.[1]

D. Variance. Failure to prove the date[2] or place[3] of escape or that the escape was by force as alleged[4] has been held no variance. Where the punishment depends on the gravity of the original offense, an allegation that the prisoner was confined on a charge of felony was not proved by evidence of a mere theft.[5] The identity of defendant in escape with the person originally committed must be shown.[6]

E. Trial — 1. Time of Trial. One who escapes while serving a term in the state prison may before the expiration of his term be tried for such escape,[7] and an escaped convict on recaption may be held until opportunity is given for a prosecution for the escape.[8]

2. Questions For Court or Jury. On trial for aiding escape the fact of custody and of its legality has been held to be a question for the jury under proper instructions from the court as to the rules of law by which to distinguish illegal custody.[9]

3. Instructions. A charge that certain documents were sufficient proof of lawful custody was held not a charge on the weight of evidence, but a proper explanation of its legal effect.[10] In determining an officer's negligence it was held not error to charge the jury that they might consider the physical strength of the prisoners and the gravity of the crimes with which they were charged and that it was the officer's duty to use bolts and bars in a manner likely to prevent escape.[11] If the indictment alleged the particular manner of aiding an escape it was error to charge that the offense was proved if the jury believed defendant in any manner aided escape.[12] To read to the jury a statute relating only to the

98. Prior tampering with jail bars is admissible for this purpose. Watson *v.* State, 32 Tex. Cr. 80, 22 S. W. 46.

On a trial for aiding an escape, to prove an understanding with the prisoners, it was held competent to prove that the defendant had been previously confined with them. Watson *v.* State, 32 Tex. Cr. 80, 22 S. W. 46.

Weight and sufficiency.— Proof of the use of a saw on cell fastenings in a manner indicating a purpose to open it has been held enough to convict one of aiding an escape (Simmons *v.* State, 88 Ga. 169, 14 S. E. 122); but where it only appeared that the prisoner asked defendant for his knife and defendant threw it into the cell, it was held not enough to prove intent (Poncio *v.* State, 28 Tex. App. 104, 12 S. W. 413).

99. See cases cited *infra*, this note.

Official records are proper evidence that the prisoner's commitment was lawful (Murray *v.* State, 25 Fla. 526, 6 So. 498; State *v.* Whalen, 98 Mo. 222, 11 S. W. 576), without producing the original documents (Sandford *v.* State, 11 Ark. 328); and the entire record has been held not to be requisite (Hudgens *v.* Com., 2 Duv. (Ky.) 239).

An original document is admissible, although there be an official record of it. Smith *v.* State, 76 Ala. 69.

A commitment not stating any offense, although written on the back of a warrant of arrest charging a felony, but not referring to it, was held not evidence of a commitment for felony. U. S. *v.* Brown, 24 Fed. Cas. No. 14,659, 4 Cranch C. C. 333.

Weight and sufficiency.— On an indictment against a constable for voluntary escape it is not necessary to produce the record of his appointment, although the officer must when he sets up his official capacity. State *v.* Manley, 1 Overt. (Tenn.) 428.

1. Testimony of a pharmacist as to the contents of bottles sold by him when connected with the escape by other evidence has been held admissible to show the means employed in aiding escape. Watson *v.* State, 32 Tex. Cr. 80, 22 S. W. 46.

2. Stevens *v.* Com., 4 Metc. (Mass.) 360.

3. Jenks *v.* State, 63 Ark. 312, 39 S. W. 361.

4. State *v.* Whalen, 98 Mo. 222, 11 S. W. 576.

5. Peeler *v.* State, 3 Tex. App. 533.

Evidence that the prisoner was held for manslaughter supported an indictment which said murder, since manslaughter is included in a charge of murder. Com. *v.* Eversole, 98 Ky. 638, 33 S. W. 1107, 17 Ky. L. Rep. 1166.

6. State *v.* Murphy, 10 Ark. 74; State *v.* Whalen, 98 Mo. 222, 11 S. W. 576.

7. Hays *v.* Stewart, 7 Ida. 193, 61 Pac. 591, under Ida. Rev. St. § 6452.

8. *Ex p.* Clifford, 29 Ind. 106, under 2 Gavin & H. St. Ind. §§ 55, 56.

9. Habersham *v.* State, 56 Ga. 61. *Compare* People *v.* Hochstim, 76 N. Y. App. Div. 25, 78 N. Y. Suppl. 638 (where the court erroneously refused to direct an acquittal); State *v.* Blackley, 131 N. C. 726, 42 S. E. 569 (where the court erroneously directed a verdict of guilty).

10. Broxton *v.* State, 9 Tex. App. 97.

11. Garver *v.* Territory, 5 Okla. 342, 49 Pac. 470.

12. White *v.* State, 13 Tex. 133.

offense of aiding prisoners to escape from an officer, when defendant was charged with the offense of carrying into jail articles useful to aid the escape of prisoners therefrom, was held error.[13]

4. VERDICT. On an indictment for feloniously aiding escape a verdict of negligently permitting escape was held an acquittal.[14]

F. Punishment — 1. IN GENERAL. Where offenses of this character have been defined or modified by statute, statutory punishments are usually provided; at common law the punishment depends upon whether the offense is a felony or a misdemeanor.[15] Where the prisoners aided to escape were confined for offenses of different degrees and a heavier penalty was provided for aiding the escape of a prisoner charged with the greater offense, on conviction defendant was liable to the greater penalty and to that alone.[16]

2. TERM.[17] Where the prison was not broken and no actual violence done the court did not inflict punishment exceeding that from which the offender had escaped.[18]

3. PLACE OF CONFINEMENT. As an offense at common law in Massachusetts no prison breach could be punished by a sentence to hard labor in the state prison.[19] Imprisonment in the jail from which defendant escaped was deemed not requisite.[20]

13. Mason *v.* State, 7 Tex. App. 623.

14. Westbrook *v.* State, 52 Miss. 777.

15. The early common law made all escapes by departure from custody felonies, but this was modified by 1 Edw. II, making it a felony or misdemeanor according to the grade of offense for which the prisoner was confined. 1 Hale P. C. 607. See People *v.* Johnson, 46 Hun (N. Y.) 667; People *v.* Duell, 3 Johns. (N. Y.) 449; Rex *v.* Haswell, R. & R. 340.

Negligent escape was always a misdemeanor. 1 Hale P. C. 591, 600.

Voluntary escape was a felony or misdemeanor according to the grade of offense for which the prisoner was confined. Weaver *v.* Com., 29 Pa. St. 445; 1 Hale P. C. 591, 600.

Prison breach was within the benefit of clergy. Com. *v.* Miller, 2 Ashm. (Pa.) 61.

16. Oleson *v.* State, 20 Wis. 58, opinion by Downer, J.

17. **A sentence of five months' imprisonment at hard labor** in the county jail and to pay a fine of one hundred and fifty dollars and costs of prosecution where the prisoner was convicted of permitting the escape of three prisoners charged with arson, counterfeiting, and larceny was held not unauthorized. Weaver *v.* Com., 29 Pa. St. 445.

18. State *v.* Doud, 7 Conn. 384.

Under Mass. Rev. St. c. 143, § 49, a prisoner, who was sentenced to the house of correction for successive terms of imprisonment on several convictions and escaped before the expiration of the sentence on the first conviction, was sentenced to suffer in the state prison the unexpired terms to which he was sentenced on all the previous convictions. Stevens *v.* Com., 4 Metc. (Mass.) 360.

19. Com. *v.* Farrell, 5 Allen (Mass.) 130.

20. State *v.* Strauss, 50 N. J. L. 345, 13 Atl. 173.

ESCHEAT

By James A. Gwyn *

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CROSS-REFERENCES

For Matters Relating to:
Confiscation of Property, see WAR.
Disability to Inherit or Take Property:
Alien, see ALIENS.
Bastard, see BASTARDS.
Forfeiture of Property, see FORFEITURES.
Grant in Aid of University, see COLLEGES AND UNIVERSITIES.

I. DEFINITION AND NATURE.

Escheat is an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.[1] Under the feudal system escheat was strictly an incident of tenure and imported an extension of tenure.[2] In this country escheat in the feudal sense existed in a few of the early colonies, but has not prevailed since the revolution,[3] and is now very generally regulated by statute.[4] The term has come to signify merely a falling of a decedent's estate into the general property of the state upon his death intestate and without lawful heirs,[5] and is applied indifferently to all rights of property of whatever nature.[6]

II. GROUNDS OF ESCHEAT.

Since the common-law disabilities of aliens[7] and bastards[8] have been greatly relaxed and modified by statute, and the English doctrine of corruption of blood

1. 2 Blackstone Comm. 244 [*quoted* in Marshall *v.* Lovelass, 1 N. C. 325, 359].
Escheat is distinguished from forfeiture in that the former was always to the lord of the fee as a consequence of the feudal connection, while the latter was always to the crown and inflicted upon a principle of public policy. 4 Kent. Comm. 426; Wright Ten. 117, 118.
Escheat is also distinguished from a reversion in that land escheated to the lord *propter defectum tenentis*, when a tenant in fee simple died without heirs; while on the other hand, on the death of the tenant for life, or the death without issue of a tenant in tail, the land reverted to the donor who had created that tenant's estate. 2 Pollock & M. Hist. Eng. L. 22, 23.
The property itself which reverts to the lord is termed an escheat. Bouvier L. Dict.
2. Burgess *v.* Wheate, 1 Eden 177, 1 W. Bl. 123; 2 Blackstone Comm. 72, 244; 4 Kent Comm. 424; Wright Ten. 115–117.
3. 3 Washburn Real Prop. (6th ed.) 61. See also Matthews *v.* Ward, 10 Gill & J. (Md.) 443; Carvill *v.* Griffith, 1 Harr. & M. (Md.) 297.
4. See the statutes of the different states and the following cases:
Illinois.— Meadowcroft *v.* Winnebago County, 181 Ill. 504, 54 N. E. 949; Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519.
Indiana.— State *v.* Meyer, 63 Ind. 33.
Kentucky.— White *v.* White, 2 Metc. 185; Com. *v.* Blanton, 2 B. Mon. 393.
Louisiana.— Townsend's Succession, 40 La. Ann. 66, 3 So. 488; Mager's Succession, 12 Rob. 584; Layre *v.* Pasco, 5 Rob. 9.
Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.
Nebraska.— State *v.* Reeder, 5 Nebr. 203.
New Jersey.— Den *v.* O'Hanlon, 21 N. J. L. 582; O'Hanlin *v.* Den, 20 N. J. L. 31.
New York.—Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753.
Oregon.— Young *v.* State, 36 Oreg. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548.
Pennsylvania.— Com. *v.* Naile, 88 Pa. St. 429; Crawford *v.* Com., 1 Watts 480.
South Carolina.— *In re* Malone, 21 S. C. 435; McCaw *v.* Galbraith, 7 Rich. 74; Wrightman *v.* Laborde, 1 Speers 525.
Tennessee.— Hinkle *v.* Shadden, 2 Swan 46.
Texas.— Wiederanders *v.* State, 64 Tex. 133.
5. 3 Washburn Real Prop. (6th ed.) 424. See also McCaw *v.* Galbraith, 7 Rich. (S. C.) 74.
6. Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 573; Gilmour *v.* Kay, 3 N. C. 108.
7. See ALIENS, 2 Cyc. 81 *et seq.*
8. See BASTARDS, 5 Cyc. 639 *et seq.*

and forfeiture for crime very generally if not universally abolished,[9] dying intestate without heirs is now practically the only ground of escheat to be considered.[10] There are a few instances of escheat which have arisen in this country under special statutes.[11]

III. PROPERTY SUBJECT TO ESCHEAT.

A. In General. Personal property never escheated in the original and technical sense of the term.[12] But in this country escheat applies to personalty as well as realty,[13] and generally to all rights of property of whatever nature.[14]

B. Equitable Estates. In England it was laid down by a very early case that equitable estates would not escheat,[15] and this decision was followed by the later

9. 4 Kent Comm. 426; 3 Washburn Real Prop. (6th ed.) 62.

Forfeiture for treason and other felonies was abolished in England by 33 & 34 Vict. c. 23, and in this country U. S. Const. art. 3, § 3, provides that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. See, generally, FORFEITURES.

10. 3 Washburn Real Prop. (6th ed.) 61. See also the following cases:

Alabama.— Mobile Cong. Church *v.* Morris, 8 Ala. 182.

Illinois.— Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519.

Kentucky.— White *v.* White, 2 Metc. 185.

Louisiana.— Townsend's Succession, 40 La. Ann. 66, 3 So. 488; Mager's Succession, 12 Rob. 584.

Maryland.—Matthews *v.* Ward, 10 Gill & J. 443.

Massachusetts.— Sewall *v.* Lee, 9 Mass. 363.

Nebraska.— State *v.* Reeder, 5 Nebr. 203.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New Jersey.— Den *v.* O'Hanlon, 21 N. J. L. 582.

New York.— Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753; Bradley *v.* Dwight, 62 How. Pr. 300.

Pennsylvania.— *In re* Bouquet, 206 Pa. St. 534, 56 Atl. 60; Com. *v.* Naile, 88 Pa. St. 429.

South Carolina.— McCaw *v.* Galbraith, 7 Rich. 74; Scott *v.* Cohen, 2 Nott & M. 293.

Tennessee.— Hinkle *v.* Shadden, 2 Swan 46.

Texas.—Wiederanders *v.* State, 64 Tex. 133.

Virginia.— Sands *v.* Lynham, 27 Gratt. 291, 21 Am. Rep. 348.

Actual seizin on the part of the decedent at the time of his death is in Pennsylvania essential to an escheat. *In re* Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645.

Where an attempted devise is ineffectual to pass title, upon the death of the devisee without heirs the property escheats to the state. McCaughal *v.* Ryan, 27 Barb. (N. Y.) 376.

If the immediate heirs are not able to succeed to the estate, as in the case of aliens at common law, yet if there be any persons legally qualified to do so the estate will pass to them and not escheat. Mager's Succession, 12 Rob. (La.) 584; Layre *v.* Pasco, 5 Rob. (La.) 9; Jackson *v.* Jackson, 7 Johns. (N. Y.) 214; Scott *v.* Cohen, 2 Nott & M. (S. C.) 293; Orr *v.* Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613.

Forfeiture of corporate franchise not a ground for escheat of corporate property see CORPORATIONS, 10 Cyc. 1088.

Dissolution of corporation no ground for escheat of personal property see CORPORATIONS, 10 Cyc. 1327.

11. **Land held by a corporation or association for religious or charitable purposes in a territory,** and exceeding fifty thousand dollars in value, shall, under the act of congress of July 1, 1862, be forfeited and escheated to the United States (Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 481 [*affirming* 5 Utah 361, 15 Pac. 473]; U. S. *v.* Church Farm, 9 Utah 289, 34 Pac. 60; U. S. *v.* Church Coal Lands, 9 Utah 288, 34 Pac. 60); but the act further provides that the existing vested rights in real estate shall not be impaired (U. S. *v.* Tithing Yard, 9 Utah 273, 34 Pac. 55).

On an abandonment of the country by the grantee of lands under the colonization laws the lands immediately reverted to the government. Horton *v.* Brown, 2 Tex. 78; Holliman *v.* Peebles, 1 Tex. 673.

The Pennsylvania statute of April 26, 1855, providing that property thereafter acquired and held by persons, corporations, or associations, in violation of the provisions of the act, should escheat to the state, was repealed as to the penalty by the act of April 8, 1881. Com. *v.* New York, etc., R. Co., 132 Pa. St. 591, 19 Atl. 291, 7 L. R. A. 634 [*overruling* Com. *v.* New York, etc., R. Co., 114 Pa. St. 340, 7 Atl. 756].

12. Com. *v.* Blanton, 2 B. Mon. (Ky.) 393; Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753.

13. Com. *v.* Blanton, 2 B. Mon. (Ky.) 393; Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753; McCaw *v.* Galbraith, 7 Rich. (S. C.) 74; Howard *v.* Schmidt, Rich. Eq. Cas. (S. C.) 452.

14. Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753; Gilmour *v.* Kay, 3 N. C. 108.

Partnership property, when all of the partners die intestate and without heirs, will escheat. Com. *v.* North American Land Co., 57 Pa. St. 102.

15. Burgess *v.* Wheate, 1 Eden 177, 1 W. Bl. 123, holding that upon the death of a *cestui que trust* intestate and without

cases as to purely equitable titles,[16] although it was held that the escheat of a legal title would carry with it equitable rights and interests incident thereto.[17] Equitable estates in England have now been made subject to escheat by statute.[18] In this country the English doctrine was never recognized, the cases holding uniformly that equitable as well as legal estates would escheat.[19]

C. Reversions and Remainders. A remainder or reversion will escheat, as well as an estate in possession.[20] A vested remainder will escheat subject to the interest of the life-tenant before the termination of the life-estate,[21] but a contingent remainder will not.[22]

IV. TO WHOM PROPERTY ESCHEATS.

A. In England. Escheat in England as an incident of feudal tenure was always to the lord of the fee,[23] which would be to the king only where the tenant was a tenant *in capite*.[24] In the absence of a mesne lord the escheat is to the crown.[25]

B. In United States. In this country there are no feudal tenures, and property escheats directly to the state as the sovereign power within whose jurisdic-

heirs the estate would not escheat, but that the trustee would hold absolutely.

16. Beale *v.* Symonds, 16 Beav. 406, 22 L. J. Ch. 708, 1 Wkly. Rep. 137; Gallard *v.* Hawkins, 27 Ch. D. 298, 53 L. J. Ch. 834, 51 L. T. Rep. N. S. 689, 33 Wkly. Rep. 31; Prescott *v.* Tyler, 1 Jur. 470.

An equity of redemption will not escheat. Beale *v.* Symonds, 16 Beav. 406, 22 L. J. Ch. 708, 1 Wkly. Rep. 137.

The right to escheat depends upon the want of a tenant, and as long as there is a tenant or a person having a right to be admitted as tenant the right of escheat does not arise. Gallard *v.* Hawkins, 27 Ch. D. 298, 53 L. J. Ch. 834, 51 L. T. Rep. N. S. 689, 33 Wkly. Rep. 31; Burgess *v.* Wheate, 1 Eden 177, 1 W. Bl. 123.

17. Downe *v.* Morris, 3 Hare 394, 8 Jur. 486, 13 L. J. Ch. 337, 25 Eng. Ch. 394.

18. Intestate's Estate Act (1884), 47 & 48 Vict. c. 71; *In re* Wood, [1896] 2 Ch. 596, 65 L. J. Ch. 814, 75 L. T. Rep. N. S. 28, 44 Wkly. Rep. 685, holding that the undisposed-of residue of the proceeds of a sale of freeholds devised to executors on trust for sale is within the provisions of the act.

19. Matthews *v.* Ward, 10 Gill & J. (Md.) 443; Gilmour *v.* Kay, 3 N. C. 108; Hubbard *v.* Goodwin, 3 Leigh (Va.) 492. See also Day *v.* Murdoch, 1 Munf. (Va.) 460.

The English doctrine is founded on the feudal idea of tenure, under which system the trustee, being in the legal seizin of the land, was a tenant capable of performing feudal services. Matthews *v.* Ward, 10 Gill & J. (Md.) 443; Hubbard *v.* Goodwin, 3 Leigh (Va.) 492.

The equitable interest of a widow under an antenuptial contract will escheat. Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753.

Land held in trust for a charitable or public corporation, and acquired by grant from the general government, escheats upon the dissolution of such corporation to the United States. Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 481 [*affirming* 5 Utah 361, 15 Pac. 473].

In Pennsylvania the statute expressly provides that equitable estates shall escheat (*In re* Linton, 198 Pa. St. 438, 48 Atl. 298; Com. *v.* Naile, 88 Pa. St. 429), but the procedure for enforcing escheats does not provide for settling trust estates and ascertaining the beneficial interest in the case of an active trust, which must be done by the proper court before escheat proceedings can be maintained (West *v.* Pennsylvania L. Ins. Co., 64 Pa. St. 195; West's Appeal, 64 Pa. St. 186).

Where, to evade the law prohibiting an alien from holding land, an alien purchases real estate in the name of a trustee on an express or secret trust to permit the alien to take and receive the rents and profits, the interest in such trust belongs to the state. Leggett *v.* Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413; Hubbard *v.* Goodwin, 3 Leigh (Va.) 492.

20. People *v.* Conklin, 2 Hill (N. Y.) 67; Com. *v.* Naile, 88 Pa. St. 429. See also Evans *v.* Brown, 5 Beav. 114, 6 Jur. 380, 11 L. J. Ch. 349.

21. People *v.* Conklin, 2 Hill (N. Y.) 67; 3 Washburn Real Prop. (6th ed.) 64. But see Com. *v.* Naile, 88 Pa. St. 429.

22. McGillis *v.* McGillis, 154 N. Y. 532, 49 N. E. 145.

23. Atty.-Gen. *v.* Mercer, 8 App. Cas. 767, 52 L. J. P. C. 84; Burgess *v.* Wheate, 1 Eden 177, 1 W. Bl. 123; 4 Kent Comm. 424, 426.

24. Doe *v.* Redfern, 12 East 96; 3 Blackstone Comm. 258.

25. Atty.-Gen. *v.* Mercer, 8 App. Cas. 767, 52 L. J. P. C. 84.

Personal property found in England belonging to a person dying intestate and without heirs and domiciled in another country goes to the crown and not to the government of his domicile. The crown takes the property as *bona vacantia* and not by succession, and so the maxim *mobilia sequuntur personam* does not apply. *In re* Barnett, [1902] 1 Ch. 847, 71 L. J. Ch. 408, 86 L. T. Rep. N. S. 346, 50 Wkly. Rep. 681.

tion it is situated,[26] unless it has by statute directed otherwise.[27] In some states the statutes provide that the escheat shall be to the county[28] or town[29] where the property is situated. Land held by grant from the general government in a territory escheats to the United States[30] unless prior to the escheat the territory has been admitted as a state.[31]

C. In Canada. In Canada property escheats to the province in which it is situated and not to the Dominion.[32]

V. RELEASE AND WAIVER.

The state may through its legislature release its claim to property to which it would be entitled by escheat,[33] or during the pendency of escheat proceedings may order an abatement of the proceedings and release all interest in the property to the parties claiming adversely.[34] Under the feudal system of tenures the right to enforce an escheat might be waived by the lord of the fee.[35]

VI. PROCEEDINGS TO ENFORCE ESCHEAT.

A. Necessity For Proceeding. In most jurisdictions it is held that property, the title to which fails for want of heirs or devisees, escheats immediately upon the death of the owner, and that no inquest or office or other judicial proceeding is necessary.[36] In other jurisdictions a proceeding is either required by

26. State *v.* Reeder, 5 Nebr. 203; Hinkle *v.* Shadden, 2 Swan (Tenn.) 46; Hughes *v.* State, 41 Tex. 10; Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691.

27. Haigh *v.* Haigh, 9 R. I. 26.

28. Meadowcroft *v.* Winnebago County, 181 Ill. 504, 54 N. E. 949; Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Pacific Bank *v.* Hannah, 90 Fed. 72, 32 C. C. A. 522.

29. Haigh *v.* Haigh, 9 R. I. 26.

30. Williams *v.* Wilson, Mart. & Y. (Tenn.) 248; Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 481 [*affirming* 5 Utah 361, 15 Pac. 473].

31. Etheridge *v.* Doe, 18 Ala. 565.

32. Atty.-Gen. *v.* Mercer, 8 App. Cas. 767, 52 L. J. P. C. 84; Atty.-Gen. *v.* O'Reilly, 6 Ont. App. 576.

33. Mobile Cong. Church *v.* Morris, 8 Ala. 182; Gresham *v.* Rickenbacher, 28 Ga. 227; Englishbe *v.* Helmuth, 3 N. Y. 294; McCaughal *v.* Ryan, 27 Barb. (N. Y.) 376; Richardson *v.* Amsdon, 85 N. Y. Suppl. 342; Brick *v.* Coster, 4 Watts & S. (Pa.) 494.

The right to an equitable as well as a legal estate may be released. Robertson *v.* Miller, 20 Fed. Cas. No. 11,926, 1 Brock. 466.

An act removing the disability of a particular person to prevent an escheat does not waive the rights of the state as against any other claimants. Mobile Cong. Church *v.* Morris, 8 Ala. 182.

A general statute making the proceeds of escheated property a part of the public school fund will not prevent the legislature from relinquishing its right in favor of another before there has been any inquest of office and sale of such property. Gresham *v.* Rickenbacher, 28 Ga. 227.

Notice of an application to the legislature to release escheated lands should be given, under N. Y. Laws (1829), c. 259, to *bona fide* purchasers of the lands under a mortgage foreclosure, or they will not be bound by the release. Bradley *v.* Dwight, 62 How. Pr. (N. Y.) 300.

The Pennsylvania statute, providing for the refunding of escheated moneys, applies only to bank deposits and only authorizes them to be refunded to the owner himself. Bull's Estate, 11 Pa. Co. Ct. 441.

34. State *v.* Tilghman, 14 Iowa 474.

35. Kelly *v.* Greenfield, 2 Harr. & M. (Md.) 121, holding that the right would be waived by the acceptance of rents.

36. *Idaho.*— State *v.* Stevenson, 6 Ida. 367, 55 Pac. 886.

Kentucky.— White *v.* White, 2 Metc. 185; Fry *v.* Smith, 2 Dana 38; Stevenson *v.* Dunlap, 7 T. B. Mon. 134.

Maryland.— Guyer *v.* Smith, 22 Md. 239, 84 Am. Dec. 650.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

Nebraska.— State *v.* Reeder, 5 Nebr. 203.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New Jersey.— Den *v.* O'Hanlon, 21 N. J. L. 582; O'Hanlin *v.* Den, 20 N. J. L. '31.

Tennessee.— Hinkle *v.* Shadden, 2 Swan 46.

See 19 Cent. Dig. tit. "Escheat," § 8.

In Kentucky the statute expressly provides that no inquest or other proceeding shall be necessary. White *v.* White, 2 Metc. 185.

If the possession be vacant at the time of the decedent's death no inquest is necessary. Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348; Com. *v.* Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226.

If the decedent be an alien at common law no inquest is necessary.

Indiana.— Reed *v.* State, 74 Ind. 252.

Massachusetts.— Wilbur *v.* Tobey, 16 Pick. 177; Slater *v.* Nason, 15 Pick. 345.

New York.— Larreau *v.* Davignon, 1 Sheld.

statute[37] or is held to be necessary because of a presumption that the decedent left heirs.[38] In all cases, however, where the escheat is claimed on the ground of a defeasible title in the adverse claimant, there must be a judicial proceeding,[39] or other notorious act equivalent thereto;[40] and the same seems to be true where there is any adverse claimant in possession,[41] although the proceeding may not be essential to the vesting of the state's title.[42]

B. Nature and Form of Proceeding. The proceeding to enforce an escheat is in the nature of an inquest of office.[43] The procedure is now generally regulated by statute,[44] and when so regulated the right must be established in the manner provided,[45] and all the requirements of the statute substantially complied with.[46] But after the state has established her right to the property she may pursue any remedy to obtain possession of it, whether it be a remedy existing at common law or given by statute.[47]

C. Jurisdiction. The question of jurisdiction is usually regulated by the statutes providing for the enforcement of escheats.[48]

128; Richardson *v.* Amsdon, 85 N. Y. Suppl. 342; Mooers *v.* White, 6 Johns. Ch. 360.

Pennsylvania.— Rubeck *v.* Gardner, 7 Watts 455.

Rhode Island.— Haigh *v.* Haigh, 9 R. I. 26.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130.

See 19 Cent. Dig. tit. "Escheat," § 8.

On an abandonment of lands under the colonization laws the lands immediately reverted to the government without inquest of office. Horton *v.* Brown, 2 Tex. 78; Holliman *v.* Peebles, 1 Tex. 673.

Where the owner is a tenant in capite no inquest of office is necessary. Atty.-Gen. *v.* O'Reilly, 6 Ont. App. 576.

37. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Crawford *v.* Com., 1 Watts (Pa.) 480; *In re* Malone, 21 S. C. 435.

38. Wilbur *v.* Tobey, 16 Pick. (Mass.) 177; Jackson *v.* Adams, 7 Wend. (N. Y.) 367.

The presumption does not apply to aliens at common law. Slater *v.* Nason, 15 Pick. (Mass.) 345; Ettenheimer *v.* Hefferman, 66 Barb. (N. Y.) 374; Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360.

39. *Alabama.*— Etheridge *v.* Doe, 18 Ala. 565; Smith *v.* Zaner, 4 Ala. 99.

California.— People *v.* Folsom, 5 Cal. 373.

Indiana.— Reid *v.* State, 74 Ind. 252.

Maryland.— McCreery *v.* Allender, 4 Harr. & M. 409.

Massachusetts.— Sheaffe *v.* O'Neil, 1 Mass. 256.

New York.— Maynard *v.* Maynard, 36 Hun 227.

North Carolina.— Marshall *v.* Lovelass, 1 N. C. 325.

Tennessee.— Williams *v.* Wilson, Mart. & Y. 248.

United States.— Governeur *v.* Robertson, 11 Wheat. 332, 6 L. ed. 488; Fairfax *v.* Hunter, 7 Cranch 603, 3 L. ed. 453.

See 19 Cent. Dig. tit. "Escheat," § 8.

40. Guyer *v.* Smith, 22 Md. 239, 85 Am. Dec. 650, holding that in Maryland the issuance of an escheat patent by the commissioner of the land-office has the same effect for this purpose as an inquest of office.

41. See Montgomery *v.* Dorion, 7 N. H. 475; Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348; Com. *v.* Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226.

42. See *infra*, VII, D, 1.

43. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; 3 Blackstone Comm. 258.

44. See the statutes of the different states and the following cases:

California.— People *v.* Hibernia Sav., etc., Soc., 72 Cal. 21, 13 Pac. 48.

Illinois.— Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519.

Indiana.— State *v.* Meyer, 63 Ind. 33.

Massachusetts.— Wilbur *v.* Tobey, 16 Pick. 177.

New Jersey.— O'Hanlin *v.* Den, 20 N. J. L. 31.

New York.— Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753.

Oregon.— State *v.* O'Day, 41 Oreg. 495, 69 Pac. 542.

Pennsylvania.— Com. *v.* Compton, 137 Pa. St. 138, 20 Atl. 417; Crawford *v.* Com., 1 Watts 480.

South Carolina.— *In re* Malone, 21 S. C. 435; McCaw *v.* Galbraith, 7 Rich. 74; Wightman *v.* Laborde, 1 Speers 525.

Texas.— Wiederanders *v.* State, 64 Tex. 133; Hughes *v.* State, 41 Tex. 10.

45. Crawford *v.* Com., 1 Watts (Pa.) 480; Muir *v.* Thomson, 28 S. C. 499, 6 S. E. 309; Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691.

Under a constitutional provision that the legislature shall provide a method for ascertaining and enforcing escheats no escheat can be enforced until such procedure is provided. Hancock *v.* McKinney, 7 Tex. 384; Jones *v.* McMasters, 20 How. (U. S.) 8, 15 L. ed. 805.

46. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Wiederanders *v.* State, 64 Tex. 133; Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691.

47. Crawford *v.* Com., 1 Watts (Pa.) 480.

48. See the statutes of the different states and Brooks *v.* McEachern, 73 Ga. 54; State *v.* O'Day, 41 Oreg. 495, 69 Pac. 542; Com. *v.* Compton, 137 Pa. St. 138, 20 Atl. 417; Murray's Estate, 13 Wkly. Notes Cas. (Pa.) 552; Hughes *v.* State, 41 Tex. 10.

D. Time to Institute Proceedings and Limitations. Where the statutes allow a certain period for persons claiming as heirs to appear and assert their title, the state cannot maintain proceedings and enforce an escheat until the expiration of this period.[49] Escheat proceedings cannot be maintained pending an administration of the estate;[50] nor can proceedings to escheat a fund in the hands of a trustee be maintained until the trustee's account has been settled and the condition of the fund ascertained.[51] As the assertion of the state's right to an escheat is an act of sovereignty, laches or the ordinary statutes of limitations will not bar a recovery;[52] but there are statutes relating expressly to escheat proceedings.[53]

E. Parties — 1. Who May Institute Proceedings. Escheat proceedings must be instituted by and in the name of the state,[54] acting through its attorney-general,[55] or an escheator,[56] or other public officer authorized to conduct such proceedings.[57]

2. Who May Contest Proceedings. Any person in possession of the property in question,[58] or claiming an interest therein adverse to that of the state,[59] may appear and contest the proceedings.

F. Citation and Appearance. In some jurisdictions the statutes require that in escheat proceedings a notice or citation shall issue to all persons interested in the estate to appear and answer;[60] and when so required the statutes must

49. People *v.* Roach, 76 Cal. 294, 18 Pac. 407; State *v.* Smith, 70 Cal. 153, 12 Pac. 121.

Constitutionality of statutes limiting the time within which claimants to escheated property may assert their rights see Constitutional Law, 8 Cyc. 905.

50. State *v.* Black, 21 Tex. Civ. App. 242, 51 S. W. 555.

Where an administrator is appointed before inquisition the state must assert its title as an heir or next of kin by citing the administrator to file an account in the orphans' court. Com. *v.* Weart, 6 Wkly. Notes Cas. (Pa.) 237. See also Com. *v.* Palmer, 6 Wkly. Notes Cas. (Pa.) 486.

51. Naile *v.* Olmsted, 4 Wkly. Notes Cas. (Pa.) 558.

52. Ellis *v.* State, 3 Tex. Civ. App. 170, 21 S. W. 66, 24 S. W. 660. See also Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430; Holmes *v.* Pattison, 25 Pa. St. 484.

53. *In re* Bousquet, 206 Pa. St. 534, 56 Atl. 60; Com. *v.* Naile, 88 Pa. St. 429.

In proceedings to escheat an estate in remainder the statute begins to run only from the expiration of the life-estate. Com. *v.* Naile, 88 Pa. St. 429.

54. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; State *v.* Meyer, 63 Ind. 33; Puckett *v.* State, 1 Sneed (Tenn.) 355. See also Croner *v.* Cowdrey, 139 N. Y. 471, 34 N. E. 1061, 36 Am. St. Rep. 716; Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753.

Where escheated property is appropriated by statute to the use of schools the action must still be brought in the name of the state. Puckett *v.* State, 1 Sneed (Tenn.) 355.

Where the state in escheat proceedings has acknowledged a certain person as heir and released its right to him, he cannot proceed with the escheat in the name of the state for his own benefit against other adverse claimants. State *v.* Engle, 21 N. J. L. 347.

55. See Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; State *v.* Meyer, 63 Ind. 33; Croner *v.* Cowdrey, 139 N. Y. 471, 34 N. E. 1061, 36 Am. St. Rep. 716.

The attorney-general may employ counsel to act in his place and the counsel so employed will have the same power and authority as the attorney-general. People *v.* Hibernia Sav., etc., Soc., 72 Cal. 21, 13 Pac. 48.

A state treasurer represented by a member of the bar has no power to act for the state in such a proceeding. D'Aquin's Succession, 9 La. Ann. 400.

56. See Gresham *v.* Rickenbacher, 28 Ga. 227; Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348.

A society, having a right by statute to appoint its own escheator to recover escheated property to which it is entitled does not forfeit or waive its right to the property by proceeding through the state escheator. Nettles *v.* Cummings, 9 Rich. Eq. (S. C.) 440.

A reasonable compensation may be allowed the escheator for his services, although he may not succeed in recovering the property. Gresham *v.* Rickenbacher, 28 Ga. 227. See also Bryant's Estate, 4 Pa. Dist. 192, 16 Pa. Co. Ct. 321.

57. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519.

58. Com. *v.* Compton, 137 Pa. St. 138, 20 Atl. 417.

59. Wiederanders *v.* State, 64 Tex. 133; Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691.

A motion to quash an inquisition of escheat cannot be made by an *amicus curiæ* unless he either has an interest himself or represents someone who has. Dunlop *v.* Com., 2 Call (Va.) 284.

60. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Eason *v.* Witcofskey, 29 S. C. 239, 7 S. E. 291; *In re* Malone, 21 S. C. 435;

be substantially complied with.[61] The judgment is not binding as to persons interested who are not brought into court by any sort of publication or other service of citation,[62] but the validity of the proceedings is not affected as to any person appearing voluntarily without formal notice.[63]

G. Pleading — 1. Information. The information must allege all the facts which are essential to the acquisition of the state's title,[64] and negative the existence of any conditions under which the title might be in another.[65] In some cases the statutes set out specifically what allegations the information must contain and these requirements must be complied with.[66]

2. Information as Counter-Claim. The state may come in as a party defendant in an action between adverse claimants for the property in question and file the information as a counter-claim.[67]

3. Traverse — a. In General. The traverse may be general or special and may extend to all or be limited to one or more of the facts necessary to support the inquisition.[68] The effect of a traverse is to bar the claim of the state until the issue is determined by trial.[69]

b. General Denial. Under the code system of pleading the traverser may give in evidence under the general denial any defense either legal or equitable.[70]

H. Evidence — 1. Presumptions and Burden of Proof. The law presumes that a decedent left heirs capable of inheriting,[71] and it is incumbent upon the state to rebut this presumption by proof.[72] While mere absence may create a presumption of death, it will not create a presumption that the decedent died intestate and without heirs, and other circumstances must be affirmatively shown from which such a presumption may be fairly drawn.[73] Where a traverse is filed to an inquest the weight of authority seems to be that the party traversing is considered in the character of a plaintiff and is bound to make out affirmatively a good title in himself,[74] but the authorities are conflicting and it has

Wiederanders *v.* State, 64 Tex. 133; State *v.* Teulon, 41 Tex. 249; Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691; Newman *v.* Crowls, 60 Fed. 220, 8 C. C. A. 577.

A citation must issue before an order can be made for the examination of persons supposed to have property subject to escheat, or an order for the production of their books and papers. People *v.* Hibernia Sav., etc., Soc., 72 Cal. 21, 13 Pac. 48.

The record of the proceeding must show that the notice required by statute was given. State *v.* Teulon, 41 Tex. 249.

61. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Wiederanders *v.* State, 64 Tex. 133.

Notice is essential to the jurisdiction of the court. Wiederanders *v.* State, 64 Tex. 133; Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691.

A misnomer of the deceased owner of the estate in the notice is fatal to the validity of the judgment. Ellis *v.* State, 3 Tex. Civ. App. 170, 21 S. W. 66, 24 S. W. 660.

62. Newman *v.* Crowls, 60 Fed. 220, 8 C. C. A. 577. See also *In re* Malone, 21 S. C. 435.

63. *In re* Malone, 21 S. C. 435, holding that each traverse is a separate case and that any claimant may appear without notice and have the issue between himself and the escheator tried.

64. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; State *v.* Witz, 87 Ind. 190; State *v.* Killian, 51 Mo. 80; Bradley *v.* Dwight, 62 How. Pr. (N. Y.) 300.

65. State *v.* Witz, 87 Ind. 190.

Where aliens are allowed by statute to hold land upon certain conditions the information to escheat lands on the ground of alienage must show affirmatively that these conditions do not exist. State *v.* Killian, 51 Mo. 80.

66. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Hughes *v.* State, 41 Tex. 10.

67. Reid *v.* State, 74 Ind. 252.

68. Com. *v.* Compton, 137 Pa. St. 138, 20 Atl. 417.

69. Murray's Estate, 13 Wkly. Notes Cas. (Pa.) 552.

70. State *v.* Meyer, 63 Ind. 33.

71. Louisville Bank *v.* Public School Trustees, 83 Ky. 219, 5 S. W. 735; Peterkin *v.* Inloes, 4 Md. 175; Hammond *v.* Inloes, 4 Md. 138; State University *v.* Harrison, 90 N. C. 385. See also 14 Cyc. 99 note 43.

72. State University *v.* Harrison, 90 N. C. 385; State *v.* Teulon, 41 Tex. 249.

73. Louisville Bank *v.* Public School Trustees, 83 Ky. 219, 5 S. W. 735.

Proof that the decedent was never heard to speak of having any family or relatives and that the place of his birth is unknown is *prima facie* evidence that he died without heirs. Jackson *v.* Etz, 5 Cow. (N. Y.) 314.

74. Townsend's Succession, 40 La. Ann. 66, 3 So. 488; Com. *v.* Desilver, 2 Ashm. (Pa.) 163; French *v.* Com., 5 Leigh (Va.) 512, 27 Am. Dec. 613; 3 Blackstone Comm. 260.

been expressly held that on a traverse of an inquest of office found on behalf of the people the traverser is to be considered as a defendant.[75]

2. ADMISSIBILITY. Where a question of pedigree is involved hearsay evidence is admissible.[76] Where actual seizin at the death of the decedent is essential to an escheat, evidence that the decedent was insane at the time he executed a deed of bargain and sale is admissible on the part of the state to show that the seizin was not divested.[77]

3. WEIGHT AND SUFFICIENCY. The evidence of the state must establish all the facts essential to the right claimed.[78] So the state must prove the death of the person whose property is claimed or facts from which the law will presume that he is dead,[79] and also that he died without heirs,[80] and without devising the property in question.[81]

I. Trial and Inquest — 1. RIGHT TO OPEN AND CLOSE. The traverser has the right to open and close the argument before the jury.[82]

2. NONSUIT. It is improper to grant a nonsuit in escheat proceedings where a traverse is filed, as there should always be a verdict of a jury finally determining the issue of fact raised.[83]

3. FINDING OF INQUEST. The inquest must find that the decedent died intestate and without heirs or any known kindred,[84] and any other fact which under the statutes of the particular state is essential to an escheat.[85]

VII. EFFECT OF ESCHEAT.

A. In General. A judgment in escheat proceedings is conclusive evidence of the state's title against all persons having either actual or constructive notice of the proceedings.[86] Escheat proceedings based upon the death of the owner of the property are if such person be alive entirely null and void;[87] and where the escheat is on the ground of alienage the judgment will not divest the title of a grantee under a deed of bargain and sale duly executed and recorded before the inquest.[88] If an estate is declared escheat after an order for its distribution has been made the administrator of the distributee has the right to receive and retain

75. People *v.* Cutting, 3 Johns. (N. Y.) 1, holding that the traverser is a defendant and may impeach the right of the state without showing title in himself.

76. *In re* Robb, 37 S. C. 19, 16 S. E. 241, holding, however, that the declarations must have been made by a relative of the person to whom they refer, the declarant be dead, and the declarations made *ante litem motam*. See also People *v.* Fulton F. Ins. Co., 25 Wend. (N. Y.) 205.

77. *In re* Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645.

78. Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519. See also Com. *v.* Hoe, 26 Leg. Int. (Pa.) 124.

Proof that the deceased owner was a foreigner, without showing that he left any one who under the statutes was entitled to succeed to his estate, is insufficient. Catham *v.* State, 2 Head (Tenn.) 553.

79. State University *v.* Harrison, 90 N. C. 385; Hanna *v.* State, 84 Tex. 664, 19 S. W. 1008.

80. Jackson *v.* Etz, 5 Cow. (N. Y.) 314; State University *v.* Harrison, 90 N. C. 385.

Postitive evidence of failure of heirs is not necessary (Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430; People *v.* Fulton F. Ins. Co., 25 Wend. (N. Y.) 205), but the best evidence which can be obtained and the testimony of witnesses who would be most likely to have knowledge of the fact must be adduced (State *v.* Teulon, 41 Tex. 249).

81. Hanna *v.* State, 84 Tex. 664, 19 S. W. 1008; Wiederanders *v.* State, 64 Tex. 133.

82. Com. *v.* Desilver, 2 Ashm. (Pa.) 163; Murray's Estate, 13 Wkly. Notes Cas. (Pa.) 552. See also Com. *v.* Hoe, 26 Leg. Int. (Pa.) 124.

83. *In re* Robb, 37 S. C. 19, 16 S. E. 241.

84. Ramsey's Appeal, 2 Watts (Pa.) 228, 27 Am. Dec. 301.

85. *In re* Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645, holding that in Pennsylvania actual seizin at the time of the decedent's death must be found by the inquest as well as failure of heirs, devisees, or known kindred.

86. Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691.

An inquest on the ground of alienage is not conclusive evidence against any person not a tenant at the time of the inquest or party or privy thereto, and such person may prove that there are lawful heirs, not aliens, competent to take. Stokes *v.* Dawes, 23 Fed. Cas. No. 13,477, 4 Mason 268.

87. Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296.

88. Com. *v.* Selden, 5 Munf. (Va.) 160.

control of the fund, and after the payment of debts to the creditors he will hold the balance for the state.[89]

B. As to Creditors. The state takes escheated property charged with all the valid debts and liabilities of the intestate,[90] and creditors may enforce such claims against the property in the hands of the state,[91] provided they are presented before being barred by the statutes of limitations.[92] The escheat statutes usually expressly provide that the rights of creditors shall not be prejudiced.[93] In the absence of such provisions there is some conflict of authority as to whether the general statutes making the property of decedents assets for the payment of debts will authorize the sale of escheated property for this purpose,[94] or whether it is necessary that there should be a statute referring expressly to escheated property.[95]

C. As to Heirs. The escheat statutes usually protect the rights of heirs by providing a certain period within which persons claiming as such may come in and establish their title to the property;[96] but no person can take advantage of such statutes who was not a legally qualified heir at the time of his ancestor's death.[97]

D. To Transfer Title — 1. When Title Vests. As previously stated the law differs in the different jurisdictions as to the necessity for a judicial proceeding to establish an escheat.[98] If no proceeding is necessary, the title of course vests in the state immediately on the death of the owner.[99] Where an inquest is held to

89. *In re* North American Land Co., 1 Brewst. (Pa.) 533.

90. See *infra*, VII, D, 2.

91. *Alabama.*— Mobile Cong. Church *v.* Morris, 8 Ala. 182.

New York.— Mooers *v.* White, 6 Johns. Ch. 360.

Pennsylvania.—*In re* North American Land Co., 1 Brewst. 533.

Tennessee.— Hinkle *v.* Shadden, 2 Swan 46.

Virginia.— Watson *v.* Lyle, 4 Leigh 236.

See 19 Cent. Dig. tit. "Escheat," § 23.

In England it was formerly the law that the crown took the escheat subject to express charges thereon not fraudulently made but not subject to general debts (Bedford *v.* Coke, 2 Ves. 116, 28 Eng. Reprint 76), but the later statutes making the estates of decedents assets for the payment of debts apply to escheated property (Evans *v.* Brown, 5 Beav. 114, 6 Jur. 380, 11 L. J. Ch. 349).

The lien of a mortgage is not invalidated by an escheat. Farmers' L. & T. Co. *v.* People, 1 Sandf. Ch. (N. Y.) 139.

Where escheated property becomes a part of the public school fund a sale of such property for the payment of the decedent's debts without making the board of school commissioners a party is void. Parchman *v.* Carlton, 1 Coldw. (Tenn.) 381; Hinkle *v.* Shedden, 2 Swan (Tenn.) 46.

An administrator of the deceased cannot enjoin the escheator general from collecting the property of the deceased, and creditors must proceed against the escheator general. Bolls *v.* Duncan, Walk. (Miss.) 161.

92. Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360; Watson *v.* Lyle, 4 Leigh (Va.) 236.

93. Mobile Cong. Church *v.* Morris, 8 Ala. 182; Matter of North American Land Co., 1 Brewst. (Pa.) 533; Watson *v.* Lyle, 4 Leigh (Va.) 236.

94. Evans *v.* Brown, 5 Beav. 114, 6 Jur. 380, 11 L. J. Ch. 349.

95. Den *v.* O'Hanlon, 21 N. J. L. 582; O'Hanlin *v.* Den, 20 N. J. L. 31.

96. *California.*— People *v.* Roach, 76 Cal. 294, 18 Pac. 407; State *v.* Smith, 70 Cal. 153, 12 Pac. 121.

Idaho.— State *v.* Stevenson, 6 Ida. 367, 55 Pac. 886.

Oregon.— Young *v.* State, 36 Oreg. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548; Fenstermacher *v.* State, 19 Oreg. 504, 25 Pac. 142.

South Carolina.— *Ex p.* Williams, 13 Rich. 77.

Texas.— Treasurer *v.* Wygall, 46 Tex. 447.

See 19 Cent. Dig. tit. "Escheat," § 22.

97. White *v.* White, 2 Metc. (Ky.) 185, holding that the naturalization of an alien heir subsequent to the ancestor's death gives him no right to recover the escheated property.

98. See *supra*, VI, A.

99. *Idaho.*— State *v.* Stevenson, 6 Ida. 367, 55 Pac. 886.

Kentucky.— White *v.* White, 2 Metc. 185; Stevenson *v.* Dunlap, 7 T. B. Mon. 134.

Maryland.— Guyer *v.* Smith, 22 Md. 239, 85 Am. Dec. 650.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

Nebraska.— State *v.* Reeder, 5 Nebr. 203.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New Jersey.— Den *v.* O'Hanlon, 21 N. J. L. 582.

Tennessee.— Hinkle *v.* Shadden, 2 Swan 46.

The fee cannot be in abeyance and must therefore vest at once. Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430; Den *v.* O'Hanlon, 21 N. J. L. 582; Sands *v.* Lynham, 27 Gratt. (Va.) 291, 12 Am. Rep. 384.

be necessary some of the cases hold that title does not vest in the state until after the proceeding,[1] while others hold that it vests at once, although a proceeding may be required by statute,[2] or may be necessary to put the state in possession against an adverse claimant.[3] In the case of an escheat on the ground of a defeasible title a proceeding is always necessary,[4] and no title vests in the state until after the proceeding is had.[5]

2. NATURE AND EXTENT OF STATE'S TITLE. The state takes the title which the former owner had and in the same condition, with all the privileges and appurtenances and subject to all liens and encumbrances.[6]

VIII. DISPOSITION OF ESCHEATED PROPERTY.

A. In General. In some of the states there are constitutional or statutory provisions that escheated property or the proceeds of its sale shall belong to the public schools[7] or state university;[8] and where a constitution so provides the legislature cannot divert the same to any other purpose.[9] Some of the statutes require that escheated lands shall be publicly sold, and in such cases they cannot be disposed of by grant.[10] Land which has escheated is not vacant land and cannot be granted,[11] or located[12] as such.

B. By Grant — 1. IN GENERAL. Except in jurisdictions where escheated property is appropriated to a particular purpose,[13] the state may dispose of it by grant,[14] but not under common warrants as vacant lands.[15] The grant may be made before any inquest of office or other judicial proceeding,[16] except in cases where such a proceeding is necessary to vest title in the state.[17]

If the decedent be an alien at common law the title of the state vests immediately on his death. Wilbur *v.* Tobey, 16 Pick. (Mass.) 177; Larreau *v.* Davignon, 1 Sheld. (N. Y.) 128; Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360; Rubeck *v.* Gardner, 7 Watts (Pa.) 455.

1. Wilbur *v.* Tobey, 16 Pick. (Mass.) 177; Jackson *v.* Adams, 7 Wend. (N. Y.) 367.

2. *In re* Malone, 21 S. C. 435; Charleston *v.* Lange, 1 Mill (S. C.) 454; Ellis *v.* State, 3 Tex. Civ. App. 170, 21 S. W. 66, 24 S. W. 660. See also Etheridge *v.* Doe, 18 Ala. 565.

3. Montgomery *v.* Dorion, 7 N. H. 475; Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348; French *v.* Com., 5 Leigh (Va.) 512, 27 Am. Dec. 613.

4. See *supra*, VI, A.

5. Montgomery *v.* Dorion, 7 N. H. 475; Maynard *v.* Maynard, 36 Hun (N. Y.) 227; Jackson *v.* Beach, 1 Johns. Cas. (N. Y.) 399; Williams *v.* Wilson, Mart. & Y. (Tenn.) 248.

6. Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; 4 Kent Comm. 427; 3 Washburn Real Prop. (6th ed.) 64. See also Jones *v.* Chiles, 4 J. J. Marsh. (Ky.) 610.

The state is entitled to the rents and profits accruing after the vesting of its title to the escheated property. Charleston *v.* Lange, 1 Mill (S. C.) 454.

7. *Georgia.*— Gresham *v.* Rickenbacher, 28 Ga. 227.

Indiana.— State *v.* Meyer, 63 Ind. 33.

Michigan.— Crane *v.* Reeder, 22 Mich. 322.

Nebraska.— State *v.* Reeder, 5 Nebr. 203.

South Carolina.— Harvey *v.* Harvey, 25 S. C. 283.

Tennessee.— Parchman *v.* Carlton, 1 Coldw. 381; Puckett *v.* State, 1 Sneed 355; Hinkle *v.* Shadden, 2 Swan 46.

8. State University *v.* Harrison, 90 N. C. 385.

9. State *v.* Reeder, 5 Nebr. 203.

10. Wolfe *v.* Reynolds, 80 Pa. St. 204; Straub *v.* Dimm, 27 Pa. St. 36; Bodden *v.* Speigner, 2 Brev. (S. C.) 321.

11. See *infra*, VIII, B, 1.

12. Jones *v.* Chiles, 4 J. J. Marsh. (Ky.) 610; Hughes *v.* State, 41 Tex. 10.

13. See *supra*, VIII, A.

14. *Georgia.*—Gresham *v.* Rickenbacher, 28 Ga. 227.

Maryland.— Jones *v.* Badley, 4 Md. Ch. 167.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

New Jersey.—Colgan *v.* McKeon, 24 N. J. L. 566.

New York.— McCaughal *v.* Ryan, 27 Barb. 376.

South Carolina.— *In re* Malone, 21 S. C. 435.

In Maryland the right of granting escheated lands is vested by statute in the commissioner of the general land-office (Armstrong *v.* Bittinger, 47 Md. 103), but the grants are made on special escheat warrants (Jones *v.* Badley, 4 Md. Ch. 167).

15. Lee *v.* Hoye, 1 Gill (Md.) 188; Jones *v.* Badley, 4 Md. Ch. 167; Skeen *v.* Pearce, 7 Serg. & R. (Pa.) 303; Bodden *v.* Speigner, 2 Brev. (S. C.) 221.

16. Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430; Colgan *v.* McKeon, 24 N. J. L. 566; *In re* Malone, 21 S. C. 435.

17. Maynard *v.* Maynard, 36 Hun (N. Y.) 227, holding that where an escheat is claimed upon the ground of a defeasible title, the state acquires no title and can convey none until after it has been established by a judicial proceeding.

2. What Passes. An escheat grant relates to and operates to pass the whole of the original tract escheated,[18] unless a contrary intention clearly appears;[19] but it will not pass title to land named in the grant which was not in fact subject to escheat at the time of the grant,[20] even though it should afterward become escheat.[21]

3. When Grantee's Title Commences. Where a grant is made under an escheat warrant the grantee's title commences from the date of the warrant, and the patent, when granted, relates back to that date.[22] Where a subsequent warrant is taken out by another person he takes only a defeasible title subject to be defeated by a compliance with the law on the part of the person taking the first warrant and the issuance of a patent to him.[23]

4. Nature and Extent of Grantee's Title. Where escheated land is regranted the grantee takes the title in the same condition as it devolved upon the state, and therefore with the same privileges and appurtenances and subject to the same liens and encumbrances as in the hands of the person from whom it escheated.[24] An escheat grant is *prima facie* evidence of the grantee's title,[25] and that the land granted was liable to escheat.[26]

5. Priority of Escheat Grant Over Mesne Grant. An escheat grant relates back to the original grant escheated, and will overreach and defeat any intervening grants to other persons obtained under the general law.[27] The existence of a mesne grant, however, where there has been no fraud practised on the state, and the grantee has taken and paid for the land in good faith upon the supposition that it was vacant, is sufficient ground for refusing to issue a subsequent grant on an escheat warrant.[28]

The lord proprietor of the province of Maryland could not grant an escheated estate until after he had revested it in himself by entry. Kelly *v.* Greenfield, 2 Harr. & M. (Md.) 121.

In New York it was held by an early case as a general principle that a grant before office found could convey no title (Jackson *v.* Adams, 7 Wend. 367), but this decision has been expressly disapproved elsewhere (Colgan *v.* McKeon, 24 N. J. L. 566), and appears to be impliedly overruled by a later decision in the same state (McCaughal *v.* Ryan, 27 Barb. 376).

18. Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; Howard *v.* Moale, 2 Harr. & J. (Md.) 249; Hall *v.* Gittings, 2 Harr. & J. (Md.) 112.

19. Jones *v.* Badley, 4 Md. Ch. 167.

20. Lee *v.* Hoye, 1 Gill (Md.) 188.

21. Hall *v.* Gittings, 2 Harr. & J. (Md.) 112.

22. Smith *v.* Devecmon, 30 Md. 473; Owings *v.* Norwood, 2 Harr. & J. (Md.) 96.

23. Smith *v.* Devecmon, 30 Md. 473.

24. Jones *v.* Chiles, 4 J. J. Marsh. (Ky.) 610; Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; 3 Washburn Real Prop. (6th ed.) 64.

25. Clement *v.* Ruckle, 9 Gill (Md.) 326; Lee *v.* Hoye, 1 Gill (Md.) 188; Hall *v.* Gittings, 2 Harr. & J. (Md.) 112.

26. Hammond *v.* Inloes, 4 Md. 138; Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; Goodwin *v.* Caton, 4 Md. Ch. 160.

27. Jones *v.* Chiles, 4 J. J. Marsh. (Ky.) 610; Stevenson *v.* Dunlap, 7 T. B. Mon. (Ky.) 134; Stith *v.* Hart, 6 T. B. Mon. (Ky.) 624; Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658 [*overruling* Bladen *v.* Cockey, 1 Harr. & M. (Md.) 230; Kelly *v.* Greenfield, 2 Harr. & M. (Md.) 121].

28. Armstrong *v.* Bittinger, 47 Md. 103.

ESCROWS

By Ernest H. Wells*.

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CROSS-REFERENCES

For Matters Relating to:
Deed as Basis of Adverse Possession, see ADVERSE POSSESSION.
Delivery of Deed to Grantee on Condition, see DEEDS.
Deposit to Comply With Statute of Frauds, see FRAUDS, STATUTE OF.
Parol Evidence of Deposit in Escrow, see EVIDENCE.

I. DEFINITION.

An escrow[1] is a written instrument,[2] which by its terms imports a legal obligation, deposited[3] by the grantor, promisor, or obligor, or his agent with a stranger or third person, that is, a person not a party to the instrument, such as the grantee, promisee, or obligee,[4] to be kept by the depositary until the performance of a condition or the happening of a certain event[5] and then to be delivered over to take effect.[6]

1. **Derivation.**— The word "escrow" which by apheresis is also "scrow" seems to have come through the French. The word "scroll" is of the same origin, being written in early modern English as "scrowl," "scrole," "scrolle," and sometimes "escroll." Century Dict. See also Harkreader *v.* Clayton, 56 Miss. 383, 391, 31 Am. Rep. 369; Tyler *v.* Cate, 29 Oreg. 515, 525, 45 Pac. 800; 4 Comyns Dig. 263; Perkins Conv. § 138.

2. **Kinds of instruments** which may be escrows see *infra*, II, B, 2, b.

3. Many of the cases, particularly the older ones, use the term "deliver" instead of "deposit" to express the tradition of the instrument to the depositary. In this article the word "deposit," whether verb or noun, is used to express only the placing of the instrument in charge of the depositary. "Deliver" and "delivery" are reserved for the final delivery of the instrument upon which it is to have legal effect. See *infra*, note 6, where the definitions and illustrations there set out will show the frequent confusion of the two expressions. For a clean-cut, exact use of "deliver" see Hoyt *v.* McLagan, 87 Iowa 746, 55 N. W. 18, where the court held that certain instruments left with a third person upon certain conditions were "left in escrow and not delivered." See also Clark *v.* Gifford, 10 Wend. (N. Y.) 311, 313, where the meanings of the terms "delivery" and "deposit" are carefully distinguished.

4. **Who may be the depositary** see *infra*, III, C.

5. **Necessity of the performance** of the condition or the happening of the event see *infra*, V, A.

6. **Other definitions and illustrations** see the following cases:

California.— Cannon *v.* Handley, 72 Cal. 133, 13 Pac. 315.

Connecticut.— White *v.* Bailey, 14 Conn. 271. See also Raymond *v.* Smith, 5 Conn. 555; Coe *v.* Turner, 5 Conn. 86.

Georgia.— Anderson *v.* Robinson, 73 Ga. 644.

Kansas.— See syllabus by the court in Davis *v.* Clark, 58 Kan. 100, 48 Pac. 563.

Kentucky.— An escrow, as now interpreted, is a writing deposited with a third party to hold until the happening of some event, as until it is signed by another party, or until a suit be dismissed; and until the event happens, or the condition be performed, it can have no effect. Mudd *v.* Green, 12 S. W. 139, 11 Ky. L. Rep. 359.

Maine.— Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511.

Minnesota.—Tharaldson *v.* Hatch, 87 Minn. 168, 91 N. W. 467.

New York.— Jackson *v.* Catlin, 2 Johns.

II. THE ESCROW AGREEMENT OR TRANSACTION.

A. In General. In the great majority of cases, the instrument deposited, together with the stipulation as to the condition or the event upon performance or happening of which the instrument is to take effect, constitutes a contract; indeed by the general rule there must be a valid existing agreement between the parties, containing all the elements of a contract;[7] and as in other contracts the

248, 3 Am. Dec. 415. See also Webster *v.* Kings County Trust Co., 80 Hun 420, 30 N. Y. Suppl. 357.

Pennsylvania.— Robins *v.* Bellas, 2 Watts 359 [*citing* Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415].

Tennessee.— Alexander *v.* Wilkes, 11 Lea 221.

Texas.— Beaumont Car Works *v.* Beaumont Imp. Co., 4 Tex. Civ. App. 257, 23 S. W. 274.

Virginia.— Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985.

Wisconsin.— Schmidt *v.* Deegan, 69 Wis. 300, 34 N. W. 83.

England.— The delivery of a deed as an escrow is said to be "where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed. And so a man may deliver a deed and such delivery is good." Sheppard Touchst. 58. See 4 Comyns Dig. 263 note.

The term is used to express the conditional execution and deposit of a written instrument in such way. See Century Dict. Thus, "an escrow is defined to be 'a conditional delivery of a deed to a stranger, and not to the grantee himself, until certain conditions shall be performed, and then it is to be delivered to the grantee.'" Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147, 160 [*citing* 2 Blackstone Comm. 387; Bouvier L. Dict.; Coke Litt. 31, 36; Jacob L. Dict.; 2 Rolle Abr. 25; 1 Stephen Comm. 459]. "The conditional delivery of a deed or instrument in writing which is not to be operative or take effect as an absolute delivery until certain conditions shall be performed, is a delivery in escrow." Baum *v.* Parkhurst, 26 Ill. App. 128, 130. Where persons executing to each other instruments for the conveyance of land leave them in the hands of a third person until they get proper abstracts of title, reserving to themselves the determination of whether the abstracts are proper, they will be held to have been left in escrow, and not delivered, although each party took immediate possession under the deed to him. Hoyt *v.* McLagan, 87 Iowa 746, 55 N. W. 18. In pursuance of a contract between certain parties, an instrument of conveyance executed by one of them was deposited with a third person for delivery to the other, who was the grantee therein, upon a fulfilment by him of the terms of the contract. It was held that the instrument was deposited in escrow. Knopf *v.* Hansen, 37 Minn. 215, 33 N. W. 781. An escrow is a conditional delivery to a stranger, to be kept by him until certain conditions are performed and then to be delivered to the grantee. Patrick *v.* McCormick, 10 Nebr. 1, 5, 4 N. W. 312, paraphrasing 4 Kent Comm. 454. A deposit in escrow is the deposit of the deed with a stranger with the direction that he shall deliver to the grantee upon the fulfilment by the latter of some condition, as the payment of a sum of money, the performance of some obligation, or upon the happening of some event, the grantor reserving the right to reclaim the deed if the condition is not fulfilled or the event does not happen. Wier *v.* Batdorf, 24 Nebr. 83, 38 N. W. 22. Deposit as an escrow is a delivery on some collateral condition consistent with the contract, on the happening of which condition the contract is to take effect. State *v.* Perry, Wright (Ohio) 662. Defendant listed mining property with an agent, who negotiated a sale to a corporation to be formed, of which such agent was to be a member. L, one of the proposed incorporators, paid defendant half of the purchase-price, the balance to be secured by mortgage due in one year. Defendant executed an instrument of conveyance to L, and sent it to the agent, with instructions to deliver it when the mortgage was given. After several months, the mortgage not having been given, defendant rescinded the sale. It was held that the leaving of the deed with the agent was a deposit in escrow only. Tyler *v.* Cate, 29 Oreg. 515, 45 Pac. 800. See also Day *v.* Lacasse, 85 Me. 242, 27 Atl. 124; Spring Garden Bank *v.* Hurlings Lumber Co., 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583.

Another use of the term is to express the custody in which such a writing so deposited is. See Century Dict.

7. Clark *v.* Campbell, 23 Utah 569, 65 Pac. 496, 90 Am. St. Rep. 716, 54 L. R. A. 508 [*citing* Stanton *v.* Miller, 58 N. Y. 192]. See *infra*, note 16.

A contract not brought to the notice of those holding stock in escrow until after they have delivered it in pursuance of the terms of the contract under which they hold will not be valid, even though it might have been valid if brought to their notice before delivery. Walker *v.* Bamberger, 17 Utah 239, 54 Pac. 108.

Lack of definite assent.— Miller *v.* Sears, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176. See *infra*, note 16. But in Hoyt *v.* McLagan, 87 Iowa 746, 55 N. W. 18, upon an exchange of land the instruments were deposited until "proper abstracts of title could be obtained," the parties reserving to them-

consideration may be either a benefit to the promisor or a detriment to the promisee.[8] There is, however, a class of cases where no contract exists,[9] as where an instrument for the conveyance of land is deposited with a third person to be delivered to the grantee upon the death of the grantor.[10]

B. Component Parts — 1. In General. The contract is composed of two elements: (1) The instrument deposited;[11] and (2) the condition or conditions stipulated.[12]

2. The Instruments — a. Requisites. The instrument must be intended to take effect eventually upon delivery.[13] An escrow for the conveyance of land should be signed and acknowledged,[14] and should be perfect and complete in all other respects;[15] in fact, it differs from a deed in one particular only — it is deposited conditionally instead of being delivered.[16]

b. Kinds. The term "escrow" was originally applied to instruments for the conveyance of land,[17] but is now applied to all written instruments so deposited.[18]

selves the right to decide whether the abstracts were proper or not.

That a wife should sign the stipulation as to the conditions making the instrument deposited with a third person an escrow is not necessary where she had jointly executed it with her husband and intrusted it to him for delivery. Hughes *v.* Thistlewood, 40 Kan. 232, 19 Pac. 629.

Effect of no contract between grantor and grantee.— Patterson *v.* Underwood, 29 Ind. 607. See Miller *v.* Sears, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176. See also *infra*, note 16.

8. Mechanics' Nat. Bank *v.* Jones, 76 N. Y. App. Div. 534, 78 N. Y. Suppl. 800 [*affirmed* in 175 N. Y. 518, 67 N. E. 1085].

9. **Promissory notes** have been deposited to take effect after death and have been upheld to pass rights thereunder. Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682; Blanchard *v.* Sheldon, 43 Vt. 512. See Daggart *v.* Simmons, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 232.

10. See *infra*, II, B, 3, c; III, B; 15 Central L. J. 162, 165.

11. See *infra*, II, B, 2.

12. See *infra*, II, B, 3.

13. Glenn *v.* Hill, 11 Wash. 541, 40 Pac. 141. Thus an instrument purporting to convey land delivered to grantee to be deposited by him with a third person until grantor returns from a journey, and in that event to be redelivered to grantor, is not an escrow because there is no event in which it is to be delivered to the grantee. "A deed so delivered, if not so intended, when deposited, to operate as a deed *in præsenti* could never have any validity, without a new agreement of the parties." Braman *v.* Bingham, 26 N. Y. 483, 492 [*citing* James *v.* Vanderheyden, 1 Paige (N. Y.) 385].

14. Lewis *v.* Prather, 21 S. W. 538, 14 Ky. L. Rep. 749. But see Torrey *v.* Thayer, 37 N. J. L. 339, where objections to the formal execution were waived.

15. Jordan *v.* Jordan, 10 Lea (Tenn.) 124, 127, 43 Am. Rep. 294.

16. "Not only must there be sufficient parties, a proper subject-matter and a consideration, but the parties must have actually contracted. When the instrument purports to be a conveyance of land, the grantor must have sold, and the grantee must have purchased the land. A proposal to sell, or a proposal to buy, though stated in writing, will not be sufficient. The minds of the parties must have met, the terms have been agreed upon, and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered, and the grantee received, except for the agreement then made that it be delivered to a third person, to be kept until some specified condition is performed by the grantee, and thereupon to be delivered to him by such third person. The actual contract of sale on the one side, and of purchase on the other, is as essential to constitute the instrument an escrow, as that it be executed by the grantor; and until both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third person, pending the proposals for sale or purchase." Fitch *v.* Bunch, 30 Cal. 208, 212. But see *infra*, III, C, 5, a.

17. Jordan *v.* Jordan, 10 Lea (Tenn.) 124, 43 Am. Rep. 294.

Definitions and illustrations of an escrow see *supra*, note 6.

18. Riggs *v.* Trees, 120 Ind. 402, 22 N. E. 254, 5 L. R. A. 696.

An indenture of apprenticeship may be deposited in escrow. Millership *v.* Brookes, 5 H. & N. 797, 800, 29 L. J. Exch. 369.

Instruments not fully executed.— Writings which are deposited with a third person to hold until the happening of some event, or until the writings are executed by additional obligors and then to be delivered over, are now regarded as escrows. Millett *v.* Parker, 2 Metc. (Ky.) 608. See *infra*, II, B, 3, c, (I).

Purchase-money for land was deposited in bank under an agreement that it was to be paid to grantor upon his removing a cloud upon the title. Strict compliance with the condition was required by the court as in an

It has been held to include both sealed and unsealed instruments,[19] as mortgages[20] and bonds,[21] promissory notes,[22] life-insurance policies,[23] licenses for the use of patents,[24] certificates of stock,[25] or subscriptions to stock.[26]

3. The Condition or Event — a. Necessity — (i) *In General.* As the stipulated condition or event which must be performed or must happen before the instrument can take effect is what marks the difference between the escrow and the completely executed instrument, as the deed, bond, or note,[27] the condition must be one in fact which will prevent the operation of the instrument until complied with;[28] a mere understanding[29] or expectation or promise[30] that something will be done is insufficient. As a general rule the condition must be part of a contract between the parties.[31]

(ii) *Whether a Condition or an Event Necessary.* By some authorities a distinction is made between instruments the final delivery of which depends upon the performance of a condition and those instruments the final delivery of which awaits merely the lapse of time, or the happening of a contingency or event; in the latter case the effect of the instrument is not suspended, but it operates at once.[32]

b. Form. By some of the old authorities it is said that it is necessary that the form of the words used in the deposit of an instrument must be "apt and proper."[33] If this ever was necessary, it is absolutely certain that it is not

ordinary case of escrow. Frichott *v.* Nowlin, (Tex. Civ. App. 1899) 50 S. W. 164.

19. Baum *v.* Parthurst, 26 Ill. App. 128.

The term was extended first to sealed obligations and then to written contracts generally. Alexander *v.* Wilkes, 11 Lea (Tenn.) 221.

20. Davis *v.* Clark, 58 Kan. 100, 48 Pac. 563.

21. Robertson *v.* Coker, 11 Ala. 466, a constable's bond.

A bond for a deed deposited in escrow with a disinterested third person to be held until a certain sum of money shall be paid is itself an escrow. Roberts *v.* Mullenix, 10 Kan. 22.

Arbitration bond deposited as escrow see 3 Cyc. 617 note 45.

Bail-bond deposited as escrow see 5 Cyc. 109.

22. Huntington *v.* Smith, 4 Conn. 235; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246. See Davis *v.* Clark, 58 Kan. 100, 48 Pac. 563; Massmann *v.* Holscher, 49 Mo. 87. See also 8 Cyc. 260 note 80; 8 Cyc. 144 note 20; 7 Cyc. 696 note 23.

23. Confederation L. Assoc. *v.* O'Donnell, 13 Can. Supreme Ct. 218. See *infra*, III, C, 5, a.

An application for fire insurance left with the agent of the company to be held by agent until applicant had got consent of another company was held an escrow. Price *v.* Home Ins. Co., 54 Mo. App. 119.

24. See Hammond *v.* Hunt, 11 Fed. Cas. No. 6,003, 4 Ban. & A. 111.

25. Clarke *v.* Eureka County Bank, 123 Fed. 922.

26. Ottawa, etc., R. Co. *v.* Hall, 1 Ill. App. 612. See Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. 318. See also 10 Cyc. 403, 416.

27. See *supra*, II, B, 2, a; *infra*, III, A.

28. Kidner *v.* Keith, 15 C. B. N. S. 35, 109 E. C. L. 35; O'Connor *v.* Beaty, 27 U. C. C. P. 203. See also Benedict *v.* Rutherford, 11 U. C. C. P. 213.

29. An understanding, for instance, that others are to sign the instrument, who fail to do so, is insufficient. It must be handed over on the condition that if others do not sign it it shall be no deed. Carrick *v.* French, 7 Humphr. (Tenn.) 459. See Thoraldson *v.* Everts, 87 Minn. 168, 91 N. W. 467; Cumberlege *v.* Lawson, 1 C. B. N. S. 709, 26 L. J. C. P. 120, 5 Wkly. Rep. 237, 87 E. C. L. 709.

30. New Jersey *v.* Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225.

31. A mere direction by the depositor to the depositary is not a contract, where the person who is supposed to be the eventual transferee and for whom the obligation of the instrument is supposed to exist, is not apprised of its character and is not a party to the transaction between the depositor and the depositary. See Stanton *v.* Miller, 58 N. Y. 192 [*reversing* 65 Barb. 58]. See *supra*, II, A.

Death of the grantor see *supra*, II, A; *infra*, II, B, 3, c, (II).

32. Cook *v.* Niehaus, 8 Ohio Dec. (Reprint) 505, 8 Cinc. L. Bul. 259, where the event was the settlement in the probate court of a certain estate and where the court held that, upon the deposit of the instrument, an interest vested at once in the grantee, who was a married woman, sufficient to constitute her the owner of a separate estate within Ohio Rev. St. § 3128, which allows a married woman to bind her separate estate. The court did not decide whether the legal title passed or not, but it adopted the distinction made by Shaw, C. J., in Foster *v.* Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154. See *infra*, II, B, 3, c, (II).

33. The form set out is as follows: "I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he deliver to you, 20*l* for me," or upon any

required now. The term "escrow" need never be used;[34] nor on the other hand will the use of the term necessarily make the instrument an escrow,[35] although it evinces more clearly and distinctly than any other the actual intention of the parties.[36] It need not be in writing.[37] In fact no particular form of words is necessary, but the terms of the escrow stipulations are to be derived from all the circumstances.[38]

c. Kinds[39] — (i) *In General.* Conditions may be of many different kinds.[40] The most common condition seems to be the payment of money by the grantee or obligee.[41] An arrangement between the obligors of an instrument, as a bond or note, that it is not to take effect until some other person or persons become

other condition then mentioned; which mode of delivery ought to be taken notice of in the attestation. 4 Comyns Dig. 263 note [*citing* 4 Cruise 36; Touchstone 58].

34. Bodwell *v.* Webster, 13 Pick. (Mass.) 411. See also White *v.* Bailey, 14 Conn. 271; Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359, 374 [*citing* Bowker *v.* Burdekin, 12 L. J. Exch. 329, 11 M. & W. 128]; Jackson *v.* Sheldon, 22 Me. 569; Trenton State Bank *v.* Evans, 15 N. J. L. 155, 28 Am. Dec. 400; Gaston *v.* Portland, 16 Oreg. 255, 19 Pac. 127.

35. Wallace *v.* Butts, (Tex. Civ. App. 1895) 31 S. W. 687.

36. Clark *v.* Gifford, 10 Wend. (N. Y.) 310.

37. "It may rest in parol or be partly in writing and in part oral." Stanton *v.* Miller, 58 N. Y. 192, 203. See also Gaston *v.* Portland, 16 Oreg. 255, 19 Pac. 127; Campbell *v.* Thomas, 42 Wis. 437, 24 Am. Rep. 427. And *compare* Baldwin *v.* Potter, 2 Root (Conn.) 81; Fulton *v.* Priddy, 123 Mich. 298, 82 N. W. 65, 81 Am. St. Rep. 201. "The rule that an instrument of contract made in writing *inter partes*, must be deemed to contain the entire agreement or understanding, has no application." Stanton *v.* Miller, 58 N. Y. 192, 203.

The term "escrow card" is sometimes used to express the written memorandum of the stipulations of the escrow contract and the instrument or instruments deposited. See Balfour *v.* Hopkins, 93 Fed. 564, 35 C. C. A. 445.

38. Thoraldson *v.* Everts, 87 Minn. 168, 91 N. W. 467; Gaston *v.* Portland, 16 Oreg. 255, 19 Pac. 127. See Landon *v.* Brown, 160 Pa. St. 538, 28 Atl. 921; Bowker *v.* Burdekin, 12 L. J. Exch. 329, 11 M. & W. 128. See O'Connor *v.* Beaty, 27 U. C. C. P. 203. But "it obviates all questions as to the intention of the parties if at the time of the deposit, or, as it is called, the first delivery, it is expressly declared that it is to be delivered upon the performance of such conditions." Tharaldson *v.* Everts, *supra* [*citing* Murray *v.* Stair, 2 B. & C. 82, 3 D. & R. 278, 26 Rev. Rep. 282, 9 E. C. L. 45]. As to intention of parties determining whether an instrument is to be an escrow or not see *infra*, III, A.

39. Whether a condition to be performed or a mere event can hold the instrument in suspense see *supra*, II, B, 3, a, (II); *infra*, II. B, 3, c, (II).

40. Thus, an agreement that the escrow should be delivered "when it is finally determined" that the deliveree owned an interest in certain property has been held a condition upon the performance of which the deliveree was entitled to the possession of the escrow. Clarke *v.* Eureka County Bank, 123 Fed. 922.

Decree of court the condition.— Cook *v.* Hendricks, 4 T. B. Mon. (Ky.) 500; Webster *v.* Kings County Trust Co., 145 N. Y. 275, 39 N. E. 964 [*affirming* 80 Hun 420, 30 N. Y. Suppl. 357].

Erecting building on land, and giving purchase-money mortgage.— Where the evidence shows that an instrument for the conveyance of land was placed with a third person for delivery on condition that he would erect a house on the land to be conveyed and give back a purchase-money mortgage therefor, it is error to refuse to find that the instrument was deposited as an escrow. Hillhouse *v.* Pratt, 74 Conn. 113, 49 Atl. 905.

41. Peter *v.* Wright, 6 Ind. 183; Roberts *v.* Mullenix, 10 Kan. 22; Landon *v.* Brown, 160 Pa. St. 538, 28 Atl. 921.

After making the devise in a formal manner the testator added, "under the following conditions, to wit: That she pay for the same one thousand dollars, with interest . . . and I have left a deed for the same in the hands of my executors, to be delivered to her after my decease, upon her paying or arranging the said sum, the said sum to go into the hands of my executors as part of my estate and divided among my legal representatives as hereinafter set forth. Held, that the grantee was not to take by virtue of the will but by virtue of testator's deed which was left in escrow and became void, when the grantee refused to pay the price named." Smith's Estate, 6 Kulp (Pa.) 76.

An instrument for the conveyance of land deposited as an escrow is equivalent to a **mortgage** to secure the first payment when the condition is that it shall remain an escrow until the first payment is made and then to be delivered as the deed of the parties. Brown *v.* Gilman, 4 Wheat. (U. S.) 255, 4 L. ed. 564. But where the grantee accepts a deed as a present operative conveyance to secure money advanced there is not a deposit of an escrow. Whelan *v.* Tobener, 71 Mo. App. 361. In Alabama it was said that the incidents of a mortgage attach to an escrow which is

obligated upon it is generally considered to supply a condition which will make the instrument deposited an escrow;[42] although this has been said not to be a condition of an escrow but merely a matter of defense.[43]

(11) *Death of Grantor or Obligor.* Whether the death of the grantor is an event upon which the instrument can assume the conditional character of an escrow is doubtful. There are authorities which hold that such an event is sufficient to hold the instrument in suspense as an escrow,[44] and that upon the death of the grantor the title passes to the grantee and that then and thereafter the title is deemed to have vested as of the time of the deposit.[45] The greater weight of authority appears to take the view that the death of the grantor is not an event which can suspend the passing of the title to the grantee.[46] Some of these author-

not to be delivered until the payment of all the purchase-money and that the grantor may proceed in equity to have a lien declared on the land, and a decree for its sale to pay the purchase-money. Suddeth *v.* Knight, (1893) 14 So. 475.

42. Wright *v.* Lang, 66 Ala. 389; Bibb *v.* Reid, 3 Ala. 88; Fertig *v.* Bucher, 3 Pa. St. 308. See *infra*, V, E, 2.

As against the sheriff's return, it cannot be presumed, because a replevin bond was signed by a part only of all the persons named in the penal part of it, that they deposited it as an escrow. Stevens *v.* Wallace, 5 T. B. Mon. (Ky.) 404. See *infra*, V, E, 2.

43. "The question of delivery as an escrow, or otherwise, arises properly only between grantor and grantee, obligor and obligee, payor and payee, regarding all those of one character upon the instrument as one party, and those of the other character as the other party; and the doctrines springing out of the question are applied to instruments completed ready for delivery to the party to whom they are to be executed . . . But there is another class of cases, not properly involving doctrines touching the delivery of escrows, into which, however, the language of the cases relative to such delivery has been introduced, where the law is not so well settled. The class of cases to which we refer consists of those wherein the several persons composing the party of obligors have arrangements among themselves, or some of them, that the instrument shall not be delivered to the other party — the obligee — till the instrument is completed according to arrangements among themselves, all being of one party, obligors. But the question arising in these cases more properly is, when can the obligors defend against an instrument delivered to the obligee by some of the obligors without the consent of others, before it was perfected according to agreement among themselves? Defend because the instrument delivered was an imperfect one? And these cases may divide themselves into four classes: 1. Those where the instrument delivered is commercial paper. 2. Where the instrument delivered is not commercial paper, but something appears upon its face indicating that the instrument is incomplete. 3. Where the instrument is not commercial paper, and nothing appears upon its face indicating that it is not complete. 4. Where independent of appearance and character of the instrument, the obligee takes it with knowledge, &c." Berry *v.* Anderson, 22 Ind. 36, 42. See Goff *v.* Bankston, 35 Miss. 518, 525, where the court said that a plea was not tendered as an escrow. "At best, it amounts only to a special plea of *non est factum*, depending for its efficacy upon the alleged facts, which, if the obligor attempted to enforce payment of the bond, would be an act of fraud upon his part."

44. Stone *v.* Duvall, 77 Ill. 475; Nottbeck *v.* Wilks, 4 Abb. Pr. (N. Y.) 315. See Hathaway *v.* Payne, 34 N. Y. 92, where the court, although not calling the instrument in question an escrow, held that the title did not pass until the second delivery. And see Haeg *v.* Haeg, 53 Minn. 33, 55 N. W. 1114, which apparently takes the same view as Hathaway *v.* Payne, *supra*, although the court cites Foster *v.* Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154, as authority, and that case does not take quite the same view as Hathaway *v.* Payne, *supra*.

To the objection that under this rule a freehold in futuro will be created the court said, in Nottbeck *v.* Wilks, 4 Abb. Pr. (N. Y.) 315, 317: "Since the adoption of the Revised Statutes, whatever may have been the old technical difficulties, a freehold estate may be created to commence at a future day, provided its creation do not suspend the absolute power of alienation for a longer period than the 'established rules' allow."

45. Hathaway *v.* Payne, 34 N. Y. 92. See also Haeg *v.* Haeg, 53 Minn. 33, 55 N. W. 1114.

46. Stewart *v.* Stewart, 5 Conn. 317, 321 (upon the argument of the case, it was contended on the one hand that the instrument in this case was an escrow, upon the other a deed. The court did not discuss this question, but was concerned with the question whether the instrument was a devise or a deed and came to the conclusion that it was a deed taking effect "from the first and only delivery, and consummated by the death of the grantor"); Belden v. Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185; Jenkinson *v.* Brooks, 119 Mich. 108, 77 N. W. 640; Latham *v.* Udell, 38 Mich. 238 (in both of which Michigan cases it was held that an instrument for the conveyance of land left by the grantor with a third person with directions to have it handed over to the grantee immediately after his death was valid. The question in the case

ities say that the instrument when left with the third person becomes a deed *in præsenti* and that when delivered to the grantee after the death of the grantor it takes effect by relation from the first delivery.[47] It is difficult to distinguish between these cases and those which hold that the instrument is an escrow; in fact the difference has been said to be "not very material."[48] But is it always true that the distinction is not material? If it is considered that an escrow has been deposited, the conveyance, if voluntary, will not relate back to cut off intervening rights.[49] If, however, it is considered that there has been a delivery of a deed, the title passes at once and cuts off the rights of creditors which arise between this delivery and the death of the grantor.[50] The theory that an instrument for the conveyance of land left with a third person to be delivered after grantor's death is a deed *in præsenti* is now developed in some jurisdictions to the rule that the deed conveys the title of the land immediately to the grantee, subject to the life-interest remaining in the grantor.[51] The conveyance of real property by an instrument to be delivered to the grantee after the death of the grantor has been sharply criticized in some of the above cases, whether the instrument has been held an escrow[52] or a deed *in præsenti*.[53]

d. When Imposed. The condition must be imposed at or before the time of

was, whether there had been sufficient delivery or not; there was no question as to what time the title passed). See also Doe *v.* Knight, 5 B. & C. 671, 8 D. & R. 348, 4 L. J. K. B. O. S. 161, 29 Rev. Rep. 355, 11 E. C. L. 632.

47. This was the view of Chief Justice Shaw in Foster *v.* Mansfield, 3 Metc. (Mass.) 412, 414, 37 Am. Dec. 154, who distinguished between a deed and an escrow as follows: "Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed, until the second delivery; but when thus delivered, it will take effect, by relation, from the first delivery" [*citing* Wheelwright *v.* Wheelwright, 2 Mass. 447, 454, 3 Am. Dec. 66]. See also Stephens *v.* Rinehart, 72 Pa. St. 434; Levengood *v.* Bailey, 1 Woodw. (Pa.) 275.

48. Foster *v.* Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154. See also Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67; Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66.

49. See *infra*, VII, C.

50. Brown *v.* Austen, 35 Barb. (N. Y.) 341. See Stephens *v.* Rinehart, 72 Pa. St. 434.

51. Schuur *v.* Rodenback, 133 Cal. 85, 65 Pac. 298; Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867; Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258; Albright *v.* Albright, 70 Wis. 528, 36 N. W. 254. See Ball *v.* Foreman, 37 Ohio St. 132 [*citing* Crooks *v.* Crooks, 34 Ohio St. 610, where, however, it was held that the title passed to the grantee upon the last delivery and by relation the instrument took effect as of the data of the first delivery]; Pence *v.* Blackford, 11 Ohio Cir. Ct. 204, 5 Ohio Cir. Dec. 320, where, however, there was a valid enforcible contract.

Promissory note.— In Ruiz *v.* Dow, 113 Cal. 490, 496, 45 Pac. 867, the grantor and donor made a deed of gift of all his realty and personalty and it was objected that there was not a valid transfer of a certain note in question to the donee, that there was neither a gift *causa mortis* nor a gift *inter vivos*. The court held that there was no gift *causa mortis*, but that there was a valid transfer of title of the note to the donee. "The donor relinquished all present right and control over the note when he made the deed and delivered it to the cashier of the bank, and by the same act he also placed the right of possession of the note beyond himself." As the right of possession was lost to the donor, it was immaterial that the right of possession did not vest immediately in the donee.

Even where the instrument has been held an escrow, it has been held that the grantor has a life-estate in the land. See Stone *v.* Duvall, 77 Ill. 475.

52. Hathaway *v.* Payne, 34 N. Y. 92, 112, where it is said: "If it were an original question, I should suppose, that such a transaction was of a testamentary character, and that it would be inoperative, for want of the attestation required by the statute of wills. But the cases establish the rule as I have stated, and they should not now be disturbed." See also Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235 [*criticizing* Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66, where the court said that the instrument was not an escrow; but it should be noted that the grantor in that case had not made an irrevocable deposit. See *infra*, III, B].

53. See Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186 (dissenting opinion by McFarland, J.); Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

the deposit.[54] Nevertheless it may be subsequently varied by the agreement of the parties.[55]

III. THE DEPOSIT.[56]

A. Whether a Deposit or Delivery Determined by Intention. Whether an instrument placed with a third person is to be an escrow or a completely executed instrument depends upon the intention of the parties.[57] If the evidence leaves any doubt upon the subject, the intention of the parties must be determined by the jury[58] upon the whole evidence.[59] A declaration by the depositor that he delivers the instrument as his deed,[60] or that "he delivers [deposits] it as an escrow"[61] is not conclusive, but is mere matter of evidence to be weighed in connection with other circumstances of the case, in order to determine the real character of the transaction.[62] It is said that a presumption exists in favor of the complete instrument and that an intention to the contrary must clearly appear if it is to be considered an escrow.[63]

B. Irrevocability of Deposit. It is an absolutely necessary element of a deposit that it should be irrevocable; that is, that when the instrument is placed in the hands of the depositary it should be intended to pass beyond the control of the grantor for all time, and that he should actually lose the control of and dominion over the instrument;[64] for in case the deposit is made in furtherance of

54. Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478.

55. Raymond *v.* Smith, 5 Conn. 555.

56. "Deposit," "deliver," and "delivery" as used in this article see *supra*, note 3.

57. Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67; Price *v.* Pittsburgh, etc., R. Co., 34 Ill. 13; Brown *v.* Austen, 35 Barb. (N. Y.) 341; Clark *v.* Gifford, 10 Wend. (N. Y.) 310; Cook *v.* Nichaus, 8 Ohio Dec. (Reprint) 505, 8 Cinc. L. Bul. 259.

Intention of grantor of a deed.—"Whether, when a deed is handed to a stranger to be delivered to the grantee at a future time, it is to be considered the deed of the grantor presently, or an escrow, to take effect on the further delivery to the grantee, is a question to be determined by the actual intent of the grantor, as gathered from the evidence." Andrews *v.* Farnham, 29 Minn. 246, 249, 13 N. W. 161 [*citing* Foster *v.* Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154; Hathaway *v.* Payne, 34 N. Y. 92]. See also Wittenbrock *v.* Cass, 110 Cal. 1, 42 Pac. 300 [*approving* Bury *v.* Young, 58 Cal. 446, 23 Pac. 338, 35 Am. St. Rep. 186; Bowker *v.* Burdekin, 12 L. J. Exch. 329, 11 M. & W. 128]; Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Doe *v.* Bennett, 8 C. & P. 124, 34 E. C. L. 645, 4 Comyns Dig. 263.

58. White *v.* Bailey, 14 Conn. 271. See Clark *v.* Gifford, 10 Wend. (N. Y.) 310, where, however, the court did not allow the case to go to the jury. See also Price *v.* Pittsburgh, etc., R. Co., 34 Ill. 13; Jackson *v.* Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557, in which cases the question was submitted to the jury.

If a written escrow agreement be uncertain and ambiguous, it is the duty of the court to inquire into the circumstances and conditions which existed at the time of the negotiation between the parties, in order to bring the language of the agreement as near to the intention and actual meaning of the parties as the words which they saw fit to employ and the rules of law would permit. Clarke *v.* Eureka County Bank, 123 Fed. 922.

59. Brown *v.* Austen, 35 Barb. (N. Y.) 341; Murray *v.* Stair, 2 B. & C. 82, 3 D. & R. 278, 26 Rev. Rep. 282, 9 E. C. L. 45.

The language employed, the situation of the parties, the object to be attained, and such other facts as may throw light upon the intention of the parties must be taken into consideration. Glenn *v.* Hill, 11 Wash. 541, 40 Pac. 141.

60. Trenton State Bank *v.* Evans, 15 N. J. L. 155, 28 Am. Dec. 400; Clark *v.* Gifford, 10 Wend. (N. Y.) 310.

61. Trenton State Bank *v.* Evans, 15 N. J. L. 155, 28 Am. Dec. 400; Clark *v.* Gifford, 10 Wend. (N. Y.) 310; Wallace *v.* Butts, (Tex. Civ. App. 1895) 31 S. W. 687.

A receipt given by the third person that he had received from the grantor, "in escrow, an indenture of deed," will not be allowed to defeat the intention of the grantor to make an absolute delivery. Brown *v.* Austen, 35 Barb. (N. Y.) 341.

62. Clark *v.* Gifford, 10 Wend. (N. Y.) 310.

63. Hall *v.* Harris, 40 N. C. 303. See *infra*, p. 587 notes 82, 83.

A deed which is deposited to secure money advanced and which is accepted as a present operative conveyance is not an escrow. Whelan *v.* Tobener, 71 Mo. App. 361. See also Adler *v.* Germania F. Ins. Co., 17 Misc. (N. Y.) 347, 39 N. Y. Suppl. 1070. But see Suddeth *v.* Knight, (Ala. 1893) 14 So. 475; Brown *v.* Gilman, 4 Wheat. (U. S.) 255, 4 L. ed. 564.

As to the condition or event determining whether an instrument has been "delivered" or "deposited" see *supra*, II, B, 3, c.

64. *California.*— Wittenbrock *v.* Cass, 110 Cal. 1, 42 Pac. 300 [*following* Bury *v.* Young,

a contract between the parties the contract must be so complete that it remains only for the grantee or obligee or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import;[65] and where the condition or event upon the happening of which the instrument is to take effect is the death of the grantor or obligor, the necessity of irrevocability of deposit is especially apparent,[66] for otherwise there might be the

98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186]; Fitch *v.* Bunch, 30 Cal. 208.

Florida.— Loubat *v.* Kipp, 9 Fla. 60.

Kansas.— See Farmer *v.* Marvin, 63 Kan. 250, 65 Pac. 221.

Michigan.— Schmid *v.* Frankfort, 131 Mich. 197, 91 N. W. 131.

Nebraska.— Wier *v.* Batdorf, 24 Nebr. 83, 38 N. W. 22.

New York.— Stanton *v.* Miller, 58 N. Y. 192; Clark *v.* Gifford, 10 Wend. 310; Jackson *v.* Rowland, 6 Wend. 666, 22 Am. Dec. 557; James *v.* Vanderheyden, 1 Paige 385.

Washington.— Nichols *v.* Oppermann, 6 Wash. 618, 34 Pac. 162.

Wisconsin.— Campbell *v.* Thomas, 42 Wis. 437, 24 Am. Rep. 427 (where, however, the contract of sale of land was held invalid on account of the statute of frauds; and where it was held that the payment of a small part of the agreed price for the land at the time of the agreement of purchase did not deprive the grantor of his right of control of his deed, it being plain that grantor intended to keep control of it); Prutsman *v.* Baker, 30 Wis. 644, 11 Am. Rep. 592. In Hillsdale College *v.* Thomas, 40 Wis. 661, where one signed a note payable to a college, and deposited it with the latter's agent under an agreement that the agent was to hold it until a certain time, to be returned to the maker in case the latter should not decide to purchase a scholarship, the note in the meantime not to be considered as delivered to the college, and at the specified time the maker demanded a return of the note, the transaction was held not an escrow contract, there having been no deposit of the note to give it a valid inception.

But a deposit does not amount to a delivery so as to take the case out of the statute of frauds where the grantee named in the instrument had taken possession of the land from another person, the condition never having been performed, who held adversely to the grantor named in the instrument deposited, and this although the grantee of the escrow had made a part payment at the time the deposit was made. Townsend *v.* Hawkins, 45 Mo. 286.

See, generally, FRAUDS, STATUTE OF.

For his right to repossession of the instrument in case the condition is not performed or the event does not happen see *infra*, VI, A.

65. Thus an instrument for the conveyance of land deposited with a third person by the grantor, to be delivered to the grantee upon the order of the grantor's agent, is not an escrow; for the grantor may, before the agent gives such order, direct the third person not to deliver the deed. Fitch *v.* Bunch, 30 Cal. 208. See also Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. 318 [*affirming* 51 Ill. App. 447].

Performance of condition see *infra*, V.

Requisites of instruments see *supra*, II, B, 1, a.

66. *Georgia.*— Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235.

Illinois.— Stinson *v.* Anderson, 96 Ill. 373.

Indiana.— Jones *v.* Loveless, 99 Ind. 317.

Maryland.— Carey *v.* Dennis, 13 Md. 1.

Massachusetts.— Daggett *v.* Simonds, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332; Hale *v.* Joslin, 134 Mass. 310.

Michigan.— Taft *v.* Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291.

New Hampshire.— See Cook *v.* Brown, 34 N. H. 460.

New York.— Jacobs *v.* Alexander, 19 Barb. 243.

North Dakota.— See Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

Ohio.— See Ball *v.* Foreman, 37 Ohio St. 132. And see Williams *v.* Schatz, 42 Ohio St. 47.

Contra.— Shed *v.* Shed, 3 N. H. 432. See Ruggles *v.* Lawson, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375, where a conveyance to the grantor's two sons in common was deposited with a third person to be delivered to the grantee in case the grantor should die before having made and executed his will. The court doubted whether the instrument was an escrow but said that the delivery was at all events conditional and to become absolute upon an event which subsequently took place and that therefore, as in the case of an escrow, the instrument would take effect from the first delivery. The question came up in a partition suit. There are a few other cases where the instrument deposited was subject to recall by the maker or grantor, and the recall not having been exercised by him was upheld so as to pass title or right. Thus, in Belden *v.* Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185, the grantor of an instrument for the conveyance of land deposited it with a third person, saying at the time: "Take this deed, and keep it. If I never call for it, deliver to B. after my death: if I call for it, deliver it up to me." The grantor not having called for it, and it having been delivered after his death, it was held a good deed in the hands of the grantee. See also Martin *v.* Flaherty, 13 Mont. 96, 32 Pac. 287, 40 Am. St. Rep. 415, 19 L. R. A. 242. In Giddings *v.* Benjamin, 51 Vt. 227, 31 Am. Rep. 682, the maker of three notes put them into an envelope which he sealed and addressed to one of the payees of the notes. He deposited the envelope with one F, who indorsed the sub-

absurd situation of a testamentary instrument, without the required formalities, being upheld in a court of law. And this whether it is considered that the instrument is deposited as an escrow or delivered as a deed or other fully executed instrument.[67] But the rule that the grantor has to part with all dominion and control over the instrument does not mean that he must put it out of his physical power to procure possession of it. It is sufficient that the instrument is deposited with the third person for the grantee without reservation and with the intention that it shall take effect and eventually operate according to its import in the case of an intended conveyance of land, to transfer the title.[68] It therefore follows that when a valid deposit of an instrument as an escrow has once been made, neither party can revoke without the consent of the other.[69] The deposit would be an idle ceremony and entirely nullify the object of the law if this were permissible.[70]

stance of the maker's directions on the wrapper which he put around the envelope, "Letter left in my care by Benj. Giddings, to be handed to Mr. Giddings if he calls for it; otherwise not to be opened in his lifetime." The maker of the note died intestate without ever having called for the package otherwise than to inquire for its safety. It was held that the option of recall not having been exercised, the delivery after death took effect by relation as of the time of the original deposit. The notes in this case were given to the three payees in payment of a third part in their father's interest in the intestate mother's dower estate, which he had enjoyed, and for which their father had never made demand. See also Blanchard *v.* Sheldon, 43 Vt. 512, where a note deposited to a third person, subject to recall during the lifetime, was held as a gift *inter vivos*. See also Daggart *v.* Simonds, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332, where the court inclines toward this doctrine, but does not absolutely decide in favor of it.

67. Culy *v.* Upham, (Mich. 1903) 97 N. W. 405, in which case the consideration of a deed was past and future services in the care of the grantor and his wife. The consideration was set out in the deed and was a condition precedent to the delivery of the deed, namely, that the grantee should live with and care for the grantor until the grantor's death. It was held that the intention of the grantor was that the title should remain in him until after he died and then it should pass to the grantee if she had performed the conditions, that this intent was testamentary in character and could not be consummated by deed, and further that the condition precedent that the grantee should live with and care for the grantor was not waived by a deposit of the instrument with a verbal direction to deliver it after the grantor's death, since the verbal modification of the conditions in a deed is void under the statute of frauds. See *supra*, note 66. But where decedent deposited with a third person an instrument which stated that it was deposited as an escrow, to be delivered to the grantee at the grantor's death, or to grantor, at his request, in his lifetime, and the grantor afterward had the last clause erased, and redeposited the instrument, stating that he wished to put the property beyond the power of recall, the lands passed to grantee at the grantor's death. Fulton *v.* Priddy, 123 Mich. 298, 82 N. W. 65, 81 Am. St. Rep. 210.

68. Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 104 Am. St. Rep. 326. See Haeg *v.* Haeg, 53 Minn. 33, 55 N. W. 1114. And *compare* Munro *v.* Bowles, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865; Everts *v.* Everts, 120 Iowa 40, 94 N. W. 496; Wright *v.* Werden, 8 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 122.

69. *California.*— McDonald *v.* Huff, 77 Cal. 279, 19 Pac. 499; Cannon *v.* Handley, 72 Cal. 133, 13 Pac. 315.

Illinois.— Stone *v.* Duvall, 77 Ill. 475.

Kentucky.— Millett *v.* Parker, 2 Metc. 608.

Minnesota.— Haeg *v.* Haeg, 53 Minn. 33, 55 N. W. 1114.

New Jersey.— Fred *v.* Fred, (Ch. 1901) 50 Atl. 776.

New York.— Stanton *v.* Miller, 65 Barb. 58 [*reversed* on other grounds in 58 N. Y. 192].

Utah.— Gammon *v.* Bunnell, 22 Utah 421, 64 Pac. 958.

70. Tharaldson *v.* Everts, 87 Minn. 168, 91 N. W. 467.

A voluntary conveyance without consideration, intended as a donation of land, placed in the hands of a custodian, may be withdrawn by the grantor at any time before delivery. Hoig *v.* Adrian College, 83 Ill. 267, where the conditions on which the deposit was made were not performed and where therefore this part of the court's opinion is *dictum*.

Deposit considered as an offer.— If the deposit is made under and upon conditions to be fulfilled by another and without original consideration, it has been said that "it is doubtless true that the person making the same [the deposit] may revoke his proposition at any time before the opposite party has complied with the conditions to be by him performed. Upon the other hand, when such opposite party has complied with the conditions and obligations under which the deposit was made, he becomes entitled to the property deposited to his benefit." See Mechanics' Nat. Bank *v.* Jones, 76 N. Y. App. Div. 534, 545, 78 N. Y. Suppl. 800, 808 [*affirmed* in 175 N. Y. 518, 67 N. E. 1085].

Repossession to correct instrument.— As to whether grantor could resume possession of

C. With Whom Made — 1. General Rule. As to who may be the depositary, the most usual expression of the general rule is that the instrument cannot be deposited with one of the parties thereto, but must be made with a stranger.[71]

2. When Instrument For Conveyance of Land Deposited. This rule, however, is subject to some modifications. Thus it has been said that an instrument for the conveyance of land may be deposited as an escrow with any person other than the grantee.[72] An instrument complete on its face for the conveyance of land cannot be deposited with the grantee as an escrow; such deposit becomes a delivery and the instrument so delivered becomes a deed,[73] which takes effect presently as the deed of the party making the delivery regardless of the oral conditions attached[74] which the party will not be bound to perform.[75] The rule is equally true, although when the instrument was delivered the parties did not intend that the grantee should acquire the legal title to the land to be conveyed and treated the instrument merely as documentary evidence of title and erroneously assumed that, notwithstanding its delivery to the grantee and its acceptance by him, the legal title would not pass until he had performed certain acts.[76]

instrument to correct it so that it will conform to his intent, it not having expressed his real intent at time of the deposit, see Meeks *v.* Stillwell, 54 Ohio St. 541, 44 N. E. 267.

71. *District of Columbia.*— Newman *v.* Baker, 10 App. Cas. 187.

Illinois.— Baum *v.* Parkhurst, 26 Ill. App. 128.

Kansas.— Carter *v.* Moulton, 51 Kan. 9, 32 Pac. 633, 37 Am. St. Rep. 259, 20 L. R. A. 309.

Maine.— Day *v.* Lacasse, 85 Me. 242, 27 Atl. 124.

Massachusetts.— Fairbanks *v.* Metcalf, 8 Mass. 230.

Nebraska.— Wier *v.* Batdorf, 24 Nebr. 83, 38 N. W. 22.

New York.— Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; James *v.* Vanderheyden, 1 Paige 385.

Tennessee.— Johnson *v.* Branch, 11 Humphr. 521.

England.— 4 Comyns Dig. 263 note [*citing* 1 Coke Inst. 36*a*; Sheppard Touchst. 58, 59].

Canada.— Haggarty *v.* O'Leary, 11 N. Brunsw. 360.

See 19 Cent. Dig. tit. "Escrows," § 6.

72. Fuller *v.* Hollis, 57 Ala. 435; Gaston *v.* Portland, 16 Oreg. 255, 19 Pac. 127.

73. *Alabama.*— Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285.

District of Columbia.— Newman *v.* Baker, 10 App. Cas. 187.

Georgia.— Mays *v.* Shields, 117 Ga. 814, 45 S. E. 65; Jordan *v.* Pollock, 14 Ga. 145.

Indiana.— Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49.

Kentucky.— Phœnix Ins. Co. *v.* Adams, 8 Ky. L. Rep. 532.

Mississippi.— McAllister *v.* Mitchner, 68 Miss. 672, 9 So. 829.

New York.— Braman *v.* Bingham, 26 N. Y. 483; Lawton *v.* Sager, 11 Barb. 349.

Oregon.— See Gaston *v.* Portland, 16 Oreg. 255, 19 Pac. 127.

United States.— Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

England.— Whyddon's Case, Cro. Eliz. 520. See Thoroughgood's Case, 9 Coke 136*b*; Bushell *v.* Pasmore, 6 Mod. 217.

Canada.— Haggerty *v.* O'Leary, 11 N. Brunsw. 360.

See 19 Cent. Dig. tit. "Escrows," § 6.

74. *Alabama.*— Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285.

Illinois.— Baker *v.* Baker, 159 Ill. 394, 42 N. E. 867; Stevenson *v.* Crapnell, 114 Ill. 19, 28 N. E. 379; McCann *v.* Atherton, 106 Ill. 31.

Indiana.— Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49.

Maine.— Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511.

Massachusetts.— Fairbanks *v.* Metcalf, 8 Mass. 230.

Michigan.— Dawson *v.* Hall, 2 Mich. 390.

New York.— Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Arnold *v.* Patrick, 6 Paige 310.

Virginia.— See Miller *v.* Fletcher, 27 Gratt. 403, 21 Am. Rep. 356.

See 19 Cent. Dig. tit. "Escrows," § 6.

A deed actually delivered by an agent to one for whom it is made is no longer an escrow, although placed in the hands of such agent under an agreement that it should be considered an escrow. *In re* Simonton, 4 Watts (Pa.) 180.

Where a mortgage, perfect on its face, and bearing no evidence that the mortgagor's wife is to join in it, has been delivered by the mortgagor to the mortgagee, parol evidence is not admissible to show that it was delivered as an escrow, to become operative only on condition that the mortgagor's wife should join in it, since a deed can never be an escrow if delivered to the grantee himself. East Texas F. Ins. Co. *v.* Clarke, 1 Tex. Civ. App. 238, 21 S. W. 277. See also Lapowski *v.* Smith, 1 Tex. Civ. App. 391, 20 S. W. 957.

75. Sheppard Touchst. 58, 59. See also Fairbanks *v.* Metcalf, 8 Mass. 230; Thoroughgood's Case, 9 Coke 136*b*; 4 Comyns Dig. 263 note.

76. "This misconception of the legal effect of the transaction could not, however, alter the fact that there was a delivery of the

3. With Party of Intended Bond or Note — a. Obligee or Payee. An instrument complete on its face and intended to take effect eventually as a bond or as a note cannot be an escrow when deposited with the obligee [77] or with one of several obligees,[78] or with the payee;[79] for such deposit operates immediately as a final

deed, and an acceptance, by which the defendant acquired the legal title to the land, and so effectually that he could only divest himself of it by a reconveyance." Darling *v.* Butler, 45 Fed. 332, 334, 10 L. R. A. 469.

Delivery to grantee works an estoppel. Pym *v.* Campbell, 6 E. & B. 370, 374, 2 Jur. N. S. 641, 25 L. J. Q. B. 277, 88 E. C. L. 370. One who executes a deed and intrusts it as an escrow to the grantee is estoppel from denying delivery as against a *bona fide* mortgagee. Resor *v.* Ohio, etc., R. Co., 17 Ohio St. 139.

To admit parol proof that the deed was delivered with the understanding that it was not to operate as a deed except upon certain conditions would be a manifest infringement of the rule which forbids the admission of oral declarations of the parties made contemporaneously with or antecedent to the execution of a written instrument for the purpose of varying or contradicting its terms. Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285. See also Duncan *v.* Pope, 47 Ga. 445; Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511; and cases *supra*, note 58. *Contra*, see Breeden *v.* Grigg, 8 Baxt. (Tenn.) 163.

77. Bonds.— *Alabama.*— Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147.

Arkansas.— Scott *v.* State Bank, 9 Ark. 36; Pope *v.* Latham, 1 Ark. 66.

Indiana.— State *v.* Chrisman, 2 Ind. 126.

Missouri.— See State *v.* Potter, 63 Mo. 212, 21 Am. Rep. 440, where the court did not consider the question whether the instrument was an escrow or not, but decided that the condition that another name should be affixed to the instrument was not a defense to an action against a surety on the instrument.

North Carolina.— Cross *v.* Long, 51 N. C. 153; Blume *v.* Bowman, 24 N. C. 338.

Rhode Island.— Easton *v.* Driscoll, 18 R. I. 318, 27 Atl. 445.

South Carolina.— See Hagood *v.* Harley, 8 Rich. 325.

Texas.— Brown *v.* State, 18 Tex. App. 326, a bond delivered to sheriff who was obligee is not an escrow.

Virginia.— Miller *v.* Fletcher, 27 Gratt. 403. 21 Am. Rep. 356.

West Virginia.— See Newlin *v.* Beard, 6 W. Va. 110.

England.— 4 Comyns Dig. 264 note [*citing* Blunden *v.* Wood, Cro. Jac. 85].

See 19 Cent. Dig. tit. "Escrows," § 6.

But see Jordan *v.* Jordan, 10 Lea (Tenn.) 124, 128, 43 Am. Rep. 294 [*citing* Breeden *v.* Grigg, 8 Baxt. (Tenn.) 163; Majors *v.* McNeilly, 7 Heisk. (Tenn.) 294, where the obligee was a clerk of court], where the court said that a deposit with the payee or obligee himself had previously been upheld.

78. A delivery to one obligee is a delivery to all. Moss *v.* Riddle, 5 Cranch (U. S.) 351, 3 L. ed. 123.

79. Notes.—*Arkansas.*—Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; Inglish *v.* Breneman, 5 Ark. 377, 41 Am. Dec. 96. See Scott *v.* State Bank, 9 Ark. 36.

Connecticut.—Badcock *v.* Steadman, 1 Root 87.

Indiana.—Roche *v.* Roanoke Classical Seminary, 56 Ind. 198.

Kentucky.— Murphy *v.* Hubble, 2 Duv. 247; Hubble *v.* Murphy, 1 Duv. 278; Wood *v.* Kendall, 7 J. J. Marsh. 212.

Missouri.— Jones *v.* Shaw, 67 Mo. 667; Henshaw *v.* Dutton, 59 Mo. 139; Massmann *v.* Holscher, 49 Mo. 87.

See 19 Cent. Dig. tit. "Escrows," § 6.

Contra.— Westman *v.* Krumweide, 30 Minn. 313, 15 N. W. 255; Alexander *v.* Wilkes, 11 Lea (Tenn.) 221 [*overruling* Johnson *v.* Branch, 11 Humphr. (Tenn.) 521]. See also Breeden *v.* Griggs, 8 Baxt. (Tenn.) 163.

A negotiable note under seal cannot be delivered to the obligee as an escrow. Neely *v.* Lewis, 10 Ill. 31 [*citing* Moss *v.* Riddle, 5 Cranch (U. S.) 351, 3 L. ed. 123]. As to whether a note under seal is negotiable see 7 Cyc. 614–616.

Check in hands of payee.— Defendant owed M about sixty dollars by account, and plaintiff was a creditor of M by note for about the same amount, and M having stopped payment, defendant handed his check on a bank to plaintiff for forty-five dollars, payable ahead, and received from plaintiff the note against M, indorsed without recourse, under an agreement that if defendant could procure M, without suit, to set off the account against the note, plaintiff was to present the check for payment and discharge defendant from an account for thirteen dollars due from him to plaintiff; otherwise, to return the check and receive back the note. M refused to make the set-off, whereupon defendant demanded his check and tendered the note to plaintiff, and upon plaintiff's refusal to comply with his agreement, stopped the payment of the check. In an action on the check it was held that these facts were a good defense to the action; the proof showing that the check had been delivered to plaintiff, not absolutely, but in the nature of an escrow. Sweet *v.* Stevens, 7 R. I. 375. It is to be noticed that in Westminster Bank *v.* Wheaton, 4 R. I. 30, it was decided that a check and a bill of exchange were the same in effect except that the former had no days of grace.

An instrument delivered as a memorandum. —An instrument not under seal may be delivered to the party as a memorandum to whom on its face it is made payable, or who by its terms is entitled to some interest or benefit under it, on a condition, the performance of which is necessary to perfect the title

delivery and as an avoidance of the conditions.[80] The same objections[81] are good in such a case as have been stated to be fatal to the operation of the oral conditions in the case of instruments intended as conveyances of land.[82]

b. Coöbligor or Joint Maker. The general rule already given[83] requiring the depositary to be a stranger has been qualified in a number of jurisdictions to the extent of allowing a coöbligor of a bond to be the depositary,[84] but even this is denied in a few states.[85]

4. With Agent of Grantee or Obligee. The ancient and more general rule is that the deposit of an instrument intended as an escrow with the agent of the grantee or obligee is equivalent to a deposit with his principal.[86] But there are

of the holder to enforce the contract. Seymour *v.* Cowing, 4 Abb. Dec. (N. Y.) 200, 1 Keyes (N. Y.) 532, 535 [*citing* Miller *v.* Gambie, 4 Barb. (N. Y.) 146]. The instruments in this case were never intended as escrows and could not be so considered in any case, for they were not intended to take effect upon performance of any condition. See *supra*, II, B, 2. The decision rested on the fact that there was no consideration for notes.

80. Johnson *v.* Branch, 11 Humphr. (Tenn.) 521.

81. The delivery to the obligee of the bond is absolute and cannot be shown by parol to have been the deposit of a mere escrow. Cocks *v.* Barker, 49 N. Y. 107. See also Badcock *v.* Steadman, 1 Root (Conn.) 87.

82. For a parol condition cannot be set up to control a written security note executed and delivered to the party himself. Badcock *v.* Steadman, 1 Root (Conn.) 87. See *supra*, III, C, 2.

A replevin bond on a distress for rent could not be delivered to the sheriff as an escrow, since he is a party. Herdman *v.* Bratten, 2 Harr. (Del.) 396.

The deposit of a bond with a clerk of court, who is authorized to take it, is not necessarily a delivery to the obligee and consequently may be deposited as an escrow merely. Whitaker *v.* Crutcher, 5 Bush (Ky.) 621; Carswell *v.* Renick, 7 J. J. Marsh. (Ky.) 281. See also Majors *v.* McNeilly, 7 Heisk. (Tenn.) 294, to the same effect, where note was to clerk and master.

When a bill of sale is delivered to the purchaser himself, neither party will be heard to assert that it was deposited as an escrow. Thomason *v.* Dill, 30 Ala. 444.

A contract cannot be deposited as an escrow with the obligee himself, such contract to take effect upon a condition not appearing in the contract. Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 [*affirming* 68 Ill. App. 592].

Presumption when instrument in possession of person intended.— Where a receipt deposited as an escrow is found in the possession of the party for whom it was intended, it is presumed to have been properly delivered. Clements *v.* Hood, 57 Ala. 459.

83. See *supra*, III, C, 1.

84. Hoboken City Bank *v.* Phelps, 34 Conn. 92.

A bond may be deposited with the principal obligor as an escrow by a surety. Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327; Pawling *v.* U. S., 4 Cranch (U. S.) 219, 2 L. ed. 601; U. S. *v.* Hammond, 26 Fed. Cas. No. 15,292, 4 Biss. 283. See also Wright *v.* Lang, 66 Ala. 389.

An executor's bond may be delivered conditionally to a coöbligor even where infants and creditors are concerned. Bibb *v.* Reid, 3 Ala. 88.

With agent of coöbligor.— If a party in executing a bond expressly stipulates that it shall not be delivered up until twelve names are obtained to it and the agent of the other party so promises, the bond is in the hands of the agent but in the nature of an escrow. Fertig *v.* Bucher, 3 Pa. St. 308.

85. Millett *v.* Parker, 2 Metc. (Ky.) 608; Graves *v.* Tucker, 10 Sm. & M. (Miss.) 9; Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1. And the deposit with the principal has been held a delivery in Deardorff *v.* Foresman, 24 Ind. 481 [*overruling* in part Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430, and *followed* in Webb *v.* Baird, 27 Ind. 368, 89 Am. Dec. 507, although there were other elements in the case which led to a decision]. But *compare* Jordan *v.* Jordan, 10 Lea (Tenn.) 124, 128, 43 Am. Rep. 294, where it is said: "But the rule [against depositary being a coöbligor] is manifestly too technical for the attainment of the ends of justice, and this court has held, and there are decisions of other courts to the same effect, that a negotiable instrument may be delivered conditionally to a coöbligor (Perry *v.* Patterson, 5 Humphr. (Tenn.) 133, 42 Am. Dec. 424), or to the payee or obligee himself: Breeden *v.* Grigg, 8 Baxt. (Tenn.) 163; Majors *v.* McNeilly, 7 Heisk. (Tenn.) 294."

The delivery of a negotiable promissory note into the hands of one of several joint makers by the others on any agreement or understanding between themselves with reference to its delivery does not impart to it the legal qualities of an escrow. Carter *v.* Moulton, 51 Kan. 9, 32 Pac. 633, 37 Am. St. Rep. 259, 20 L. R. A. 309, where the note was perfect on its face and the payee had no notice of the condition.

86. *Alabama.*— Parrish *v.* Steadham, 102 Ala. 615, 15 So. 354.

Georgia.— Duncan *v.* Pope, 47 Ga. 445.

Indiana.— Clamn *v.* Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; Stewart *v.* Anderson, 59 Ind. 375; Madison, etc., Plank-Road Co. *v.* Stevens, 10 Ind. 1.

a number of cases, for the most part recent, which refuse to hold that the term "stranger" or "third person" as used in defining the depositary of an escrow necessarily precludes the agent of the grantee or obligee from acting as custodian.[87] If the agent is such a one as that his acting as custodian of the instrument is not antagonistic to his principal's interests and the paper is put in his hand, not as a delivery, but as a deposit, this is no reason why he, as well as a stranger, should not be permitted to act for both parties.[88] The majority of the cases taking this view are cases where the depositary was the agent of a corporation; in fact it has been directly held that there is no such personal identity between a corporation and its officers as will preclude a deposit with them of an escrow for the conveyance of land to the corporation.[89] On the other hand it has been held that since a corporation can act only through its officers and agents a deposit with such a person is an absolute delivery.[90]

Kentucky.— Dils *v.* Pikeville Bank, 109 Ky. 757, 60 S. W. 715, 22 Ky. L. Rep. 1451; Wight *v.* Shelby R. Co., 16 B. Mon. 4, 63 Am. Dec. 522.

Maine.— Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511.

New Jersey.— New Jersey *v.* Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225.

New York.— Cocks *v.* Barker, 49 N. Y. 107; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330.

North Carolina.— Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179.

Vermont.— Pratt *v.* Holman, 16 Vt. 530.

A note cannot be deposited as an escrow with one acting at the time as attorney for the payee, and such deposit is delivery to the payee. Murray *v.* Kimball, 10 Ind. App. 141, 37 N. E. 736.

A delivery of a guardian's bond to a county surrogate, he acting as the deputy of the ordinary, the obligee, cannot be merely in escrow. New Jersey *v.* Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225.

Agent of grantor as depositary.— An instrument for the conveyance of land cannot be deposited as an escrow with the agent of the grantor. Day *v.* Lacasse, 85 Me. 242, 27 Atl. 124. See also Peck *v.* Rees, 7 Utah 467, 27 Pac. 581, 13 L. R. A. 714. *Contra*, see McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816. See *supra*, III, B.

87. Cincinnati, etc., R. Co. *v.* Iliff, 13 Ohio St. 235, 254, where it was said that the term might mean "a person so free from any personal or legal identity with the parties to the instrument, as to leave him free to discharge his duty, as a depositary, to both parties, without involving a breach of duty to either."

88. Price *v.* Home Ins. Co., 54 Mo. App. 119, 123 [*citing* Bishop Contr. § 356], where the application was left with an agent of the company. The grantor may make the agent of the grantee his depositary to hold an instrument in escrow pending the performance of specified conditions. Merchants' Ins. Co. *v.* Nowlin, (Tex. Civ. App. 1900) 56 S. W. 198 [*citing* 2 Jones Real Prop. art. 1304].

Deposit of a character to negative delivery.— In order that an instrument signed, sealed, and deposited may operate as an escrow and not as a deed, it is sufficient if the deposit be of such a character as to negative its being delivered to the grantee or person who is to have the benefit of it. It may so operate, although placed in the hands of the grantee's solicitor, if it be proved that he was intended to hold it as an incomplete instrument. Watkins *v.* Nash, L. R. 20 Eq. 262, 44 L. J. Ch. 505, 23 Wkly. Rep. 647; Bishop Contr. § 356, criticizing the older cases. See also Dixon *v.* Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193, to exactly the same effect [*qualifying* Duncan *v.* Pope, 47 Ga. 445].

The relation of a son as agent of his father does not prevent him from holding a release of alimony in favor of his father as an escrow for his mother. Walter *v.* Walter, 9 Ohio Dec. (Reprint) 351, 12 Cinc. L. Bul. 212.

Written condition accompanying deposit.— A deed may be delivered to the attorney of the grantee in escrow, the delivery being accompanied by a writing explaining the condition on which delivery to the grantee depends. Ashford *v.* Prewitt, 102 Ala. 264, 14 So. 663, 48 Am. St. Rep. 37.

89. Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359. See Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985. See 10 Cyc. 411–420. And *compare* Minah Consol. Min. Co. *v.* Briscoe, 47 Fed. 276.

Deposit with director of corporation not necessarily delivery to corporation. Ottawa, etc., R. Co. *v.* Hall, 1 Ill. App. 612.

One of a committee appointed by the inhabitants of a town to obtain subscriptions to the stock of a railroad company, which subscriptions were to be delivered to the company only upon certain parol conditions, is not an agent of the company in such a sense as to prevent his receiving the subscription list as an escrow, although he is at the time acting as a member of said committee. Beloit, etc., R. Co. *v.* Palmer, 19 Wis. 574. See Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. 318. And *compare* Rhodes *v.* Gardiner School Dist. No. 14, 30 Me. 110.

90. Price *v.* Pittsburg, etc., R. Co., 34 Ill. 13. The defense that a subscription of stock in a railway company was left with one of the commissioners as an escrow is wholly invalid. If such a subscription could under any circumstances be made an escrow, it must be left in the hands of a third person. Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am.

5. Rule Limited — a. To Instruments Complete on Face.[91] The rule that an instrument for the conveyance of land cannot be deposited with the grantee as an escrow, and that such attempted deposit becomes an absolute delivery and the conditions nugatory, has been held in some jurisdictions to be applicable only where such instruments are upon their faces complete contracts, requiring nothing but delivery to make them perfect binding contracts according to the intention of the parties.[92]

b. Not Applicable to Mere Tradition In Transitu. The mere tradition of the instrument to the grantee does not operate as a delivery absolute where it is agreed that the grantee is to deposit the instrument as an escrow with a third person certain and it is in due course actually so deposited.[93]

IV. Authority and Liabilities of Depositary.

Until the escrow contract has been made, the depositary has no rights or authority enforceable at law.[94] When this has been made and the instrument deposited, the depositary is not the agent of the grantor, obligor, or promisor alone, but he is the agent of both parties.[95] When the condition upon the hap-

Dec. 522. See also Madison, etc., Plank-Road Co. *v.* Stevens, 10 Ind. 1.

Deposit of note with officer of bank.— Accommodation indorsers of a note made payable to themselves cannot escape liability to plaintiff bank on the ground that the note was deposited by them with the vice-president and general manager of the bank upon the faith of his agreement that the note was not to be accepted or discounted by him for the bank until it had been indorsed by another person, as the bank is to be regarded as the payee, and a note cannot be delivered to the payee as an escrow; but defendant may by counter-claim recover damages for breach of the agreement. Dils *v.* Pikeville Bank, 109 Ky. 757, 60 S. W. 715, 22 Ky. L. Rep. 1451.

91. Requisites of the instruments see *supra*, II, B, 1, a.

92. Wendlinger *v.* Smith, 75 Va. 309, 40 Am. Rep. 727; Hicks *v.* Goode, 12 Leigh (Va.) 479, 37 Am. Dec. 677. Thus in Wendlinger *v.* Smith, 75 Va. 309, 317, 40 Am. Rep. 727, a writing appended to the covenant of the instrument which was in the possession of the grantee showed clearly on its face an intention that all the devisees of one Vial should by signing the writing declare their approval and ratification of the covenant. "It is true, they are not mentioned by their names in the body of the writing; but, with as much certainty as if particularly named, they are described collectively as 'the undersigned devisees under the will of the late Seymour P. Vial,' and corresponding scrolls were subjoined to which their signatures were to be prefixed. According to the authorities which have been cited, it was properly competent for Wendlinger to prove, as he offered to do, by parol evidence, that he delivered this covenant to Goddin to take effect only on condition that all of the devisees of Vial should give their written assent to the covenant, as the writing shows was contemplated. See also remarks of Daniel, J., in Smith *v.* Spiller, 10 Gratt. (Va.) 318, 324." Per Burks, J., in Wendlinger *v.* Smith, 75 Va. 309, 318, 40 Am. Rep. 727 [*distinguishing* Nash *v.* Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780]. See also Shelby *v.* Tardy, 84 Ala. 327, 4 So. 276, holding that an instrument for the conveyance of land reciting in its body that it is from the grantor and his wife, but lacking the wife's signature and acknowledgment, since it is imperfect on its face, is not within the rule that an escrow cannot be delivered to a grantee or his agent, and deposited with the grantee's agent, to be by him delivered to the grantee on payment of the purchase-money, will not pass the husband's title.

93. *Alabama.*— Cherry *v.* Herring, 83 Ala. 458, 3 So. 667.

Connecticut.— Wolcott *v.* Coleman, 1 Conn. 375.

Massachusetts.— In Fairbanks *v.* Metcalf, 8 Mass. 230, the leading case, it was said that the instrument, while in the hands of the grantee, should be considered as *in transitu* to the possession of the third party, and the deposit with the latter is effectual to operate as an escrow.

New York.— Gilbert *v.* North American F. Ins. Co., 23 Wend. 43, 35 Am. Dec. 543 [*questioned* in Braman *v.* Bingham, 26 N. Y. 483].

Tennessee.— Brown *v.* Reynolds, 5 Sneed 639, where the instrument was a bond.

Agreement subsequent to delivery.—Where an instrument, signed and sealed, is delivered by the grantor to the grantee, it is a deed, not an escrow, although both parties afterward have it placed in the hands of a third person. Gibson *v.* Partee, 19 N. C. 530.

94. Farmers' L. & T. Co. *v.* Alcorn County, 93 Fed. 579, 35 C. C. A. 460.

95. *California.*— McDonald *v.* Huff, 77 Cal. 279, 19 Pac. 499 [*citing* Shirley *v.* Ayres, 14 Ohio 307, 45 Am. Dec. 546]; Cannon *v.* Handley, 72 Cal. 133, 13 Pac. 315.

Georgia.— Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235.

Kansas.— Davis *v.* Clark, 58 Kan. 100, 48 Pac. 563.

pening of which the instrument is to take effect is performed, the depositary becomes the mere agent or trustee of the grantee [96] and the depositary's possession is the possession of the grantee.[97] The depositary must have the power to judge whether the condition has been performed, in order to act,[98] unless he is relieved of this duty by the stipulations of the parties.[99] Where he has such power and exercises it, the non-performance of the condition cannot be asserted against *bona fide* purchasers.[1] A depositary who violates the terms of the escrow contract is liable in damages for the loss suffered thereby.[2]

V. PERFORMANCE OF CONDITION OR HAPPENING OF EVENT.

A. Necessity of. Where an instrument is deposited as an escrow, it cannot be operative until the conditions or the event stipulated upon are performed or has happened.[3] This rule was laid down by Perkins nearly four centuries

Kentucky.— Lewis *v.* Prather, 21 S. W. 538, 14 Ky. L. Rep. 749.

New Jersey.— Fred *v.* Fred, (Ch. 1901) 50 Atl. 776.

New York.— Stanton *v.* Miller, 1 Thomps. & C. 23 [*reversed* in 58 N. Y. 192]. See Mechanics' Nat. Bank *v.* Jones, 76 N. Y. App. Div. 534, 78 N. Y. Suppl. 800.

Utah.— Gammon *v.* Bunnell, 22 Utah 421, 64 Pac. 958.

Vermont.—Adams *v.* Smilie, 50 Vt. 1.

Virginia.— Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985.

A third person who according to the grantor's contract has tendered a deed which the grantee has refused to accept thenceforth holds the same as the depositary of both parties, according to their respective rights. Adams *v.* Smilie, 50 Vt. 1.

The depositary has been considered the special agent of the grantor in some cases see *infra*, V, E, 3.

96. White Star Line Steam-Boat Co. *v.* Moragne, 91 Ala. 610, 8 So. 867.

97. Cannon *v.* Handley, 72 Cal. 133, 13 Pac. 315; Shirley *v.* Ayres, 14 Ohio 307, 45 Am. Dec. 546.

The depositary is as much bound to deliver the instrument on performance of the condition as to withhold it until performance. Stanton *v.* Miller, 1 Thomps. & C. (N. Y.) 23 [*reversed* in 58 N. Y. 192]; Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776. See *infra*, VII.

98. Humphrey *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985. See also Henderson *v.* Johns, 13 Colo. 280, 22 Pac. 461; Burlington, etc., R. Co. *v.* Palmer, 42 Iowa 222.

99. Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776.

Consent of parties after performance.— Where a judgment debtor deposited certain notes with a third person, the receipt of the depositary providing for their delivery to the judgment creditor on the presentation of a written consent signed by the respective attorneys, such consent must be given by the attorneys whenever the condition of the deposit is fulfilled, and a failure or refusal to give it cannot defeat the delivery. Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776.

The depositary of a voluntary instrument for the conveyance of land delivered in escrow is not the judge of whether the conditions have been performed and he has no right to deliver the same until the donor is satisfied. Hoig *v.* Adrian College, 83 Ill. 267. In this case the court decided that the condition had not been performed. As to withdrawal after deposit see *supra*, III, B.

1. Provident L. & T. Co. *v.* Mercer County, 170 U. S. 593, 18 S. Ct. 788, 42 L. ed. 1156 [*affirming* 72 Fed. 623, 19 C. C. A. 44], where a trustee holding negotiable bonds of a county in escrow was vested with discretion to determine when a condition precedent to their delivery had been performed.

Necessity of performance of condition see *infra*, V, A, E.

2. Nathan *v.* Rehkopf, 57 Ill. App. 212.

Wrongful delivery.— Riggs *v.* Trees, 120 Ind. 402, 22 N. E. 254, 5 L. R. A. 696. See *infra*, V, E.

Failure to deliver.— A depositary of notes, to be delivered to the payee when the property for which they are given is freed from encumbrance, is not liable in damages for their non-delivery, if forbidden by the maker to surrender them, although the latter may be. Lafarge *v.* Morgan, 11 Mart. (La.) 462. See *infra*, VI, A, 2.

Negligence.— Dupeux *v.* His Creditors, 7 Rob. (La.) 243.

Ratification of depositary's wrongful delivery.— Eichlor *v.* Holroyd, 15 Ill. App. 657.

3. *Alabama.*— Fuller *v.* Hollis, 57 Ala. 435.

Arkansas.— Ober *v.* Pendleton, 30 Ark. 61; Chandler *v.* Chandler, 21 Ark. 95.

California.— McLaughlin *v.* Clausen, 85 Cal. 322, 24 Pac. 636 (completion of street railway); Dyson *v.* Bradshaw, 23 Cal. 528; Beem *v.* McKusick, 10 Cal. 538.

Colorado.— Wolcott *v.* Johns, 7 Colo. App. 360, 44 Pac. 675.

Connecticut.— White *v.* Bailey, 14 Conn. 271; Coe *v.* Turner, 5 Conn. 86.

Illinois.— Skinner *v.* Baker, 79 Ill. 496; Stone *v.* Duvall, 77 Ill. 475; Furness *v.* Williams, 11 Ill. 229. And *compare* Ottawa, etc., R. Co. *v.* Hall, 1 Ill. App. 612.

Indiana.— Peter *v.* Wright, 6 Ind. 183.

Iowa.— Jackson *v.* Rowley, 88 Iowa 184, 55 N. W. 339; McGregor *v.* McGregor, 21 Iowa 441.

ago.[4] And generally the courts hold the grantee or obligee to a very strict compliance with the conditions imposed.[5] That the grantee has gone into possession of the land to be conveyed does not alter the rule.[6] A part performance has no effect on the status of the instrument. An entire performance of the condition is necessary.[7] The depositor cannot require more of him, however.[8] Where the obligee may fairly be said to have performed his part, although not all the conditions have been complied with, the delivery will be sometimes upheld if no real injury is caused thereby.[9] If the condition is not complied with through the

Kentucky.— Arnold *v.* Covington, etc., Bridge Co., 1 Duv. 372.

Maine.— Jackson *v.* Sheldon, 22 Me. 569.

Maryland.— See Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76.

Massachusetts — Daggett *v.* Daggett, 143 Mass. 516, 10 N. E. 311; Fairbanks *v.* Metcalf, 8 Mass. 230.

Missouri.— St. Louis Plattdeutscher Club *v.* Tegeler, 17 Mo. App. 569.

Montana.— Helm *v.* Kleinschmidt, 12 Mont. 586, 31 Pac. 542; Chadwick *v.* Tatem, 9 Mont. 354, 23 Pac. 729.

New York.— Green *v.* Putnam, 1 Barb. 500; Jackson *v.* Catlin, 2 Johns. 248, 3 Am. Dec. 415. See Jackson *v.* Rowland, 6 Wend. 666, 22 Am. Dec. 557. See also Pendleton *v.* Hughes, 65 Barb. 136 [*affirmed* in 53 N. Y. 626].

Oregon.— Gaston *v.* Portland, 16 Oreg. 255, 19 Pac. 127.

Pennsylvania.— Fertig *v.* Bucher, 3 Pa. St. 308.

Vermont.— Stiles *v.* Brown, 16 Vt. 563 (holding that an escrow is not admissible in evidence if the conditions have not been performed); Jarvis *v.* Rogers, 3 Vt. 336.

Virginia.— Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985; Hicks *v.* Goode, 12 Leigh 479, 37 Am. Dec. 677.

Wisconsin.— Beloit, etc., R. Co. *v.* Palmer, 19 Wis. 574.

United States.— Calhoun County *v.* American Emigrant Co., 93 U. S. 124, 23 L. ed. 826; Clarke *v.* Eureka County Bank, 123 Fed. 922; Carr *v.* Hoxie, 5 Fed. Cas. No. 2,438, 5 Mason 60.

England.— See Bell *v.* Ingestre, 12 Q. B. 317, 64 E. C. L. 316 [*following* Adams *v.* Jones, 12 A. & E. 455, 9 L. J. Q. B. 407, 4 P. & D. 174, 40 E. C. L. 229; Marston *v.* Allen, 1 Dowl. P. C. N. S. 442, 11 L. J. Exch. 122, 8 M. & W. 494]; 4 Comyns Dig. 263 note, 264.

Canada.— Confederation L. Assoc. *v.* O'Donnell, 13 Can. Supreme Ct. 218.

See 19 Cent. Dig. tit. "Escrows," § 11.

4. Perkins Conv. § 138, p. 28 [*quoted* in Stanley *v.* Valentine, 79 Ill. 544, 547].

5. *Iowa.*— Sioux City, etc., Town Lot, etc., Co. *v.* Wilson, 50 Iowa 422.

Nebraska.— Cotton *v.* Gregory, 10 Nebr. 125, 4 N. W. 939.

New York.— Hinman *v.* Booth, 21 Wend. 267.

Texas.— Frichott *v.* Nowlin, (Civ. App. 1899) 50 S. W. 164.

Vermont.— Jarvis *v.* Rogers, 3 Vt. 336.

Virginia.— Trout *v.* Warwick, 77 Va. 731.

See 19 Cent. Dig. tit. "Escrows," § 11 *et seq.*

6. "This transaction must not be confounded with a contract for the sale of real estate by virtue of which the vendee acquires an equitable title. In such a case, if the contract is not in writing, the delivery of possession under it takes it out of the statute of frauds, and equity will decree its specific performance, notwithstanding it was by parol." Wolcott *v.* Johns, 7 Colo. App. 360, 44 Pac. 675, 681.

Possession by grantee raising an estoppel against the grantor and in favor of a *bona fide* purchaser see *infra*, V, E, 3, b.

7. Taylor *v.* Thomas, 13 Kan. 217.

Where the heir of the grantor settles with the grantee and delivers the instrument to him, there is a final and complete delivery of the deed as to such heir. Keirsted *v.* Avery, 4 Paige (N. Y.) 1.

8. By the terms of a contract of sale of real estate, the consideration of the instrument deposited was a stock of goods and a transfer of the lease of the store in which they were. An invoice of the goods had been made and the amount and value thereof fixed to the satisfaction of both parties, and upon the second day thereafter the vendor duly tendered the key of the store and an assignment of the lease, and upon the refusal of the latter to accept the same deposited them with the holder of the deed. There being no change in the amount or condition of the goods and no objection being made to the form or place of the tender, it was held that the seller was entitled to a delivery of the deed and that the purchaser was not entitled, under the evidence in the case, to exact as a further condition that the seller should allow him to make a reëxamination of the goods and a comparison thereof with the invoice previously made, in order to verify the accuracy of the same before final acceptance. Knopf *v.* Hansen, 37 Minn. 215, 33 N. W. 781.

9. Elston *v.* Chamberlain, 41 Kan. 354, 21 Pac. 259 (consideration instrument not recorded); Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246 (consideration instrument not properly executed through fault of others).

Compliance after delivery.— Where the instrument is deposited by the grantor named therein with a third person, to be held as an escrow until the grantee shall have paid the specified debt and the instrument is delivered before the debt is fully paid, the delivery will be operated if the debt is sub-

depositor's negligence he ought not to be heard to complain.[10] If his act prevents performance by the grantee or obligee, a delivery subsequent to the actual fulfilment of the conditions will be upheld.[11]

B. By Whom Performed. Although the old idea of an escrow, as well as that found in some cases quite modern, seemed to be that the condition was to be performed by the grantee or obligee, where performance by any one was required,[12] it is not necessary that the condition should be performed by him;[13] it may be made by either party, by the grantor or obligor, as well as by the grantee or obligee.[14]

C. Time of Performance. If no time is stipulated for performance, the condition must be performed in a reasonable time.[15] If the time is set, a failure to perform within the agreed period will not preclude, after a performance, the grantee's or obligee's right to a delivery of the instrument where time was not an element of the contract,[16] or where the conduct of the grantor or obligor has acted as a waiver of the time element of the condition.[17]

D. In Whom Title Until Performance, Etc. Until the performance of the condition the title to the land to be conveyed remains in the grantor.[18] If the

sequently paid in full and the deed will be valid at least from the time the debt is satisfied. Connell *v.* Connell, 32 W. Va. 319, 9 S. E. 252.

10. Hodo *v.* Leeman, 27 Tex. Civ. App. 204, 65 S. W. 381.

11. Beaumont *v.* Kline, 3 Phila. (Pa.) 44.

12. See *supra*, V, A, and the following cases:

Florida.— Loubat *v.* Kipp, 9 Fla. 60.

Georgia.— Duncan *v.* Pope, 47 Ga. 445.

Illinois.— Stone *v.* Duvall, 77 Ill. 475 [*following* Jackson *v.* Catlin, 2 Johns. (N. Y.) 248; Sheppard Touchst. 58].

New Jersey.— White *v.* Williams, 3 N. J. Eq. 376, 383, where it was held that where a deed is executed and left with a third person until the grantor shall have an opportunity to acknowledge it, then to be delivered to the grantee, it is not an escrow. Vroom, Ch., said: "In all cases the condition is to be performed by the grantee, and not by the grantor. The grantor has done all that was needful for him, to give complete effect to the instrument; he cannot by any subsequent act or omission or refusal of his, prevent his own deed from being operative. In this case, the act was to be done by the grantor, that is to say, he was to acknowledge the deed, and therefore it cannot be considered as an escrow." As to whether the chancellor in this case has confused what is a proper condition and by whom it may be performed with what the requisites of the escrow and the escrow contract are see *supra*, II, B.

Ohio.— Cook *v.* Niehaus, 8 Ohio Dec. (Reprint) 505, 8 Cinc. L. Bul. 259.

Tennessee.— Evans *v.* Gibbs, 6 Humphr. 405.

13. District of Columbia *v.* Moore, 16 Fed. Cas. No. 9,359, 1 Cranch C. C. 193.

14. Raymond *v.* Smith, 5 Conn. 555. See also Conneau *v.* Geis, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785; Price *v.* New York Home Ins. Co., 54 Mo. App. 119. In Bradbury *v.* Davenport, 120 Cal. 152, 52 Pac. 301, it was held that where a note and mortgage past due and a conveyance from the mortgagor to the mortgagee were deposited as escrows upon condition that if the note and mortgage were paid by a time fixed the custodian should deliver all the papers to the mortgagor, and satisfy the mortgage, and that if he should fail to make such payment the custodian should deliver the deed to the mortgagee in full satisfaction and payment of the mortgage indebtedness and should deliver the note to the mortgagor, it appearing that the amount of the indebtedness was in excess of the value of the property and that the arrangement was deliberate and voluntary and free from fraud, undue influence, or imposition, the transaction was valid, operative, complete, and irrevocable from the date of the deposit of the instrument. See *supra*, II, B, 3.

15. Burnap *v.* Sharpsteen, 149 Ill. 225, 36 Pac. 1008. "And no default can attach until after a demand and failure or refusal to perform." Gammon *v.* Bunnell, 22 Utah 421, 427, 64 Pac. 958 [*citing* 2 Warvelle Vend. 774].

16. Witmer Bros. Co. *v.* Weid, 108 Cal. 569, 41 Pac. 491. See also Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776.

17. Baum's Appeal, 113 Pa. St. 58, 4 Atl. 461.

For performance of condition after death of one of the parties see *infra*, VII, C.

Place of performance.— Where a note is held as an escrow pending the performance of a condition requiring the payee to deliver property sold to the maker and the place of delivery is not fixed by any agreement, an offer to deliver it at the place where it was located at the time of sale is a sufficient performance of the condition if made within a reasonable time. Pacific Nat. Bank *v.* San Francisco Bridge Co., 23 Wash. 425, 63 Pac. 207.

18. *Alabama.*— Fuller *v.* Hollis, 57 Ala. 435.

Colorado.— Wolcott *v.* Johns, 7 Colo. App. 360, 44 Pac. 675.

grantor dies before the happening of the event or the performance of the condition, the title descends to his heirs subject to the purchaser's equitable interest.[19]

E. Unauthorized Delivery Before Performance, Etc.— 1. General Rule. It follows therefore that an escrow given to the grantee or obligee by the depositary before compliance with the conditions or before the happening of the event stipulated passes no title to the grantee or gives no right to the obligee.[20]

Connecticut.— Coe *v.* Turner, 5 Conn. 86.

Indiana.— Burkam *v.* Burk, 96 Ind. 270; Koons *v.* Ferguson, 25 Ind. 388; Peter *v.* Wright, 6 Ind. 183.

Mississippi.— Harkreader *v.* Clayton, 56 Miss. 383, 31 Am. Rep. 369.

Montana.— Chadwick *v.* Tatem, 9 Mont. 354, 23 Pac. 729.

Nebraska.— Wier *v.* Batdorf, 24 Nebr. 83, 38 N. W. 22.

New York.— Green *v.* Putnam, 1 Barb. 500.

Ohio.— Cook *v.* Niehaus, 8 Ohio Dec. (Reprint) 505, 8 Cinc. L. Bul. 259.

United States.— Calhoun County *v.* American Emigrant Co., 93 U. S. 124, 23 L. ed. 826.

When event is death of grantor.— "After such delivery, [that is, deposit with the condition that instrument is to take effect upon death of grantor] he has no more connection with the title to the land than one who never owned it." Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258, holding that where the event upon which the instrument is to take effect is death, the deposit is a delivery which transfers the title to grantee subject to the life-interest of the grantor in the land. See also Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186. Under above cases the instrument is not an escrow but a deed. See *supra*, II, B, 3, c, (II).

A vendor of land, surrendering possession and depositing conveyance as an escrow to be held until payment of the price, thereby disposes of his legal title, reserving only an equity of redemption, enforceable only on the vendor's failure to pay. Whitfield *v.* Harris, 48 Miss. 710.

Usufruct remains with the grantor, at least to the extent of performing acts beneficial to the estate. Blair *v.* St. Louis, etc., R. Co., 24 Fed. 539.

So an instrument executed by a sheriff for lands purchased at a sale under a fieri facias, and delivered to the attorney of plaintiff to be delivered by him to the grantee on payment of the purchase-money, is an escrow, and, until the condition is performed, the estate continues in the execution debtor. Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415. See also Robins *v.* Bellas, 2 Watts (Pa.) 359 [*citing* Jackson *v.* Catlin, 8 Johns. (N. Y.) 520].

The grantor of an escrow has an insurable interest in the property conveyed and if the conditions remain unperformed at the time of a loss under the policy he is entitled to recover therefor. Merchants' Ins. Co. *v.* Nowlin, (Tex. Civ. App. 1900) 56 S. W. 198, opinion by James, C. J.

19. Flagg *v.* Teneick, 29 N. J. L. 25. See also Harkreader *v.* Clayton, 56 Miss. 383, 31 Am. Rep. 369.

Estate of grantee.— A grantee of land, the instrument for the conveyance of which is deposited as an escrow until he shall attain a specified age, has not an expectant estate in the lands which entitles him to mesne rents and profits under the fortieth section of the title of the statutes relative to the creation and division of estates. "There can be no valid existing limitation of an estate, under an escrow, until it has become effective by the eventual delivery." Hunter *v.* Hunter, 17 Barb. (N. Y.) 25, 84. See, however, *supra*, II, B, 3, c, (II).

Grantee a married woman.— Cook *v.* Niehaus, 8 Ohio Dec. (Reprint) 105, 8 Cinc. L. Bul. 259. See *supra*, p. 564, note 32.

Suit on an escrow by an obligee.— A bond for the payment of money on condition was placed in the hands of a third party as an escrow to be delivered to the payee when the conditions were complied with. It was held that until the bond was delivered to the payee he could not maintain an action upon it, or, ignoring the execution of the bond, on the original consideration. Carter *v.* Turner, 5 Sneed (Tenn.) 178.

20. *Alabama.*— Clements *v.* Hood, 57 Ala. 459.

Colorado.—Hamill *v.* Thompson, 3 Colo. 518.

Connecticut.— Coe *v.* Turner, 5 Conn. 86.

Georgia.— Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. 706. See Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68.

Illinois.— Burnap *v.* Sharpsteen, 149 Ill. 225, 36 N. E. 1008; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Stanley *v.* Valentine, 79 Ill. 544; Eichlor *v.* Holroyd, 15 Ill. App. 657.

Indiana.— Stringer *v.* Adams, 98 Ind. 539; Robbins *v.* Magee, 76 Ind. 381; Berry *v.* Anderson, 22 Ind. 36. See Freeland *v.* Charnley, 80 Ind. 132.

Iowa.— Daniels *v.* Gower, 54 Iowa 319, 3 N. W. 424, 6 N. W. 525 [*citing* Ayres *v.* Milroy, 53 Mo. 516, 14 Am. Rep. 465; People *v.* Bostwick, 32 N. Y. 445, and *approving* Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430].

Maine.— Rhodes *v.* Gardiner School Dist. No. 14, 30 Me. 110.

Massachusetts.— Daggett *v.* Daggett, 143 Mass. 516, 10 N. E. 311. See Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66.

Michigan.— Davis *v.* Kneale, 103 Mich. 323, 61 N. W. 508 (a deed deposited as an escrow, but delivered without authority by the depositary to the grantee, who inequitably refuses to perform condition, will be declared void); Abbott *v.* Alsdorf, 19 Mich. 157.

2. Where Condition Is Another Person to Be Obligated on Instrument. But where the condition is that another person shall become obligated on an instrument, as a bond or a note, the obligee or his assignee, when the instrument is fair on its face, must have notice of the condition or be put on his inquiry to have it operate against him.[21] Where the instrument is incomplete on its face by the omission of names appearing in the body of the instrument from among the signatures, this is sufficient notice of the condition.[22]

Minnesota.— Hoit *v.* McIntire, 50 Minn. 466, 52 N. W. 918.

Nebraska.— Matteson *v.* Smith, 61 Nebr. 761, 86 N. W. 472. See also Eggleston *v.* Pollock, 38 Nebr. 188, 56 N. W. 805; Patrick *v.* McCormick, 10 Nebr. 1, 4 N. W. 312.

New Hampshire.— See Ela *v.* Kimball, 30 N. H. 126.

New Jersey.— Black *v.* Shreve, 13 N. J. Eq. 455.

Ohio.— Ogden *v.* Ogden, 4 Ohio St. 182.

Pennsylvania.— Robins *v.* Bellas, 2 Watts 359. *Contra,* Booth *v.* Williams, 11 Phila. 266 [*following* Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478], holding that an unauthorized delivery conveys a voidable title or right.

Vermont.— Nichols *v.* Nichols, 28 Vt. 228, 67 Am. Dec. 699; Jarvis *v.* Rogers, 3 Vt. 336.

West Virginia.— White *v.* Core, 20 W. Va. 272.

Wisconsin.— Everts *v.* Agnes, 4 Wis. 343, 65 Am. Dec. 314.

United States.— Calhoun County *v.* American Emigrant Co., 93 U. S. 124, 23 L. ed. 826. See also Glover *v.* Chase, 11 Fed. 375, 3 McCrary 599.

England.— 4 Comyns Dig. 263 note. See Hooper *v.* Ramsbotton, 4 Campb. 121, 1 Marsh 414, 6 Taunt. 12, 1 E. C. L. 485.

Canada.— Reynolds *v.* Waddell, 12 U. C. Q. B. 9.

Where a purchase-price mortgage has been executed and deposited as an escrow to await completion of title in the mortgagor in fulfilment of a verbal bargain by the mortgagee to sell the land to the mortgagor, and the title to the land in the meantime passes into other hands, the delivery of the mortgage in violation of the agreement will not operate to make it a valid mortgage, binding upon the mortgagor. Powell *v.* Conant, 33 Mich. 396.

21. *Illinois.*— Smith *v.* Peoria County, 59 Ill. 412.

Indiana.— Webb *v.* Baird, 27 Ind. 368, 89 Am. Dec. 507 [*following* Deardorff *v.* Foresman, 24 Ind. 481].

Kentucky.— Hall *v.* Smith, 14 Bush 604.

Missouri.— State *v.* Baker, 64 Mo. 167, 27 Am. Rep. 214; State *v.* Potter, 63 Mo. 212, 21 Am. Dec. 440. See also Ayres *v.* Milroy, 53 Mo. 516, 14 Am. Rep. 465.

North Carolina.— Fitts *v.* Green, 14 N. C. 291.

Tennessee.— Jordan *v.* Jordan, 10 Lea 124, 43 Am. Rep. 294 [*following* Amis *v.* Marks, 3 Lea 568; Buford *v.* Cox, 3 Lea 518, both cases of public official bonds, and *criticizing dictum* in Perry *v.* Patterson, 5 Humphr. 133, 42 Am. Dec. 424].

Virginia.— See Miller *v.* Fletcher, 27 Gratt. 403, 21 Am. Rep. 356.

Contra.— Black *v.* Shreve, 13 N. J. Eq. 455; Perry *v.* Patterson, 5 Humphr. (Tenn.) 133, 42 Am. Dec. 424, *dictum.*

Filling blanks.— Where a surety signs a bond to the government and delivers it to his principal on an agreement as to the amount of the penalty, and as to the other sureties who had not yet signed, the condition will not operate as an escrow, so as to protect him, where it is filled out and signed by other sureties in violation of the agreement, unless the condition was expressed on its face, so that it could not be delivered by his principal to the obligee without notice thereof. Butler *v.* U. S., 21 Wall. (U. S.) 272, 22 L. ed. 614.

22. Hall *v.* Smith, 14 Bush (Ky.) 604; St. Louis Plattdeutscher Club *v.* Tegeler, 17 Mo. App. 569; Fletcher *v.* Austin, 11 Vt. 447, 34 Am. Dec. 698 [*citing* U. S. *v.* Leffler, 11 Pet. (U. S.) 86, 9 L. ed. 642; Pawling *v.* U. S., 4 Cranch (U. S.) 219, 2 L. ed. 601; Johnson *v.* Baker, 4 B. & Ald. 440, 23 Rev. Rep. 338, 6 E. C. L. 551]; Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749. *Contra,* Towns *v.* Kellett, 11 Ga. 286; Blume *v.* Bowman, 24 N. C. 338.

Injunction bond.— It is a good defense to an action on an injunction bond, that defendant signed as surety only, intrusting it to the principal obligor for delivery, but with authority to deliver it only on condition that other persons injured joined as sureties in its execution, and that the principal delivered it without authority, such other persons not having joined in the execution of the bond. Guild *v.* Thomas, 54 Ala. 414, 25 Am. Rep. 703, where the court said: "Whoever has accepted delivery from a coöbligor, has been forewarned by judicial decision that he was bound at his peril to inquire if he had authority to make it."

Name in instrument at time condition imposed subsequently erased without knowledge of obligee or obligor.— Hoboken City Bank *v.* Phelps, 34 Conn. 92.

Scrolls without names would not put party on inquiry. Nash *v.* Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780.

The civil law does not require a person who signs an instrument to specially stipulate the condition that the others named in the instrument should sign. It takes the ground that "the contract is incomplete until all the parties contemplated to join in its execution affix their names to it; and while in

3. The Rule When Bona Fide Subvendees — a. Generally. That a subvendee with notice of[23] or a subvendee put upon his inquiry as to[24] the wrongful delivery of the instrument would take no title or obtain no right is elementary. The great weight of authority sustains the view that an unauthorized delivery of the instrument conveys no title or gives no right even in favor of an innocent subvendee without notice of the conditions or event stipulated in the escrow contract;[25] and the authorities are very strong where the escrow has been obtained or delivered through fraud.[26] The principle on which the doctrine rests

this state cannot be enforced against any one of them. The law presumes, that the party signing, did so, upon the condition that the other obligors named in the instrument should also sign it; and their failure to comply with their agreement gives him a right to retract. The authority of Pothier is express on this head." Wells *v.* Dill, 1 Mart. N. S. (La.) 592, 593 [*citing* Pothier Traité des obligations, § 11].

23. Roberson *v.* Reiter, 38 Nebr. 198, 46 N. W. 877.

24. Balfour *v.* Hopkins, 93 Fed. 564, 35 C. C. A. 445 [*affirming* 84 Fed. 855].

25. *Illinois.*— Skinner *v.* Baker, 79 Ill. 496.

Indiana.— Berry *v.* Anderson, 22 Ind. 36.

Mississippi.— See Harkreader *v.* Clayton, 56 Miss. 383, 31 Am. Rep. 369.

Oregon.— Tyler *v.* Cate, 29 Oreg. 515, 525, 45 Pac. 800 [*citing* Berry *v.* Anderson, 22 Ind. 36; Patrick *v.* McCormick, 10 Nebr. 1, 4 N. W. 312; Black *v.* Shreve, 13 N. J. Eq. 455; Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179].

Wisconsin.— Chipman *v.* Tucker, 38 Wis. 43, 20 Am. Rep. 1.

United States.— See Balfour *v.* Hopkins, 93 Fed. 564, 35 C. C. A. 445. And see Provident L., etc., Co. *v.* Mercer County, 170 U. S. 593, 604, 18 S. Ct. 788, 42 L. ed. 1156, where the court distinguished between the case of a *bona fide* purchaser of negotiable paper which had been wrongfully delivered by a depositary and that of the purchaser of real estate under like conditions. The court quoted with approval the following language used in Fearing *v.* Clark, 16 Gray (Mass.) 74, 76, 77 Am. Dec. 394: "The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide*, without notice."

England.—Hooper *v.* Ramsbotton, 4 Campb. 121, 1 Marsh. 414, 6 Taunt. 12, 1 E. C. L. 485.

Contra.— An instrument for the conveyance of land deposited with an agent as an escrow and by him delivered to the grantee contrary to the condition passes at most a voidable title and not a void one. The instrument is not therefore void in the hands of a *bona fide* purchaser from the grantee, without notice of the condition. Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478. See also Landon *v.* Brown, 160 Pa. St. 538, 28 Atl. 921, to the effect that delivery without compliance with conditions makes instrument voidable. See Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511, where Blight *v.* Schenck, *supra*, is strongly approved and the opposite doctrine is strongly condemned. And see *infra*, V, E, 3, b. In Schmid *v.* Frankfort, 131 Mich. 197, 200, 91 N. W. 131, a village council agreed to give three bonds for one thousand dollars each as a bonus for the establishment of a factory in the village. The council directed the president and clerk to sign a contract with the proprietor of the proposed factory and also to execute three bonds, of one thousand dollars each, to be deposited as escrows and delivered when the factory was completed as per contract. It was held that as by the terms of the resolution of the council the bonds were to be deposited with the bank as escrows to be delivered by it to the proprietor on the completion of the contract, the delivery to him was sufficient, whether the contract was performed or not. "Whether the condition was performed or not, we need not inquire. The bonds were issued, and were delivered to Seeley, by whom they were negotiated to plaintiffs through the bank. We think this constitutes a sufficient delivery."

A negotiable note placed as an escrow to be delivered on conditions not apparent on its face is valid as against the maker in the hands of an innocent purchaser for value, although the terms of the escrow contract were violated. Garrett *v.* Campbell, 2 Indian Terr. 301, 51 S. W. 956. See Provident Life, etc., Co. *v.* Mercer County, 170 U. S. 593, 18 S. Ct. 788, 42 L. ed. 1156. See Commercial Paper, 8 Cyc. 1.

26. *California.*— Raymond *v.* Glover, (1894) 37 Pac. 772.

Georgia.— Dixon *v.* Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193.

Indiana.— Henry *v.* Carson, 96 Ind. 412.

Iowa.— Jackson *v.* Lynn, 94 Iowa 151, 62 N. W. 704, 58 Am. St. Rep. 386.

Massachusetts.— Daggett *v.* Daggett, 143 Mass. 516, 10 N. E. 311.

Vermont.— Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179.

Wisconsin.— Everts *v.* Agnes, 4 Wis. 343, 65 Am. Dec. 314, 6 Wis. 453 [*criticized* in Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511].

is that an instrument delivered in violation of the terms on which it has been placed as an escrow is not in fact delivered and that its possession by the grantee is no more effective to convey title than would be the possession of a forged or stolen instrument.[27] Some authorities proceed on the theory that a depositary is a special agent of the depositor and therefore, his powers being limited to the conditions of the deposit, one who claims through him takes the risk of the agent exceeding his powers.[28]

b. Estoppel Raised. The grantor or obligor may be estopped to assert the condition of the deposit of the instrument where he has recognized the validity of the delivery or has remained silent when called upon to speak and others have been injured.[29] If the grantor ratifies the unauthorized delivery he is estopped from disputing the rights of innocent third persons who have bought in good faith.[30] The grantor cannot recognize the grantee's possession of the instrument as valid for some purposes and disclaim it as nugatory for all others when innocent persons would be injured thereby. The partial recognition of the validity of the delivery works a complete estoppel.[31] Yet an act which is intended to protect the depositor's rights but which amounts to a ratification of the delivery may not operate as an estoppel.[32] An effectual demand for the payment of the balance of the purchase-money cannot be regarded as an acquiescence in the wrongful delivery of an escrow.[33] Where the grantee has been put into possession of the land and the instrument wrongfully delivered to him and recorded as a deed, the grantor is estopped to assert against a *bona fide* purchaser the non-performance of the condition,[34] for it is a familiar principle that where one is in possession

Judgment creditors of the grantee have been held not to acquire any rights in the land where the instrument was delivered fraudulently by the depositary. Patrick *v.* McCormick, 10 Nebr. 1, 4 N. W. 312. See also Stanley *v.* Valentine, 79 Ill. 544.

27. Balfour *v.* Hopkins, 93 Fed. 564, 35 C. C. A. 445 [*citing* cases *supra*, note 106; and Haven *v.* Kramer, 41 Iowa 382; Tisher *v.* Beckwith, 30 Wis. 55, 11 Am. Rep. 546].

Balancing equities under this doctrine.— To maintain the plea of a *bona fide* purchaser, the subvendee must have obtained the legal title which he thus attempts to protect against some undisclosed equity or charge on the land. This he cannot do, for, although he bought on the faith of his grantor's possession of the escrow, the original grantor or his heirs still had the legal title. The original grantee had therefore no title and could convey none. The equities of the second grantee and of the heirs of the original grantor, being equal, or the equities of such heirs being superior, the legal title, which still remains in such heirs, will prevail. Harkreader *v.* Clayton, 56 Miss. 383, 31 Am. Rep. 369. To same effect see Everts *v.* Agnes, 4 Wis. 343, 65 Am. Dec. 314.

28. Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408, 447 [*citing* Everts *v.* Agnes, 4 Wis. 443, 65 Am. Dec. 314, which does not so hold]; Black *v.* Shreve, 13 N. J. Eq. 455; Ogden *v.* Ogden, 4 Ohio St. 182; White *v.* Cove, 20 W. Va. 272. See also Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179. See *infra*, VII, C. As to this theory stated in text violating the principle that death of principal ends agency see PRINCIPAL AND AGENT. And see Farmer *v.* Marvin, 63 Kan. 250, 65 Pac. 221, where the instrument deposited was admitted not to be an escrow. In that case a note signed by the maker, without consideration moving to him, was placed in the hands of a third person, with written instructions to deliver on the happening of a certain contingency, and, in the event the contingency happened, then on the giving of indemnity thereafter to be agreed on by both the maker and payee in the note. Before the happening of the contingency, or the indemnity to be given had been agreed on the maker of the note died. It was held that the agency of the third person to make delivery of the note ceased and the note did not become the binding obligation of the estate of the deceased.

29. Dixon *v.* Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193. See also Wright *v.* Lang, 66 Ala. 389; Henderson *v.* Vermilyea, 27 U. C. Q. B. 544.

30. Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68.

Condition waived.— Gish *v.* Brown, 171 Pa. St. 479, 33 Atl. 60; Truman *v.* McCollum, 20 Wis. 360.

31. Cotton *v.* Gregory, 10 Nebr. 125, 4 N. W. 939.

32. Balfour *v.* Hopkins, 93 Fed. 564, 35 C. C. A. 445.

33. Hamill *v.* Thompson, 3 Colo. 518.

34. Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68; Schurtz *v.* Colvin, 55 Ohio St. 274, 45 N. E. 527 [*distinguishing* Ogden *v.* Ogden, 4 Ohio St. 182] (where the grantee in possession induced the depositary to deliver the escrow to him that he might exhibit it as evidence of title, and the grantee did so to one ignorant of the facts, who in good faith made him a loan secured by mortgage on the property. The court held that the

of land and has a deed of record, the possession will be referred to his deed, unless there are facts which are known to one who is about to acquire an interest in the land and which indicate a different possessory right.[35] But a broader and more general principle of equity governs the case; that is, where one of two innocent persons must suffer, he through whose agency the loss occurred must sustain the loss.[36] This principle is the more appropriately applied if the grantor learns of the unauthorized delivery and recording of the instrument and fails to take steps to prevent innocent third persons from acting to their injury.[37] The bare fact that the instrument has been placed on record does not estop the depositor from asserting the non-performance of the condition.[38] If the acts of the depositor have not changed the position of the persons claiming an estoppel, the claim is

grantor was estopped from setting up his claim to the land or a lien on it for purchase-money against the innocent mortgagee); Bailey *v.* Crim, 2 Fed. Cas. No. 734, 9 Biss. 95 [*distinguishing* Berry *v.* Anderson, 22 Ind. 36; Everts *v.* Agnes, 6 Wis. 453], holding that where persons exchanging lands deposit their instruments as escrows and transfer each his possession to the other and the depositary records one of the deeds without the knowledge of the grantor and the grantee procures a loan on the land, a mortgagee in good faith acquires a valid lien upon the land, although the mortgagor misappropriates the money instead of paying it to the other party to the exchange, as was agreed. See also Simson *v.* Bank of Commerce, 43 Hun (N. Y.) 156, where grantee was not in possession but title was recorded in him and depositary was to aid the grantee in making a loan on the land. How far this fact influenced the court does not distinctly appear. It was held that the depositary was in that case the agent of the grantor and that the case was within the rule that a party who has voluntarily placed the *indicia* of title with another is estopped thereby as against a *bona fide* purchaser.

35. Quick *v.* Milligan, 108 Ind. 419, 424, 9 N. E. 392, 58 Am. Rep. 49 [*distinguishing* Berry *v.* Anderson, 22 Ind. 36].

Notice of escrow.— Possession does not import a delivery where there is notice. Peter *v.* Wright, 6 Ind. 183.

36. Quick *v.* Milligan, 108 Ind. 419, 423, 9 N. E. 392, 58 Am. Rep. 49.

37. If he makes no attempt to have the record expunged, he is estopped from denying the title of the *bona fide* purchaser who bought on the faith of the record. Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68; Haven *v.* Kramer, 41 Iowa 382 [*following* Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478, but not resting the decision solely on that authority]; Connell *v.* Connell, 32 W. Va. 319, 9 S. E. 252. But see Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179, where the orators deposited a mortgage executed by them with R, to be held as an escrow until T, at whose request the mortgage was made, should furnish them with P's bond of indemnity. The mortgage was made with the understanding of all the parties that, when the bond was given, it was to be used with the state treasurer for the benefit of the defendants, a banking corporation. R, before the bond of indemnity was furnished, and without authority so to do, delivered the mortgage to the bank, who, ignorant of the condition as to its delivery, in good faith advanced the consideration therefor. It was held that the subsequent expression by the orators of their willingness to accept the bond of B in the place of P, and their neglect for two months to notify the bank that they claimed the mortgage to be invalid, did not amount to a ratification of the delivery by R.

Laches in asserting the conditional obligation on a bond.— Robertson *v.* Coker, 11 Ala. 466, 472. See also Wright *v.* Lang, 66 Ala. 389; Towns *v.* Kellett, 11 Ga. 286.

Against grantees.— The grantees of an escrow who obtain custody thereof before the condition on their part has been performed and convey the land to others are estopped to avoid it or to say that no title passed to them. Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269.

38. Stanley *v.* Valentine, 79 Ill. 544, where the instrument was a release of a mortgage and where the depositary recorded it without the authority or knowledge of the depositor. See Beaumont Car Works *v.* Beaumont Imp. Co., 4 Tex. Civ. App. 257, 23 S. W. 274, where, however, purchaser had notice. So where an instrument for the conveyance of land is deposited in the hands of a third person by the grantor, to be held until the performance of a certain condition, the recording the instrument will not render it binding upon him in case of a fraudulent delivery of it by the depositary to a *bona fide* grantee, if the grantor consented to such recording with the express understanding that the depositary should still retain the deed after it was recorded until the performance of the condition upon which it was to be delivered. Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179. See also Minah Consol. Min. Co. *v.* Briscoe, 47 Fed. 276; Calhoun County *v.* American Emigrant Co., 93 U. S. 124, 23 L. ed. 826.

Recording of the conveyance of land taken in exchange and occupancy of land not an estoppel.— Jackson *v.* Lynn, 94 Iowa 151, 62 N. W. 704, 58 Am. St. Rep. 386, where estoppel was not pleaded and court did not consider whether the purchaser bought in good faith.

not made out.[39] Where there is no question of *bona fide* purchasers, no estoppel can operate against the grantor or obligor unless he knows that the condition has not been performed.[40]

VI. ENFORCEMENT OF CONTRACT AND PROTECTION OF RIGHTS THEREUNDER.

A. Right to and Forms of Actions and Remedies — 1. OF DEPOSITOR — a. In General. Where there has been an irrevocable deposit, as of an escrow of an instrument for the conveyance of land, the grantor may enforce specific performance of the contract on the part of the grantee to compel him to pay over the purchase-money agreed upon;[41] but if there has not been an irrevocable deposit the contract cannot be enforced.[42] A formal tender of the instrument is not necessary to enable the grantor to sue for the purchase-money, the payment of which was the condition precedent to the instrument taking effect.[43] Where the condition is not performed within the proper period of time, the grantor is entitled to the possession of the instrument.[44]

b. When Wrongful Delivery or Recording — (I) *INJUNCTION.*[45] The registration of an instrument,[46] or the sale of the land under a judgment against the grantee who has wrongfully obtained possession of the instrument,[47] will be restrained at the suit of the grantor.

(II) *CANCELLATION*[48] *AND REMOVING CLOUD.*[49] Where an escrow is put upon record through accident or mistake,[50] or by fraud,[51] there is a cloud on the grantor's title which a court in the exercise of its equity powers will remove. So an escrow fraudulently obtained from the depositary will by a court of equity be canceled in the hands of the grantee[52] or his assignee for value,[53] who if in

39. Balfour *v.* Hopkins, 93 Fed. 564, 35 C. C. A. 445.

40. Robbins *v.* Magee, 76 Ind. 381; Hoit *v.* McIntire, 50 Minn. 466, 52 N. W. 918.

Pleading.—An answer alleging that defendant purchased the lots in question of H, "and paid him therefor the full value thereof, without any notice or knowledge that the said plaintiff claimed any right thereto, or interest therein" is sufficient when no objection was taken in the court below, although it "would, perhaps, have been vulnerable to a motion for a more specific statement." Haven *v.* Kramer, 41 Iowa 382, 388 [*comparing* the answer in Everts *v.* Agnes, 4 Wis. 343, 65 Am. Dec. 314, (upon which plaintiff relied) which alleged only that defendant paid "a good and valuable consideration according to a contract"].

41. Farley *v.* Palmer, 20 Ohio St. 223.

Specific performance generally see SPECIFIC PERFORMANCE.

42. Dietz *v.* Farish, 44 N. Y. Super. Ct. 190.

43. Olmstead *v.* Smith, 87 Mo. 602.

44. Hayden *v.* Meeks, (Ark. 1900) 14 S. W. 864; Bodwell *v.* Webster, 13 Pick. (Mass.) 411; Equity Gas Light Co. *v.* McKeige, 139 N. Y. 237, 34 N. E. 898 [*affirming* 19 N. Y. Suppl. 914]. But where there was no evidence that the grantee consented to the return or that he had failed to comply with the conditions, it was held that the return must be deemed unauthorized. Grove *v.* Jennings, 46 Kan. 366, 26 Pac. 738. See *supra*, III, B.

If the deposit is not irrevocable, the depositor has a right to a return or a cancellation of the instrument. Everts *v.* Everts, 120 Iowa 40, 94 N. W. 496. See, generally, CANCELLATION OF INSTRUMENTS.

45. **Injunction** generally see INJUNCTIONS.

46. Matteson *v.* Smith, 61 Nebr. 761, 86 N. W. 472.

47. Patrick *v.* McCormick, 10 Nebr. 1, 4 N. W. 312.

48. **Cancellation of instruments** generally see CANCELLATION OF INSTRUMENTS.

49. **Removal of cloud** see QUIETING TITLE.

50. Stanley *v.* Valentine, 79 Ill. 544.

51. Parrott *v.* Parrott, 1 Heisk. (Tenn.) 681.

52. Hanley *v.* Sweeny, 109 Fed. 712, 48 C. C. A. 612.

53. See Henry *v.* Carson, 96 Ind. 412.

Where a grantor surreptitiously obtains possession of a deed that has been deposited as an escrow until the title is examined and the consideration is paid and thereafter conveys the land to a third person who has knowledge of the facts, a decree setting aside the latter deed and establishing the former is proper. Lewis *v.* Prather, 21 S. W. 538, 14 Ky. L. Rep. 749.

Lease from grantee who had no title through non-performance.— The grantee in an instrument drew a draft for the amount of the purchase-money for land which he had previously contracted to purchase, and placed it in the hands of a banker for collection; and the owner of the land placed his deed to the purchaser in the hands of the same banker, to be delivered to the purchaser on condition that the draft was duly paid; and the purchaser agreed that if the draft was not duly paid he would relinquish all his right to the land under the contract. The draft was re-

possession will be compelled to restore possession[54] and to account for the rents and profits.[55]

2. Of Deliveree. Upon performance of the condition the grantee or obligee is entitled to delivery,[56] which will be enforced by a decree of court.[57] Where a condition which was in favor of the grantee was not performed, he may waive it and enforce delivery.[58] If the depositary refuses to deliver, the remedy is not against the other party to compel specific performance of the escrow contract, but against the depositary to obtain possession of the instrument.[59] The ancient rule that a court of equity enforces only certain and defined agreements applies as well here as elsewhere; an action for specific performance of the contract will not be maintained if there is a want of certainty in respect to the persons to whom the conveyance is to be made.[60] If the depositary refuses to make the delivery due to the deliveree on the ground that the depositor claims the escrow, the depositary may be held liable for conversion.[61] If the escrows deposited are in such case certificates of stock, the measure of damages under a general allegation is the value of the certificates with the accumulated dividends thereon at the time of the demand for delivery and the legal interest on the same from the time of conversion.[62]

B. Pleading.[63] At common law the general plea of *non est factum* is the proper one to admit the defense to an action on the instrument by the grantee, etc., that the instrument is still an escrow with the condition precedent unperformed.[64] The defense is admissible under a special *non est factum*, but this carries with it the disadvantage of the burden of proof, whereas the burden is on the other party under the general plea.[65] Where a bond is in possession of

turned protested for non-payment. It was held that no title passed by the deed, but all claim of the grantee to the land under his contract was extinguished; and that a lease from him which stood upon the records was a cloud upon the title of the owner, and should be removed by a court of equity by decree. Skinner *v.* Baker, 79 Ill. 496.

54. Hogueland *v.* Arts, 113 Iowa 634, 85 N. W. 818.

55. Clement *v.* Evans, 15 Ill. 92.

56. Knopf *v.* Hansen, 37 Minn. 215, 33 N. W. 781; Clarke *v.* Eureka County Bank, 123 Fed. 922. See *supra*, IV.

57. Tharaldson *v.* Everts, 87 Minn. 168, 171, 91 N. W. 467 [*citing* 4 Kent Comm. 454]. See Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776; Carter *v.* Turner, 5 Sneed (Tenn.) 178. "To compel the delivery of deeds and other instruments in favor of persons who are legally entitled to them, is an old head of equity jurisdiction. . . . And a case where a deed has been delivered in escrow upon a condition which has been fulfilled, would seem to be one which especially justifies and calls for the exercise of this jurisdiction, since the withholding of the deed interferes with, and probably prevents, the vesting of the legal title." Stanton *v.* Miller, 65 Barb. (N. Y.) 58, 72 [*reversed* in 58 N. Y. 192, on the facts of the case, but principle not denied]. See also Mechanics' Nat. Bank *v.* Jones, 76 N. Y. App. Div. 534, 78 N. Y. Suppl. 800.

Detinue to recover instrument see Detinue, 14 Cyc. 239 note.

58. Tharaldson *v.* Everts, 87 Minn. 168, 91 N. W. 467.

59. Wolcott *v.* Johns, 7 Colo. App. 360, 44 Pac. 675.

60. Stanton *v.* Miller, 58 N. Y. 192. In Mechanics Nat. Bank *v.* Jones, 76 N. Y. App. Div. 534, 78 N. Y. Suppl. 800 [*affirmed* in 175 N. Y. 518, 67 N. E. 1085], it was contended that the agreement was not certain and definite enough to be specifically enforced, but the court held, upon a thorough review of the facts in the case, that the trial court had properly enforced the contract.

61. Clarke *v.* Eureka County Bank, 123 Fed. 922.

62. Clarke *v.* Eureka County Bank, 123 Fed. 922, 930 [*citing* New Dunderberg Min. Co. *v.* Old, 97 Fed. 150, 38 C. C. A. 89, 1 Sedgwick Dam. (8th ed.) § 316].

63. Pleading generally see Pleading.

64. Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324. See Daggett *v.* Daggett, 143 Mass. 516, 10 N. E. 311; Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Stoytes *v.* Pearson, 4 Esp. 255; Huron County *v.* Armstrong, 27 U. C. Q. B. 533.

Contra.— Under a general plea of *non est factum*, a question as to the conditional signing and delivery of a writing cannot be considered. A special plea of *non est factum* is essentially necessary in order to make a defense upon the ground that there was a conditional signing or deposit of the writing. Hall *v.* Smith, 14 Bush (Ky.) 604.

Non-assumpsit is a proper plea under which evidence that instrument was intended as an escrow may be admitted. Couch *v.* Meeker, 2 Conn. 302, 7 Am. Dec. 274.

65. Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Carter *v.* Turner, 5 Sneed (Tenn.) 178. See Hicks *v.* Goode, 12 Leigh (Va.) 479, 37 Am. Dec. 677. And Holt, C. J., said that in all his time he never knew such a plea

the obligee, a special *non est factum* which does not allege to whom it was delivered is defective.[66] When the deposit as of an escrow is pleaded by an equitable plea, an allegation showing the conditional deposit as of an escrow is absolutely necessary;[67] and the pleadings must properly connect plaintiffs with the conditions alleged.[68]

C. Burden of Proof. The burden of proof is usually on him who alleges the instrument to be an escrow.[69] Nevertheless the other party may have the affirmative of the issue as a result of the condition of the pleadings.[70] If the party who is relying upon the conditional deposit of the instrument as an escrow proves the deposit, it is then the duty of the other party to go forward and prove the performance of the condition or the happening of the event upon which the instrument was to take effect.[71] Where there is a question of *bona fide* purchasers who claim to have bought land without knowledge of an escrow contract, the burden of proving all the facts necessary to constitute a *bona fide* purchase rests upon those who make that claim.[72]

D. Evidence[73] **— 1. Admissibility.** Parol evidence is admissible to prove the condition upon which the instrument is deposited.[74] If, however, the condition be in writing, evidence to vary it is inadmissible.[75] Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to the deed, are inadmissible as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed.[76]

as this; for all these special *non est factums* in case of escrow and rasure, etc., are impertinent, for thereby defendant brings all the proof upon himself; whereas if he had pleaded *non est factum* generally, he would have turned the proof of whatever is necessary to make it his deed upon plaintiff. Bushell *v.* Pasmore, 6 Mod. 217, 218.

66. Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147.

67. Cumberlege *v.* Lawson, 1 C. B. N. S. 709, 26 L. J. C. P. 120, 5 Wkly. Rep. 237, 87 E. C. L. 709. See also Graves *v.* Tucker, 10 Sm. & M. (Miss.) 9, 21.

68. Huron County *v.* Armstrong, 27 U. C. Q. B. 533.

Burden of proof see *infra*, VI, C.

Want of verification.— In debt on a bond, defendant pleads that bond was delivered as escrow upon conditions which were not performed, *et sic non est factum*; the plea is not verified by affidavit of the party according to statute (1 Va. Rev. Code, c. 128, § 33), but plaintiff makes no objection for want of such affidavit, and the plea is received by the court, issue joined upon it, trial, verdict, and judgment for defendant; the want of the affidavit to the plea is not good objection to the judgment in an appellate court. Hicks *v.* Goode, 12 Leigh (Va.) 479, 37 Am. Dec. 677.

69. Evans *v.* Gibbs, 6 Humphr. (Tenn.) 404.

70. Light *v.* Woodstock, etc., R., etc., Co., 13 U. C. Q. B. 216.

71. Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Black *v.* Shreve, 13 N. J. Eq. 455.

72. Balfour *v.* Hopkins, 93 Fed. 564, 35 C. C. A. 445.

73. Evidence generally see Evidence.

74. *California.*— Wittenbrock *v.* Cass, 110 Cal. 1, 42 Pac. 300.

New Jersey.— Black *v.* Shreve, 13 N. J. Eq. 455.

New York.— Stanton *v.* Miller, 58 N. Y. 192.

Oregon.—Gaston *v.* Portland, 16 Oreg. 255, 19 Pac. 127.

Rhode Island.— Sweet *v.* Stevens, 7 R. I. 375.

Washington.— Nichols *v.* Oppermann, 6 Wash. 618, 34 Pac. 162.

Wisconsin.— Campbell *v.* Thomas, 42 Wis. 437, 24 Am. Rep. 427.

England.— London Freehold, etc., Property Co. *v.* Suffield, [1897] 2 Ch. 608, 66 L. J. Q. B. 790, 77 L. T. Rep. N. S. 445, 46 Wkly. Rep. 102; Pym *v.* Campbell, 6 E. & B. 370, 2 Jur. N. S. 641, 25 L. J. Q. B. 277, 88 E. C. L. 370.

75. Pacific Nat. Bank *v.* San Francisco Bridge Co., 23 Wash. 425, 63 Pac. 207.

76. See Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258, where an instrument deposited with a third person until the death of the grantor was held a present deed conveying title subject to life-interest of grantor. So in Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, holding the same as to an instrument delivered in the same way, it was held that on the question whether a grantor had power to recall an instrument deposited as an escrow, evidence of subsequent acts of the grantor, tending to show his intentions at the time he made the deed, is inadmissible. Where a note was deposited with his servant by the deceased, and after his death delivered by the servant to the payee, evidence of the directions given by the deceased when he handed the note to his servant is competent in an action against the executor of the deceased's will by the payee. So also are the admissions

2. Sufficiency. Declarations of liability on the instrument and laches, together with contradictory direct evidence as to its ratification of the delivery of the instrument, without performance of the condition, is sufficient to sustain a verdict of ratification.[77] Evidence that the conditions had been performed and that the depositary had given the instrument to the grantor on his declaring that he took it for the purpose of delivering it to the grantee is sufficient to warrant a finding that there was a delivery valid to vest title in grantee.[78] A declaration by one of the obligors in the presence of some of the others at the time of execution that "others are to sign" is sufficient to allow the jury to infer that an escrow was intended by the obligors present.[79] A judgment in a former action wherein the question of performance of the condition of the deposit is litigated makes that question *res adjudicata*.[80] The exercise of acts of ownership by the grantee in possession of the land for a long period of time with the acquiescence of the grantor in such acts, together with the fact that the grantor had reserved the land out of a tract subsequently conveyed, is sufficient to show that the instrument was absolutely delivered.[81] The possession of the instrument by the grantee[82] or obligee[83] is *prima facie* evidence that it had been delivered to him.

E. Questions of Law and Fact. Whether an instrument has been deposited as an escrow or delivered as a deed or other fully executed instrument is a question for the jury.[84] If the condition precedent is expressed in writing, the construction of the writing is for the court.[85] Whether a wrongful delivery to the grantee or obligee has been ratified by the grantor or obligor is a question for the jury.[86]

by the testator in reference to the note. Daggett *v.* Simonds, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332.

Declarations of depositary to show passing of title.— Where an instrument has been deposited with a third person for delivery upon the performance of certain conditions by the grantee, proof of the declaration of the third person to the grantee that the instrument was ready for her is not admissible to show delivery in an action by the grantor upon an insurance policy issued upon the property described in the instrument. Merchants' Ins. Co. *v.* Nowlin, (Tex. Civ. App. 1900) 56 S. W. 198.

An escrow is not admissible in evidence if the conditions of the escrow agreement have not been performed. Stiles *v.* Brown, 16 Vt. 563.

77. Henderson *v.* Vermilyea, 27 U. C. Q. B. 544. See also Mudd *v.* Green, 12 S. W. 139, 11 Ky. L. Rep. 359; Eggleston *v.* Pollock, 38 Nebr. 188, 56 N. W. 805.

78. Regan *v.* Howe, 121 Mass. 424, 426.

79. Pawling *v.* U. S., 4 Cranch (U. S.) 219, 2 L. ed. 601.

The mere circumstance that the name of a person who did not execute an instrument is inserted in the body of it as one of the obligors and a seal left for his name is not sufficient evidence of itself to show that those who did sign, seal, and transfer its possession, transferred it as an escrow, on condition that that person should also execute it. Towns *v.* Kellett, 11 Ga. 286; Blume *v.* Bowman, 24 N. C. 338. See *supra*, V, E, 2.

80. Missouri Pac. R. Co. *v.* Atkison, 17 Mo. App. 484.

81. Where the direct evidence is conflicting as to whether the instrument was delivered as the deed of the grantor or deposited as an escrow, the fact that grantee had occupied the land for more than twenty years without paying rent and had exercised the political right in connection with the ownership of the land of voting on the property three times at county elections and once when the grantor, his father, was the returning officer, and one year he had qualified on the property as a municipal councilor, swearing that he owned the property; and the fact that thirteen years after the execution of the instrument the grantor deeded a tract of land to another son, expressly reserving from the operation of the deed the land covered by the description of instrument claimed to be an escrow, is sufficient to show that the instrument was delivered absolutely as the deed of the grantor. Young *v.* Hubbs, 15 U. C. Q. B. 250.

82. Hare *v.* Horton, 5 B. & Ad. 715, 3 L. J. K. B. 41, 2 N. & M. 428, 27 E. C. L. 302. But see Cogswell *v.* O'Connor, 13 Nova Scotia 513.

83. See Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147.

84. See *supra*, III, A.

Whether the depositary was or was not the agent of the grantee named in the escrow, to procure its delivery from the maker, is also a question for the jury. Dixon *v.* Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193 [*qualifying* Duncan *v.* Pope, 47 Ga. 445].

85. Furness *v.* Meek, 27 L. J. Exch. 34.

86. See Dixon *v.* Bristol Sav. Bank, 102 Ga. 461, 31 S. W. 96, 66 Am. St. Rep. 193.

Question in court of equity.— Whether the questions of fact are to be determined by a jury depend upon the kind of an action in which the questions are to be determined.

VII. WHEN INSTRUMENT TAKES EFFECT.

A. At Delivery or Upon Performance. It is very often held that the escrow does not take effect as a fully executed instrument as a deed, bond, or note until the rightful delivery to the grantee, obligee, or promisee.[87] The logical position, approved by a number of authorities, is that the escrow takes effect as a deed, etc., the instant the required condition or event is performed or takes place, without any formal act of delivery.[88]

B. According to Agreement. The instrument will take effect according to the agreement of the parties where no intervening rights are injured.[89]

C. By Relation. The rule that the instrument does not take effect as a deed, bond, etc., until delivery or until performance of the condition is modified to the extent that, where justice requires it, the delivery will be held, by fiction of law, to relate back to the deposit, *ut res magis valeat quam pereat*.[90] Any title acquired by the grantor between the deposit and the delivery passes by such delivery to the grantee.[91] This principle applies where either of the parties to the instrument dies before the condition is performed, or before final delivery;[92]

In an action of the character which belongs to courts of equity jurisdiction the questions of fact may be found by the court. See for example Hillhouse *v.* Pratt, 74 Conn. 113, 49 Atl. 905; Eggleston *v.* Pollock, 38 Nebr. 188, 56 N. W. 805; Mudd *v.* Green, 12 S. W. 139, 11 Ky. L. Rep. 359.

87. *Alabama.*— Fuller *v.* Hollis, 57 Ala. 435.

Connecticut.— Sparrow *v.* Smith, 5 Conn. 113.

Illinois.—Demesmey *v.* Gravelin, 56 Ill. 93; Price *v.* Pittsburg, etc., R. Co., 34 Ill. 13.

Maine.— Day *v.* Lacasse, 85 Me. 242, 27 Atl. 124.

Massachusetts.— Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66.

New York.— Cagger *v.* Lansing, 43 N. Y. 550 [*reversing* 57 Barb. 421].

England.— Sheppard Touchst. (6th ed.) 57, 59.

If a vendee secures possession prematurely of an instrument of conveyance deposited as an escrow, his liability upon a purchase-money mortgage deposited with the instrument at once arises. Balfour *v.* Parkinson, 84 Fed. 855.

88. **Conveyance of land.**— Couch *v.* Meeker, 2 Conn. 302, 7 Am. Dec. 274; Farley *v.* Palmer, 20 Ohio St. 223; Shirley *v.* Ayres, 14 Ohio 307, 45 Am. Dec. 546. See also White Star Line Steam-Boat Co. *v.* Moragne, 91 Ala. 610, 8 So. 867; Bradbury *v.* Davenport, 120 Cal. 152, 52 Pac. 301; Gammon *v.* Bunnell, 22 Utah 421, 64 Pac. 958. So also in Wymark's Case, 5 Coke 74*a*, a deed of release of waste had been delivered by plaintiff to a third person, to be by him delivered to defendant, on a condition to be performed; after condition performed, plaintiff got the deed back into his possession; but the deed was considered effectual, and the party permitted to plead the matter specially, without showing the deed. See Regan *v.* Howe, 121 Mass. 424; Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

"It is the performance of the condition, and not the second delivery, that gives it vitality and existence as a deed, and so are the old authorities." State Bank *v.* Evans, 15 N. J. L. 155, 160, 28 Am. Dec. 400.

A note deposited as an escrow takes effect the instant the conditions of the escrow are performed, even though the depositary has not formally delivered it to the payee (Taylor *v.* Thomas, 13 Kan. 217; Missouri Pac. R. Co. *v.* Atkison, 17 Mo. App. 484; 1 Daniel Neg. Instr. § 68) and becomes the absolute property of the transferee upon the removal of the encumbrance (Chase *v.* Gates, 33 Me. 363).

Condition performed after death.— The deposit of a note as an escrow during the lifetime of a party becomes absolute upon the happening of the condition after his death. Bostwick *v.* McEvoy, 62 Cal. 496. See *infra*, VII, C.

Attempted detention after performance of condition.— Where it was stipulated that the instrument for the conveyance of land deposited as an escrow should not be delivered till a check given in payment shall be cashed; upon the check being duly cashed, an attempted detention of the deed by the depositary on the order of the grantors will not prevent it from taking effect. Hughes *v.* Thistlewood, 40 Kan. 232, 19 Pac. 629.

89. Price *v.* Pittsburg, etc., R. Co., 34 Ill. 13.

90. Simpson *v.* McGlathery, 52 Miss. 723; Whitfield *v.* Harris, 48 Miss. 710; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288 [*reversed* in 18 Johns. 544, 9 Am. Dec. 246]; Shirley *v.* Ayres, 14 Ohio 307, 45 Am. Dec. 546; Spring Garden Bank *v.* Hurlings Lumber Co., 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583.

91. Prewitt *v.* Ashford, 90 Ala. 294, 7 So. 831; Andrews *v.* Farnham, 29 Minn. 246, 13 N. W. 161; Tooley *v.* Dibble, 2 Hill (N. Y.) 641; Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246.

92. *Alabama.*— Prewitt *v.* Ashford, 90 Ala. 294, 301, 7 So. 831 [*citing* Foster *v.* Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154].

whether grantor[93] or grantee,[94] or both parties.[95] If the grantee die before final delivery, the depositary may make delivery to the grantee's heirs and it will be held ordinarily to have taken effect in the ancestor so as to transmute title through him to the heirs by inheritance, where nothing intervenes to prevent.[96] So too will the delivery relate back to the deposit if in the meantime one of the parties has come under a disability, as mental incapacity[97] or, in the case of a woman, the marriage status.[98] The fiction will be resorted to only where justice requires it — never when injustice would result.[99] Thus it cannot be applied

Kansas.— Davis *v.* Clark, 58 Kan. 100, 48 Pac. 563.

Minnesota.— Lindley *v.* Groff, 37 Minn. 338, 34 N. W. 26.

United States.—Hammond *v.* Hunt, 11 Fed. Cas. No. 6,003, 4 Ban. & A. 111.

England.— Perryman's Case, 5 Coke 84*a*; 4 Comyns. Dig. 263.

93. Tharaldson *v.* Everts, 87 Minn. 168, 91 N. W. 467; Webster *v.* Kings County Trust Co., 145 N. Y. 275, 39 N. E. 964 [*affirming* 80 Hun 420, 30 N. Y. Suppl. 357]. See also Cook *v.* Hendricks, 4 T. B. Mon. (Ky.) 500; Hunter *v.* Hunter, 17 Barb. (N. Y.) 25, where death of one of the parties, parents of grantee, before performance of condition was not allowed to affect grantee's right of delivery.

Contra.— Where a statute provides that "a conveyance, settlement, or other act of a testator by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, but the will passes the property which would otherwise devolve by succession," the doctrine of relation cannot apply as against the disposition of property made by a will of the grantor, for the case falls directly within the inhibition of the statute, the title to the land being still in the grantor. Chadwick *v.* Tatem, 9 Mont. 354, 364, 23 Pac. 729.

Where the death of the grantor is the event upon the happening of which the escrow is to become a deed or the deed is to take effect (according to the view taken of an instrument deposited on such condition), the doctrine of relation is applied. See *supra*, III, B, 3, c, (II); and Goodpaster *v.* Leathers, 123 Ind. 121, 23 N. E. 1090; Owen *v.* Williams, 114 Ind. 179, 15 N. E. 678; Gish *v.* Brown, 171 Pa. St. 479, 33 Atl. 60.

94. Prewitt *v.* Ashford, 90 Ala. 294, 301, 7 So. 831 [*citing* Stone *v.* Duvall, 77 Ill. 475; Jones *v.* Jones, 16 Am. Dec. 40, 41 note], opinion by Somerville, J.

95. Graham *v.* Graham, 1 Ves. Jr. 272, 30 Eng. Reprint 339.

96. Prewitt *v.* Ashford, 90 Ala. 294, 301, 7 So. 831.

97. See Wheelwright *v.* Wheelwright, 2 Mass. 447, 454, 3 Am. Dec. 66, where the court said: "In Brook's Reading, on the statute of limitations, p. 150, there is another exception. A. delivers a deed, as an escrow, to J. S., to deliver over on condition performed, before which A. becomes *non compos mentis*; the condition is then performed, and the deed delivered over; it is good, for it shall be A.'s deed from the first delivery."

98. Perkins Conv. §§ 139, 140 [*cited* in Wheelwright *v.* Wheelwright, 2 Mass. 447, 454, 3 Am. Dec. 66]. See also 4 Comyns Dig. 263 note.

99. Taft *v.* Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246 [*reversing* 1 Johns. Ch. 288]; Landon *v.* Brown, 160 Pa. St. 538, 28 Atl. 921.

Where fiction would injure grantor.—Plaintiff was defendant's tenant of premises in Toronto, for which he was in arrear to the amount of one hundred and forty-five dollars and eighty-three cents. Defendant sold the premises to the crown. The instrument of conveyance dated Oct. 23, 1872, was delivered by F, the agent at Toronto of the minister of justice, to M, the agent of the defendant, on November 15, for execution. On November 16 it was executed, and was by M handed to F as an escrow, to become a deed when the money was paid. The instrument was returned to F on November 26, and he registered it on November 29, but the money was not paid till December 7. Defendant having distrained on plaintiff for rent on November 29, it was held that the instrument did not become operative as a deed from its deposit by relation back, in which case defendant would have had no reversionary interest at the time of the distress, but from the payment of the purchase-money only. Oliver *v.* Mowat, 34 U. C. Q. B. 472. So where there is no exception to the covenant of warranty of an escrow, although a building on the land belonged to a third person, the deed will not, when delivered, relate back to the time of its execution, when it appears that prior to the delivery the grantee settled for the building with its owner, and the evidence shows that he did this because he had agreed with his grantor to take the lot subject to the right of the third person to remove it. Hoyt *v.* McLagan, 87 Iowa 746, 55 N. W. 18.

Corporation not in esse a grantee.— After the corporators had signed an agreement to become a corporation, and before the charter had been obtained, conveyance of land to corporation by name was signed and acknowledged by the grantor and deposited with a third person, with directions to retain it until the corporation obtained its charter and organized, and then to deliver it to the corporation, and after the charter had been received and the corporation organized under it, depositary made delivery to and acceptance was made by the corporation. It was held that said deed operated as a valid conveyance of said land to the corporation from the date of the delivery of said deed to it. Spring Garden Bank *v.* Hurlings Lumber Co., 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583.

where its application will operate to the prejudice of intervening rights of third persons not parties or privies.[1]

ESCUTCHEON. An insignia, suggested by valorous achievement or other cause, which is adopted by an influential family.[1]

ESPECIAL. Distinguished among others of the same class or kind; special; concerning a species or a single object.[2]

ESPLEES. The products which the land yields.[3]

ESQUIRE. A term which imports magisterial character; a justice.[4]

ESSENCE. That which constitutes the particular nature of a being or substance and distinguishes it from all others; formal existence; constituent substance, as, the pure essence of a spirit. The predominant qualities or virtues of any plant or drug, extracted, refined, or rectified from grosser matter; or more strictly, a volatile essential oil, as the essence of mint.[5]

ESSENTIAL. Constituting or making that which is characteristic or most important in a thing; fundamental; indispensable.[6]

1. Jackson *v.* Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557, where it was held that fiction would not be allowed to preclude a judgment creditor who had recovered judgment between the deposit and the performance of the condition. See also Brown *v.* Austen, 35 Barb. (N. Y.) 341.

It will not be resorted to in favor of volunteers as against the grantor's creditors without notice of the deposit. Rathmell *v.* Shirey, 60 Ohio St. 187, 53 N. E. 1098, where there was no substantial consideration and where the court assumed in its opinion that there was such a delivery of the deed as would give it effect as against the heirs at law of the grantors. See also Taft *v.* Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291. But in Whitfield *v.* Harris, 48 Miss. 710, it was held that the fiction would be resorted to when the record showed that the sale of land sought to be made by judgment creditors was by virtue of a levy made after the grantee had paid the purchase-price and had received the deed by final delivery and had left it for record, together with the further fact that she had been in possession and receiving the rents for about eighteen months, which was notice to the creditors of her title, and after the final delivery of the deed if not before equivalent to a record as between her and said judgment creditors.

Doctrine will not violate a contract.— A county, which contracted to sell lands which it owned and stipulated that it would not assess taxes against them until they should be conveyed, executed a conveyance and deposited it with the clerk of the board of county supervisors as an escrow, not to be delivered until the performance by the grantee of a certain condition and the conveyance was surreptitiously placed on record without performance of the condition. Subsequently upon performance of the condition a suit by the county to set the record and contract aside was dismissed by consent and a decree entered barring the county from setting up any right or title to the lands in controversy. It was held that an assessment for taxes before such decree was void, since the county still had title and the doctrine of relation would not be applied in direct violation of the agreement. Calhoun County *v.* American Emigrant Co., 93 U. S. 124, 23 L. ed. 826.

Cutting off dower.— Where an instrument was executed by a husband and wife and deposited as an escrow, and prior to the payment of purchase-money and acceptance of the instrument grantor's wife died and he remarried, it relates back to the time of its deposit as an escrow, so as to cut out the dower claim of the second wife. Vorheis *v.* Kitch, 8 Phila. (Pa.) 554; Smiley *v.* Smiley, 114 Ind. 258, 16 N. E. 585, where the condition or event was the death of the grantor and the grantees, children of the grantor by a former wife, being volunteers, and the second wife had been informed of the escrows before marriage.

1. Kirksey *v.* Bates, 7 Port. (Ala.) 529, 535, 31 Am. Dec. 722.

2. Webster Int. Dict.

"Especial care" see Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 116, 124.

"Especial privilege" see Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577, 578.

3. Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287, 293 [*quoting* Jacob L. Dict.]. See also Shed *v.* Shed, 3 N. H. 432, 435; Witherow *v.* Keller, 11 Serg. & R. (Pa.) 271, 275.

4. Call *v.* Foresman, 5 Watts (Pa.) 331, 332. See also Christian *v.* Ashley County, 24 Ark. 142, 151; Com. *v.* Vance, 15 Serg. & R. (Pa.) 36, 39; Wilson *v.* Belinda, 3 Serg. & R. (Pa.) 396, 399.

"Esquire" in an indictment as an addition to name of person indicted see Rex *v.* Ogilvie, 2 C. & P. 230, 12 E. C. L. 542.

5. Webster Dict. [*quoted* in State *v.* Muncey, 28 W. Va. 494, 495].

"Essence of cinnamon" see State *v.* Muncey, 28 W. Va. 494, 495.

"Essence of lemon" see Intoxicating Liquor Cases, 25 Kan. 751, 766, 37 Am. Rep. 284.

6. Century Dict. But *compare* Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 654, 44 Atl. 762, where it is said: "When we are examining a body of sys-

ESSENTIALLY. Strictly.[7]

ESSOIN. An excuse for the personal appearance of a party in court at the return of process.[8]

ESTABLECIMIENTO. A Spanish word corresponding to the English word ESTABLISHMENT,[9] *q. v.*

ESTABLISH.[10] To institute;[11] to ordain;[12] to pass;[13] to decree; to enact; to enact or decree by authority and for permanence;[14] to found,[15] or to found permanently;[16] to originate;[17] to make;[18] to create;[19] to form;[20] to organize;[21] to model;[22] to constitute;[23] to set in office;[24] to build; to prepare;[25] to erect.[26] The term is not limited to the signification of to found and set up; for it is as often employed to signify the putting or fixing on a firm basis, of putting in a settled or an efficient state or condition, an existing legal organization or institution, as it is to found or set up such organization or institution;[27] and not infrequently the word has been used as meaning to make stable,[28] stable and firm,[29] firm or

tematic law in order to determine whether certain characteristics are substantial or merely accidental, we use language according to the subject-matter. In such a connection the words 'organic,' 'inherent,' 'essential' and the like do not import a physical, moral or mathematical necessity, but rather a scientific fitness and congruity, having regard to inveterate usage, historical development and the nature of legal things."

"Essential difference" in respect to the collection of demands against boats and vessels between statutory and common-law procedure see Robinson *v.* The Red Jacket, 1 Mich. 171, 175.

"Essential oil" does not include nitrobenzole under customs revenue laws, being a manufacture from benzole and nitric acid. Murphy *v.* Arnson, 96 U. S. 131, 132, 24 L. ed. 773.

7. Hoffman *v.* Supreme Council A. L. of H., 35 Fed. 252, 254, but not synonymous with "materially."

8. Bushel *v.* Com. Ins. Co., 15 Serg. & R. (Pa.) 173, 184 [*citing* 1 Kyd Corp. 270], where it is said that "a corporation cannot be essoigned." See also Rooke *v.* Leicester, 2 T. R. 16 [*cited* in Yarborough *v.* Bank of England, 16 East 6, 7 note, 14 Rev. Rep. 272].

"Essoin day" is a day on which the court sits to take the essoins or excuses for such as do not appear according to the summons of a writ. 3 Blackstone Comm. 278.

9. Dent *v.* Bingham, 8 Mo. 579, 592, distinguished from the English word "common."

10. Compared with and distinguished from "construct" see Brockport *v.* Green, 39 Misc. (N. Y.) 231, 233, 79 N. Y. Suppl. 416; Hempstead *v.* Seymour, 34 Misc. (N. Y.) 92, 94, 69 N. Y. Suppl. 462.

11. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125; Hempstead *v.* Seymour, 34 Misc. (N. Y.) 92, 94, 69 N. Y. Suppl. 462; U. S. *v.* Smith, 4 N. J. L. 38, 42.

12. Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 698, 58 Am. Rep. 697 [*citing* Webster Dict.; Worcester Dict.]; Kepner *v.* Com., 40 Pa. St. 124, 129; Century Dict. [*quoted* in Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 38, 20 S. Ct. 860, 44 L. ed. 961].

13. Kepner *v.* Com., 40 Pa. St. 124, 129.

14. Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 698, 58 Am. Rep. 697 [*citing* Webster Dict.; Worcester Dict.].

15. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125; Hempstead *v.* Seymour, 34 Misc. (N. Y.) 92, 94, 69 N. Y. Suppl. 462; Davenport *v.* Caldwell, 10 S. C. 317, 336; Bouvier L. Dict. [*quoted* in Seagrave's Appeal, 125 Pa. St. 362, 376, 17 Atl. 412].

16. Macdonell *v.* International, etc., R. Co., 60 Tex. 590, 595.

17. Hempstead *v.* Seymour, 34 Misc. (N. Y.) 92, 94, 69 N. Y. Suppl. 462.

18. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125; Kepner *v.* Com., 40 Pa. St. 124, 129; Macdonell *v.* International, etc., R. Co., 60 Tex. 590, 595.

19. *Kentucky.*— Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana 113, 125.

Minnesota.— State *v.* School Dist. No. 152, 54 Minn. 213, 215, 55 N. W. 1122.

New York.— Hempstead *v.* Seymour, 34 Misc. 92, 94, 69 N. Y. Suppl. 462.

Pennsylvania.— Seagrave's Appeal, 125 Pa. St. 362, 376, 17 Atl. 412 [*quoting* Bouvier L. Dict.].

South Carolina.— Davenport *v.* Caldwell, 10 S. C. 317, 336.

Texas.— State *v.* Cook, 78 Tex. 406, 417, 14 S. W. 990.

20. U. S. *v.* Smith, 4 N. J. L. 38, 42.

21. State *v.* School Dist. No. 152, 54 Minn. 213, 215, 55 N. W. 1122.

22. U. S. *v.* Smith, 4 N. J. L. 38, 43.

23. Kepner *v.* Com., 40 Pa. St. 124, 129.

24. U. S. *v.* Smith, 4 N. J. L. 38, 43.

25. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125.

26. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125; Macdonell *v.* International, etc., R. Co., 60 Tex. 590, 595. See also State *v.* Herselus, 86 Iowa 214, 216, 53 N. W. 105.

27. State *v.* Rogers, 107 Ala. 444, 453, 19 So. 909, 32 L. R. A. 520.

28. Century Dict. [*quoted* in Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 38, 20 S. Ct. 860, 44 L. ed. 961].

29. Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 698, 58 Am. Rep. 697 [*citing* Webster Dict.; Worcester Dict.]; Webster Dict. [*quoted* in Ambler's Appeal, 2 Montg. Co. Rep. (Pa.) 65, 66].

sure;[30] to settle[31] firmly,[32] finally, or certainly;[33] to settle or fix;[34] to fix permanently,[35] or unalterably;[36] to settle or fix unalterably;[37] to fix or set unalterably;[38] to settle certainly or fix permanently what was before uncertain, doubtful, or disputed;[39] to ratify;[40] to confirm;[41] to permanently settle and confirm.[42] Whether considered in its popular use or as defined by the most approved lexicographers it has been held that this word must be understood to mean not merely to designate, but to create, erect, build, prepare, or fix permanently.[43] Again the term may even be used in the sense of to appoint;[44] to acknowledge; to recognize or support;[45] to regulate;[46] to prescribe.[47] It has been said that upon few words could there be more room for argument than upon this word; it has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context.[48] As applied to evidence, to secure its preservation for possible

30. Century Dict. [*quoted* in Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 38, 20 S. Ct. 860, 44 L. ed. 961].

31. Davenport *v.* Caldwell, 10 S. C. 317, 336; Suit *v.* State, 30 Tex. App. 319, 322, 17 S. W. 458 [*citing* Bouvier L. Dict.; Webster Dict.].

32. McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 478, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; Eberhardt *v.* Sanger, 51 Wis. 72, 79, 8 N. W. 111 [*cited* in Endowment Rank K. of P. *v.* Steele, 107 Tenn. 1, 7, 63 S. W. 1126]; Davenport *v.* Caldwell, 10 S. C. 317, 336; Bouvier L. Dict. [*quoted* in O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196, 201, 39 Atl. 428]. See also U. S. *v.* Smith, 4 N. J. L. 38, 43.

33. Endowment Rank K. of P. *v.* Steele, 107 Tenn. 1, 8, 63 S. W. 1126.

34. Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 698, 58 Am. Rep. 697 [*citing* Webster Dict.; Worcester Dict.]; Suit *v.* State, 30 Tex. App. 319, 322, 17 S. W. 458 [*citing* Bouvier L. Dict.; Webster Dict.].

35. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125; Endowment Rank K. of P. *v.* Steele, 107 Tenn. 1, 8, 63 S. W. 1126.

The idea of permanency need not, however, be conveyed. Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 38, 20 S. Ct. 860, 44 L. ed. 961; Newton *v.* Mahoning County, 100 U. S. 548, 561, 25 L. ed. 710; Atty.-Gen. *v.* Toronto, 6 Ont. L. Rep. 159, 167. And *compare* Yazoo, etc., R. Co. *v.* Baldwin, 78 Miss. 57, 64, 29 So. 763.

36. McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 487, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; Eberhardt *v.* Sanger, 51 Wis. 72, 79, 8 N. W. 111 [*quoted* in Endowment Rank K. of P. *v.* Steele, 107 Tenn. 1, 7, 63 S. W. 1126]; Davenport *v.* Caldwell, 10 S. C. 317, 336. *Compare* Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 38, 20 S. Ct. 860, 44 L. ed. 961 [*quoted* in Atty.-Gen. *v.* Toronto, 6 Ont. L. Rep. 159, 167].

37. Webster Dict. [*quoted* in Ambler's Appeal, 2 Montg. Co. Rep. (Pa.) 65, 66; Century Dict. [*quoted* in Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 38, 20 S. Ct. 860, 44 L. ed. 961].

38. Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 698, 58 Am. Rep. 697 [*citing* Webster Dict.; Worcester Dict.]. But see Davenport *v.* Caldwell, 10 S. C. 317, 336.

39. Smith *v.* Forrest, 49 N. H. 230, 234 [*quoted* in O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196, 201, 39 Atl. 428; Egan *v.* Finney, 42 Oreg. 599, 603, 72 Pac. 133; Endowment Rank K. of P. *v.* Steele, 107 Tenn. 1, 7, 63 S. W. 1126].

40. Davenport *v.* Caldwell, 10 S. C. 317, 336.

41. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125; Ketchum *v.* Buffalo, 14 N. Y. 356, 361 [*affirming* 21 Barb. 294]; Davenport *v.* Caldwell, 10 S. C. 317, 336; Suit *v.* State, 30 Tex. App. 319, 322, 17 S. W. 458 [*citing* Bouvier L. Dict.; Webster Dict.]. See also 8 Cyc. 565 note 6.

42. Weigel's Succession, 18 La. Ann. 49, 52 [*quoted* in O'Keefe *v.* Irvington Real Estate, 87 Md. 196, 201, 39 Atl. 428].

43. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125.

44. Osborne *v.* San Diego Land, etc., Co., 178 U. S. 22, 38, 20 S. Ct. 860, 44 L. ed. 96.

45. Davenport *v.* Caldwell, 10 S. C. 317, 336, 339.

46. Davenport *v.* Caldwell, 10 S. C. 317, 336; Bouvier L. Dict. [*quoted* in Seagrave's Appeal, 125 Pa. St. 362, 375, 17 Atl. 412].

47. *Ex p.* Lothrop, 118 U. S. 113, 119, 6 S. Ct. 984, 30 L. ed. 108 [*citing* Webster Dict.].

48. Davenport *v.* Caldwell, 10 S. C. 317, 336 [*citing* Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25; 1 Story Const. (3d ed.) § 454].

Establish "a banking company" (see Com. *v.* Simonds, 11 Gray (Mass.) 306, 307); "a boundary line" (see Faucher *v.* Tutewiller, 76 Ill. 194, 196; Weeks *v.* Trask, 81 Me. 127, 131, 16 Atl. 413, 2 L. R. A. 532; Smith *v.* Forrest, 49 N. H. 230, 234); "a business," "a character," "a government," "a manufactory" (see Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113, 125); "a cemetery" (see Bogert *v.* Indianapolis, 13 Ind. 134, 181); "a claim" (see Weigel's Succession, 18 La. Ann. 49, 52; Brinkworth *v.* Hazlett, 64 Nebr. 592, 598, 90 N. W. 537); "a company for business" (see Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 455, 18 L. ed. 377); "a county" (see Askew *v.* Hale County, 54 Ala. 639, 642, 25 Am. Rep. 730; Detroit First Nat. Bank *v.* Beltrami County, 77 Minn. 43, 79 N. W. 591; State *v.* Mc-

future use, in a judicial controversy;[49] to prove.[50] (To Establish: A Boundary, see BOUNDARIES. A Bridge, see BRIDGES. A Canal, see CANALS. A City, see MUNICIPAL CORPORATIONS. A Constitution, see CONSTITUTIONAL LAW. A County, see COUNTIES. A Court, see COURTS. A Custom or Usage, see CUSTOMS AND USAGES. A Drain, see DRAINS. A Highway, see STREETS AND HIGHWAYS. An Election District, see ELECTIONS. A Private Road, see PRIVATE ROADS. A Public School, see SCHOOLS AND SCHOOL-DISTRICTS. A Railroad, see RAILROADS. A Telegraph or Telephone, see TELEGRAPHS AND TELEPHONES. A Town, see TOWNS. A Trust, see TRUSTS. A Turnpike or Toll Road, see TOLL ROADS. A Will, see WILLS. Legitimacy, see BASTARDS. Lost Instruments, see LOST INSTRUMENTS.)

ESTABLISHMENT.[51] The place in which one is permanently fixed for residence or business; residence with grounds, furniture, equipage, etc., with which one is fitted out; also, any office or place of business, with its fixtures.[52]

ESTABLISSEMENT. A French word meaning ESTABLISHMENT,[53] *q. v.*

Fadden, 23 Minn. 40, 42 [*cited* in State *v.* Parker, 25 Minn. 215, 219]); "a court" (see Forbes *v.* State, 2 Pennew. (Del.) 197, 205, 43 Atl. 626); "a ferry or bridge" (see Wright *v.* Nagle, 101 U. S. 791, 796, 25 L. ed. 921); "a highway" (see Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 556, 3 So. 158, 11 Am. St. Rep. 395); "a hospital" (see Seagrave's Appeal, 125 Pa. St. 362, 376, 17 Atl. 412; Richmond *v.* Henrico County, 83 Va. 204, 208, 2 S. E. 26); "a market" (see Jacksonville *v.* Ledwith, 26 Fla. 163, 192, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; People *v.* Lowber, 28 Barb. (N. Y.) 65, 70; Ketchum *v.* Buffalo, 21 Barb. (N. Y.) 294, 298 [*affirmed* in 14 N. Y. 356]; Wartman *v.* Philadelphia, 33 Pa. St. 202, 210; Rex *v.* Cotterill, 1 B. & Ald. 67); "amount of damages" (see Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 698, 58 Am. Rep. 697); "an office" (see Reed *v.* Walker, 2 Tex. Civ. App. 92, 95, 21 S. W. 687); "a place of business" (see Rhodes *v.* Salem Turnpike, etc., Corp., 98 Mass. 95, 97); "a rate" (see U. S. *v.* Howell, 56 Fed. 21, 29); "a road or way" (see Chester *v.* Baltimore, etc., R. Co., 140 Pa. St. 275, 289, 21 Atl. 320; Ambler's Appeal, (Pa. 1886) 4 Atl. 187, 188; Ambler's Appeal, 2 Walk. (Pa.) 287, 288); "a school" (see Dickey *v.* Maysville, etc., Turnpike Road Co., *supra*; Atty.-Gen. *v.* Soule, 28 Mich. 153, 157 [*citing* Atty.-Gen. *v.* Hull, 9 Hare 647, 15 E. L. & Eq. 182, 41 Eng. Ch. 647]); "a school-house" (see Atty.-Gen. *v.* Hull, *supra*); "a uniform rule" (see Dickey *v.* Maysville, etc., Turnpike Road Co., *supra*; U. S. *v.* Severino, 125 Fed. 949, 953); "a village" (see Stephenson *v.* Leesburgh, 33 Ohio St. 475, 480); "a will" (see Clark *v.* Poor, 73 Hun (N. Y.) 143, 144, 25 N. Y. Suppl. 908); "by a jury" (see Fitch *v.* Taft, 126 Mass. 503, 504); "by law" (see Dane *v.* Smith, 54 Ala. 47, 49; Healey *v.* Dudley, 5 Lans. (N. Y.) 115, 120); "justice" (see Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 475, 1 L. ed. 440); "post-offices and post roads" (see Dickey *v.* Maysville, etc., Turnpike Road Co., *supra*; Richmond *v.* Henrico County, 83 Va. 204, 209, 2 S. E. 26; Ware *v.* U. S., 4 Wall. (U. S.) 617, 632, 18 L. ed. 389; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 417, 4 L. ed. 579); "transportation lines" (see State *v.* Mansfield Tp., 23 N. J. L. 510, 513, 57 Am. Dec. 409); "the grade of a street" (see *In re* New York Mut. L. Ins. Co., 89 N. Y. 530, 533); or "wharves, docks, piers, etc." (see Madison *v.* Daley, 58 Fed. 751, 755).

"Establish" used with respect to a dower see Richards *v.* Bellingham Bay Land Co., 54 Fed. 209, 213, 4 C. C. A. 290.

"Legally establish" see *In re* Mason's Orphanage, etc., [1896] 1 Ch. 54, 59.

"Lawfully establish" see People *v.* Cohoctou Stone Road, 25 Hun (N. Y.) 13, 16.

The word "additional" may limit the meaning of the word "establish." Com. *v.* Charity Hospital, 199 Pa. St. 119, 122, 48 Atl. 906.

49. *In re* Goode, 3 Mo. App. 226, 229, distinguishing "rendering judgment" from "establishing evidence." See also Eberhardt *v.* Sanger, 51 Wis. 72, 79, 8 N. W. 111 [*cited* in Endowment Rank K. of P. *v.* Steele, 107 Tenn. 1, 7, 63 S. W. 1126].

50. Fury *v.* State, 8 Tex. App. 471, 473.

51. **Used as synonymous with "constitution"** see 8 Cyc. 694 note 10.

52. Webster Unabr. Dict. [*quoted* in Richmond County Academy *v.* Bohler, 80 Ga. 159, 162, 7 S. E. 633, where the word is defined in connection with "institution"].

May include good-will and right to use name. Lane *v.* Smythe, 46 N. J. Eq. 443, 452, 19 Atl. 199 [*citing* Boon *v.* Moss, 70 N. Y. 465]. *Compare* Anderson *v.* Faulconer, 30 Miss. 145, 146.

May include appliances.—Memphis Gaslight Co. *v.* State, 6 Coldw. (Tenn.) 310, 312, 98 Am. Dec. 452.

In the popular language of the French of Missouri, the word means nothing more than is implied in the popular language of the Anglo-Americans of the same country, by the word "settlement." Dent *v.* Bingham, 8 Mo. 579, 592.

"Establishment of a dispensary" is the procuring of a site and the erection of a suitable building therefor. Beekman *v.* People, 27 Barb. (N. Y.) 260, 264 [*citing* Atty.-Gen. *v.* Hull, 9 Hare 647, 15 Eng. L. & Eq. 182, 41 Eng. Ch. 647].

53. Dent *v.* Bingham, 8 Mo. 579, 592.

EST ALIQUID QUOD NON OPORTET, ETIAM SI LICET; QUICQUID VERO NON LICET CERTÈ NON OPORTET. A maxim meaning "There is some thing which ought not to be done, even though it be lawful; but whatever is not lawful certainly ought not to be done." [54]

ESTALLAGE. As applied to markets, a satisfaction to the owner of the soil for the liberty of placing a stall upon it.[55]

54. Adams Gloss.

55. Northampton *v.* Ward, 2 Str. 1238, 1239 [*citing* Blunt L. Dict.; Minshens Boyer; Spellman Gloss., and *quoted* in Draper *v.* Sperring, 10 C. B. N. S. 113, 123, 30 L. J. M. C. 225, 4 L. T. Rep. N. S. 365, 9 Wkly. Rep. 656, 100 E. C. L. 113], opinion by Lee, C. J.

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I. DEFINITION AND APPLICATION OF THE TERM "ESTATE."

An estate in land is the degree, quantity, nature, or extent of interest which a person has in it.[1] While in its primary and technical sense the term "estate" refers only to an interest in land,[2] yet by common usage it has acquired a much wider import and application,[3] being applied to personal property as well as

1. Robertson *v.* Van Cleave, 129 Ind. 217, 232, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68 [*citing* Black L. Dict.; 2 Blackstone Comm. 103; Bouvier L. Dict.; Coke Litt. § 347; 2 Crabb Real Prop. pt. 2, § 942; Preston Est. 20; 1 Washburn Real Prop. 45].

Blackstone's definition is: "An estate in lands, tenements, and hereditaments, signifies such interest as the tenant has therein." 2 Blackstone Comm. 103 [*quoted* in Clift *v.* White, 12 N. Y. 519, 527]. See also Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 476, 89 N. W. 848; New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17, 22.

Lord Coke's definition is: "Estate signifieth such inheritance, freehold, terme for yeares, tenancie by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements." Coke Litt. 345*a*, § 650 [*quoted* in Ball *v.* Chadwick, 46 Ill. 28, 32; Carter *v.* Gray, 58 N. J. Eq. 411, 413, 43 Atl. 711; O'Neil *v.* Carey, 8 U. C. C. P. 339, 343; Doe *v.* Peterson, 3 U. C. Q. B. O. S. 497, 500].

Other definitions are: "The degree, quantity, nature and extent of interest which a person has in real property." Messmore *v.* Williamson, 189 Pa. St. 73, 78, 41 Atl. 1110, 69 Am. St. Rep. 791 [*quoting* Bouvier L. Dict.]; Troth *v.* Robertson, 78 Va. 46, 55.

"The quantity of interest which a person has, from absolute ownership down to naked possession." Lowery *v.* Powell, 109 Ga. 192, 194, 34 S. E. 296; Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 476, 89 N. W. 848; Maclaren *v.* Stone, 18 Ohio Cir. Ct. 854, 855, 9 Ohio Cir. Dec. 794.

"That title or inheritance which a man hath, in lands or tenements." Rash's Estate, 2 Pars. Eq. Cas. (Pa.) 160, 162.

"The interest which any one has in lands or in any other subject of property." Lowery *v.* Powell, 109 Ga. 192, 194, 34 S. E. 296 [*quoting* Black L. Dict.].

Estate is derived from status, and in its most general sense means position or standing in respect to the things and concerns of this world. Bond *v.* Hilton, 51 N. C. 180.

A vacant estate is defined by the Louisiana civil code as an estate when no person claims its possession, either as heir or under any other title. Davis *v.* Elkins, 9 La. 135.

The possibility of reverter in the grantor of a conditional fee is not an estate. Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265.

The inchoate right of dower, prior to the death of the husband, is not an estate. Davis *v.* Townsend, 32 S. C. 112, 10 S. E. 837.

A judgment lien is not an estate or interest in land. Ashton *v.* Slater, 19 Minn. 347; Burwell *v.* Tullis, 12 Minn. 572.

Alimony is not an estate. Campbell *v.* Campbell, 37 Wis. 206.

2. Bates *v.* Sparrell, 10 Mass. 323; Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118; Messmore *v.* Williamson, 189 Pa. St. 73, 41 Atl. 1110, 69 Am. St. Rep. 791; Campbell *v.* Campbell, 37 Wis. 206.

3. Bates *v.* Sparrell, 10 Mass. 323; Read *v.* Jamaica, 40 Vt. 629.

The word "estate" was originally used to designate the interest which one had in land, then to indicate the land itself, and was afterward extended to all property, real and personal. *In re* Hinckley, 58 Cal. 457, 514 [*citing* Burrill L. Dict.]. See also Barry *v.* Edgeworth, 2 P. Wms. 523, 24 Eng. Reprint 845.

The word "estate" is genus generalissimum and includes all things real and personal. Thornton *v.* Mulquinne, 12 Iowa 549, 79 Am. Dec. 548; Bridgewater *v.* Bolton, 6 Mod. 106, 1 Salk. 236; O'Neil *v.* Carey, 8 U. C. C. P. 339.

The word "estate" is applied to land in two senses: (1) To point out the land itself; and (2) to signify the degree, quantity, nature, and extent of interest therein. Troth *v.* Robertson, 78 Va. 46.

The word "estate," as used with reference to a decedent's property, has acquired a

realty,[4] and in its most extreme sense signifying everything of which riches or fortune may consist.[5] In many cases therefore its precise meaning can only be ascertained from the context, or the circumstances under which it is used.[6] As applied to land it does not necessarily import a fee or even a freehold,[7] but merely the quantity of interest a person has from absolute ownership to naked possession,[8] and is applied to rights in land, both in possession and expectancy, and to future estates either vested or contingent.[9] There is a very plain and marked distinction between an estate in lands and a title to lands; the former signifying the interest which a person has, and the latter the evidence of his right or of the extent of his interest, or the means whereby he is enabled to assert or maintain his possession.[10]

wider application in a popular sense and refers to the entire mass of the decedent's property, both real and personal. Harrison *v.* Lamar, 33 Ark. 824.

Estate as applicable to the payment of alimony includes income, however accruing, whether from the estate proper, or employment, or both. Campbell *v.* Campbell, 37 Wis. 206.

Choses in action are included under the word "estate." Hurdle *v.* Outlaw, 55 N. C. 75; Pippin *v.* Ellison, 34 N. C. 61, 55 Am. Dec. 403; Cooney *v.* Lincoln, 20 R. I. 183, 37 Atl. 1031.

4. *Illinois.*— Greenwood *v.* Greenwood, 178 Ill. 387, 53 N. E. 101.

Maine.— Deering *v.* Tucker, 55 Me. 284.

Maryland.— Elder *v.* Lantz, 49 Md. 186.

Minnesota.— Johnson *v.* Johnson, 32 Minn. 513, 21 N. W. 725.

Nebraska.— Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118.

New Jersey.— Whittaker *v.* Whittaker, 40 N. J. Eq. 33; Adamson *v.* Ayres, 5 N. J. Eq. 349.

New York.— U. S. *v.* Crookshank, 1 Edw. 233.

Pennsylvania.— Messmore *v.* Williamson, 189 Pa. St. 73, 41 Atl. 1110, 69 Am. St. Rep. 791; Shoch *v.* Shoch, 19 Pa. St. 252.

Vermont.— Read *v.* Jamaica, 40 Vt. 629.

Virginia.— Troth *v.* Robertson, 78 Va. 46.

Wisconsin.—Campbell *v.* Campbell, 37 Wis. 206.

United States.— Weatherhead *v.* Baskerville, 11 How. 329, 13 L. ed. 717; Archer *v.* Deneale, 1 Pet. 585, 7 L. ed. 272.

Canada.— Macdonald *v.* Georgian Bay Lumber Co., 2 Can. Supreme Ct. 364; O'Neil *v.* Carey, 8 U. C. C. P. 339.

See 19 Cent. Dig. tit. "Estates," § 1.

5. Ayers *v.* Lawrence, 59 N. Y. 192, 198 [*citing* Bouvier L. Dict.; Wharton L. Dict.]; Cooney *v.* Lincoln, 20 R. I. 183, 186, 37 Atl. 1031 [*quoting* Bouvier L. Dict.]; Troth *v.* Robertson, 78 Va. 46.

A constitution requiring, as a qualification for voting, the ownership of an estate of a certain value embraces every species of property capable of valuation in money. Bridge *v.* Lincoln, 14 Mass. 367.

A man's estate means what he is worth in property, and that is the value of his property over and above his liabilities. Smith *v.* Terry, 43 N. J. Eq. 659, 12 Atl. 204.

6. *In re* Hinckley, 58 Cal. 457, 514 [*quoting* Burrill L. Dict.]; Den *v.* Snitcher, 14 N. J. L. 53; Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 31 N. E. 231; Campbell *v.* Campbell, 37 Wis. 206.

The word "estate" may mean real or personal estate; or it may be descriptive of the locality or quantity of land only; or of the quantity of time or interest therein, or of both. Den *v.* Drew, 14 N. J. L. 68.

In a will the meaning of the term "estate" must be determined from the connection in which it is used (*In re* Hinckley, 58 Cal. 457; Crew *v.* Dixon, 129 Ind. 85, 27 N. E. 728); and it may refer either to the thing devised or to the quantity of interest (Hudson *v.* Wadsworth, 8 Conn. 348; Hart *v.* White, 26 Vt. 260; Lambert *v.* Paine, 3 Cranch (U. S.) 96, 2 L. ed. 377); and be restricted to realty only (Brainerd *v.* Cowdrey, 16 Conn. 1), or to personalty (Norris *v.* Clark, 10 N. J. Eq. 51; Havens *v.* Havens, 1 Sandf. Ch. (N. Y.) 324; Archer *v.* Deneale, 1 Pet. (U. S.) 585, 7 L. ed. 272), or include both (Taylor *v.* Dodd, 2 Thomps. & C. (N. Y.) 88); standing alone without any qualification or restriction it will include all kinds of property, real, personal, and mixed (Cook *v.* Lanning, 40 N. J. Eq. 369, 3 Atl. 132; Gourley *v.* Thompson, 2 Sneed (Tenn.) 387; Pulliam *v.* Pulliam, 10 Fed. 23).

In statutes the import of the term depends in a great degree upon its association with other expressions (*In re* Hinckley, 58 Cal. 457); and the fixed absolute sense of the word in the abstract must give way to the connection in which it is used (Campbell *v.* Campbell, 37 Wis. 206).

The term "estate" when used to denote the subject of a lien should be understood as comprehending property susceptible of being impressed with a lien, so as to accomplish and not defeat the obvious purpose of the instrument. Higgins *v.* Higgins, 121 Cal. 487, 53 Pac. 1081, 66 Am. St. Rep. 57.

7. Anderson L. Dict. [*citing* Sudbury *v.* Stow, 13 Mass. 462, and *quoted* in Maclaren *v.* Stone, 18 Ohio Cir. Ct. 854, 855, 9 Ohio Cir. Dec. 794].

8. Lowery *v.* Powell, 109 Ga. 192, 34 S. E. 296; Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 89 N. W. 848; Jackson *v.* Parker, 9 Cow. (N. Y.) 73; Maclaren *v.* Stone, 18 Ohio Cir. Ct. 854, 9 Ohio Cir. Dec. 794.

9. Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 89 N. W. 848.

10. Robertson *v.* Vancleave, 129 Ind. 217, 232, 26 N. E. 899, 29 N. E. 781, 15 L. R. A.

II. CLASSIFICATION.

A. In General. Estates are classified: (1) With regard to the quantity of interest which the tenant has in the tenement; (2) with regard to the time at which that quantity is to be enjoyed; and (3) with regard to the number and connections of the tenants.[11]

B. With Regard to Quantity of Interest — 1. In General. With regard to the quantity of interest which the tenant has in the tenement, estates are classified as estates of freehold and estates less than freehold.[12]

2. Estates of Freehold — a. Definition and Classification. An estate of freehold is an estate of inheritance or for life in real property.[13] Estates of freehold are either estates of inheritance or estates not of inheritance,[14] all being estates of inheritance except estates for life.[15]

b. Freeholds of Inheritance — (I) *Definition and Classification.* An estate of inheritance is an estate which may descend to heirs.[16] Estates of inheritances are divided into inheritances absolute or fee simple, and inheritances limited.[17]

(II) *Fee Simple.* A tenant in fee simple is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever; generally, absolutely, and

68 [*citing* Black L. Dict.; 2 Blackstone Comm. 195; Coke Litt. 345].

11. 2 Blackstone Comm. 103; Rash's Estate, 2 Pars. Eq. Cas. (Pa.) 160.

12. New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17; Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118; 2 Blackstone Comm. 103.

13. New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

A freehold is otherwise defined as: "Such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature, by what is equivalent thereto." Crawl *v.* Harrington, 33 Nebr. 107, 112, 49 N. W. 1118 [*quoting* 2 Blackstone Comm. 104].

"Any estate of inheritance or for life in either a corporeal or incorporeal hereditament existing in or arising from real property of free tenure." Wyatt *v.* Larimer, etc., Irr. Co., 18 Colo. 298, 307, 33 Pac. 144, 36 Am. St. Rep. 280.

"Such an estate in lands as is conveyed by livery of seisin, and may be in fee simple or conditional fee, and may be for life only." Hughes *v.* Milligan, 42 Kan. 396, 400, 22 Pac. 313.

The old definition of a freehold as an estate which could only be created by livery of seizin, or the possession of the soil by a freeman, is not applicable where all claim to be freeman and livery of seizin is dispensed with. New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

An estate during widowhood is an estate of freehold in the widow and in any one to whom she may convey the land. Roseboom *v.* Van Vechten, 5 Den. (N. Y.) 414.

A water-right acquired by user of water under a contract with an irrigation company constitutes a freehold estate. Wyatt *v.* Larimer, etc., Irr. Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280.

A devise of the use and occupation of a dwelling-house during the life or widowhood of the devisee creates an estate of freehold. Anderson *v.* Hensley, 8 Heisk. (Tenn.) 834.

A husband living with his wife on land owned by her and occupied by them as their homestead is a freeholder. Hughes *v.* Milligan, 42 Kan. 396, 22 Pac. 313.

An agreement without any words of grant or conveyance by which one of the parties is to have certain land to hold as long as it shall be used for a certain purpose is a mere license and does not create an estate of freehold in the land. Malott *v.* Price, 109 Ind. 22, 9 N. E. 718.

In Massachusetts it is provided by statute that a lessee, under a lease for a term of one hundred years, shall, so long as fifty years of the time be unexpired, be regarded as a freeholder. Stark *v.* Mansfield, 178 Mass. 76, 59 N. E. 643.

14. Crawl *v.* Harrington, 33 Nebr. 107, 112, 49 N. W. 1118 [*quoting* 2 Blackstone Comm. 104].

15. Crawl *v.* Harrington, 33 Nebr. 107, 112, 49 N. W. 1118 [*citing* Bouvier L. Dict.].

An estate either for the tenant's own life or for the life of another is an estate of freehold. See Roseboom *v.* Van Vechten, 5 Den. (N. Y.) 414.

16. Crawl *v.* Harrington, 33 Nebr. 107, 112, 49 N. W. 1118 [*citing* 1 Washburn Real Prop. 51].

An estate of inheritance is otherwise defined as: "A species of freehold estate in lands, otherwise called a fee, where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successively represent him *in perpetuum*, in right of blood, according to a certain established order of descent." Burrill L. Dict. [*quoted* in Brown *v.* Freed, 43 Ind. 253, 256].

17. Crawl *v.* Harrington, 33 Nebr. 107, 112, 49 N. W. 1118 [*quoting* 2 Blackstone Comm. 104]; 4 Kent Comm. 4.

simply, without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law.[18] By fee simple is generally meant a fee simple absolute; but "fee simple" and "fee" are often used as convertible terms,[19] and the former does not necessarily mean a fee simple absolute,[20] but may be applied to a base or determinable fee,[21] or to a fee conditional.[22] A fee simple is so called because it is clear of any condition or restriction as to particular heirs.[23] It is the largest estate and most extensive interest that can be enjoyed in land,[24] being an absolute estate in perpetuity,[25] and conferring an unlimited power of alienation.[26]

(III) *LIMITED OR CONDITIONAL FEES*—(A) *In General.* Limited or conditional fees are of two kinds: (1) Qualified or base fees; and (2) fees conditional, so called at the common law; and afterward fees tail, in consequence of the statute *de donis*.[27]

(B) *Base, Qualified, or Determinable Fees.* A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end.[28] This estate is a fee, because by

18. 2 Blackstone Comm. 104.

A fee simple is otherwise defined as: "A pure fee; an absolute estate of inheritance, that which a person holds inheritable to him and his heirs general forever." Haynes *v.* Bourn, 42 Vt. 686, 690.

"A pure inheritance or absolute ownership, clear of any qualification or condition, or a time in the land without end, and upon the death of the proprietor gives a right of succession to all his heirs." Farnum *v.* Loomis, 2 Oreg. 29, 32 [*quoting* 1 Hilliard Real Prop. 35–38].

"A pure inheritance, clear of any qualification or condition, and it gives the right of succession to all the heirs generally." Friedman *v.* Steiner, 107 Ill. 125, 131.

"An estate to a man and his heirs forever." Burrill L. Dict. [*quoted* in Brown *v.* Freed, 43 Ind. 253, 256].

19. People *v.* White, 11 Barb. (N. Y.) 26.

The term "fee simple" when used alone without any words of qualification or limitation means an estate in possession and owned in severalty. Brackett *v.* Ridlon, 54 Me. 426.

The word "absolute" is not used legally to distinguish a fee from a life-estate, but to distinguish a qualified or conditional fee from a fee simple. Greenawalt *v.* Greenawalt, 71 Pa. St. 483.

20. Richardson *v.* Noyes, 2 Mass. 56, 3 Am. Dec. 627.

The terms "fee," "fee simple," and "fee simple absolute," as used in modern estates and conveyancing, are substantially synonymous. Jecko *v.* Taussig, 45 Mo. 167.

The New York statutes relating to the creation and division of estates provide that "every estate of inheritance, notwithstanding the abolition of tenures, shall continue to be termed a fee simple or fee; and every such estate, when not defeasible or conditional, shall be termed a fee simple absolute or an absolute fee." *In re* New York, 74 N. Y. App. Div. 197, 206, 77 N. Y. Suppl. 737.

21. Richardson *v.* Noyes, 2 Mass. 56, 3 Am. Dec. 627; People *v.* White, 11 Barb. (N. Y.) 26.

22. Richardson *v.* Noyes, 2 Mass. 56, 3 Am. Dec. 627.

23. Haynes *v.* Bourn, 42 Vt. 686.

24. *Delaware.*— Bush *v.* Bush, 5 Del. Ch. 144.

Maine.— Brackett *v.* Ridlon, 54 Me. 426.

Missouri.— Jecko *v.* Taussig, 45 Mo. 167.

Oregon.— Farnum *v.* Loomis, 2 Oreg. 30.

Vermont.— Haynes *v.* Bourn, 42 Vt. 686.

25. Friedman *v.* Steiner, 107 Ill. 125; Jecko *v.* Taussig, 45 Mo. 167; 4 Kent Comm. 5.

26. Friedman *v.* Steiner, 107 Ill. 125; Haynes *v.* Bourn, 42 Vt. 686; 4 Kent Comm. 5.

An equitable estate in fee may be alienated, subject to the existing trusts, if the instrument creating it puts no restraint on the power of alienation. Gunn *v.* Brown, (Md. 1892) 23 Atl. 462.

27. 2 Blackstone Comm. 109.

Estates tail see *infra*, III.

28. 2 Blackstone Comm. 109 [*quoted* in Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83, 93].

Other definitions are: "An estate which is subject to a reverter, and continues until the qualification annexed to it is at an end." Farnsworth *v.* Perry, 83 Me. 447, 449, 22 Atl. 373; Moulton *v.* Trafton, 64 Me. 218, 222.

"A fee is so qualified as to be made to determine, or liable to be defeated, upon the happening of some contingent event or act." Hall *v.* Turner, 110 N. C. 292, 305, 14 S. E. 791.

"An estate which may continue in one and his heirs forever, but which may come to an end or be determined by some act or event expressed on the limitation, to circumscribe its continuance." Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159, 168.

"An estate which is to continue till the happening of a certain event, and then to cease." North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 174, 29 N. E. 524, 15 L. R. A. 231.

"An interest which may continue for ever, but the estate is liable to be determined with-

possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.[29] If the happening of the event upon which the estate is to be determined becomes impossible it is converted into an estate in fee simple.[30] The qualification on which the estate is to determine must be found in the instrument creating the estate,[31] but no especial or technical words are required to establish it.[32] A base fee during its continuance has all the incidents of a fee simple.[33] It is descendible [34] and assignable,[35] and the owner, while his title continues, has the same right to the exclusive use and enjoyment of the land and as complete dominion over it for all purposes as though he held it in fee simple.[36] The owner of a base fee cannot alone convey a perfect title to the property,[37] and if he conveys in fee the determinable quality of the estate follows the transfer;[38] but an indefeasible title in fee simple may be conveyed if those who would take the estate upon the contingency by which his estate would be defeated join with him in the conveyance.[39] Upon the determination of a base fee the property reverts to the grantor.[40] In the mean-

out the aid of a conveyance by some act or event circumscribing its continuance or extent." Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; 4 Kent Comm. 9 [*quoted* in Grout *v.* Townsend, 2 Den. (N. Y.) 336, 339]. See also People *v.* White, 11 Barb. (N. Y.) 26.

"Fees which are liable to be determined by some act or event expressed on their limitation to circumscribe their continuance, or inferred by law as bounding their extent." Vantongeren *v.* Heffernan, 5 Dak. 180, 38 N. W. 52, 73; Greer *v.* Wilson, 108 Ind. 322, 326, 9 N. E. 284; McLane *v.* Bovee, 35 Wis. 27, 36 [each *quoting* 1 Washburn Real Prop. 62].

The terms "determinable fee," "base fee," and "qualified fee" are now used indiscriminately (4 Kent Comm. 9), although some authors have made distinctions in their application (see Hall *v.* Turner, 110 N. C. 292, 14 S. E. 791).

Instances of the creation of such estates are: A grant of land to hold so long as it shall be used for a certain purpose. Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83; North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; State *v.* Brown, 27 N. J. L. 13. An exception in a deed of a mill privilege so long as it is occupied with mills. Moulton *v.* Trafton, 64 Me. 218. An exception in a deed of a store, with the privilege of remaining so long as the store stands. Farnsworth *v.* Perry, 83 Me. 447, 22 Atl. 373. A devise to a particular person with a devise over to other persons upon the contingency of the first devisee dying without issue. *In re* New York, etc., R. Co., 105 N. Y. 89, 11 N. E. 492, 59 Am. St. Rep. 478.

The grantee of a tenant in tail takes a base fee determinable after the death of the tenant in tail by the entry of the issue in tail. Whiting *v.* Whiting, 4 Conn. 179; Waters *v.* Margerum, 60 Pa. St. 39.

The mere expression of a purpose for which the land is to be used will not of itself debase a fee (Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547; Griffitts *v.* Cope, 17 Pa. St. 96; Stuart *v.* Easton, 170 U. S. 383, 18 S. Ct. 650, 42 L. ed. 1078); but where an estate is conveyed in fee for a specified purpose "and no other" the fee is a base fee determinable upon cessation of the use of the property for that purpose (Slegel *v.* Lauer, *supra*; Scheetz *v.* Fitzwater, 5 Pa. St. 126).

29. 2 Blackstone Comm. 110 [*quoted* in Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83, 93]. See also North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; Weed *v.* Woods, 71 N. H. 581, 53 Atl. 1024; Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547; Bryan *v.* Spires, 1 Leg. Gaz. (Pa.) 191; 4 Kent Comm. 9.

30. Friedman *v.* Steiner, 107 Ill. 125; 4 Kent Comm. 9.

31. Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

32. See Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547.

33. Whiting *v.* Whiting, 4 Conn. 179; State *v.* Brown, 27 N. J. L. 13.

34. Farnsworth *v.* Perry, 83 Me. 447, 22 Atl. 373; Fall *v.* Turner, 110 N. C. 292, 14 S. E. 791; 4 Kent Comm. 9.

35. Farnsworth *v.* Perry, 83 Me. 447, 22 Atl. 373; Moulton *v.* Trafton, 64 Me. 218; Grout *v.* Townsend, 2 Den. (N. Y.) 336.

36. Weed *v.* Woods, 71 N. H. 581, 53 Atl. 1024; New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133 [*affirmed* in 47 N. J. Eq. 598, 22 Atl. 1076].

37. North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

38. Grout *v.* Townsend, 2 Den. (N. Y.) 336; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

39. *In re* New York, etc., R. Co., 105 N. Y. 89, 11 N. E. 492, 59 Am. St. Rep. 478.

40. Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547. See also 2 Blackstone Comm. 109.

while the estate is out of him and all that remains to him is the mere possibility of reverter;[41] yet this mere possibility has been held to be an interest capable of assignment.[42] Base or qualified fees are still recognized,[43] and were not done away with by the statute *quia emptores*.[44]

(c) *Fees Conditional.* A conditional fee is one which restrains the fee to some particular heirs, exclusive of others, as to the heirs of a man's body, or to the heirs male of his body.[45] This estate was held to be a fee simple on condition that the donee had issue,[46] and with the further condition that in default of such issue it should revert to the donor.[47] As soon as any issue was born the estate was supposed to become absolute by performance of the condition, at least for three purposes: (1) To alien; (2) to forfeit for treason; and (3) to charge with rents and certain other encumbrances.[48] The estate might be aliened before the birth of issue so as to bar the rights of such issue,[49] but not so as to bar the donor's right of reverter.[50] After birth of issue alienation passed the entire estate and barred the donor's reverter;[51] but since the reverter was not barred in case the issue died before alienation,[52] it became customary to alien immediately on birth of issue and repurchase to hold in fee simple.[53] To prevent this the statute *de donis conditionalibus*[54] was passed which took away from the donee the power of

41. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547. See also North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; 4 Kent Comm. 9.

42. Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547; Scheetz *v.* Fitzwater, 5 Pa. St. 126. But see Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265.

43. North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809; Hall *v.* Turner, 110 N. C. 292, 14 S. E. 791 [*disapproving* the statement in Providence Tp. *v.* Kesler, 67 N. C. 443, where a base or qualified fee is spoken of as an obsolete estate].

44. North Adams First Universalist Soc. *v.* Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

45. 4 Kent Comm. 11.

Blackstone's definition is: "A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others, . . . as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs male of his body, in exclusion both of collaterals, and lineal females also." 2 Blackstone Comm. 110 [*quoted* in Barksdale *v.* Gamage, 3 Rich. Eq. (S. C.) 271, 280; Kirk *v.* Furgerson, 6 Coldw. (Tenn.) 479, 483]. See also Owings *v.* Hunt, 53 S. C. 187, 31 S. E. 237.

46. 2 Blackstone Comm. 110; 4 Kent Comm. 11; Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265.

All the rules applying to estates in fee simple are equally applicable to the estate in fee conditional with the exception of its order of descent and the right of alienation to bar the donor. The laws providing for the distribution of intestate estates do not apply to estates in fee conditional. Owings *v.* Hunt, 53 S. C. 187, 31 S. E. 237.

The only difference between a fee simple and a fee conditional is as to the possibility of duration. Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265.

47. 2 Blackstone Comm. 110; and the following cases:

Illinois.— Frazer *v.* Peoria County, 74 Ill. 282.

South Carolina.— Barksdale *v.* Gamage, 3 Rich. Eq. 271.

Tennessee.— Kirk *v.* Furgerson, 6 Coldw. 479.

Virginia.— Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608.

United State.—Croxall *v.* Sherrerd, 5 Wall. 268, 18 L. ed. 572.

See 19 Cent. Dig. tit. "Estates," § 7.

48. 2 Blackstone Comm. 111; 4 Kent Comm. 11; and the following cases:

Illinois.— Frazer *v.* Peoria County, 74 Ill. 282.

New Hampshire.— Jewell *v.* Warner, 35 N. H. 176.

South Carolina.— Barksdale *v.* Gamage, 3 Rich. Eq. 271.

Virginia.—Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608.

United States.—Croxall *v.* Sherrerd, 5 Wall. 268, 18 L. ed. 572.

See 19 Cent. Dig. tit. "Estates," § 7.

49. Izard *v.* Middelton, Bailey Eq. (S. C.) 228; 4 Kent Comm. 11.

50. Barksdale *v.* Gamage, 3 Rich. Eq. (S. C.) 271.

51. Barksdale *v.* Gamage, 3 Rich. Eq. (S. C.) 271; 4 Kent Comm. 11.

52. 2 Blackstone Comm. 111; Frazer *v.* Peoria County, 74 Ill. 282; Barksdale *v.* Gamage, 3 Rich. Eq. (S. C.) 271.

53. 2 Blackstone Comm. 111; Frazer *v.* Peoria County, 74 Ill. 282; Paterson *v.* Ellis, 11 Wend. (N. Y.) 259; Orndoff *v.* Turman, 2 Leigh (Va.) 200, 21 Am. Dec. 608; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572.

54. St. 13 Edw. I, c. 1.

alienation,[55] and converted the estate into what was afterward known as a fee tail.[56] In a fee conditional the entire estate is in the donee, the donor having a mere possibility of reverter,[57] which he may release to the donee and thereby convert the estate into a fee simple absolute.[58] A fee conditional estate is bound by the lien of a judgment and subject to the claims of creditors in bar of all rights of the issue.[59]

c. Freeholds Not of Inheritance. Freeholds not of inheritance are estates for life only.[60]

3. Estates Less Than Freehold. Estates less than freehold are of three sorts: Estates for years, estates at will, and estates by sufferance.[61]

C. With Regard to Time of Enjoyment — 1. In General. Estates with regard to the time of their enjoyment are divided into estates in possession and estates in expectancy.[62]

2. Estates in Possession. Estates in possession are those whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency.[63]

3. Estates in Expectancy — a. Definition and Classification. An estate in expectancy is where the right to the possession is postponed to a future period.[64] Estates in expectancy are divided into future estates and reversions.[65] Expectant estates are by statute in some jurisdictions descendible, devisable, and alienable in the same manner as estates in possession.[66]

b. Future Estates. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.[67] When the future estate is dependent upon a preceding estate it is termed a remainder.[68] Future estates are either vested or contin-

55. 2 Blackstone Comm. 112; and the following cases:

Illinois.— Frazer *v.* Peoria County, 74 Ill. 282.

New Hampshire.— Jewell *v.* Warner, 35 N. H. 176.

New York.— Paterson *v.* Ellis, 11 Wend. 259.

Tennessee.— Kirk *v.* Furgerson, 6 Coldw. 479.

Virginia.— Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608.

United States.— Croxall *v.* Sherrerd, 5 Wall. 268, 18 L. ed. 572.

See 19 Cent. Dig. tit. "Estates," § 7.

56. See *infra*, III.

57. Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265.

58. Pearse *v.* Killian, McMull. Eq. (S. C.) 231.

59. Pearse *v.* Killian, McMull. Eq. (S. C.) 231; Izard *v.* Middelton, Bailey Eq. (S. C.) 228.

60. 2 Blackstone Comm. 120.

Life-estates see *infra*, IV.

61. 2 Blackstone Comm. 140.

An estate less than freehold is not an estate of inheritance at common law. Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118.

These estates are treated under another title. See Landlord and Tenant.

62. L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; Moore *v.* Littel, 41 N. Y. 66; Palmer *v.* Dunham, 52 Hun (N. Y.) 468, 6 N. Y. Suppl. 46 [*affirmed* in 125 N. Y. 68, 25 N. E. 1081]; 2 Blackstone Comm. 163.

63. 2 Blackstone Comm. 163. See also Livingston *v.* New York L. Ins., etc., Co., 13 N. Y. Suppl. 105.

64. Moore *v.* Littel, 41 N. Y. 66; Palmer *v.* Dunham, 52 Hun (N. Y.) 468, 6 N. Y. Suppl. 46 [*affirmed* in 125 N. Y. 68, 25 N. E. 1081]; Livingston *v.* New York L. Ins., etc., Co., 13 N. Y. Suppl. 105.

65. L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339; Moore *v.* Littel, 41 N. Y. 66; Tilden *v.* Greene, 54 Hun (N. Y.) 231, 7 N. Y. Suppl. 382.

Reversions see *infra*, VI.

66. Hovey *v.* Nellis, 98 Mich. 374, 57 N. W. 255; Dodge *v.* Stevens, 105 N. Y. 585, 12 N. E. 759; Beardsley *v.* Hotchkiss, 96 N. Y. 201; Barber *v.* Brundage, 50 N. Y. App. Div. 123, 63 N. Y. Suppl. 347; Livingston *v.* New York L. Ins., etc., Co., 13 N. Y. Suppl. 105.

67. L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339; Moore *v.* Littel, 41 N. Y. 66; Jessup *v.* Fenton, 47 N. Y. App. Div. 622, 62 N. Y. Suppl. 308.

Executory devise or limitation by will of a future contingent interest in lands see, generally, Wills.

68. L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21; Moore *v.* Littel, 41 N. Y. 66.

Remainders see *infra*, V.

Future estates include all remainders,

gent.[69] They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate.[70] They are contingent while the person to whom, or the event upon which they are limited to take effect, remains uncertain.[71]

D. With Regard to Number and Connections of Tenants. Estates with regard to the number and connections of their owners may be held in four different ways: In severalty, in joint tenancy, in coparcenary, and in common.[72]

E. Estates Upon Condition[73] — **1. Definition and Nature.** Estates upon condition are those whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, enlarged, or finally defeated.[74] Conditions may be annexed to every species of estate or interest in real property,[75] and are therefore more properly qualifications of other estates than a distinct species of themselves.[76]

2. Classification — a. In General. Estates upon condition are divided into estates upon condition implied or in law, and estates upon condition expressed or in deed;[77] and are further divided into estates upon condition precedent and estates upon condition subsequent.[78]

b. Conditions Implied. Estates upon condition implied in law are where the grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words.[79]

c. Conditions Expressed. An estate on condition expressed in the grant or devise itself is where the estate granted has a qualification annexed, whereby the estate shall commence, be enlarged, or defeated, upon performance or breach of such qualification or condition.[80]

d. Conditions Precedent. Conditions precedent are such as must happen or be performed before the estate can vest or be enlarged.[81]

e. Conditions Subsequent. Conditions subsequent are such, by the failure or non-performance of which an estate already vested may be defeated.[82] Estates

whether vested or contingent. Dodge *v.* Stevens, 105 N. Y. 585, 12 N. E. 759.

69. Hovey *v.* Nellis, 98 Mich. 374, 57 N. W. 255; Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 89 N. W. 848; Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339; Moore *v.* Littel, 41 N. Y. 66; Ogden *v.* Ogden, 40 Misc. (N. Y.) 473, 82 N. Y. Suppl. 710.

70. Hovey *v.* Nellis, 98 Mich. 374, 57 N. W. 255; Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 89 N. W. 848; Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339; Moore *v.* Littel, 41 N. Y. 66; Matter of Davis, 91 Hun (N. Y.) 53, 36 N. Y. Suppl. 822; Palmer *v.* Dunham, 52 Hun (N. Y.) 468, 6 N. Y. Suppl. 46 [*affirmed* in 125 N. Y. 68, 25 N. E. 1081]; Ogden *v.* Ogden, 40 Misc. (N. Y.) 473, 82 N. Y. Suppl. 710.

71. Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 89 N. W. 848; Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339; Moore *v.* Littel, 41 N. Y. 66; Livingston *v.* New York L. Ins., etc., Co., 13 N. Y. Suppl. 105; Barker *v.* Southerland, 6 Dem. Surr. (N. Y.) 220. See also Townshend *v.* Frommer, 125 N. Y. 446, 26 N. E. 805.

72. 2 Blackstone Comm. 179.

A tenant in severalty of lands is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. 2 Blackstone Comm. 179.

Joint tenancy see Joint Tenancy.

Coparcenary see Tenancy in Common.

Tenancy in common see Tenancy in Common.

73. See Deeds, 13 Cyc. 645, 683 *et seq.*; and, generally, Wills.

74. 2 Blackstone Comm. 152 [*quoted* in Warner *v.* Bennett, 31 Conn. 468, 475]. See also Coke Litt. 201*a*; 4 Kent Comm. 121.

75. Vermont *v.* Society for Propagation, etc., 28 Fed. Cas. No. 16,920, 2 Paine 545.

76. 2 Blackstone Comm. 152.

77. 2 Blackstone Comm. 152; Coke Litt. 201*a*; 4 Kent Comm. 121.

78. Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682; Fowlkes *v.* Wagoner, (Tenn. Ch. App. 1898) 46 S. W. 586; 2 Blackstone Comm. 154; Coke Litt. 201*a*; 4 Kent Comm. 124.

79. 2 Blackstone Comm. 152. See also 4 Kent Comm. 121.

The doctrine of estates upon condition in law is of feudal extraction, and resulted from the obligations arising out of the feudal relation. 4 Kent Comm. 122.

80. Wheeler *v.* Walker, 2 Conn. 196, 7 Am. Dec. 264; Fowlkes *v.* Wagoner, (Tenn. Ch. App. 1898) 46 S. W. 586. See also 2 Blackstone Comm. 154; Coke Litt. 201.

81. 2 Blackstone Comm. 154 [*quoted* in Warner *v.* Bennett, 31 Conn. 468, 475]. See also 4 Kent Comm. 125.

82. 2 Blackstone Comm. 154 [*quoted* in Warner *v.* Bennett, 31 Conn. 468, 475].

A condition subsequent is one operating on an estate already created and vested, and rendering it liable to be defeated. Brown *v.*

upon condition subsequent have until defeated the same qualities and incidents as though no condition was annexed thereto,[83] but if conveyed or devised they pass subject to the condition.[84]

3. Requisites of the Condition. The condition annexed to the estate must be legal and possible.[85] The condition is void if it be impossible at the time of its creation,[86] or afterward becomes so by the act of God,[87] or of the grantor;[88] or if it be contrary to law[89] or to public policy,[90] or repugnant to the nature of the estate.[91] In such cases if the condition is a condition subsequent the effect is to vest the estate in the grantee, discharged from the condition;[92] but if a condition precedent be void the estate dependent thereon is also void, and the grantee takes nothing by the grant.[93]

4. Conditions and Limitations Distinguished. The distinction between a condition and a limitation is that in the case of a limitation the estate determines as soon as the contingency happens, without any act on the part of him who is next in expectancy, while in the case of a condition the estate continues beyond the happening of the contingency, unless the grantor or his heirs take advantage of the breach of the condition and make an entry or claim in order to avoid the estate.[94] The limitation specifies the utmost time of continuance, and the condition marks some event upon which the estate may be defeated.[95]

5. Conditional Limitations. A conditional limitation is an estate limited to take effect after the determination of an estate, which, in the absence of a limitation over, would have been an estate upon condition.[96] The estate is of a mixed nature, partaking both of a condition and of a limitation;[97] of a condition, because it defeats the estate previously limited; and of a limitation, because upon

State, 5 Colo. 496; Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412; 4 Kent Comm. 125.

83. Warner *v.* Bennett, 31 Conn. 468; Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412; 4 Kent Comm. 125.

84. Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412; 4 Kent Comm. 125, 126.

85. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; 2 Blackstone Comm. 156.

86. Brown *v.* Peck, 1 Eden 140, 28 Eng. Reprint 637; 2 Blackstone Comm. 156; Coke Litt. 206*a*.

87. Jones *v.* Doe, 2 Ill. 276; Morse *v.* Hayden, 82 Me. 227, 19 Atl. 443; Parker *v.* Parker, 123 Mass. 584; Merrill *v.* Emery, 10 Pick. (Mass.) 507.

88. Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514.

89. Scovill *v.* McMahon, 62 Conn. 378, 26 Atl. 479, 36 Am. St. Rep. 350, 21 L. R. A. 58; Mahoning County Com'rs *v.* Young, 59 Fed. 96, 8 C. C. A. 27; Doe *v.* Rugeley, 6 Q. B. 107, 8 Jur. 615, 13 L. J. M. C. 137, 51 E. C. L. 107; Coke Litt. 206*b*.

90. Conrad *v.* Long, 33 Mich. 78; Hawke *v.* Euyart, 30 Nebr. 149, 46 N. W. 422, 27 Am. St. Rep. 391; Wren *v.* Bradley, 2 De G. & S. 49, 12 Jur. 168, 17 L. J. Ch. 172; Brown *v.* Peck, 1 Eden 140, 28 Eng. Reprint 637.

91. Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; Canal Bridge *v.* Methodist Religious Soc., 13 Metc. (Mass.) 335; Blackstone Bank *v.* Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470; Schermerhorn *v.* Negus, 1 Den. (N. Y.) 448.

92. Jones *v.* Doe, 2 Ill. 276; Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; Morse *v.* Hayden, 82 Me. 227, 19 Atl. 443; Parker *v.* Parker, 123 Mass. 584; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; 2 Blackstone Comm. 157; Coke Litt. 206*a*. See also Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682.

93. 2 Blackstone Comm. 157; Coke Litt. 206*a*.

If a condition precedent is impossible the estate will not vest. Stockton *v.* Weber, 98 Cal. 433, 33 Pac. 332.

94. Tallman *v.* Snow, 35 Me. 342; Atty.-Gen. *v.* Merrimack Mfg. Co., 14 Gray (Mass.) 586; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Miller *v.* Levi, 44 N. Y. 489; 2 Blackstone Comm. 155; 4 Kent Comm. 126.

95. 4 Kent Comm. 126.

96. Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420.

A conditional limitation is otherwise defined as: "A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there is a breach of it." Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 146, 63 Am. Dec. 725.

"The denomination of a limitation over to take effect in abridgment of the particular estate." Horton *v.* Sledge, 29 Ala. 478, 496.

Conditional limitations comprehend every limitation which is to vest an interest in a third person, on a condition, or upon an event which may or may not happen. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725.

97. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; 4 Kent Comm. 127.

the happening of the contingency, the estate passes to the person having the next expectant interest without entry or claim.[98] Conditional limitations were not recognized by the common law and could only be created so as to become valid and effectual under the statutes of uses.[99]

III. ESTATES TAIL.

A. Definition and Nature. Estates tail are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and upon the extinction of such issue the estate determines.[1] It is such an estate as prior to the statute *de donis conditionalibus* was a fee conditional at common law.[2] This statute provided in effect that the estate should no longer be alienable by the donee upon birth of issue, but should remain to the heirs of his body according to the form of the gift, and on the failure of such heirs should revert to the donor.[3] The statute divided the estate into two parts, giving to the donee a particular estate, the fee tail, and leaving in the donor the ultimate fee simple expectant upon a failure of issue.[4] Estates tail were introduced into this country with the other parts of the English jurisprudence,[5] and recognized in most of the states until abolished or modified by statute.[6] In a few of the states, however, they were never recognized.[7] An estate tail like an estate in fee simple may

98. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725. See also Fowlkes *v.* Wagoner, (Tenn. Ch. App. 1898) 46 S. W. 586.

99. Horton *v.* Sledge, 29 Ala. 478; Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420.

1. Richardson *v.* Richardson, 80 Me. 585, 593, 16 Atl. 250; Fanning *v.* Doan, 128 Mo. 323, 328, 30 S. W. 1032 [each *quoting* 1 Washburn Real Prop. (5th ed.) 104]. See also Smith *v.* Greer, 88 Ala. 414, 6 So. 911.

Other definitions are: "An estate of inheritance, deriving its existence from the statute *de donis conditionalibus*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general." Jordan *v.* Roach, 32 Miss. 481, 603 [*quoting* 1 Cruise 78]; Prindle *v.* Beveridge, 7 Lans. (N. Y.) 225, 228 [*quoting* Cruise Dig. tit. 2, c. 1, § 12].

"A fee conditional at common law, limited to certain heirs, to the exclusion of heirs general — to lineals to the exclusion of collaterals." McLeod *v.* Dell, 9 Fla. 427, 441.

"An estate of inheritance which instead of descending to heirs generally goes to the heirs of the donee's body, or to him and particular heirs of his body." Rivard *v.* Gisenhof, 35 Hun (N. Y.) 247, 251.

"An estate limited to the issue of the donee." Jiggetts *v.* Davis, 1 Leigh (Va.) 368, 418.

"An estate . . . where lands and tenements are given to one and the heirs of his body begotten." Butler *v.* Huestis, 68 Ill. 594, 599, 18 Am. Rep. 589.

"An estate . . . limited to a person and the heirs of his body." McArthur *v.* Allen, 15 Fed. Cas. No. 8,659.

2. *Illinois.*— Butler *v.* Huestis, 68 Ill. 594, 18 Am. Rep. 589.

Mississippi. — Jordan *v.* Roach, 32 Miss. 481.

New Jersey.— Den *v.* Allaire, 20 N. J. L. 6.

Ohio.— Pollock *v.* Speidel, 17 Ohio St. 439.

Oregon.— Rowland *v.* Warren, 10 Oreg. 129.

Tennessee.— Kirk *v.* Fergerson, 6 Coldw. 479.

See 19 Cent. Dig. tit. "Estates Tail," § 1.

3. *Illinois.*— Frazer *v.* Peoria County, 74 Ill. 282; Butler *v.* Huestis, 68 Ill. 594, 18 Am. Rep. 589.

Iowa.— Pierson *v.* Lane, 60 Iowa 60, 14 N. W. 90.

Mississippi. — Jordan *v.* Roach, 32 Miss. 481.

New Jersey.— Den *v.* Allaire, 20 N. J. L. 6.

Ohio.— Pollock *v.* Speidel, 17 Ohio St. 439.

Virginia.— Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608.

United States.— Croxall *v.* Sherrerd, 5 Wall. 268, 18 L. ed. 572.

See 19 Cent. Dig. tit. "Estates Tail," § 1.

4. *Illinois.*— Frazer *v.* Peoria County, 74 Ill. 282.

Massachusetts.— Wight *v.* Thayer, 1 Gray 284.

Mississippi. — Jordan *v.* Roach, 32 Miss. 481.

Tennessee.— Kirk *v.* Furgerson, 6 Coldw. 479.

Virginia.— Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608.

See 19 Cent. Dig. tit. "Estates Tail," § 1.

5. Pollock *v.* Speidel, 17 Ohio St. 439, 446 [*citing* 4 Kent Comm. 12–14]; 1 Washburn Real Prop. (6th ed.) 98.

6. See *infra*, III, F.

7. Pierson *v.* Lane, 60 Iowa 60, 14 N. W. 90; Jordon *v.* Roach, 32 Miss. 481.

Estates tail are not applicable to the habits and conditions of our society nor in harmony with the genius, spirit, and objects of

depend for its continuance on the performance of a condition or may be defeated by the happening of a contingency.[8] Estates tail are created either by deed or by will.[9]

B. Classification. Estates tail are either general or special,[10] according to whether the limitation is to the heirs of the donee's body generally,[11] or to certain specified heirs, coming within that description, to the exclusion of others.[12] But the specified heirs must be lineal heirs, as an estate tail can only be created by a gift to the donee and the heirs of his body begotten.[13] Estates tail may be further limited to the heirs male or to the heirs female.[14]

C. What May Be Entailed. The statute *de donis* which in terms referred to "tenements" was held to comprehend all corporeal hereditaments and also incorporeal hereditaments which savor of the realty, such as rents, commons, and estovers;[15] but mere personal chattels could not be entailed;[16] and a limitation which would create an estate tail in land passed the entire interest in personal property.[17] An estate *pur autre vie* may be limited in tail.[18]

D. Incidents. The incidents of an estate tail were: That the tenant in tail was not chargeable with waste, that the estate was subject to both dower and curtesy,[19] and was not liable to forfeiture for treason or felony nor chargeable with the debts of the tenant after his death.[20] After the decision in Taltarum's case the right to suffer a common recovery became an inseparable incident to estates tail.[21] At a later period they were made liable by statute for the debts of the tenant to the crown due by record or special contract, and still later they were made liable for all his debts in case of bankruptcy.[22] In Massachusetts estates tail are by statute liable for the debts of the tenant in tail.[23] Estates tail are not subject to the doctrine of merger.[24]

E. Rights and Liabilities of Tenant in Tail. The tenant in tail might com-

our institutions. Pierson *v.* Lane, 60 Iowa 60, 14 N. W. 90.

8. Linn *v.* Alexander, 59 Pa. St. 43; 1 Washburn Real Prop. (6th ed.) 91. See also Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565.

9. Maslin *v.* Thomas, 8 Gill (Md.) 18.

Creation by deed see DEEDS, 13 Cyc. 645.

Creation by will see, generally, WILLS.

10. Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505; Duffy *v.* Jarvis, 84 Fed. 731; McArthur *v.* Allen, 15 Fed. Cas. No. 8,659; 2 Blackstone Comm. 113.

11. Horshley *v.* Hilburn, 44 Ark. 458; Kirk *v.* Fergerson, 6 Coldw. (Tenn.) 479; Duffy *v.* Jarvis, 84 Fed. 731; McArthur *v.* Allen, 15 Fed. Cas. No. 8,659.

12. Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505; Allen *v.* Craft, 109 Ind. 476, 478, 9 N. E. 919, 58 Am. Rep. 425 [*citing* 2 Blackstone Comm. 113]; McArthur *v.* Allen, 15 Fed. Cas. No. 8,659.

13. Jordan *v.* Roach, 32 Miss. 481, 603 [*citing* 2 Preston Est. 355].

14. 2 Blackstone Comm. 114.

15. 2 Blackstone Comm. 113; 1 Washburn Real Prop. (6th ed.) 86.

16. Paterson *v.* Ellis, 11 Wend. (N. Y.) 259; 2 Blackstone Comm. 113; 1 Washburn Real Prop. (6th ed.) 86.

17. Norris *v.* Beyea, 13 N. Y. 273; Paterson *v.* Ellis, 11 Wend. (N. Y.) 259; Butterfield *v.* Butterfield, 1 Ves. 133, 27 Eng. Reprint 938; *Ex p.* Sterne, 6 Ves. Jr. 156, 31 Eng. Reprint 989.

Slaves which under the Virginia statute were declared to be held as real estate might be entailed if annexed to lands but not otherwise. Blackwell *v.* Wilkinson, Jeff. (Va.) 73.

18. Low *v.* Burron, 3 P. Wms. 262, 24 Eng. Reprint 1055; *Ex p.* Sterne, 6 Ves. Jr. 156, 31 Eng. Reprint 989.

19. 2 Blackstone Comm. 116; 4 Kent Comm. 12; Pollock *v.* Speidel, 17 Ohio St. 439.

Dower in estates tail see DOWER, 14 Cyc. 902 note 57.

20. 4 Kent Comm. 13.

21. Hawley *v.* Northampton, 8 Mass. 3, 5 Am. Dec. 66; Orndoff *v.* Turman, 2 Leigh (Va.) 200, 21 Am. Dec. 608; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572.

A condition that a tenant in tail shall not suffer a recovery is void. Bradley *v.* Peixote, 3 Ves. Jr. 324, 4 Rev. Rep. 7, 30 Eng. Reprint 1034.

22. 2 Blackstone Comm. 119; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572.

23. Holland *v.* Cruft, 3 Gray (Mass.) 162.

If the estate is defeasible upon a contingency, it may be taken in execution by a creditor of the tenant and held until the happening of the contingency. Phillips *v.* Rogers, 12 Metc. (Mass.) 405.

The guardian of an insane person may, on being duly licensed therefor, sell the estate tail of his ward during his life for the payment of his debts, and by such sale the estate tail and remainders are extinguished. Williams *v.* Hichborn, 4 Mass. 189.

Estates tail in remainder are not within the operation of the statute. Holland *v.* Cruft, 3 Gray (Mass.) 162.

24. See *infra*, VII, D, 5.

mit waste,[25] but could not alien the estate,[26] or charge it with his obligations so as to affect it after his death.[27] He might convey a base fee which would bind him during his life, and which at his death his issue might defeat by entry,[28] but could not make any lease or other estate to commence after his death.[29] The tenant in tail was not bound to pay off any outstanding encumbrances on the estate or even to keep down the interest.[30]

F. Statutory Abolition or Modification.[31] In most of the United States estates tail have been either entirely abolished or materially modified by statute.[32] In some states they have been abolished entirely and converted into estates in fee simple in the hands of the first taker;[33] in others the estate is preserved as an estate tail in the hands of the first taker but vests as an estate in fee simple in his

25. 2 Blackstone Comm. 115; 4 Kent Comm. 12.

26. *Connecticut.*— Williams *v.* McCall, 12 Conn. 328.

Illinois.— Frazer *v.* Peoria County, 74 Ill. 282.

Mississippi.— Jordan *v.* Roach, 32 Miss. 481.

New Jersey.— Den *v.* Allaire, 20 N. J. L. 6.

Vermont.— Giddings *v.* Smith, 15 Vt. 344.

Virginia.— Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608.

United States.— Croxall *v.* Sherrerd, 5 Wall. 268, 18 L. ed. 572.

See 19 Cent. Dig. tit. "Estates Tail," § 4.

Where estates tail have been modified by statute so as to continue as estates tail only in the hands of the first taker, they are during his lifetime subject to the same disabilities as to alienation as other estates tail. Pollock *v.* Speidel, 27 Ohio St. 86.

Where the tenant in tail of an undivided half of a tract of land and the owner of the other half make a partition of the land and execute mutual releases, the transaction will not bind the heir in tail after the death of the tenant. Buxton *v.* Bowen, 4 Fed. Cas. No. 2,260, 2 Woodb. & M. 365.

27. 4 Kent Comm. 12; 1 Washburn Real Prop. (6th ed.) 95.

The heir in tail is not bound to fulfil a contract of his father for the sale of the entailed land. Partridge *v.* Dorsey, 3 Harr. & J. (Md.) 302.

28. Whiting *v.* Whiting, 4 Conn. 179; Waters *v.* Margerum, 60 Pa. St. 39; Sharp *v.* Thompson, 1 Whart. (Pa.) 139; Doe *v.* Rivers, 7 T. R. 276.

The death of the tenant in tail does not ipso facto determine the grantee's estate, but merely gives the issue in tail a right of entry. Whiting *v.* Whiting, 4 Conn. 179; Machell *v.* Clarke, 2 Ld. Raym. 778.

29. Machell *v.* Clarke, 2 Ld. Raym. 778.

30. 4 Kent Comm. 18; 1 Washburn Real Prop. (6th ed.) 95.

31. See, generally, WILLS.

32. Pollock *v.* Speidel, 17 Ohio St. 439; 4 Kent Comm. 14; Tiffany Real Prop. 56.

33. *Alabama.*—Smith *v.* Greer, 88 Ala. 414, 6 So. 911.

California.— Barnett *v.* Barnett, 104 Cal. 298, 37 Pac. 1049.

Georgia.— Durant *v.* Miller, 88 Ga. 251, 14 S. E. 612; Ewing *v.* Shropshire, 80 Ga. 374, 7 S. E. 554; Gray *v.* Gray, 20 Ga. 804.

Indiana.— McIlhinny *v.* McIlhinny, 137 Ind. 411, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489; Allen *v.* Craft, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425.

New York.— Nellis *v.* Nellis, 99 N. Y. 505, 3 N. E. 59; Wendell *v.* Crandall, 1 N. Y. 491 [*affirming* 2 Den. 9]; Rivard *v.* Gisenhof, 35 Hun 247; Seaman *v.* Harvey, 16 Hun 71; Van Rensselaer *v.* Poucher, 5 Den. 35.

North Carolina.— Leathers *v.* Gray, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30 [*overruling* 96 N. C. 548, 2 S. E. 455]; Patterson *v.* Patterson, 2 N. C. 163; Wells *v.* Newbolt, 1 N. C. 450.

Pennsylvania.— Nicholson *v.* Bettle, 57 Pa. St. 384; Stocksleger's Estate, 5 Pa. Co. Ct. 305.

Tennessee.— Kirk *v.* Furgerson, 6 Coldw. 479.

Virginia.— Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608; Jiggetts *v.* Davis, 1 Leigh 368; Carter *v.* Tyler, 1 Call 165.

West Virginia.— Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

United States.— Duffy *v.* Jarvis, 84 Fed. 731.

See 19 Cent. Dig. tit. "Estates Tail," § 2.

In Maryland the statute to direct descents operates to convert an estate tail general into a fee simple. Clarke *v.* Smith, 49 Md. 106; Posey *v.* Budd, 21 Md. 477; Hill *v.* Hill, 5 Gill & J. 87; Newton *v.* Griffith, 1 Harr. & G. 111 [*overruling* Smith *v.* Smith, 2 Harr. & J. 314].

In Mississippi the statute *de donis* never had any existence or operation, but the legislature, apparently supposing it to be in effect, expressly abolished estates tail and provided that they should be thereafter held in fee simple absolute. Jordan *v.* Roach, 32 Miss. 481.

In New Hampshire the statute *de donis* was impliedly repealed by the statute of 1789. Jewell *v.* Warner, 35 N. H. 176.

In Oregon the statute *de donis* is held to be impliedly repealed by the statute concerning conveyances. Rowland *v.* Warren, 10 Oreg. 129.

A vested remainder in tail is within the operation of the statutes as well as estates in possession. Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297, 13 L. ed. 703.

issue ;[34] in others the first taker has merely a life-estate with the remainder in fee to those to whom the estate would pass at his death.[35]

G. Barring Estates Tail — 1. By Common Recovery. The first relief against the evils incident to estates tail[36] was procured through the courts in the decision of Taltarum's case,[37] where it was held that an estate tail might be barred by a common recovery.[38] Common recoveries thereafter became the regular means of conveying estates tail,[39] and the right to suffer a recovery was recognized as one of the incidents of such estates.[40] A common recovery duly executed passed an absolute estate defeating not only the rights of the tenant in tail but those in remainder and reversion ;[41] but it let in all the preceding encumbrances of the tenant, and rendered valid all the acts of ownership which he had exercised over the estate.[42] Common recoveries were introduced into this country and allowed as a means of barring estates tail,[43] but have now very generally been done away with under the statutory provisions relating to these estates.[44]

34. St. John *v.* Dann, 66 Conn. 401, 34 Atl. 110; Allyn *v.* Mather, 9 Conn. 114; Phillips *v.* Herron, 55 Ohio St. 478, 45 N. E. 720; Pollock *v.* Speidel, 27 Ohio St. 86; Pollock *v.* Speidel, 17 Ohio St. 439; Aikin *v.* Spellman, 6 Ohio S. & C. Pl. Dec. 409, 4 Ohio N. P. 297; Sutton *v.* Miles, 10 R. I. 348; Lippitt *v.* Huston, 8 R. I. 415, 94 Am. Dec. 115.

The statutes embrace subsisting estates tail as well as those which might thereafter be created. Pollock *v.* Speidel, 27 Ohio St. 86.

In Rhode Island the statute applies only to estates tail created by will. Sutton *v.* Miles, 10 R. I. 348.

The estate in the hands of the first donee is subject to all the rights and liabilities incident to estates tail. Pollock *v.* Speidel, 27 Ohio St. 86.

35. *Arkansas.*—Horsley *v.* Hilburn, 44 Ark. 458.

Illinois.— Peterson *v.* Jackson, 196 Ill. 40, 63 N. E. 643; Griswold *v.* Hicks, 132 Ill. 494, 24 N. E. 63, 22 Am. St. Rep. 549; Frazer *v.* Peoria County, 74 Ill. 282; Butler *v.* Huestis, 68 Ill. 594, 18 Am. Rep. 589.

Missouri.— Fanning *v.* Doan, 128 Mo. 323, 30 S. W. 1032; Godman *v.* Simmons, 113 Mo. 122, 20 S. W. 972; Emmerson *v.* Hughes, 110 Mo. 627, 19 S. W. 979; Wood *v.* Kice, 103 Mo. 329, 15 S. W. 623; Phillips *v.* La Forge, 89 Mo. 72, 1 S. W. 220.

New Jersey.— Doty *v.* Teller, 54 N. J. L. 163, 23 Atl. 944, 33 Am. St. Rep. 670.

United States.— Preston *v.* Smith, 26 Fed. 884.

See 19 Cent. Dig. tit. "Estates Tail," § 2.

Under the earlier New Jersey statutes relating to estates tail see Redstrake *v.* Townsend, 39 N. J. L. 372; Den *v.* Dubois, 16 N. J. L. 285; Den *v.* Smith, 10 N. J. L. 39.

36. The evils incident to estates tail were that children grew disobedient, farmers were ousted of their leases, creditors defrauded of their debts, and treasons were encouraged. Orndoff *v.* Turman, 2 Leigh (Va.) 200, 221, 21 Am. Dec. 608 [*quoting* 2 Blackstone Comm. 116].

37. Y. B. 12 Edw. IV, 14, 19.

38. 2 Blackstone Comm. 117; Richman *v.* Lippincott, 29 N. J. L. 44; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572.

Estates tail created by the crown were excepted from the operation of this decision by 34 & 35 Hen. VIII, c. 20. 2 Blackstone Comm. 118.

39. 2 Blackstone Comm. 117; Richman *v.* Lippincott, 29 N. J. L. 44.

40. See *supra*, III, D.

41. 4 Kent Comm. 13; Hawley *v.* Northampton, 8 Mass. 3, 5 Am. Dec. 66; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572.

A common recovery was the only means in England of passing an absolute title, since a deed conveyed only a base or voidable fee which would not exclude the heirs, and a fine only barred the issue of the tenant in tail and not subsequent remainders. 4 Kent Comm. 13.

A deed to lead the uses of a fine or recovery was not in itself a conveyance and had no immediate operation on the seizin or estate, but was merely a covenant or agreement to levy a fine or suffer a common recovery. Sharp *v.* Thompson, 1 Whart. (Pa.) 139.

42. Maslin *v.* Thomas, 8 Gill (Md.) 18.

43. See Dow *v.* Warren, 6 Mass. 328; Dudley *v.* Sumner, 5 Mass. 438; Frost *v.* Cloutman, 7 N. H. 9, 26 Am. Dec. 723; Richman *v.* Lippincott, 29 N. J. L. 44; Ransley *v.* Stott, 26 Pa. St. 126; Carter *v.* McMichael, 10 Serg. & R. (Pa.) 429; Sharp *v.* Thompson, 1 Whart. (Pa.) 139.

In Pennsylvania common recovery as a means of barring estates tail was expressly authorized by statute, but the statute was held to be merely declaratory of the common law of that state. Lyle *v.* Richards, 9 Serg. & R. 322; Dunwoodie *v.* Reed, 3 Serg. & R. 435; Nokes *v.* Smith, 1 Yeates 238.

44. Maslin *v.* Thomas, 8 Gill (Md.) 18.

Statutory abolition or modification of estates tail see *supra*, III, F.

Statutes authorizing conveyance of estates tail see *infra*, III, G, 5.

In England common recoveries were abolished by 3 & 4 Wm. IV, c. 74, authorizing tenants in tail to alienate the land in fee simple. Tiffany Real Prop. 67.

2. By Lease. The next mode of barring estates tail was by virtue of a statute[45] whereby certain leases made by tenants in tail were allowed to be good in law and bind the issue in tail.[46]

3. By Fine. A later statute[47] provided that a fine duly levied by a tenant in tail should be a complete bar to him and his heirs, and all persons claiming under the entail.[48] Fines as a means of barring estates tail were recognized in this country in a few of the states until they were abolished by statute.[49]

4. By Appointment to Charitable Uses. A later statute[50] provided that an appointment by a tenant in tail of the lands entailed to a charitable use should be good without fine or recovery.[51] This means of barring estates tail is not recognized in this country.[52]

5. By Conveyance by Deed. In the absence of statute a tenant in tail can convey only a base fee subject to be defeated at his death by the entry of his issue.[53] It is now provided by statute both in England[54] and in this country that the tenant in tail may convey the estate by deed and thus bar the entail.[55] The deed must be made *bona fide*,[56] for a good or valuable consideration,[57] and must be executed[58] and recorded[59] in the manner provided by statute, and have proper parties

In Virginia fines and recoveries were abolished by a statute which allowed estates tail to be docked only by an act of assembly, or in respect to estates of small value, by proceedings under a writ of *ad quod damnum* (Watts *v.* Cole, 2 Leigh 653; Carter *v.* Tyler, 1 Call 165), which continued to be the law until the act of 1776 by which estates tail were abolished and converted into estates in fee simple (Orndoff *v.* Turman, 2 Leigh 200, 21 Am. Dec. 608).

45. St. 32 Hen. VIII, c. 28.

46. 2 Blackstone Comm. 118.

47. St. 32 Hen. VIII, c. 36.

48. 2 Blackstone Comm. 118; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572. See also Orndoff *v.* Turman, 2 Leigh (Va.) 200, 21 Am. Dec. 608.

Estates tail created by the crown and to which the crown had the reversion were excepted from the operation of the statute. 2 Blackstone Comm. 118.

49. See Roseboom *v.* Van Vechten, 5 Den. (N. Y.) 414; Orndoff *v.* Turman, 2 Leigh (Va.) 200, 21 Am. Dec. 608; Carter *v.* Tyler, 1 Call (Va.) 165.

50. St. 43 Eliz. c. 4.

51. 2 Blackstone Comm. 119.

52. Theological Seminary *v.* Wall, 44 Pa. St. 353.

53. Whiting *v.* Whiting, 4 Conn. 179; Waters *v.* Margerum, 60 Pa. St. 39; Gleeson *v.* Scott, 3 Hen. & M. (Va.) 278; Doe *v.* Rivers, 7 T. R. 276.

A married woman as tenant in tail could not, by a deed of bargain and sale with warranty executed jointly with her husband, work a discontinuance of the estate to the issue in tail. Mayson *v.* Sexton, 1 Harr. & M. (Md.) 275.

54. St. 3 & 4 Wm. IV, c. 74; Tiffany Real Prop. 67.

55. *Maine.*— Willey *v.* Haley, 60 Me. 176; Fisk *v.* Keene, 35 Me. 349.

Maryland.— Maslin *v.* Thomas, 8 Gill 18.

Massachusetts.— Collamore *v.* Collamore, 158 Mass. 74, 32 N. E. 1034; Hall *v.* Thayer, 5 Gray 523; Weld *v.* Williams, 13 Metc. 486; Lithgow *v.* Kavenagh, 9 Mass. 161.

North Carolina.— Moore *v.* Bradley, 3 N. C. 142; Minge *v.* Gilmour, 2 N. C. 279.

Pennsylvania.— Seibert *v.* Wise, 70 Pa. St. 147; Doyle *v.* Mullady, 33 Pa. St. 264; Eicbelberger *v.* Barnitz, 9 Watts 447.

Rhode Island.— Cooper *v.* Cooper, 6 R. I. 261; Manchester *v.* Durfee, 5 R. I. 549.

United States.— Minge *v.* Gilmour, 17 Fed. Cas. No. 9,631, Brunn. Col. Cas. 383.

See 19 Cent. Dig. tit. "Estates Tail," § 8.

A tenant in tail cannot divest himself of the power of barring the entail by a covenant with the remainder-man that he will not use such power. Doyle *v.* Mullady, 33 Pa. St. 264.

Estates tail existing at the time of the passage of a statute authorizing a conveyance by deed may be conveyed as well as estates tail subsequently created. Riggs *v.* Sally, 15 Me. 408. *Contra*, Ream *v.* Wolls, 61 Ohio St. 131, 55 N. E. 176, holding that the Ohio statute providing for the sale or lease of estates tail in certain cases does not apply to estates tail created before the act took effect.

56. See Nightingale *v.* Burrell, 15 Pick. (Mass.) 104; Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66.

57. Soule *v.* Soule, 5 Mass. 61.

Either a good or valuable consideration is sufficient to support a conveyance. Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66. *Compare* Lithgow *v.* Kavenagh, 9 Mass. 161.

58. Perry *v.* Kline, 12 Cush. (Mass.) 118.

A deed delivered to a third person as the deed of the grantor to be delivered over to the grantee on a future event takes effect from the first delivery and operates to pass the estate, although the grantor at the time of the second delivery is dead. Wheelwright *v.* Wheelwright, 2 Mass. 447, 3 Am. Dec. 66.

59. Ridgeley *v.* McLaughlin, 3 Harr. & M. (Md.) 220; Theological Seminary *v.* Wall, 44 Pa. St. 353.

legally capable of contracting.[60] The deed must be executed by the tenant in tail seized of the estate,[61] and will not be effectual to bar the entail if made by a tenant in tail in remainder[62] or by the heir in tail during his ancestor's lifetime.[63] A tenant in tail instead of defeating the estate tail altogether may convey only a limited interest therein, and upon the expiration of the particular interest will again take the estate tail as originally held.[64] Under a statute authorizing an absolute conveyance by deed the tenant in tail may mortgage the estate.[65] The mortgage deed does not of itself bar the entail, as the whole estate is not thereby conveyed,[66] and if the mortgage debt is paid the old estate is again revived;[67] but if it is not, a sale of the equity of redemption passes the entire remaining interest and bars the entail.[68] A deed properly executed and recorded is effectual to bar an estate tail, although executed merely for this purpose, for a nominal consideration, and on an express trust that the grantee shall immediately reconvey to the grantor.[69] The deed of the tenant in tail conveys to the grantee an absolute estate in fee simple,[70] and bars not only the estate tail but also all remainders and reversions,[71] and executory devises over,[72] and does not, as in the case of a common recovery,[73] let in prior encumbrances.[74]

6. By Adverse Possession. An estate tail may be barred by adverse possession under the statutes of limitation, and when the statute has run against the tenant in tail in possession it operates to bar both the issue in tail,[75] and also all remainders

An unrecorded deed conveys the grantor's right of possession but is insufficient to bar the entail. George *v.* Morgan, 16 Pa. St. 95.

The deed may be recorded after the death of the grantor and after recording relates back to the date of delivery. Terry *v.* Briggs, 12 Metc. (Mass.) 17.

A court of chancery cannot decree that a deed of conveyance executed by a tenant in tail may be recorded after the expiration of the time limited by law for the recording of deeds. Jones *v.* Jones, 2 Harr. & J. (Md.) 281.

60. Wood *v.* Bayard, 63 Pa. St. 320.

Where the tenant in tail is a married woman a deed executed by the husband and wife together will convey the estate and bar the entail. Nightingale *v.* Burrell, 15 Pick. (Mass.) 104.

61. Whittaker *v.* Whittaker, 99 Mass. 364; Holland *v.* Cruft, 3 Gray (Mass.) 162.

A tenant in tail of an undivided half of a parcel of land is seized of land within the meaning of the statute. Coombs *v.* Anderson, 138 Mass. 376.

A sheriff's sale of the estate of a tenant in tail does not so divest him of the inheritance that he may not afterward execute a deed under the statute for the purpose of barring the issue in tail. Waters *v.* Margerum, 60 Pa. St. 39; Doyle *v.* Mullady, 33 Pa. St. 264; Elliott *v.* Pearsoll, 8 Watts & S. (Pa.) 38.

62. Allen *v.* Ashley School Fund, 102 Mass. 262; Whittaker *v.* Whittaker, 99 Mass. 364; Holland *v.* Cruft, 3 Gray (Mass.) 162. But see Sutton *v.* Miles, 10 R. I. 348, holding that a tenant in tail in remainder, with the concurrence of the life-tenant, may bar the entail.

63. Hopkins *v.* Threlkeld, 3 Harr. & M. (Md.) 443; Whittaker *v.* Whittaker, 99 Mass. 364.

64. Laidler *v.* Young, 2 Harr. & J. (Md.) 69.

65. Todd *v.* Pratt, 1 Harr. & J. (Md.) 465.

66. Laidler *v.* Young, 2 Harr. & J. (Md.) 69; Cuffee *v.* Milk, 10 Metc. (Mass.) 366.

In Canada a mortgage in fee simple bars the entail. *Re* Lawlor, 7 Ont. Pr. 242.

67. See Laidler *v.* Young, 2 Harr. & J. (Md.) 69.

68. Cuffee *v.* Milk, 10 Metc. (Mass.) 366.

69. Lawrence *v.* Lawrence, 105 Pa. St. 335.

70. Fisk *v.* Keene, 35 Me. 349; Perry *v.* Kline, 12 Cush. (Mass.) 118; Lithgow *v.* Kavenagh, 9 Mass. 161; Jillson *v.* Wilcox, 7 R. I. 515; Cooper *v.* Cooper, 6 R. I. 261; Manchester *v.* Durfee, 5 R. I. 549.

71. Fisk *v.* Keene, 35 Me. 349; Lithgow *v.* Kavenagh, 9 Mass. 161; Moody *v.* Snell, 81 Pa. St. 359; Greenawalt *v.* Greenawalt, 71 Pa. St. 483; Jillson *v.* Wilcox, 7 R. I. 515; Cooper *v.* Cooper, 6 R. I. 261; Manchester *v.* Durfee, 5 R. I. 549.

The reversionary interest of the proprietary of Maryland, afterward held by the state, is extinguished by a conveyance by a tenant in tail under the statute. Howard *v.* Moale, 2 Harr. & J. (Md.) 249.

72. Ralston *v.* Truesdell, 178 Pa. St. 429, 35 Atl. 813.

73. See *supra*, III, G, 1.

74. Maslin *v.* Thomas, 8 Gill (Md.) 18, holding that an outstanding unsatisfied judgment against the tenant in tail will not be let in as a lien or encumbrance on the estate.

75. Martindale *v.* Troop, 3 Harr. & M. (Md.) 244; Baldridge *v.* McFarland, 26 Pa. St. 338; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572; Inman *v.* Barnes, 13 Fed. Cas. No. 7,048, 2 Gall. 315.

An equitable estate tail may be barred in the same manner as an estate tail at law. Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572.

When the statute of limitations once begins to run against an heir in tail, no subse-

and reversionary interests,[76] limited to take effect after the termination of the preceding estate tail.

7. By Means Provided by Instrument Creating Entail. The original grantor, in creating an entail, may in the same instrument provide the means by which it may be barred.[77]

IV. LIFE-ESTATES.

A. Definition and Nature. An estate for life is a freehold interest in land, the duration of which cannot extend beyond the life or lives of some particular person or persons, but which may possibly endure for the period of such life or lives.[78] The estate is a freehold whether for the tenant's own life or for that of another person,[79] but may be so limited that upon the happening of a contingency it may be entirely defeated before the death of the person for whose life it was granted.[80]

B. Classification — 1. Conventional and Legal Life-Estates. Estates for life are either conventional, which are created by the acts of the parties; or legal, which are created by construction and operation of law.[81] Conventional life-estates are either for the tenant's own life or for the life of some other person,[82] to which may be added a third class, estates for the tenant's own life and the life of one or more third persons.[83]

2. Estates Pur Autre Vie. An estate *pur autre vie* is an estate for the life of some person other than the tenant himself,[84] and is the lowest estate of freehold.[85] At common law if a tenant *pur autre vie* died in the lifetime of the *cestui que vie* any person might enter and hold the estate for the balance of the term as a general occupant;[86] but if the estate was granted to the tenant and his heirs the heirs were entitled to take it as special occupants.[87] The subject of occupancy is now regulated by statute in England[88] and in most of the states in this country.[89]

3. Tenancy in Tail After Possibility of Issue Extinct. Tenancy in tail after possibility of issue extinct is where one is tenant in special tail and the person from whose body the issue was to spring dies without issue; or having left issue, that issue becomes extinct.[90] The estate resembles an estate tail in that the tenant is not punishable for waste;[91] and an ordinary life-estate in that at common

quent event can interrupt its progress; and when it has run twenty years no formedon can afterward be maintained. Dow *v.* Warren, 6 Mass. 328.

76. Bassett *v.* Hawk, 118 Pa. St. 94, 11 Atl. 802.

77. Yoder *v.* Ford, 11 Ohio Dec. (Reprint) 675, 23 Cinc. L. Bul. 54.

Where a deed creating an estate tail contains a proviso that if the grantee shall sell and convey the premises before his death the title shall pass to the purchaser, a deed executed by the tenant in tail will bar the entail. Aikin *v.* Spellman, 6 Ohio S. & C. Pl. Dec. 409, 4 Ohio N. P. 297.

Where a devise of an estate tail charges the estate with the payment of a legacy, a sale under an execution for the purpose of raising the legacy passes a fee simple to the purchaser and extinguishes the entail. Gause *v.* Wiley, 4 Serg. & R. (Pa.) 509.

78. Tiffany Real Prop. 69.

79. Roseboom *v.* Van Vechten, 5 Den. (N. Y.) 414.

80. Warner *v.* Tanner, 38 Ohio St. 118; 2 Blackstone Comm. 121; 4 Kent Comm. 26.

An estate during widowhood is a life-estate determinable on the grantee ceasing to be a widow. Roseboom *v.* Van Vechten, 5 Den. (N. Y.) 414.

A grant for so long as the grantee shall use the property for a certain purpose creates a life-estate determinable on the cessation of such use. Warner *v.* Tanner, 38 Ohio St. 118.

81. 2 Blackstone Comm. 120; 4 Kent. Comm. 24.

82. 2 Blackstone Comm. 120: 4 Kent Comm. 25.

83. Coke Litt. 41*b*; 4 Kent Comm. 26.

84. 2 Blackstone Comm. 120; 4 Kent Comm. 26.

85. 4 Kent Comm. 26.

86. 2 Blackstone Comm. 258; 4 Kent Comm. 26.

87. Northen *v.* Carnegie, 4 Drew. 587, 28 L. J. Ch. 930, 7 Wkly. Rep. 481; 2 Blackstone Comm. 259; 4 Kent Comm. 26.

The wife and family of a tenant pur autre vie who dies during the lifetime of the *cestui que vie* are entitled to continue in possession of the property during the remainder of the latter's life, Hopewell *v.* Patterson, (Tex. Civ. App. 1896) 36 S. W. 319.

88. 2 Blackstone Comm. 259.

89. 3 Washburn Real Prop. (6th ed.) 66. See also 4 Kent Comm. 27.

90. 2 Blackstone Comm. 124.

91. 2 Blackstone Comm. 125; Coke Litt. 27*b*. See also Williams *v.* Williams, 15

law it was forfeited by alienation in fee,[92] and is subject to the doctrine of merger.[93]

4. Life-Estates in Personal Property. By the early common law a life-estate in personal property with remainder over could not be created,[94] and a gift for life carried the absolute interest.[95] It is now settled that such estates may be created,[96] and that they may be created by deed as well as by devise,[97] and without the intervention of a trustee.[98] A specific bequest for life of property necessarily consumable in the use passes the entire interest,[99] unless the will shows a contrary intention on the part of the testator;[1] but if such property is included in a general residuary bequest for life it must be sold and the principal preserved for the remainder-man.[2]

C. Creation. Life-estates created by the acts of the parties may be created either by express words[3] or by implication.[4] An express life-estate is not enlarged into a fee by being coupled with a power of conveyance,[5] or by a warranty in fee

Ves. Jr. 419, 12 East 207, 33 Eng. Reprint 812.

92. 2 Blackstone Comm. 125; Coke Litt. 28*a*.

93. Coke Litt. 28*a*.

94. 2 Blackstone Comm. 398; 2 Kent Comm. 352.

95. 2 Kent Comm. 352.

96. *Georgia.*— Phillips *v.* Crews, 65 Ga. 274.

Illinois.— Martin *v.* Martin, 170 Ill. 18, 48 N. E. 694 [*reversing* 68 Ill. App. 169]; McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585]; Trogdon *v.* Murphy, 85 Ill. 119.

Kentucky.— Johnson *v.* Johnson, 104 Ky. 714, 47 S. W. 883, 20 Ky. L. Rep. 890; Knight *v.* Donahoo, 3 B. Mon. 277.

Maine.— Sampson *v.* Randall, 72 Me. 109.

New York.— Smith *v.* Van Ostrand, 64 N. Y. 278; Westcott *v.* Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306.

South Carolina.— Patterson *v.* Devlin, McMull. Eq. 459.

England.— Upwell *v.* Halsey, 10 Mod. 441, 1 P. Wms. 651, 24 Eng. Reprint 554; Hyde *v.* Parrat, 1 P. Wms. 1, 24 Eng. Reprint 269, 2 Vern. Ch. 331, 23 Eng. Reprint 813; 2 Blackstone Comm. 398; 2 Kent Comm. 352.

See 33 Cent. Dig. tit. "Life Estates," § 5.

A life-estate may be created in money as well as in other personal property. Phillips *v.* Crews, 65 Ga. 274; Smith *v.* Van Ostrand, 64 N. Y. 278.

97. McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585]; Cook *v.* Collier, (Tenn. Ch. App. 1901) 62 S. W. 658; 2 Blackstone Comm. 398.

98. McDaniel *v.* Johns, 45 Miss. 632; Cook *v.* Collier, (Tenn. Ch. App. 1901) 62 S. W. 658.

99. Evans *v.* Iglehart, 6 Gill & J. (Md.) 171; Wooten *v.* Burch, 2 Md. Ch. 190; Patterson *v.* Devlin, McMull. Eq. (S. C.) 459; Henderson *v.* Vaulx, 10 Yerg. (Tenn.) 30; Randall *v.* Russell, 3 Meriv. 190, 17 Rev. Rep. 56, 36 Eng. Reprint 73; 2 Kent Comm. 353.

A bequest of money for life is a gift of the interest only. Field *v.* Hitchcock, 17 Pick. (Mass.) 182, 28 Am. Dec. 288.

1. Miller *v.* Williamson, 5 Md. 219.

2. Ackerman *v.* Vreeland, 14 N. J. Eq. 43; Patterson *v.* Devlin, McMull. Eq. (S. C.) 459; Randall *v.* Russell, 3 Meriv. 190, 17 Rev. Rep. 56, 36 Eng. Reprint 73; 2 Kent Comm. 353. See *infra*, IV, G, 1, b.

3. 2 Blackstone Comm. 121; 4 Kent Comm. 25.

4. 2 Blackstone Comm. 121; 4 Kent Comm. 25.

Where land is granted without any words of limitation the grantee will take an estate for his own life unless the grantor is only a tenant for life, in which case the grantee will take an estate for the life of the grantor. Jackson *v.* Van Hoesen, 4 Cow. (N. Y.) 325.

A grant for so long as the grantee shall use the property for a certain purpose creates a life-estate (Warner *v.* Tanner, 38 Ohio St. 118); but not where the grant is to a corporation instead of a natural person (Haly's Estate, 5 Pa. Dist. 533, 18 Pa. Co. Ct. 124).

The reservation of "a life-estate from year to year" does not imply less than a life-estate. It is not an estate for years, but a life-estate running from year to year during the life or lives mentioned. Hurd *v.* Hurd, 64 Iowa 414, 20 N. W. 740.

A grant to take effect after certain lives does not imply that a life-estate is intended to the persons whose lives are made the contingency to the commencement of the interest granted. Robinson *v.* Pitman, 2 Bibb (Ky.) 55.

A lease to a man for life and the life of his wife if he should marry vests no estate in the wife, the only effect being to lengthen the term and vest the life-interest in his heirs during her life in case she survive him. Remington *v.* Remington, 1 Root (Conn.) 463.

5. *Connecticut.*— Glover *v.* Stillson, 56 Conn. 316, 15 Atl. 752.

Illinois.— Walker *v.* Pritchard, 121 Ill. 221, 12 N. E. 336 [*affirming* 22 Ill. App. 286]; Welsch *v.* Belleville Sav. Bank, 94 Ill. 191.

Iowa.— Baldwin *v.* Morford, 117 Iowa 72, 90 N. W. 487.

Maine.— Stuart *v.* Walker, 72 Me. 145, 39 Am. Rep. 311.

Massachusetts.— Welsh *v.* Woodbury, 144 Mass. 542, 11 N. E. 762.

or covenant for quiet enjoyment to the grantee and his heirs,[6] or by its being doubtful who will ultimately receive the remainder.[7] A life-estate in land cannot be created by a verbal agreement but only by a valid deed or will.[8]

D. Incidents[9] — **1. Alienability.**[10] A life-estate is alienable whether the estate is in land[11] or in personal property.[12]

2. Liability For Debts of Life-Tenant. A life-estate is liable for the debts of the life-tenant,[13] and this liability cannot be avoided by any provision in the instrument creating the estate.[14]

E. Relative Value of Life-Estate and Remainder. There are many cases in which it becomes necessary to put a present value upon an estate for life.[15] The English rule was to consider an estate for life as equal in value to one third of the whole,[16] and this rule has been adopted in some of the cases in this country.[17] The general rule, however, is to calculate the value according to the probable duration of the life-estate, based upon the tables of life expectancy, but taking into consideration the state of the tenant's health and the other circumstances of the particular case.[18] The application of these rules in dividing the proceeds of sales and apportioning burdens and benefits is treated elsewhere.[19]

F. Relation of Life-Tenant to Remainder-Man or Reversioner — 1. In General. The relation of a life-tenant to the remainder-man or reversioner is usually termed that of a trustee,[20] or as explained in some of the decisions, a

Pennsylvania.— Hinkle's Appeal, 116 Pa. St. 490, 9 Atl. 938.

See 33 Cent. Dig. tit. "Life Estates," § 2.

A power to consume so much of the *corpus* of the estate as might be necessary for the support of the life-tenant is not inconsistent with a remainder over, and the remainder-man may take whatever is not so consumed. Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032.

6. Roberts *v.* Forsythe, 14 N. C. 26.

7. Waldhoeffer *v.* Falk, 3 Walk. (Pa.) 140.

8. Smith *v.* May, 3 Pennew. (Del.) 233, 50 Atl. 59.

9. Rights and liabilities of life-tenant as incident to estates for life see *infra*, IV, G.

10. Sales and conveyances by a life-tenant see *infra*, IV, H, 1, *a*.

11. Ridgely *v.* Cross, 83 Md. 161, 34 Atl. 469; Jackson *v.* Van Hoesen, 4 Cow. (N. Y.) 325.

12. Lewis *v.* Kemp, 38 N. C. 233; King *v.* Sharp, 6 Humphr. (Tenn.) 55.

13. Wellington *v.* Janvrin, 60 N. H. 174; Pringle *v.* Allen, 1 Hill Eq. (S. C.) 135. See also McClure *v.* Melendy, 44 N. H. 469.

Only the life-interest can be subjected to the payment of the debts of the life-tenant, although he is apparently the owner in fee; it being incumbent upon his creditors to inform themselves of the state of his title. Cunningham *v.* Estill, 68 S. W. 1081, 24 Ky. L. Rep. 559.

14. Blackstone Bank *v.* Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; Wellington *v.* Janvrin, 60 N. H. 174.

15. See Williams' Case, 3 Bland (Md.) 186, 221, where these various instances are enumerated.

16. Clyat *v.* Batteson, 1 Vern. Ch. 404, 23 Eng. Reprint 546. See also Williams' Case, 3 Bland (Md.) 186; Dennison's Appeal, 1 Pa. St. 201; Shorb *v.* Parr, 4 Pa. Co. Ct. 460.

17. Datesman's Appeal, 127 Pa. St. 348, 17 Atl. 1086, 1100; Shippen's Appeal, 80 Pa. St. 391; Dennison's Appeal, 1 Pa. St. 201; Henderson *v.* Henderson, 4 Pa. Dist. 688; Shorb *v.* Parr, 4 Pa. Co. Ct. 460.

18. Steiner *v.* Berney, 130 Ala. 289, 30 So. 570; Williams' Case, 3 Bland (Md.) 186; Jones *v.* Sherrard, 22 N. C. 179; Carnes *v.* Polk, 5 Heisk. (Tenn.) 244.

19. Apportionment of assessments for public improvement see *infra*, IV, G, 11.

Apportionment of encumbrance paid off by life-tenant see *infra*, IV, G, 12.

Apportionment of proceeds of sale see *infra*, IV, H, 1, d.

20. Smith *v.* Van Ostrand, 64 N. Y. 278; Green *v.* Green, 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846; Clarke *v.* Saxon, 1 Hill Eq. (S. C.) 69; Smith *v.* Daniel, 2 McCord Eq. (S. C.) 143, 16 Am. Dec. 641; Tabb *v.* Cabell, 17 Gratt. (Va.) 160. *Compare* Bogle *v.* North Carolina R. Co., 51 N. C. 419.

A life-tenant is an implied and not an expressed trustee. Joyce *v.* Gunnels, 2 Rich. Eq. (S. C.) 259.

Where a life-tenant is given the custody of a fund in which he has a life-interest he is a trustee for the remainder-man of the principal of the fund during the continuance of his estate. Smith *v.* Van Ostrand, 64 N. Y. 278; Montfort *v.* Montfort, 24 Hun (N. Y.) 120.

Where the entire interest in personal property is sold by the life-tenant in order to avoid a loss of the property, he holds the principal of the fund received therefor as trustee for the remainder-man. McKeil *v.* Cutlar, 57 N. C. 381.

It is by regarding the tenant for life as a trustee that equity takes jurisdiction for the purpose of compelling his personal representative to execute the trust by delivering the property to the person entitled in remainder. Horry *v.* Glover, 2 Hill Eq. (S. C.) 515.

A purchaser with notice of a life-estate in personal property becomes thereby a trustee

quasi-trustee.[21] He is a trustee in the sense that he cannot injure or dispose of the property to the injury of the rights of the remainder-man,[22] or acquire an outstanding title for his own exclusive benefit;[23] but he differs from the trustee of a pure trust in that he may use the property for his exclusive benefit and take all of the income and profits.[24] In general a life-tenant can do nothing during the continuance of his estate to impair the estate in remainder,[25] and on the other hand the remainder-man cannot do any act which will affect the life-estate.[26] There is no tenure[27] nor any privity of contract[28] between a life-tenant and a remainder-man; nor is there such a fiduciary relation as will prevent the life-tenant from purchasing from the remainder-man his remainder interest.[29]

2. ACQUISITION OF OUTSTANDING TITLE OR CLAIM. A life-tenant who allows the property to be sold for taxes cannot acquire a title adverse to the remainder-man or reversioner by purchasing at the tax-sale,[30] or by receiving a release of the title acquired by another purchaser.[31] The same rule applies to a foreclosure sale caused by the neglect of the life-tenant to pay the interest upon an encumbrance.[32] If the life-tenant purchases an outstanding title or encumbrance it will be held to be for the joint benefit of himself and the remainder-man or reversioner,[33] if the latter will contribute his share of the sum which the life-tenant has

for the remainder-man. Swan *v.* Ligan, 1 McCord Eq. (S. C.) 227.

21. Calhoun *v.* Furgeson, 3 Rich. Eq. (S. C.) 160; Vaden *v.* Vaden, 1 Head (Tenn.) 444; King *v.* Sharp, 6 Humphr. (Tenn.) 55.

22. Calhoun *v.* Furgeson, 3 Rich. Eq. (S. C.) 160; Vaden *v.* Vaden, 1 Head (Tenn.) 444; King *v.* Sharp, 6 Humphr. (Tenn.) 55.

23. Moore *v.* Simonson, 27 Oreg. 117, 39 Pac. 1105.

If a life-tenant of a renewable leasehold estate renews the lease the law will not permit him to do so for his exclusive use, but will make him a trustee for the reversioner or remainder-man. Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

24. Cook *v.* Collier, (Tenn. Ch. App. 1901) 62 S. W. 658; Vaden *v.* Vaden, 1 Head (Tenn.) 444.

25. Auhuchon *v.* Bender, 44 Mo. 560.

Liability of life-tenant for waste see *infra*, IV, G, 6.

26. Doe *v.* Thompson, 5 Cow. (N. Y.) 371, holding that without proof it will not be presumed that the remainder-man acted with the privity or consent of the life-tenant.

27. Coakley *v.* Chamberlain, 38 How. Pr. (N. Y.) 483; Tiedeman Real Prop. 318; 2 Washburn Real Prop. (6th ed.) 521.

28. Wright *v.* Graves, 80 Ala. 416; Bogle *v.* North Carolina R. Co., 51 N. C. 419.

29. Ware *v.* Frank, 38 S. W. 1061, 18 Ky. L. Rep. 1009.

30. *Alabama.*— Pruitt *v.* Holly, 73 Ala. 369.

Iowa.— Olleman *v.* Kelgore, 52 Iowa 38, 2 N. W. 612.

Kansas.— Menger *v.* Carruthers, 57 Kan. 425, 46 Pac. 712.

Mississippi.— Stewart *v.* Matheny, 66 Miss. 21, 5 So. 387, 14 Am. St. Rep. 538.

Ohio.— Cook *v.* Prosser, 14 Ohio Cir. Ct. 137, 7 Ohio Cir. Dec. 619; Archer *v.* Brockschmidt, 5 Ohio S. & C. Pl. Dec. 348, 5 Ohio N. P. 349.

Vermont.— Lyman *v.* Hollister, 12 Vt. 407.

United States.— Chaplin *v.* U. S., 29 Ct. Cl. 231; Patrick *v.* Sherwood, 18 Fed. Cas. No. 10,804, 4 Blatchf. 112.

See 33 Cent. Dig. tit. "Life Estates," § 14.

The owner of a life-estate in remainder, to follow another life-estate in possession, cannot acquire a title adverse to that of the remainder-man by purchasing at a sale for taxes assessed during the estate of his predecessor in title. Defreese *v.* Lake, 109 Mich. 415, 67 N. W. 505, 63 Am. St. Rep. 584, 32 L. R. A. 744.

31. Varney *v.* Stevens, 22 Me. 331.

32. Bowen *v.* Brogan, 119 Mich. 218, 77 N. W. 942, 75 Am. St. Rep. 387.

33. *Iowa.*— Werner *v.* Dolan, 106 Iowa 355, 76 N. W. 724.

Kentucky.— Daviess *v.* Myers, 13 B. Mon. 511; Bowling *v.* Dobyns, 5 Dana 434.

Minnesota.— Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

Oregon.— Moore *v.* Simonson, 27 Oreg. 117, 39 Pac. 1105.

Pennsylvania.— Caufman *v.* Cedar Springs Presb. Congregation, 6 Binn. 59.

Wisconsin.— Melms *v.* Pabst Brewing Co., 93 Wis. 140, 66 N. W. 244; Phelan *v.* Boylan, 25 Wis. 679.

United States.— Myers *v.* Reed, 17 Fed. 401, 9 Sawy. 132.

See 33 Cent. Dig. tit. "Life Estates," § 14.

The meaning of this rule is only that the life-tenant will not be permitted to acquire an adverse title by or through such purchase, or otherwise cut out the reversioner's right of contribution, without affording the latter an opportunity to redeem, and it will not prevent an assignment of the encumbrance to a third party and a foreclosure suit by such party to require the reversioner to redeem to the extent of his proportion. Downing *v.* Hartshorn, (Nebr. 1903) 95 N. W. 801.

This principle does not apply to contracts made by a life-tenant to which the remainderman is not a party, the benefit of which he

paid.[34] If the life-tenant in such case pays more than his proportionate share he simply becomes a creditor of the estate for that amount.[35] If the property is sold under foreclosure to satisfy an encumbrance the life-tenant may be a purchaser at the sale.[36] He cannot, however, hold the title adversely, but will be deemed to have made the purchase for the benefit of himself and the remainder-man or reversioner in case the latter will contribute his share of the purchase-price,[37] and does so within a reasonable time.[38]

G. Rights and Liabilities of Life-Tenant — 1. Right to Possession of Estate — a. Land. The life-tenant of real property is entitled to its possession and enjoyment as long as his estate therein continues,[39] and cannot be compelled to submit to a sale thereof or to accept a sum of money in lieu of the specific use of the property.[40] If the remainder-man or reversioner obtains possession of the land before the determination of the life-estate, he will be required to restore the possession and to account to the life-tenant for all the rents and profits received by him.[41]

b. Personal Property. Where specific chattels are bequeathed for life the life-tenant is entitled to the actual possession of the property,[42] and cannot be compelled to submit to a sale or a commutation of his interest;[43] but where personal property is included in a general residuary bequest for life it should be sold by the executor, and the interest paid to the legatee for life, and the principal kept for the remainder-man,[44] unless the will shows a contrary intention on the part of the

may enjoy without disputing the remainder-man's title. Bogle *v.* North Carolina R. Co., 51 N. C. 419.

Where lands held by a life-tenant are sold for street assessments the acquisition by the life-tenant of the title of the purchaser inures to the benefit of the remainder-man as well as himself. Nineteenth, etc., St. Presb. Church *v.* Fithian, 29 S. W. 143, 16 Ky. L. Rep. 581.

A tenant in dower cannot, by purchasing an outstanding title and selling it to a stranger, defeat the right of the reversioners under whose title she entered, nor prevent a restitution of possession to them after her death. Kirk *v.* Nichols, 2 J. J. Marsh. (Ky.) 469.

34. See Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

35. Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

36. Meads *v.* Hutchinson, 111 Mo. 620, 19 S. W. 1111; Fidelity Ins., etc., Co. *v.* Dietz, 132 Pa. St. 36, 18 Atl. 1090 [*affirming* 6 Pa. Co. Ct. 241].

37. Meads *v.* Hutchinson, 111 Mo. 620, 19 S. W. 1111; Allen *v.* De Groodt, 105 Mo. 442, 16 S. W. 494, 1049; Allen *v.* De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626.

38. Cockrill *v.* Hutchinson, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564, holding that the right of the remainder-man to contribute will be denied after a number of years during which the property has been improved and greatly increased in value by the life-tenant.

39. Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71; Armiger *v.* Reitz, 91 Md. 334, 46 Atl. 990; Buck *v.* Binninger, 3 Barb. (N. Y.) 391; Hughes *v.* Hughes, 63 How. Pr. (N. Y.) 408; McCall *v.* McCall, 2 Walk. (Pa.) 202.

A conveyance by the reversioner of a house built and occupied by him as tenant at will of the life-tenant will not entitle the grantee to enter and ocupy the house as against the life-tenant. Cooper *v.* Adams, 6 Cush. (Mass.) 87.

A remainder-man has no right to lease the land during the continuance of the preceding life-estate, and one in possession under such lease is a trespasser as against the life-tenant or his lessee. Jones *v.* Potter, 89 N. C. 220.

Where a life-estate is granted subject to a lease for years previously granted, the life-tenant may maintain summary proceedings against the lessee who holds over after the expiration of the lease. White *v.* Arthurs, 24 Pa. St. 96.

40. Armiger *v.* Reitz, 91 Md. 334, 46 Atl. 990; Hughes *v.* Hughes, 63 How. Pr. (N. Y.) 408.

41. Jones *v.* Freed, 42 Ark. 357.

42. Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Freeman *v.* Knight, 37 N. C. 72.

43. Armiger *v.* Reitz, 91 Md. 334, 46 Atl. 990.

44. *Massachusetts.*— Westcott *v.* Nickerson, 120 Mass. 410.

New Jersey.— Ackerman *v.* Vreeland, 14 N. J. Eq. 23.

New York.— Montfort *v.* Montfort, 24 Hun 120; Covenhoven *v.* Shuler, 2 Paige 122, 21 Am. Dec. 73.

North Carolina.— Jones *v.* Simmons, 42 N. C. 178; Smith *v.* Barham, 17 N. C. 420, 25 Am. Dec. 721.

Pennsylvania.— Bunnell *v.* Bacon, 6 Lanc. L. Rev. 33.

South Carolina.— Calhoun *v.* Furgeson, 3 Rich. Eq. 160.

Tennessee.— Henderson *v.* Vaulx, 10 Yerg. 30.

England.— Randall *v.* Russell, 3 Meriv. 190, 17 Rev. Rep. 56, 36 Eng. Reprint 73; Howe *v.* Dartmouth, 7 Ves. Jr. 137, 6 Rev. Rep. 96, 32 Eng. Reprint 56.

See 33 Cent. Dig. tit. "Life Estates," § 29.

In Maine the rule is to allow the tenant

testator.[45] An executor should also invest a bequest for life of money,[46] and should sell and invest the proceeds of property, the use of which is its conversion into money,[47] or the possession of which is not essential to its beneficial enjoyment,[48] or which is of a perishable character,[49] unless the will shows an intention that the possession of the fund or property should be intrusted to the life-tenant.[50] The executor may instead of selling the property intrust it to the life-tenant upon his giving a sufficient bond;[51] but if he does so without such security and the property is consumed or wasted by the life-tenant the executor will be liable to the remainder-man for the injury sustained.[52]

2. Rights as to Use of Personal Property. Where there is a life-estate in personal property there must always be a power to make it available according to the circumstances,[53] and the life-tenant may convert one kind of property into another or change the character of the investments, provided such acts are in accordance with prudent management and the value of the property as a whole is not diminished.[54] Ordinarily the life-tenant is entitled to appropriate only the income and profits, and cannot encroach upon the *corpus* of the estate,[55] unless

for life to have the actual possession of the property unless the will provides otherwise. Sampson *v.* Randall, 72 Me. 109; Starr *v.* McEwan, 69 Me. 334.

45. *Maryland.*— Evans *v.* Iglehart, 6 Gill & J. 171.

New Jersey.— Crane *v.* Van Duyne, 9 N. J. Eq. 259.

South Carolina.— Brooks *v.* Brooks, 12 S. C. 422; Calhoun *v.* Furgeson, 3 Rich. Eq. 160.

Tennessee.— Henderson *v.* Vaulx, 10 Yerg. 30.

England.— Rowe *v.* Rowe, 29 Beav. 276; Pickering *v.* Pickering, 2 Beav. 31, 17 Eng. Ch. 31.

Canada.— Wakefield *v.* Wakefield, 32 Ont. 36.

See 33 Cent. Dig. tit. "Life Estates," § 29.

46. *Illinois.*— Welsch *v.* Belleville Sav. Bank, 94 Ill. 191.

Maryland.— Wootten *v.* Burch, 2 Md. Ch. 190. See also Evans *v.* Iglehart, 6 Gill & J. 171.

Massachusetts.— Field *v.* Hitchcock, 17 Pick. 182, 28 Am. Dec. 288.

New York.— *In re* McDougall, 141 N. Y. 21, 35 N. E. 961; Smith *v.* Van Ostrand, 64 N. Y. 278.

North Carolina.— Freeman *v.* Knight, 37 N. C. 72.

Virginia.— Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241.

See 33 Cent. Dig. tit. "Life Estates," § 29.

47. Wootten *v.* Burch, 2 Md. Ch. 190. See also Evans *v.* Iglehart, 6 Gill & J. (Md.) 171.

48. *In re* McDougall, 141 N. Y. 21, 35 N. E. 961; Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241.

49. Woods *v.* Sullivan, 1 Swan (Tenn.) 507.

50. Smith *v.* Van Ostrand, 64 N. Y. 278; Mason *v.* Jones, 26 Gratt. (Va.) 271; Pickering *v.* Pickering, 3 Jur. 743, 8 L. J. Ch. 336, 4 Myl. & C. 289, 18 Eng. Ch. 289, 41 Eng. Reprint 113. See also Woods *v.* Sullivan, 1 Swan (Tenn.) 507.

Where land is devised to a trustee to hold for a certain person for life with remainder to another, but with a power to convert the land into money, the fact that the will provides that the life-tenant may have the possession and use of the land does not give such tenant the right to possession of the principal of the fund in case the land be sold. Sedgwick *v.* Taylor, 84 Va. 820, 6 S. E. 226.

51. Tyson *v.* Blake, 22 N. Y. 558; Matter of Gillespie, 18 Abb. N. Cas. (N. Y.) 41. See also Montfort *v.* Montfort, 24 Hun (N. Y.) 120.

A life-tenant is entitled to demand possession of the property instead of having it sold if he will give sufficient security. Livingston *v.* Murray, 68 N. Y. 485.

52. Wootten *v.* Burch, 2 Md. Ch. 190; Jones *v.* Simmons, 42 N. C. 178.

53. Sutphen *v.* Ellis, 35 Mich. 446.

54. Warren *v.* Webb, 68 Me. 133; Sutphen *v.* Ellis, 35 Mich. 446.

The life-tenant will not be liable for a diminution in value of one species of property if the estate as a whole is in as good condition as when received. Calhoun *v.* Furgeson, 3 Rich. Eq. (S. C.) 160.

55. Chase *v.* Howie, 64 Kan. 320, 67 Pac. 822; Wooten *v.* House, (Tenn. Ch. App. 1895) 36 S. W. 932.

Where a life-tenant converts property of the estate into money and spends the money, the remainder-man is entitled to recover the principal sum with simple interest from the date of the life-tenant's death. Anderson *v.* Northrop, 44 Fla. 472, 33 So. 419.

Where the principal of a fund held in trust for a life-tenant is broken into for his benefit in violation of the trust, the life-interest may be held to make good the deficit not only against the life-tenant himself but also against his assignee in insolvency or bankruptcy. Peck *v.* Smith, 16 R. I. 260, 15 Atl. 312.

Where the life-tenant is the widow of the testator and the remainder-men his children, and their means and those of the mother are insufficient to support and educate them in a proper manner, the widow may use a portion of the *corpus* of the estate for this purpose. Wooten *v.* House, (Tenn. Ch. App. 1895) 36 S. W. 932.

authorized to do so by the will;[56] but he may invest a fund, and the profits from such investment become his exclusive property, the remainder-man being entitled only to a return of the original sum.[57] When there is a specific bequest of personal property entirely consumable in the use and not reproductive the life-tenant may use it without any accountability to the remainder-man,[58] and when such property is included in a general bequest of personal property, to be specifically enjoyed, the rights of the remainder-man are defeated as to all of such property which is consumed in the use intended to be made of it;[59] but where personal property which should properly be sold and the proceeds invested is left in the custody of the life-tenant, he must account for all of the property consumed by him above the proportion to which he is entitled.[60] Where the property is consumable but also reproductive, such as flocks and herds, the life-tenant is entitled to the increase but must keep up the original stock.[61]

3. Estovers. Every tenant for life is entitled of common right to take reasonable estovers; that is, wood from off the land for fuel, fences, agricultural erections, and other necessary improvements.[62] In taking wood for fuel he is entitled to take a reasonable quantity,[63] and to take good fuel and such as is conveniently situated.[64] The right includes a reasonable supply for servants living in the same or another house upon the premises.[65] He may cut whatever timber is necessary for making repairs on the premises,[66] and if there are mines on the estate which he has a right to work he may take such timber as is necessary for mining operations.[67] He has no right to sell any of the firewood or timber or to exchange it for materials for repairs or to take more than is necessary.[68]

4. Emblements. A tenant for life, or his legal representative, is entitled to emblements, that is, the crops planted by him prior to the termination of the life-estate, in all cases where the life-estate is terminated by the act of God, as by the death of the tenant,[69] or where without the tenant's fault it is terminated by the

56. Smith *v.* Van Ostrand, 64 N. Y. 278; *In re* Weeden, 37 Misc. (N. Y.) 716, 76 N. Y. Suppl. 462.

Where a devise authorizes the life-tenant to consume and dispose of so much of the estate as is necessary for her comfort and convenience, the estate does not vest in her beyond the uses and necessities mentioned in the will, and all that remains at her decease, whether in the same or different form, is a constituent part of the estate, to be distributed according to the will. Gorham *v.* Billings, 77 Me. 386.

57. Broome *v.* Curry, 19 Ala. 805; Cook *v.* Collier, (Tenn. Ch. App. 1901) 62 S. W. 658.

58. Calhoun *v.* Furgeson, 3 Rich. Eq. (S. C.) 160.

59. Ballentine *v.* Spear, 2 Baxt. (Tenn.) 269; Vancil *v.* Evans, 4 Coldw. (Tenn.) 340; Forsey *v.* Luton, 2 Head (Tenn.) 183.

Where an estate consisting of land, stock, farming implements, and provisions is given for life, although some of the articles may be consumable in the use and others are worn out by use, yet when taken altogether they are reproductive, the estate must be made to keep up its own repairs; and stock that die or implements that are worn out must be replaced by the life-tenant. Robertson *v.* Collier, 1 Hill Eq. (S. C.) 370. See also Patterson *v.* Devlin, McMull. Eq. (S. C.) 459.

60. Jones *v.* Simmons, 42 N. C. 178.

61. Calhoun *v.* Furgeson, 3 Rich. Eq. (S. C.) 160; Horry *v.* Glover, 2 Hill Eq. (S. C.) 515.

62. Zimmerman *v.* Shreeve, 59 Md. 357; Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; 4 Kent Comm. 73.

63. Smith *v.* Jewett, 40 N. H. 530; Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705.

64. Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705; Rutherford *v.* Aiken, 2 Thomps. & C. (N. Y.) 281.

65. Smith *v.* Jewett, 40 N. H. 530. But see Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601, holding that on a farm of one hundred and sixty-five acres a tenant for life is not entitled to firewood for the dwelling of a laborer on the premises in addition to that for the principal dwelling-house.

66. Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Beam *v.* Woolridge, 3 Pa. Co. Ct. 17.

67. Neel *v.* Neel, 19 Pa. St. 323.

Fuel for salt works may be taken by the life-tenant in whatever amount is necessary for carrying on the works. Findley *v.* Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

68. See *infra*, IV, G, 6, b.

69. *Connecticut.*— Bradley *v.* Bailey, 56 Conn. 374, 15 Atl. 746, 7 Am. St. Rep. 316, 1 L. R. A. 427.

Georgia.— Thornton *v.* Burch, 20 Ga. 791.

Indiana.— Shaffer *v.* Stevens, 143 Ind. 295, 42 N. E. 620.

Iowa.— Reilly *v.* Ringland, 39 Iowa 106.

North Carolina.— Poindexter *v.* Blackburn, 36 N. C. 286; Perry *v.* Terrel, 21 N. C. 441.

South Carolina.— Gwin *v.* Hicks, 1 Bay 503.

Tennessee.— Hunt *v.* Watkins, 1 Humphr. 498.

law;[70] but not where the estate is terminated by the voluntary act of the tenant himself.[71] A life-tenant is not entitled to crops planted prior to the beginning of the life-estate.[72] An under-tenant or lessee of a tenant for life is entitled to crops planted by him prior to the death of the life-tenant,[73] and a tenant *pur autre vie* is entitled to crops planted by him prior to the death of the *cestui que vie*.[74] The right includes only such crops as are produced annually by the labor of the tenant,[75] and which are planted before the life-estate determines.[76] The right to emblements carries with it a right of ingress and egress to preserve the crop and gather it and carry it away.[77]

5. Income, Profits, and Accretions — a. In General. Everything in the nature of income or profits accruing during the continuance of the life-estate belongs to the life-tenant,[78] and at his death, if not otherwise disposed of by him, passes to his

See 33 Cent. Dig. tit. "Life Estates," § 33. See also 2 Blackstone Comm. 122; 4 Kent Comm. 73.

The condition of the life-tenant's health at the time the crops are planted or the probability that he will die before their maturity has no effect upon the right to emblements. Bradley *v.* Bailey, 56 Conn. 374, 15 Atl. 746, 7 Am. St. Rep. 316, 1 L. R. A. 427.

A life-tenant may dispose of a crop planted in his lifetime, although it is not matured or gathered until after his death. Shaffer *v.* Stevens, 143 Ind. 295, 42 N. E. 620.

70. 2 Blackstone Comm. 123; 4 Kent Comm. 73.

71. Hawkins *v.* Skeggs, 10 Humphr. (Tenn.) 31; Bulwer *v.* Bulwer, 2 B. & Ald. 470, 21 Rev. Rep. 358; 2 Blackstone Comm. 123; 4 Kent Comm. 73.

A parson who resigns his living is not entitled to emblements. Bulwer *v.* Bulwer, 2 B. & Ald. 470, 21 Rev. Rep. 358.

If a tenant for life forfeits his estate by committing waste he is not entitled to emblements. 2 Blackstone Comm. 123.

72. Glover *v.* Hearst, 10 Rich. Eq. (S. C.) 329.

73. Bradley *v.* Bailey, 56 Conn. 374, 15 Atl. 746, 7 Am. St. Rep. 316, 1 L. R. A. 427; Bevans *v.* Briscoe, 4 Harr. & J. (Md.) 139.

Where the estate is determined by the act of the life-tenant the under tenant or lessee is still entitled to emblements. 2 Blackstone Comm. 123.

74. King *v.* Whittle, 73 Ga. 482; 2 Blackstone Comm. 123.

The husband of a life-tenant is entitled to the crops planted by him prior to the death of the wife. King *v.* Whittle, 73 Ga. 482.

75. Evans *v.* Iglehart, 6 Gill & J. (Md.) 171; Graves *v.* Weld, 5 B. & Ad. 105, 2 L. J. K. B. 176, 2 N. & M. 725, 27 E. C. L. 53; 2 Blackstone Comm. 123; 4 Kent Comm. 73.

Clover and hay growing on the estate are not emblements. Evans *v.* Iglehart, 6 Gill & J. (Md.) 171.

76. Thompson *v.* Thompson, 6 Munf. (Va.) 514. See also Gee *v.* Young, 2 N. C. 17.

77. Bevans *v.* Briscoe, 4 Harr. & J. (Md.) 139.

78. *Maine.*— Gorham *v.* Billings, 77 Me. 386.

Mississippi.— Tatum *v.* McLellan, 56 Miss. 352; Peck *v.* Glass, 6 How. 195.

New Hampshire.— Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192.

New York.— Dwyer *v.* Wells, 5 Misc. 18, 25 N. Y. Suppl. 59; Scovel *v.* Roosevelt, 5 Redf. Surr. 121.

North Carolina.— Hall *v.* Robinson, 56 N. C. 348.

Tennessee.— Forsey *v.* Luton, 2 Head 183; Woods *v.* Sullivan, 1 Swan 507.

See 33 Cent. Dig. tit. "Life Estates," § 34.

Failure to give bond does not deprive the life-tenant of his right to the income of the property but merely necessitates an investment. Weller's Succession, 107 La. 466, 31 So. 883.

Land purchased with the profits from the life-estate belongs exclusively to the life-tenant. Gibony *v.* Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648.

The capital of the estate cannot be broken into for the benefit of the remainder-man so as to diminish the income of the life-tenant without the latter's consent. Matter of Ryder, 4 Edw. (N. Y.) 338.

Rents of an open mine are income and belong to the tenant for life. Koen *v.* Bartlett, 41 W. Va. 559, 23 S. E. 664, 56 Am. St. Rep. 884, 31 L. R. A. 128.

A life-tenant is entitled to royalties from oil wells opened under a lease made by the testator whether the wells are opened before or after the life-estate took effect. Andrews *v.* Andrews, 31 Ind. App. 189, 67 N. E. 461.

Where a trustee neglects to make sale and investment and pay over the income to the life-tenant, the estate of the life-tenant, at his death, may recover out of the general estate compensation for the loss of income during his life. Rowlls *v.* Bebb, [1900] 2 Ch. 107, 69 L. J. Ch. 562, 82 L. T. Rep. N. S. 633, 48 Wkly. Rep. 562.

A trustee cannot retain any of the income to compensate for a decrease in the value of the property from which it is derived. Matter of Johnson, 57 N. Y. App. Div. 494, 67 N. Y. Suppl. 1004; Matter of Chapman, 32 Misc. (N. Y.) 187, 66 N. Y. Suppl. 235.

Where lands are vested in trustees, to be sold and the proceeds invested, and the income to be paid to the tenant for life with remainder over, the tenant for life is entitled to receive the net rents and profits until such conversion. Hope *v.* D'Hédouville, [1893] 2 Ch. 361, 62 L. J. Ch. 589, 68 L. T. Rep. N. S. 516, 3 Reports 348, 41 Wkly. Rep. 330.

Where a life-tenant elects to carry on the business of the testator which is included in a general bequest, to be specifically enjoyed,

representative;[79] but any appreciation in the principal of the estate belongs to the remainder-man.[80] Where the income of a fund is given for life the life-tenant cannot be compelled to take a gross sum in lieu thereof,[81] but if he elects to do so it may be permitted by the court.[82]

b. Increase of Live Stock. A person having a life-estate in live stock is entitled to the natural increase produced during the continuance of his estate.[83] In most of the states this rule was held not to apply to the increase of slaves, which went with the mother to the owner of the remainder,[84] unless a contrary intention appeared from the instrument creating the estate.[85]

c. Interest. The interest on money forming a part of the estate belongs exclusively to the life-tenant.[86]

d. Rents.[87] The life-tenant is entitled to all the rents accruing from the property during the continuance of his estate;[88] but where the life-tenant takes his estate subject to an existing lease, and dies during the term of the lessee, before

the life-tenant is entitled to all the profits appropriated to his own use, but such profits as are used to increase the business become the property of the general estate. Wakefield *v.* Wakefield, 32 Ont. 36.

If a remainder-man takes possession of property in which another has a life-estate he must account to the life-tenant for the profits of such property while in his possession, notwithstanding the possession was taken in order to prevent the removal of the property from the state by the life-tenant. Medley *v.* Jones, 5 Munf. (Va.) 98.

79. Tatum *v.* McLellan, 56 Miss. 352.

Any accumulations of income accruing during the life-estate and not used by the life-tenant become the property of his estate. Matter of Cutler, 23 Misc. (N. Y.) 508, 52 N. Y. Suppl. 842.

80. Matter of Cutler, 23 Misc. (N. Y.) 508, 52 N. Y. Suppl. 842; Scovel *v.* Roosevelt, 5 Redf. Surr. (N. Y.) 121.

Where a fund, the income of which is devised for life, is invested by the trustee in government securities, which increase in value so as to produce, when sold, a larger fund than that originally invested, the remainder-man is entitled to the whole fund as increased and the life-tenant to only the interest thereon. Townsend *v.* U. S. Trust Co., 3 Redf. Surr. (N. Y.) 220.

81. State *v.* Brown, 64 Md. 97, 1 Atl. 410; *In re* Camp, 126 N. Y. 377, 27 N. E. 799; Luce *v.* Burchard, 78 Hun (N. Y.) 537, 29 N. Y. Suppl. 215.

82. Jermain *v.* Sharpe, 29 Misc. (N. Y.) 258, 61 N. Y. Suppl. 700.

83. Leonard *v.* Owens, 93 Ga. 678, 20 S. E. 65; Lewis *v.* Davis, 3 Mo. 133, 23 Am. Dec. 698; Saunders *v.* Haughton, 43 N. C. 217, 57 Am. Dec. 581; Poindexter *v.* Blackburn, 36 N. C. 286; Perry *v.* Terrel, 21 N. C. 441; Patterson *v.* Devlin, McMull. Eq. (S. C.) 459.

84. *Alabama.*— Strong *v.* Brewer, 17 Ala. 706.

Kentucky.— Johnson *v.* Johnson, 8 B. Mon. 470; Young *v.* Small, 4 B. Mon. 220; Miller *v.* McClelland, 7 T. B. Mon. 231; Murphy *v.* Riggs, 1 A. K. Marsh. 532.

North Carolina.— Saunders *v.* Haughton, 43 N. C. 217, 57 Am. Dec. 581; Patterson *v.* High, 43 N. C. 52; Covington *v.* McEntire, 37 N. C. 316; Erwin *v.* Kilpatrick, 10 N. C. 456; Glasgow *v.* Flowers, 2 N. C. 233.

South Carolina.— Tidyman *v.* Rose, Rich. Eq. Cas. 294; Ellis *v.* Shell, 4 Desauss. 611.

Tennessee.— Wirt *v.* Cannon, 4 Coldw. 121.

United States.— Preston *v.* McGaughey, 19 Fed. Cas. No. 11,397, Brunn. Col. Cas. 174, Cooke (Tenn.) 113.

See 33 Cent. Dig. tit. "Life Estates," § 34.

This exception was based upon principles of humanity and allowed in order to prevent the separation of the mother and her children. Johnson *v.* Johnson, 8 B. Mon. (Ky.) 470; Murphy *v.* Riggs, 1 A. K. Marsh. (Ky.) 532.

In Delaware and Maryland the children of slaves born during the continuance of the life-estate were held to be the property of the life-tenant. Smith *v.* Milman, 2 Harr. (Del.) 497; Bohn *v.* Headley, 7 Harr. & J. (Md.) 257; Standiford *v.* Amoss, 1 Harr. & J. (Md.) 526; Wootten *v.* Burch, 2 Md. Ch. 190.

85. Withespoon *v.* McKee, 4 Desauss. (S. C.) 14.

Where the instrument provided that a slave subject to a life-interest should be free at the termination of the life-estate and no remainder was created, the children born during the particular estate were the property of the life-tenant. Johnson *v.* Johnson, 8 B. Mon. (Ky.) 470.

86. Hall *v.* Robinson, 56 N. C. 348.

Interest on money due to the testator goes to the representative of the life-tenant, although not collected until after the termination of the life-estate. Hunt *v.* Watkins, 1 Humphr. (Tenn.) 498.

The interest on a bequest of a life-estate in a residuary fund, where no time is prescribed in the will for the commencement of the interest or enjoyment of such residue, should be estimated from the time of the death of the testator on the amount of the residue as afterward ascertained. Bullard *v.* Benson, 1 Dem. Surr. (N. Y.) 486; King's Estate, 11 Phila. (Pa.) 26.

87. Rent generally see LANDLORD AND TENANT.

88. Gairdner *v.* Tate, 110 Ga. 456, 35 S. E. 697; Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192.

any rent becomes due, his administrator cannot recover any part thereof, but the rent for the entire term becomes an incident to the reversion.[89] At common law there could be no apportionment of rent as to time where the tenant for life leased and died during the period for which rent was payable.[90] This was remedied by statute[91] as to leases terminable by the death of the life-tenant;[92] and by a later statute[93] providing for apportionment between the representative of the life-tenant and the reversioner as to leases continuing after the life-tenant's death.[94] In this country there are similar statutes in some of the states allowing an apportionment.[95] In others the rule remains the same as at common law,[96] but if the lessee continues to occupy the premises after his lease has been determined by the

Where the rent for the entire term accrued during the life-estate it belongs to the estate of the life-tenant, although notes given for its payment do not become due until after the life-tenant's death. Noble *v.* Tyler, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735.

89. Watson *v.* Penn, 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26.

90. Clun's Case, 10 Coke 127*a*; Hay *v.* Palmer, 2 P. Wms. 501, 24 Eng. Reprint 835; Jenner *v.* Morgan, 1 P. Wms. 392, 24 Eng. Reprint 439; *Ex p.* Smyth, 1 Swanst. 337, 36 Eng. Reprint 412. See also Marshall *v.* Moseley, 21 N. Y. 280; Gee *v.* Gee, 22 N. C. 103; Borie *v.* Crissman, 82 Pa. St. 125.

If the rent is paid voluntarily to the executor of the life-tenant the reversioner cannot recover any part of it. Van Hayes *v.* West, 3 Ohio Cir. Ct. 64, 2 Ohio Cir. Dec. 37. But see Paget *v.* Gee, Ambl. 198, 9 Mod. 482, 27 Eng. Reprint 133.

91. St. 11 Geo. II, c. 19, § 15.

92. *Ex p.* Smyth, 1 Swanst. 337, 36 Eng. Reprint 412; 2 Blackstone Comm. 124. See also Perry *v.* Aldrich, 13 N. H. 343, 38 Am. Dec. 493; Marshall *v.* Moseley, 21 N. Y. 280; Borie *v.* Crissman, 82 Pa. St. 125.

Prior to this statute neither the representative of the life-tenant nor the reversioner could recover any rent for the period between the last rent day and the death of the life-tenant. Marshall *v.* Moseley, 21 N. Y. 280; 2 Blackstone Comm. 124.

A tenant in tail after possibility of issue extinct is a life-tenant within the meaning of the statute. See Paget *v.* Gee, Ambl. 198, 9 Mod. 482, 27 Eng. Reprint 133.

Where the lessor is tenant pur autre vie and is living and the lease determines by the death of the *cestui que vie* the statute does not apply, although the hardship is as great in one case as the other. Perry *v.* Aldrich, 13 N. H. 343. 38 Am. Dec. 493.

93. St. 4 Wm. IV, c. 22.

94. 1 Washburn Real Prop. (6th ed.) 115.

Prior to this statute the rent for the whole rental period during which the life-tenant died went to the reversioner. Marshall *v.* Moseley, 21 N. Y. 280.

95. *Alabama.*— Price *v.* Pickett, 21 Ala. 741.

Iowa.— Gudgel *v.* Southerland, 117 Iowa 309, 90 N. W. 623.

Kentucky.— Redmon *v.* Bedford, 80 Ky. 13.

North Carolina.— King *v.* Foscue, 91 N. C. 116.

Pennsylvania.— Borie *v.* Crissman, 82 Pa. St. 125; Henderson *v.* Boyer, 44 Pa. St. 220; Gheen *v.* Osborn, 17 Serg. & R. 171; Agnew's Estate, 24 Pa. Co. Ct. 327; Smith *v.* Wistar, 5 Phila. 145.

Tennessee.— Collins *v.* Crownover, (Ch. App. 1900) 57 S. W. 357.

See 33 Cent. Dig. tit. "Life Estates," § 34.

In New York there has been a substantial reënactment of 11 Geo. II, c. 19, but there is no legislation corresponding to the later 4 Wm. IV, c. 22. Marshall *v.* Moseley, 21 N. Y. 280; Stillwell *v.* Doughty, 3 Bradf. Surr. 359.

Where the life-tenant receives the rent for the whole term in advance, with the consent of the remainder-man, and dies during the term, his estate may retain his proportionate part of the rent, but the balance is held in trust for the remainder-man. Agnew's Estate, 24 Pa. Co. Ct. 327.

The grantee of the life-tenant is not liable to the remainder-man for any portion of the rents of the year during which the life-tenant died, where prior to the conveyance of the life-estate the life-tenant had assigned the rent notes taken from his tenant to a third person to whom the rents were paid. Terrell *v.* Reeves, 103 Ala. 264, 16 So. 54.

Where a life-tenant and remainder-man join in an oil lease and agree as to how the rents, payable annually in advance, shall be divided during the life of the life-tenant, the remainder-man cannot recover any of that part of the rent paid to the life-tenant where the life-tenant dies during the year for which the rent was paid. Agnew's Estate, 17 Pa. Super. Ct. 201.

If the lessee of a life-tenant rents only a certain number of acres on which to make a crop with no right to retain the land after the crop is taken off, the administrator of the life-tenant is entitled to all the rents reserved by the contract; but if the use of dwellings, pastures, and other rights are embraced in the contract which, at the death of the life-tenant, pass to the reversioner, the administrator is entitled to the amount of the rent contract less the fair proportionate value of the use of such of the premises as the tenant's crops do not occupy, estimated from the death of the life-tenant to the end of the rental term. Reed *v.* McGouirk, (Tex. Civ. App. 1896) 35 S. W. 527.

96. Hoagland *v.* Crum, 113 Ill. 365, 55 Am. Rep. 424; Noble *v.* Tyler, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735; Van Hayes *v.* West, 3 Ohio Cir. Ct. 64, 2 Ohio Cir. Dec. 37.

death of the life-tenant, the remainder-man may recover the reasonable value of such use and occupation.[97]

e. Stock Dividends.[98] Where the income from corporate stock is given for life with remainder over there is much conflict in the decisions as to the respective rights of the life-tenant and remainder-man.[99] In Massachusetts the rule is that cash dividends are income and go to the life-tenant and that stock dividends are capital and go to the remainder-man,[1] even though the cash dividends consist of a part of the capital of the company,[2] or the stock dividends are declared out of the net earnings.[3] The rule most generally followed, however, is to class a dividend according to what it really represents and not according to the form in which it is declared.[4] So if it is declared from the earnings of the company it is income and goes to the life-tenant, although declared in stock[5] or certificates of indebtedness.[6] On the other hand if the dividend is in fact a distribution of a part of the actual capital of the company it belongs to the remainder-man.[7] As regards the time of declaring the dividend, dividends declared during the continuance of the life-estate go to the life-tenant,[8] while those declared before the life-estate takes effect,[9] or after its termination,[10] are part of the *corpus* of the estate. Dividends earned prior to the creation of the life-

97. Hoagland *v.* Crum, 113 Ill. 365, 55 Am. Rep. 424; Guthmann *v.* Vallery, 51 Nebr. 824, 71 N. W. 734, 66 Am. St. Rep. 475.

98. Dividends generally see CORPORATIONS.

99. See Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705; Van Doren *v.* Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Cragg *v.* Riggs, 5 Redf. Surr. (N. Y.) 82; Pritchitt *v.* Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856, and cases cited in the following notes.

1. Lyman *v.* Pratt, 183 Mass. 58, 66 N. E. 423; Leland *v.* Hayden, 102 Mass. 542; Daland *v.* Williams, 101 Mass. 571; Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705.

2. Reed *v.* Head, 6 Allen (Mass.) 174.

3. Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705.

4. Thomas *v.* Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; *In re* Skillman, 9 N. Y. Suppl. 469, 24 Abb. N. Cas. (N. Y.) 41, 2 Connoly Surr. (N. Y.) 161; Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164; Thompson's Estate, 9 Pa. Co. Ct. 639; Pritchitt *v.* Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

Dividends will be presumed to be from the earnings, income, and profits, and therefore the property of the life-tenant, in the absence of evidence to the contrary. Walker *v.* Walker, 68 N. H. 407, 39 Atl. 432.

In distributing the assets of a corporation upon its dissolution that proportion of the amount which represents earnings or dividends not previously distributed belongs to the life-tenant. Offutt *v.* Divine, (Ky. 1899) 53 S. W. 816, 49 S. W. 1065, 20 Ky. L. Rep. 1732; *In re* Rogers, 161 N. Y. 108, 55 N. E. 393 [*affirming* 22 N. Y. App. Div. 428, 48 N. Y. Suppl. 175].

5. *Maryland.*— Thomas *v.* Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310.

New Jersey.—Van Doren *v.* Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650.

New York.— Lowry *v.* Farmers' L. & T. Co., 56 N. Y. App. Div. 408, 67 N. Y. Suppl. 759 [*reversing* 30 Misc. 334, 63 N. Y. Suppl. 429]; Riggs *v.* Cragg, 26 Hun 89 [*affirming* 5 Redf. Surr. 82, and *reversed* on other grounds in 89 N. Y. 479]; Clarkson *v.* Clarkson, 18 Barb. 646.

Pennsylvania.— Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164; Earp's Appeal, 28 Pa. St. 368.

Tennessee.— Pritchitt *v.* Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

See 33 Cent. Dig. tit. "Life Estates," § 35.

6. Millen *v.* Guerrard, 67 Ga. 284, 44 Am. Rep. 720.

7. Walker *v.* Walker, 68 N. H. 407, 39 Atl. 432; *In re* Skillman, 9 N. Y. Suppl. 469, 24 Abb. N. Cas. (N. Y.) 41, 2 Connoly Surr. (N. Y.) 161; Knight *v.* Lidford, 3 Dem. Surr. (N. Y.) 88; Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116.

8. People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20; Millen *v.* Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Hall *v.* Robinson, 56 N. C. 348. But see *Ex p.* Rutledge, 1 Harp. Eq. (S. C.) 65, 14 Am. Dec. 696, holding that where a testator devised the dividends of certain bank-stock for life "to be paid half yearly, as they shall be received from the bank," and died a few days before the semiannual dividend was declared, that the amount received should be apportioned.

Earnings on stock in a building association subscribed for by a testator in his lifetime, the instalments upon which are paid by his executor until the stock matures, less legal interest to the time of the death of the testator on sums paid by him in his lifetime, are income and should be paid to the life-tenant. Elton's Estate, 12 Pa. Co. Ct. 79.

9. *In re* Kernochan, 104 N. Y. 618, 11 N. E. 149.

10. Greene *v.* Huntington, 73 Conn. 106, 46 Atl. 883; People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20; Mann *v.* Anderson, 106 Ga. 818, 32 S. E. 870; Quinn *v.* Madigan, 65 N. H. 8, 17 Atl. 976.

estate but not declared until afterward are income and go to the life-tenant.[11] This general rule has in some cases been applied to extraordinary dividends in the nature of a distribution of profits accumulated but not declared prior to the creation of the life-estate, the entire amount being given to the life-tenant as income,[12] while other cases hold that such accumulations are a part of the capital and that the life-tenant is entitled only to that part which accumulated after the beginning of his estate.[13] The value of an option to subscribe for new stock,[14] or the proceeds of the sale of such option,[15] or new stock purchased with such proceeds,[16] or any increase of the market value of the stock,[17] is a part of the principal and belongs to the remainder-man.

6. WORKING MINES, QUARRIES, OIL, OR GAS WELLS.[18] A tenant for life of lands containing minerals, oil, or gas cannot open any new mines,[19] or wells,[20] or lease the land to others for this purpose.[21] If, however, any mines are already opened at the time the life-estate is created the tenant may continue to work them,[22] even to exhaustion;[23] and not only for his own use but for profit.[24] If necessary he

11. Bates *v.* Mackinley, 31 Beav. 280, 8 Jur. N. S. 299, 31 L. J. Ch. 389, 5 L. T. Rep. N. S. 783, 10 Wkly. Rep. 241.

12. *In re* Kernochan, 104 N. Y. 618, 11 N. E. 149; *In re* Hopkins, L. R. 18 Eq. 696, 43 L. J. Ch. 722, 30 L. T. Rep. N. S. 627, 22 Wkly. Rep. 687. See also Millen *v.* Guerrard, 67 Ga. 284, 44 Am. Rep. 720.

13. Van Doren *v.* Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Earp's Appeal, 28 Pa. St. 368.

Where a corporation capitalizes accumulated profits and issues new shares of stock, the stock belongs to the remainder-man. Chester *v.* Buffalo Car Mfg. Co., 70 N. Y. App. Div. 443, 75 N. Y. Suppl. 428.

14. Peirce *v.* Burroughs, 58 N. H. 302; *In re* Kernochan, 104 N. Y. 618, 11 N. E. 149.

15. Walker *v.* Walker, 68 N. H. 407, 39 Atl. 432; Biddle's Appeal, 99 Pa. St. 278. *Compare* Wiltbank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585.

16. Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164.

17. Biddle's Appeal, 99 Pa. St. 278.

18. Mines generally see MINES AND MINERALS.

19. Hook *v.* Garfield Coal Co., 112 Iowa 210, 83 N. W. 963; Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. St. Rep. 280.

The only rights of a life-tenant in an unopened quarry are to prevent such use of it as will interfere with his enjoyment of his life-estate and to protect it from injury for the remainder-man, and the former right is waived by his joining with the remainder-man in a lease of the quarry. Maher *v.* Maher, 73 Vt. 243, 50 Atl. 1063.

20. Marshall *v.* Mellon, 179 Pa. St. 371, 36 Atl. 201, 57 Am. St. Rep. 601, 35 L. R. A. 816; Marshall *v.* Mellon, 17 Pa. Co. Ct. 366; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891.

21. Hook *v.* Garfield Coal Co., 112 Iowa 210, 83 N. W. 963; Gerkins *v.* Kentucky Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370; Kenton Gas, etc., Co. *v.* Dorney, 17 Ohio Cir. Ct. 101, 9 Ohio Cir. Dec. 604; Marshall *v.* Mellon, 179 Pa. St. 371, 36 Atl. 201, 57 Am. St. Rep. 601, 35 L. R. A. 816; Marshall *v.* Mellon, 17 Pa. Co. Ct. 366.

Where a life-tenant who is also one of the remainder-men leases the land for the purpose of boring for natural gas and the lessee, with the knowledge and consent of a part of the remainder-men, opens the well and erects expensive machinery, he will not be compelled to close the well but will be allowed to continue to operate it upon paying a royalty to the remainder-men. Gerkins *v.* Kentucky Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 320, 19 Ky. L. Rep. 130 [*modifying* (1896) 36 S. W. 1].

22. Gaines *v.* Green Pond Iron Min. Co., 33 N. J. Eq. 603; Sayers *v.* Hoskinson, 110 Pa. St. 473, 1 Atl. 308; Lynn's Appeal, 31 Pa. St. 44, 72 Am. Dec. 721; Irwin *v.* Covode, 24 Pa. St. 162; Neel *v.* Neel, 19 Pa. St. 323; Koen *v.* Bartlett, 41 W. Va. 559, 23 S. E. 664, 56 Am. St. Rep. 884, 31 L. R. A. 128; *In re* Chaytor, [1900] 2 Ch. 804, 69 L. J. Ch. 837, 49 Wkly. Rep. 125; Clavering *v.* Clavering, Moseley 219, 25 Eng. Reprint 359, 2 P. Wms. 388, 24 Eng. Reprint 780, Sel. Cas. Ch. 79.

Where a stone quarry has been previously opened for the purpose of profit and not merely for building or repairing houses on the property, a life-tenant may continue to work the same and sell the stone quarried. Elias *v.* Snowdon Slate Quarries Co., 4 App. Cas. 454, 48 L. J. Ch. 811, 41 L. T. Rep. N. S. 289, 28 Wkly. Rep. 54; Elias *v.* Griffith, 8 Ch. D. 521, 38 L. T. Rep. N. S. 871, 26 Wkly. Rep. 869.

Sand pits opened and used prior to the creation of the life-estate may be worked by the life-tenant. Reed *v.* Reed, 16 N. J. Eq. 248.

23. Sayers *v.* Hoskinson, 110 Pa. St. 473, 1 Atl. 308; Irwin *v.* Covode, 24 Pa. St. 162; Findlay *v.* Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

24. Neel *v.* Neel, 19 Pa. St. 323.

Where coal had been taken from an outcrop for domestic purposes only prior to the creation of the life-estate the life-tenant may use it only for the same purpose and cannot mine the coal for sale. Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. St. Rep. 280.

may sink new shafts,[25] provided they are not for working veins which could not be reached by means of the old shaft or opening.[26] He may pursue the veins opened to the limits of the tract but not into another distinct tract on which no opening was made.[27] In the case of mines in which work was discontinued prior to the creation of the life-estate, a mere cessation of work for however long will not defeat the right of the life-tenant to continue it,[28] but if the mine has been permanently abandoned with a view to some advantage to the property supposed to accompany such discontinuance,[29] or with an executed intention of devoting the land to some other use,[30] the work cannot be continued by the life-tenant.

7. LIABILITY FOR WASTE[31] — a. In General. A life-tenant has no right to commit waste,[32] either voluntary or permissive,[33] and he is liable for waste committed by a stranger as well as for that committed by himself.[34] No precise rule can be laid down that will apply to all estates as to what specific acts will constitute waste,[35] but in general any act which does a permanent injury to the inheritance is waste.[36] Owing to the difference in conditions, the common-law doctrine of

25. Gaines *v.* Green Pond Iron Min. Co., 33 N. J. Eq. 603; Spencer *v.* Scurr, 31 Beav. 334, 9 Jur. N. S. 9, 31 L. J. Ch. 808, 10 Wkly. Rep. 878; Clavering *v.* Clavering, Moseley 219, 25 Eng. Reprint 359, 2 P. Wms. 388, 24 Eng. Reprint 780, Sel. Cas. Ch. 79.

New openings for salt works may be made where the purpose is not to reach any new vein of water, but where such openings are the only practicable mode of using the old vein. Findlay *v.* Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

26. Spencer *v.* Scurr, 31 Beav. 334, 9 Jur. N. S. 9, 31 L. J. Ch. 808, 10 Wkly. Rep. 878.

27. Westmoreland Coal Co.'s Appeal, 85 Pa. St. 344.

28. Gaines *v.* Green Pond Iron Min. Co., 33 N. J. Eq. 603 [*reversing* 32 N. J. Eq. 86]. But see Bagot *v.* Bagot, 32 Beav. 509, 8 Jur. N. S. 1022, 33 L. J. Ch. 116, 9 L. T. Rep. N. S. 217, 12 Wkly. Rep. 35, where the court, after holding that a mine not worked for twenty years was an open mine, expressed the opinion that a mine not worked for one hundred years could not be so treated.

Where clay pits had not been worked for twenty years it was held that the working of such pits by the life-tenant should be enjoined until a trial of the question as to whether they had been permanently abandoned. Viner *v.* Vaughan, 2 Beav. 466, 17 Eng. Ch. 466.

29. See Bagot *v.* Bagot, 32 Beav. 509, 8 Jur. N. S. 1022, 33 L. J. Ch. 116, 9 L. T. Rep. N. S. 217, 12 Wkly. Rep. 35.

30. Hook *v.* Garfield Coal Co., 112 Iowa 210, 83 N. W. 963; Gaines *v.* Green Pond Iron Min. Co., 33 N. J. Eq. 603 [*reversing* 32 N. J. Eq. 86].

31. Waste generally see WASTE.

32. Van Syckel *v.* Emery, 18 N. J. Eq. 387; Porch *v.* Fries, 18 N. J. Eq. 204; Williamson *v.* Jones, 42 W. Va. 563, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Pardoe *v.* Pardoe, 82 L. T. Rep. N. S. 547.

Waste by tenant in dower see DOWER, 14 Cyc. 1014.

33. St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756; Kearney *v.* Kearney, 17 N. J. Eq. 59; Wade *v.* Malloy, 16 Hun (N. Y.) 226. *Compare In re* Cartwright, 41 Ch. D. 532, 58 L. J. Ch. 590, 60 L. T. Rep. N. S. 891, 37 Wkly. Rep. 612.

34. Fay *v.* Brewer, 3 Pick. (Mass.) 203; Wood *v.* Griffin, 46 N. H. 230.

The stranger who committed the waste is liable over to the life-tenant for damages which the latter has been compelled to pay to the owner of the reversion. Wood *v.* Griffin, 46 N. H. 230; 4 Kent Comm. 77.

35. Keeler *v.* Eastman, 11 Vt. 293.

Making material alterations in buildings which ordinarily would constitute waste is permissible where they have become useless on account of changes in the condition of the surrounding property, for which the life-tenant is not responsible. Melms *v.* Pabst Brewing Co., 104 Wis. 9, 79 N. W. 738, 46 L. R. A. 478.

36. Wade *v.* Malloy, 16 Hun (N. Y.) 226; Jackson *v.* Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Livingston *v.* Reynolds, 26 Wend. (N. Y.) 115; McCullough *v.* Irvine, 13 Pa. St. 438; Keeler *v.* Eastman, 11 Vt. 293; Williamson *v.* Jones, 42 W. Va. 563, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

The life-tenant must enjoy his estate in such a reasonable way that the land shall pass to the reversioner as nearly as practicable unimpaired as to its natural capacity and the improvements upon it. Dorsey *v.* Moore, 100 N. C. 41, 6 S. E. 270.

Taking clay from the soil and manufacturing it into brick for sale is waste. Livingston *v.* Reynolds, 2 Hill (N. Y.) 157; Lewisburg University *v.* Tucker, 31 W. Va. 621, 8 S. E. 410.

Cutting wood for burning brick where the brick is to be sold is waste. Livingston *v.* Reynolds, 26 Wend. (N. Y.) 115.

Any injury caused by over tillage and bad management is waste. Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601.

The cutting of timber trees, except in a due course of management for the benefit and preservation of the estate, is waste. Pardoe *v.* Pardoe, 82 L. T. Rep. N. S. 547.

Where a building is destroyed by the act of God it is waste for the life-tenant to take

waste has been greatly modified in this country, and many things may be done by a tenant for life here that in England would be waste.[37] In England it is waste for a life-tenant to convert arable land into meadow or pasture land or *vice versa*,[38] but in this country the rule is otherwise,[39] unless the change is detrimental to the inheritance and contrary to the ordinary course of good husbandry.[40] Where a life-estate is given in personal property, to be enjoyed in specie, the tenant is liable for waste if he converts any of the chattels to unauthorized uses.[41] A life-estate may be created "without impeachment for waste," in which case the tenant may do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste;[42] but he cannot commit malicious or equitable waste so as to destroy the estate.[43]

b. Cutting and Removal of Timber. The common-law doctrine of waste has been modified in this country most particularly with regard to the cutting and removal of timber,[44] which in many cases would benefit rather than injure the

timber from the estate to rebuild it. Miller *v.* Shields, 55 Ind. 71.

Failure to insure buildings on the property is not waste. Harrison *v.* Pepper, 166 Mass. 288, 44 N. E. 222, 56 Am. St. Rep. 404, 33 L. R. A. 239.

Where a building has become ruinous it is not waste to take timber for the construction of a new building in its place. Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601.

Failure to make necessary repairs see *infra*, IV, G, 8.

Allowing land to be sold for taxes see *infra*, IV, G, 11.

The fact that the life-tenant has improved the estate is no justification for acts of waste committed by him. Van Syckel *v.* Emery, 18 N. J. Eq. 387.

The fact that the inheritance is as valuable at the termination of the life-estate as at its beginning is no justification for an act of waste committed by the life-tenant. McCullough *v.* Irvine, 13 Pa. St. 438.

37. *Georgia.*— Woodward *v.* Gates, 38 Ga. 205.

Massachusetts.— Pynchon *v.* Stearns, 11 Metc. 304, 45 Am. Dec. 207.

Mississippi.— Learned *v.* Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621; Cannon *v.* Barry, 59 Miss. 289.

Nebraska.— Disher *v.* Disher, 45 Nebr. 100, 63 N. W. 368.

New York.— McCay *v.* Wait, 51 Barb. 225.

North Carolina.—Davis *v.* Gilliam, 40 N. C. 308.

Ohio.— Crockett *v.* Crockett, 2 Ohio St. 180.

Pennsylvania.— Williard *v.* Williard, 56 Pa. St. 119; Lynn's Appeal, 31 Pa. St. 44, 72 Am. Dec. 721; Glass *v.* Glass, 6 Pa. Co. Ct. 408.

Vermont.— Keeler *v.* Eastman, 11 Vt. 293.

Wisconsin.— Meins *v.* Pabst Brewing Co., 104 Wis. 9, 79 N. W. 738, 46 L. R. A. 478.

See 33 Cent. Dig. tit. "Life Estates," § 42.

In this country nothing will generally speaking be held to constitute waste which is dictated by good husbandry and promotes rather than diminishes the permanent value of the property as an estate or inheritance. Cannon *v.* Barry, 59 Miss. 289.

38. 2 Blackstone Comm. 282. See also Pynchon *v.* Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621; Keeler *v.* Eastman, 11 Vt. 293.

39. Proffitt *v.* Henderson, 29 Mo. 325; McCullough *v.* Irvine, 13 Pa. St. 438; Glass *v.* Glass, 6 Pa. Co. Ct. 408.

Permitting arable or pasture land to grow up in timber is not waste in this country. Clark *v.* Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450; Shine *v.* Wilcox, 21 N. C. 631.

40. See Pynchon *v.* Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621.

41. Vancil *v.* Evans, 4 Coldw. (Tenn.) 340.

42. Belt *v.* Simkins, 113 Ga. 894, 39 S. E. 430; Chapman *v.* Epperson Circled Heading Co., 101 Ill. App. 161; Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205.

Timber trees may be cut by the tenant and sold or converted to his own use. Clement *v.* Wheeler, 25 N. H. 361.

No particular form of words is necessary to make an estate for life without impeachment for waste. Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705.

A full and absolute power of management in the gift of a life-estate does not render the tenant dispunishable for waste. Pardoe *v.* Pardoe, 82 L. T. Rep. N. S. 547.

43. Duncombe *v.* Felt, 81 Mich. 332, 45 N. W. 1004; Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205; Vane *v.* Barnard, Gilb. Cas. 127, Prec. Ch. 454, 1 Salk. 161, 2 Vern. Ch. 738, 23 Eng. Reprint 1082; Aston *v.* Aston, 1 Ves. 264, 27 Eng. Reprint 1021. See also Clement *v.* Wheeler, 25 N. H. 361; Kane *v.* Vanderburgh, 1 Johns. Ch. (N. Y.) 11.

Ornamental or shade trees cannot be destroyed by the tenant. Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205; Packington's Case, 3 Atk. 215, 26 Eng. Reprint 925.

Buildings which are part of the freehold cannot be destroyed or removed. Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205.

All of the timber trees cannot be removed even where the tenant is without impeachment of waste. Duncombe *v.* Felt, 81 Mich. 332, 45 N. W. 1004; Aston *v.* Aston, 1 Ves. 264, 27 Eng. Reprint 1021.

44. Sayers *v.* Hoskinson, 110 Pa. St. 473, 1 Atl. 308.

inheritance,[45] but which must be decided as a question of fact upon the particular circumstances of each case.[46] The tenant in this country may usually remove timber so as to fit the land for pasture or cultivation,[47] the rule being that such clearing is not waste if it does not damage or diminish the value of the inheritance and the acts of the tenant are conformable to the rules of good husbandry;[48] and in such cases the timber removed may be sold by the tenant or used off the premises.[49] The amount of clearing which may be done depends upon the circumstances of the particular case;[50] and if it is in fact an injury to the inheritance,[51] or the real purpose of the clearing is not the improvement of the land, but the sale of the timber,[52] its removal is waste. It is not waste to cut dead or decaying trees,[53] or within certain limits to thin out the trees for the purpose of improving those that are left;[54] but it is waste to cut for sale either timber trees[55] or fire-

45. Woodward *v.* Gates, 38 Ga. 205; Proffitt *v.* Henderson, 29 Mo. 325; Davis *v.* Clark, 40 Mo. App. 515; Davis *v.* Gilliam, 40 N. C. 308.

46. McCay *v.* Wait, 51 Barb. (N. Y.) 225; Drake *v.* Wigle, 22 U. C. C. P. 341.

Whether the clearing of lands has been beneficial or injurious to the inheritance is a question of fact which must depend upon the relative portions of cleared land and woodland and the value of the trees destroyed. Shine *v.* Wilcox, 21 N. C. 631.

47. Proffitt *v.* Henderson, 29 Mo. 325; Davis *v.* Gilliam, 40 N. C. 308; Shine *v.* Wilcox, 21 N. C. 631; McCullough *v.* Irvine, 13 Pa. St. 438; Beam *v.* Woolridge, 3 Pa. Co. Ct. 17.

In Canada the rule is the same as in the United States. Saunders *v.* Breakie, 5 Ont. 603; Drake *v.* Wigle, 22 U. C. C. P. 341.

48. *Georgia.*— Woodward *v.* Gates, 38 Ga. 205.

Nebraska.— Disher *v.* Disher, 45 Nebr. 100, 63 N. W. 368.

New York.—Jackson *v.* Brownson, 7 Johns. 227, 5 Am. Dec. 258.

Pennsylvania.— Morris *v.* Knight, 14 Pa. Super. Ct. 324.

Vermont.— Keeler *v.* Eastman, 11 Vt. 293.

Wisconsin.— Wilkinson *v.* Wilkinson, 59 Wis. 557, 18 N. W. 527.

See 33 Cent. Dig. tit. "Life Estates," § 42.

But see Clark *v.* Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450, holding that where a life-tenant had permitted pasture land to grow up in timber trees he could not afterward cut such trees and restore the land to pasture, even though it might have been good husbandry on the part of an owner in fee to do so.

Where the shade of trees standing in open fields prevents the growth of vegetation to such extent that good husbandry requires their removal, it is not waste for the life-tenant to remove them. Sayers *v.* Hoskinson, 110 Pa. St. 473, 1 Atl. 308.

49. Keeler *v.* Eastman, 11 Vt. 293; Wilkinson *v.* Wilkinson, 59 Wis. 557, 18 N. W. 527. *Compare* Saunders *v.* Breakie, 5 Ont. 603.

Timber cut to improve the land belongs to the tenant for life and not to the reversioner. See Crockett *v.* Crockett, 2 Ohio St. 180.

50. Keeler *v.* Eastman, 11 Vt. 293.

Whether the clearing of land is waste depends upon the custom of farmers, the situation of the country, and the value of the timber. McCullough *v.* Irvine, 13 Pa. St. 438.

The extent to which timber may be removed before the tenant is guilty of waste must be left to the sound discretion of the jury under the directions of the court. Jackson *v.* Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258.

To remove all of the valuable timber, even for purposes of cultivation, is waste. Proffitt *v.* Henderson, 29 Mo. 325; Jackson *v.* Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258.

Where there is not enough timber left to repair the plantation the clearing is waste. Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

51. Disher *v.* Disher, 45 Nebr. 100, 63 N. W. 368; McCay *v.* Wait, 51 Barb. (N. Y.) 225; Jackson *v.* Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

The fact that the amount of land already cleared is insufficient for the support of the life-tenant will not authorize the cutting of valuable timber trees, the removal of which will be an injury to the inheritance. Robertson *v.* Meadors, 73 Ind. 43.

52. Davis *v.* Clark, 40 Mo. App. 515; Davis *v.* Gilliam, 40 N. C. 308.

53. Sayers *v.* Hoskinson, 110 Pa. St. 473, 1 Atl. 308; Keeler *v.* Eastman, 11 Vt. 293. *Compare* Perrot *v.* Perrot, 3 Atk. 94, 26 Eng. Reprint 857.

54. See Bagot *v.* Bagot, 32 Beav. 509, 8 Jur. N. S. 1022, 33 L. J. Ch. 116, 9 L. T. Rep. N. S. 217, 12 Wkly. Rep. 35.

55. *Indiana.*— Modlin *v.* Kennedy, 53 Ind. 267.

Maine.— Richardson *v.* York, 14 Me. 216.

Mississippi.— Learned *v.* Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621.

Missouri.— Davis *v.* Clark, 40 Mo. App. 515.

New Hampshire.— Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705.

New Jersey.— Van Syckel *v.* Emery, 18 N. J. Eq. 387.

wood,[56] or to exchange timber for fuel,[57] or to sell or exchange it for materials for repairs,[58] or in making repairs to cut a greater amount of timber than is necessary.[59] Timber trees, except such as the life-tenant is authorized to cut,[60] become the property of the remainder-man or reversioner, whether cut by the life-tenant,[61] or a third person,[62] or blown down upon the land by storms;[63] and he may maintain replevin for their recovery,[64] or trespass for taking them away and converting them.[65]

c. Removal or Destruction of Buildings. For a life-tenant to tear down a house on the premises is waste,[66] even though the house is not tenantable,[67] or the object in removing it is to erect a better building in its place.[68] A building not affixed to the freehold may be removed by the life-tenant,[69] but the removal of any building intended as a permanent part of the freehold is waste.[70]

8. Repairs. A tenant for life must make all the ordinary repairs necessary to preserve the property and prevent its going to waste,[71] unless there is a provision

North Carolina.— Dorsey *v.* Moore, 100 N. C. 41, 6 S. E. 270.

Pennsylvania.— Glass *v.* Glass, 6 Pa. Co. Ct. 408.

Rhode Island.— Lester *v.* Young, 14 R. I. 579.

See 33 Cent. Dig. tit. "Life Estates," § 42.

Where land is devised chiefly to provide a source of support to the life-tenant and the testator so used the property as to indicate that the cutting of timber was one of the profits of the land, the cutting of a reasonable amount of timber for sale by the life-tenant is not waste. Beam *v.* Woolridge, 3 Pa. Co. Ct. 17.

The purchaser of timber with notice of the nature of the title is liable to the remainder-man for the value thereof, as of the date and place of conversion. Bergen *v.* Sears, 67 S. W. 1002, 24 Ky. L. Rep. 80.

56. Johnson *v.* Johnson, 18 N. H. 594; Fuller *v.* Wason, 7 N. H. 341; Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601; Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621.

57. Padelford *v.* Padelford, 7 Pick. (Mass.) 152.

In an action for an accounting for a wrongful cutting of trees the life-tenant is not entitled to any allowance on account of the fact that he has procured firewood from other sources instead of cutting it from the estate. Phillips *v.* Allen, 7 Allen (Mass.) 115. *Contra,* Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601.

58. Dennett *v.* Dennett, 43 N. H. 499; Elliot *v.* Smith, 2 N. H. 430.

An exception to this rule has been made in a few cases where it appeared that the sale of the timber and the purchase of materials with the proceeds was the most economical means of making the repairs. See Miller *v.* Shields, 55 Ind. 71; Loomis *v.* Wilbur, 15 Fed. Cas. No. 8,598, 5 Mason 13.

59. Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601.

60. Cutting timber under right of estovers see *supra,* IV, G, 3.

61. Richardson *v.* York, 14 Me. 216; Lester *v.* Young, 14 R. I. 579.

62. Lane *v.* Thompson, 43 N. H. 320.

63. Stonebreaker *v.* Zollickoffer, 52 Md. 154, 36 Am. Rep. 364.

Where timber trees are blown down upon pasture land so as to interfere with the pasturage they should not be allowed to obstruct the pasture, but should be removed and disposed of upon such terms as are equitable to all parties. Houghton *v.* Cooper, 6 B. Mon. (Ky.) 281.

Parts of trees suitable only for firewood belong to the life-tenant. See Stonebreaker *v.* Zollickoffer, 52 Md. 154, 36 Am. Rep. 364.

64. Richardson *v.* York, 14 Me. 216.

65. Lane *v.* Thompson, 43 N. H. 320.

66. McCullough *v.* Irvine, 13 Pa. St. 438; Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621; Dooly *v.* Stringham, 4 Utah 107, 7 Pac. 405.

An outbuilding in such a dilapidated condition as to be dangerous to stock may be removed by the life-tenant unless its condition resulted from his neglect. Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621.

67. Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621.

68. Dooly *v.* Stringham, 4 Utah 107, 7 Pac. 405.

69. Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621.

70. Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205, holding also that the rule is the same where the tenant is without "impeachment for waste."

71. *District of Columbia.*— Stansbury *v.* Inglehart, 20 D. C. 134.

Michigan.— Smith *v.* Blindbury, 66 Mich. 319, 33 N. W. 391.

Minnesota.— St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756.

New Jersey.— Perrine *v.* Newell, 62 N. J. Eq. 14, 49 Atl. 724; Murch *v.* J. O. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213; *In re* Steele, 19 N. J. Eq. 120; Kearney *v.* Kearney, 17 N. J. Eq. 504 [*affirming* 17 N. J. Eq. 59].

New York.— Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163.

Pennsylvania.— Baker *v.* Esbin, 1 Chest. Co. Rep. 293.

Rhode Island.— Thurston *v.* Thurston, 6 R. I. 296.

Tennessee.— Ballentine *v.* Spear, 2 Baxt. 269.

to the contrary in the instrument creating the estate;[72] but he is not required to expend any extraordinary sums for this purpose,[73] or to repair buildings which are in an untenantable condition at the time the life-estate is created.[74] A life-tenant is not bound to restore a building destroyed by the act of God[75] or by an accidental fire for which he was not to blame.[76] A failure to make necessary repairs is waste.[77] If repairs are necessary to preserve the estate, and the life-tenant after due notice and request does not make them within a reasonable time, the remainder-man may do so and may recover the cost of such repairs from the life-tenant,[78] or a receiver may be appointed to apply the rents and income to this purpose.[79] Where the necessary repairs are also in the nature of permanent improvements which are of benefit to both the life-tenant and the remainder-man, and increase the value of the latter's estate as compared with its value at the time the life-estate was created, the expense of such repairs may be apportioned according to the respective interests.[80]

9. IMPROVEMENTS. A tenant for life is not bound to make any permanent

England.— Drake *v.* Trefusis, L. R. 10 Ch. 364, 33 L. T. Rep. N. S. 85, 23 Wkly. Rep. 762; Crowe *v.* Crisford, 17 Beav. 507, 2 Wkly. Rep. 45; Nairn *v.* Marjoribanks, 3 Russ. 582, 3 Eng. Ch. 582, 38 Eng. Reprint 693; Hibbert *v.* Cooke, 1 Sim. & St. 552, 24 Rev. Rep. 225, 1 Eng. Ch. 552.

See 33 Cent. Dig. tit. "Life Estates," § 37.

The premises must be kept in as good repair as they were when the life-tenancy began. Murch *v.* J. O. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213.

The obligations of an equitable tenant for life in regard to repairs are substantially the same as those of the legal life-tenant. Schulting *v.* Schulting, 41 N. J. Eq. 130, 3 Atl. 526.

If the life-estate is in the hands of a trustee he may apply the rents and profits to making necessary repairs, but in the absence of a power of sale cannot sell any part of the property for this purpose. Thurston *v.* Thurston, 6 R. I. 296.

Where the trustee of an estate advances money for repairs, and the life-tenant dies before he has had an opportunity to reimburse himself from the profits of the estate, he cannot charge any part of the amount upon the remainder-man. Perrine *v.* Newell, 62 N. J. Eq. 14, 49 Atl. 724.

Repaving a sidewalk in front of the premises, under the requirements of a city ordinance, is more in the nature of a repair than of a permanent improvement, and is properly chargeable against the life-tenant (Hackworth *v.* Louisville Artificial Stone Co., 106 Ky. 234, 50 S. W. 33, 20 Ky. L. Rep. 1789; Brodie *v.* Parsons, 64 S. W. 426, 23 Ky. L. Rep. 831); and he must also pay for such paving when at the time it is to be done the property is in possession of a tenant from year to year claiming under him (Hitner *v.* Ege, 23 Pa. St. 305).

An expenditure for plate glass in making repairs is not necessarily beyond the rule of ordinary repairs, and is properly charged against the life-estate instead of against the estate in remainder. Hancox *v.* Meeker, 95 N. Y. 528.

Where the life-tenant is unable to make necessary repairs and the rents of the property are insufficient for this purpose, a court of equity may direct a sale of timber from the premises to raise the amount necessary. Flener *v.* Flener, 69 S. W. 954, 24 Ky. L. Rep. 725.

A life-tenant of certain rooms in a house and the reversioner who occupies the rest of the house are in contemplation of law occupants of distinct dwellings, and neither can recover from the other on account of repairs made without request. Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192.

Application of insurance money to repairs in case of partial loss see *infra*, IV, G, 9.

72. Griffin *v.* Fleming, 72 Ga. 697, holding that where the devise of a life-estate contained a provision that it should be occupied "free of rent or other charges" the tenant was not obliged to make repairs.

73. Wilson *v.* Edmonds, 24 N. H. 517; Crowe *v.* Crisford, 17 Beav. 507, 2 Wkly. Rep. 45.

If the cost of repairs would exceed the value of the house he is not bound to repair it but may leave it to its natural destruction. Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621.

74. Sohier *v.* Eldredge, 103 Mass. 345.

75. Miller *v.* Shields, 55 Ind. 71.

76. Sampson *v.* Grogan, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711.

77. St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756; Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601.

78. Baker *v.* Esbin, 1 Chest. Co. Rep. (Pa.) 293.

79. St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756.

80. Matter of Laytin, 20 N. Y. Suppl. 72, 2 Connoly Surr. (N. Y.) 106; Baker *v.* Esbin, 1 Chest. Co. Rep. (Pa.) 293.

The common-law rule for apportioning the cost of repairs, in the absence of evidence of the value of the respective interests, is one third to the life-tenant and two thirds to the remainder-man. Baker *v.* Esbin, 1 Chest. Co. Rep. (Pa.) 392.

improvements on the estate;[81] and when such improvements are made by an executor or trustee they are not chargeable against the life-tenant except when made by his procurement;[82] although in some cases where the improvement was a distinct benefit to both interests it has been held that the cost should be apportioned.[83] If the life-tenant himself makes permanent improvements it will be presumed that they were for his own benefit, and he cannot recover anything therefor from the remainder-man or reversioner.[84] Exceptions to this rule have been made in the case of a life-tenant who completes a dwelling-house begun by the donor of the estate,[85] or who makes improvements upon mining property to prevent its forfeiture.[86] A life-tenant who makes improvements believing himself to be the owner in fee is not entitled to the benefit of the betterment or occupying claimant laws.[87]

81. Bradley's Estate, 3 Pa. Dist. 359; Tragbar's Estate, 2 Pa. Dist. 407, 12 Pa. Co. Ct. 635.

82. Matter of Pollock, 3 Redf. Surr. (N. Y.) 100.

83. Peck *v.* Sherwood, 56 N. Y. 615; Cogswell *v.* Cogswell, 2 Edw. (N. Y.) 231; Moore *v.* Simonson, 27 Oreg. 117, 39 Pac. 1105. See also Matter of Lamb, 10 Misc. (N. Y.) 638, 32 N. Y. Suppl. 225.

Apportionment of assessments for permanent improvements see *infra*, IV, G, 11.

84. *Illinois.*— Chilvers *v.* Race, 196 Ill. 71, 63 N. E. 701.

Kentucky.— Mayes *v.* Payne, 60 S. W. 710, 22 Ky. L. Rep. 1465; Culleton *v.* Kenne, (1897) 39 S. W. 511, 18 Ky. L. Rep. 1065; Nineteenth, etc., Presb. Church *v.* Fithian, 29 S. W. 143, 16 Ky. L. Rep. 581; Caldwell *v.* Jacob, 22 S. W. 436, 27 S. W. 86, 16 Ky. L. Rep. 21; Johnson *v.* Stewart, 8 Ky. L. Rep. 857.

Maine.— Doak *v.* Wiswell, 38 Me. 569; Austin *v.* Stevens, 24 Me. 520.

Maryland.— Weber *v.* Lauman, 91 Md. 90, 45 Atl. 870.

Massachusetts.— Sohier *v.* Eldredge, 103 Mass. 345.

Minnesota.— Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

Mississippi.— Wilson *v.* Parker, (1894) 14 So. 264; Stewart *v.* Matheny, 66 Miss. 21, 5 So. 387, 14 Am. St. Rep. 538; Pass *v.* McLendon, 62 Miss. 580.

Nebraska.— Schimpf *v.* Rhodewald, 62 Nebr. 105, 86 N. W. 908.

New York.— Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163; Matter of Lamb, 10 Misc. 638, 32 N. Y. Suppl. 225.

North Carolina.— Merritt *v.* Scott, 81 N. C. 385.

Oregon.— Moore *v.* Simonson, 27 Oreg. 117, 39 Pac. 1105.

Pennsylvania.—Datesman's Appeal, 127 Pa. St. 348, 17 Atl. 1086, 1100.

South Carolina.— Trimmier *v.* Darden, 61 S. C. 220, 39 S. E. 373; Corbett *v.* Laurens, 5 Rich. Eq. 301; Thurston *v.* Dickinson, 2 Rich. Eq. 317, 46 Am. Dec. 56.

Texas.— Elam *v.* Harkhill, 60 Tex. 581.

West Virginia.— Jones *v.* Shufflin, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848.

England.— Bostock *v.* Blakeney, 2 Bro. Ch. 653, 29 Eng. Reprint 362; Caldecott *v.* Brown, 2 Hare 144, 24 Eng. Ch. 144.

See 33 Cent. Dig. tit. "Life Estates," § 38.

The husband of a life-tenant who makes improvements on the estate cannot recover from the remainder-man. Creutz *v.* Heil, 89 Ky. 429, 12 S. W. 926, 11 Ky. L. Rep. 652; Mayes *v.* Payne, 60 S. W. 710, 22 Ky. L. Rep. 1465; Varney *v.* Stevens, 22 Me. 331.

Where the life-tenant and remainder-man are infants money of the life-tenant expended in improving the estate cannot be afterward recovered from the remainder-man, although the improvements were made by authority of the court given in a proper proceeding instituted by the guardian. Caldwell *v.* Jacob, 22 S. W. 436, 27 S. W. 86, 16 Ky. L. Rep. 21.

Where a tenant for life is also a tenant in common of the remainder he will be allowed, on partition with his cotenants, compensation for improvements made during the continuance of the life-estate. Broyles *v.* Waddel, 11 Heisk. (Tenn.) 32.

In the case of a sale under order of court of property on which the life-tenant has made permanent improvements for the mutual accommodation of himself and the remainder-man, he will be allowed to recover the value of such improvements out of the proceeds of the sale. Gambril *v.* Gambril, 3 Md. Ch. 259.

85. Dent *v.* Dent, 30 Beav. 363, 8 Jur. N. S. 786, 31 L. J. Ch. 436, 10 Wkly. Rep. 375; Hibbert *v.* Cooke, 1 Sim. & St. 552, 24 Rev. Rep. 225, 1 Eng. Ch. 552. See also Sohier *v.* Eldredge, 103 Mass. 345.

86. Dent *v.* Dent, 30 Beav. 363, 8 Jur. N. S. 786, 31 L. J. Ch. 436, 10 Wkly. Rep. 375.

87. Nineteenth St., etc., Presb. Church *v.* Fithian, 29 S. W. 143, 16 Ky. L. Rep. 581; Johnson *v.* Stewart, 8 Ky. L. Rep. 857. *Compare* Bond *v.* Hill, 37 Tex. 626.

In Arkansas the statute allows a life-tenant to recover for improvements made under the belief that he was the owner in fee. Bloom *v.* Strauss, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563.

Right of grantee of life-tenant to recover for improvements in ejectment see 15 Cyc. 225 note 71, 228 note 94.

10. INSURANCE.[88] In the absence of any agreement or any stipulation in the instrument creating the estate, the life-tenant is not bound to keep the premises insured for the benefit of the remainder-man or reversioner.[89] Either may insure for his own benefit and neither will be benefited by the other's policy.[90] So if the life-tenant insures for his own benefit and the property is destroyed he is entitled to the entire proceeds, which need not be applied to rebuilding,[91] even though the amount received is greatly in excess of the actual value of the life-estate.[92] If a building is already insured prior to the creation of the life-estate and is afterward totally destroyed, the property is in effect converted into personalty and the tenant for life is entitled to the income of the insurance money for his life and the reversioner to the principal after the tenant's death,[93] and neither has a right to require that the money should be applied to rebuilding the house;[94] but where the building is merely damaged either the tenant for life or the reversioner has a right to demand that the insurance money be applied to repairing the injury, and as far as so applied the interest of the parties in the insurance is absorbed and is represented by the repaired building.[95]

11. TAXES AND ASSESSMENTS.[96] A life-tenant must pay all the ordinary taxes on the property during the continuance of his estate,[97] unless there is some agree-

88. Insurance generally see FIRE INSURANCE, and other insurance titles.

89. Harrison *v.* Pepper, 166 Mass. 288, 44 N. E. 222, 55 Am. St. Rep. 404, 33 L. R. A. 239; *Re* Curry, 33 Nova Scotia 392.

Where insurance on the property is made an express charge on the life-estate the life-tenant must, at the risk of committing waste if neglected, insure the property for the benefit of the whole estate. Hopkins *v.* Keazer, 89 Me. 347, 36 Atl. 615.

Where the estate is subject to a mortgage executed by the donor of the life-estate and containing a covenant that the buildings on the estate shall be kept insured, the premiums must be paid by the life-tenant. Stevens *v.* Melcher, 152 N. Y. 551, 46 N. E. 965 [*modifying* 80 Hun (N. Y.) 514, 30 N. Y. Suppl. 625].

90. Spalding *v.* Miller, 103 Ky. 405, 45 S. W. 462, 20 Ky. L. Rep. 131; Harrison *v.* Pepper, 166 Mass. 288, 44 N. E. 222, 55 Am. St. Rep. 404, 33 L. R. A. 239; Kearney *v.* Kearney, 17 N. J. Eq. 59. But see Green *v.* Green, 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846, holding that the life-tenant is trustee for the remainder-man and cannot insure the property for his own benefit, and that if the property is insured by the life-tenant, the proceeds, in case of total loss, must be used in rebuilding or must go to the remainder-man, reserving the interest for life for the life-tenant.

A life-estate is an insurable interest. Louden *v.* Waddle, 98 Pa. St. 242.

An executor who holds the remainder in trust may join with the life-tenant in insuring the buildings on the estate, and the amount paid by him for premiums is a proper charge against the trust estate. Peck *v.* Sherwood, 56 N. Y. 615.

Where a building is insured by the life-tenant in his own name, but for the benefit of both himself and the remainder-man, he is entitled to recover the entire amount of the insurance and to hold the part in excess of his interest as trustee for the remainder-man. Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

Where a testator devises his estate to an executor in trust, giving to his wife the income and benefit of the estate for life, and the executor insures the buildings on the estate, and the widow dies before the expiration of the period for which they are insured, she is chargeable only with the proportionate amount of the premium corresponding to the part of the time elapsed prior to the death. Matter of Wyatt, 9 Misc. (N. Y.) 285, 30 N. Y. Suppl. 275.

91. Spalding *v.* Miller, 103 Ky. 405, 45 S. W. 462, 20 Ky. L. Rep. 131; Harrison *v.* Pepper, 166 Mass. 288, 44 N. E. 222, 55 Am. St. Rep. 404, 33 L. R. A. 239; Sampson *v.* Grogan, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711; *Re* Curry, 33 Nova Scotia 392.

92. Spalding *v.* Miller, 103 Ky. 405, 45 S. W. 462, 20 Ky. L. Rep. 131.

93. Graham *v.* Roberts, 43 N. C. 99; Haxall *v.* Shippen, 10 Leigh (Va.) 536, 34 Am. Dec. 745. See also Brough *v.* Higgins, 2 Gratt. (Va.) 408.

94. Haxall *v.* Shippen, 10 Leigh (Va.) 536, 34 Am. Dec. 745.

95. Brough *v.* Higgins, 2 Gratt. (Va.) 408.

96. Taxation generally see TAXATION.

97. *Alabama.*— Pruitt *v.* Holly, 73 Ala. 369.

District of Columbia.— Stansbury *v.* Inglehart, 20 D. C. 134.

Georgia.— McCook *v.* Harp, 81 Ga. 229, 7 S. E. 174.

Illinois.— Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71; Prettyman *v.* Walston, 34 Ill. 175.

Iowa.— Olleman *v.* Kelgore, 52 Iowa 38, 2 N. W. 612.

Kentucky.— Creutz *v.* Heil, 89 Ky. 429, 12 S. W. 926, 11 Ky. L. Rep. 652; Johnson *v.* Smith, 5 Bush 102; Arnold *v.* Smith, 3 Bush 163.

ment,[98] or some provision in the instrument creating the estate relieving him of this liability;[99] and in the case of his failure to do so a receiver may be appointed

Louisiana.— Mehle *v.* Bensel, 39 La. Ann. 680, 2 So. 201.

Maine.— Stetson *v.* Day, 51 Me. 434; Varney *v.* Stevens, 22 Me. 331.

Massachusetts.— Plympton *v.* Boston Dispensary, 106 Mass. 544.

Michigan.— Jeffers *v.* Sydnam, 129 Mich. 440, 89 N. W. 42; Watkins *v.* Green, 101 Mich. 493, 60 N. W. 44; Jenks *v.* Horton, 96 Mich. 13, 55 N. W. 372; Smith *v.* Blindbury, 66 Mich. 319, 33 N. W. 391.

Minnesota.— St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756; Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

Mississippi.— Cannon *v.* Barry, 59 Miss. 289.

Missouri.— Hall *v.* French, 165 Mo. 430, 65 S. W. 769; Bone *v.* Tyrrell, 113 Mo. 175, 20 S. W. 796; Hildenbrandt *v.* Wolff, 79 Mo. App. 333.

Nebraska.— Johnson County *v.* Tierney, (1898) 76 N. W. 1090; Disher *v.* Disher, 45 Nebr. 100, 63 N. W. 368.

New Hampshire.— Peirce *v.* Burroughs, 58 N. H. 302.

New Jersey.— Brearley *v.* Molten, 62 N. J. Eq. 345, 50 Atl. 317; Murch *v.* J. O. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213; Holcombe *v.* Holcombe, 27 N. J. Eq. 473.

New York.— Sage *v.* Gloversville, 43 N. Y. App. Div. 245, 60 N. Y. Suppl. 791; Carter *v.* Youngs, 42 N. Y. Super. Ct. 418; Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163; Conkie *v.* Grisson, 24 Misc. 115, 52 N. Y. Suppl. 500; Fleet *v.* Dorland, 11 How. Pr. 489; Cairns *v.* Chabert, 3 Edw. 312.

Ohio.— Cook *v.* Prosser, 14 Ohio Cir. Ct. 137.

Oregon.— Abernethy *v.* Orton, 42 Oreg. 437, 71 Pac. 327, 95 Am. St. Rep. 774.

Pennsylvania.— Jewell's Estate, 11 Phila. 73; McDonald *v.* Heylin, 4 Phila. 73.

Tennessee.— Fergeson *v.* Quinn, 97 Tenn. 46, 36 S. W. 576, 33 L. R. A. 688; Stovall *v.* Austin, 16 Lea 700; Anderson *v.* Hensley, 8 Heisk. 834.

Virginia.— Downey *v.* Strouse, 101 Va. 226, 43 S. E. 348.

Wisconsin.— Phelan *v.* Boylan, 25 Wis. 679.

United States.— Pike *v.* Wassell, 94 U. S. 711, 24 L. ed. 307; Newby *v.* Brownlee, 23 Fed. 320; Chaplin *v.* U. S., 29 Ct. Cl. 231; Patrick *v.* Sherwood, 18 Fed. Cas. No. 10,804, 4 Blatchf. 112.

Canada.— Gray *v.* Hatch, 18 Grant Ch. (U. C.) 72; Biscoe *v.* Van Bearle, 6 Grant Ch. (U. C.) 438.

See 33 Cent. Dig. tit. "Life Estates," § 39.

The life-tenant of a fund is subject to the same liability as to taxes, and the trustee of the fund may retain out of the income a sufficient amount for this purpose. Holcombe *v.* Holcombe, 27 N. J. Eq. 473.

Where a part of the estate is bank-stock the ordinary taxes assessed upon the stock during the life-estate are a charge upon the life-estate. Peirce *v.* Burroughs, 58 N. H. 302.

The reservation of rent does not change the nature of the estate or relieve the life-tenant from his liability. Carter *v.* Youngs, 42 N. Y. Super. Ct. 418.

A life-tenant is not entitled to the benefit of the occupying claimant law as to taxes paid by him during the continuance of his estate. Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

A purchaser from a life-tenant, although holding under a deed which purports to convey the fee, must pay the annual taxes, and cannot recover therefor when ejected by the remainder-man. Bone *v.* Tyrrell, 113 Mo. 175, 20 S. W. 796.

If the life-tenant considers the tax illegal he should notify the reversioner of this fact and should be indemnified against loss in case the payment of the tax is to be resisted. Stetson *v.* Day, 51 Me. 434.

Where the tax had been assessed against the testator and become a liability against him prior to the creation of the life-estate, it must be paid by the executors and cannot be charged against the life-tenant. Matter of Babcock, 52 Hun (N. Y.) 142, 4 N. Y. Suppl. 903 [*reversing* 3 N. Y. Suppl. 555]; Trimmier *v.* Darden, 61 S. C. 220, 39 S. E. 373.

Taxes which have become a lien on the land before the life-tenant's death must be paid by him, although they are not payable until after his death. Brodie *v.* Parsons, 64 S. W. 426, 23 Ky. L. Rep. 831.

On the death of the life-tenant taxes for the current year should be apportioned between him and the remainder-man according to the respective periods of their enjoyment (Crump's Estate, 2 Pa. Dist. 478, 13 Pa. Co. Ct. 286. *Contra*, Holmes *v.* Taber, 9 Allen (Mass.) 246); and if paid in advance by the life-tenant his estate may recover the amount due from such apportionment (Fest's Estate, 28 Wkly. Notes Cas. (Pa.) 415).

Taxes which have accumulated against the life-tenant are not chargeable against the remainder-man. Loeb *v.* Struck, 42 S. W. 401, 19 Ky. L. Rep. 935.

Forfeiture of estate for non-payment of taxes under the Ohio statute see *infra*, IV, J, 5, c.

98. Abernethy *v.* Orton, 42 Oreg. 437, 71 Pac. 327, 95 Am. St. Rep. 774, holding also that the burden of proving any agreement which would relieve the life-tenant from his liability for taxes is upon the life-tenant.

99. Griffin *v.* Fleming, 72 Ga. 697, holding that where the devise of a life-estate contains a provision that it shall be occupied "free of rent or other charges" the life-tenant is not liable for the payment of taxes.

Where a will shows an intention that the entire income of a trust fund should be paid to the tenant for life, the trustee should pay

to collect the rents and income and apply them to this purpose,[1] or the remainder-man may pay the taxes and recover the amount from the life-tenant.[2] The liability as a rule is limited to the income or rental value of the property,[3] but all of the rents and profits accruing during the continuance of the life-estate are applicable to the discharge of the liability.[4] To allow the estate to be sold for taxes is waste,[5] and the life-tenant is liable to the remainder-man for the injury sustained by him,[6] except in cases where the income or rental value of the property was insufficient to pay the taxes.[7] An assessment for a public improvement is not an ordinary tax.[8] If the assessment is for something in the nature of a permanent improvement of the whole estate it may be ratably and equitably divided between the tenant for life and remainder-man,[9] but where the improvement is of a temporary character, calculated to benefit only the life-interest, the assessment must be paid entirely by the life-tenant.[10]

12. DEBTS, CHARGES, AND ENCUMBRANCES. A life-tenant of property subject to

the taxes out of the principal fund. Crater *v.* Ryan, 130 N. C. 618, 41 S. E. 800.

Where the devise of an income from an estate for life provides that if the income in any year shall be less than a stated amount, the deficiency shall be made up out of the principal, this interest cannot be reduced by the payment of taxes below the amount stated. Bruner's Estate, 6 Pa. Co. Ct. 221.

1. Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439; St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756; Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163; Sage *v.* Gloversville, 43 N. Y. App. Div. 245, 60 N. Y. Suppl. 791; Carter *v.* Youngs, 42 N. Y. Super. Ct. 418; Cairns *v.* Chabert, 3 Edw. (N. Y.) 312. See also Pike *v.* Wassell, 94 U. S. 711, 24 L. ed. 307.

In Michigan the appointment of a receiver is not a proper remedy. Jenks *v.* Horton, 96 Mich. 13, 55 N. W. 372.

2. Abernethy *v.* Orton, 42 Oreg. 437, 71 Pac. 327, 95 Am. St. Rep. 774, holding also that equity will declare a lien upon the interest of the life-tenant in favor of the remainder-man for the amount which the latter has had to pay.

3. Clark *v.* Middlesworth, 82 Ind. 240; Murch *v.* J. O. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213. See also Abernethy *v.* Orton, 42 Oreg. 437, 71 Pac. 327, 95 Am. St. Rep. 774; Newby *v.* Brownlee, 23 Fed. 320.

4. Murch *v.* J. O. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213.

5. St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756; Cannon *v.* Barry, 59 Miss. 289; Phelan *v.* Boylan, 25 Wis. 679.

6. Clark *v.* Middlesworth, 82 Ind. 240; Stetson *v.* Day, 51 Me. 434; Wade *v.* Malloy, 16 Hun (N. Y.) 226.

The measure of damages is the loss actually resulting to the remainder-man from the default of the life-tenant. Clark *v.* Middlesworth, 82 Ind. 240.

7. Clark *v.* Middlesworth, 82 Ind. 240, holding further that, in an action by the remainder-man against the life-tenant for failure to pay the taxes, the burden of showing that the income from the property was sufficient for this purpose is upon the remainder-man.

8. Huston *v.* Tribbetts, 171 Ill. 547, 49 N. E. 711, 63 Am. St. Rep. 275 [*affirming* 69 Ill. App. 340]; Plympton *v.* Boston Dispensary, 106 Mass. 544; Peck *v.* Sherwood, 56 N. Y. 615; Chambers *v.* Chambers, 20 R. I. 370, 39 Atl. 243.

9. *Illinois.*— Huston *v.* Tribbetts, 171 Ill. 547, 49 N. E. 711, 63 Am. St. Rep. 275 [*affirming* 69 Ill. App. 340].

Massachusetts.— Plympton *v.* Boston Dispensary, 106 Mass. 544.

Missouri.— Reyburn *v.* Wallace, 93 Mo. 326, 3 S. W. 482; Bobb *v.* Wolff, 54 Mo. App. 515.

New Jersey.— Brearley *v.* Molten, 62 N. J. Eq. 345, 50 Atl. 317.

New York.— Chamberlin *v.* Gleason, 163 N. Y. 214, 57 N. E. 487 [*affirming* 20 N. Y. App. Div. 624, 46 N. Y. Suppl. 1090]; Peck *v.* Sherwood, 56 N. Y. 615; Stilwell *v.* Doughty, 2 Bradf. Surr. 311; Miller's Estate, 1 Tuck. Surr. 346. See also Fleet *v.* Dorland, 11 How. Pr. 489; Cairns *v.* Chabert, 3 Edw. 312.

Ohio.— Crawford *v.* Crawford, 4 Ohio Dec. (Reprint) 138, 1 Clev. L. Rep. 67.

Oregon.— Moore *v.* Simonson, 27 Oreg. 117, 39 Pac. 1105.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Babbitt, 22 R. I. 113, 46 Atl. 403; Chambers *v.* Chambers, 20 R. I. 370, 39 Atl. 243.

See 33 Cent. Dig. tit. "Life Estates," § 39.

The conveyance by a life-tenant of his interest will not relieve him from paying his share of an assessment levied prior to the conveyance. Bobb *v.* Wolff, 54 Mo. App. 515.

The proper rule of apportionment has been held to be that the life-tenant should pay the annual interest on the assessment during the term of his enjoyment, and that the principal should be paid by the remainder-man. Gunning *v.* Carman, 3 Redf. Surr. (N. Y.) 69; Stilwell *v.* Doughty, 2 Bradf. Surr. (N. Y.) 311. But see Miller's Estate, 1 Tuck. Surr. (N. Y.) 346, holding that the amount should be calculated according to the age of the life-tenant by the usual tables.

10. Reyburn *v.* Wallace, 93 Mo. 326, 3 S. W. 482; Hitner *v.* Ege, 23 Pa. St. 305.

encumbrances must keep down the interest accruing on such encumbrances during the continuance of his estate,[11] at least to the extent of the income or rental value of the property.[12] So if the encumbrance is paid off by the remainder-man or reversioner during the continuance of the life-estate, the life-tenant must contribute as his proportionate share the interest on the amount during the continuance of his estate.[13] The remainder-man or reversioner is not obliged to accept this interest in annual instalments, but may require that it be estimated according to the probable duration of the life-estate and paid in a gross sum;[14] but if no apportionment is made until the termination of the life-estate it will be based upon the period of its actual duration.[15] The life-tenant is not obliged to pay off arrears of interest accumulated prior to the beginning of his estate,[16] although such interest will be counted as a part of the principal debt on which the subsequently accruing interest must be kept down.[17] A life-tenant is under no obligation to pay off the principal of an encumbrance,[18] even to prevent a fore-

11. *Kentucky.*— Parrish *v.* Ross, 103 Ky. 33, 44 S. W. 134, 19 Ky. L. Rep. 1676.

Maryland.— Wheeler *v.* Addison, 54 Md. 41; Barnum *v.* Barnum, 42 Md. 251.

Massachusetts.— Plympton *v.* Boston Dispensary, 106 Mass. 544.

Michigan.— Bowen *v.* Brogan, 119 Mich. 218, 77 N. W. 942, 75 Am. St. Rep. 387; Damm *v.* Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601; Welbon *v.* Welbon, 109 Mich. 356, 67 N. W. 338.

New Jersey.— Ivory *v.* Klein, 54 N. J. Eq. 379, 35 Atl. 346; Thomas *v.* Thomas, 17 N. J. Eq. 356.

New York.— Wade *v.* Malloy, 16 Hun 226; Gelston *v.* Shields, 16 Hun 143; Mosely *v.* Marshall, 27 Barb. 42; Carter *v.* Youngs, 42 N. Y. Super. Ct. 418; Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163; Matter of Pfohl, 20 Misc. 627, 46 N. Y. Suppl. 1086; Cogswell *v.* Cogswell, 2 Edw. 231.

North Carolina.— Blount *v.* Hawkins, 57 N. C. 161; Jones *v.* Sherrard, 22 N. C. 179.

Pennsylvania.— Ward's Estate, 3 Pa. Co. Ct. 224; Jewell's Estate, 11 Phila. 73; McDonald *v.* Heylin, 4 Phila. 73; Pennock *v.* Imbrie, 3 Phila. 140.

South Carolina.— Warley *v.* Warley, Bailey Eq. 397.

Tennessee.— Hunt *v.* Watkins, 1 Humphr. 498.

United States.— Bourne *v.* Maybin, 3 Fed. Cas. No. 1,700, 3 Woods 724.

England.— Barnes *v.* Bond, 32 Beav. 653; *In re* Gjers, [1899] 2 Ch. 54, 68 L. J. Ch. 442, 80 L. T. Rep. N. S. 689, 47 Wkly. Rep. 535.

Canada.— Reid *v.* Reid, 29 Grant Ch. (U. C.) 372.

See 33 Cent. Dig. tit. "Life Estates," § 36.

The obligation exists only between the life-tenant and remainder-man and not between the life-tenant and the encumbrancers. *In re* Morley, L. R. 8 Eq. 594.

Where the life-tenant wilfully neglects to pay the interest on an encumbrance so that the property may be sold he is guilty of waste and is liable to the remainder-man for the injury sustained. Wade *v.* Malloy, 16 Hun (N. Y.) 226.

A tenant in dower having a life-interest in only one third of the estate is required to keep down only one third of the interest on an encumbrance. House *v.* House, 10 Paige (N. Y.) 158; Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318.

Where there is a life-estate in expectancy and the encumbrance is not upon the life-estate in possession but upon the estates to follow, the life-tenant in expectancy and the remainder-man must each contribute to the payment of the interest according to the basis of the relative value of their estates. Damm *v.* Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601.

Where the encumbrance is created jointly by the life-tenant and remainder-man, after the creation of the life-estate, the interest must be apportioned between them. Weber *v.* Lauman, 91 Md. 90, 45 Atl. 870; Fosdick *v.* Lyons, 38 N. Y. App. Div. 608, 56 N. Y. Suppl. 942.

12. See Jones *v.* Sherrard, 22 N. C. 179; Tracy *v.* Hereford, 2 Bro. Ch. 128, 29 Eng. Reprint 75; Kensington *v.* Bouverie, 7 De G. M. & G. 134, 56 Eng. Ch. 104.

13. Plympton *v.* Boston Dispensary, 106 Mass. 544; Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Cogswell *v.* Cogswell, 2 Edw. (N. Y.) 231; White *v.* White, 4 Ves. Jr. 24, 4 Rev. Rep. 161, 31 Eng. Reprint 13.

14. Bourne *v.* Maybin, 3 Fed. Cas. No. 1,700, 3 Woods 724. See also Plympton *v.* Boston Dispensary, 106 Mass. 544; Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318.

15. Callicott *v.* Parks, 58 Miss. 528.

16. Jones *v.* Sherrard, 22 N. C. 179; Ward's Estate, 3 Pa. Co. Ct. 224; Sharshaw *v.* Gibbs, 1 Kay 333 [*disapproving* Tracy *v.* Hereford, 2 Bro. Ch. 128, 29 Eng. Reprint 75; Penrhyn *v.* Hughes, 5 Ves. Jr. 99, 31 Eng. Reprint 492].

17. Jones *v.* Sherrard, 22 N. C. 179.

18. *Maryland.*— Barnum *v.* Barnum, 42 Md. 251.

Massachusetts.— Plympton *v.* Boston Dispensary, 106 Mass. 544.

Minnesota.— Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

Mississippi.— Peck *v.* Glass, 6 How. 195.

closure sale;[19] and if he does so he is entitled to call upon the remainder-man or reversioner for contribution,[20] and has a lien on the property for the amount due.[21] The amount for which the remainder-man or reversioner is liable is the amount paid less the amount of the interest which would have been payable by the life-tenant.[22]

13. Expenses, Deterioration, and Losses. The ordinary expense of the care and management of a life-estate must be paid by the life-tenant.[23] A life-tenant is liable for such losses or injuries to the *corpus* of the estate as are the result of his default or neglect,[24] but he is not liable for any loss or deterioration occurring from natural causes or from accident and without any fault on his part.[25]

H. Sales, Mortgages, Leases, and Contracts — 1. Sale[26] or Conveyance[27] — a. By Life-Tenant. A tenant for life of land may alien his life-interest,[28] but

New Jersey.— Thomas *v.* Thomas, 17 N. J. Eq. 356.

New York.— Cogswell *v.* Cogswell, 2 Edw. 231.

United States.— Bourne *v.* Maybin, 3 Fed. Cas. No. 1,700, 3 Woods 724.

England.— Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 227, 30 Eng. Reprint 314.

Canada.— Reid *v.* Reid, 29 Grant Ch. (U. C.) 372.

See 33 Cent. Dig. tit. "Life Estates," § 36.

19. Fidelity Ins., etc., Co. *v.* Dietz, 132 Pa. St. 36, 18 Atl. 1090 [*affirming* 6 Pa. Co. Ct. 241].

20. *Illinois.*— Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566; Boue *v.* Kelsey, 53 Ill. App. 295.

Minnesota.— Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

Mississippi.— Callicott *v.* Parks, 58 Miss. 528; Peck *v.* Glass, 6 How. 195.

Nebraska.— Downing *v.* Hartshorn, (1903) 95 N. W. 801.

New Jersey.— Thomas *v.* Thomas, 17 N. J. Eq. 356.

Tennessee.— Hunt *v.* Watkins, 1 Humphr. 498.

See 33 Cent. Dig. tit. "Life Estates," § 36.

21. Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566; Peck *v.* Glass, 6 How. (Miss.) 195.

A tenant for life who pays off a mortgage on the estate may preserve the lien for reimbursements for the proportion of the amount which should be paid by the remainder-man. Downing *v.* Hartshorn, (Nebr. 1903) 95 N. W. 801.

22. Callicott *v.* Parks, 58 Miss. 528; Thomas *v.* Thomas, 17 N. J. Eq. 356.

23. Peirce *v.* Burroughs, 58 N. H. 302; Perrine *v.* Newell, 62 N. J. Eq. 14, 49 Atl. 724.

Counsel fees incurred in preserving the estate from waste cannot be charged by the life-tenant against the estate in remainder. Post *v.* Cavender, 12 Mo. App. 20.

Commissions for collecting the interest constituting a life-estate in a fund must be paid out of the interest and are not chargeable against the principal. Danly *v.* Cummins, 31 N. J. Eq. 208.

No part of the expenses of administering on the estate of the life-tenant can be deducted from the fund payable to the remainder-man. Reiff's Estate, 124 Pa. St. 145, 16 Atl. 636.

The costs of a life-tenant incurred in litigation over his interest in a trust estate must be paid out of the income and not out of the body of the estate. Bates *v.* Rider, 44 S. W. 666, 19 Ky. L. Rep. 1768.

Where there is a devise for life of an undivided interest in an entire estate consisting of both real and personal property, and it is necessary to keep the estate together for a period of years, the necessary expenses of keeping the property in repair and the expenses of administration during this period are payable out of the income of the estate. Beermann *v.* De Give, 112 Ga. 614, 37 S. E. 883.

24. Mehle *v.* Bensel, 39 La. Ann. 680, 2 So. 201.

The question of deterioration is determined, not by whether each article that went to make up the estate as a whole is in the same condition as to preservation, value, and productiveness as at the death of the testator, but whether the estate as a whole is in such condition. Brooks *v.* Brooks, 12 S. C. 422.

A tenant for life may surrender his life-estate in personal property to the remainder-man and will not thereafter be liable for the safe-keeping of the property. Bowling *v.* Bowling, 6 B. Mon. (Ky.) 31.

25. Lewis *v.* Kemp, 38 N. C. 233; Brooks *v.* Brooks, 12 S. C. 422.

The owner of a life-interest in slaves was not liable in case the slaves died during the continuance of the estate. Lewis *v.* Kemp, 38 N. C. 233; Pettyjohn *v.* Woodroof, 77 Va. 507.

If a flock has perished without any fault on the part of the life-tenant, as by pestilence or unavoidable accident, the life-tenant is not liable. See Calhoun *v.* Furgeson, 3 Rich. Eq. (S. C.) 160.

The burden of proof to show a deterioration of the property improperly permitted by the life-tenant rests upon the remainder-man. Brooks *v.* Brooks, 12 S. C. 422.

26. Sale generally see Sales.

27. Conveyance generally see Deeds.

28. Sylvester *v.* Sylvester, 83 Me. 46, 21 Atl. 783; Ridgely *v.* Cross, 83 Md. 161, 34 Atl. 469; Jackson *v.* Van Hoesen, 4 Cow. (N. Y.) 325.

cannot create any greater estate.[29] He may also dispose of his life-interest in personal property,[30] but not in any manner which will defeat the rights of the remainder-man.[31] An attempted conveyance in fee,[32] or a sale purporting to pass the entire interest in personal property,[33] passes only the life-estate and does not affect the estate in remainder, unless it is made under a power of sale,[34] or conveyance,[35] or the unauthorized act is subsequently ratified or adopted by the

An estate by the curtesy initiate may be sold and conveyed in the same manner that other life-estates are. Jacobs *v.* Rice, 33 Ill. 369.

Where land is devised to a widow for life, subject to a trust that it be devoted to the support of herself and the children of the testator, she cannot dispose of the life-estate for her own benefit. Hunter *v.* Hunter, 58 S. C. 382, 36 S. E. 734, 79 Am. St. Rep. 845.

29. Jackson *v.* Van Hoesen, 4 Cow. (N. Y.) 325.

30. Lewis *v.* Kemp, 38 N. C. 233; King *v.* Sharp, 6 Humphr. (Tenn.) 55.

31. King *v.* Sharp, 6 Humphr. (Tenn.) 55.

Where a life-tenant sells personal property to be taken out of the state, or to one who he knows will remove it from the state, he is liable for the value of the property. Lewis *v.* Kemp, 38 N. C. 233. See also Coffey *v.* Wilkerson, 1 Metc. (Ky.) 101.

The remainder-man may either assert his claim to the property in the hands of the purchaser or hold the life-tenant responsible for its value in case of a wrongful sale purporting to pass the entire interest. Tabb *v.* Cabell, 17 Gratt. (Va.) 160.

Where the purchaser of personal property with notice of the nature of the title removes it from the state and disposes of it, the life-tenant is primarily liable to the remainder-man for the value of the property and the purchaser secondarily. Rippy *v.* Gilmore, 9 Rich. Eq. (S. C.) 365.

Equity will validate a sale of a part of personal property, the use of which is devised to a widow for life, where the sale was necessary for the support of her family. Jones *v.* Jones, 3 N. C. 128.

32. *Alabama.*—Pendley *v.* Madison, 83 Ala. 484, 3 So. 618; Pickett *v.* Doe, 74 Ala. 122; Pope *v.* Pickett, 65 Ala. 487.

Georgia.— Beckham *v.* Maples, 95 Ga. 773, 22 S. E. 894; Fields *v.* Bush, 94 Ga. 664, 21 S. E. 827.

Kentucky.— Hamilton *v.* Hamilton, 29 S. W. 876, 16 Ky. L. Rep. 793; Berry *v.* Hall, 11 S. W. 474, 11 Ky. L. Rep. 30.

Michigan.— Jeffers *v.* Sydnam, 129 Mich. 440, 89 N. W. 42.

South Carolina.— Mims *v.* Hair, 56 S. C. 4, 33 S. E. 729.

Texas.— Caffey *v.* Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65; Morris *v.* Eddins, 18 Tex. Civ. App. 38, 44 S. W. 203.

See 33 Cent. Dig. tit. "Life Estates." § 44.

A grantee in good faith and without notice of any defect in the title takes only the life-estate. Taylor *v.* Kemp, 86 Ga. 181, 12 S. E. 296.

Where the remainder-men are infants and their parents as tenants for life undertake to convey the fee, they will not be bound by the conveyance if it was not ratified by them after becoming of age. Tantum *v.* Coleman, 26 N. J. Eq. 128.

The silence of a remainder-man after learning of a conveyance in trust for creditors by the owner of a preceding life-estate is no estoppel to the assertion of his title. Inge *v.* Murphy, 10 Ala. 885.

Estate not forfeited by alienation in fee see *infra*, IV, J, 5, a.

33. Thrasher *v.* Ingram, 32 Ala. 645; Price *v.* Price, 23 Ala. 609; Lark *v.* Linstead, 2 Md. 420; *Ex p.* Richardson, 66 S. C. 413, 44 S. E. 964.

A bona fide purchaser from the life-tenant takes no greater estate than the life-tenant had. Lyde *v.* Taylor, 17 Ala. 270.

A contingent remainder in personal property is not destroyed by a sale of the property by the life-tenant. Price *v.* Price, 23 Ala. 609.

Where the life-tenant is also executor the sale passes only the life-interest, where it is not shown to have been made in the latter capacity. Lark *v.* Linstead, 2 Md. 420; Hailes *v.* Ingram, 41 N. C. 477.

A decree for the value of personal property which has been sold and removed from the state vests a good title in the purchaser, and no action for the recovery of the specific property can thereafter be maintained. Whitesides *v.* Dorris, 7 Dana (Ky.) 101.

The remainder-man does not waive any right in the property by failing to object to the sale before his right to the possession of the property accrues. Parker *v.* Chambers, 24 Ga. 518.

34. Andrews *v.* Brumfield, 32 Miss. 107.

35. Hardy *v.* Sanborn, 172 Mass. 405, 52 N. E. 517; Baird *v.* Boucher, 60 Miss. 326.

A power to convey upon a contingency or condition cannot be exercised until the contingency arises (Baird *v.* Boucher, 60 Miss. 326), or otherwise than upon the condition named (Naglee *v.* Ingersoll, 7 Pa. St. 185).

If the nature of the conveyance is such that it can only have full effect as an execution of the power, it will be held to have been made under the power, although there is no express reference thereto. Baird *v.* Boucher, 60 Miss. 326. *Compare* Ridgely *v.* Cross, 83 Md. 161, 34 Atl. 469.

Where a life-tenant is also named as executrix of the will with power "to sell and convey any and all of testator's real estate . . . 'using her own discretion,'" this does not have the effect of coupling an absolute power of disposition with the life-estate.

remainder-man.[36] A remainder-man may, however, ratify a wrongful sale of the entire property and recover his proportion of the proceeds.[37]

b. By Order of Court.[38] In some of the states there are statutes allowing the entire interest in land subject to a life-estate to be sold under an order of court for the purpose of reinvestment,[39] or where the estate is subject to contingent remainders or executory limitations,[40] or where lands are limited over to infants or in contingency where a sale would be beneficial,[41] or where it appears that a

Clark *v.* Clark, 172 Ill. 355, 358, 50 N. E. 101.

36. Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13; Isler *v.* Isler, 88 N. C. 576; Russell *v.* State Nat. Bank, 104 Tenn. 614, 58 S. W. 245.

An acceptance of a part of the purchase-money by a remainder-man is a ratification and adoption of an unauthorized alienation in fee by the life-tenant, and equity will compel a conveyance of the remainder to the purchaser or enjoin the remainder-man from asserting any title to the property. Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13.

If the trustee of a life-estate sells the fee and receives the purchase-money for the whole, investing the same in other lands, and the remainder-man, after the death of the life-tenant, appropriates these lands to his own use, with knowledge of all the material facts, this will constitute a ratification of the conveyance and will estop the remainder-man from recovering the remainder interest from the purchaser. Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

To constitute an acquiescence in the sale on the part of the remainder-man the acts relied on must be such as would amount to a fraud upon the purchaser. Parker *v.* Chambers, 24 Ga. 518.

37. Hunter *v.* Yarborough, 92 N. C. 68; Haughton *v.* Benbury, 55 N. C. 337.

Where a life-tenant wrongfully exchanges certain articles of personal property for property of a different kind, the executor may waive the tort and ratify the exchange if he considers it beneficial to the estate. Leonard *v.* Owens, 93 Ga. 678, 20 S. E. 65.

38. Judicial sale generally see JUDICIAL SALES.

39. See statutes of the different states and the following cases:

Kentucky.— Luttrell *v.* Wells, 97 Ky. 84, 30 S. W. 10, 16 Ky. L. Rep. 812; Ullman *v.* Harper, 12 Bush 164; Ewing *v.* Riddle, 8 Bush 568; Terrell *v.* Spence, 5 Bush 637.

Maryland.— Snook *v.* Munday, 90 Md. 701, 45 Atl. 1004; Downes *v.* Long, 79 Md. 382, 29 Atl. 827.

Ohio.— Oyler *v.* Scanlan, 33 Ohio St. 308.

Virginia.— Lantz *v.* Massie, 99 Va. 709, 40 S. E. 50.

West Virginia.— Burlingham *v.* Vandevender, 47 W. Va. 804, 35 S. E. 835.

See 33 Cent. Dig. tit. "Life Estates," §§ 49, 50.

The fact that the testator intended that the life-tenant should hold the property during his life does not deprive the court of the power to decree a sale under the statute. Downes *v.* Long, 79 Md. 382, 29 Atl. 827.

A sale of a part of an estate for the purpose of repairing and improving the residue is not authorized under a statute permitting sales for reinvestment. Falls City Real Estate, etc., Assoc. *v.* Vankirk, 8 Bush (Ky.) 459.

Where a life-tenant is owner in fee of a part of the estate that part cannot be included in an order of court for a sale for reinvestment. Munnell *v.* Orear, 84 Ky. 452, 1 S. W. 725, 8 Ky. L. Rep. 669.

An order of sale based upon an ex parte petition of the life-tenant is unauthorized. Snook *v.* Munday, 90 Md. 701, 45 Atl. 1004.

The sale must be public under the Kentucky statute, and the court has no authority to direct a private sale. Luttrell *v.* Wells, 97 Ky. 84, 30 S. W. 10, 16 Ky. L. Rep. 812.

The life-tenant may be a purchaser of the property at a sale for reinvestment. Blankenbaker *v.* Blankenbaker, 12 S. W. 708, 11 Ky. L. Rep. 545.

Where a sale for reinvestment would be advantageous to all the parties the court may, upon the application of the life-tenant, order the sale of the entire property, including the interest of infant remainder-men. Kuhn *v.* Kuhn, 68 S. W. 16, 24 Ky. L. Rep. 112.

Where a sale by order of court is authorized by the will creating the estate the sale need not be made under and according to the statutory provisions for the sale of estates in remainder. Garr *v.* Elbe, 29 S. W. 317, 16 Ky. L. Rep. 661.

40. Pratt *v.* Bates, 161 Mass. 315, 37 N. E. 439; Symmes *v.* Moulton, 120 Mass. 343; Westhafer *v.* Koons, 144 Pa. St. 26, 22 Atl. 885; Greenawalt's Estate, 5 Pa. Dist. 314; Fox's Estate, 18 Pa. Co. Ct. 114.

A statute authorizing a sale where there is a life-estate and a contingent limitation to such issue of the life-tenant as shall be living at the death of the parent does not authorize a sale where the remainder is contingent upon the marriage of the life-tenant. American Security, etc., Co. *v.* Muse, 4 App. Cas. (D. C.) 12.

A guardian ad litem must be appointed to act as the next friend of all minors, persons not ascertained, and persons not in being who are or may become interested in the estate. Pratt *v.* Bates, 161 Mass. 315, 37 N. E. 439.

41. Angar *v.* Angar, 38 N. J. Eq. 549 [*reversing* 37 N. J. Eq. 501].

sale is necessary to protect the rights of the parties in interest.[42] It is also within the general powers of a court of equity to order a sale for reinvestment where all the parties interested are properly represented.[43] In the absence of statute a court of equity has no jurisdiction to decree a sale of the fee simple title in order to pay taxes or assessments.[44] Where property subject to a life-estate is sold under a decree of court that portion of the proceeds representing the relative value of the life-estate vests absolutely in the life-tenant and passes to his assignee or personal representative.[45]

e. Under Execution. A life-estate may be sold under execution for the debts of the life-tenant.[46] The purchaser at an execution sale against a life-tenant acquires the same estate that the judgment debtor had with all its incidents and liabilities.[47]

d. Division and Disposition of Proceeds. Where the life-estate alone is sold the proceeds belong absolutely to the life-tenant;[48] but where the life-tenant and remainder-man join in a conveyance of the entire estate there must be an apportionment of the proceeds,[49] which must be based upon the value of their respective interests at the time of the sale.[50] The usual mode of disposing of the proceeds of a sale is to award the life-tenant the interest on the fund for his life, and the principal after his death to the remainder-man;[51] but the court may in its discretion divide the proceeds between the parties according to the value of their respective interests and award to each absolutely his proportionate share,[52] except

42. Garrison *v.* Hecker, 128 Mich. 539, 87 N. W. 642.

43. Marsh *v.* Dellinger, 127 N. C. 360, 37 S. E. 494; Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477. See, generally, *infra*, V, F, 2.

When necessary to provide support for infant remainder-men a court of equity may order a sale of the land and an investment of the proceeds (Bofil *v.* Fisher, 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627), or may order a sale of a portion of the property to raise a fund to be applied directly to this purpose if the life-tenant will waive his interest therein (Rakestraw *v.* Rakestraw, 70 Ga. 806).

All parties in interest who are in being and within the jurisdiction of the court must be made parties to the proceeding. Williams *v.* Holmes, 4 Rich. Eq. (S. C.) 475.

44. Stansbury *v.* Inglehart, 20 D. C. 134; Van Dusen's Estate, 11 Pa. Co. Ct. 201.

In New York the property may be sold under an order of court where a part of it has been sold or is liable to be sold to satisfy a tax or assessment, but the statute does not authorize a sale to reimburse a life-tenant for taxes or assessments already paid by him. Norsworthy *v.* Bergh, 16 How. Pr. 315.

45. Williams' Case, 3 Bland (Md.) 186.

46. See *supra*, IV, D, 2; and, generally, EXECUTIONS.

But in Pennsylvania the sale can be made only by direction of the court and after at least ten days' notice to the life-tenant of the application of the writ. Workingmen's Protection, etc., Assoc. *v.* Hausman, 8 Wkly. Notes Cas. 517. Notice served on the attorney of record of the life-tenant is sufficient. Goodell *v.* Ehresman, 11 Pa. Co. Ct. 400.

47. Murch *v.* J. O. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213; Burhans *v.* Van Zandt, 7 N. Y. 523.

An execution purchaser of a life-estate in personal property must account to the remainder-man for the use of such property from the death of the life-tenant until the property is delivered to the remainder-man. Clifford *v.* Read, 3 Rich. Eq. (S. C.) 218.

48. State *v.* Culbertson, 50 Mo. 341.

49. Henderson *v.* Henderson, 4 Pa. Dist. 688; Foster *v.* Hilliard, 9 Fed. Cas. No. 4,972, 1 Story 77. See also Callicott *v.* Parks, 58 Miss. 528.

Where the life-tenant and remainder-man join in executing an oil lease, giving the lessee the right to remove all the oil in the place, it is in effect a sale of a portion of the land, and the proceeds must be apportioned. Blakley *v.* Marshall, 174 Pa. St. 425, 34 Atl. 564. See also Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292.

Equity has jurisdiction to apportion the proceeds, where the tenant for life and the remainder-man or reversioner unite in a sale or conveyance of the estate, without any agreement as to the apportionment of the proceeds. Thompson *v.* Thompson, 107 Ala. 163, 18 So. 247.

50. Foster *v.* Hilliard, 9 Fed. Cas. No. 4,972, 1 Story 77, holding that where the life-tenant dies before the proceeds of the sale are collected his interest must be determined according to the probable duration of his life at the time of the sale, as shown by the common tables, and not according to the actual duration of his estate. But see Wilkinson *v.* Duncan, 23 Beav. 469, 3 Jur. N. S. 530, 26 L. J. Ch. 495, 5 Wkly. Rep. 398.

51. Blakley *v.* Marshall, 174 Pa. St. 425, 34 Atl. 564.

52. Datesman's Appeal, 127 Pa. St. 348, 17 Atl. 1086, 1100; Henderson *v.* Henderson, 4 Pa. Dist. 688.

The English rule of apportionment is to give the tenant for life one third and the

in cases where it is expressly required by statute that the proceeds of the sale shall be invested.[53]

2. LEASE.[54] A tenant for life may lease the premises for any term less than his own,[55] but cannot create any term which will outlast his own estate.[56] The lessee, during the continuance of the lease, is entitled to the same rights and privileges as the original tenant for life;[57] but on the death of the life-tenant the lease terminates, although the term of years has not expired,[58] unless made under a power;[59] and the lessee becomes thereafter a tenant by sufferance,[60] whose

remainder-man two thirds of the surplus. Brent *v.* Best, 1 Vern. Ch. 69, 23 Eng. Reprint 317. See also Datesman's Appeal, 127 Pa. St. 348, 17 Atl. 1086, 1100, where the same rule of apportionment was followed.

53. Zahrt's Estate, 2 N. Y. Civ. Proc. 272, 11 Abb. N. Cas. (N. Y.) 225, 1 Dem. Surr. (N. Y.) 444.

54. Lease generally see LANDLORD AND TENANT.

55. Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Van Deusen *v.* Young, 29 N. Y. 9; McIntyre *v.* Clark, 6 Misc. (N. Y.) 377, 26 N. Y. Suppl. 744; 4 Kent Comm. 73.

A rental contract to continue in force during his life does not pass the entire estate of the life-tenant where the agreement shows a contrary intention; and the tenant may be removed upon failing to pay one of the annual instalments. Sykes *v.* Benton, 90 Ga. 402, 17 S. E. 1002.

Apportionment of rents when the life-tenant leases and dies during the term see *supra*, IV, G, 5, d.

56. Wright *v.* Graves, 80 Ala. 416; Johnson *v.* Grantham, 104 Ga. 558, 30 S. E. 781; McIntyre *v.* Clark, 6 Misc. (N. Y.) 377, 26 N. Y. Suppl. 744; King *v.* Foscue, 91 N. C. 116.

Equity will not enjoin a life-tenant from making a lease for any number of years, as the lease is legally incapable of extending beyond the lessor's life so as to affect the estate in remainder. Preston *v.* Smith, 26 Fed. 884 [*affirming* 23 Fed. 737].

A covenant for quiet enjoyment in a lease for years executed by a life-tenant does not bind the remainder-man after the life-tenant's death. Coakley *v.* Chamberlain, 8 Abb. Pr. N. S. (N. Y.) 37, 38 How. Pr. (N. Y.) 483.

A covenant for renewal in a lease executed by the trustee of a life-estate is not binding upon the remainder-man after the death of the life-tenant. Bergengren *v.* Aldrich, 139 Mass. 259, 29 N. E. 667.

57. Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; 4 Kent Comm. 73.

Rights and privileges included in the grant of the life-estate which were intended as being personal to the life-tenant do not pass to his lessee. Gronendyke *v.* Cramer, 2 Ind. 382.

58. *Illinois.*— Hoagland *v.* Crum, 113 Ill. 365, 55 Am. Rep. 424.

Indiana.— Lowrey *v.* Reef, 1 Ind. App. 244, 27 N. E. 626.

Iowa.— Carman *v.* Mosier, 105 Iowa 367, 75 N. W. 323.

Massachusetts.— Page *v.* Wight, 14 Allen 182.

Nebraska.— Guthmann *v.* Vallery, 51 Nebr. 824, 71 N. W. 734, 66 Am. St. Rep. 475.

New York.— McIntyre *v.* Clark, 6 Misc. 377, 26 N. Y. Suppl. 744; Coakley *v.* Chamberlain, 8 Abb. Pr. N. S. 37, 38 How. Pr. 483.

North Carolina.— King *v.* Foscue, 91 N. C. 116.

Tennessee.— Collins *v.* Crownover, (Ch. App. 1900) 57 S. W. 357.

See 33 Cent. Dig. tit. "Life Estates," § 47.

Where the lease contains words creating an implied covenant for quiet enjoyment the covenant is limited to the continuance of the life-estate, and no action can be maintained against the administrator or executor for a breach caused by the death of the life-tenant (Adams *v.* Gibney, 6 Bing. 656, 8 L. J. C. P. O. S. 242, 4 M. & P. 491, 31 Rev. Rep. 514, 19 E. C. L. 296; Swan *v.* Stransham, Dyer 257*a*. See also Coakley *v.* Chamberlain, 8 Abb. Pr. N. S. (N. Y.) 37, 38 How. Pr. (N. Y.) 483), unless the life-tenant had a power of appointment by which he might have protected the lessee for the full period of the lease (Hamilton *v.* Wright, 28 Mo. 199).

The acceptance of rent by the remainder-man after the termination of a lease by the death of the life-tenant creates a new tenancy and entitles the lessee to retain possession. Lowrey *v.* Reef, 1 Ind. App. 244, 27 N. E. 626; Holden *v.* Boring, 52 W. Va. 37, 43 S. E. 86.

The lessee may hold over to the end of the current year under the statutes of some of the states. See King *v.* Foscue, 91 N. C. 116; Holden *v.* Boring, 52 W. Va. 37, 43 S. E. 86. See, generally, LANDLORD AND TENANT.

A statute allowing the lessee to hold over to the end of the current year applies only to agricultural or farming land. Shufflin *v.* House, 45 W. Va. 731, 31 S. E. 974, 72 Am. St. Rep. 851.

59. 4 Kent Comm. 106.

60. Wright *v.* Graves, 80 Ala. 416; Page *v.* Wight, 14 Allen (Mass.) 182; Guthmann *v.* Vallery, 51 Nebr. 824, 71 N. W. 734, 66 Am. St. Rep. 475.

An occupant under a mere license from a life-tenant is with respect to the remainder-man a trespasser after the determination of the life-estate. Williams *v.* Caston, 1 Strobh. (S. C.) 130.

If the lessee is not in possession or does not hold over, the mere recognition by the remainder-man of the validity of the lease pre-

interest in the premises is limited to the crops growing thereon at the time of the life-tenant's death.[61]

3. Mortgage.[62] A tenant for life may mortgage his own interest,[63] but not the entire estate so as to bind the interest in remainder.[64] He may, however, mortgage the entire estate, if the life-estate is coupled with a power of conveyance,[65] or a power to use the estate for his own benefit with a remainder over of only whatever may remain,[66] or where the mortgage is authorized by an order of court.[67]

4. Contracts and Agreements.[68] A tenant for life cannot make any contract or agreement which will bind the remainder-man or his estate;[69] and conversely a remainder-man cannot sue on a contract made by a life-tenant to which he was not a party.[70]

I. Remedies For Protection of Remainder or Reversion — 1. Requirement of Inventory. Where a life-estate is given in personal property the tenant on taking possession may be required to file an inventory thereof,[71] but in the absence of proof of actual danger this is the only protection to which the remainder-man is entitled.[72]

2. Requirement of Security. A tenant for life of personal property is usually entitled to its possession without giving security for the forthcoming of the prop-

viously made does not constitute a tenancy by sufferance or other tenancy. Wright *v.* Graves, 80 Ala. 416.

61. Lowrey *v.* Reef, 1 Ind. App. 244, 27 N. E. 626; King *v.* Foscue, 91 N. C. 116; Collins *v.* Crownover, (Tenn. Ch. App. 1900) 57 S. W. 357.

Right of lessee to emblements see *supra*, IV, G, 4.

If no crops have been sown by the lessee he is liable to the remainder-man for any use or occupation of the premises after the death of the life-tenant. Carman *v.* Mosier, 105 Iowa 367, 75 N. W. 323.

62. Mortgage generally see Mortgages.

63. Jermain *v.* Sharpe, 29 Misc. (N. Y.) 258, 61 N. Y. Suppl. 700.

64. Lehndorf *v.* Cope, 122 Ill. 317, 13 N. E. 505; McDonald *v.* Woodward, 58 S. C. 554, 36 S. E. 918.

A deed of trust executed by a life-tenant to secure a loan, although purporting to pass the fee, attaches only to the life-estate, and does not affect the estate in remainder. New South Bldg., etc., Assoc. *v.* Gann, 101 Ga. 678, 29 S. E. 15.

65. Jackson *v.* Everett, (Tenn. Sup. 1894) 58 S. W. 340. *Compare* Rhode Island Hospital Trust Co. *v.* Commercial Nat. Bank, 14 R. I. 625, holding that a power of sale does not authorize a mortgage of the entire interest in personal property.

66. Swarthout *v.* Ranier, 143 N. Y. 499, 38 N. E. 726; Jenks' Petition, 21 R. I. 390, 43 Atl. 871.

67. The court may authorize a life-tenant to mortgage the estate to raise funds for making improvements which will be of permanent value to the estate. Stevenson's Estate, 5 Pa. Dist. 5, 17 Pa. Co. Ct. 312; Dorrance's Estate, 8 Kulp (Pa.) 16.

68. Contract generally see Contracts.

69. Chilvers *v.* Race, 196 Ill. 71, 63 N. E. 701; Bogle *v.* North Carolina R. Co., 51 N. C. 419; Hill *v.* Roderick, 4 Watts & S. (Pa.) 221.

A mechanic's lien for labor and materials furnished under a contract with the tenant for life does not attach to the estate in remainder. Osgood *v.* Pacey, 23 Ill. App. 116.

A contract for a right of way made by a life-tenant does not bind the interest of the remainder-man. Bentonville R. Co. *v.* Baker, 45 Ark. 252.

The assent of a life-tenant to an improper investment by the executor of personal property in which he has a life-interest is not binding upon the remainder-man. *In re* Talmage, 32 N. Y. App. Div. 10, 52 N. Y. Suppl. 710.

If the remainder-man receives the consideration for a contract made by the life-tenant he will be deemed to have ratified the contract and will be bound thereby. Townes *v.* Augusta, 46 S. C. 15, 23 S. E. 984.

70. Bogle *v.* North Carolina R. Co., 51 N. C. 419.

71. Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Howell *v.* Howell, 38 N. C. 522; McLemore *v.* Blocker, 1 Harp. Eq. (S. C.) 272; Leeke *v.* Bennett, 1 Atk. 470, 26 Eng. Reprint 300; Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089.

One having only a contingent future interest in the property cannot require the filing of an inventory. Emmons *v.* Cairns, 3 Barb. (N. Y.) 243 [*reversing* 2 Sandf. Ch. 369].

72. *California.*— Garrity's Estate, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

Maine.— Sampson *v.* Randall, 72 Me. 109.

Maryland.— Stevens *v.* Gordy, 9 Gill 405.

Minnesota.— *In re* Oertle, 34 Minn. 173, 24 N. W. 924, 57 Am. St. Rep. 48.

New York.— Covenhoven *v.* Shuler, 2 Paige 122, 21 Am. Dec. 73.

South Carolina.— Joyce *v.* Gunnels, 2 Rich. Eq. 259; Gardner *v.* Harden, 2 McCord Eq. 32.

Tennessee.— McCutchin *v.* Price, 3 Hayw. 211.

England.— Foley *v.* Burnell, 1 Bro. Ch.

erty at the termination of the life-estate.[73] If, however, the property is such as should be sold and the proceeds invested,[74] security should be required if instead of such sale it is delivered to the life-tenant.[75] The old practice of requiring security in all cases has been overruled, and it is now required only in cases of actual danger,[76] so that it cannot be demanded by the remainder-man as a matter of absolute right,[77] unless it is so provided by statute.[78] It is, however, within the discretion of the court to require security,[79] unless the instrument creating the estate provides otherwise.[80] Security should be required whenever the property is in actual danger of loss or injury,[81] or where it has been removed from the state,[82] or there is actual danger of it being removed;[83] and should be refused in

274, 28 Eng. Reprint 1125; Temple *v.* Thring, 56 L. T. Rep. N. S. 283.

See 33 Cent. Dig. tit. "Life Estates," §§ 17, 18.

73. *California.*— Garrity's Estate, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

Maine.— Pierce *v.* Stidworthy, 79 Me. 234, 9 Atl. 617, 81 Me. 50, 16 Atl. 333.

Minnesota.— *In re* Oertle, 34 Minn. 173, 24 N. W. 924, 57 Am. St. Rep. 48.

North Carolina.— Howell *v.* Howell, 38 N. C. 522; Sutton *v.* Craddock, 36 N. C. 134.

West Virginia.— Houser *v.* Ruffner, 18 W. Va. 244.

England.— Leeke *v.* Bennett, 1 Atk. 470, 26 Eng. Reprint 300.

See 33 Cent. Dig. tit. "Life Estates," § 18.

A usufructuary in Louisiana must give bond unless it is dispensed with by the instrument creating the usufruct or the requirement is waived by the owner of the property. Maguire *v.* Maguire, 110 La. 279, 34 So. 443.

74. See *supra*, IV, G, 1, b.

75. *In re* McDougall, 141 N. Y. 21, 35 N. E. 961.

76. Covenhoven *v.* Shuler, 2 Paige (N. Y.) 122, 21 Am. Dec. 73; Howell *v.* Howell, 38 N. C. 522; Sutton *v.* Craddock, 36 N. C. 134; Henderson *v.* Vaulx, 10 Yerg. (Tenn.) 30; Foley *v.* Burnell, 1 Bro. Ch. 274, 28 Eng. Reprint 1125; Temple *v.* Thring, 56 L. T. Rep. N. S. 283.

77. Roberts *v.* Stoner, 18 Mo. 481; Howell *v.* Howell, 38 N. C. 522; Holliday *v.* Coleman, 2 Munf. (Va.) 162; Houser *v.* Ruffner, 18 W. Va. 244.

Where the life-tenant is a non-resident or insolvent the remainder-man has a right to demand that he shall give security before the property is delivered to him. *In re* McDougall, 141 N. Y. 21, 35 N. E. 961. See also Montfort *v.* Montfort, 24 Hun (N. Y.) 120.

78. *In re* Feiser, 1 Walk. (Pa.) 256. See also Van Duzen's Appeal, 102 Pa. St. 224; *In re* Runner, 3 Del. Co. (Pa.) 395.

79. Worthington *v.* Crabtree, 1 Metc. (Ky.) 478; Sampson *v.* Randall, 72 Me. 109; Roberts *v.* Stoner, 18 Mo. 481; Smith *v.* Daniel, 2 McCord Eq. (S. C.) 143, 16 Am. Dec. 641; Gardner *v.* Harden, 2 McCord Eq. (S. C.) 32.

Even where the will shows an intention that the possession of the property should be intrusted to the life-tenant the court may require security if it appears necessary for the protection of the rights of the remainder-man. Matter of Lowery, 19 Misc. (N. Y.) 83, 44 N. Y. Suppl. 972.

Where there is a specific bequest of personal property consumable in the use, and the will shows an intention that it should not be consumed but go to the party in remainder, equity will in cases of danger require the life-tenant to give security. Miller *v.* Williamson, 5 Md. 219.

A statute authorizing the probate court to order an executor to deliver the property to the life-tenant upon giving bond does not affect the general power of a court of chancery to require a bond where the rights of the remainder-man are in danger. Security Co. *v.* Hardenburgh, 53 Conn. 169, 2 Atl. 391.

The rights of the life-tenant are not enlarged in regard to the use and management of the estate by the fact that no bond is required. Cook *v.* Collier, (Tenn. Ch. App. 1901) 62 S. W. 658.

80. Garrity's Estate, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

81. *Alabama.*— Bethea *v.* Bethea, 116 Ala. 265, 22 So. 561.

Georgia.— Collins *v.* Barksdale, 23 Ga. 602.

Kentucky.— Worthington *v.* Crabtree, 1 Metc. 478.

Maryland.— Miller *v.* Williamson, 5 Md. 219.

Missouri.— Roberts *v.* Stoner, 18 Mo. 481.

North Carolina.— Hales *v.* Griffin, 22 N. C. 425.

South Carolina.—Bentley *v.* Long, 1 Strobh. Eq. 43, 47 Am. Dec. 523; Cordes *v.* Ardrian, 1 Hill Eq. 154.

Tennessee.— McCutchin *v.* Price, 3 Hayw. 211.

See 33 Cent. Dig. tit. "Life Estates," § 18.

The possession of the property by a wrongdoer who claims the entire title as his own is sufficient ground for requiring security. Ramey *v.* Green, 18 Ala. 771.

The fact that the remainder-man is indebted to the life-tenant will not affect the right to demand security but may be considered by the court in determining the amount. Bethea *v.* Bethea, 116 Ala. 265, 22 So. 561.

The amount of the bond may be increased on application, where it is shown that the interest of the remainder-man has increased in value. McCutchin *v.* Price, 3 Hayw. (Tenn.) 211.

82. Riddle *v.* Kellum, 8 Ga. 374; Moon *v.* Moon, 2 Strobh. Eq. (S. C.) 327.

83. Langworthy *v.* Chadwick, 13 Conn. 42; Cross *v.* Camp, 42 N. C. 193; Bellamy *v.* Ballard, 3 N. C. 361; Clarke *v.* Saxon, 1 Hill Eq.

all cases where no actual danger to the rights of the remainder-man is shown.[84] Security may also be required from one who purchases the life-estate from the life-tenant,[85] or at a sale under execution.[86]

3. Right to Equitable Relief in General.[87] In all cases where property in the hands of a life-tenant is in danger of loss, deterioration, or injury, the remainder-man or reversioner is entitled to come into equity by a bill *quia timet* for the protection of his interest in the property.[88] Either a vested or a contingent remainder-man is entitled to equitable relief for the protection of his interest,[89] but in the case of a contingent remainder-man the allowance of such relief will be governed by the circumstances of the particular case, and the degree of probability as to the contingent interest ever becoming vested.[90]

4. Injunction[91]**— a. To Restrain Removal of Personal Property.** Equity will enjoin a life-tenant of personal property from removing it out of the state,[92] but not unless good grounds are shown for believing that it is his intention to do so;[93] and, if the property has already been removed, equity will not usually interfere to redress the wrong until the remainder-man's right to possession has accrued.[94]

b. To Prevent Waste.[95] A life-tenant of land will be enjoined from committing waste on the estate.[96]

(S. C.) 69; Gardner *v.* Harden, 2 McCord Eq. (S. C.) 32.

84. *Alabama.*— Nance *v.* Coxe, 16 Ala. 125.

California.— Garrity's Estate, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

North Carolina.— Clagon *v.* Veasey, 42 N. C. 173; Sutton *v.* Craddock, 36 N. C. 134.

South Carolina.— Smith *v.* Daniel, 2 McCord Eq. 143, 16 Am. Dec. 641.

Virginia.— Holliday *v.* Coleman, 2 Munf. 162; Mortimer *v.* Moffatt, 4 Hen. & M. 503.

See 33 Cent. Dig. tit. "Life Estates," § 18.

85. Lyde *v.* Taylor, 17 Ala. 270; Gill *v.* Tittle, 14 Ala. 528; Riddle *v.* Kellum, 8 Ga. 374; Swan *v.* Ligan, 1 McCord Eq. (S. C.) 227.

A purchaser in good faith from a life-tenant, without notice of the interest in remainder, who sells the property before suit brought or any notice of such interest, cannot be required to give security. Chisholm *v.* Starke, 3 Call (Va.) 25.

86. Cordes *v.* Ardrian, 1 Hill Eq. (S. C.) 154; Pringle *v.* Allen, 1 Hill Eq. (S. C.) 135; Frazer *v.* Bevill, 11 Gratt. (Va.) 9.

Where the execution purchaser claims the entire interest under a sale where the life-estate only was liable he will be required to give security. McDougal *v.* Armstrong, 6 Humphr. (Tenn.) 428.

87. Equitable relief generally see Equity.

88. *Alabama.*— Bethea *v.* Bethea, 116 Ala. 265, 22 So. 561; Lewis *v.* Hudson, 6 Ala. 463.

Georgia.— Collins *v.* Barksdale, 23 Ga. 602; Riddle *v.* Kellum, 8 Ga. 374.

Indiana.— Goudie *v.* Johnston, 109 Ind. 427, 10 N. E. 296.

Kentucky.— Yancy *v.* Holladay, 7 Dana 230.

Mississippi.— Gibson *v.* Jayne, 37 Miss. 164.

North Carolina.— Brown *v.* Wilson, 41 N. C. 558.

Where the life-tenant is claiming a right to the property adverse to that of the remainder-man the latter may maintain a bill *quia timet* to assert and establish his right. Yancy *v.* Holladay, 7 Dana (Ky.) 230; Clark *v.* Cattron, 23 Tex. Civ. App. 51, 56 S. W. 99.

The sale of personal property by a life-tenant to a person outside of the state is not ground for equitable relief where it is not shown that the sale was of more than the life-interest, or was fraudulently made, or that any injury to the remainder-man has resulted therefrom. Lee *v.* McBride, 41 N. C. 533.

A threat of making a lease, which might extend beyond the tenant's life, which would be a legal impossibility, is no ground for equitable interference. Preston *v.* Smith, 23 Fed. 737.

89. Kollock *v.* Webb, 113 Ga. 762, 39 S. E. 339.

90. Carson *v.* Kennerly, 8 Rich. Eq. (S. C.) 259.

91. Injunction generally see Injunctions.

92. Cross *v.* Camp, 42 N. C. 193; Brown *v.* Wilson, 41 N. C. 558; Henderson *v.* Vaulx, 10 Yerg. (Tenn.) 30. See also Bowling *v.* Bowling, 6 B. Mon. (Ky.) 31.

Where the specific property bequeathed has been disposed of by the life-tenant in exchange for other property, equity will not enjoin the removal of the property taken in exchange or require security for the delivery of this property to the remainder-man at the expiration of the life-estate. Bonner *v.* Bonner, 7 Humphr. (Tenn.) 436.

93. Mercer *v.* Byrd, 57 N. C. 358; Clagon *v.* Veasey, 42 N. C. 173; Joyce *v.* Gunnels, 2 Rich. Eq. (S. C.) 259.

94. Bowling *v.* Bowling, 6 B. Mon. (Ky.) 31.

95. Actions for waste see, generally, Waste.

96. Porch *v.* Fries, 18 N. J. Eq. 204; Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

An injunction to stay waste will be denied wherever the injury complained of is not irreparable and an action for damages would

5. Accounting.[97] Equity will require an accounting where the life-tenant has committed waste on the estate,[98] or has wrongfully disposed of personal property of which he has the custody,[99] or where he has mingled it with his own property so that its identity is lost.[1]

6. Sequestration[2] and Ne Exeat.[3] A writ of sequestration may be issued at the instance of a remainder-man or reversioner to prevent a life-tenant of personal property from removing it from the state,[4] but the writ will not be granted where there are not sufficient facts set forth to enable the court to see that the fear of such removal is well founded.[5] If the property subject to a life-estate has already been removed the court cannot order the sequestration of other property of the life-tenant,[6] but the tenant himself may be arrested under a writ of ne exeat and required to give bond not to leave the state and to abide the judgment of the court.[7]

7. Receiver.[8] A receiver may be appointed for the custody of property subject to a life-estate whenever necessary to protect the rights of the remainder-man or reversioner.[9]

J. Termination of Estate — 1. By Death of Life-Tenant or Cestui Que Vie. A life-estate is terminated immediately on the death of the tenant, if the estate is for his own life,[10] or on the death of the *cestui que vie*, if it is an estate *pur*

afford adequate relief. Greathouse *v.* Greathouse, 46 W. Va. 21, 32 S. E. 994.

97. Accounting generally see Accounts and Accounting.

98. Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601.

Where timber has been wrongfully cut by the life-tenant he is liable to account for its value. Phillips *v.* Allen, 7 Allen (Mass.) 115; Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

The statute of limitations has no application in an action by a remainder-man to compel a life-tenant to render a general accounting. Young *v.* Young, 2 Misc. (N. Y.) 381, 24 N. Y. Suppl. 1008.

99. Kollock *v.* Webb, 113 Ga. 762, 39 S. E. 339; Collins *v.* Collins, 32 Hun (N. Y.) 156.

1. Mann *v.* Martin, 69 Ill. App. 501.

2. Sequestration generally see Sequestration.

3. Ne exeat generally see Ne Exeat.

4. McNeill *v.* Bradley, 59 N. C. 41; Brantley *v.* Kee, 58 N. C. 332. *Compare* Crewes *v.* Davie, 1 Ga. Dec. 66, holding that in the absence of statute the issuing of a writ of ne exeat for the arrest of property upon a threat of its removal from the state is unauthorized.

5. Mercer *v.* Byrd, 57 N. C. 358; Lehman *v.* Logan, 42 N. C. 296.

6. Williams *v.* Smith, 57 N. C. 254.

7. Wade *v.* Parks, 10 N. C. 202; Coleman *v.* Coleman, 10 N. C. 200; Moon *v.* Moon, 2 Strohh. Eq. (S. C.) 327. See also Riddle *v.* Kellum, 8 Ga. 374.

8. Receiver generally see Receivers.

9. Webb *v.* Lexington First Colored Baptist Church, 90 Ky. 117, 13 S. W. 362, 11 Ky. L. Rep. 926; St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756; Lewey *v.* Lewey, 34 Mo. 367; Washbon *v.* Cope, 67 Hun (N. Y.) 272, 22 N. Y. Suppl. 241; Cairns *v.* Chabert, 3 Edw. (N. Y.) 312.

Appointment of receiver: On failure of tenant to make necessary repairs see *supra*, IV, G, 8. On failure of tenant to pay taxes see *supra*, IV, G, 11.

Where personal property has been converted into money by the life-tenant and the fund is in danger of being lost, it may be placed in the hands of a receiver. Lewey *v.* Lewey, 34 Mo. 367.

Where a life-tenant threatens to remove personal property from the state or to sell it to another with a view to its removal, the remainder-man is entitled to have a receiver appointed to take the property into custody unless a bond is given for its forthcoming. See Cross *v.* Camp, 42 N. C. 193.

10. Ratcliff *v.* Ratcliff, 12 Sm. & M. (Miss.) 134; Henderson *v.* Henderson, 4 Pa. Dist. 688.

A lease "for twenty years or during the natural life" of the lessee expires on the death of the lessee during the twenty years. Sutton *v.* Hiram Lodge, 83 Ga. 770, 10 S. E. 585, 6 L. R. A. 703.

A lease for the tenant's own life and for the life of another person does not terminate on the death of the tenant during the life of the other *cestui que vie*. Flagg *v.* Badger, 58 Me. 258.

A lease to two persons "for and during their natural life" continues during the life of each. Kenney *v.* Wentworth, 77 Me. 203.

A usufruct is terminated by the death of the usufructuary (Declouet *v.* Borel, 15 La. Ann. 606), but if given to two persons "during their lives" no part of the usufruct ceases until the death of both usufructuaries (Arceneaux *v.* Bernard, 10 La. 246).

In California it is provided by statute that on the death of a life-tenant the superior court may make a decree declaring the estate terminated, but the court is not authorized to declare in whom the title is vested. *In re* Tracey, 136 Cal. 385, 69 Pac. 20.

A person "civilly dead" because sentenced to imprisonment is not dead in the sense of

autre vie.[11] that is, limited upon the life of some person other than the tenant to whom it is granted or devised.

2. By Limitation in Deed, Breach of Covenant, or Condition. A life-estate is terminated by the event of any contingency named in the instrument creating the estate as a limitation for its continuance,[12] or by the breach of any covenant or condition which that instrument provides shall terminate the estate;[13] but the breach of a covenant in the conveyance will not work a forfeiture of the estate unless it is expressly so provided.[14]

3. By Surrender. A life-estate may be terminated by a surrender,[15] which consists in yielding up the particular estate to the person having the next immediate estate in reversion or remainder.[16]

4. By Foreclosure Sale. Where a life-estate is created in property subject to a mortgage a foreclosure sale of the property terminates the life-estate.[17]

5. By Forfeiture — a. For Alienation in Fee. At common law if a tenant for

vesting a title to property limited to take effect after his death. Avery *v.* Everett, 36 Hun (N. Y.) 6.

11. Livingston *v.* Tanner, 14 N. Y. 64.

What is a reasonable search and inquiry for the lives on which the continuance of the estate depends is a mixed question of law and fact (Clarke *v.* Cummings, 5 Barb. (N. Y.) 339), and depends upon the circumstances of the particular case (Clark *v.* Owens, 18 N. Y. 434; Clarke *v.* Cummings, *supra*).

Notice to quit is not necessary where a tenant *pur autre vie* holds over. Livingston *v.* Tanner, 14 N. Y. 64; Seaton *v.* Davis, 1 Thomps. & C. (N. Y.) 91.

Where a tenant pur autre vie of personal property hires it out for a certain period and the life-estate terminates during this period, the remainder-man may bring detinue against the person in actual possession or wait until the hiring expires and the property is returned to its former possessor. Walker *v.* Fenner, 20 Ala. 192.

12. Warner *v.* Tanner, 38 Ohio St. 118.

An estate to a widow for life or during widowhood is terminated by her subsequent marriage. Boylan *v.* Deinzer, 45 N. J. Eq. 485, 18 Atl. 119.

An estate to one for life "providing he sees fit to use and occupy the same so long as a home and a residence" is terminated by the tenant ceasing to so use and occupy the premises. Lariverre *v.* Rains, 112 Mich. 276, 70 N. W. 583.

A grant reserving "a life lease from year to year" and providing that the right of the grantor to such possession and use must be requested in writing before a certain day in each year creates a life-estate, and the condition is not a limitation for the determination of the estate but merely affects the right to possession during the year for which the notice is given. Hurd *v.* Hurd, 64 Iowa 414, 20 N. W. 740.

13. Gilker *v.* Brown, 47 Mo. 105.

A covenant that the grantee will not "sell and dispose of, or assign his estate in, the premises" under penalty of forfeiting the life-estate is not broken by the conveyance of a lesser estate for a term of years. Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278.

A lease to a woman for life of certain property, providing that it is "only for herself to occupy for a residence," and providing that the lease shall terminate upon the violation of any of its covenants, is not terminated by the woman marrying a man with children and taking them to live with her on the premises. Schroeder *v.* King, 38 Conn. 78.

The lien of a judgment against the life-tenant is destroyed by the breach of a condition which forfeits the estate. Moore *v.* Pitts, 53 N. Y. 85.

14. Heiple *v.* Reed, (Iowa 1895) 65 N. W. 331; Simonton *v.* White, (Tex. Civ. App. 1899) 49 S. W. 269.

15. Curtis *v.* Hollenbeck, 92 Ill. App. 34; Livingston *v.* Potts, 16 Johns. (N. Y.) 28.

16. Fisher *v.* Edington, 12 Lea (Tenn.) 189.

Where a lessee for life accepts a new lease or a grant in fee of the same premises it is an implied surrender of the particular estate. Livingston *v.* Potts, 16 Johns. (N. Y.) 28.

An actual and continued change of possession by mutual consent of the parties amounts to a surrender of the life-estate. Curtis *v.* Hollenbeck, 92 Ill. App. 34.

An application for an order of sale of an estate in which the applicant has a life-interest, for the purpose of investing the proceeds is not a surrender of the life-estate. Snook *v.* Munday, 90 Md. 701, 45 Atl. 1004.

An agreement by the life-tenant that the remainder-man may enter on the land and build and make permanent improvements thereon is not a surrender of the life-estate. Hatcher *v.* Hatcher, 2 McMull. (S. C.) 429.

Where two persons grant a lease for life to a third, who afterward conveys his interest to only one of them, it does not operate as a surrender of the lease. Sperry *v.* Sperry, 8 N. H. 477.

A statutory requirement that a surrender shall be in writing cannot be dispensed with by calling it a forfeiture and agreeing that it shall operate as such. Allen *v.* Brown, 5 Lans. (N. Y.) 280, 60 Barb. (N. Y.) 39.

17. Fidelity Ins., etc., Co. *v.* Dietz, 132 Pa. St. 36, 18 Atl. 1090 [*affirming* 6 Pa. Co. Ct. 241]; Holmes *v.* Winler, 47 Fed. 257.

life made a conveyance in fee by way of feoffment, fine, or recovery, he forfeited his estate.[18] A conveyance by deed of bargain and sale, lease and release, or other conveyance under the statute of uses, did not work a forfeiture.[19] In this country an alienation in fee does not work a forfeiture of the life-estate, but merely passes the estate of the grantor;[20] and in some of the states it is expressly so provided by statute.[21]

b. For Waste. At common law a life-tenant forfeited his estate by the commission of waste,[22] and in this country it is so provided by statute in some of the states.[23] Equity will in some cases prevent a forfeiture where the injury is repaired by the life-tenant before judgment of forfeiture is rendered.[24]

c. For Non-Payment of Taxes. In Ohio it is provided by statute that where a life-tenant permits the land to be sold for taxes and does not redeem the same within one year his estate shall be forfeited.[25]

d. For Disclaimer. At common law a tenant for life forfeited his estate by any act in a court of record amounting to a disclaimer of the superior title, as by claiming in himself a larger estate or affirming the reversion to be in a stranger.[26]

18. 2 Blackstone Comm. 274; 4 Kent Comm. 82, 427. See also McMichael *v.* Craig, 105 Ala. 382, 16 So. 883; Jackson *v.* Mancius, 2 Wend. (N. Y.) 357.

A common recovery suffered by a tenant for life forfeits the estate. Stump *v.* Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632.

19. *Alabama.*— McMichael *v.* Craig, 105 Ala. 382, 16 So. 883.

Georgia.— Sanford *v.* Sanford, 55 Ga. 527.

Kansas.— Goodman *v.* Malcom, 5 Kan. App. 285, 48 Pac. 439.

Massachusetts.— Stevens *v.* Winship, 1 Pick. 318, 11 Am. Dec. 178.

New Hampshire.— Bell *v.* Twilight, 22 N. H. 500.

New York.— Grout *v.* Townsend, 2 Hill 554; Jackson *v.* Mancius, 2 Wend. 357.

Virginia.— Pendleton *v.* Vandevier, 1 Wash. 381.

See 33 Cent. Dig. tit. "Life Estates," § 8. See also 4 Kent Comm. 84, 427.

20. *Connecticut.*— Rogers *v.* Moore, 11 Conn. 553.

Georgia.— Sanford *v.* Sanford, 55 Ga. 527.

Kansas.— Goodman *v.* Malcom, 5 Kan. App. 285, 48 Pac. 439.

New Hampshire.— Bell *v.* Twilight, 22 N. H. 500.

Ohio.— Carpenter *v.* Denoon, 29 Ohio St. 379.

Tennessee.— McCorry *v.* King, 3 Humphr. 267, 39 Am. Dec. 165.

Virginia.— Pendleton *v.* Vandevier, 1 Wash. 381.

See 33 Cent. Dig. tit. "Life Estates," § 8.

21. See the statutes of the different states; and Edwards *v.* Bender, 121 Ala. 77, 25 So. 1010; McMichael *v.* Craig, 105 Ala. 382, 16 So. 883; Quimby *v.* Dill, 40 Me. 528; Grout *v.* Townsend, 2 Hill (N. Y.) 554; Patrick *v.* Sherwood, 18 Fed. Cas. No. 10,804, 4 Blatchf. 112.

The sale of a chattel by one having a life-interest therein does not terminate the estate but passes the life-interest to the grantee. Jones *v.* Hoskins, 18 Ala. 489.

22. 4 Kent Comm. 82.

23. Chauncey *v.* Brown, 99 Ga. 766, 26 S. E. 763; Woodward *v.* Gates, 38 Ga. 205; Kent *v.* Bentley, 10 Ohio Cir. Ct. 132, 6 Ohio Cir. Dec. 457.

Prior to the Georgia statute the estate was not forfeited and the tenant was liable only for the injury done to the estate. Woodward *v.* Gates, 38 Ga. 205; Parker *v.* Chambliss, 12 Ga. 235.

The Kentucky statute applies only to voluntary waste, and the tenant forfeits only that portion of the estate on which the waste was committed. Smith *v.* Mattingly, 96 Ky. 228, 28 S. W. 503, 16 Ky. L. Rep. 418.

Prior to the statute in Ohio no estates for life were forfeitable for waste except dower and curtesy, and the statute does not apply to life-estates vested prior to its passage. Kent *v.* Bentley, 10 Ohio Cir. Ct. 132, 6 Ohio Cir. Dec. 457.

If the reversioner consented to the act complained of either before or after its commission he cannot claim a forfeiture of the estate. Clemence *v.* Steere, 1 R. I. 272, 53 Am. Dec. 621.

24. Johnson *v.* Pettitt, 1 Cinc. Super. Ct. 25.

25. Estabrook *v.* Royon, 52 Ohio St. 318, 39 N. E. 808, 32 L. R. A. 805 [*reversing* 5 Ohio Cir. Ct. 315, 3 Ohio Cir. Dec. 156]; McMillan *v.* Robbins, 5 Ohio 28.

If the sale is invalid so that no valid deed can be made to the purchaser at the tax-sale the estate is not forfeited. Estabrook *v.* Boyon, 52 Ohio St. 318, 39 N. E. 808, 32 L. R. A. 805 [*reversing* 5 Ohio Cir. Ct. 315, 3 Ohio Cir. Dec. 156].

The reversioner's right to enforce a forfeiture is merely an inchoate right until decreed by a court of competent jurisdiction. Johnson *v.* Pettitt, 1 Cinc. Super. Ct. 25.

26. 2 Blackstone Comm. 275. See also Hart *v.* Soward, 14 B. Mon. (Ky.) 301; Robinson *v.* Miller, 2 B. Mon. (Ky.) 284.

A parol disclaimer of the right of the reversioner or remainder-man would not forfeit the estate. Hart *v.* Soward, 14 B. Mon. (Ky.) 301.

The acceptance of a deed of the fee by a

This rule of the common law has apparently never been adopted in this country.[27]

e. Waiver of Forfeiture. A forfeiture incurred by a life-tenant may be waived by the person entitled to enforce it.[28]

K. Actions by Life-Tenant — 1. Rights of Action in General. A life-tenant may maintain an action for any injury to his possession and right of enjoyment,[29] but not for any injury to the inheritance unless he has previously satisfied the remainder-man or reversioner.[30]

2. Parties.[31] A life-tenant may maintain an action for an injury to his own estate without making the remainder-men parties;[32] or he may join with the remainder-man in an action to recover for the injury to the interests of both.[33] If the injury complained of is an injury only to the life-estate, it is not proper to join the remainder-men as parties plaintiff.[34] Where the action is to recover the proceeds of a sale of the entire estate, all of the persons interested in the fund must be made parties.[35]

3. Damages.[36] In an action by a life-tenant he can recover damages only for the injury done to the life-estate;[37] and the measure of damages is the amount necessary to make good the actual loss sustained by him.[38]

life-tenant from a person whose title is hostile to that of the reversioner is not an act done in a court of record within the operation of the rule. Rosseel *v.* Jarvis, 15 Wis. 571.

27. Rosseel *v.* Jarvis, 15 Wis. 571; 1 Washburn Real Prop. (6th ed.) 107.

28. King *v.* Mims, 7 Dana (Ky.) 267; Jackson *v.* Mancius, 2 Wend. (N. Y.) 357. See also Chaffee *v.* Foster, 52 Ohio St. 358, 39 N. E. 947.

29. Zimmerman *v.* Shreeve, 59 Md. 357; Lane *v.* Thompson, 43 N. H. 320. See also Bentonville R. Co. *v.* Baker, 45 Ark. 252.

The owner of a life-estate in personal property may maintain an action of trover for the conversion of the property. Logan *v.* Hartford City, etc., Coal Co., 9 Heisk. (Tenn.) 689.

Where the land is in possession of the remainder-man, who cultivates it as a tenant of the owner of the life-estate, paying no rents except the payment of the taxes, the life-tenant cannot maintain an action for injury to the crops. Brown *v.* Woodliff, 89 Ga. 413, 15 S. E. 491.

30. See Wood *v.* Griffin, 46 N. H. 230, holding that a life-tenant cannot maintain an action against a stranger for waste until he has made satisfaction to the remainder-man or reversioner.

31. Parties generally see Parties.

32. Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812; Reading R. Co. *v.* Boyer, 13 Pa. St. 497. See also McIntire *v.* Westmoreland Coal Co., 118 Pa. St. 108, 11 Atl. 808; Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

Where the life-estate is limited upon a contingency by which it may be determined before the death of the life-tenant, he cannot maintain an action for damages caused by the construction of a railroad without making the persons interested in the fee parties thereto. Bach *v.* New York El. R. Co., 60 Hun (N. Y.) 128, 14 N. Y. Suppl. 620.

33. Whitesides *v.* Dorris, 7 Dana (Ky.) 101; McIntire *v.* Westmoreland Coal Co., 118 Pa. St. 108, 11 Atl. 808. See also Reading R. Co. *v.* Boyer, 13 Pa. St. 497.

Where there is a life-estate in a term for ninety-nine years, and the life-tenant is also the owner of the reversion after the expiration of the term, he may in a single action of trespass by means of a *per quod*, recover not only for the trespass but the value of the property destroyed. Burnett *v.* Thompson, 51 N. C. 210, 52 N. C. 407.

34. Neuhs *v.* Grasselli Chemical Co., 8 Ohio S. & C. Pl. Dec. 203, 5 Ohio N. P. 359.

35. Cuthbert *v.* U. S., 20 Ct. Cl. 172.

Where property has been taken under the right of eminent domain and an action is brought by the life-tenant to recover his share of the fund assessed as damages, the remainder-man is entitled as a matter of right to intervene in the action. Jones *v.* Asheville, 116 N. C. 817, 21 S. E. 691.

36. Damages generally see Damages.

37. Brown *v.* Woodliff, 89 Ga. 413, 15 S. E. 491; Sagar *v.* Eckert, 3 Ill. App. 412; Zimmerman *v.* Shreeve, 59 Md. 357.

In an action of trespass the life-tenant can recover damages only for the injury to his possessory interests. Zimmerman *v.* Shreeve, 59 Md. 357.

In an action of trover by a life-tenant to recover damages for the conversion of personal property in which he has a life-estate, he cannot recover the value of the property but only the damages to his life-interest. Strong *v.* Strong, 6 Ala. 345.

Where the injury consists in the destruction of a growing crop the life-tenant is entitled to recover the amount of the entire injury. Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812.

38. Johnson *v.* Chapman, 43 W. Va. 639, 28 S. E. 744.

In an action for damages for the eviction of a life-tenant from the premises the measure of damages is the rental value of the premises from the date of eviction up to the

4. Abatement of Action.[39] An action by a life-tenant to recover the possession of land in which he has a life-estate is abated by his death.[40]

V. Remainders.

A. Definition and Nature. A remainder is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it.[41] The term "remainder" is a relative expression and implies that some part of the estate is previously disposed of,[42] which part must necessarily be something less than a fee, or in other words, such as would leave a reversion in the grantor if no remainder were created.[43] The particular estate and remainder, although different parts, the one in possession and the other in expectancy, are in fact only one estate.[44] The creation of these estates and the distinctions between vested and contingent remainders are treated elsewhere.[45]

B. Essential Characteristics — 1. Must Have Preceding Particular Estate — a. Necessity. The first essential of a remainder is that there must be a preceding particular estate.[46] This follows necessarily from the definition, since there

commencement of the action, and the present worth of the rental value from that time forward during the tenant's life expectancy. Grove *v.* Youell, 110 Mich. 285, 68 N. W. 132, 33 L. R. A. 297.

The injury to a life-estate caused by the construction of a railroad may be estimated by multiplying the net value of the premises by the life-tenant's expectancy of life and reducing this amount by calculation to a present cash value. Pittsburg, etc., R. Co. *v.* Bentley, 88 Pa. St. 178.

Where a building has been destroyed it is error to estimate the value of the life-interest by multiplying the annual value of the rents and profits by the probable number of years of duration of the life-estate, without making any deduction for taxes and repairs or any rebate of interest. Greer *v.* New York, 4 Rob. (N. Y.) 675, 1 Abb. Pr. N. S. (N. Y.) 206.

39. Abatement of actions generally see Abatement and Revival.

40. Brown *v.* Kendall, 13 Gray (Mass.) 272.

41. 4 Kent Comm. 197 [*quoted* in Achorn *v.* Jackson, 86 Me. 215, 29 Atl. 989; Wood *v.* Griffin, 46 N. H. 230; Bennett *v.* Garlock, 10 Hun (N. Y.) 328].

Other definitions are: "An estate limited to take effect and be enjoyed after another estate is determined." Todd *v.* Jackson, 26 N. J. L. 525, 540; 2 Blackstone Comm. 163.

"A residue in an estate in land depending upon a particular estate, and created together with the same." Coke Litt. 49*a* [*quoted* in Alderman *v.* Chester, 34 Ga. 152, 158; Wadsworth *v.* Murray, 29 N. Y. App. Div. 191, 197, 51 N. Y. Suppl. 1038].

"What is left of an entire estate in lands after a preceding part of the same estate has been disposed of, whose regular termination the remainder must await." Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*citing* 2 Minor Inst. 331].

"A remnant of an estate in lands or tenements, expectant upon a particular estate, created together with the same at one time." Coke Litt. 143*a* [*quoted* in Kingsley *v.* Broward, 19 Fla. 722, 743; Buist *v.* Dawes, 4 Rich. Eq. (S. C.) 496, 497].

"The remnant of an estate, limited to arise immediately on the determination of a precedent particular estate." Booth *v.* Terrell, 16 Ga. 20, 24.

"A remnant of an estate in lands or tenements, expectant on a particular estate created together with the same at one time." Sayward *v.* Sayward, 7 Me. 210, 213, 22 Am. Dec. 191 [*quoting* Fearne Rem. 11, 12].

"An estate limited to take effect and to be enjoyed after the determination of another estate which is created with it." Woodbridge *v.* Jones, 183 Mass. 549, 552, 67 N. E. 878.

42. Hudson *v.* Wadsworth, 8 Conn. 348; 2 Blackstone Comm. 165.

43. Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; Tiedeman Real Prop. 316.

44. Bush *v.* Bush, 5 Del. Ch. 144; 2 Blackstone Comm. 164; 4 Kent Comm. 198.

45. See Deeds, 13 Cyc. 647 *et seq.*; and, generally, Wills.

46. *Georgia.*— Alderman *v.* Chester, 34 Ga. 152.

Illinois.— Madison *v.* Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356.

Pennsylvania.— McCay *v.* Clayton, 119 Pa. St. 133, 12 Atl. 860.

Texas.— Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*quoting* 2 Minor Inst. 331, 332].

United States.— McArthur *v.* Allen, 15 Fed. Cas. No. 8,659.

England.— Rhodes *v.* Whitehead, 2 Dr. & Sm. 532, 12 L. T. Rep. N. S. 601, 13 Wkly. Rep. 100.

See 42 Cent. Dig. tit. "Remainders," § 2.

See also 2 Blackstone Comm. 165; 4 Kent Comm. 233.

can be no remnant of the whole unless a part has been disposed of;[47] and in the case of a freehold estate, which at common law could be created only by livery of seizin, it was necessary, in order to support the remainder, to create a particular estate, to the tenant of which livery of seizin could be made, to hold until the remainder should vest in possession.[48]

b. Character of Preceding Estate.[49] The particular estate must be a valid estate, for if void in its creation a remainder limited thereon is void also.[50] In quantity of interest it may be an estate tail,[51] or, as is usually the case, an estate for life;[52] but a tenancy at will is said to be too slender and precarious to be considered a portion of the inheritance and therefore insufficient to support a remainder.[53] A freehold limitation after an estate for years is not technically a remainder but takes effect at once subject to the term of years.[54] If the remainder is contingent and amounts to a freehold it must have a particular estate or freehold to support it.[55]

2. Must Be Created at Same Time as Preceding Estate. The remainder must pass out of the grantor at the time of the creation of the particular estate,[56] and by the same conveyance;[57] for if the particular estate were first created the residue would be a reversion, and if the remainder were first created it would fail for want of a particular estate to support it.[58]

3. Must Await Regular Determination of Preceding Estate. A remainder must await the natural termination of the particular estate and cannot be limited on an event which prematurely determines it.[59] A remainder may, however, take effect after a special limitation as distinguished from an estate on condition,[60] since a limitation merely marks the natural termination of the preceding estate and does not operate in derogation of it.[61]

4. Must Vest During or Immediately on Termination of Preceding Estate. The remainder must vest in right during the continuance of the particular estate, or *eo instanti* that it determines,[62] otherwise the freehold would be in abeyance and the remainder would fail for want of a particular estate to support it.[63]

5. No Remainder After a Fee Simple. A remainder cannot be limited so as to take effect after a fee simple,[64] whether it be a fee simple absolute or a

47. Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*quoting* 2 Minor Inst. 331, 332]; 2 Blackstone Comm. 165; 4 Kent Comm. 233.

48. 2 Blackstone Comm, 166.

49. See also, generally, Wills.

50. 2 Blackstone Comm. 167; 4 Kent Comm. 233, 236.

51. Hall *v.* Priest, 6 Gray (Mass.) 18; Wilkes *v.* Lion, 2 Co (N. Y.) 333; Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565; Coke Litt. 143*a*; Tiffany Real Prop. 279.

52. Tiffany Real Prop. 279.

53. 2 Blackstone Comm. 166.

54. Tiffany Real Prop. 280.

55. 4 Kent Comm. 236; 2 Washburn Real Prop. (6th ed.) 548.

56. Kingsley *v.* Broward, 19 Fla. 722; Booth *v.* Terrell, 16 Ga. 20; Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*quoting* 2 Minor Inst. 331, 332]; McArthur *v.* Allen, 15 Fed. Cas. No. 8,659; 2 Blackstone Comm. 167; 4 Kent Comm. 248.

57. Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*quoting* 2 Minor Inst. 331, 332]; 4 Kent Comm. 248.

58. Tiffany Real Prop.. 281.

59. Myers *v.* Weimer, 69 Ark. 319, 63 S. W. 52; Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*quoting* 2 Minor Inst. 331, 332]; 4 Kent Comm. 249.

60. 4 Kent Comm. 250; Tiffany Real Prop. 280. See also Myers *v.* Weimer, 69 Ark. 319, 63 S. W. 52; Goodtitle *v.* Billington, 2 Dougl. 725.

61. See *supra*, II, E, 4.

62. Madison *v.* Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*quoting* 2 Minor Inst. 331, 332]; McArthur *v.* Allen, 15 Fed. Cas. No. 8,659; 2 Blackstone Comm. 168; 4 Kent Comm. 248.

63. 2 Blackstone Comm. 168; 4 Kent Comm. 248.

64. *Alabama.*— Horton *v.* Sledge, 29 Ala. 478.

Connecticut.— Macumber *v.* Bradley, 28 Conn. 445.

Massachusetts.— Blanchard *v.* Brooks, 12 Pick. 47.

South Carolina.— Buist *v.* Dawes, 4 Strobh. Eq. 37.

Texas.— Wells *v.* Houston, 23 Tex. Civ. App. 629, 654, 57 S. W. 584 [*quoting* 2 Minor Inst. 331, 332].

See 42 Cent. Dig. tit. "Remainders," § 2.

See also 2 Blackstone Comm. 164.

fee conditional,[65] or a base or qualified fee,[66] although such a limitation may be good as an executory devise;[67] for a fee being the entire estate there can be no remainder after that is disposed of.[68] But notwithstanding a remainder cannot be limited after a fee, it is possible even at common law to limit two concurrent fees by way of remainder as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest.[69] In such cases neither remainder is limited upon or after the other, but as soon as either becomes vested all rights under the other are forever excluded.[70] These remainders are sometimes known as "alternative remainders," and sometimes as "remainders on a contingency with a double aspect."[71]

6. STATUTORY MODIFICATIONS. The requirements of the common law as to the creation and essential characteristics of remainders have now been so modified by statute that the statutes of the particular state must be consulted.[72] But even in the absence of express statute these common-law requirements have lost most of their practical importance, since under the statutes of uses and wills a future limitation, although not good as a remainder, may in almost all cases take effect as a future use or executory devise.[73]

C. Remainders in Personal Property. At common law there could be no interest by way of remainder created in personal property,[74] and a gift for life with remainder over passed the entire interest therein;[75] but it is now well settled that such estates may be created.[76] Remainders in personal property may be

65. Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; Bedon *v.* Bedon, 2 Bailey (S. C.) 231; Buist *v.* Dawes, 4 Strobh. Eq. (S. C.) 37; Deas *v.* Horry, 2 Hill Eq. (S. C.) 244.

66. See Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420.

67. See Macumber *v.* Bradley, 28 Conn. 445; Buist *v.* Dawes, 4 Strobh. Eq. (S. C.) 37; 4 Kent Comm. 200. See also, generally, WILLS.

68. Outland *v.* Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; Sayward *v.* Sayward, 7 Me. 210, 22 Am. Dec. 191; 2 Blackstone Comm. 164; 4 Kent Comm. 199.

69. *Maryland.*— Demill *v.* Reid, 71 Md. 175, 17 Atl. 1014; Woollen *v.* Frick, 38 Md. 428.

Massachusetts.— Richardson *v.* Noyes, 2 Mass. 56, 3 Am. Dec. 24.

New Jersey.— Micheau *v.* Crawford, 8 N. J. L. 90.

New York.— Hennessy *v.* Patterson, 85 N. Y. 91.

North Carolina.— Watson *v.* Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665.

Pennsylvania.—Waddell *v.* Rattew, 5 Rawle 231; Dunwoodie *v.* Reed, 3 Serg. & R. 435.

Virginia.— Allison *v.* Allison, 101 Va. 537, 556, 44 S. W. 904, 63 L. R. A. 920 [*quoting* 2 Minor Inst. 394].

England.— Doe *v.* Selby, 2 B. & C. 926. 4 D. & R. 608, 26 Rev. Rep. 585, 9 E. C. L. 398; Goodright *v.* Dunham, 1 Dougl. 264; Loddington *v.* Kime, 1 Salk. 224.

See 42 Cent. Dig. tit. "Remainders," § 2.

70. Woollen *v.* Frick, 38 Md. 428. See also Doe *v.* Selby, 2 B. & C. 926. 4 D. & R. 608, 26 Rev. Rep. 585, 9 E. C. L. 398.

71. Tiffany Real Prop. 300.

72. See the statutes of the different states; and Stimpson Am. St. L. §§ 1421, 1424, 1425, 1426, 1440; Tiffany Real Prop. 281; 2 Washburn Real Prop. (6th ed.) 554.

Thus there are statutes in some states providing that any estate may be made to commence *in futuro* without the intervention of a preceding estate; that a fee may be limited after a fee, or a contingent freehold remainder after a term of years; that a remainder may be limited on a contingency which might operate to abridge the preceding estate; that a contingent remainder shall be valid if it would be valid as a conditional limitation; and that an estate which would be good as an executory devise shall be equally so if created by deed. Stimpson Am. St. L. § 1421 *et seq.*; Tiffany Real Prop. 343 *et seq.*

73. Tiffany Real Prop. 281.

74. 2 Blackstone Comm. 398; 2 Kent Comm. 352; Ragsdale *v.* Norwood, 38 Ala. 21, 79 Am. Dec. 79; Kirkpatrick *v.* Davidson, 2 Ga. 297; Keen *v.* Macey, 3 Bibb (Ky.) 39; Randall *v.* Russell, 3 Meriv. 190, 17 Rev. Rep. 56, 36 Eng. Reprint 73.

In determining the validity of a remainder created in another state by deed, the court will presume that the common-law rule against the creation of remainders in personal property prevails in that state, unless there is an allegation to the contrary. Brown *v.* Pratt, 56 N. C. 202.

75. See *supra*, IV, B, 4.

76. *Connecticut.*— Taber *v.* Packwood, 2 Day 52; Griggs *v.* Dodge, 2 Day 28, 2 Am. Dec. 82.

Georgia.— Broughton *v.* West, 8 Ga. 248.

Indiana.— Owen *v.* Cooper, 46 Ind. 524.

Kentucky.— Garland *v.* Denny, 3 B. Mon. 125; Keen *v.* Macey, 3 Bibb 39.

Maine.— Fox *v.* Rumery, 68 Me. 121.

South Carolina.— Logan *v.* Ladson, 1 Desauss. 271.

created either by deed or by will,[77] but it has been held that they cannot be created by parol.[78]

D. Acceleration of Remainder. A remainder is said to be accelerated where the time for its vesting in possession is shortened by the preceding estate being prematurely determined or for some reason incapable of taking effect.[79] So, where there is a devise for life to one who is legally incapable of taking,[80] or to one who refuses to accept the devise,[81] or if the life-interest is revoked by the testator,[82] or is subsequently forfeited by the life-tenant,[83] or if the devisee for life dies before the testator and the remainder-man survives him,[84] a vested remainder dependent thereon is accelerated; and where there are several successive remainders, one of which is void, the succeeding remainder is accelerated.[85] So also where there is a devise to a widow during widowhood with remainder over after her death, and the widow remarries, the remainder takes effect at once.[86] The doctrine of acceleration, however, is founded on the presumed intention of the testator, and will not be applied where a contrary intention appears.[87] In the case of a contingent remainder, it being uncertain until the happening of the contingency who will be entitled thereto, there can be no acceleration by a premature determination of the preceding estate.[88] The rule as to acceleration applies to remainders in personal property as well as realty.[89]

E. Rights and Liabilities of Remainder-Men. A great majority of the cases in which the rights and liabilities of both remainder-men and reversioners are considered arise out of controversies between these tenants and a preceding tenant for life, and as their rights and remedies in such cases are in most respects similar, they are, in order to avoid the repetition of general principles, treated

England.— Hyde *v.* Parrat, 1 P. Wms. 1, 24 Eng. Reprint 269, 2 Vern. Ch. 331, 23 Eng. Reprint 813; Clarges *v.* Albermarle, 2 Vern. Ch. 245, 23 Eng. Reprint 758; Smith *v.* Clever, 2 Vern. Ch. 59, 23 Eng. Reprint 647.

See 42 Cent. Dig. tit. "Remainders," § 3.

A remainder may be created in money as well as in other personal property. Crawford *v.* Clark, 110 Ga. 729, 36 S. E. 404; Hitchcock *v.* Clendennin, 6 Mo. App. 99.

In the case of personal property entirely consumable in the use a gift for life still passes the entire interest. See *supra*, IV, B, 4.

77. Langworthy *v.* Chadwick, 13 Conn. 42; Kirkpatrick *v.* Davidson, 2 Ga. 297; Garland *v.* Denny, 3 B. Mon. (Ky.) 125; 2 Blackstone Comm. 398; 2 Kent Comm. 352.

Creation by deed see DEEDS, 13 Cyc. 650 note 38.

Creation by will see WILLS.

A bill of sale is sufficient to create a remainder in personal property. Keen *v.* Macy, 3 Bibb (Ky.) 39.

78. Ragsdale *v.* Norwood, 38 Ala. 21, 79 Am. Dec. 79; Yarborough *v.* West, 10 Ga. 471; Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385; Kirkpatrick *v.* Davidson, 2 Ga. 297; Fitzhugh *v.* Anderson, 2 Hen. & M. (Va.) 289, 3 Am. Dec. 625. But see Alderman *v.* Chester, 34 Ga. 152, where the court questions the soundness of this rule, saying that it was founded upon the old rule that a remainder could not be created in personal property even by deed or will, and that since that rule has ceased to exist the other ought to have passed away with it.

A trust of personalty in remainder may be created or proven by parol. Gordon *v.* Green, 10 Ga. 534.

79. See Blatchford *v.* Newberry, 99 Ill. 11; Fox *v.* Rumery, 68 Me. 121; Jull *v.* Jacobs, 3 Ch. D. 703, 35 L. T. Rep. N. S. 153, 24 Wkly. Rep. 947.

Acceleration is defined in 1 Cyc. 221.

80. Key *v.* Wethersbee, 43 S. C. 414, 21 S. E. 324, 49 Am. St. Rep. 846; Jull *v.* Jacobs, 3 Ch. D. 703, 35 L. T. Rep. N. S. 153, 24 Wkly. Rep. 947. See also Darcus *v.* Crump, 6 B. Mon. (Ky.) 363.

81. Fox *v.* Rumery, 68 Me. 121; Randall *v.* Randall, 85 Md. 430, 37 Atl. 209; Parker *v.* Ross, 69 N. H. 213, 45 Atl. 576; Hall *v.* Smith, 61 N. H. 144; Yeaton *v.* Roberts, 28 N. H. 459; Adams *v.* Gillespie, 55 N. C. 244.

82. Eavestaff *v.* Austin, 19 Beav. 591; Lainson *v.* Lainson, 18 Beav. 1, 17 Jur. 1044, 23 L. J. Ch. 170, 2 Wkly. Rep. 82.

83. Craven *v.* Brady, L. R. 4 Eq. 209, 36 L. J. Ch. 905, 15 Wkly. Rep. 952.

84. Mercer *v.* Hopkins, 88 Md. 292, 41 Atl. 156; Taylor *v.* Wendel, 4 Bradf. Surr. (N. Y.) 324.

85. Goodright *v.* Cornish, 1 Salk. 226.

86. Clark *v.* Tennison, 33 Md. 85.

87. Blatchford *v.* Newberry, 99 Ill. 11; Rogers *v.* Safe Deposit, etc., Co., 97 Md. 674, 55 Atl. 679; Wehrhane *v.* Safe Deposit, etc., Co., 89 Md. 179, 42 Atl. 930; Hinkley *v.* House of Refuge, 40 Md. 461, 17 Am. Rep. 617.

88. Purdy *v.* Hayt, 92 N. Y. 446. See also Dale *v.* Bartley, 58 Ind. 101; Augustus *v.* Seabolt, 3 Metc. (Ky.) 155.

89. Eavestaff *v.* Austin, 19 Beav. 591; Jull *v.* Jacobs, 3 Ch. D. 703, 35 L. T. Rep. N. S.

under that part of this article relating to life-estates.[90] A remainder-man has no right of entry or possession until the death of the preceding tenant for life,[91] unless the remainder is accelerated;[92] but he is entitled to possession immediately upon the death of the preceding tenant,[93] and also to all rents and profits accruing subsequent to the death of such tenant;[94] and where the property consists of a fund of money, to interest on the amount from that date.[95] If a life-tenant incurs a forfeiture of his estate the remainder-man is not obliged to enter, but a new right of entry accrues upon the death of the life-tenant;[96] and the same rule applies where a devisee for life refuses to accept the estate devised.[97]

F. Conveyance, Sale, or Mortgage of Remainder — **1. Conveyance or Sale by Remainder-Man.**[98] A vested remainder is a present interest in the property which the remainder-man may convey by deed.[99] By the common law a contingent remainder is not such an interest as can be conveyed directly by deed,[1] and a deed purporting to convey it can operate only as an estoppel.[2] If, however,

153, 24 Wkly. Rep. 947. See also Fox *v.* Rumery, 68 Me. 121.

90. See *supra*, IV.

91. *Alabama.*— Findley *v.* Hill, 133 Ala. 229, 32 So. 497.

Illinois.— Turner *v.* Hause, 199 Ill. 464, 65 N. E. 445.

New York.— Snow *v.* Monk, 81 N. Y. App. Div. 206, 80 N. Y. Suppl. 719; Bennett *v.* Garlock, 10 Hun 328.

Pennsylvania.— McLaughlin's Appeal, 3 Walk. 173.

Tennessee.— Wiley *v.* Bird, 108 Tenn. 168, 66 S. W. 43.

Virginia.— Hope *v.* Norfolk, etc., R. Co., 79 Va. 283.

See 42 Cent. Dig. tit. "Remainders," §§ 8, 9.

92. See *supra*, V, D.

93. Beckham *v.* Maples, 95 Ga. 773, 22 S. E. 894; Covar *v.* Cantelou, 25 S. C. 35.

94. Ramey *v.* Green, 18 Ala. 771.

Where a trustee fails to deduct the full amount of his commissions in paying over the income to the life-tenant, he cannot recover the balance due out of the rents collected after the life-tenant's death. Armistead *v.* Armistead, (Tenn. Ch. App. 1901) 61 S. W. 1071.

95. Hitchcock *v.* Clendennin, 6 Mo. App. 99; Reiff's Estate, 124 Pa. St. 145, 16 Atl. 636.

Interest which accrued prior to the death of the life-tenant cannot be recovered by the remainder-man. McCook *v.* Harp, 81 Ga. 229, 7 S. E. 174.

96. Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Reese *v.* Holmes, 5 Rich. Eq. (S. C.) 531.

97. Wells *v.* Prince, 9 Mass. 508.

98. Conveyance generally see Deeds.

Sale generally see Sales; Vendor and Purchaser.

Sale under execution see Executions.

99. *Florida.*— Kingsley *v.* Broward, 19 Fla. 722.

Kentucky.— Johnson *v.* Jacob, 11 Bush 646.

Maine.— Watson *v.* Cressey, 79 Me. 381, 10 Atl. 59; Pearce *v.* Savage, 45 Me. 90.

Massachusetts.— Blanchard *v.* Brooks, 12 Pick. 47.

New Hampshire.— Glidden *v.* Blodgett, 38 N. H. 74.

South Carolina.— Roux *v.* Chaplin, 1 Strobh. Eq. 129.

See 42 Cent. Dig. tit. "Remainders," § 10.

See also 2 Blackstone Comm. 290; 4 Kent Comm. 260.

One of several vested remainder-men may convey his undivided interest in the property and his grantee becomes a tenant in common with the other remainder-men. Coleman *v.* Lane, 26 Ga. 515.

A remainder in personal property may be disposed of by deed or other writing, but since delivery cannot be made during the continuance of the preceding estate such disposition cannot be made by parol. Hill *v.* McDonald, 1 Head (Tenn.) 383.

A remainder-man in fee, by joining with the tenant of the preceding estate, may convey an absolute and indefeasible title in fee simple. Gardiner *v.* Guild, 106 Mass. 25.

Inadequacy of consideration is no ground for setting aside the conveyance of a vested remainder by a person *sui juris*, where there is no mistake of fact, fraud, or trust relation between the parties. *In re* Phillips, 205 Pa. St. 511, 55 Atl. 212.

1. *Connecticut.*—Smith *v.* Pendell, 19 Conn. 107, 48 Am. Dec. 146.

Illinois.— Williams *v.* Esten, 179 Ill. 267, 53 N. E. 562.

Massachusetts.— Blanchard *v.* Brooks, 12 Pick. 47.

New Hampshire.— Hayes *v.* Tabor, 41 N. H. 521; Hall *v.* Nute, 38 N. H. 422; Robertson *v.* Wilson, 38 N. H. 48.

Pennsylvania.— Stewart *v.* Neely, 139 Pa. St. 309, 20 Atl. 1002.

Rhode Island.— Bailey *v.* Hoppin, 12 R. I. 560.

See 42 Cent. Dig. tit. "Remainders," § 10.

Where property is devised to trustees for the support of the testator's daughter during her life, and the residue, if any, to be divided among her children, the latter, before the death of their mother, have no interest which they can convey. Watson *v.* Conrad, 38 W. Va. 536, 18 S. E. 744.

2. Robertson *v.* Wilson, 38 N. H. 48; Stewart *v.* Neely, 139 Pa. St. 309, 20 Atl. 1002;

a contingent remainder-man makes a conveyance by deed with general covenants of warranty, the title which vests upon the happening of the contingency inures to the benefit of the grantee, and the grantor will be estopped to assert title to the property;[3] and a conveyance for a valuable consideration will also be upheld in equity as an executory contract to convey and will be enforced as such upon the happening of the contingency and vesting of the estate.[4] The tendency of the modern authorities is to make a distinction between the cases where the contingency is in the uncertainty of the person and where it is merely in the uncertainty of the event,[5] holding that if the person who is to take the remainder in case the contingency happens is definitely ascertained, his interest is more than a mere possibility and may be conveyed;[6] and it has even been held that one of a class of such remainder-men, whose interest is liable to be cut down in amount by the birth of other remainder-men, may nevertheless convey his own interest subject to this contingency.[7] A contingent remainder might even at common law be released to the tenant in possession.[8] In a number of the states contingent remainders are alienable under the statutes authorizing the conveyance of "expectant estates,"[9] or "any estate or interest,"[10] or "any interest or claim" in real property.[11]

2. SALE BY ORDER OF COURT.[12] A court of equity has jurisdiction, provided the parties in interest are properly represented before it, to order the sale of property

Jackson *v.* Everett, (Tenn. Sup. 1894) 58 S. W. 340; 4 Kent Comm. 260.

In a recent decision by the supreme court of Pennsylvania it is stated that "without inquiring as to the present status of the law elsewhere, it may be confidently asserted that in this state a person, *sui juris*, owning a contingent remainder in land, or in personal property, may sell the same" (Whelen *v.* Phillips, 151 Pa. St. 312, 322, 25 Atl. 44); but the cases cited do not support the statement and there is no reference to a prior decision of the same court (Stewart *v.* Neely, 139 Pa. St. 309, 316, 20 Atl. 1002), where the court said: "A contingent remainder can only be conveyed by devise; a deed purporting to convey it operates only as an estoppel, unless the conveyance is after the contingency happens."

3. *Illinois.*— Walton *v.* Follansbee, 131 Ill. 147, 23 N. E. 332.

Maine.— Read *v.* Fogg, 60 Me. 479.

New Hampshire.—Hayes *v.* Tabor, 41 N. H. 521; Robertson *v.* Wilson, 38 N. H. 48.

North Carolina.— Foster *v.* Hackett, 112 N. C. 546, 17 S. E. 426.

Virginia.— Young *v.* Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642.

See 42 Cent. Dig. tit. "Remainders," § 10.

A deed without covenants of warranty does not pass the after-acquired title of a contingent remainder-man or estop him from asserting title to the property. Read *v.* Fogg, 60 Me. 479. *Compare* Hannon *v.* Christopher, 34 N. J. Eq. 459.

A mere release or quitclaim deed will not estop the heirs of a remainder-man from claiming the remainder interest. Hall *v.* Nute, 38 N. H. 422.

Contingent remainder-men who were minors and whose interests were conveyed by a guardian will not be estopped by the deed. Hayes *v.* Tabor, 41 N. H. 521.

The estoppel is binding not only upon the remainder-man but upon his heirs. Walton *v.* Follansbee, 131 Ill. 147, 23 N. E. 332.

4. *Missouri.*— Lackland *v.* Nevins, 3 Mo. App. 335.

New Jersey.— Hannon *v.* Christopher, 34 N. J. Eq. 459.

North Carolina.— Watson *v.* Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665.

Rhode Island.— Mudge *v.* Hammill, 21 R. I. 283, 43 Atl. 544, 79 Am. St. Rep. 802; Wilcox *v.* Daniels, 15 R. I. 261, 3 Atl. 204; Bailey *v.* Hoppin, 12 R. I. 560.

England.— Wright *v.* Wright, 1 Ves. 409, 27 Eng. Reprint 1111.

See 42 Cent. Dig. tit. "Remainders," § 10.

5. Grayson *v.* Tyler, 80 Ky. 358; 2 Washburn Real Prop. (6th ed.) 527.

6. Grayson *v.* Tyler, 80 Ky. 358; Cummings *v.* Stearns, 161 Mass. 506, 37 N. E. 758; Butterfield *v.* Reed, 160 Mass. 361, 35 N. E. 1128; Wainwright *v.* Sawyer, 150 Mass. 168, 22 N. E. 885; Putnam *v.* Story, 132 Mass. 205; Dunn *v.* Sargent, 101 Mass. 336. See also Wilson *v.* Wilson, 32 Barb. (N. Y.) 328.

7. Putnam *v.* Story, 132 Mass. 205.

8. Smith *v.* Pendell, 19 Conn. 107, 48 Am. Dec. 146; Williams *v.* Esten, 179 Ill. 267, 53 N. E. 562; Miller *v.* Emans, 19 N. Y. 384.

9. Defreese *v.* Lake, 109 Mich. 415, 67 N. W. 505, 63 Am. St. Rep. 584, 32 L. R. A. 744; L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 63 Am. St. Rep. 584; Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339 [*affirming* 40 Hun 355]; Lawrence *v.* Bayard, 7 Paige (N. Y.) 70.

10. Brown *v.* Fulkerson, 125 Mo. 400, 28 S. W. 632; Godman *v.* Simmons, 113 Mo. 122, 20 S. W. 972; Lackland *v.* Nevins, 3 Mo. App. 335.

11. Young *v.* Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642. But see Grayson *v.* Tyler, 80 Ky. 358.

12. Sale by order of court generally see JUDICIAL SALES.

in which there are remainder interests, for the purpose of reinvestment,[13] or where a sale is necessary to preserve such interests for those ultimately entitled thereto.[14] There is some conflict of authority, however, as to the power of the court in cases where there are remainder-men who are not ascertained or not in being.[15] If the remainder is to a class, those of the class who are in being may represent the others and a sale may be ordered,[16] so also if there are successive classes and the first class entitled to the remainder is represented.[17] If the remainder is to a class, none of whom are in being, it has been held that such interest cannot be represented and that no sale can be ordered,[18] and the same has been held where the remainder was to such children of the life-tenant as might be surviving at his death, on the ground that until the event it could not be ascertained who would represent the class.[19] In other cases, however, it has been held that the sale might be ordered, notwithstanding none of the class first entitled to the remainder were in being.[20] Where the estate is vested in a trustee he may represent contingent remainder-men not in being and the court may order a sale.[21] In all cases the order of the court must provide for such an investment of the proceeds as will protect the rights of all persons who have or may subsequently acquire an interest therein.[22] A court of equity will not order a sale to satisfy an execution[23] or the claims of attaching creditors.[24]

3. Mortgage[25] by Remainder-Man. The owner of a vested remainder may mortgage his interest during the continuance of the preceding estate.[26] A contingent remainder, where the person to take is definitely ascertained, may also be mortgaged in those jurisdictions where such a remainder is held to be a possibility coupled with an interest;[27] and upon a breach of the condition of the mortgage the mortgagee may proceed to foreclose the same prior to the happening of the contingency upon which the remainder is to vest.[28]

Sale on application of life-tenant see *supra*, IV, H, 1, b.

13. Marsh *v.* Dellinger, 127 N. C. 360, 37 S. E. 494; Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477; Reed *v.* Alabama, etc., Iron Co., 107 Fed. 586. *Compare* Hoskins *v.* Ames, 78 Miss. 986, 29 So. 828.

14. Gavin *v.* Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; Ruggles *v.* Tyson, 104 Wis. 500, 81 N. W. 367, 48 L. R. A. 809.

15. See Springs *v.* Scott, 132 N. C. 548, 44 S. E. 116; Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477; and cases cited in the following notes.

16. *Ex p.* Yancey, 124 N. C. 151, 32 S. E. 491, 70 Am. St. Rep. 577; Irvin *v.* Clark, 98 N. C. 437, 4 S. E. 30; Reed *v.* Alabama, etc., Iron Co., 107 Fed. 586.

17. Springs *v.* Scott, 132 N. C. 548, 44 S. E. 116; *In re* Dodd, 62 N. C. 97. See also Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477.

18. Watson *v.* Watson, 56 N. C. 400. See also Long *v.* Long, 62 Md. 33; *In re* Dodd, 62 N. C. 97.

19. Hodges *v.* Lipscomb, 128 N. C. 57, 38 S. E. 281; Hutchinson *v.* Hutchinson, 126 N. C. 671, 36 S. E. 149; Justice *v.* Guion, 76 N. C. 442.

In the case of personal property a sale may be made where the remainder interest is represented by the executor. Drovers', etc., Nat. Bank *v.* Hughes, 83 Md. 355, 34 Atl. 1012.

20. Gavin *v.* Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477.

In North Carolina the question has now been settled by a recent statute which provides that a sale may be made where there is a contingent remainder to persons who are not in being, or where the contingency has not yet happened which will determine who the remainder-men are. Springs *v.* Scott, 132 N. C. 548, 44 S. E. 116.

21. Springs *v.* Scott, 132 N. C. 548, 44 S. E. 116; Overman *v.* Tate, 114 N. C. 571, 19 S. E. 706.

22. Springs *v.* Scott, 132 N. C. 548, 44 S. E. 116; Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477.

23. Wiley *v.* Bridgman, 1 Head (Tenn.) 68.

Remainder subject to sale under execution see Executions.

24. Armiger *v.* Reitz, 91 Md. 334, 46 Atl. 990.

25. Mortgage generally see Chattel Mortgages; Mortgages.

26. *In re* John, etc., Sts., 19 Wend. (N. Y.) 659; Andress' Estate, 14 Phila. (Pa.) 240.

27. Wilson *v.* Wilson, 32 Barb. (N. Y.) 328; People's Loan, etc., Bank *v.* Garlington, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

28. People's Loan, etc., Bank *v.* Garlington, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

G. Bar or Defeat of Contingent Remainder — **1. In General.** Since the remainder must have a preceding particular estate to support it,[29] and must vest during the continuance of this estate or *eo instanti* that it determines,[30] it follows that in the absence of any statutory provision,[31] or the interposition of a trustee to preserve the remainder,[32] if the particular estate determines or is defeated before the happening of the contingency upon which alone the remainder can vest, any contingent remainder dependent thereon will be defeated;[33] and it is immaterial whether the preceding estate is ended by reaching its natural limit or is terminated by the act of the tenant or by operation of law.[34] If the contingent remainder cannot take effect immediately on the first determination of the particular estate, it cannot vest afterward, although the particular estate should again come in being.[35]

2. By Natural Termination of Preceding Estate. If the preceding estate reaches its natural termination, as by the death of a life-tenant, before the event of the contingency upon which the contingent remainder is to vest, the remainder is defeated;[36] but if the preceding estate is in several persons, in common or in severalty, the remainder may fail as to one part and take effect as to another, since the particular tenant of one part may die before the contingency happens and the tenant of another part survive it.[37] Where the remainder is to a class of persons definitely described,[38] or to the survivors of a class,[39] only those persons answering the description who are in being when the contingency happens can take; and where none are in being answering such description at the happening of the contingency, the remainder is entirely defeated.[40]

3. By Alienation or Forfeiture. A contingent remainder may be barred by a tortious conveyance by the tenant of the preceding particular estate, as where he makes a conveyance of the estate by means of feoffment with livery of seizin,[41]

29. See *supra*, V, B, 1.

30. See *supra*, V, B, 4.

31. See *infra*, V, G, 7.

32. See *infra*, V, G, 6.

33. *Illinois.*— Madison *v.* Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356.

Pennsylvania.— McCay *v.* Clayton, 119 Pa. St. 133, 12 Atl. 860; Lyle *v.* Richards, 9 Serg. & R. 322.

South Carolina.— McElwee *v.* Wheeler, 10 S. C. 392.

Tennessee.— Ryan *v.* Monaghan, 99 Tenn. 338, 42 S. W. 144.

England.— Rhodes *v.* Whitehead, 2 Dr. & Sm. 532, 12 L. T. Rep. N. S. 601, 13 Wkly. Rep. 100; Purefoy *v.* Rogers, 2 Saund. 380.

See 42 Cent. Dig. tit. "Remainders," § 7.

See also 2 Blackstone Comm. 171; 4 Kent Comm. 253.

If the particular estate is altered in quantity of interest the remainder will be defeated, but not if the alteration is merely in quality. 4 Kent Comm. 253. See also Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322.

The destruction of the subject-matter of a contingent remainder in personal property before the happening of the contingency defeats the remainder, and the fact that the property has been sold by the preceding tenant gives the remainder-man no claim upon the proceeds where the destruction of the property was not the result of the sale. Herndon *v.* Pratt, 59 N. C. 327.

Where the remainder is limited upon two lives in being at the time of the grant it will not be defeated by the failure of an intermediate trust estate. King *v.* Whaley, 59 Barb. (N. Y.) 71.

An infant en ventre sa mere is to be deemed *in esse* for the purpose of taking a remainder. Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

34. Madison *v.* Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322.

35. Purefoy *v.* Rogers, 2 Saund. 380.

36. Irvine *v.* Newlin, 63 Miss. 192; Ryan *v.* Monaghan, 99 Tenn. 338, 42 S. W. 144; Price *v.* Hall, L. R. 5 Eq. 399, 37 L. J. Ch. 191, 16 Wkly. Rep. 642; Rhodes *v.* Whitehead, 2 Dr. & Sm. 532, 12 L. T. Rep. N. S. 601, 13 Wkly. Rep. 100; Festing *v.* Allen, 13 L. J. Exch. 74, 12 M. & W. 279.

37. Madison *v.* Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356.

38. Demill *v.* Reid, 71 Md. 175, 17 Atl. 1014, holding that where one of the class named dies before the happening of the contingency, his children do not take the share to which he would have been entitled had he survived the happening of the contingency.

39. Carson *v.* Kennerly, 8 Rich. Eq. (S. C.) 259; Rhodes *v.* Whitehead, 2 Dr. & Sm. 532, 12 L. T. Rep. N. S. 601, 13 Wkly. Rep. 100.

40. Ryan *v.* Monaghan, 99 Tenn. 338, 42 S. W. 144; Festing *v.* Allen, 13 L. J. Exch. 74, 12 M. & W. 279.

41. McElwee *v.* Wheeler, 10 S. C. 392; Faber *v.* Police, 10 S. C. 376; Redfern *v.* Middleton, Rice (S. C.) 459.

The South Carolina act of 1883 provides that no estate in remainder, whether vested

fine,[42] or common recovery;[43] but conveyances which derive their operation from the statute of uses, as a bargain and sale, lease and release, and the like, do not bar contingent remainders since they do not pass any greater estate than the grantor may lawfully convey.[44] The particular tenant may also forfeit his estate, and thus bar a contingent remainder by other means, as by the breach of a condition subsequent;[45] but any act of the tenant which merely gives the person having the next vested estate a right of entry, and does not *ipso facto* determine the estate, will not bar the contingent remainder unless advantage of the forfeiture be taken.[46]

4. By Merger.[47] A contingent remainder may be defeated by merger, where the preceding particular estate and the next vested estate of inheritance meet in the same person;[48] and if they meet only as to a part of the inheritance the remainder will be defeated *pro tanto*.[49] If the inheritance is given to the donee of the particular estate by the same instrument creating the contingent remainder, the estates will not merge so as to defeat such remainder;[50] but if by a subsequent conveyance, the contingent remainder will be defeated.[51] A further distinction is to be observed where the tenant of the particular estate takes the inheritance by descent.[52] If the descent is immediate from the person by whom the particular estate and the contingent remainder were created, there will be no merger,[53] unless after the descent the estates are conveyed to a third person;[54] but if the descent is not immediate the remainder will be defeated.[55]

5. By Sale Under Order of Court. In Pennsylvania it is provided by statute that contingent remainders may be barred by a sale under order of court,[56] but it must be alleged in the application that such is the purpose of the sale,[57] and all persons having a present interest in the property must be made parties.[58]

6. Trustees to Preserve Remainder. In order to prevent contingent remainders from being defeated by the premature determination or destruction of the preceding estate, a system was devised of interposing a trustee having a legal estate to support the remainder until the happening of the contingency upon which it could take effect.[59] This might be effected either by giving the trustee

or contingent, shall be defeated by any deed of feoffment with livery of seizin. People's Loan, etc., Bank *v.* Garlington, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

42. Roseboom *v.* Van Vechten, 5 Den. (N. Y.) 414; Doe *v.* Howell, 10 B. & C. 191, 8 L. J. K. B. O. S. 123, 5 M. & R. 24, 21 E. C. L. 89; Parker *v.* Carter, 4 Hare 400, 30 Eng. Ch. 400; Snell *v.* Silcock, 5 Ves. Jr. 469, 31 Eng. Reprint 687.

43. Waddell *v.* Rattew, 5 Rawle (Pa.) 231; Stump *v.* Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; Abbott *v.* Jenkins, 10 Serg. & R. (Pa.) 296; Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322; Doe *v.* Selby, 2 B. & C. 926, 4 D. & R. 608, 26 Rev. Rep. 585, 9 E. C. L. 398; Goodright *v.* Dunham, 1 Dougl. 264; Loddington *v.* Kime, 1 Salk. 224. See also Dunwoodie *v.* Reed, 3 Serg. & R. (Pa.) 435; Hoge *v.* Hoge, 1 Serg. & R. (Pa.) 144.

44. Dennett *v.* Dennett, 40 N. H. 498; 4 Kent Comm. 255; 2 Washburn Real Prop. (6th ed.) 253.

A mortgage by the life-tenant and sale under foreclosure in his lifetime will not bar a contingent remainder. Bentham *v.* Smith, Cheves Eq. (S. C.) 33, 34 Am. Dec. 599.

45. See Williams *v.* Angell, 7 R. I. 145; 2 Washburn Real Prop. (6th ed.) 552.

46. Williams *v.* Angell, 7 R. I. 145; 4 Kent Comm. 255.

47. **Merger** see, generally, *infra*, VII.

48. Craig *v.* Warner, 5 Mackey (D. C.) 460, 60 Am. Rep. 381; Jordan *v.* McClure, 85 Pa. St. 495; Bennett *v.* Morris, 5 Rawle (Pa.) 9; Egerton *v.* Massey, 3 C. B. N. S. 338, 91 E. C. L. 338; Purefoy *v.* Rogers, 2 Saund. 380.

49. Craig *v.* Warner, 5 Mackey (D. C.) 460, 60 Am. Rep. 381; Crump *v.* Norwood, 7 Taunt. 362, 2 E. C. L. 400.

50. Purefoy *v.* Rogers, 2 Saund. 380; Tiffany Real Prop. 297.

51. Jordan *v.* McClure, 85 Pa. St. 495. See also Purefoy *v.* Rogers, 2 Saund. 380.

52. Craig *v.* Warner, 5 Mackey (D. C.) 460, 60 Am. Rep. 381; Bennett *v.* Morris, 5 Rawle (Pa.) 9; 4 Kent Comm. 254; 2 Washburn Real Prop. (6th ed.) 553.

53. Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480; Plunket *v.* Holmes, 1 Lev. 11; Purefoy *v.* Rogers, 2 Saund. 380 note.

54. Bennett *v.* Morris, 5 Rawle (Pa.) 9; Tiffany Real Prop. 297.

55. Craig *v.* Warner, 5 Mackey (D. C.) 460, 60 Am. Rep. 381; Crump *v.* Norwood, 7 Taunt. 362, 2 E. C. L. 400. See also Purefoy *v.* Rogers, 2 Saund. 380 note.

56. Westhafer *v.* Koons, 144 Pa. St. 26, 22 Atl. 885.

57. Westhafer *v.* Koons, 144 Pa. St. 26, 22 Atl. 885; Smith *v.* Townsend, 32 Pa. St. 434.

58. Smith *v.* Townsend, 32 Pa. St. 434.

59. Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 9; Webster *v.* Gilman, 29 Fed. Cas. No. 17,335, 1 Story 499; Mansell *v.* Mansell, Cas. t. Talb. 252, 25 Eng. Reprint 763, 2

a vested remainder, or by conveying the estate directly to the trustee and his heirs in trust for the tenant of the particular estate, and upon the further trust to preserve the contingent remainder.[60] Limitations in trust to preserve contingent remainders were not executed by the statute of uses, the legal estate in such case remaining in the trustee.[61] The trustee might, by joining with the preceding tenant, defeat the remainder,[62] which ordinarily would constitute a breach of trust;[63] but under the particular circumstances of some cases it has been held not to be a breach of trust,[64] and courts of equity have even directed that he should do so.[65]

7. Statutory Provisions. The possibility of contingent remainders being defeated by the premature determination or destruction of the preceding estate is now very generally done away with by express statutory provision, both in England,[66] and in this country.[67] There are also statutes in some of the states providing that any estate may be created to commence *in futuro* without any preceding estate to support it,[68] and that no conveyance shall operate to pass more than the grantor can lawfully convey.[69]

H. Actions by Remainder-Man[70] — **1. Rights of Action — a. At Law.** A vested remainder-man may, during the continuance of the preceding estate, maintain an action for damages for any injury to his remainder interest.[71] A contingent remainder-man, having no vested interest, cannot maintain an action for damages in the nature of waste,[72] although he is entitled to have his contingent

P. Wms. 678, 24 Eng. Reprint 913; Pye *v.* George, 1 P. Wms. 128, 24 Eng. Reprint 323; Moody *v.* Walters, 16 Ves. Jr. 283, 33 Eng. Reprint 992; 2 Blackstone Comm. 171; 4 Kent Comm. 256.

60. Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 9; Moody *v.* Walters, 16 Ves. Jr. 283, 33 Eng. Reprint 992.

61. Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 9.

62. Mansell *v.* Mansell, Cas. t. Talb. 252, 25 Eng. Reprint 763, 2 P. Wms. 678, 24 Eng. Reprint 913; Else *v.* Osborn, 1 P. Wms. 387, 24 Eng. Reprint 437.

63. Else *v.* Osborn, 1 P. Wms. 387, 24 Eng. Reprint 437; Pye *v.* George, 1 P. Wms. 128, 24 Eng. Reprint 323.

If the purchaser takes with notice of the breach of trust he will hold the estate subject to the same trust. Mansell *v.* Mansell, Cas. t. Talb. 252, 25 Eng. Reprint 763, 2 P. Wms. 678, 24 Eng. Reprint 913.

64. Biscoe *v.* Perkins, 1 Ves. & B. 485, 35 Eng. Reprint 188; Moody *v.* Walters, 16 Ves. Jr. 283, 33 Eng. Reprint 992.

65. Winnington *v.* Foley, 1 P. Wms. 536, 24 Eng. Reprint 505; Basset *v.* Clapham, 1 P. Wms. 358, 24 Eng. Reprint 425; Platt *v.* Sprigg, 2 Vern. Ch. 303, 23 Eng. Reprint 796. See also Townsend *v.* Lawton, 2 P. Wms. 379, Sel. Cas. Ch. 71, 24 Eng. Reprint 775.

The court will not compel a trustee to join in a conveyance which will not only destroy contingent remainders but will also defeat the uses originally intended by the settlement. Symance *v.* Tattam, 1 Atk. 613, 26 Eng. Reprint 385.

66. St. 8 & 9 Vict. c. 106, § 8.

67. See the statutes of the different states; and Ritchie *v.* Ritchie, 171 Mass. 504, 51 N. E. 132; L'Etourneau *v.* Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; People's Loan, etc., Bank *v.* Garlington, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

For a collection of the various statutory provisions see 1 Stimson Am. St. L. § 1403; Tiffany Real Prop. 298; 2 Washburn Real Prop. (6th ed.) 554.

68. See 1 Stimson Am. St. L. § 1421; Tiffany Real Prop. 343.

69. See 1 Stimson Am. St. L. § 1402; Tiffany Real Prop. 295.

70. Remedies of remainder-man against preceding tenant for life see *supra*, IV, I.

71. Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338, 30 N. E. 1084; Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519. See also Robertson *v.* Rodes, 13 B. Mon. (Ky.) 325; Bogle *v.* North Carolina R. Co., 51 N. C. 419.

If the injury is of a permanent nature which would deteriorate the market value of the property in case the remainder-man should sell his interests therein, there is an injury to his estate for which he is entitled to sue. Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 579.

A sale of the entire interest in personal property by a stranger, during the continuance of the preceding estate, is an injury for which the remainder-man is entitled to sue. Arthur *v.* Gayle, 38 Ala. 259.

Where a life-tenant has allowed property to be sold through failure to pay the interest on an encumbrance, the fact that the remainder-man might have had a sequestrator appointed during the lifetime of the life-tenant, to apply the rents and income to this purpose, does not deprive him of the right to recover the damages sustained from the estate of the life-tenant after his death. Rowe *v.* Thomas, 8 Kulp (Pa.) 449.

72. Cannon *v.* Barry, 59 Miss. 289; Taylor *v.* Adams, 93 Mo. App. 277; Sager *v.* Galloway, 113 Pa. St. 500, 6 Atl. 209.

interest protected in equity.[73] Since a remainder-man has no present right to possession,[74] he cannot, during the continuance of the preceding estate, maintain an action for partition,[75] or an action of trespass to try title,[76] or a writ of entry against one rightfully in possession under the life-tenant.[77] A remainder-man cannot, even after the termination of the life-estate, maintain an action of trover for a conversion during the continuance of that estate.[78] Immediately on the death of the life-tenant the remainder-man's right of entry is complete and he may maintain an action to recover the property.[79] A remainder interest in personal property may be recovered either in an action on the case[80] or in an action of account.[81] Where personal property has been wrongfully sold by the life-tenant the remainder-man may, after the life-tenant's death, elect to proceed for the recovery of the property itself or for its value.[82]

b. In Equity. A remainder-man is entitled to equitable relief whenever necessary to protect his interest against loss or injury,[83] whether in the hands of the preceding tenant for life[84] or some other person.[85] And where the property is in the hands of a trustee any breach of trust or improper conduct on the part of the trustee is a ground for equitable relief,[86] and the remainder-man may maintain a suit for the appointment of a new trustee and for an accounting.[87] A remainder-man may also, during the continuance of the preceding estate, maintain a suit in equity to remove a cloud upon his title.[88] The rights of a contingent remainder-man are much more extensive in equity than at law, for, while he will not be

A statute providing that the person having the next immediate estate of inheritance may maintain an action of waste does not apply to a contingent remainder-man. Hunt *v.* Hall, 37 Me. 363.

73. See *infra*, V, H, 1, b.

74. See *supra*, V, E.

75. Wolfe's Estate, 15 Montg. Co. Rep. (Pa.) 128, 22 Pa. Co. Ct. 340.

76. Cook *v.* Caswell, 81 Tex. 678, 17 S. W. 385.

77. Sylvester *v.* Sylvester, 83 Me. 46, 21 Atl. 783.

78. For it is essential to the maintenance of the action that at the time of the alleged conversion he should have a present right of possession. Nations *v.* Hawkins, 11 Ala. 859; Cole *v.* Robinson, 23 N. C. 541; Lewis *v.* Mobley, 20 N. C. 467, 34 Am. Dec. 379; Graham *v.* Penham, 1 Brev. (S. C.) 399.

During the continuance of the life-estate a remainder-man cannot, although in possession, maintain an action of trover against a wrong-doer for the conversion of personal property. Barwick *v.* Barwick, 33 N. C. 80.

79. Beckham *v.* Maples, 95 Ga. 773, 22 S. E. 894; Covar *v.* Cantelou, 25 S. C. 35.

Either a formedon in remainder or a writ of entry may be maintained to recover possession of land after the termination of the preceding estate. Wells *v.* Prince, 4 Mass. 64.

80. Taber *v.* Packwood, 2 Day (Conn.) 52.

81. Griggs *v.* Dodge, 2 Day (Conn.) 28, 2 Am. Dec. 82.

82. Cross *v.* Cross, 4 Gratt. (Va.) 257.

83. Gibson *v.* Jayne, 37 Miss. 164; Murphy *v.* Whitney, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123 [*affirming* 69 Hun 573, 23 N. Y. Suppl. 1134].

A trespass upon the rights of the life-tenant gives the remainder-man no right to equitable relief, unless the trespass in some way endangers the remainder interest. Land *v.* Cowan, 19 Ala. 297.

84. See *supra*, IV, I, 3.

85. Sanderson *v.* Jones, 6 Fla. 430, 63 Am. Dec. 217; Shipp *v.* McLean, (Tenn. Ch. App. 1899) 54 S. W. 669; Robinson *v.* Day, 5 Gratt. (Va.) 55.

The fact that personal property is in the possession of a person other than the tenant for life is no ground for equitable relief, where it is not alleged that he holds the property otherwise than in subordination to the true title. Land *v.* Cowan, 19 Ala. 297.

86. Haydel *v.* Hurck, 5 Mo. App. 267; Hunter *v.* Hunter, 58 S. C. 382, 36 S. E. 734, 79 Am. St. Rep. 845; Sedgwick *v.* Taylor, 84 Va. 820, 6 S. E. 226.

Where a trust deed has been set aside under a decree fraudulently obtained, the remainder-man may maintain a bill to have the property restored to the original trust. Wright *v.* Miller, 1 Sandf. Ch. (N. Y.) 103.

If the trustee is already under a valid and sufficient bond to protect the remainder interest, the remainder-man is not entitled to any other relief. Terry *v.* Allen, 60 Conn. 530, 23 Atl. 150.

The remainder-man cannot, during the continuance of the life-estate, sue on the trustee's bond to recover any part of the amount wasted, although he could proceed in equity to compel the trustee to bring the money into court to be invested. State *v.* Brown, 64 Md. 97, 1 Atl. 410.

87. Haydel *v.* Hurck, 5 Mo. App. 267.

88. Watson *v.* Adams, 103 Ga. 733, 30 S. E. 577; Wiley *v.* Bird, 108 Tenn. 168, 66 S. W. 43; Aiken *v.* Suttle, 4 Lea (Tenn.) 103.

Under the Missouri statute of 1897 a remainder-man, either vested or contingent, may maintain an action against any person claiming any interest in the property, to determine

allowed to recover damages for that which may not be his,[89] he should be allowed to prevent the destruction of that which may become his.[90]

2. LIMITATION AND LACHES.[91] The statute of limitations does not begin to run against the right of a remainder-man to recover his remainder interest or establish his title to the same until after the determination of the preceding particular estate;[92] nor is he guilty of laches in failing to assert his claim before his right to the possession of the property accrues.[93] But this rule as to actions of a possessory nature does not apply to actions for injuries which the remainder-man may maintain during the continuance of the preceding particular estate,[94] or to actions which he is expressly authorized by statute to bring during this period;[95] nor does

the interests of the parties therein. Utter *v.* Sidman, 170 Mo. 284, 70 S. W. 702.

89. See *supra*, V, H, 1, a.

90. Taylor *v.* Adams, 93 Mo. App. 277. See also Cannon *v.* Barry, 59 Miss. 289.

91. Limitation generally see LIMITATION OF ACTIONS.

Laches generally see EQUITY.

92. *Alabama.*— Findley *v.* Hill, 133 Ala. 229, 32 So. 497; Pickett *v.* Pope, 74 Ala. 122.

Arkansas.— Morrow *v.* James, 69 Ark. 539, 64 S. W. 269.

Georgia.— Augusta *v.* Radcliffe, 66 Ga. 469.

Illinois.— Turner *v.* Hause, 199 Ill. 464, 65 N. E. 445.

Indiana.— Chambers *v.* Chambers, 139 Ind. 111, 38 N. E. 334.

Iowa.— Bottorff *v.* Lewis, 121 Iowa 27, 95 N. W. 262.

Kentucky.— Jeffries *v.* Butler, 108 Ky. 531, 56 N. W. 979, 22 Ky. L. Rep. 226; Hamilton *v.* Hamilton, 29 S. W. 876, 16 Ky. L. Rep. 793; Mays *v.* Hannal, 4 Ky. L. Rep. 50.

Maryland.— Long *v.* Long, 62 Md. 33.

Massachusetts.— Jewett *v.* Jewett, 10 Gray 31.

Mississippi.— Hoskins *v.* Ames, 78 Miss. 986, 29 So. 828; Gibson *v.* Jayne, 37 Miss. 164.

Missouri.— Graham *v.* Stafford, 171 Mo. 692, 72 S. W. 507.

New York.— Gilbert *v.* Taylor, 148 N. Y. 298, 42 N. E. 713 [*modifying* 76 Hun 92, 27 N. Y. Suppl. 828]; Matson *v.* Abbey, 141 N. Y. 179, 36 N. E. 11 [*affirming* 70 Hun 475, 24 N. Y. Suppl. 284]; Snow *v.* Monk, 81 N. Y. App. Div. 206, 80 N. Y. Suppl. 719; Bennett *v.* Garlock, 10 Hun 328; Fogal *v.* Pirro, 17 Abb. Pr. 113.

North Carolina.— Hallyburton *v.* Slagle, 130 N. C. 482, 41 S. E. 877; Wooten *v.* Wilmington, etc., R. Co., 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298; McMillan *v.* Baker, 85 N. C. 291.

Rhode Island.— Watson *v.* Thompson, 12 R. I. 466.

South Carolina.— Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209; Moseley *v.* Hankinson, 25 S. C. 519; McCreary *v.* Burns, 17 S. C. 45; Walker *v.* Fraser, 7 Rich. Eq. 230.

Tennessee.— Aiken *v.* Suttle, 4 Lea 103; Cook *v.* Collier, (Ch. App. 1901) 62 S. W. 658; Ewin *v.* Lindsay, (Ch. App. 1900) 58 S. W. 388.

Virginia.— Hope *v.* Norfolk, etc., R. Co., 79 Va. 283; Pettyjohn *v.* Woodroof, 77 Va. 507.

See 42 Cent. Dig. tit. "Remainders," § 16.

A remainder-man, during the continuance of a preceding life-estate, is under "legal disability" within the meaning of the proviso of a statute allowing a person under legal disability to maintain an action for the recovery of land within five years after the removal of such disability. Jewett *v.* Jewett, 10 Gray (Mass.) 31.

Where a life-tenant wrongfully conveys land in fee limitations do not run against the remainder-man until the life-tenant's death. Griffin *v.* Thomas, 128 N. C. 310, 38 S. E. 903; Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209.

Where land is partitioned among several life-tenants who thereafter occupy the different parts in severalty, the statute of limitations as to each tract begins to run from the death of the life-tenant to whom the particular tract was allotted, and is not postponed until the death of the last surviving life-tenant. Peterson *v.* Jackson, 196 Ill. 40, 63 N. E. 643.

A remainder-man who was not a party to an action of ejectment brought by a landlord against the life-tenant to recover possession of property for the non-payment of rent is not within the provision of the statute limiting the tenant's right to redeem by paying the rent in arrears to six months after the landlord has been placed in possession. Sand *v.* Church, 152 N. Y. 174, 46 N. E. 609 [*reversing* 31 N. Y. Suppl. 1133].

93. *Illinois.*— Turner *v.* Hause, 199 Ill. 464, 65 N. E. 445.

Mississippi.— Gibson *v.* Jayne, 37 Miss. 164.

Missouri.— Graham *v.* Stafford, 171 Mo. 692, 72 S. W. 507.

Tennessee.— Aiken *v.* Suttle, 4 Lea 103.

Virginia.— Pettyjohn *v.* Woodroof, 77 Va. 507.

See 42 Cent. Dig. tit. "Remainders," § 16.

This rule does not apply to cases where the remainder-man has a present beneficial interest in addition to his interest in remainder, and in such a case a bill to set aside a deed executed by a trustee of the estate will be barred where there has been an unreasonable delay on the part of the remainder-man in asserting his claim to the property. McCoy *v.* Poor, 56 Md. 197.

94. Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338, 30 N. E. 1084.

95. Murray *v.* Quigley, (Iowa 1902) 92 N. W. 869, holding that under the Iowa stat-

the rule apply to possessory actions where the entire estate is granted to a trustee, who holds the legal title in fee for the benefit of both the particular estate and the estate in remainder, in which case if the trustee's right of action is barred the *cestuis que trustent* in remainder are barred also.[96] The failure of a remainder-man to enter or otherwise enforce a forfeiture incurred by a preceding life-tenant until the right to do so is barred merely confirms the existing life-estate and does not affect his subsequently accruing right upon the death of the life-tenant,[97] and the same rule applies in cases where the life-tenant refuses to accept the devise.[98]

3. PARTIES.[99] In an action by a remainder-man, after the termination of the preceding estate, to recover his remainder interest in the hands of an adverse claimant, it is not necessary that the personal representative of the testator,[1] or of the preceding tenant,[2] should be made a party. Where personal property has been wrongfully disposed of by the preceding tenant and a remainder-man sues to recover his interest in the proceeds, all of the remainder-men interested in the fund must be made parties,[3] but any remainder-men who joined in the sale, and thereby divested themselves of their interest in the property, need not be joined.[4] Several remainder-men may maintain a joint action against a personal representative of a preceding life-tenant to recover rents collected by him which accrued after the termination of the life-estate.[5] A bill for the sequestration of personal property to prevent its removal from the state, which does not seek a final adjudication of the rights of the parties, but only to have the property secured, may be maintained by one remainder-man without making another, who is tenant in common with him, a party.[6]

4. PLEADINGS.[7] In an action to recover a remainder interest it is not necessary to aver a grant of administration on the estate of the testator,[8] nor need every article sought to be recovered be specifically described.[9] In a suit in equity to protect the remainder from loss or injury every fact essential to the relief which plaintiff seeks must be averred in the bill, and no relief can be granted for matters not alleged, although they may appear from other parts of the pleadings and evidence.[10]

5. EVIDENCE.[11] On a writ of entry by a remainder-man the entry of the remainder-man or some person for him or holding under him must be proved;[12] and in an action of ejectment the evidence must show that the preceding life-tenant was dead at the time the action was commenced.[13] In an action of trover against a purchaser from the life-tenant proof of a demand and refusal is evidence not only of a conversion at the time of the demand, but it authorizes a jury to presume a conversion from the time the remainder-man's right to possession accrued.[14]

6. VARIANCE. In an action by a remainder-man for an injury to his estate, the fact that it is misnamed as a reversion instead of a remainder is immaterial.[15]

ute the right to maintain an action to quiet title, involving the vacating of a patent, may be barred during the continuance of the life-estate.

96. Edwards *v.* Woolfolk, 17 B. Mon. (Ky.) 376; King *v.* Rhew, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 76; Herndon *v.* Pratt, 59 N. C. 327.

97. Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Reese *v.* Holmes, 5 Rich. Eq. (S. C.) 531.

98. Wells *v.* Prince, 9 Mass. 508.

99. Parties generally see PARTIES.

1. Bufford *v.* Holliman, 10 Tex. 560, 60 Am. Dec. 223.

2. Sanderford *v.* Moore, 54 N. C. 206.

3. Hunter *v.* Yarborough, 92 N. C. 68.

4. Stuart *v.* Swanzy, 12 Sm. & M. (Miss.) 684.

5. Marshall *v.* Moseley, 21 N. Y. 280.

6. Brantly *v.* Kee, 58 N. C. 332.

7. Pleading generally see EQUITY; PLEADING.

8. Bufford *v.* Holliman, 10 Tex. 560, 60 Am. Dec. 223.

9. Taber *v.* Packwood, 2 Day (Conn.) 52, holding that a description of the property as being "money and other articles of personal property" of a certain value is sufficient.

10. Land *v.* Cowan, 19 Ala. 297.

11. Evidence generally see EVIDENCE.

12. Wells *v.* Prince, 4 Mass. 64.

13. Laster *v.* Blackwell, 133 Ala. 337, 32 So. 166.

14. Talbird *v.* Baynard, 2 Hill (S. C.) 597.

15. Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A.

7. Damages. The remainder-man can recover only for the injury done to the estate in remainder and not for any injury to the preceding estate.[16]

VI. REVERSIONS.

A. Definition and Nature. An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.[17] It is a present vested estate, although to take effect in possession and profit *in futuro*,[18] and necessarily assumes that the original owner has not parted with his whole estate or interest in the land.[19]

B. Creation. A reversion is never created by deed or writing but arises by construction and operation of law,[20] and occurs wherever a grantor has conveyed less than his whole interest or estate.[21]

C. Incidents. The usual incidents to reversions at common law were fealty

519, holding that since the distinction refers only to the manner of derivation of title, each meaning an estate after the termination of a particular estate, a failure to discriminate in this form of action is immaterial.

Where a particular right of action is expressly given by statute to a "reversioner" it will not be held to include a remainder-man. Symons *v.* Leaker, 15 Q. B. D. 629, 49 J. P. 775, 54 L. J. Q. B. 480, 53 L. T. Rep. N. S. 227, 33 Wkly. Rep. 875.

16. Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

The damage to the remainder by the construction of a railroad is ascertained by taking the damage to the fee and apportioning it between the life-tenant and remainder-man, according to the annuity tables. Thompson *v.* Manhattan R. Co., 8 N. Y. Suppl. 641.

17. 2 Blackstone Comm. 175 [*quoted* in Alexander *v.* De Kermel, 5 Ky. L. Rep. 382, 385 (*affirming* 4 Ky. L. Rep. 142); Barber *v.* Brundage, 50 N. Y. App. Div. 123, 125, 63 N. Y. Suppl. 347; Powell *v.* Dayton, etc., R. Co., 16 Oreg. 33, 38, 16 Pac. 863, 8 Am. St. Rep. 251].

A reversion is otherwise defined as: "The return of an estate to the grantor and his heirs, after the grant is over." Booth *v.* Terrell, 16 Ga. 20, 25; 4 Kent Comm. 353.

"What remains to the owner of an estate after he has parted with a portion of it, the possession of what thus remains being to return or revert to him upon the termination of the period for which the portion so parted with was to be enjoyed." 2 Washburn Real Prop. (6th ed.) 496 [*quoted* in De Kermel *v.* Alexander, 4 Ky. L. Rep. 142, 145].

"The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate." Todd *v.* Jackson, 26 N. J. L. 525, 540.

"The residue of an estate left to the grantor or his heirs commencing in possession on the determination of a particular estate granted or devised." Wood *v.* Taylor, 9 Misc. (N. Y.) 640, 646, 30 N. Y. Suppl. 433.

"Where the residue of the estate always doth continue in him that made the particular estate or where the particular estate is derived out of his estate." Coke Litt. 22*b* [*quoted* in Alexander *v.* De Kermel, 5 Ky. L. Rep. 382, 385 (*affirming* 4 Ky. L. Rep. 142)].

"The Estate left in the Lessor or Donor, where he has given or parted with the Possession to another." Wrotesley *v.* Adams, 1 Plowd. 187, 196.

"The residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised." Livingston *v.* New York L. Ins., etc., Co., 13 N. Y. Suppl. 105, 107; Payn *v.* Beal, 4 Den. (N. Y.) 405, 411.

The term "reversion" has two significations: first, as designating the estate left in the grantor during the continuance of a particular estate; and second, the returning of the land to the grantor or his heirs after the grant is over. Powell *v.* Dayton, etc., R. Co., 16 Oreg. 33, 16 Pac. 863, 8 Am. St. Rep. 251; Wrotesley *v.* Adams, 1 Plowd. 187.

A possibility of reverter, as in the case of a qualified or conditional fee, is not a reversion. Hopper *v.* Barnes, 113 Cal. 636, 45 Pac. 874; Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650; 4 Kent Comm. 353.

18. Wingate *v.* James, 121 Ind. 69, 22 N. E. 735; Barber *v.* Brundage, 50 N. Y. App. Div. 123, 63 N. Y. Suppl. 347; Payn *v.* Beal, 4 Den. (N. Y.) 405; 4 Kent Comm. 354.

19. Wood *v.* Taylor, 9 Misc. (N. Y.) 640, 30 N. Y. Suppl. 433; Payn *v.* Beal, 4 Den. (N. Y.) 405; 4 Kent Comm. 353.

20. Alexander *v.* De Kermel, 5 Ky. L. Rep. 382 [*affirming* 4 Ky. L. Rep. 142]; 2 Blackstone Comm. 175; 4 Kent Comm. 354.

At common law, if a remainder were limited to the heirs of the grantor, it took effect as a reversion, and it would be competent for the grantor as being himself the reversioner, after making such a limitation, to grant away the reversion. 2 Washburn Real Prop. (6th ed.) 503 [*quoted* in Akers *v.* Clark, 184 Ill. 136, 137, 56 N. E. 296, 75 Am. St. Rep. 152; Alexander *v.* De Kermel, 5 Ky. L. Rep. 382, 387 (*affirming* 4 Ky. L. Rep. 142)].

A loan of personal property for life, with a stipulation that, on the death of the borrower, it shall return to the lender or his heirs, does not create a reversion. Booth *v.* Terrell, 16 Ga. 20.

21. Wingate *v.* James, 121 Ind. 69, 22 N. E. 735.

and rent.[22] The former, in the feudal sense, does not exist in this country.[23] Rent is an incident to the reversion, although not inseparably so.[24] The rent may be granted away, reserving the reversion,[25] or the reversion may be granted away reserving the rent by special words.[26] By a general grant of the reversion the rent will pass with it as an incident to it,[27] and the rule is the same where the assignment of the reversion is by mortgage instead of by an absolute conveyance;[28] but a general grant of the rent will not pass the reversion.[29] Rent which is due and in arrears at the time of the assignment of the reversion does not pass as an incident thereto.[30] A reversion is devisable, descendible, and alienable in the same manner as an estate in possession.[31]

D. Rights and Liabilities of Reversioner. A reversioner has no right of possession during the continuance of the preceding estate and is liable for trespass on the land in the same manner as any other person;[32] but upon the termination of such estate he is entitled to the immediate possession of the premises, notwithstanding any lease previously executed by the preceding tenant.[33] If the owner of a precedent life-estate is disseized, the reversioner is not obliged to enter at once, but has a new right of entry upon the death of the life-tenant.[34] A reversioner cannot, during the continuance of a life-estate, authorize the cutting of timber on the estate.[35] A reversioner is entitled to the benefit of any increase in value in the property before the termination of the preceding estate.[36]

E. Conveyance by Reversioner.[37] A reversion is a vested estate which the reversioner may convey absolutely by deed.[38]

22. 2 Blackstone Comm. 176; 4 Kent Comm. 355.

23. 4 Kent Comm. 355.

24. McMurphy *v.* Minot, 4 N. H. 251; Demarest *v.* Willard, 8 Cow. (N. Y.) 206; Johnston *v.* Smith, 3 Penr. & W. (Pa.) 496, 24 Am. Dec. 339; 2 Blackstone Comm. 176; 4 Kent Comm. 356.

25. Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

26. 2 Blackstone Comm. 176; 4 Kent Comm. 356. See also Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

27. Burden *v.* Thayer, 3 Metc. (Mass.) 76, 37 Am. Dec. 117; Kimball *v.* Pike, 18 N. H. 419; York *v.* Jones, 2 N. H. 454; Johnston *v.* Smith, 3 Penr. & W. (Pa.) 496, 24 Am. Dec. 339; 2 Blackstone Comm. 176.

It is not necessary that the rent should be payable in money for it to be incident to the reversion. Johnston *v.* Smith, 3 Penr. & W. (Pa.) 496, 24 Am. Dec. 339.

The devisee of a reversionary interest is entitled to the rents as an incident thereto. Lewis *v.* Wilkins, 62 N. C. 303.

28. Burden *v.* Thayer, 3 Metc. (Mass.) 76, 37 Am. Dec. 117; Kimball *v.* Pike, 18 N. H. 419; Birch *v.* Wright, 1 T. R. 378, 1 Rev. Rep. 228.

29. Demarest *v.* Willard, 8 Cow. (N. Y.) 206; 2 Blackstone Comm. 176.

30. Burden *v.* Thayer, 3 Metc. (Mass.) 76, 37 Am. Dec. 117.

31. Barber *v.* Brundage, 50 N. Y. App. Div. 123, 63 N. Y. Suppl. 347.

Conveyance by reversioner see *infra*, VI, E.

Devise of reversion see WILLS.

32. Lane *v.* Thompson, 43 N. H. 320; Anderson *v.* Nesmith, 7 N. H. 167.

Where there is a suit pending between the reversioner and another concerning a question of waste or improvements, he has a right to go upon the premises in a peaceable manner, with his witnesses, for the purpose of examining the same. Conwell *v.* State, 3 Ind. 387, 56 Am. Dec. 512.

33. Guthmann *v.* Vallery, 51 Nebr. 824, 71 N. W. 734, 66 Am. St. Rep. 475.

Termination of lease upon death of life-tenant see *supra*, IV, H, 2.

34. Tilson *v.* Thompson, 10 Pick. (Mass.) 359; Wallingford *v.* Hearl, 15 Mass. 471; Jackson *v.* Mancius, 2 Wend. (N. Y.) 357.

35. Simpson *v.* Bowden, 33 Me. 549.

36. Haulenbeck *v.* Cronkright, 23 N. J. Eq. 407.

37. Conveyance generally see DEEDS.

38. Fowler *v.* Griffin, 3 Sandf. (N. Y.) 385; Livingston *v.* New York L. Ins., etc., Co., 13 N. Y. Suppl. 105; Doe *v.* Cole, 7 B. & C. 243, 6 L. J. K. B. O. S. 20, 1 M. & R. 33, 14 E. C. L. 115. See also Akers *v.* Clark, 184 Ill. 136, 56 N. E. 296, 75 Am. St. Rep. 152.

A reversion lies in grant and was conveyed at common law without livery of seizin. Doe *v.* Cole, 7 B. & C. 243, 6 L. J. K. B. O. S. 20, 1 M. & R. 33, 14 E. C. L. 115.

A grant of the reversion passes all rights reserved to the grantor in the grant of the preceding particular estate. Burnside *v.* Weightman, 9 Watts (Pa.) 46.

A conveyance by a reversioner immediately after becoming of age will not be set aside for mere inadequacy of price, where no fraud or imposition on the part of the purchaser is shown and there is no confidential relation between the parties. Cribbins *v.* Markwood, 13 Gratt. (Va.) 495, 67 Am. Dec. 775.

When rent passes as incident to a reversion on conveyance thereof see *supra*, VI, C.

F. Actions — 1. **Rights of Action**[39] — a. **At Law.** A reversioner may, during the continuance of the preceding estate, maintain an action for any injury done to the inheritance,[40] but not for an injury which affects only the preceding estate and not the reversionary interest.[41] If an injury to the possession is of such a character that without further interference by the act of man it would in the ordinary course of things continue to be so after the determination of the particular estate, the reversioner has a right of action on the ground that it might by lapse of time ripen into a right injurious to the inheritance,[42] but this rule is restricted to cases of nuisances of a fixed and permanent nature, the necessary effect of which is the injury complained of.[43] An action of case is the proper form of proceeding for an injury to an interest in reversion.[44] An action of trespass cannot be maintained by a reversioner who is not in possession of the premises,[45] unless authorized by statute.[46]

b. In Equity. A reversioner may maintain a suit in equity to prevent a threatened injury to his rights,[47] or to establish his claim, and to be placed in a condition to make it available whenever he shall become entitled to the possession of the estate.[48]

2. **Parties.**[49] In an action by a reversioner for an injury done to the inherit-

39. Remedies against tenant for life of preceding estate see *supra*, IV, I.

40. *Connecticut.*— Randall *v.* Cleaveland, 6 Conn. 328.

Massachusetts.— Ashley *v.* Ashley, 4 Gray 197; Putney *v.* Lapham, 10 Cush. 232.

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320.

New Jersey.— Tinsman *v.* Belvidere Delaware R. Co., 25 N. J. L. 255, 64 Am. Dec. 415.

New York.— Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Smith *v.* Felt, 50 Barb. 612.

England.— Tucker *v.* Newman, 11 A. & E. 40, 39 E. C. L. 46; Jesser *v.* Gifford, 4 Burr. 2141.

See 42 Cent. Dig. tit. "Reversions," § 9.

The owner of a reversionary interest in personal property may sue for an injury thereto during the continuance of a preceding life-estate. Harvey *v.* Skipwith, 16 Gratt. (Va.) 393.

The fact that the injury complained of is also an injury to the tenant of the preceding estate does not affect the reversioner's right of action. Tinsman *v.* Belvidere Delaware R. Co., 25 N. J. L. 255, 64 Am. Dec. 415.

The fact that there is an intermediate life-estate will not prevent the reversioner from maintaining an action against the tenant in possession for an injury to the inheritance. Short *v.* Piper, 4 Harr. (Del.) 181; Van Deusen *v.* Young, 29 N. Y. 9.

A possibility that the cause of the injury may be removed before the termination of the particular estate does not affect the reversioner's right of action. Tinsman *v.* Belvidere Delaware R. Co., 25 N. J. L. 255, 64 Am. Dec. 415; Jesser *v.* Gifford, 4 Burr. 2141.

The fact that it is the duty of the life-tenant to protect the inheritance and that he might sue for an act of waste committed by a third person does not affect the reversioner's right of action for such injury. Learned *v.* Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621.

Washing sand, etc., into a mill-pond, filling it up, and diminishing its capacity to hold water is an injury for which the reversioner has a right of action. Beavers *v.* Trimmer, 25 N. J. L. 97.

A sale of the entire interest in personal property by the tenant of the particular estate, or by a stranger, is an injury to the reversion for which the reversioner may maintain an action on the case. Williams *v.* Brassell, 51 Ala. 397.

41. Sparhawk *v.* Bagg, 16 Gray (Mass.) 583; Lane *v.* Thompson, 43 N. H. 320; Beavers *v.* Trimmer, 25 N. J. L. 97; Baxter *v.* Taylor, 4 B. & Ad. 72, 2 L. J. K. B. 65, 1 N. & M. 14, 24 E. C. L. 41.

A simple trespass, even when accompanied with a claim of right, is not necessarily injurious to the reversionary estate. Baxter *v.* Taylor, 4 B. & Ad. 72, 2 L. J. K. B. 65, 1 N. & M. 14, 24 E. C. L. 41.

42. Tinsman *v.* Belvidere Delaware R. Co., 25 N. J. L. 255, 64 Am. Dec. 415; Beavers *v.* Trimmer, 25 N. J. L. 97. See also Bower *v.* Hill, 1 Bing. N. Cas. 549, 27 E. C. L. 759.

43. Beavers *v.* Trimmer, 25 N. J. L. 97.

44. Frankenthal *v.* Meyer, 55 Ill. App. 405. Case generally see Case, Action on.

45. Shattuck *v.* Gragg, 23 Pick. (Mass.) 88; Lane *v.* Thompson, 43 N. H. 320.

46. Van Deusen *v.* Young, 29 N. Y. 9; Mortimer *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 509, 8 N. Y. Suppl. 536 [*affirmed* in 129 N. Y. 81, 29 N. E. 5]; Livingston *v.* Mott, 2 Wend. (N. Y.) 605.

Trespass generally see Trespass.

A statute authorizing an action of trespass by a reversioner against a stranger does not authorize such an action where the act complained of was done under the authority, or by the permission of, the tenant in possession. Livingston *v.* Mott, 2 Wend. (N. Y.) 605.

47. Phelan *v.* Boylan, 25 Wis. 679.

48. Simmons *v.* McKay, 5 Bush (Ky.) 25.

49. Parties generally see Parties.

ance it is not necessary for the owner of the preceding particular estate to be made a party.[50] One of two reversioners may maintain an action for an injury to the inheritance without joining the other, unless the non-joinder is pleaded in abatement; and under the general issue, evidence of such non-joinder will not defeat the action, but will merely restrict plaintiff to the recovery of a moiety of the damage.[51]

3. PLEADING.[52] The declaration must either state an injury of such a permanent nature as to be necessarily injurious to the reversion, or must explicitly allege that it was done to the injury of the reversion.[53] The declaration should not be argumentative or contain a statement of the proof.[54] It is sufficient if it sets up an injury of such a permanent nature as to be necessarily injurious to the reversion,[55] but a mere allegation of injury to the reversion, without facts showing an injury of this character, is insufficient.[56] Under a statute providing that personal property shall be forfeited to the reversioner upon its removal out of the state by a tenant in dower, without the reversioner's consent, the declaration must allege that the removal was without such consent.[57]

4. EVIDENCE.[58] The evidence must be confined strictly to the damage done to the inheritance,[59] and the proof must establish that the injury complained of is prejudicial to the reversionary interest and not merely to the estate in possession.[60]

5. LIMITATIONS AND LACHES.[61] The statute of limitations does not run against a reversioner until the determination of the preceding particular estate,[62] nor can any laches in asserting his claim to the property be imputed to him until after his right of entry accrues.[63]

6. QUESTIONS OF LAW AND FACT. Whether the injury complained of is an injury to the reversion or merely to the possessory interest is a question of fact for the jury.[64]

7. DAMAGES. The reversioner can recover damages only for the injury done to the inheritance and not for any injury to the preceding estate.[65]

50. Van Deusen *v.* Young, 29 N. Y. 9.

51. Putney *v.* Lapham, 10 Cush. (Mass.) 232.

52. Pleading generally see PLEADING.

53. Chicago *v.* McDonough, 112 Ill. 85; Proffitt *v.* Henderson, 29 Mo. 325; Van Hoozer *v.* Van Hoozer, 18 Mo. App. 19; Tinsman *v.* Belvidere Delaware R. Co., 25 N. J. L. 255, 64 Am. Dec. 415; Baxter *v.* Taylor, 4 B. & Ad. 72, 2 L. J. K. B. 65, 1 N. & M. 14, 24 E. C. L. 41; Jackson *v.* Pesked, 1 M. & S. 234, 14 Rev. Rep. 417.

54. Van Hoozer *v.* Van Hoozer, 18 Mo. App. 19.

55. Chicago *v.* McDonough, 112 Ill. 85; Proffitt *v.* Henderson, 29 Mo. 325.

56. Beavers *v.* Trimmer, 25 N. J. L. 97.

57. Hicks *v.* Calvit, 5 Mart. (La.) 691.

58. Evidence generally see EVIDENCE.

59. Van Deusen *v.* Young, 29 N. Y. 9.

60. Tinsman *v.* Belvidere Delaware R. Co., 25 N. J. L. 255, 64 Am. Dec. 415.

61. Limitation generally see LIMITATIONS OF ACTIONS.

Laches generally see LACHES.

62. *Illinois.*— Orthwein *v.* Thomas, 127 Ill. 554, 13 N. E. 564, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434.

Kentucky.— Williams *v.* McClanahan, 3 Metc. 420; Betty *v.* Moore, 1 Dana 235.

Maine.— Poor *v.* Larrabee, 58 Me. 543.

Missouri.— Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578.

New York.— Randall *v.* Raab, 2 Abb. Pr. 307.

North Carolina.— Childers *v.* Bumgarner, 53 N. C. 297.

Tennessee.— Carver *v.* Maxwell, 110 Tenn. 75, 71 S. W. 752.

See 42 Cent. Dig. tit. "Reversions," § 11.

If the person in possession does not claim under the tenant of the particular estate, but under contracts with the reversioners, the statute of limitation begins to run against the right of the reversioners to recover the land from the date of their respective contracts, and is not postponed until the death of the life-tenant. Tucker *v.* Price, 29 S. W. 857, 17 Ky. L. Rep. 11.

63. Orthwein *v.* Thomas, 127 Ill. 554, 13 N. E. 564, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434.

64. Tucker *v.* Newman, 11 A. & E. 40, 39 E. C. L. 46; Young *v.* Spencer, 10 B. & C. 145, 8 L. J. K. B. O. S. 106, 5 M. & R. 47, 21 E. C. L. 70.

65. Ven Deusen *v.* Young, 29 N. Y. 9; Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

In an action by a reversioner for wrongfully mining and removing coal from the land, he may recover not only the value of the coal taken but also compensation for any damage done to the land or to the coal left in the mine. The measure of damages as to the coal removed is the value of the coal when

VII. MERGER OF ESTATES.[66]

A. Rule Stated. Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or in the law phrase it is said to be merged, that is, sunk or drowned in the greater.[67] The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person.[68] A greater estate can never be merged into a smaller, and if either perishes by the merger it must be the smaller estate;[69] but a portion of a particular estate may be merged without the residue; the merger being coextensive with the interest merged and extending only to the part in which the owner has two several estates.[70] The estate in which the merger takes place is not enlarged by the accession of the preceding estate; it continues precisely of the same quality and extent of ownership as before, and the lesser estate is extinguished.[71]

B. Application of Rule at Law and in Equity. At law, the rule that whenever a greater estate and a less coincide in the same person without any intermediate estate the lesser is merged, is invariable and inflexible.[72] In equity, the rules of law as to merger are not followed,[73] and the doctrine of merger is not favored.[74] Equity will prevent or permit a merger as will best subserve the pur-

first severed from its native bed, without deducting the expense of severing it. Franklin Coal Co. *v.* McMillan, 49 Md. 549, 33 Am. Rep. 280.

66. Merger of annuity in superior estate see ANNUITIES, 2 Cyc. 463.

Merger of easements in dominant estate see EASEMENTS, 14 Cyc. 1188.

Merger of mortgage interest in the fee see ADMIRALTY, 1 Cyc. 897 note 15. And see, generally, MORTGAGES.

Merger of right to ground-rent see GROUND-RENTS.

Merger of tenancy in the fee see LANDLORD AND TENANT.

Merger of trust estate see TRUSTS.

67. 2 Blackstone Comm. 177 [*quoted* in Shelton *v.* Hadlock, 62 Conn. 143, 155, 25 Atl. 483; Allen *v.* Anderson, 44 Ind. 395, 398; Holcomb *v.* Lake, 24 N. J. L. 686, 693; Aiken *v.* Milwaukee, etc., R. Co., 37 Wis. 469, 477]. To the same effect see Harrison *v.* Moore, 64 Conn. 344, 30 Atl. 55; Jackson *v.* Roberts, 1 Wend. (N. Y.) 478; Youmans *v.* Wagener, 30 S. C. 302, 9 S. E. 106, 3 L. R. A. 447; Boykin *v.* Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; Mangum *v.* Piester, 16 S. C. 316; Little *v.* Bowen, 76 Va. 724.

Merger is defined as: "The annihilation of one estate in another." Boykin *v.* Ancrum, 28 S. C. 486, 495, 6 S. E. 305, 13 Am. St. Rep. 698; Little *v.* Bowen, 76 Va. 724, 727; Garland *v.* Pamplin, 32 Gratt. (Va.) 305, 315.

"The annihilation by act of law of the less in the greater of two vested estates, meeting without any intervening estate, in the same person, in the same right." Cary *v.* Warner, 63 Me. 571, 574; Johnson *v.* Johnson, 7 Allen (Mass.) 196, 198, 83 Am. Dec. 676.

"When a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate." Bassett *v.* O'Brien, 149 Mo. 381, 389, 51 S. W. 107; James *v.* Morey, 2 Cow. (N. Y.) 246, 300, 14 Am. Dec. 475.

A mining claim is merged in the greater estate conveyed by the issuance of a patent. Black *v.* Elkhorn Min. Co., 49 Fed. 549.

Where land which had been set apart as a homestead is afterward set apart to a widow as a year's support, the homestead is merged in the latter estate. Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767.

The term "merger" is applicable to rights other than such as exist in land. Clift *v.* White, 12 N. Y. 519 [*reversing* 15 Barb. 70].

68. Boykin *v.* Ancrum, 28 S. C. 486, 496, 6 S. E. 305, 13 Am. St. Rep. 698 [*quoting* 4 Kent Comm. 100].

69. Collamer *v.* Kelley, 12 Iowa 319.

70. Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; 4 Kent Comm. 100.

71. 4 Kent Comm. 99.

72. *Alabama.*— Welsh *v.* Phillis, 54 Ala. 309, 25 Am. Rep. 679.

California.— Rumpp *v.* Gerkens, 59 Cal. 496.

New York.— Jackson *v.* Roberts, 1 Wend. 478; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475.

Wisconsin.—Aiken *v.* Milwaukee, etc., R. Co., 37 Wis. 469.

England.— Ingle *v.* Jenkins, [1900] 2 Ch. 368, 69 L. J. Ch. 618, 83 L. T. Rep. N. S. 155, 48 Wkly. Rep. 684.

See 19 Cent. Dig. tit. "Estates," §§ 9, 10.

73. Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268; Rumpp *v.* Gerkens, 59 Cal. 496; Forbes *v.* Moffatt, 18 Ves. Jr. 384, 11 Rev. Rep. 222, 34 Eng. Reprint 362.

74. Smith *v.* Roberts, 91 N. Y. 470 [*affirming* 62 How. Pr. 196]; Watson *v.* Dundee

poses of justice and the actual and just intent of the parties.[75] Wherever a merger would operate inequitably it will be prevented.[76] The controlling consideration is the intention, expressed or implied, of the person in whom the estates unite,[77] provided the intention be just and fair,[78] and a merger will not be permitted contrary to such intent.[79] Where there is no expression of intention equity will presume such an intent as is consistent with the best interests of the party;[80] and the same presumption is indulged where the party is an infant,[81] or person of

Mfg., etc., Co., 12 Oreg. 474, 8 Pac. 548; *In re* Hartzell, 188 Pa. St. 384, 41 Atl. 879; Dougherty *v.* Jack, 5 Watts (Pa.) 456, 30 Am. Dec. 335.

Merger in equity is never allowed unless for special reasons and to promote the intention of the parties. 4 Kent Comm. 102 [*quoted* in McLaughlin *v.* McLaughlin, 80 Md. 115, 117, 30 Atl. 607; Bell *v.* Woodward, 34 N. H. 90; Clos *v.* Boppe, 23 N. J. Eq. 270, 271; Mechanics' Bank *v.* Edwards, 1 Barb. (N. Y.) 271, 277].

75. *California.*— Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268.

Connecticut — Donalds *v.* Plumb, 8 Conn. 447.

Mississippi.— Lewis *v.* Starke, 10 Sm. & M. 120.

Nebraska.— Peterborough Sav. Bank *v.* Pierce, 54 Nebr. 712, 75 N. W. 20.

New Jersey.—Andrus *v.* Vreeland, 29 N. J. Eq. 394.

New York — Sheldon *v.* Edwards, 35 N. Y. 279; Mechanics' Bank *v.* Edwards, 1 Barb. 271; Starr *v.* Ellis, 6 Johns. Ch. 393.

Tennessee.— Copeland *v.* Burkett, (Ch. App. 1897) 45 S. W. 533.

See 19 Cent. Dig. tit. "Estates," §§ 9, 10.

Application of rule to particular estates see *infra*, VII, D, 1, 2, 4.

76. *New Hampshire.*— Bell *v.* Woodward, 34 N. H. 90.

New Jersey.— Clos *v.* Boppe, 23 N. J. Eq. 270.

New York.— Smith *v.* Roberts, 91 N. Y. 470 [*affirming* 62 How. Pr. 196].

Ohio.— Moore *v.* Moore, 6 Ohio S. & C. Pl. Dec. 154.

Pennsylvania.— *In re* Hartzell, 188 Pa. St. 384, 41 Atl. 879; Wallace *v.* Blair, 1 Grant 75; Dougherty *v.* Jack, 5 Watts 456, 30 Am. Dec. 335; Butler's Estate, 14 Pa. Co. Ct. 667.

Tennessee.—Copeland *v.* Burkett, (Ch. App. 1897) 45 S. W. 533.

England.— Brandon *v.* Brandon, 31 L. J. Ch. 47, 5 L. T. Rep. N. S. 339, 9 Wkly. Rep. 825.

See 19 Cent. Dig. tit. "Estates," §§ 9, 10.

Where the interests of a creditor would be prejudiced equity will not permit a merger of the two estates. Mechanics' Bank *v.* Edwards, 1 Barb. (N. Y.) 271; Wallace *v.* Blair, 1 Grant (Pa.) 75.

Whenever the rights of strangers, not parties to the act that would otherwise work an extinguishment of the particular estate, require it, a merger will be prevented. Moore *v.* Luce, 29 Pa. St. 260, 72 Am. Dec. 629.

77. *Illinois.*— Campbell *v.* Carter, 14 Ill. 286.

Missouri.— Hayden *v.* Lauffenburger, 157 Mo. 88, 57 S. W. 721; Bassett *v.* O'Brien, 149 Mo. 381, 51 S. W. 107.

New York.— Clift *v.* White, 12 N. Y. 519 [*reversing* 15 Barb. 70]; Mechanics' Bank *v.* Edwards, 1 Barb. 271; Jackson *v.* Roberts, 1 Wend. 478; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475.

Wisconsin.—Aiken *v.* Milwaukee, etc., R. Co., 37 Wis. 469.

England.— Ingle *v.* Jenkins, [1900] 2 Ch. 368, 69 L. J. Ch. 618, 83 L. T. Rep. N. S. 155, 48 Wkly. Rep. 684; Forbes *v.* Moffatt, 18 Ves. Jr. 384, 11 Rev. Rep. 222, 34 Eng. Reprint 362.

See 19 Cent. Dig. tit. "Estates," §§ 9, 10.

78. Clift *v.* White, 12 N. Y. 519 [*reversing* 15 Barb. 70]; Starr *v.* Ellis, 6 Johns. Ch. (N. Y.) 393.

79. *Illinois.*— Cole *v.* Beale, 89 Ill. App. 426.

Minnesota.— Davis *v.* Pierce, 10 Minn. 376; Wilcox *v.* Davis, 4 Minn. 197.

New Jersey.—Andrus *v.* Vreeland, 29 N. J. Eq. 394; Clos *v.* Boppe, 23 N. J. Eq. 270.

New York.— Smith *v.* Roberts, 91 N. Y. 470 [*affirming* 62 How. Pr. 196]; Binsse *v.* Paige, 1 Abb. Dec. 138, 1 Keyes 87.

Virginia.— Garland *v.* Pamplin, 32 Gratt. 305.

England.— Snow *v.* Boycott, [1892] 3 Ch. 110, 61 L. J. Ch. 591, 66 L. T. Rep. N. S. 762, 40 Wkly. Rep. 603.

See 19 Cent. Dig. tit. "Estates," §§ 9, 10.

80. *California.*— Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268.

Minnesota.— Davis *v.* Pierce, 10 Minn. 376.

Missouri.— Hospes *v.* Almstedt, 83 Mo. 473 [*affirming* 13 Mo. App. 270].

New York.— Smith *v.* Roberts, 91 N. Y. 470 [*affirming* 62 How. Pr. 196]; Sheldon *v.* Edwards, 35 N. Y. 279; Clift *v.* White, 12 N. Y. 519 [*reversing* 15 Barb. 70]; Smith *v.* Holbrook, Sheld. 474.

Oregon.— Watson *v.* Dundee Mortg., etc., Invest. Co., 12 Oreg. 474, 8 Pac. 548.

Pennsylvania.— *In re* Hartzell, 188 Pa. St. 384, 41 Atl. 879; Wagner *v.* Wenrich, 1 Woodw. 35.

Texas.— Cole *v.* Grigsby, (Civ. App. 1894) 35 S. W. 680.

England.— Ingle *v.* Jenkins, [1900] 2 Ch. 368, 69 L. J. Ch. 618, 83 L. T. Rep. N. S. 155, 48 Wkly. Rep. 684; Forbes *v.* Moffatt, 18 Ves. Jr. 384, 11 Rev. Rep. 222, 34 Eng. Reprint 362.

See 19 Cent. Dig. tit. "Estates," §§ 9, 10.

81. Cole *v.* Grigsby, (Tex. Civ. App. 1894) 35 S. W. 680. See also Thomas *v.* Kemish,

unsound mind.[82] The intent of the party does not become fixed and unchangeable until someone acquires an interest in the property giving a right to draw such intent in question.[83]

C. Conditions Essential to Merger. In order that there may be a merger it is essential that there should be at least two distinct estates,[84] and that these estates should meet in the same person,[85] at the same time,[86] and without any intervening estate.[87] It is also laid down by some authorities that the estates must be held in the same right,[88] but while this is true where one estate is an accession to the other merely by operation of law, there may be a merger of two estates held in different rights which meet in the same person by act of the parties.[89] Where the greater estate is held by a fraudulent conveyance which is set aside, the lesser estate will not be merged.[90]

D. Merger of Particular Estates — 1. LIFE-ESTATES. Whenever a particular estate for life and the next vested estate in remainder or reversion expectant thereon meet in the same person the former estate is merged,[91] provided the

Freem. 207, 22 Eng. Reprint 1163, 2 Vern. Ch. 348, 23 Eng. Reprint 821.

82. Compton *v.* Oxenden, 4 Bro. Ch. 397, 29 Eng. Reprint 954, 2 Ves. Jr. 261, 30 Eng. Reprint 624.

83. Smith *v.* Roberts, 91 N. Y. 470 [*affirming* 62 How. Pr. 196].

84. Sheldon *v.* Edwards, 35 N. Y. 279; Clift *v.* White, 12 N. Y. 519 [*reversing* 15 Barb. 70]; Asch *v.* Asch, 18 Abb. N. Cas. (N. Y.) 82; Doe *v.* Walker, 5 B. & C. 111, 7 D. & R. 487, 4 L. J. K. B. O. S. 93, 29 Rev. Rep. 184, 11 E. C. L. 389.

A fee conditional cannot merge in the possibility of reverter, since when a fee conditional is granted the whole estate is in the tenant, and the possibility of reverter is not an estate. Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265.

85. *Missouri.*— Hospes *v.* Almstedt, 13 Mo. App. 270.

New York.— Bascom *v.* Smith, 34 N. Y. 320; Reed *v.* Latson, 15 Barb. 9.

Pennsylvania.— Wallace *v.* Blair, 1 Grant 75.

Virginia.— Garland *v.* Pamplin, 32 Gratt. 305.

West Virginia.— Kanawha Valley Bank *v.* Wilson, 29 W. Va. 645, 2 S. E. 768.

Wisconsin.—Aiken *v.* Milwaukee, etc., R. Co., 37 Wis. 469.

See 19 Cent. Dig. tit. "Estates," § 9.

86. See Little *v.* Bowen, 76 Va. 724; Garland *v.* Pamplin, 32 Gratt. (Va.) 305.

87. Johnson *v.* Johnson, 7 Allen (Mass.) 196, 83 Am. Dec. 676; Bassett *v.* O'Brien, 149 Mo. 381, 51 S. W. 107; Miller *v.* Talley, 48 Mo. 503; Wead *v.* Gray, 8 Mo. App. 515; Logan *v.* Green, 39 N. C. 370; Watson *v.* Dundee Mortg., etc., Invest. Co., 12 Oreg. 474, 8 Pac. 548.

An equitable estate will not merge in a legal estate if some other interest has intervened prior to the vesting of the legal title. Morgan *v.* Hammett, 34 Wis. 512.

Where the beneficiary for life of a trust fund purchases the interest of the remainderman there is no merger which will divest the legal title of the trustee during the life of the *cestui que trust.* Matter of Lewis, 3 Misc. (N. Y.) 164, 23 N. Y. Suppl. 287.

88. Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68; Little *v.* Bowen, 76 Va. 724; Garland *v.* Pamplin, 32 Gratt. (Va.) 305; *In re* Radcliffe, [1892] 1 Ch. 227, 61 L. J. Ch. 186, 66 L. T. Rep. N. S. 363, 40 Wkly. Rep. 323; 2 Blackstone Comm. 177.

The life-estate of a wife will not merge into the remainder which is held by the husband and wife by entirety. Bomar *v.* Mullins, 4 Rich. Eq. (S. C.) 80.

Where a man owns the life-estate in his own right and the remainder in the right of his wife the estates will not merge. Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68.

89. Clift *v.* White, 12 N. Y. 519 [*reversing* 15 Barb. 70]; 4 Kent Comm. 101; 1 Washburn Real Prop. (6th ed.) 457.

90. Humes *v.* Scruggs, 64 Ala. 40; Richardson *v.* Wyman, 62 Me. 280, 16 Am. Rep. 459; Malony *v.* Horan, 12 Abb. Pr. N. S. (N. Y.) 289.

Where the conveyance of a legal title is set aside as being in fraud of creditors it will not be allowed to merge and destroy an equitable interest which the grantee has in the same property. Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335 [*reversing* 53 Barb. 29, 36 How. Pr. 260]; Jackson *v.* Roberts, 1 Wend. (N. Y.) 478.

91. *Connecticut.*— Harrison *v.* Moore, 64 Conn. 344, 30 Atl. 55; Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483.

Georgia.— Wilder *v.* Holland, 102 Ga. 44, 29 S. E. 134.

Illinois.— Field *v.* Peeples, 180 Ill. 376, 54 N. E. 304; Talcott *v.* Draper, 61 Ill. 56.

Indiana.— Allen *v.* Anderson, 44 Ind. 395.

Kentucky.— Fox *v.* Long, 8 Bush 551.

Maine.— Cary *v.* Warner, 63 Me. 571.

Massachusetts.— Pynchon *v.* Stearns, 11 Metc. 304, 312, 45 Am. Dec. 207, 210.

There would be an absolute incompatibility in a person filling at the same time the characters of tenant and reversioner in one and the same estate. 4 Kent Comm. 99 [*quoted* in Fox *v.* Long, 8 Bush (Ky.) 551, 555].

estate in remainder or reversion is as large as the preceding estate.[92] If the owner of a life-estate acquires the fee to only a portion of the remainder there will be a merger *pro tanto*,[93] but the life-estate in the remainder of the property will not be affected.[94] An estate *pur autre vie* may merge in an estate for the tenant's own life,[95] as well as in the remainder or reversion in fee.[96] In equity the merger will be prevented whenever necessary to protect the rights of an innocent third party,[97] or of the person in whom the estates meet.[98]

2. Estates For Years. An estate for years will merge in the remainder or reversion in fee,[99] or in another estate for years or an estate for life.[1] A particular estate for years will merge in a reversionary term for years, although it may be for a longer period than the reversion,[2] and any term of years, however long, will merge in an estate for life.[3] A legal title for a term of years will not be merged where the title to the reversion is merely equitable.[4] Equity will prevent the merger of an estate for years, if necessary to protect the interests of the person in whom the estates meet.[5]

3. Equitable Estates. Whenever the legal and equitable estates in the same land become united in the same person the equitable is merged in the legal estate,[6] unless it is the intention of the party in whom they unite,[7] or manifestly to his

92. Boykin *v.* Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; 4 Kent Comm. 101.

93. Harrison *v.* Moore, 64 Conn. 344, 30 Atl. 55; Fox *v.* Long, 8 Bush (Ky.) 551. See, generally, *supra*, VII, A.

94. Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157.

95. Boykin *v.* Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; 4 Kent Comm. 100.

96. Mangum *v.* Piester, 16 S. C. 316.

97. Moore *v.* Luce, 29 Pa. St. 260, 72 Am. Dec. 629; Butler's Estate, 14 Pa. Co. Ct. 667.

98. Cole *v.* Grigsby, (Tex. Civ. App. 1894) 35 S. W. 680.

99. Otis *v.* McMillan, 70 Ala. 46; Haps *v.* Hewitt, 97 Ill. 498; Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354; Logan *v.* Green, 39 N. C. 370; 2 Blackstone Comm. 177; 4 Kent Comm. 100.

The same person cannot be both landlord and tenant at the same time with respect to the same property. Fox *v.* Long, 8 Bush (Ky.) 551, 555 [*quoting* Taylor Landl. & Ten. 364].

1. 4 Kent Comm. 100. See also Boykin *v.* Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698.

Where the terms are not concurrent but successive, as where one is a lease to commence *in futuro*, there will be no merger. Doe *v.* Walker, 5 B. & C. 111, 7 D. & R. 487, 4 L. J. K. B. O. S. 93, 29 Rev. Rep. 184, 11 E. C. L. 389.

2. Stephens *v.* Bridges, 6 Madd. 66, 22 Rev. Rep. 242; Tiffany Real Prop. 133; 1 Washburn Real Prop. (6th ed.) 458.

If the expectant estate for years is a remainder instead of a reversion, the first term will not merge in the remainder, but the person in whom they unite may have the benefit of both terms in succession. 1 Washburn Real Prop. (6th ed.) 458.

3. Tiffany Real Prop. 133 [*citing* 3 Preston Conv. 220].

4. Litle *v.* Ott, 15 Fed. Cas. No. 8,389, 3 Cranch C. C. 416.

5. Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268.

6. *Alabama.*— Welsh *v.* Phillips, 54 Ala. 309, 25 Am. Rep. 679.

Illinois.— Camphell *v.* Carter, 14 Ill. 286.

Maryland.— Bennett *v.* Baltimore M. E. Church, 66 Md. 36, 5 Atl. 291.

Mississippi.— Lewis *v.* Starke, 10 Sm. & M. 120.

New Hampshire.— Hopkinson *v.* Dumas, 42 N. H. 296; Hutchins *v.* Carleton, 19 N. H. 487.

New Jersey.— Wills *v.* Cooper, 25 N. J. L. 137; Whyte *v.* Arthur, 17 N. J. Eq. 521.

New York.— James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475.

United States.—Robison *v.* Codman, 20 Fed. Cas. No. 11,970, 1 Sumn. 121.

England.— Wade *v.* Paget, 1 Bro. Ch. 363, 28 Eng. Reprint 1180, 1 Cox Ch. 74, 29 Eng. Reprint 1069; *In re* Douglas, 28 Ch. 327, 54 L. J. Ch. 421, 52 L. T. Rep. N. S. 131, 33 Wkly. Rep. 390; Selby *v.* Alston, 3 Ves. Jr. 339, 4 Rev. Rep. 10, 30 Eng. Reprint 1042.

See 19 Cent. Dig. tit. "Estates," § 10.

A man cannot be trustee for himself, and consequently, as soon as a trust estate and the legal title unite in the same person, the trust estate is merged and lost. Hopkinson *v.* Dumas, 42 N. H. 296; Wills *v.* Cooper, 25 N. J. L. 137; Goodright *v.* Wells, 1 Dougl. (3d ed.) 771.

Where a widow, prior to an assignment of dower, joins with the heirs in a conveyance purporting to pass the entire estate, her equitable interest is merged in the estate conveyed by the heirs, and she cannot thereafter claim an assignment of dower in the land. Reeves *v.* Brooks, 80 Ala. 26.

Merger or extinguishment of mortgage, of equity of redemption, and of mortgage debt see Mortgages.

7. *Massachusetts.*— Earle *v.* Washburn, 7 Allen 85.

interest,[8] or essential to the ends of justice,[9] that the estates should be kept separate.[10] But there can be no merger of a legal in an equitable estate so as to extinguish the legal title.[11] It is essential to the merger of an equitable in a legal estate that the two estates should be coextensive and commensurate.[12]

4. DOWER. Where a widow becomes the owner in fee of land in which she has a dower right, the dower right is merged in the fee,[13] except where it is manifestly to her interest that the two titles should be kept distinct.[14]

5. ESTATES TAIL. An estate tail is an exception to the rule of merger, and a man may have in his own right both an estate tail and a reversion in fee.[15]

EST BONI JUDICIS AMPLIARE JURISDICTIONEM.[1] A maxim meaning "It is the part of a good judge to extend the jurisdiction." [2]

EST BONI JUDICIS AMPLIARE JUSTICIAM, NON JURISDICTIONEM. A maxim meaning "It is the duty of a good judge to amplify, extend justice, not jurisdiction or authority." [3]

ESTIMATE.[4] As a noun, a valuing or rating by the mind, without actually measuring, weighing, or the like; rough or approximate calculation;[5] an approxi-

Minnesota.— Wilcox *v.* Davis, 4 Minn. 197.
New Hampshire.— Bell *v.* Woodward, 34 N. H. 90.
New Jersey.— Andrus *v.* Vreeland, 29 N. J. Eq. 394; Clos *v.* Boppe, 23 N. J. Eq. 270.
New York.— Sheldon *v.* Edwards, 35 N. Y. 279; Bascom *v.* Smith, 34 N. Y. 320; Champney *v.* Coope, 32 N. Y. 543; Binsse *v.* Paige, 1 Abb. Dec. 138, 1 Keyes 87; Millard *v.* McMullin, 5 Hun 572.
Pennsylvania.— Campbell's Appeal, 36 Pa. St. 247, 78 Am. Dec. 375.
Wisconsin.— Aiken *v.* Milwaukee, etc., R. Co., 37 Wis. 469.
See 19 Cent. Dig. tit. "Estates," § 10.

8. *Connecticut.*— Donalds *v.* Plumb, 8 Conn. 447; Lockwood *v.* Sturdevant, 6 Conn. 373.
Minnesota.— Davis *v.* Pierce, 10 Minn. 376.
Missouri.— Bassett *v.* O'Brien, 149 Mo. 381, 51 S. W. 107; Hospes *v.* Almstedt, 83 Mo. 473 [*affirming* 13 Mo. App. 270].
New York.— James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475.
Oregon.— Watson *v.* Dundee Mortg., etc., Invest. Co., 12 Oreg. 474, 8 Pac. 548.
See 19 Cent. Dig. tit. "Estates," § 10.

9. Earle *v.* Washburn, 7 Allen (Mass.) 95; Bell *v.* Woodward, 34 N. H. 90; Andrus *v.* Vreeland, 29 N. J. Eq. 394; Clos *v.* Boppe, 23 N. J. Eq. 270.

10. See, generally, *supra*, VII, B.

11. Bassett *v.* O'Brien, 149 Mo. 381, 51 S. W. 107; Hopkinson *v.* Dumas, 42 N. H. 296; Litle *v.* Ott, 15 Fed. Cas. No. 8,389, 3 Cranch C. C. 416.

12. *Connecticut.*— Donalds *v.* Plumb, 8 Conn. 447.
Massachusetts.— Hildreth *v.* Eliot, 8 Pick. 293.
New Jersey.— Wills *v.* Cooper, 25 N. J. L. 137.
New York.— Millard *v.* McMullin, 5 Hun 572.
England.— Brydges *v.* Brydges, 3 Ves. Jr. 120, 30 Eng. Reprint 926.
See 19 Cent. Dig. tit. "Estates," § 10.

13. Kreamer *v.* Fleming, 191 Pa. St. 534, 43 Atl. 388; Youmans *v.* Wagener, 30 S. C. 302, 9 S. E. 106, 3 L. R. A. 447.
This doctrine is applied to the inchoate right of dower prior to the death of the husband (Youmans *v.* Wagener, 30 S. C. 302, 9 S. E. 106, 3 L. R. A. 447), notwithstanding this right is not an estate so that technically the doctrine of merger would not apply (Davis *v.* Townsend, 32 S. C. 112, 10 S. E. 837).
Where the fee is conveyed to a trustee for the use of the wife, and upon such conditions as to make it necessary that the legal estate should remain in him, the dower right will not be merged. Davis *v.* Townsend, 32 S. C. 112, 10 S. E. 837.

14. McLeery *v.* McLeery, 65 Me. 172, 20 Am. Rep. 683; Wettlaufer *v.* Ames, 133 Mich. 201, 94 N. W. 950; Fink's Appeal, 130 Pa. St. 256, 18 Atl. 621.

15. Holcomb *v.* Lake, 24 N. J. L. 686; Roe *v.* Baldwere, 5 T. R. 104, 2 Rev. Rep. 550; 2 Blackstone Comm. 177.

1. **Lord Coke's maxim.**— Taylor *v.* Rightmire, 8 Leigh (Va.) 468, 471.

2. Adams Gloss.
Applied in Edmiston *v.* Edmiston, 2 Ohio 251, 253; Taylor *v.* Rightmire, 8 Leigh (Va.) 468, 471; Hesketh *v.* Ward, 17 U. C. C. P. 667, 692; Collins *v.* Blantern, 2 Wils. C. P. 347, 350. See also Russell *v.* Smyth, 1 Dowl. P. C. N. S. 929, 936, 11 L. J. Exch. 308, 9 M. & W. 810.

3. Adams Gloss.
Applied in People *v.* Judges Dutchess Oyer, etc., 2 Barb. (N. Y.) 282, 287.

4. **Context and subject-matter control.**— "The sense in which this word is used, the particular idea intended to be expressed by its use, must be determined by the subject-matter under consideration, together with the context of the instrument." People *v.* Clark, 37 Hun (N. Y.) 201, 203.

5. Webster Int. Dict. [*quoted* in McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99].

mate judgment or opinion as to weight, magnitude, cost and the like; a calculation without measuring or weighing;[6] measure,[7] an accurate calculation or measurement.[8] As a verb, to judge and form an opinion of the value, from imperfect data; to fix the worth of roughly or in a general way, to form an opinion of, as to amount, number, etc., from imperfect data, comparison, or experience; to make an estimate of; to rate;[9] to calculate roughly;[10] to form an opinion as to amount from imperfect data;[11] to fix the amount of the damages, or the value of the thing to be ascertained; to assess.[12] (Estimate: By Architect, Engineer, etc., see BUILDERS AND ARCHITECTS.)

ESTIMATED. Computed.[13]

ESTIMATION. COUNTENANCE,[14] *q. v.*

When properly and correctly used, in oral communications or written instruments, it is a word selected to express the mind or judgment of the speaker or writer on the particular subject under consideration. It implies a computation or calculation. Webster Dict. [*cited* in People *v.* Clark, 37 Hun (N. Y.) 201, 203].

6. Webster Dict. [*quoted* in Shipman *v.* State, 43 Wis. 381, 389].

7. Galloway *v.* Week, 54 Wis. 604, 606, 12 N. W. 10.

8. Herrick *v.* Belknap, 27 Vt. 673, 688. And see Heald *v.* Cooper, 8 Me. 32, 34.

"Estimate of the damage to the owner" see Monterey County *v.* Cushing, 83 Cal. 507, 514, 23 Pac. 700.

"Estimate of value," as applied to fire insurance, means an opinion of the value of the property in question made by the applicant for a policy (Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 522, 18 Pac. 758, 9 Am. St. Rep. 216 [*citing* 1 Wood Ins. § 325]); as used in a statute in regard to a homestead, means "something existing in the mind of a person, of which certainty can not assuredly be predicated; for nothing is more uncertain or more variable than an estimate of value" (Ham *v.* Santa Rosa Bank, 62 Cal. 125, 136, 45 Am. Rep. 654). *Compare In re* Hurlbalt, 57 L. J. Ch. 421, 423.

9. Webster Int. Dict. [*quoted* in McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99].

10. Louisville, etc., R. Co. *v.* Chandler, 72 S. W. 805, 24 Ky. L. Rep. 2035; Webster Dict. [*quoted* in McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99].

11. Louisville, etc., R. Co. *v.* Chandler, 72 S. W. 805, 24 Ky. L. Rep. 2035.

12. Roddy *v.* McGetrick, 49 Ala. 159, 162 [*citing* Webster Unabr. Dict.].

13. Tully *v.* Felton, 177 Pa. St. 344, 356, 36 Atl. 285.

"Estimated capacity," as applied to a railway car, is "the supposed or probable capacity of the car" (Louisville, etc., R. Co. *v.* Chandler, 72 S. W. 805, 24 Ky. L. Rep. 2035); as applied to an irrigation canal, is the ability of a canal to supply water, based on its physical capacity, and the probability of obtaining water from the stream supplying it under normal conditions during the season of irrigation (Blakely *v.* Ft. Lyon Canal Co., 31 Colo. 224, 239, 73 Pac. 249 [*citing* La Junta, etc., Canal Co. *v.* Hess, 6 Colo. App. 497, 42 Pac. 50]. See also Wyatt *v.* Larimer, etc., Irr. Co., 18 Colo. 298, 313, 33 Pac. 144, 36 Am. St. Rep. 280, 23 Colo. 480, 48 Pac. 528).

"Estimated cash value," as applied to an insurance policy, refers to the "estimated cash value at the time the insurance was effected." Elliott *v.* Lycoming County Mut. Ins. Co., 66 Pa. St. 22, 26, 5 Am. Rep. 323.

"Estimated cost," in a building contract, means "the reasonable cost." Lambert *v.* Sanford, 55 Conn. 437, 443, 12 Atl. 519.

"Estimated damages," as used in the law of contracts, means "liquidated damages." Gallo *v.* McAndrews, 29 Fed. 715.

14. See 11 Cyc. 298.

ESTOPPEL *

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I. ESTOPPEL IN GENERAL.

A. Terminology — 1. "ESTOPPEL." In the broad sense of the term "estoppel" is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais*.[1]

1. See Williams *v.* Supreme Council A. L. of H., 80 N. Y. App. Div. 402, 80 N. Y. Suppl. 713.

Other definitions are: "A preclusion in law which prevents a man alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor." Coogler *v.* Rogers, 25 Fla. 853, 873, 7 So. 391 [*quoting* Stephen Pl. 239]; Davis *v.* Collier, 13 Ga. 485, 491 [*citing* Coke Litt. 352*a*; Stephen Pl. 196]; Gavin *v.* Graydon, 41 Ind. 559, 566 [*quoting* Bouvier L. Dict.]; Reid *v.* Benge, 112 Ky. 810, 814, 66 S. W. 997, 23 Ky. L. Rep. 2202, 99 Am. St. Rep. 334, 57 L. R. A. 253 [*quoting* Stephen Pl.]; Stuyvesant *v.* Grissler, 12 Abb. Pr. N. S. (N. Y.) 6, 18 [*citing* Bouvier L. Dict.]

"An admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies." Sly *v.* Hunt, 159 Mass. 151, 153, 34 N. E. 187, 38 Am. St. Rep. 403, 21 L. R. A. 680.

"The conclusive ascertainment of a fact by the parties, so that it no longer can be controverted between them." Wilkins *v.* Suttles, 114 N. C. 550, 556, 19 S. E. 606; Woodhouse *v.* Williams, 14 N. C. 508, 509.

"The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part, or on the part of those under whom he claims." Bouvier L. Dict. [*quoted* in Coogler *v.* Rogers, 25 Fla. 853, 873, 7 So. 391; Reid *v.* Benge, 112 Ky. 810, 814, 66 S. W. 997, 23 Ky. L. Rep. 2202, 99 Am. St. Rep. 334, 57 L. R. A. 253].

"A fictitious statement treated as true." General Finance, etc., Co. *v.* Liberator Permanent Ben. Bldg. Soc., 10 Ch. D. 15, 39 L. T. Rep. N. S. 600, 27 Wkly. Rep. 210.

"A restraint, or impediment, imposed, by the policy of the law, to preclude a party from averring the truth." Gibson *v.* Gibson, 15 Mass. 106, 110, 8 Am. Dec. 94.

"The conclusion of the truth." Moore *v.* Willis, 9 N. C. 555, 558.

An estoppel arises: Where a man "has done some act which the policy of the law will not permit him to gainsay or deny." Greenleaf Ev. c. 4 [*quoted* in South *v.* Deaton, 113 Ky. 312, 320, 68 S. W. 137, 1105, 25 Ky. L. Rep. 196, 533]. See also Davis *v.* O'Farrall, 4 Greene (Iowa) 358, 363.

"Where a man hath done some act, or executed some deed, which estops or precludes him from averring anything to the contrary." 3 Blackstone Comm. 308 [*quoted* in Grant *v.* Savannah, etc., R. Co., 51 Ga. 348, 355; Davis *v.* O'Ferrall, 4 Greene (Iowa) 358, 363; Reid *v.* Benge, 112 Ky. 810, 815, 66 S. W. 997, 22 Ky. L. Rep. 2202, 99 Am. St. Rep. 334, 57 L. R. A. 253; Haynes *v.* Stevens, 11 N. H. 28, 31; Stuyvesant *v.* Grissler, 12 Abb. Pr. N. S. (N. Y.) 6, 18; Ensel *v.* Levy, 46 Ohio St. 255, 259, 19 N. E. 597].

"Where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth." Termes de la Ley [*quoted* in Demarest *v.* Hopper, 22 N. J. L. 599, 619; Ashpitel *v.* Bryan, 3 B. & S. 474, 489, 33 L. J. Q. B. 328, 11 L. T. Rep. N. S. 221, 12 Wkly. Rep. 1082, 113 E. C. L. 474, per Wightman, J.].

"When a man is concluded, by his own act or acceptance, to say the truth." Comyns Dig. tit. "Estoppel," A, 1 [*cited* in Bush *v.* Critchfield, 5 Ohio 109, 112].

"Where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth." Simm *v.* Anglo-American Tel. Co., 5 Q. B. D. 188, 44 J. P. 280, 49 L. J. Q. B. 392, 42 L. T. Rep. N. S. 37, 28 Wkly. Rep. 290. See Needlar *v.* Winton, Hob. 227; 1 Coke Inst. 227.

It is so called "because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth." Coke Litt. 352*a* [*quoted* in Edmondson *v.* Montague, 14 Ala. 370, 377; Chesser *v.* De Prater, 20 Fla. 691, 696; McCabe *v.* Raney, 32 Ind. 309, 312; Ridgway *v.* Morrison, 28 Ind. 201, 203; Davis *v.* O'Ferrall, 4 Greene (Iowa) 358, 363; Martin *v.* Maine Cent. R. Co., 83 Me. 100, 104, 21 Atl. 740; Gibson *v.* Gibson, 15 Mass. 106, 111, 8 Am. Dec. 94; Haynes *v.* Stevens, 11 N. H. 28, 31; Hudson *v.* Winslow Tp., 35 N. J. L. 437, 441; Demarest *v.* Hopper, 22 N. J. L. 599, 619; Sparrow *v.* Kingman, 1 N. Y. 242, 256; Frost *v.* Saratoga Mut. Ins. Co., 5 Den. (N. Y.) 154, 157, 49 Am. Dec. 234; Armfield *v.* Moore, 44 N. C. 157, 161; Ensel *v.* Levy, 46 Ohio St. 255, 259, 19 N. E. 597; Water's Appeal, 35 Pa. St. 523, 527, 78 Am. Dec. 354; Stebbins *v.* Bruce, 80 Va. 389, 397; Bigelow Estop. 44 (*quoted* in Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 363, 2 Flipp. 692)]. See also Dean *v.* Doe, 8 Ind. 475, 479; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 483, 24 Am. Dec. 51. Estoppel as precluding the truth see also *infra*, I, C.

The purpose of all estoppels is to prevent duplicity and inconsistency. Bower *v.* McCormack, 23 Gratt. (Va.) 310. Estoppel "concludes the truth in order to prevent fraud and falsehood." Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297, 326, 13 L. ed. 703. The reason which governs estoppels is

2. "ESTOPPEL BY CONDUCT." If a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped, as against the latter, to deny that that state of facts does in truth exist.[2]

3. "ESTOPPEL BY CONTRACT." This form of estoppel constitutes one of the main divisions into which the present article is divided, and it is accordingly defined in that connection.[3]

4. "ESTOPPEL BY DEED." A definition of this form of estoppel also will be found in the main division of this article which it constitutes.[4]

5. "ESTOPPEL BY JUDGMENT." "Estoppel by judgment" is a bar which precludes the parties to an action to relitigate, after final judgment, the same cause of action or ground of defense, or any fact determined by the judgment.[5]

6. "ESTOPPEL BY LACHES." A neglect to do something which one should do or to seek to enforce a right at a proper time has been termed, with questionable propriety, "estoppel by laches."[6]

7. "ESTOPPEL BY MISREPRESENTATION." This form of estoppel is treated in

that after a man has by his own deed or act *in pais* admitted a fact to be true, he shall not be permitted to contradict it. Flagg *v.* Mann, 14 Pick. (Mass.) 467 [*quoted* in Haynes *v.* Stevens, 11 N. H. 28, 31].

Estoppel as to rules of law.— Estoppels preclude the assertion of facts not law. Moore *v.* Willis, 9 N. C. 555. See also *infra*, V, B, 1, b, (I), (B); and CONSTITUTIONAL LAW, 8 Cyc. 791 *et seq.*

"An estoppel is always something personal — the party is estopped from recovering his claim, or proving his defence, by some act in law, or in deed, or *in pais*, which precludes him from going beyond it, and proving all the case. It always arises from the act of the party estopped by it." Gavin *v.* Graydon, 41 Ind. 559, 565. This does not apply in all respects to estoppel by record. A judicial record, considered as a memorial of the judgment, is binding on all the world. See *infra*, II, B, 1. Nor does an estoppel by record necessarily arise from the act of the party estopped. See *infra*, II, B, C.

Evidence distinguished.— The principle of estoppel is sometimes spoken of as a rule of evidence (Langdon *v.* Doud, 10 Allen (Mass.) 433, 435; Bean *v.* Pettingill, 30 N. Y. Super. Ct. 1; Crawford *v.* Lockwood, 9 How. Pr. (N. Y.) 547, 550; Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157; Low *v.* Bouverie, [1891] 3 Ch. 82, 101, 60 L. J. Ch. 594, 65 L. T. Rep. N. S. 533, 40 Wkly. Rep. 50. *Compare* Martin *v.* Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740), but it is not such. Evidence, properly speaking, is merely a means of proving a fact, and rules of evidence are a part of the adjective or remedial law. An estoppel to deny a fact, on the other hand, like a so-called conclusive presumption of law, is a rule of substantive law which declares the legal insignificance of the non-existence of the fact in question. Evidence of the falsity of the fact is excluded because the non-existence of the fact is immaterial. Whether the fact exists or not, the rights of the parties are the same in law. Accordingly a statute declaring that a certificate of acknowledgment is not conclusive does not prevent the operation of an estoppel by deed. It merely prescribes a rule of evidence, while an estoppel by deed involves a rule of property. Mutual L. Ins. Co. *v.* Corey, 135 N. Y. 326, 31 N. E. 1095.

2. Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 316, 317, 44 L. J. C. P. 109, 31 L. T. Rep. N. S. 785, 23 Wkly. Rep. 747.

The ground upon which the estoppel rests is that the conduct constitutes an implied representation of the truth of the state of facts in question. Bigelow Estop. (5th ed.) 570.

For a full discussion of this form of estoppel see *infra*, V, B, 2.

3. See *infra*, IV, A.

4. See *infra*, III, A.

5. Wisconsin *v.* Torinus, 28 Minn. 175, 179, 9 N. W. 725 (where it is said: "It is founded upon two maxims of the law, one of which is that 'a man should not be twice vexed for the same cause,' the other that 'it is for the public good that there be an end of litigation,' and it is undoubtedly true that if there be any one principle of law settled, it is that whenever a cause of action, in the language of the law, '*transit in rem adjudicatam*,' and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever"); Kingston's Case, 20 How. St. Tr. 355, 358, 2 Smith Lead. Cas. 713.

It is a species of estoppel by record (see *infra*, II, B, 2), includes the so-called estoppel by verdict (see *infra*, I, A, 11), and is commonly known as *res judicata* or former adjudication.

For a full discussion of this form of estoppel see JUDGMENTS.

6. Hunt *v.* Reilly, 23 R. I. 471, 472, 50 Atl. 833.

Laches is analogous to estoppel in pais (see for example ATTORNEY AND CLIENT, 4 Cyc. 972; CORPORATIONS, 10 Cyc. 971), but the essential elements of the two conceptions are not necessarily the same. Estoppel *in pais* see *infra*, I, A, 13; V.

Laches see EQUITY, *ante*, p. 150 *et seq.*

another place as one of the main divisions of this article and a definition of it will accordingly be found there.[7]

8. "ESTOPPEL BY NEGLIGENCE." This term may be applied to the class of cases where a man is estopped by another's misrepresentation, if, in breach of some duty to the person deceived, he has supplied the person making the misrepresentation with that which was necessary to make it credible.[8]

9. "ESTOPPEL BY RECORD." This form of estoppel constitutes one of the main divisions of the present article, and is defined in another place.[9]

10. "ESTOPPEL BY SILENCE." "Estoppel by silence" arises where a person who by force of circumstances is under a duty to another to speak refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice.[10]

11. "ESTOPPEL BY VERDICT." The principle which precludes the parties to an action from relitigating a fact which has been determined in a previous action between them, notwithstanding that it did not of itself constitute the cause of action or ground of defense in the prior suit, is sometimes, with doubtful propriety, termed "estoppel by verdict."[11]

12. "ESTOPPEL BY WARRANTY." This is an estoppel based on the principle of giving effect to the manifest intention of the grantor appearing on the deed, as to the lands or estate to be conveyed, and of preventing the grantor from derogating from or destroying his own grant by any subsequent act.[12]

13. "ESTOPPEL IN PAIS."[13] By the earlier usage matter *in pais* commonly meant matter of fact as distinguished from matter of record.[14] In the law of estoppel, however, it meant, and still means, matter of fact as distinguished from matter of record or conventional writing.[15] "Estoppel *in pais*" therefore

7. See *infra*, V, A, 1.

8. Metropolitan L. Ins. Co. *v.* Bender, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708; McKenzie *v.* British Linen Co., 6 App. Cas. 82, 44 L. T. Rep. N. S. 431, 29 Wkly. Rep. 477; Ingham *v.* Primrose, 7 C. B. N. S. 82, 9 Jur. N. S. 710, 28 L. J. C. P. 294, 97 E. C. L. 82; West *v.* Jones, 20 L. J. Ch. 362, 1 Sim. N. S. 205, 40 Eng. Ch. 205; Ewart Estop. 20, 37. See Bigelow Estop. (5th ed.) 653 *et seq.*

It is a species of estoppel by misrepresentation, since the estoppel arises because the negligence gives credibility to the unauthorized misrepresentation, express or implied, of a third person. Ewart Estop. 20, 37.

The rule is expressed in the principle that "wherever one of two innocent persons must suffer by the acts of a third he who enables such third person to occasion the loss must sustain it." Turner *v.* Flinn, 72 Ala. 532; State Nat. Bank *v.* Flathers, 45 La. Ann. 75, 12 So. 243, 40 Am. St. Rep. 216; Lickharrow *v.* Mason, 6 East 21 note, 1 H. Bl. 357, 2 T. R. 63, 1 Rev. Rep. 425; Ewart Estop. 177.

For a full discussion of this form of estoppel see *infra*, V, B, 3.

9. See *infra*, II, A.

10. Morehouse *v.* Burgot, 22 Ohio Cir. Ct. 174, 177, 12 Ohio Cir. Dec. 163.

"Negligent silence may work an estoppel as effectually as an express representation" (Tobias *v.* Morris, 126 Ala. 535, 551, 28 So. 517 [*citing* Bigelow Estop. 588]), for "it is a just and well recognized principle, that 'He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to keep silent'" (2 Herman Estop. & Res Jud. §§ 937, 938 [*quoted* in Harris *v.* American Bldg., etc., Assoc., 122 Ala. 545, 554, 25 So. 200]).

The silence is a species of conduct and constitutes an implied representation of the existence of the state of facts in question, and the estoppel is accordingly a species of estoppel by misrepresentation. See *infra*, V, B, 2.

11. Chicago Theological Seminary *v.* People, 189 Ill. 439, 59 N. E. 977; Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228.

It is a species of estoppel by judgment. See *supra*, I, A, 5.

It is not accurate to speak of estoppel "by verdict," since a verdict alone without a judgment upon it does not work an estoppel. Dougherty *v.* Lehigh Coal, etc., Co., 202 Pa. St. 635, 52 Atl. 18, 90 Am. St. Rep. 660; Black Judgm. § 506.

For a full discussion of the subject see JUDGMENTS.

12. Condit *v.* Bigalow, 64 N. J. Eq. 504, 513, 54 Atl. 160 [*citing* Staffordville Gravel Co. *v.* Newell, 53 N. J. L. 412, 19 Atl. 209; Hannon *v.* Christopher, 34 N. J. Eq. 459; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297, 13 L. ed. 703].

It is a species of estoppel by deed. See *infra*, III, B, C.

13. **Literally** "Estoppel in the country." Adams Gloss.

14. 2 Blackstone Comm. 294; Cyclopedic L. Dict.; 1 Stephen Comm. 466.

15. Coke Litt. 352*a*.

includes all forms of estoppel not arising from a record, from a deed, or from a written contract.[16]

14. "EQUITABLE ESTOPPEL." "Equitable estoppel" is estoppel *in pais*,[17] signifying estoppel by misrepresentation,[18] and a definition of it will accordingly be found in the division of this article treating of that form of estoppel.[19] The three terms are commonly used interchangeably. The term was borrowed originally from equity and hence denominated "equitable estoppel."[20] Equitable estoppels are so called not, however, because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just.[21] The doctrine is recognized in the courts of common law just as much as in courts of equity,[22] although it was at first administered as a branch of equity jurisprudence.[23]

15. "QUASI-ESTOPPEL." This term has been applied to certain rules of law which are analogous to and yet differ from the principle founding estoppel *in pais*, and constitute one of the main divisions into which this article is divided.[24]

16. "TECHNICAL ESTOPPELS." "Technical estoppels" are those which arise from matter of record or the deed of the party estopped.[25]

In their common-law origin estoppels *in pais* seem to have arisen only in the case of those solemn and peculiar acts to which the law gave the power of creating a right or passing an estate, and to which the law attached as much efficacy and importance as to matters appearing either by deed or of record. Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157.

A term of recent growth.— The doctrine of estoppels *in pais* is one which, so far at least as that term is concerned, has grown up chiefly within the last few years. Strong *v.* Ellsworth, 26 Vt. 366.

16. Estoppel by contract is sometimes said to be of two sorts, viz.: (1) That arising from the contract itself, i. e., facts settled by contract; and (2) that arising from acts done under a contract. If the contract is in writing, the first sort of estoppel by contract is analogous to certain phases of estoppel by deed, and is not embraced in estoppel *in pais* (see *infra*, IV, A), although estoppel *in pais* is sometimes loosely defined or referred to as an estoppel not of record or under seal (Ragsdale *v.* Gohlke, 36 Tex. 286, 288; Love *v.* Barber, 17 Tex. 312, 318; Adams Gloss.); and if the contract is not in writing, it would seem to be a quasi-estoppel. The second sort of estoppel by contract seems to be a quasi-estoppel whether or not the contract is in writing. See *infra*, IV, A; VI, B, 1, f, (III).

Estoppel by misrepresentation, express or implied, is a species of estoppel *in pais*. See *infra*, V.

"Equitable estoppel" is a common term for estoppel by misrepresentation, and it is accordingly embraced in estoppel *in pais*. See *infra*, I, A, 14; V.

Technical estoppels compared.— "Technical estoppels, which conclude the party from showing the truth, are, for the most part, by deed or by matter of record. But there are other less solemn acts and admissions which may have the force of concluding the party, and are said to operate as estoppels *in pais*." Dezell *v.* Odell, 3 Hill (N. Y.) 215, 221, 38 Am. Dec. 628. They are not restricted by rules of technical estoppel (Hainer *v.* Iowa L. of H., 78 Iowa 245, 43 N. W. 185), but when established they operate as effectually as an estoppel by matter of record or deed (Lucas *v.* Hart, 5 Iowa 415).

Ratification distinguished see *infra*, p. ——, note ——.

Election distinguished see *infra*, VI, A.

Taking inconsistent position distinguished see *infra*, VI, B, 1.

Waiver distinguished see *infra*, VI, B, 2.

17. West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 290, 71 Am. Dec. 66; Chesapeake, etc., R. Co. *v.* Walker, 100 Va. 69, 91, 40 S. E. 633, 914. See also *supra*, I, A, 13. However, "the equitable estoppel of to-day is essentially and widely different from the legal estoppel *in pais* of Lord Coke." Martin *v.* Maine Cent. R. Co., 83 Me. 100, 104, 21 Atl. 740.

18. Fairbanks *v.* Baskett, 98 Mo. App. 53, 64, 71 S. W. 1113; Den *v.* Baldwin, 21 N. J. L. 395; Williams *v.* Chandler, 25 Tex. 4; Matthews *v.* Massachusetts Nat. Bank, 16 Fed. Cas. No. 9,286, Holmes 396; Bigelow Estop. (5th ed.) 556.

19. See *infra*, V, A, 1.

20. Hallowell Nat. Bank *v.* Marston, 85 Me. 488, 493, 27 Atl. 529.

21. Barnard *v.* German American Seminary, 49 Mich. 444, 445, 13 N. W. 811.

22. Simm *v.* Anglo-American Tel. Co., 5 Q. B. D. 188, 206, 44 J. P. 280, 49 L. J. Q. B. 392, 42 L. T. Rep. N. S. 37, 28 Wkly. Rep. 290. See *infra*, V, A, 3.

23. West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 290, 71 Am. Dec. 66.

24. See *infra*, VI, A.

25. Fletcher *v.* Holmes, 25 Ind. 458, 469; Hainer *v.* Iowa L. of H., 78 Iowa 245, 251, 43 N. W. 185; Owen *v.* Bartholomew, 9 Pick. (Mass.) 520, holding that a petition to the legislature for a grant by the state which recognizes the title of the latter, not being a

17. "TITLE BY ESTOPPEL." Where a person without title, having conveyed with warranty, subsequently acquires the title, it inures to the benefit of the grantee, who is said to acquire the title by estoppel.[26] "Title by estoppel" or "right of estoppel" is said to arise also where one person makes to another a statement which is afterward acted upon, since in any action afterward brought upon faith of that statement by the person to whom it was made, the person making it is not allowed to deny that the facts were what he represented them to be, although in truth they were different.[27]

B. Classification. It is commonly said that there are three kinds of estoppel, viz., by matter of record, by matter in writing, and by matter *in pais*.[28] Estoppel by record is founded either on a judicial or a legislative record.[29] Estoppel by matter in writing is based on either a deed[30] or a written contract.[31] Estoppel by matter *in pais*[32] is founded on misrepresentation, express or implied.[33] There are also certain legal bars which have the same effect as an estoppel and yet are not strictly such, which have been termed quasi-estoppels.[34]

C. Odiousness of Estoppels. It is a common saying in the earlier reports that estoppels are odious and are not favored in law because they exclude the truth.[35] In so far as this *dictum* proceeds upon the theory that an estoppel necessarily excludes the truth it is founded on a misconception, for it is only within the possibilities that the truth may be excluded. It is rather to be supposed that facts which have been settled by judgment or by deed or which have been represented as existing are true in fact.[36] And in the later cases the wisdom and jus-

record or under seal, is not a technical estoppel, but only an evidential admission. See also Dezell *v.* Odell, 3 Hill (N. Y.) 215, 221, 38 Am. Dec. 628.

Estoppel by: Deed see *infra*, III. Record see *infra*, II.

26. Bigelow Estop. (5th ed.) 384 *et seq.*

It is a species of estoppel by deed. See *infra*, III, C.

27. Simm *v.* Anglo-American Tel. Co., 5 Q. B. D. 188, 203, 44 J. P. 280, 49 L. J. Q. B. 392, 42 L. T. Rep. N. S. 37, 28 Wkly. Rep. 290.

This is estoppel by misrepresentation. See *infra*, V, B.

28. Coke Litt. 352*a* (where it is said: "Touching estoppels, which is an excellent and curious kinde of learning, it is to be observed, that there be three kinde of estoppels, viz. by matter of record, by matter in writing, and by matter *in pais*"); Davis *v.* Collier, 13 Ga. 485, 491; Jackson *v.* Brinckerhoff, 3 Johns. Cas. (N. Y.) 101, 103; Armfield *v.* Moore, 44 N. C. 157, 162.

Estoppels are of three kinds, viz.: by matter of record, by deed, and *in pais*. Grant *v.* Savannah, etc., R. Co., 51 Ga. 348, 355 [*citing* Bouvier L. Dict.]; Hainer *v.* Iowa L. of H., 78 Iowa 245, 251, 43 N. W. 185; Sparrow *v.* Kingman, 1 N. Y. 242, 256; Frost *v.* Saratoga Mut. Ins. Co., 5 Den. (N. Y.) 154, 157, 49 Am. Dec. 234.

Estoppels "may be by writing or in pais." Chesser *v.* De Prater, 20 Fla. 691, 696 [*citing* Comyns Dig. tit. "Estoppel"].

29. See *infra*, II.

30. See *infra*, III.

31. See *infra*, IV.

32. **Estoppels in pais defined** see *supra*, I, A, 13.

33. See *infra*, V.

34. See *supra*, I, A, 15; *infra*, VI, A.

35. *Connecticut.*— Hubbard *v.* Norton, 10 Conn. 422; Smith *v.* Sherwood, 4 Conn. 276, 10 Am. Dec. 143.

Georgia.— Wilkinson *v.* Thigpen, 71 Ga. 497.

Indiana.— Dean *v.* Doe, 8 Ind. 475.

Kentucky.— Hanson *v.* Buckner, 4 Dana 251, 29 Am. Dec. 401.

Louisiana.— Herber *v.* Thompson, 46 La. Ann. 186, 14 So. 504.

Maine.— Steele *v.* Adams, 1 Me. 1.

Massachusetts.— Owen *v.* Bartholomew, 9 Pick. 520.

New York.— Dempsey *v.* Tylee, 3 Duer 73; Jackson *v.* Brinckerhoff, 3 Johns. Cas. 101.

North Carolina.— Moore *v.* Willis, 9 N. C. 555.

Ohio.— Bush *v.* Critchfield, 5 Ohio 109.

Vermont.— Probate Ct. *v.* Matthews, 6 Vt. 269.

Virginia.— Bower *v.* McCormick, 23 Gratt. 310, holding accordingly that estoppels, whether legal or equitable, are not to be extended by construction.

United States.— Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp. 692.

Canada.— Doe *v.* Piquotte, 4 U. C. Q. B. 101.

Estoppels as excluding the truth see also *supra*, note 1.

36. Bowman *v.* Taylor, 2 A. & E. 278, 289, 4 L. J. K. B. 58, 4 N. & M. 264, 29 E. C. L. 142 (where Lord Denman, C. J., says: "The doctrine of estoppel has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal; but because the estoppel may exclude the truth"); 1 Greenleaf Ev. § 22.

tice of the principle of estoppel, especially estoppel *in pais*, are fully recognized, and practically all ground of odium has disappeared.[37]

II. ESTOPPEL BY RECORD.

A. Definition. Estoppel by record is the preclusion to deny the truth of matter set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction.[1]

B. Judicial Record — 1. In General. It is a well-established rule that the records of a court of justice import absolute verity, and no one, whether or not a party to the proceeding in which it was made, may in a collateral proceeding impeach it by adducing evidence in denial of the facts of which it purports to be a memorial.[2] So a recital in a judicial record imports absolute verity, and all

"No man ought to allege any thing but the truth for his defence; and what he has alleged once is to be presumed true, and therefore he ought not to contradict it." Haynes *v.* Stevens, 11 N. H. 28, 31 [*quoting* Coke Litt. 352*a*; Hargrave & B. note 306]; Steinhauer *v.* Witman, 1 Serg. & R. (Pa.) 438, 442 [*quoting* Coke Litt. 352*a* note 11].

37. *Florida.*— Camp *v.* Moseley, 2 Fla. 171, 197 [*quoted* in Coogler *v.* Rogers, 25 Fla. 853, 873, 7 So. 391], where it is said: "The technicalities incident to estoppels [especially *in pais*] are gradually giving way to considerations of reason and practical utility, and the courts of the present day seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality."

Maine.— Hallowell Nat. Bank *v.* Marston, 85 Me. 488, 493, 27 Atl. 529, where it is said: "In answer to the statutory defense, the plaintiff invokes the application of the principle of estoppel. Not that ancient legal species, confined within certain narrow iron rules, to be strictly construed, applicable to but a few cases and which shut out not only the truth but also the equity and justice of the individual case and was rightfully denominated 'odious' (Horn *v.* Cole, 51 N. H. 287, 289, 12 Am. Rep. 111; Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 309; Coke Litt. 352*a*), but of the more modern species, borrowed originally from equity and hence denominated equitable estoppel."

New Hampshire.— Stevens *v.* Dennett, 51 N. H. 324, 333, where it is said: "An equitable estoppel is not odious, and is intended to promote and effectuate equity."

Pennsylvania.— Waters' Appeal, 35 Pa. St. 523, 527, 78 Am. Dec. 354, where the court said: "This used to be considered harsh law, and it grew into a proverb that estoppels were odious; but the observations of Mr. Smith, in concluding his note on Kingston's Case, (2 Smith Lead. Cas. 713) strike us as just, and they shall conclude this opinion. 'The truth is,' says that excellent writer, 'that the courts have been for some time favourable to the utility of the doctrine of estoppel, but hostile to its technicality. Perceiving how essential it is to the quiet and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no man ever was deceived, or induced to alter his position. Such estoppels are still odious.'"

South Carolina.— Bull *v.* Rowe, 13 S. C. 355, 369, where it is said: "The doctrine is not shifting and uncertain according to the caprice of the judge, but rests upon well-defined and fixed rules. Thus understood estoppels no longer deserve the epithet of 'odious' but are most useful agencies in the administration of justice."

And see *infra*, V, A, 2; Bigelow Estop. (5th ed.) 6.

1. See *infra*, II, B, C.

"An estoppel founded upon matter of record." Black L. Dict.; Burrill L. Dict.

Conclusiveness of records: County records see COUNTIES, 11 Cyc. 569. Generally see RECORDS.

Estoppel of married women see HUSBAND AND WIFE.

2. *Maine.*— Willard *v.* Whitney, 49 Me. 235.

Massachusetts.— Kelley *v.* Dresser, 11 Allen 31, holding that the record of a magistrate acting judicially and within his jurisdiction in a criminal case cannot be impeached for falsity.

New York.— Campbell *v.* Butts, 3 N. Y. 173.

Tennessee.— Strong *v.* Harris, 3 Humphr. 451.

England.— Reed *v.* Jackson, 1 East 355, 6 Rev. Rep. 283; Noon's Case, 2 Leon. 67; Arundell *v.* Arundell, Yelv. 33. See also Brune *v.* Thompson, C. & M. 34, 41 E. C. L. 24; Berry *v.* Banner, 1 Peake 156, 3 Rev. Rep. 674.

See 19 Cent. Dig. tit. "Estoppel," § 1.

Coke's statement.— "The rolls, being the records or memorials of the judges of the courts of record, impose in them such incontrollable credit and verity as they admit no averment, plea, or proof to the contrary." Coke Inst. 260*a*.

A judicial record is an instrument, prepared by an officer of the court, whether in the

parties thereto are estopped from denying its truth,[3] for example a recital that the cause has been transferred to another court by consent.

2. JUDGMENTS. Two sorts of estoppel arise from the record of a judgment; first from the record considered as a memorial or entry of the judgment, and second, from the record considered as a judgment. As a memorial of the fact of the rendition of the judgment the record imports absolute verity and may be impeached by no one, whether or not a party to the proceeding in which it was made.[4] As a judgment, on the other hand, the record has the further effect of precluding a reëxamination into the truth of the matters decided; but in this aspect it is as a rule binding only upon the parties to the proceeding and their privies. This further and secondary effect of the record considered as a judgment is otherwise known as estoppel by judgment, the matters adjudicated being termed *res judicata*.[5]

3. JUDICIAL ADMISSIONS. The questions of the conclusiveness of the allegations of a pleading on the party interposing it, and of the admissibility of a pleading against the pleader as evidence of the facts alleged, whether in the same or a subsequent proceeding, do not strictly speaking fall within the scope of estoppel by record, and they are accordingly elsewhere considered;[6] and the same is true of admissions in court, agreed facts, stipulations, and sworn statements generally, such for instance as affidavits, made in a judicial or quasi-judicial proceeding.[7]

C. Legislative Roll. The enrolment of a legislative act, if regular on its face, ordinarily imports absolute verity, and is conclusive of the due enactment of the statute and of its terms. Accordingly by the better opinion no one may impeach it by resorting to the legislative journals for the purpose of showing that the statute was not regularly enacted or that its terms were not accurately enrolled. As to the latter point, however, a contrary view is upheld in many states, in some cases because of peculiar constitutional provisions.[8]

III. ESTOPPEL BY DEED.[9]

A. Definition. Estoppel by deed is a bar which precludes a party to a deed

form of a book or of a roll, containing a chronological account of the proceedings of a court of justice and intended as a memorial thereof. See Herman Estop. & Res. Jud. § 22. Nothing is part of the record which is not enrolled. Glynn *v.* Thorpe, 1 B. & Ald. 153. In England it was necessary to transcribe the proceedings on a roll of parchment (Coke Inst. 260*a*), but in the United States paper has universally supplied the place of parchment as the material for a record (Nugent *v.* Powell, 4 Wyo. 173, 186, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199 [*citing* Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742]).

Explaining mode of making record.— A record cannot be contradicted so far as it speaks; but where it sought to charge an officer whose signature appears thereto with negligence as to acts therein recited, proof of facts and circumstances relative to the mode in which it was made up is admissible to weaken the inference deducible from the signature. Strong *v.* Harris, 3 Humphr. (Tenn.) 451.

3. *Ex p.* Rice, 102 Ala. 671, 15 So. 450; Thompson *v.* Thompson, 29 Ala. 619; Deslonde *v.* Darrington, 29 Ala. 92; Anderson's Appeal, 4 Yeates (Pa.) 35; Radford Trust Co. *v.* East Tennessee Lumber Co., 92 Tenn. 126, 21 S. W. 329, holding that a record of the supreme court showing that a certain person was "sitting, by consent of counsel," as special judge of such court in the absence of one of the commissioned judges thereof, cannot be collaterally attacked on petition for supersedeas in a case decided by such court while thus constituted. See, however, Hess *v.* Heeble, 4 Serg. & R. (Pa.) 246, holding that in special assumpsit plaintiff may give evidence inconsistent with the record of another action by him against the same defendant.

Conclusiveness of recital: In judgment see JUDGMENTS. Of appearance by attorney see APPEARANCES, 3 Cyc. 531 *et seq.*

4. See JUDGMENTS. See also Bigelow Estop. (5th ed.) 8, 35; Black Judgm. (2d ed.) §§ 604, 605.

5. See JUDGMENTS.

6. **Conclusiveness of allegations on party pleading** see PLEADING.

Pleadings as evidence against pleader see EVIDENCE, 16 Cyc. IV, C, 3 b.

7. See EVIDENCE, 16 Cyc. IV, C, 3, c, d.

Payment into court as admission of liability see TENDER.

8. See STATUTES.

Conclusiveness of recitals in statutes see STATUTES.

Statutes as evidence see STATUTES.

9. **Estoppel by:** Deed conveying mortgaged property see MORTGAGES. Land contract see

and his privies from asserting as against the other and his privies any right or title in derogation of the deed or from denying the truth of any material fact asserted in it.[10]

B. General Rule — 1. Estoppel Against Grantor. A person who assumes to convey an estate by deed is estopped, as against the grantee, to assert anything in derogation of the deed. He will not be heard, for the purpose of defeating the title of the grantee, to say that at the time of the conveyance he had no title, or that none passed by the deed; nor can he deny to the deed its full operation and effect as a conveyance.[11]

Vendor and Purchaser. Lease see Landlord and Tenant. Mortgage see Mortgages.

Estoppel to assert title by adverse possession see Adverse Possession.

10. See cases cited *infra*, note 11 *et seq.*

"A preclusion against the competent parties to a valid sealed instrument and their privies, to deny its force and effect by any evidence of inferior solemnity." Bigelow Estop. (5th ed.) 332 [*quoted* in Fields *v.* Willingham, 49 Ga. 344, 351].

The principle is that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts he shall not be permitted to deny any matter which he has so asserted. Bowman *v.* Taylor, 2 A. & E. 278, 290, 4 L. J. K. B. 58, 4 N. & M. 264, 29 E. C. L. 142, per Taunton, J. See also Farrar *v.* Cooper, 34 Me. 394; Goodtitle *v.* Bailey, 2 Cowp. 597.

11. *Alabama.*—Tew *v.* Henderson, 116 Ala. 545, 23 So. 128. See Elyton Land Co. *v.* South Alabama, etc., R. Co., 95 Ala. 631, 10 So. 270.

California.— Belcher Consol. Gold Min. Co. *v.* Deferrari, 62 Cal. 160; Dodge *v.* Walley, 22 Cal. 224, 83 Am. Dec. 61.

Colorado.— Drake *v.* Root, 2 Colo. 685.

Connecticut.— Smith *v.* Moodus Water Power Co., 35 Conn. 392.

District of Columbia.— Morris *v.* Wheat, 8 App. Cas. 379.

Illinois.— Hull *v.* Glover, 126 Ill. 122, 18 N. E. 198; Dobbins *v.* Cruger, 108 Ill. 188; Needham *v.* Clary, 62 Ill. 344; Wead *v.* Larkin, 54 Ill. 489, 5 Am. Rep. 149; Jones *v.* King, 25 Ill. 383.

Indiana.— Neely *v.* Boyce, 128 Ind. 1, 27 N. E. 169; Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488.

Iowa.— Van Husen *v.* Omaha Bridge, etc., R. Co., 118 Iowa 366, 92 N. W. 47; Thomas *v.* Stickle, 32 Iowa 71.

Kentucky.— Cox *v.* Lacey, 3 Litt. 334; Central Coal, etc., Co. *v.* Walker, 73 S. W. 778, 24 Ky. L. Rep. 2191.

Louisiana.— Beard *v.* Lufriu, 46 La. Ann. 875, 15 So. 207; Delogny *v.* David, 12 La. Ann. 30; Poultney *v.* Cecil, 8 La. 321.

Maine.— Currier *v.* Earl, 13 Me. 216.

Maryland.— Reese *v.* Reese, 41 Md. 554; Showman *v.* Miller, 6 Md. 479.

Massachusetts.— Frost *v.* Courtis, 172 Mass. 401, 52 N. E. 515.

Michigan.— Case *v.* Green, 53 Mich. 615, 19 N. W. 554; Damouth *v.* Klock, 29 Mich. 289; Stockton *v.* Williams, 1 Dougl. 546.

Minnesota.— Morris *v.* Watson, 15 Minn. 212.

Missouri.— Steele *v.* Culver, 158 Mo. 136, 59 S. W. 67.

New Hampshire.—Logan *v.* Eaton, 66 N. H. 575, 31 Atl. 13; Thorndike *v.* Norris, 24 N. H. 454.

New York.— Ludlow *v.* Hudson River R. Co., 4 Hun 239; Mount *v.* Morton, 20 Barb. 123; Hill *v.* Hill, 4 Barb. 419; Dennison *v.* Ely, 1 Barb. 610; Jackson *v.* Stevens, 16 Johns. 110; Jackson *v.* Wheeler, 10 Johns. 164.

North Carolina.— Cuthrell *v.* Hawkins, 98 N. C. 203, 3 S. E. 672.

Ohio.— Jones *v.* Timmons, 21 Ohio St. 596; Watterson *v.* Ury, 5 Ohio Cir. Ct. 347.

Oregon.— Welch *v.* Oregon R., etc., Co., 34 Oreg. 447, 56 Pac. 417; Wilson *v.* McEwan, 7 Oreg. 87.

Rhode Island.— Harvey *v.* Harvey, 13 R. I. 598; Olney *v.* Fenner, 2 R. I. 211, 57 Am. Dec. 711.

South Carolina.— Crews *v.* McKinnie, 2 Nott & M. 52; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tennessee.— Ruffin *v.* Johnson, 5 Heisk. 604; Moseley *v.* Stewart, (Ch. App. 1899) 52 S. W. 671.

Texas.— Richardson *v.* Powell, 83 Tex. 588, 19 S. W. 262; Gould *v.* West, 32 Tex. 338.

Vermont.— Walworth *v.* Readsboro, 24 Vt. 252.

West Virginia.— Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Mitchell *v.* Petty, 2 W. Va. 470, 98 Am. Dec. 777.

United States.— Jenkins *v.* Collard, 145 U. S. 546, 12 S. Ct. 868, 36 L. ed. 812; Patrick *v.* Leach, 2 Fed. 120, 1 McCrary 250.

England.—Goodtitle *v.* Bailey, 2 Cowp. 597.

Canada.— McQueen *v.* Reg., 16 Can. Supreme Ct. 1; Doe *v.* Power, 6 N. Brunsw. 271; *In re* Laplante, 5 Ont. 634; Cameron *v.* Hunter, 34 U. C. Q. B. 121; Plumb *v.* McGannon, 32 U. C. Q. B. 8.

See 19 Cent. Dig. tit. "Estoppel," § 63 *et seq.*

Name of grantee or obligee.— A grantor or obligor is estopped, in the absence of fraud or mistake, to say that the deed or bond was intended for any other person than the person named therein. Andrus *v.* Coleman, 82 Ill. 26, 25 Am. Rep. 289; German Mut. Ins. Co. *v.* Grim, 32 Ind. 249, 2 Am. Rep. 341; Gray *v.* Stockton, 8 Minn. 529; Stoney *v.* McNeile, 1 McCord (S. C.) 85.

A husband uniting with his wife simply for the purpose of enabling her to partition is not estopped to assert a claim which is independent of the title under which the partition is made. Bauer *v.* Lohr, 6 Ohio Dec.

2. Estoppel Against Grantee. By accepting a deed of conveyance in fee and going into possession a grantee is not estopped to deny the title [12] or seizin [13] of his grantor, unless he claims under the deed.[14] Nor will the acceptance of a grant in

(Reprint) 848, 8 Am. L. Rec. 426 [*affirmed* in 10 Cinc. L. Bul. 364].

Sale of chattels.— Where a chattel or chose in action is assigned by deed, the grantor is estopped to deny that possession of the thing granted has not been transferred. Tarbox *v.* Grant, 56 N. J. Eq. 199, 39 Atl. 378, 379.

Extinguishment of estoppel.— A warranty deed reserving the right to use a private way for a specified purpose will not estop the grantor to use the way for other purposes after it has been established as a public easement. Flagg *v.* Flagg, 16 Gray (Mass.) 175. An estoppel by a subsequent judgment will prevail over a prior estoppel by the covenants in a deed. Boynton *v.* Haggart, 120 Fed. 819, 57 C. C. A. 301.

Construction, operation, and effect of deed see Deeds, 13 Cyc. 600 *et seq.*

Parol evidence to vary or contradict deed see Evidence.

12. *California.*— Wenzel *v.* Schultz, 100 Cal. 250, 34 Pac. 696.

Kentucky.— Winlock *v.* Hardy, 4 Litt. 272; Moore *v.* Farrow, 3 A. K. Marsh. 41.

Maryland.— Maslin *v.* Thomas, 8 Gill 18, holding that a grantee is not estopped to show that the estate of the grantor was less than that which he assumed to convey.

Missouri.— Cutter *v.* Waddingham, 33 Mo. 269; Blair *v.* Smith, 16 Mo. 273.

New York.— Bigelow *v.* Finch, 11 Barb. 498; Hill *v.* Hill, 4 Barb. 419; Averill *v.* Wilson, 4 Barb. 180 (holding that the grantee in fee in either a quitclaim or a warranty deed is not estopped to deny that the grantor had title either at or previous to the date of the deed); Spicer *v.* Spicer, 16 Abb. Pr. N. S. 112.

Texas.— Collins *v.* Box, 40 Tex. 190.

Wisconsin.— Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426.

United States.— Merryman *v.* Bourne, 9 Wall. 592, 19 L. ed. 683.

Canada.— See Wilkinson *v.* Conklin, 10 U. C. C. P. 211, holding that the acceptance of a deed from a reversioner is not an acknowledgment of any present right or interest in the latter.

See 19 Cent. Dig. tit. "Estoppel," § 69 *et seq.*

An estoppel exists only when there is an obligation, express or implied, that the occupant will at some time, or in some event, surrender the possession; as between landlord and tenant or as between vendor and purchaser before conveyance. Bigelow *v.* Finch, 11 Barb. (N. Y.) 498.

Purchasers at execution sale.— The fact that persons have acquired land through an execution sale will not estop them from denying that the judgment debtor had title to the property at the time of the levy and sale and trace the title through a former owner, in the absence of any showing that possession had been taken under and by virtue of the execution sale. Shockley *v.* Starr, 119 Ind. 172, 21 N. E. 473.

Confirmatory deeds.— The acceptance of a deed confirmatory of a prior deed will not estop the grantee from claiming under such former deed. Tully *v.* Tully, 137 Cal. 60, 69 Pac. 700 [*citing* Robinson *v.* Thornton, 102 Cal. 675, 34 Pac. 120; Wenzel *v.* Schultz, 100 Cal. 250, 34 Pac. 696; San Francisco *v.* Lawton, 18 Cal. 465, 79 Am. Dec. 187]. See also Fickett *v.* Dyer, 19 Me. 58.

Deeds of substitution.— A grantee who accepts from his grantor a new deed as a substitute for the original is estopped to claim title to land described in the original deed which is not included in the substitute. Fox *v.* Windes, 127 Mo. 502, 30 S. W. 323, 48 Am. St. Rep. 648; Doty *v.* Bernard, 92 Tex. 104, 47 S. W. 712; Chloupek *v.* Perotka, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858. See also Jackson *v.* Murray, 7 Johns. (N. Y.) 5, holding that persons deriving title from a patentee who procured a second grant from the state are estopped to claim that the first grant included land embraced in the second patent. Where, however, a grantee surrenders the deed to the grantor and takes a new deed conveying the same and additional property, with no intention of revesting title in the grantor, he is not estopped to assert that he had title under the original deed. St. Joseph *v.* Baker, 86 Mo. App. 310.

Subsequently acquired rights.— A grantee is not estopped as to rights acquired subsequent to the deed. Kinsell *v.* Daggett, 11 Me. 309.

A grantee cannot set up as a breach of warranty a title in himself or the ownership of an encumbrance at the time of the conveyance. Carson *v.* Cabeen, 45 Ill. App. 262.

Estoppel to allege eviction.— A grantee is not estopped to set up eviction by a paramount title by the fact that he knew of such title when the deed was delivered. Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 629, 27 S. W. 1002, 28 S. W. 657, opinions by Riddick, J.

Estoppel of purchaser to deny vendor's title see Vendor and Purchaser.

Estoppel to deny title or seizin of husband to defeat dower right see Husband and Wife.

13. Small *v.* Proctor, 15 Mass. 495; Dittrick *v.* O'Connor, 7 U. C. Q. B. 448. See Fickett *v.* Dyer, 19 Me. 58.

A grantee is estopped to assert that he himself was seized of the premises at the date of the deed. Fitch *v.* Baldwin, 17 Johns. (N. Y.) 161. See *infra*, note 14.

14. Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18; Curlee *v.* Smith, 91 N. C. 172; Den *v.* Bailey, 35 N. C. 221, holding that one claiming under a deed may be estopped as to two adverse claimants. However, one

aid of a title estop the grantee to claim under the conveyance purporting to confer that title. One having or claiming title to land may for greater security or to buy his peace purchase or procure an outstanding or adverse claim or title without estopping himself to deny its validity.[15]

3. Instruments Founding Estoppel — a. In General. To estop the grantor from denying that he had title at the time of the conveyance, the deed must either expressly or by implication be based upon the assumption of the existence of title in him, and it must purport to convey that title.[16] Subject to this limitation any deed of conveyance may found an estoppel against the grantor.[17] It need contain no technical covenants for title. If it bears on its face evidence that the grantor intended to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing, it creates an estoppel against the grantor in respect to the estate thus described, although no technical covenants be inserted.[18]

b. Quitclaim Deed. A mere quitclaim deed does not ordinarily operate as an estoppel against the grantor;[19] nor does it estop the grantee to dispute the

claiming under a conveyance is not estopped to show that his grantor did not have title at a time anterior to the delivery of the deed (Frey *v.* Ramsour, 66 N. C. 466); and a party claiming under a deed by an executor who conveyed under a power in a will and also as heir at law of the testator may show that the grantor inherited the land (Deery *v.* Cray, 5 Wall. (U. S.) 795, 18 L. ed. 653).

Seizin.— A grantee in possession under a deed cannot dispute the seizin of the grantor at the time of the conveyance. Hamblin *v.* Cumberland Bank, 19 Me. 66; Cox *v.* Janes, 45 N. Y. 557; Cruger *v.* Daniel, McMull. Eq. (S. C.) 157.

15. *Arizona.*— Singer Mfg. Co. *v.* Tillman, (1889) 21 Pac. 818.

California.— Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Georgia.— Gwinn *v.* Smith, 55 Ga. 145.

Indiana.— Brandenburg *v.* Siegfried, 75 Ind. 568.

Kansas.— Watkins *v.* Houch, 44 Kan. 502, 24 Pac. 361; Kansas Pac. R. Co. *v.* Dunmeyer, 24 Kan. 725.

Kentucky.— Fauntleroy *v.* Henderson, 12 B. Mon. 447; Henderson *v.* Bonar, 11 S. W. 809, 11 Ky. L. Rep. 219.

Maine.— Thompson *v.* Thompson, 19 Me. 235, 36 Am. Dec. 751.

Maryland.— Casey *v.* Inloes, 1 Gill 430, 39 Am. Dec. 658.

Missouri.— Mattison *v.* Ausmuss, 50 Mo. 551; Wall *v.* Shindler, 47 Mo. 282; Landes *v.* Perkins, 12 Mo. 238.

New Hampshire.— Newbury Bank *v.* Eastman, 44 N. H. 431.

New York.— Osterhout *v.* Shoemaker, 3 Hill 513; Jackson *v.* Cary, 16 Johns. 302; Lee *v.* Hunter, 1 Paige 519.

Ohio.— Coakley *v.* Perry, 3 Ohio St. 344; Lake Shore, etc., R. Co. *v.* Cleveland, 32 Cinc. L. Bul. 206, 1 Ohio N. P. 1.

Pennsylvania.— Lorain *v.* Hall, 33 Pa. St. 270.

South Carolina.— State *v.* Pacific Guano Co., 22 S. C. 50.

See 19 Cent. Dig. tit. "Estoppel," § 69 *et seq.*

16. Whitman *v.* Jones, 17 Nova Scotia 443; Dodge *v.* Smith, 3 Ont. L. Rep. 305; Morrison *v.* Steer, 32 U. C. Q. B. 182, holding that there can be no estoppel by an instrument which passes no interest, but is a mere conditional arrangement which was never carried into effect.

Deed of reassignment.— A grantor is not estopped to deny seizin and title by a deed which contains no warranty, is a mere reassignment of title acquired under a former deed, and whose effect is to cancel such prior deed and to restore the *status quo*. Smith *v.* Strong, 14 Pick. (Mass.) 128.

Statute of uses.— No person can be technically estopped by a conveyance under the statute of uses. Jackson *v.* Brinckerhoff, 3 Johns. Cas. (N. Y.) 101.

17. Estoppel by: Assignment for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 146 note 96. Deed conveying mortgaged property see Mortgages. Land contract see Vendor and Purchaser. Lease see Landlord and Tenant. Mortgage see Mortgages. Sheriff's deed see *infra*, III, C, 3, e, (II). Trust deed see Mortgages: Trusts.

18. Thompson *v.* Thompson, 19 Me. 235, 36 Am. Dec. 751; Bayley *v.* McCoy, 8 Oreg. 259; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297, 13 L. ed. 703. *Contra*, Pratt *v.* Grand Trunk R. Co., 8 Ont. 499.

19. Traver *v.* Baker, 15 Fed. 186, 8 Sawy. 535 (holding that a quitclaim deed to a described parcel of land operates as a conveyance only to pass the grantor's present interest, but that if the deed contains a covenant warranting the possession of the land against any claim by or through the grantor it will estop him and his privies); Minaker *v.* Hawkins, 20 U. C. Q. B. 20.

Compromise deed.— Where one of two adverse claimants of title to land took a conveyance from the other without warranty, paying a consideration therefor and thus settled pending litigation between them, no estoppel results, in subsequent litigation between those holding under the parties to the

grantor's title or seizin,[20] or the quality of the title,[21] or to deny that anything passed by the instrument.[22]

c. Deed Poll. Ordinarily the estoppel arising from a deed poll applies only to the grantor and does not operate against the grantee, who may accordingly deny that his grantor had such an estate as he undertook to convey.[23] The acceptance of a deed poll will not estop the grantee to deny the grantor's title or to acquire a superior title;[24] but where the deed contains agreements or covenants to be performed by the grantee, his acceptance of the deed estops him to deny them.[25]

d. Chattel Mortgage. A deed in the form of a chattel mortgage may ordinarily found an estoppel the same as any other.[26]

C. Estoppel to Assert After-Acquired Title — 1. General Rule. If a grantor having no title, a defective title, or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee or to his benefit, by way of estoppel.[27] The rule which equally applies to a special as to a

compromise deed, from the introduction of that deed in evidence, together with the competing title of the grantee therein. Strong *v.* Powell, 92 Ga. 591, 20 S. E. 6.

20. San Francisco *v.* Lawton, 18 Cal. 465, 79 Am. Dec. 187; Ham *v.* Ham, 14 Me. 351; Lytle *v.* Beveridge, 58 N. Y. 592; Sparrow *v.* Kingman, 1 N. Y. 242; McAllister *v.* Devane, 76 N. C. 57.

21. Farnum *v.* Loomis, 2 Oreg. 29.

22. Flagg *v.* Mann, 14 Pick. (Mass.) 467.

23. *Kentucky.*— Winlock *v.* Hardy, 4 Litt. 272.

New Hampshire.— Great Falls Co. *v.* Worster, 15 N. H. 412; Otis *v.* Parshley, 10 N. H. 403.

New York.— Sparrow *v.* Kingman, 1 N. Y. 242; Bigelow *v.* Finch, 11 Barb. 498.

Rhode Island.— Gardner *v.* Greene, 5 R. I. 104.

England.— Hunter *v.* Fry, 2 B. & Ald. 421, 21 Rev. Rep. 421; Skipwith *v.* Green, 1 Str. 610.

Canada.— Doe *v.* Wetmore, 8 N. Brunsw. 140; Minaker *v.* Ash, 10 U. C. C. P. 363.

See 19 Cent. Dig. tit. "Estoppel," § 70.

Exceptions and reservations.— A deed poll will not estop the grantee to deny that his grantor had title to land excepted out of the grant. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; Carver *v.* Astor, 4 Pet. (U. S.) 1, 7 L. ed. 761.

24. Cooper *v.* Watson, 73 Ala. 252; Patterson *v.* Johnson, 113 Ill. 559; Giles *v.* Pratt, 2 Hill (S. C.) 439; Giles *v.* Pratt, Dudley (S. C.) 54; Robertson *v.* Pickrell, 109 U. S. 608, 3 S. Ct. 407, 27 L. ed. 1049. *Contra*, Chloupek *v.* Perotka, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858.

25. Emerson *v.* Mooney, 50 N. H. 315; Hagerty *v.* Lee, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631 (holding that a covenant or stipulation inserted in a deed poll binds the grantee, his heirs and assigns, where it relates to the premises conveyed); Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 35; Spaulding *v.* Hallenbeck, 35 N. Y. 204; Belmont *v.* Coman, 22 N. Y. 438, 78 Am. Dec. 213; Trotter *v.* Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Vanmeter *v.* Vanmeter, 3 Gratt. (Va.) 148.

Taking inconsistent positions.— Where the grantee does not sign the deed, the estoppel created by his acceptance of it is not an estoppel by deed strictly speaking but a quasi-estoppel based on the principle which precludes a person from taking the benefits of a transaction and at the same time avoiding its obligations. See *infra*, VI, B, 1, b.

26. Myers *v.* Snyder, 96 Iowa 107, 64 N. W. 771; Layson *v.* Cooper, 174 Mo. 211, 73 S. W. 472, 97 Am. St. Rep. 545; Harvey *v.* Harvey, 13 R. I. 598; Ryder *v.* Sisson, 7 R. I. 341; Paton *v.* Browne, 19 U. C. Q. B. 337, holding that a mortgagor cannot dispute the title of an assignee of the mortgage.

27. *Alabama.*—Wheeler *v.* Aycock, 109 Ala. 146, 19 So. 497; Blakeslee *v.* Mobile L. Ins. Co., 57 Ala. 205; Johnson *v.* Collins, 12 Ala. 322; Stewart *v.* Anderson, 10 Ala. 504; Kennedy *v.* McCartney, 4 Port. 141.

Arkansas.—Tupy *v.* Kocourek, 66 Ark. 433, 51 S. W. 69.

California.— Wholey *v.* Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Quivey *v.* Baker, 37 Cal. 465; Clark *v.* Baker, 14 Cal. 612, 76 Am. Dec. 449.

Connecticut.— Dudley *v.* Cadwell, 19 Conn. 218; Hoyt *v.* Dimon, 5 Day 479.

Delaware.— Doe *v.* Dowdall, 3 Houst. 369, 11 Am. Rep. 757.

Florida.— Knox *v.* Spratt, 19 Fla. 817.

Georgia.— O'Bannon *v.* Paremour, 24 Ga. 489. It has also been held in this state that the subsequently acquired title does not vest in the grantee by estoppel (Linsey *v.* Ramsey, 22 Ga. 627; Way *v.* Arnold, 18 Ga. 181), but that on the grantor's acquiring title a perfect equity vests in the grantee which entitles him to recover the land (Goodson *v.* Beacham, 24 Ga. 150), and which rebuts and bars an action of ejectment by the grantor (Linsey *v.* Ramsey, *supra*).

Illinois.— Whitson *v.* Grosvenor, 170 Ill. 271, 48 N. E. 1018; Walton *v.* Follansbee, 131 Ill. 147, 23 N. E. 332; Hull *v.* Glover,

general warranty — where the special warranty is of the title to the land not of an

126 Ill. 122, 18 N. E. 198; Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541; Hitchcock *v.* Fortier, 65 Ill. 239; Gochenour *v.* Mowry, 33 Ill. 331; Jones *v.* King, 25 Ill. 383; Bennett *v.* Waller, 23 Ill. 97; Frink *v.* Darst, 14 Ill. 304, 58 Am. Dec. 575; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462.

Indiana.— Frain *v.* Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Thalls *v.* Smith, 139 Ind. 496, 39 N. E. 154; Neely *v.* Boyce, 128 Ind. 1, 27 N. E. 169; Karnes *v.* Wingate, 94 Ind. 594; Locke *v.* White, 89 Ind. 492; Johnson *v.* Bedwell, 15 Ind. App. 236, 43 N. E. 246. See Bradford *v.* Russell, 79 Ind. 64.

Iowa.— Nicodemus *v.* Young, 90 Iowa 423, 57 N. W. 906; Van Orman *v.* McGregor, 23 Iowa 300; Childs *v.* McChesney, 20 Iowa 431, 89 Am. Dec. 545; Warburton *v.* Mattox, Morr. 367.

Kansas.— Armstrong *v.* Portsmouth Bldg. Co., 57 Kan. 62, 45 Pac. 67; Scoffins *v.* Grandstaff, 12 Kan. 467; Letson *v.* Roach, 5 Kan. App. 57, 47 Pac. 321.

Kentucky.— Altemus *v.* Nickell, 115 Ky. 506, 74 S. W. 221, 245, 24 Ky. L. Rep. 2401, 2416; Perkins *v.* Coleman, 90 Ky. 611, 14 S. W. 640, 12 Ky. L. Rep. 501; Bohon *v.* Bohon, 78 Ky. 408; Carpenter *v.* Carpenter, 8 Bush 283; Churchill *v.* Ferrill, 1 Bush 54; Nunnally *v.* White, 3 Metc. 584; Dickerson *v.* Talbot, 14 B. Mon. 60; Fitzhugh *v.* Tyler, 9 B. Mon. 559; Griffith *v.* Dicken, 4 Dana 561; Hutcherson *v.* Coleman, 2 J. J. Marsh. 244; Smith *v.* Mahan, 7 T. B. Mon. 228; Morrison *v.* Caldwell, 5 T. B. Mon. 426, 17 Am. Dec. 84; Logan *v.* Steele, 4 T. B. Mon. 430, 7 T. B. Mon. 101; Aldridge *v.* Kincaid, 2 Litt. 390; Massie *v.* Sebastian, 4 Bibb 433; McIlvain *v.* Porter, 7 S. W. 309, 8 S. W. 705, 9 Ky. L. Rep. 899. See Hall *v.* Edrington, 9 Dana 364; McKenzie *v.* Lexington, 4 Dana 129.

Louisiana.— Benton *v.* Sentell, 50 La. Ann. 869, 24 So. 297; Jacobs *v.* Yale, 39 La. Ann. 359, 1 So. 822; Rapp *v.* Lowry, 30 La. Ann. 1272; Zunts *v.* Courcelle, 16 La. Ann. 96.

Maine.— Powers *v.* Patten, 71 Me. 583; Bachelder *v.* Lovely, 69 Me. 33; Read *v.* Fogg, 60 Me. 479; Kelly *v.* Jenness, 50 Me. 455, 79 Am. Dec. 623; Crocker *v.* Pierce, 31 Me. 177; Pike *v.* Galvin, 29 Me. 183; Gardiner *v.* Gerrish, 23 Me. 46; Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49; Lawry *v.* Williams, 13 Me. 281; Fairbanks *v.* Williamson, 7 Me. 96; Webber *v.* Webber, 6 Me. 127; Allen *v.* Sayward, 5 Me. 227, 17 Am. Dec. 221. See, however, Harding *v.* Springer, 14 Me. 407, 3 Am. Dec. 61.

Massachusetts.— Ayer *v.* Philadelphia, etc., Face Brick Co., 159 Mass. 84, 34 N. E. 177; Huzzey *v.* Heffernan, 143 Mass. 232, 9 N. E. 570; Knight *v.* Thayer, 125 Mass. 25; Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; Lincoln *v.* Emerson, 108 Mass. 87; Cole *v.* Raymond, 9 Gray 217; Perry *v.* Kline, 12 Cush. 118; White *v.* Patten, 24 Pick. 324; Bates *v.* Norcross, 17 Pick. 14, 28 Am. Dec. 271; Somes *v.* Skinner, 3 Pick. 52.

Michigan.— Dye *v.* Thompson, 126 Mich. 597, 85 N. W. 1113; Duffy *v.* White, 115 Mich. 264, 73 N. W. 363; Morris *v.* Jansen, 99 Mich. 436, 58 N. W. 365; Pendill *v.* Marquette County Agricultural Soc., 95 Mich. 491, 55 N. W. 384; Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130; Clark *v.* Daniels, 77 Mich. 26, 43 N. W. 854; Smith *v.* Williams, 44 Mich. 240, 6 N. W. 662; Lee *v.* Clary, 38 Mich. 223; Shotwell *v.* Harrison, 22 Mich. 410.

Minnesota.— Rooney *v.* Koenig, 80 Minn. 483, 83 N. W. 399.

Mississippi.— Andrews *v.* Anderson, (1894) 16 So. 346; Kaiser *v.* Earhart, 64 Miss. 492, 1 So. 635; Bush *v.* Cooper, 26 Miss. 599, 59 Am. Dec. 270; Wightman *v.* Doe, 24 Miss. 675; Fletcher *v.* Wilson, Sm. & M. Ch. 376.

Missouri.— Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748; Fordyce *v.* Rapp, 131 Mo. 354, 33 S. W. 57; Ivy *v.* Yancy, 129 Mo. 501, 31 S. W. 937; Norfleet *v.* Russell, 64 Mo. 176; Dodd *v.* Williams, 3 Mo. App. 278.

Nebraska.— Hagensick *v.* Castor, 53 Nebr. 495, 73 N. W. 932.

New Hampshire.—Fletcher *v.* Chamberlain, 61 N. H. 438; Hayes *v.* Tabor, 41 N. H. 521; Kimball *v.* Schoff, 40 N. H. 190; Jewell *v.* Porter, 31 N. H. 34; Morrison *v.* Underwood, 20 N. H. 369; Chamberlain *v.* Meeder, 16 N. H. 381; Wark *v.* Willard, 13 N. H. 389; Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

New Jersey.— Ross *v.* Adams, 28 N. J. L. 160; Moore *v.* Rake, 26 N. J. L. 574; Gough *v.* Bell, 21 N. J. L. 156; Vreeland *v.* Blauvelt, 23 N. J. Eq. 483; Decker *v.* Caskey, 3 N. J. Eq. 446.

New York.— House *v.* McCormick, 57 N. Y. 310; Mickles *v.* Townsend, 18 N. Y. 575; Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292; Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Fertilizer Co., 19 Hun 47; Doyle *v.* Peerless Petroleum Co., 44 Barb. 239; Kent *v.* Harcourt, 33 Barb. 491; Vanderheyden *v.* Crandall, 2 Den. 9; Jackson *v.* Hoffman, 9 Cow. 271; Jackson *v.* Stevens, 16 Johns. 110; Jackson *v.* Wright, 14 Johns. 193; Jackson *v.* Stevens, 13 Johns. 316; Jackson *v.* Murray, 12 Johns. 201; Jackson *v.* Matsdorf, 11 Johns. 91, 6 Am. Dec. 355; Jackson *v.* Bull, 1 Johns. Cas. 81; Utica Bank *v.* Mersereau, 3 Barb. Ch. 528; Kellogg *v.* Wood, 4 Paige 578.

North Carolina.— Hallyburton *v.* Slagle, 132 N. C. 947, 44 S. E. 655, 130 N. C. 482, 41 S. E. 877; Foster *v.* Hackett, 112 N. C. 546, 17 S. E. 426; Bell *v.* Adams, 81 N. C. 118; Farmers' Bank *v.* Gleen, 68 N. C. 35; Benick *v.* Bowman, 56 N. C. 314; Jones *v.* Kingsey, 55 N. C. 463; Wellborn *v.* Finley, 52 N. C. 228; Hassell *v.* Walker, 50 N. C. 270; Fortescue *v.* Satterwaite, 23 N. C. 566. And see Den *v.* McKinnie, 6 N. C. 67.

Ohio.— Broadwell *v.* Phillips, 30 Ohio St. 255; Philly *v.* Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Tremper *v.* Barton, 18 Ohio 418; Jackson *v.* Williams, 10 Ohio 69; Allen

existing or limited interest therein — and which is said to be correctly called

v. Parish, 3 Ohio 107; Bond *v.* Swearingen, 1 Ohio 395.

Oregon.— Taggart *v.* Risley, 3 Oreg. 306, 4 Oreg. 235.

Pennsylvania.— Easton's Appeal, 47 Pa. St. 255; Washabaugh *v.* Entriken, 34 Pa. St. 74; Skinner *v.* Starner, 24 Pa. St. 123; Wood *v.* Jones, 7 Pa. St. 478; Brown *v.* McCormick, 6 Watts 60, 31 Am. Dec. 450; Ewing *v.* Desilver, 8 Serg. & R. 92; McWilliams *v.* Nisly, 2 Serg. & R. 507, 7 Am. Dec. 654; Rank *v.* Dauphin, etc., Coal Co., 1 Pearson 453; Hirsch *v.* Tillman, 2 Pa. Dist. 662; Hays *v.* Leonard, 10 Pa. Co. Ct. 648; Barger *v.* Burr, 4 Luz. Leg. Reg. 316; Downington Bldg., etc., Assoc. *v.* McCaughey, 1 Chest. Co. Rep. 504.

Rhode Island.— Hodges *v.* Goodspeed, 20 R. I. 537, 40 Atl. 373; Bradford *v.* Burgess, 20 R. I. 290, 38 Atl. 975; McCusker *v.* McEvey, 9 R. I. 528, 11 Am. Rep. 295.

South Carolina.— Gaffney *v.* Peeler, 21 S. C. 55; Wingo *v.* Parker, 19 S. C. 9; Robertson *v.* Sharpton, 17 S. C. 592; Craig *v.* Reeder, 3 McCord 411; Davis *v.* Keller, 5 Rich. Eq. 434; Lamar *v.* Simpson, 1 Rich. Eq. 71, 42 Am. Dec. 345.

South Dakota.—Johnson *v.* Branch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857.

Tennessee.— Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67; Coal Creek Min., etc., Co. *v.* Ross, 12 Lea 1; Irvine *v.* Muse, 10 Heisk. 477; Dunbar *v.* McFall, 9 Humphr. 505; Gookin *v.* Graham, 5 Humphr. 480; Jarnigan *v.* Mairs, 1 Humphr. 473; Henderson *v.* Overton, 2 Yerg. 394, 24 Am. Dec. 492; Skaggs *v.* Kelly, (Ch. App. 1897) 42 S. W. 275.

Texas.— Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; Lindsay *v.* Freeman, 83 Tex. 259, 18 S. W. 727; Robinson *v.* Douthit, 64 Tex. 101; Satterwhite *v.* Rosser, 61 Tex. 166; Rutherford *v.* Stanford, 60 Tex. 447; Harrison *v.* Boring, 44 Tex. 255; Ackerman *v.* Smiley, 37 Tex. 211; Gould *v.* West, 32 Tex. 338; Mays *v.* Lewis, 4 Tex. 38; Burkitt *v.* Twyman, (Civ. App. 1896) 35 S. W. 421; Morris *v.* Housley, (Civ. App. 1896) 34 S. W. 659; Scates *v.* Fohn, (Civ. App. 1900) 59 S. W. 837; Jenkins *v.* Adcock, 5 Tex. Civ. App. 466, 27 S. W. 21.

Vermont.— McElroy *v.* McLeay, 71 Vt. 396, 45 Atl. 898 (a case where a tenant in common conveyed and afterward acquired full ownership); Prouty *v.* Mather, 49 Vt. 415; Cross *v.* Martin, 46 Vt. 14; Smith *v.* Hall, 28 Vt. 364; Pope *v.* Henry, 24 Vt. 560; Middlebury College *v.* Cheney, 1 Vt. 336, Hutchinson, J., delivering opinion of the court.

Virginia.— Flanary *v.* Kane, 102 Va. 547, 46 S. E. 312, 681; Townsend *v.* Outten, 95 Va. 536, 28 S. E. 958; Nye *v.* Lovett, 92 Va. 710, 74 S. E. 345; Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; Raines *v.* Walker, 77 Va. 92; Burtners *v.* Keran, 24 Gratt. 42; Wynn *v.* Harman, 5 Gratt. 157; Doswell *v.* Buchanan, 3 Leigh 365, 23 Am. Dec. 280.

Washington.— Brazee *v.* Schofield, 2 Wash. Terr. 209, 3 Pac. 265.

West Virginia.— Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Buford *v.* Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854; Mitchell *v.* Petty, 2 W. Va. 470, 98 Am. Dec. 777.

Wisconsin.— Shepherd *v.* Kahle, (1903) 97 N. W. 506; Wiesner *v.* Zaun, 39 Wis. 188.

Wyoming.— Balch *v.* Arnold, 9 Wyo. 17, 59 Pac. 434.

United States.— Ryan *v.* U. S., 136 U. S. 68, 10 S. Ct. 913, 34 L. ed. 447; Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 10 S. Ct. 206, 33 L. ed. 487; Myers *v.* Croft, 13 Wall. 291, 20 L. ed. 562; Irvine *v.* Irvine, 9 Wall. 617, 19 L. ed. 800; French *v.* Spencer, 21 How. 228, 16 L. ed. 97; Bush *v.* Marshall, 6 How. 284, 12 L. ed. 440; Gallaway *v.* Finley, 12 Pet. 264, 9 L. ed. 1079; Mason *v.* Muncaster, 9 Wheat. 454, 6 L. ed. 131; Crawford *v.* Moore, 28 Fed. 824; Curran *v.* Burdsall, 20 Fed. 835; Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; Faulks *v.* Kamp, 3 Fed. 898, 17 Blatchf. 432; Corcoran *v.* Brown, 6 Fed. Cas. No. 3,226, 3 Cranch C. C. 143; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366; Lamb *v.* Carter, 14 Fed. Cas. No. 8,013, 1 Sawy. 212; McGill *v.* Jordan, 16 Fed. Cas. No. 8,795*a*.

England.— Trevivan *v.* Laurence, 2 Ld. Raym. 1036, 6 Mod. 256, 1 Salk. 276; Hermitage *v.* Tomkins, 1 Ld. Raym. 729; *Re* Horton, 51 L. T. Rep. N. S. 420.

Canada.— Doe *v.* Wetmore, 8 N. Brunsw. 140; McMillan *v.* Munro, 25 Ont. App. 288; Nevitt *v.* McMurray, 14 Ont. App. 126; Casselman *v.* Casselman, 9 Ont. 442; Featherston *v.* McDonell, 15 U. C. C. P. 162.

See 19 Cent. Dig. tit. "Estoppel," § 84.

Knowledge of grantee.— In equity an after-acquired title will not inure to the benefit of the grantee where the latter knew that the grantor had no title when he conveyed, and there is no evidence of good faith or that the grantee claimed any interest in the lands. Viele *v.* Van Steenberg, 31 Fed. 249.

Where there is anything for a warranty to operate on the doctrine of estoppel to assert after-acquired title does not apply. Jackson *v.* Hoffman, 9 Cow. (N. Y.) 271; Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56.

Reacquisition of title.— If at the time of the conveyance and warranty the estate conveyed was liable to be taken by the grantor's creditors, a taking by them would constitute a breach of the warranty, and a reacquisition of the estate by purchase from his assignee in insolvency would estop him. Gibbs *v.* Thayer, 6 Cush. (Mass.) 30.

There is no principle of the Spanish law by which an after-acquired title will inure to the benefit of a former grantee. Bixby *v.* Bent, 59 Cal. 522; Norcum *v.* Gaty, 19 Mo. 65.

Estoppel to assert after-acquired title to fund in court see DEPOSITS IN COURT, 13 Cyc. 1038 note 54.

"the curious learning of title by estoppel" was adopted to avoid circuity of action.[28] The rule has been applied to transfers of personal property as well as real estate.[29]

2. INSTRUMENTS FOUNDING ESTOPPEL[30]—a. In General. To give rise to an estoppel to assert an after-acquired title there must be a deed purporting to convey an estate,[31] and the conveyance must have been the act of the person subsequently asserting title. A sheriff's sale of property not belonging to the debtor does not estop him from asserting against the purchaser title subsequently acquired.[32]

b. Necessity For Covenants — (I) *In General.* At common law the deed must contain a covenant of warranty in order to preclude the grantor from asserting an after-acquired title,[33] but at the present day other covenants may give rise to the estoppel;[34] and moreover if a deed either expressly or by necessary implication shows that the grantor intended to convey and that the grantee expected to become vested with an estate of a particular kind, the deed may found an estoppel, although it contains no technical covenants.[35] In many states statutes exist whereby conveyances purporting to convey the fee, or to convey a greater interest than the grantee has, or containing prescribed words of grant, are deemed to have the same legal effect as deeds which by the terms of the grant or covenants therein would estop the grantor to claim an after-acquired title or estate.[36]

28. Colton *v.* Galbraith, 35 S. C. 531, 14 S. E. 957; Coal Creek Min., etc., Co. *v.* Ross, 12 Lea (Tenn.) 1. And see cases cited *supra*, note 27.

29. Clark *v.* Slaughter, 34 Miss. 65; Pass *v.* Lea, 32 N. C. 410.

Chattel mortgages.— If a person without title to chattels mortgages them and subsequently acquires title, it inures to the benefit of the mortgagee. Watkins *v.* Crenshaw, 59 Mo. App. 183; Hickman *v.* Dill, 39 Mo. App. 246. So where sellers of mortgaged personalty covenant "to warrant and defend the sale against all and every person whatsoever," and the mortgage is subsequently assigned to them, they are estopped to enforce it. Kane *v.* Lodor, 56 N. J. Eq. 268, 38 Atl. 966.

30. Estoppel by: Deed of Partition see PARTITION. By Land Contract see VENDOR AND PURCHASER. By Mortgage see MORTGAGES.

31. Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980, holding that an agreement to sell certain lands, in case they are acquired by the promisor, and divide the proceeds with another, is not such a conveyance as operates as an estoppel, when title is subsequently obtained by him.

32. *California.*— Emerson *v.* Sansome, 41 Cal. 552.

Indiana.— Flenner *v.* Travellers' Ins. Co., 89 Ind. 164.

Maine.— Freeman *v.* Thayer, 29 Me. 369.

Montana.— Meyendorf *v.* Frohner, 3 Mont. 282.

North Carolina.— Frey *v.* Ramsour, 66 N. C. 466; Gentry *v.* Wagstaff, 14 N. C. 370.

Contra.— Fairbanks *v.* Williamson, 7 Me. 96 (*semble*); Varnum *v.* Abbot, 12 Mass. 474, 7 Am. Dec. 87 (both holding that the extent of an execution raises an estoppel, as much as if the conveyance were made by deed).

33. Clark *v.* Baker, 14 Cal. 612, 76 Am. Dec. 449; Edridge *v.* Rochester City, etc., R. Co., 54 Hun (N. Y.) 194, 7 N. Y. Suppl. 439; Boyd *v.* Longworth, 11 Ohio 235.

An estoppel cannot be predicated on an executory covenant not to claim a right which is first to accrue afterward. There must be a warranty of title. Vance *v.* Vance, 21 Me. 364; Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94.

A conveyance of an equitable estate without warranty will not vest in the grantee a legal estate subsequently acquired. Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280.

Presumption.— Where a deed on which an estoppel to assert after-acquired title is sought to be asserted has been lost, and a memorial of it shows it to have been an ordinary conveyance in fee but does not show what covenants it contained, and the adverse party shows no title, the deed will be presumed to have been one which would operate by estoppel. Armstrong *v.* Little, 20 U. C. Q. B. 425.

34. See *infra*, III, C, 2, c, (II)-(VII).

35. Hagensick *v.* Castor, 53 Nebr. 495, 73 N. W. 932; Taggart *v.* Risley, 4 Oreg. 235; Flanary *v.* Kane, 102 Va. 547, 46 S. E. 312, 681; French *v.* Spencer, 21 How. (U. S.) 228, 16 L. ed. 97.

There is no estoppel to assert an after-acquired title where the deed contains no recital or covenants for title. Nye *v.* Lovitt, 92 Va. 710, 74 S. E. 345; Casselman *v.* Casselman, 9 Ont. 442.

36. *Alabama.*— Higman *v.* Humes, 127 Ala. 404, 30 So. 733, holding, however, that particular words of grant which have by statute the effect to warrant the title will not operate to displace or impair an outstanding lien or claim in a third party.

Arkansas.— Jones *v.* Green, 41 Ark. 363; Cocke *v.* Brogan, 5 Ark. 693.

California.— Stanway *v.* Rubio, 51 Cal. 41; Dalton *v.* Hamilton, 50 Cal. 422; Green *v.* Clark, 31 Cal. 59; Clark *v.* Baker, 14 Cal.

(II) *Conveyance of Present Interest.* A conveyance by bargain and sale, release, or the like, which does not purport to convey any estate or which conveys a present estate, or the right, title, and interest of the grantor, and without covenants of warranty or seizin, passes only such a title as the grantor has at the time of its execution and delivery, and will not operate to confer on the grantee a new and independent title subsequently acquired by the grantor. This because the estoppel is coextensive with the estate, right, or interest which its conveyance purports to pass.[37] Accordingly a quitclaim deed will not estop the grantor from setting up a title subsequently acquired by him.[38]

612, 76 Am. Dec. 449. This statute is inoperative as to a grant of public land made by a grantor who has not applied for the land nor paid anything toward its purchase. People *v.* Hemme, (Cal. 1890) 22 Pac. 1143; People *v.* Blake, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313.

Dakota.—Campbell *v.* Wambole, 3 Dak. 184, 13 N. W. 567.

Illinois.— Pratt *v.* Pratt, 96 Ill. 184; Taylor *v.* Kearn, 68 Ill. 339; King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; De Wolf *v.* Haydn, 24 Ill. 525; Doe *v.* Ballance, 7 Ill. 141. But see Frink *v.* Darst, 14 Ill. 304, 58 Am. Dec. 575. Under the conveyance act, an after-acquired title inures to the grantee only when the grantor has warranted his ownership and right to convey. Whitson *v.* Grosvenor, 170 Ill. 271, 48 N. E. 1018.

Indiana.— Burget *v.* Merritt, 155 Ind. 143, 57 N. E. 714.

Iowa.— Cook *v.* Prindle, 97 Iowa 464, 66 N. W. 781, 59 Am. St. Rep. 424; Nicodemus *v.* Young, 90 Iowa 423, 57 N. W. 906; Rogers *v.* Hussey, 36 Iowa 664; Morgan *v.* Graham, 35 Iowa 213; Van Orman *v.* McGregor, 23 Iowa 300; Childs *v.* McChesney, 20 Iowa 431, 89 Am. Dec. 545.

Maryland.—Williams *v.* Peters, 72 Md. 584, 20 Atl. 175.

Mississippi.— Leflore County *v.* Allen, 80 Miss. 298, 31 So. 815; Bramlett *v.* Roberts, 68 Miss. 325, 10 So. 56; McInnis *v.* Pickett, 65 Miss. 354, 3 So. 660; Taylor *v.* Eckford, 11 Sm. & M. 21.

Missouri.— Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748; Boyd *v.* Haseltine, 110 Mo. 203, 19 S. W. 822. A deed of trust on a leasehold interest is not within the purview of the statute. Geyer *v.* Girard, 22 Mo. 159.

Montana.— McDermott Min. Co. *v.* McDermott, 27 Mont. 143, 69 Pac. 715.

Nebraska.— Pillsbury *v.* Alexander, 40 Nebr. 242, 58 N. W. 859.

See 19 Cent. Dig. tit. "Estoppel," § 106.

37. *California.*— Quivey *v.* Baker, 37 Cal. 465; Cadiz *v.* Majors, 33 Cal. 288.

Connecticut.— Dart *v.* Dart, 7 Conn. 250.

Illinois.— Whitson *v.* Grosvenor, 170 Ill. 271, 48 N. E. 1018; Ridgeway *v.* Underwood, 67 Ill. 419; Phelps *v.* Kellogg, 15 Ill. 131; Frink *v.* Darst, 14 Ill. 304, 58 Am. Dec. 575.

Indiana.— Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Nicholson *v.* Caress, 45 Ind. 479; Shumaker *v.* Johnson, 35 Ind. 33; Dean *v.* Doe, 8 Ind. 475. See Smith *v.* McClain, 146 Ind. 77, 45 N. E. 41.

Kansas.— Sheffield *v.* Griffin, 21 Kan. 417; Bruce *v.* Luke, 9 Kan. 201, 12 Am. Rep. 491.

Kentucky.— Beard *v.* Griggs, 1 J. J. Marsh. 22; Jackson *v.* Jackson, 58 S. W. 423, 597, 22 Ky. L. Rep. 536.

Maine.— Pike *v.* Galvin, 29 Me. 183.

Michigan.— Brennan *v.* Eggeman, 73 Mich. 658, 41 N. W. 840.

Mississippi.— McInnis *v.* Pickett, 65 Miss. 354, 3 So. 660.

New Hampshire.— Horne *v.* Hutchins, 72 N. H. 211, 55 Atl. 361.

New Jersey.— Smith *v.* De Russy, 29 N. J. Eq. 407.

New York.— Dwight *v.* Pearl, 24 Barb. 55; Edwards *v.* Varick, 5 Den. 664; Brown *v.* Galley, Lalor 308; Pelletreau *v.* Jackson, 11 Wend. 110. See also Champlain, etc., R. Co. *v.* Valentine, 19 Barb. 484.

Ohio.— Hart *v.* Gregg, 32 Ohio St. 502; Warner *v.* Webster, 13 Ohio 505; Kinsman *v.* Loomis, 11 Ohio 475; Douglass *v.* Miller, 4 Ohio S. & C. Pl. Dec. 414.

Pennsylvania.— Kennedy *v.* Skeer, 3 Watts 95.

Tennessee.— Gookin *v.* Graham, 5 Humphr. 480.

Texas.— Simon *v.* Stearns, 17 Tex. Civ. App. 13, 43 S. W. 50.

West Virginia.—Kent *v.* Watson, 22 W. Va. 561; Western Min., etc., Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406.

Wisconsin.— Goodel *v.* Bennett, 22 Wis. 565.

United States.— Lounsdale *v.* Portland, 15 Fed. Cas. Nos. 8,578, 8,579, Deady 1, 39, 1 Oreg. 381, 397.

England.— Right *v.* Bucknell, 2 B. & Ad. 278, 22 E. C. L. 122. See Lloyd *v.* Lloyd, 2 C. & L. 592, 4 Dr. & War. 354.

Canada.— Casselman *v.* Casselman, 9 Ont. 442.

See 19 Cent. Dig. tit. "Estoppel," § 108.

38. *California.*— Anderson *v.* Yoakum, 94 Cal. 227, 29 Pac. 500, 28 Am. St. Rep. 121; Quivey *v.* Baker, 37 Cal. 465; Cadiz *v.* Majors, 33 Cal. 288; Morrison *v.* Wilson, 30 Cal. 344.

Georgia.— Taylor *v.* Wainman, 116 Ga. 795, 43 S. E. 58; Morrison *v.* Whiteside, 116 Ga. 459, 42 S. E. 729.

Illinois.— Benneson *v.* Aiken, 102 Ill. 284, 40 Am. Rep. 592.

Indiana.— Burget *v.* Merritt, 155 Ind. 143, 57 N. E. 714; Graham *v.* Lunsford, 149 Ind. 83, 48 N. E. 627; Thorp *v.* Hanes, 107 Ind. 324, 6 N. E. 920; Bryan *v.* Uland, 101 Ind.

c. Nature of Covenant — (I) *Covenant of Warranty.* Estoppel to assert an after-acquired title is most frequently founded on a conveyance with covenant of warranty.[39]

(II) *Covenant For Quiet Enjoyment.* An ordinary deed of bargain and sale with covenant for quiet enjoyment gives the grantee the benefit of a title subsequently acquired by the grantor.[40]

(III) *Covenant of Seizin and Right to Convey.* In some states title by estoppel may be founded on a covenant of seizin and right to convey.[41]

(IV) *Covenant Against Encumbrances.* A covenant against encumbrances will estop the grantor to assert a subsequent title acquired through the enforcement of a lien existing at the time of the conveyance,[42] but not a title otherwise acquired.[43]

(V) *Covenant of Non-Claim.* A covenant of non-claim in a deed amounts to the ordinary covenant of warranty and operates as an estoppel on an after-acquired title,[44] being confined, however, to the estate granted by the deed.[45]

(VI) *Covenant For Further Assurance.* A subsequent title inures under a covenant for further assurance as well as under a covenant of warranty.[46]

(VII) *Special Covenants.* A conveyance with special covenants as to acts

477, 1 N. E. 52; Avery *v.* Akins, 74 Ind. 283; Graham *v.* Graham, 55 Ind. 23.

Kansas.— Johnson *v.* Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; Scoffins *v.* Grandstaff, 12 Kan. 467; Simpson *v.* Greeley, 8 Kan. 586.

Maine.— Harriman *v.* Gray, 49 Me. 537; Loomis *v.* Pingree, 43 Me. 299; Derby *v.* Jones, 27 Me. 357.

Michigan.— People *v.* Miller, 79 Mich. 93, 44 N. W. 172; Fay *v.* Wood, 65 Mich. 390, 32 N. W. 614.

Missouri.—Gibson *v.* Chouteau, 39 Mo. 536.

New Hampshire.— Robertson *v.* Wilson, 38 N. H. 48; Bell *v.* Twilight, 26 N. H. 401; Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

New York.— Cramer *v.* Benton, 64 Barb. 522; Jackson *v.* Peek, 4 Wend. 300; Jackson *v.* Winslow, 9 Cow. 13; Woodcock *v.* Bennet, 1 Cow. 711, 13 Am. Dec. 568; Jackson *v.* Hubble, 1 Cow. 613; Jackson *v.* Wright, 14 Johns. 193.

Texas.— Perrin *v.* Perrin, 62 Tex. 477.

Wisconsin.— Jourdain *v.* Fox, 90 Wis. 99, 62 N. W. 936; Sydnor *v.* Palmer, 29 Wis. 226.

United States.— Lamb *v.* Starr, 14 Fed. Cas. No. 8,022, Deady 447.

Canada.— Casselman *v.* Casselman, 9 Ont. 442.

See 19 Cent. Dig. tit. "Estoppel," § 109.

Estoppel in pais.— The grantor in a quitclaim deed may be equitably estopped from asserting an after-acquired title. Dorris *v.* Smith, 7 Oreg. 267.

Recitals in quitclaim deed.— If a quitclaim deed given by an heir of his interest in the estate recites that he is an heir, it may bind him by estoppel from asserting the title subsequently accruing to him on the death of the ancestor. Hagensick *v.* Castor, 53 Nebr. 495, 73 N. W. 932.

39. See cases cited *supra*, note 27 *et seq.*

40. Smith *v.* Williams, 44 Mich. 240, 6 N. W. 662; Ryan *v.* U. S., 136 U. S. 68, 10 S. Ct. 913, 34 L. ed. 447.

41. *Michigan.*— Smith *v.* Williams, 44 Mich. 240, 6 N. W. 662, *semble.*

Mississippi.— Wightman *v.* Reynolds, 24 Miss. 675.

New York.— Vanderheyden *v.* Crandall, 2 Den. 9.

United States.— Irvine *v.* Irvine, 9 Wall. 617, 19 L. ed. 800, *semble.*

England.— Bensley *v.* Burdon, 4 L. J. Ch. O. S. 164, 25 Rev. Rep. 258, 2 Sim. & St. 519, 1 Eng. Ch. 519.

See 19 Cent. Dig. tit. "Estoppel," § 102.

Contra.— Allen *v.* Sayward, 5 Me. 227, 17 Am. Dec. 221; Doane *v.* Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

42. Brundred *v.* Walker, 12 N. J. Eq. 140; Coleman *v.* Bresnaham, 54 Hun (N. Y.) 619, 8 N. Y. Suppl. 158.

43. Sweetser *v.* Lowell, 33 Me. 446; Pike *v.* Galvin, 30 Me. 539; Wilson *v.* King, 23 N. J. Eq. 150.

44. *California.*— Gee *v.* Moore, 14 Cal. 472.

Kentucky.— See Fitzhugh *v.* Tyler, 9 B. Mon. 559.

Maine.— Fairbanks *v.* Williamson, 7 Me. 96.

Massachusetts.— Trull *v.* Eastman, 3 Metc. 121, 37 Am. Dec. 126.

New Hampshire.— Robertson *v.* Wilson, 38 N. H. 48.

Ohio.— Garlick *v.* Pittsburgh, etc., R. Co., 67 Ohio St. 223, 239, 65 N. E. 896.

See 19 Cent. Dig. tit. "Estoppel," § 105.

45. Morrison *v.* Wilson, 30 Cal. 344; Gee *v.* Moore, 14 Cal. 472; Read *v.* Whittemore, 60 Me. 479; Partridge *v.* Patten, 33 Me. 483, 54 Am. Dec. 633; Pike *v.* Galvin, 29 Me. 183; Hatch *v.* Kimball, 14 Me. 9; Wight *v.* Shaw, 5 Cush. (Mass.) 56; Hope *v.* Stone, 10 Minn. 141.

46. Wholey *v.* Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Bennett *v.* Waller, 23 Ill. 97 (holding that the rule is the same when the covenant occurs in a quitclaim deed); Norfleet *v.* Russell, 64 Mo. 176; Lamb *v.* Carter, 14 Fed. Cas. No. 8,013, 1 Sawy. 212. See also

of the grantor or those in privity with him, or against a particular title, will not preclude the grantor to acquire or assert an after-acquired title,[47] unless such acquisition is against the terms of the covenants therein.[48] So where a deed does not on its face purport to convey an indefeasible estate, but only the present right, title, and interest of the grantor, a covenant of warranty which attaches to the interest only and not to the land is qualified and limited by the grant, and will not pass an after-acquired estate, if it is apparent that the grantor intended to convey no greater estate than he was possessed of.[49]

d. Inoperative Covenants. Although it has been held that the general rule as to title by estoppel is not changed by the fact that a right of action on the covenant on which the estoppel is based is barred by limitation,[50] the weight of authority is to the effect that a grantor is not estopped to assert an after-acquired estate, if there is no liability on his covenants because of their being inoperative or having been extinguished.[51]

3. Estates or Rights Affected — a. In General. The estoppel will not operate as to land or an interest therein other than that which is specifically conveyed or called for by the plain import of the conveyance, and as to which the covenants for title are confined.[52]

b. Title Acquired by Patent From Sovereignty. The doctrine that if one

Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

47. *California.*— Kimball *v.* Semple, 25 Cal. 440.

Illinois.— Holbrook *v.* Debo, 99 Ill. 372.

Maine.— Bennett *v.* Davis, 90 Me. 457, 38 Atl. 372.

Massachusetts.— Huzzey *v.* Heffernan, 143 Mass. 232, 9 N. E. 570; Miller *v.* Ewing, 6 Cush. 34; Comstock *v.* Smith, 13 Pick. 116, 23 Am. Dec. 670.

Minnesota.— Thillen *v.* Richardson, 35 Minn. 509, 29 N. W. 677.

New Hampshire.— Bell *v.* Twilight, 26 N. H. 401; Hall *v.* Chaffee, 14 N. H. 215.

Ohio.— Boyd *v.* Longworth, 11 Ohio 235.

Virginia.— See Wynn *v.* Harman, 5 Gratt. 157, holding that a conveyance of a claim to specific land which warrants the same but recites that the grantee shall have no recourse if the title fails will not estop the grantor as to a title subsequently acquired by him.

West Virginia.— Western Min., etc., Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406.

United States.— Lamb *v.* Wakefield, 14 Fed. Cas. No. 8,024, 1 Sawy. 251.

See 19 Cent. Dig. tit. "Estoppel," § 100. See also *infra*, III, C, 3, a.

Contingent interest.—A warranty in a conveyance of "all right, title, and interest" in land is only a warranty of the interest thus vested, and will not operate by way of estoppel on a contingent interest. Blanchard *v.* Brooks, 12 Pick. (Mass.) 47; Hall *v.* Chaffee, 14 N. H. 215.

48. Blake *v.* Tucker, 12 Vt. 39, holding that a grantor by quitclaim who covenants against a particular title which he subsequently acquires is estopped to assert that title against his grantee.

49. *California.*— Kimball *v.* Semple, 25 Cal. 440; Gee *v.* Moore, 14 Cal. 472.

Illinois.— Holbrook *v.* Debo, 99 Ill. 372.

Massachusetts.— Miller *v.* Ewing, 6 Cush. 34; Allen *v.* Holton, 20 Pick. 458; Comstock *v.* Smith, 13 Pick. 116, 23 Am. Dec. 670; Blanchard *v.* Brooks, 12 Pick. 47.

Missouri.— Bogy *v.* Shoab, 13 Mo. 365.

New Hampshire.— Bell *v.* Twilight, 26 N. H. 401; Hall *v.* Chaffee, 14 N. H. 215.

New Jersey.— Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237.

Ohio.— White *v.* Brocaw, 14 Ohio St. 339.

Virginia.— Wynn *v.* Harman, 5 Gratt. 157.

United States.— Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Brown *v.* Jackson, 3 Wheat. 449, 4 L. ed. 432.

England.— Kingston's Case, 20 How. St. Tr. 355, 537, 2 Smith Lead. Cas. 713.

Limitation of specific grant.— A recital of an intention "to convey the entire interest" of the grantor will not thus limit the rule as to title by estoppel, where the granting clause purports to convey a specific tract. Locke *v.* White, 89 Ind. 492.

50. Cole *v.* Raymond, 9 Gray (Mass.) 217.

51. Smiley *v.* Fries, 104 Ill. 416; Webber *v.* Webber, 6 Me. 127; Howe *v.* Harrington, 18 N. J. Eq. 495; Goodel *v.* Bennett, 22 Wis. 565.

Discharge in bankruptcy.— Where land subject to a judgment lien was mortgaged with warranty, and the mortgagor took the benefit of the bankrupt act and then purchased the property at a sale under the judgment, he is estopped by his covenant from setting up the after-acquired title to defeat the mortgage, since the bankrupt act does not extinguish a covenant in such a case. Bush *v.* Person, 18 How. (U. S.) 82, 15 L. ed. 273.

52. *Alabama.*— Wheeler *v.* Aycock, 109 Ala. 146, 19 So. 497.

Illinois.— Gill *v.* Grand Tower Min., etc., Co., 92 Ill. 249.

New York.— Jackson *v.* Wright, 14 Johns. 193.

West Virginia.—Kent *v.* Watson, 22 W. Va. 561.

Wisconsin.— Simanek *v.* Nemetz, 120 Wis. 42, 97 N. W. 508.

have a mere equitable title and convey the land the legal title when acquired by him will vest in his grantee is applicable to conveyances by persons entitled to grants or patents of land from the state or general government, so that when a patent is issued the title to the land vests in the grantee or inures to his benefit.[53]

c. Title Acquired in Name of Third Person. The grantor cannot defeat the estoppel by procuring title to the after-acquired property to be taken in the name of a third person.[54]

d. Title Acquired For Third Person. The doctrine does not apply where an after-acquired title passes to the grantor subject to a resulting trust in favor of

See 19 Cent. Dig. tit. "Estoppel," § 114. See also *supra*, III, C, 2, b, (II).

Consistent title.— A grantor is not debarred from showing that he has subsequently acquired another independent title consistent with the provisions of the deed. Cuthrell *v.* Hawkins, 98 N. C. 203, 3 S. E. 672.

Estoppel by conveyance of future estate see ASSIGNMENTS, 4 Cyc. 15; DEEDS, 13 Cyc. 529, 637, 658.

53. *Alabama.*— Croft *v.* Doe, 125 Ala. 391, 28 So. 84; Carter *v.* Doe, 21 Ala. 72; Johnson *v.* Collins, 12 Ala. 322.

California.— Orr *v.* Stewart, 67 Cal. 275, 7 Pac. 693; Stanway *v.* Rubio, 51 Cal. 41; Christy *v.* Dana, 34 Cal. 548. However, the grantee of school lands acquires no rights where his grantor had not applied to purchase, nor paid anything on the land. People *v.* Hemme, (1890) 22 Pac. 1143; People *v.* Blake, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313.

Iowa.— Nicodemus *v.* Young, 90 Iowa 423, 57 N. W. 906; Warburton *v.* Mattox, Morr. 367.

Kentucky.—Patrick *v.* Chenault, 6 B. Mon. 315; Griffith *v.* Huston, 7 J. J. Marsh. 385; Cissell *v.* Rapier, 3 Ky. L. Rep. 690.

Maine.— Fairbanks *v.* Williamson, 7 Me. 96.

Massachusetts.— Burghardt *v.* Turner, 12 Pick. 534.

Michigan.— Frost *v.* Methodist Episcopal Church Missionary Soc., 56 Mich. 62, 22 N. W. 189; Haney *v.* Roy, 54 Mich. 635, 20 N. W. 621.

Mississippi.— Nixon *v.* Carco, 28 Miss. 414.

Missouri.— Wright *v.* Rutgers, 14 Mo. 585.

Nebraska.—Lyon *v.* Gombert, 63 Nebr. 630, 88 N. W. 774; Pillsbury *v.* Alexander, 40 Nebr. 242, 58 N. W. 859.

North Carolina.— Langston *v.* McKinnie, 6 N. C. 67.

Pennsylvania.— Wood *v.* Jones, 7 Pa. St. 478.

South Dakota.— Bernardy *v.* Colonial, etc., Mortg. Co., (1904) 98 N. W. 166.

Texas.— Miller *v.* Gist, 91 Tex. 335, 43 S. W. 263 [*modifying* 16 Tex. Civ. App. 274, 41 S. W. 396] (holding that on revocation of a national road certificate after a transfer with warranty of so much as was located on a designated tract, and on issue of the patent, the transferee will take by estoppel the legal title to a like undivided interest in the land granted); Baldwin *v.* Root, 90 Tex. 546, 40 S. W. 3; Johnson *v.* Newman, 43 Tex. 628; Garrett *v.* McClain, 18 Tex. Civ. App. 245, 44 S. W. 47; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396; Dupree *v.* Frank, (Civ. App. 1897) 39 S. W. 988; Morrison *v.* Faulkner, (Civ. App. 1893) 21 S. W. 984. See also Rankin *v.* Busby, (Civ. App. 1894) 25 S. W. 678, holding that the grantee acquires an equitable title to be enforced by action.

Wisconsin.— Spiess *v.* Neuberg, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211; Hayward *v.* Ormsbee, 11 Wis. 3.

United States.— Elwood *v.* Flannigan, 104 U. S. 562, 26 L. ed. 842; Massey *v.* Papin, 24 How. 362, 16 L. ed. 734; Mann *v.* Wilson, 23 How. 457, 16 L. ed. 584; French *v.* Spencer, 21 How. 228, 16 L. ed. 97; Landes *v.* Brant, 10 How. 348, 13 L. ed. 447 (so holding under a statute); Bush *v.* Marshall, 6 How. 284, 12 L. ed. 440; Barr *v.* Gratz, 4 Wheat. 213, 4 L. ed. 553; Harmer *v.* Morris, 11 Fed. Cas. No. 6,076, 1 McLean 44 [*affirmed* in 7 Pet. 554, 8 L. ed. 781]. But see Gilmer *v.* Poindexter, 10 How. 257, 13 L. ed. 411.

Canada.—Allen *v.* Edinburgh L. Assur. Co., 23 Grant Ch. (U. C.) 306; Guegain *v.* Langis, 21 N. Brunsw. 549; Robertson *v.* Daley, 11 Ont. 352; Boulter *v.* Hamilton, 15 U. C. C. P. 125; Irvine *v.* Webster, 2 U. C. Q. B. 224; Doe *v.* McEwan, 5 U. C. Q. B. O. S. 598; Doe *v.* Myers, 2 U. C. Q. B. O. S. 424. *Contra*, Todd *v.* Cain, 16 U. C. Q. B. 516; Doe *v.* Shea, 2 U. C. Q. B. 483.

See, however, McDermott Min. Co. *v.* McDermott, 27 Mont. 143, 69 Pac. 715, where a grantee in a deed of a mining claim which conveyed all the owner's interest and all estate which might be acquired under proceedings previously instituted failed to do the required representation for a certain year, and did not resume work the next year until a third party had in good faith relocated the claim, and conveyed to the original grantor, and it was held that the grantor was not estopped by his deed from asserting title under the deed to him from the relocator.

54. Quivey *v.* Baker, 37 Cal. 465. However, the acquisition of an adverse title by a wife will not inure to the benefit of a grantee to whom the husband has conveyed with warranty. Carter *v.* Bustamente, 59 Miss. 559; Cameron *v.* Lewis, 59 Miss. 134.

Burden of proof.— Where a grantee with warranty attempts to take the benefit of a title subsequently acquired by a stranger in trust for the grantor, the burden is on him to satisfactorily prove that the stranger does so hold in trust. Ward *v.* Price, 12 N. J. Eq. 543.

the actual purchaser, or the conveyance is made to him as a conduit and for the purpose of vesting the title in a third person.[55]

e. Title Acquired From Grantee — (I) *By Purchase.* A title subsequently acquired from the grantee or those claiming under him will not inure to the benefit of him or them.[56]

(II) *By Judicial Sale* — (A) *In General.* If the property is sold as the grantee's at a judicial sale, the grantor is not estopped by his covenant from purchasing at the sale and asserting the title thus acquired against the grantee.[57]

(B) *Tax-Sale.* The grantor may acquire title through a sale for taxes which have accrued since the conveyance,[58] but not where the taxes were a lien at the time of the conveyance, or the sale was the result of the grantor's delinquency.[59]

(III) *By Adverse Possession.* A subsequent possession by the grantor of the premises conveyed for the period prescribed by the statute of limitations will inure to his benefit and not to the benefit of the grantee.[60]

4. Operation of Law in Vesting Title in Grantee — a. In General. It is commonly said that if a grantor without title subsequently acquires it, the title thereupon vests in the grantee by operation of law as of the time of the conveyance;[61]

55. *Colorado.*— Phillippi *v.* Leet, 19 Colo. 246, 35 Pac. 540.

New Hampshire.— Runlet *v.* Otis, 2 N. H. 167.

New Jersey.— Condit *v.* Bigalow, 64 N. J. Eq. 504, 54 Atl. 160.

Ohio.— Buckingham *v.* Hanna, 2 Ohio St. 551; Burchard *v.* Hubbard, 11 Ohio 316.

Texas.— Tretelliere *v.* Hindes, 57 Tex. 392.

See 19 Cent. Dig. tit. "Estoppel," § 115.

Where, however, a person holding a bond for title conveyed the property, and afterward the vendor conveyed to him, and at the same time a third person advanced the money to pay the vendor, and thereupon took a mortgage on the land from the purchaser, the purchaser was not a mere instrument of conveyance or a trustee of the mortgagee so as to vest title in the mortgagee to the exclusion of the first grantee. Wark *v.* Willard, 13 N. H. 389.

56. Smiley *v.* Fries, 104 Ill. 416; Berthelemy *v.* Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Harding *v.* Springer, 14 Me. 407, 31 Am. Dec. 61.

57. Harrold *v.* Morgan, 66 Ga. 398 (execution sale); Jones *v.* King, 25 Ill. 383; Thielen *v.* Richardson, 35 Minn. 509, 29 N. W. 677.

58. Ervin *v.* Morris, 26 Kan. 664; Foster *v.* Johnson, 89 Tex. 640, 36 S. W. 67 [*reversing* (Civ. App. 1896) 34 S. W. 821].

59. Hannah *v.* Collins, 94 Ind. 201; Porter *v.* Lafferty, 33 Iowa 254; Gardiner *v.* Gerrish, 23 Me. 46; Frank *v.* Caruthers, 108 Mo. 569, 18 S. W. 927, holding that the rule is the same where the grantor purchases from one who bought at the tax-sale.

60. *Alabama.*— Doolittle v. Robertson, 109 Ala. 412, 19 So. 851.

California.— Garabaldi *v.* Shattuck, 70 Cal. 511, 11 Pac. 778.

Maine.— Hines *v.* Henderson, 57 Me. 324, 99 Am. Dec. 772; Traip *v.* Traip, 57 Me. 268.

Massachusetts.— Stearns *v.* Hendersass, 9 Cush. 497, 57 Am. Dec. 65; Parker *v.* Merrimack River Locks, etc., 3 Metc. 91, 37 Am. Dec. 121.

Nebraska.— Horbach *v.* Boyd, 64 Nebr. 129, 89 N. W. 644.

New York.— Sherman *v.* Kane, 86 N. Y. 57 [*affirming* 46 N. Y. Super. Ct. 310]; Cramer *v.* Benton, 64 Barb. 522; Kent *v.* Harcourt, 33 Barb. 491.

North Carolina.— Eddleman *v.* Carpenter, 52 N. C. 616.

Texas.— Harn *v.* Smith, 79 Tex. 310, 15 S. W. 240, 23 Am. St. Rep. 340.

See 19 Cent. Dig. tit. "Estoppel," § 116.

61. *Alabama.*— Parker *v.* Marks, 82 Ala. 548, 3 So. 5; McCaa *v.* Woolf, 42 Ala. 389; McGee *v.* Eastis, 5 Stew. & P. 426.

Arkansas— Watkins *v.* Wassell, 15 Ark. 73.

Georgia.— Parker *v.* Jones, 57 Ga. 204; Goodson *v.* Beacham, 24 Ga. 150; Henderson *v.* Hackney, 23 Ga. 383, 68 Am. Dec. 529.

Illinois.— Whitson *v.* Grosvenor, 170 Ill. 271, 48 N. E. 1018.

Maine.— Crocker *v.* Pierce, 31 Me. 177; Gardiner *v.* Gerrish, 23 Me. 46; Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49.

Massachusetts.— Somes *v.* Skinner, 3 Pick. 52.

Mississippi.— Edwards *v.* Hillier, 70 Miss. 803, 13 So. 692.

Missouri.— Fordyce *v.* Rapp, 131 Mo. 354, 33 S. W. 57.

New Hampshire.— Robertson *v.* Wilson, 38 N. H. 48; Morrison *v.* Underwood, 20 N. H. 369.

New Jersey.— Ross *v.* Adams, 28 N. J. L. 160; Moore *v.* Rake, 26 N. J. L. 574.

New York.— Tefft *v.* Munson, 63 Barb. 31; Utica Bank *v.* Mesereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

North Carolina.— Foster *v.* Hackett, 112 N. C. 546, 17 S. E. 426.

Ohio.— Philly *v.* Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Bond *v.* Swearingen, 1 Ohio 395.

South Dakota.—Johnson *v.* Branch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857.

Tennessee.—Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67.

Texas.— Hale *v.* Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288.

but by the better opinion the estoppel merely renders the after-acquired title unavailable against the grantee.[62] Consequently the grantor cannot compel the grantee to take the new title against his will, either in satisfaction of a covenant for title or in mitigation of damages for the breach of it;[63] nor may a stranger take advantage of the estoppel.[64]

b. Conflicting Grants. The cases are in conflict as to whether the grantee may urge the estoppel against a *bona fide* purchaser of the grantor's after-acquired title. A majority of the cases hold that he may do so,[65] but in some states the contrary rule prevails.[66] In some jurisdictions the doctrine of estoppel has been

Vermont.— Cross *v.* Martin, 46 Vt. 14; Jarvis *v.* Aikens, 25 Vt. 635.

United States.— Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; Harmer *v.* Morris, 12 Fed. Cas. No. 6,076, 1 McLean 44 [*affirmed* in 7 Pet. 554, 8 L. ed. 781].

See 19 Cent. Dig. tit. "Estoppel," § 120.

Grantee takes subject to encumbrances.— Where an heir, previous to the death of his ancestor, conveys by deed all his interest in the estate of his ancestor, and there is a judgment against the heir previous to the conveyance on which, after the descent of the property, a sale is had, the purchaser at such sale, and not the grantee under the conveyance, takes the land. Jackson *v.* Bradford, 4 Wend. (N. Y.) 619.

Covenants running with estates by estoppel see 11 Cyc. 1080 note 82.

62. Harmon *v.* Christopher, 34 N. J. Eq. 459; Rankin *v.* Busby, (Tex. Civ. App. 1894) 25 S. W. 678; Burtners *v.* Kearen, 24 Gratt. (Va.) 42. And see Robertson *v.* Rents, (Minn. 1897) 74 N. W. 133. *Contra*, Perkins *v.* Coleman, 90 Ky. 611, 14 S. W. 640, 12 Ky. L. Rep. 501.

63. *Indiana.*— Burton *v.* Reeds, 20 Ind. 87.

Massachusetts.— Blanchard *v.* Ellis, 1 Gray 195, 61 Am. Dec. 417.

Minnesota.— Resser *v.* Carney, 52 Minn. 397, 54 N. W. 89.

New York.— See McCarty *v.* Leggett, 3 Hill 134.

Tennessee.— Woods *v.* North, 6 Humphr. 309, 44 Am. Dec. 312.

Wisconsin.— McInnis *v.* Lyman, 62 Wis. 191, 22 N. W. 405.

Contra.— Reese *v.* Smith, 12 Mo. 344; Boulter *v.* Hamilton, 15 U. C. C. P. 125.

It is otherwise where the grantor acquires a paramount title before the grantee is evicted under it. In this event only nominal damages are recoverable. King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; Burton *v.* Reeds, 20 Ind. 87; Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49.

64. See cases cited *infra*, notes 28, 29.

65. *Delaware.*— Doe *v.* Dowdall, 3 Houst. 369, 11 Am. Rep. 757.

Illinois.— Owen *v.* Brookport, 208 Ill. 35, 69 N. E. 952.

Indiana.— See Thalls *v.* Smith, 139 Ind. 496, 39 N. E. 154.

Maine.— Powers *v.* Patten, 71 Me. 583; Fairbanks *v.* Williamson, 7 Me. 96.

Massachusetts.— Knight *v.* Thayer, 125 Mass. 25; White *v.* Patten, 24 Pick. 324.

Minnesota.— Hooper *v.* Henry, 31 Minn. 264, 17 N. W. 473.

Mississippi.— Anderson *v.* Wilder, 83 Miss. 606, 35 So. 875; Edwards *v.* Hillier, 70 Miss. 803, 13 So. 692.

New Hampshire.— Chamberlain *v.* Meeder, 16 N. H. 381 (*semble*); Wark *v.* Willard, 13 N. H. 389.

New York.— Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980 (*semble*); Tefft *v.* Munson, 57 N. Y. 97.

North Carolina.— Sinclair *v.* Huntley, 131 N. C. 243, 42 S. E. 605.

Ohio.— Philly *v.* Sanders, 11 Ohio St. 490, 78 Am. Dec. 316. See, however, Buckingham *v.* Hanna, 2 Ohio St. 551.

Oregon.— Wilson *v.* McEwan, 7 Oreg. 87; Taggart *v.* Risley, 4 Oreg. 235.

Rhode Island.— McCusker *v.* McEvey, 9 R. I. 528, 11 Am. Rep. 295.

Tennessee.— Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67.

Texas.— See Hale *v.* Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288.

Vermont.— Jarvis *v.* Aikens, 25 Vt. 635.

England.— Trevivan *v.* Lawrence, 2 Ld. Raym. 1036, 6 Mod. 256, 1 Salk. 276; Bensley *v.* Burdon, 4 L. J. Ch. O. S. 164, 2 Sim. & Str. 519, 25 Rev. Rep. 258, 1 Eng. Ch. 519.

Canada.—Guegain *v.* Langis, 21 N. Brunsw. 549; Irvine *v.* Webster, 2 U. C. Q. B. 224; Doe *v.* McEwan, 5 U. C. Q. B. O. S. 598.

See 19 Cent. Dig. tit. "Estoppel," § 113.

66. Ford *v.* Unity Church Soc., 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561; Calder *v.* Chapman, 52 Pa. St. 359, 91 Am. Dec. 163. And see Gilliland *v.* Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413.

Execution purchaser.— A person extending an execution on land of a grantor who has acquired title since the conveyance is estopped by the warranty in the deed to claim the land as against the grantee. Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

Notice.— If the purchaser of the after-acquired title has notice of the first deed he is bound by the estoppel. Letson *v.* Roach, 5 Kan. App. 57, 47 Pac. 321; Barker *v.* Circle, 60 Mo. 258; Wark *v.* Willard, 13 N. H. 389; Mann *v.* Young, 1 Wash. Terr. 454. It is otherwise if the first conveyance was made in fraud of creditors. Gilliland *v.* Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413.

Purchase for value.— The purchaser is estopped also if he does not show that he bought for value. Lindsay *v.* Freeman, 83 Tex. 259, 18 S. W. 727; Mann *v.* Young, 1 Wash. Terr. 454.

so far modified by the registry laws as to give priority to one who purchases the after-acquired title in reliance on the record, where the first grantee negligently failed to examine it.[67] If two or more conveyances are made by a person having no title, a title subsequently acquired by him inures to the benefit of the first grantee.[68]

D. Estoppel to Deny Truth of Recitals[69] — **1. General Rules — a. In General.** All parties to a deed are bound by the recitals in it legitimately appertaining to the subject-matter of it.[70] Recitals of matter of fact in a deed are ordinarily binding on the grantor.[71] They are binding also on the grantee and

67. Wheeler *v.* Young, 76 Conn. 44, 55 Atl. 670; Way *v.* Arnold, 18 Ga. 181 (*semble*); Dodd *v.* Williams, 3 Mo. App. 278; Bingham *v.* Kirkland, 34 N. J. Eq. 229. And see Salisbury Sav. Soc. *v.* Cutting, 50 Conn. 113.

Record as notice.— A record of a mortgage prior to the acquisition of title by the mortgagor is constructive notice to a subsequent purchaser in good faith from the mortgagor. Tefft *v.* Munson, 57 N. Y. 97. See also White *v.* Patten, 24 Pick. (Mass.) 324. Where, however, an agent intrusted with money to be loaned on mortgage security used the money for his own benefit, and procured a third person to execute a note to the principal for the money, and also a mortgage on certain land to which he had no title, and the agent subsequently acquired title to the land, the record of the mortgage was not constructive notice to the creditors of the agent of the equitable lien in favor of the principal. Robertson *v.* Rentz, 71 Minn. 489, 74 N. W. 133.

68. Morrison *v.* Caldwell, 5 T. B. Mon. (Ky.) 426, 17 Am. Dec. 84. And see Watkins *v.* Wassell, 15 Ark. 73.

69. Recitals as evidence see Evidence.

70. *Connecticut.*— Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Delaware.— Inskeep *v.* Shields, 4 Harr. 345.

Illinois.— Byrne *v.* Morehouse, 22 Ill. 603; Wynkoop *v.* Cowing, 21 Ill. 570.

Kansas.— Taylor *v.* Riggs, 8 Kan. App. 323, 57 Pac. 44; Libby *v.* Ralston, 2 Kan. App. 125, 43 Pac. 294.

Mississippi.— Robbins *v.* McMillan, 26 Miss. 434.

Missouri.— St. Louis *v.* Wiggins Ferry Co., 15 Mo. App. 227.

New Jersey.— Woolley *v.* Brewer, 1 N. J. L. 172.

New York.— Sinclair *v.* Jackson, 8 Cow. 543.

Oregon.— Graham *v.* Meek, 1 Oreg. 325.

Tennessee.— Rankin *v.* Warner, 2 Lea 302.

United States.— Carver *v.* Astor, 4 Pet. 1, 7 L. ed. 761; U. S. Bank *v.* Benning, 2 Fed. Cas. No. 908, 4 Cranch C. C. 81.

England.—Wiles *v.* Woodward, 5 Exch. 557, 20 L. J. Exch. 261.

See 19 Cent. Dig. tit. "Estoppel," § 27 *et seq.*

See also Deeds, 13 Cyc. 611.

A recital as distinguished from a direct affirmation may work an estoppel. Bower *v.* McCormick, 23 Gratt. (Va.) 310; Bowman *v.* Taylor, 2 A. & E. 278, 4 L. J. K. B. 58, 4 N. & M. 264, 29 E. C. L. 142.

To constitute an estoppel the recital must come from the party against whom the estoppel is asserted. Miller *v.* Bagwell, 3 McCord (S. C.) 429; Hayne *v.* Maltby, 3 T. R. 438.

Recital of one deed in another binds the parties and those claiming under them by estoppel.

Arkansas.— Doe *v.* Porter, 3 Ark. 18, 36 Am. Dec. 448.

Georgia.— McCleskey *v.* Leadbetter, 1 Ga. 551.

Kansas.— Simpson *v.* Greeley, 8 Kan. 586.

New York.— Sinclair *v.* Jackson, 8 Cow. 543; Jackson *v.* Willson, 9 Johns. 92.

Texas.— Hardy *v.* De Leon, 5 Tex. 211.

Vermont.— Green *v.* Clark, 13 Vt. 158.

United States.— Crane *v.* Morris, 6 Pet. 598, 8 L. ed. 514.

See 19 Cent. Dig. tit. "Estoppel," § 39.

See, however, Douglass *v.* Huhn, 24 Kan. 766 (holding that a plaintiff in an action to quiet title who offers in evidence a quitclaim deed to defendant reciting the execution of a tax deed to the grantor therein named, for the purpose of proving the adverse claim made by defendant, is not bound by the recitals of the deed); Parker *v.* Parker, 17 Mass. 370 (holding that mere reference to an instrument will not preclude a party to the deed from disputing the existence of the writing referred to); Blake *v.* Tucker, 12 Vt. 39; Brown *v.* Moore, 15 N. Brunsw. 407. See also *infra*, note 72.

Acknowledgment of title.— One who by a formal authentic act acknowledges the title of another cannot subsequently attack it (Kellogg *v.* McMillan, 9 La. Ann. 225) as fraudulently acquired (Theriot *v.* Michel, 28 La. Ann. 107).

71. *District of Columbia.*—Morris *v.* Wheat, 8 App. Cas. 379.

Georgia.— McCleskey *v.* Leadbetter, 1 Ga. 551.

Kentucky.— Norton *v.* Sanders, 7 J. J. Marsh. 12; Cissell *v.* Rapier, 3 Ky. L. Rep. 690.

Mississippi.— Newell *v.* Newell, 34 Miss. 385.

Missouri.— Clamorgan *v.* Greene, 32 Mo. 285.

Nebraska.— Hagensick *v.* Castor, 53 Nebr. 495, 73 N. W. 932.

New York.— Jackson *v.* Parkhurst, 9 Wend. 209; Smith *v.* Burnham, 9 Johns. 306.

Vermont.— Blake *v.* Tucker, 12 Vt. 39.

Washington.— Brazee *v.* Schofield, 2 Wash. Terr. 209, 3 Pac. 265.

his successors in estate,[72] where he or they base their rights on the deed, but not otherwise.[73] The estoppel is limited by the intention of the parties, however, and whether one party or the other or both are estopped by a recital depends upon their intent as manifested by the deed.[74]

b. General and Particular Recitals. To found an estoppel the recital must be certain.[75] With this idea in mind recitals have been classified as being either

United States.— Nevett *v.* Berry, 18 Fed. Cas. No. 10,135, 5 Cranch C. C. 291.

See, however, Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498.

As between grantors.— Where a will assumed to, but did not in law, devise a certain lot to one of the heirs, and all the heirs joined in a release to the executor, reciting that that lot was devised to the particular heir, there was no estoppel as between the several heirs as grantors, binding them to the truth of the recital. *Re* Bain, 25 Ont. 136.

Misnomer.— Although one misnamed in a deed sues the grantor in the name by which he is described, his grantor is not estopped to plead the misnomer in abatement, since the grantor is estopped to deny only that he conveyed the land to the grantee by a wrong name. Pinckard *v.* Milmine, 76 Ill. 453.

72. *District of Columbia.*— Anderson *v.* Reid, 10 App. Cas. 426.

Georgia.— Thrower *v.* Wood, 53 Ga. 458.

Illinois.— Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306 [*reversing* 70 Ill. App. 251]; Despain *v.* Wagner, 163 Ill. 598, 45 N. E. 129; Orthwein *v.* Thomas, 127 Ill. 554, 13 N. E. 564, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434 (holding that the recitals in a deed operate by way of estoppel upon the grantee, and after its record upon his grantees); Pinckard *v.* Milmine, 76 Ill. 453; Byrne *v.* Morehouse, 22 Ill. 603; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462.

New York.— Judd *v.* Seekins, 62 N. Y. 266; Jackson *v.* Ireland, 3 Wend. 99; Jackson *v.* Thompson, 6 Cow. 178. See, however, Hunt *v.* Johnson, 19 N. Y. 279.

Ohio.— Scott *v.* Douglass, 7 Ohio 227; McChesney *v.* Wainwright, 5 Ohio 452.

South Carolina.—Smith *v.* Asbell, 2 Strobh. 141.

Texas.— Fisk *v.* Flores, 43 Tex. 340; Kimbro *v.* Hamilton, 28 Tex. 560; Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. 403. See, however, Stephenson *v.* Martin, 68 Tex. 483, 3 S. W. 89.

Virginia.— Flanary *v.* Kane, 102 Va. 547, 46 S. E. 312, 681; Menefee *v.* Marge, (1888) 4 S. E. 726.

England.— Bowman *v.* Taylor, 2 A. & E. 278, 4 L. J. K. B. 58, 4 N. & M. 264, 29 E. C. L. 142; Hills *v.* Laming, 9 Exch. 256, 23 L. J. Exch. 60.

Evidence.— Recitals in a deed will operate as an estoppel against the grantee only under those circumstances where the declarations of a grantor, made at the time of the execution of a deed, would be evidence against the grantee and those claiming under him. A recital is not competent to show title in the grantor. Joeckel *v.* Easton, 11 Mo. 118, 47 Am. Dec. 142. See, generally, EVIDENCE.

A party is estopped to dispute a title which is recognized in a deed under which he claims. Sawyer *v.* Campbell, 130 Ill. 186, 22 N. E. 458; Hanly *v.* Blackford, 1 Dana (Ky.) 1, 25 Am. Dec. 114; McDonald *v.* King, 1 N. J. L. 432; Kinsman *v.* Loomis, 11 Ohio 475; Hart *v.* Johnson, 6 Ohio 87. See also *supra*, note 70.

Estoppel to attack prior mortgage.— A creditor who accepts a second chattel mortgage which expressly recites that it is subject to a prior mortgage or expressly recites the existence of a prior mortgage is estopped to attack the prior mortgage as in fraud of creditors or to assert that it constituted an assignment for the benefit of creditors generally. Smith-McCord Dry Goods Co. *v.* John B. Farwell Co., 6 Okla. 318, 50 Pac. 149. See also MORTGAGES.

Manner of holding.— The grantee cannot deny the manner of the grantor's holding as asserted in the deed. McCloskey *v.* Doherty, 97 Ky. 300, 30 S. W. 649, 17 Ky. L. Rep. 178; Stimpson *v.* Thomaston Bank, 28 Me. 259.

Authority to convey.— Claimants under a deed executed under a power of attorney are not estopped by the recitals of the power of attorney to show a title in the attorney different from that which the power represents him to have. Poage *v.* Chinn, 4 Dana (Ky.) 50. See, however, Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99.

73. *California.*— Sonoma County Water Co. *v.* Lynch, 50 Cal. 503.

Iowa.— Baldwin *v.* Thompson, 15 Iowa 504.

New York.— Whyland *v.* Weaver, 67 Barb. 116.

United States.— Burr *v.* Duryee, 4 Fed. Cas. No. 2,190.

England.— Hayne *v.* Maltby, 3 T. R. 438.

74. Farrar *v.* Christy, 24 Mo. 453; Blake *v.* Tucker, 12 Vt. 39; McCullough *v.* Dashiell, 78 Va. 634; Bower *v.* McCormick, 23 Gratt. (Va.) 310; Stroughill *v.* Buck, 14 Q. B. 781, 14 Jur. 741, 19 L. J. Q. B. 209, 68 E. C. L. 781; Watson *v.* Dennis, 3 Russ. 90, 3 Eng. Ch. 90; Honner *v.* Morton, 3 Russ. 65, 27 Rev. Rep. 15, 3 Eng. Ch. 65.

A recital as a rule does not raise an estoppel. To give it that effect it must show that the object of the parties was to make the matter recited a fixed fact, as the basis of their action. Hays *v.* Askew, 50 N. C. 63.

75. *California.*— Zimmler *v.* San Luis Water Co., 57 Cal. 221.

Connecticut.— Hubbard *v.* Norton, 10 Conn. 422.

North Carolina.— Hays *v.* Askew, 50 N. C. 63.

general or particular. General recitals are such as do not definitely affirm or deny the existence of some fact, or either expressly or impliedly show a clear intention of the parties that either one or the other or both of them shall be concluded from disputing the fact recited. These do not work an estoppel as to the fact in question.[76] Thus a recital in the alternative is not conclusive of either alternative alone. A party may deny its truth as to one of the alternatives.[77] Particular recitals, on the other hand, are such as definitely affirm or deny the existence of some fact and either expressly or impliedly show a clear intention of the parties that either one or the other or both shall be precluded from asserting anything to the contrary. These are binding.[78] Thus recitals in municipal bonds of preliminary facts touching the regularity of their issuance estop the municipality from denying those facts.[79]

c. Materiality. The doctrine of estoppel does not extend to mere descriptive matter or statements or recitals which are immaterial and not contractual or essential to the purposes of the instrument.[80] Thus the description in a deed of

Texas.— Linney *v.* Woods, 66 Tex. 22, 17 S. W. 244.

United States.— Steam-Boat Rock Independent School Dist. *v.* Stone, 106 U. S. 183, 1 S. Ct. 84, 27 L. ed. 90.

See also *infra*, III, E, 4, c.

Recital excepting land from grant.— A recital in a deed that a part of the land described had been conveyed to another, inserted for the purpose of excepting such part out of the grant, but void for uncertainty, will not operate as an estoppel against the grantee in a subsequent action to recover the land referred to in the recital. Mooney *v.* Cooledge, 30 Ark. 640.

76. *Louisiana.*— Brian *v.* Bonvillain, 111 La. 441, 35 So. 632.

Maine.— Farrar *v.* Cooper, 34 Me. 394.

Massachusetts.— Jackson *v.* Allen, 120 Mass. 64.

Mississippi.—Stevenson *v.* McReary, 12 Sm. & M. 9, 51 Am. Dec. 102.

New Jersey.— Lot *v.* Thomas, 2 N. J. L. 407e, 2 Am. Dec. 354.

New York.— Purdy *v.* Coar, 109 N. Y. 448, 17 N. E. 352, 4 Am. St. Rep. 491; Huntington *v.* Havens, 5 Johns. Ch. 23.

Pennsylvania.— Hall *v.* Benner, 1 Penr. & W. 402, 21 Am. Dec. 394.

Tennessee.— McDonald *v.* Lusk, 9 Lea 654.

Virginia.— Sheffey *v.* Gardiner, 79 Va. 313.

England.— Kepp *v.* Wiggett, 10 C. B. 35, 14 Jur. 1137, 20 L. J. C. P. 49, 70 E. C. L. 35; Salter *v.* Kidley, 1 Show. 58.

77. Right *v.* Bucknell, 2 B. & Ad. 278, 22 E. C. L. 122.

78. *Minnesota.*— Calkins *v.* Copley, 29 Minn. 471, 13 N. W. 904.

Missouri.— Sutton *v.* Casselleggi, 5 Mo. App. 111.

New York.— Kellogg *v.* Dennis, 38 Misc. 82, 77 N. Y. Suppl. 172; Huntington *v.* Havens, 5 Johns. Ch. 23.

Pennsylvania.— Root *v.* Crock, 7 Pa. St. 378.

Virginia.— Anderson *v.* Phlegar, 93 Va. 415, 25 S. E. 107.

England.— Hosier *v.* Searle, 2 B. & P. 299; Carpenter *v.* Buller, 10 L. J. Exch. 393, 8 M. & W. 209; Salter *v.* Kidley, 1 Show. 58; Shelley *v.* Wright, Willes 9.

If a deed bounds the land on a street or way the parties cannot deny the existence of the street or way. See *infra*, III, D, 2, c.

79. Flagg *v.* Barnes County School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258; Webb *v.* Herne Bay Com'rs, L. R. 5 Q. B. 642, 39 L. J. Q. B. 221, 22 L. T. Rep. N. S. 745, 19 Wkly. Rep. 241. See also MUNICIPAL CORPORATIONS.

80. *California.*— Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498.

Georgia.— Thrower *v.* Wood, 53 Ga. 458.

Iowa.— Walker *v.* Sioux City, etc., Town Lot Co., 65 Iowa 563, 22 N. W. 676.

Massachusetts.— Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638.

Missouri.— Lajoye *v.* Primm, 3 Mo. 529.

New Hampshire.— Comings *v.* Wellman, 14 N. H. 287.

New York.— Reed *v.* McCourt, 41 N. Y. 435; Edmonston *v.* Edmonston, 13 Hun 133; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. 484; Jackson *v.* Bard, 4 Johns. 230, 4 Am. Dec. 267.

North Carolina.— Brinegar *v.* Chaffin, 14 N. C. 108, 22 Am. Dec. 711; Den *v.* Dew, 7 N. C. 260.

Pennsylvania.— Muhlenberg *v.* Druckenmiller, 103 Pa. St. 631; McKonkey's Appeal, 13 Pa. St. 253; Mehaffy *v.* Dobbs, 9 Watts 363.

Tennessee.— East Tennessee, etc., R. Co. *v.* Nashville, etc., R. Co., (Ch. App. 1897) 51 S. W. 202.

Texas.— Bartell *v.* Kelsey, (Civ. App. 1900) 59 S. W. 631; Smith *v.* Dunman, 9 Tex. Civ. App. 319, 29 S. W. 432.

Vermont.— Stillman *v.* Barney, 4 Vt. 187.

England.— Limmer Asphalte Pav. Co. *v.* Inland Revenue Com'rs, L. R. 7 Exch. 211, 41 L. J. Exch. 106, 26 L. T. Rep. N. S. 633, 20 Wkly. Rep. 610; Doe *v.* Shelton, 3 A. & E. 265, 1 Hurl. & W. 287, 4 N. & M. 857, 30 E. C. L. 137 (holding that a party to a deed is not estopped by statements which do not go to make up his title in anterior deeds through which he derives title); Hosier *v.* Searle, 2 B. & P. 299; Dowty *v.* Fawne, 1 Brownl. & G. 117, 2 Bulst. 19, Yelv. 226;

lands excepted from the conveyance, as having been conveyed to another, does not estop the grantor, nor one to whom he shall convey the excepted lands, from alleging that no such conveyance as recited had been made.[81]

d. Conclusiveness in Collateral Action. A recital works an estoppel only in an action founded on the deed or brought to enforce rights arising under it. While in a collateral action it may constitute evidence against the one party or the other, it is not conclusive.[82]

e. Bonds.[83] The parties are estopped by the material recitals in a bond the same as by recitals in a deed of conveyance.[84]

Cullingworth's Case, Godb. 177; Skipworth *v.* Green, 8 Mod. 311; Salter *v.* Kidley, 1 Show. 58. See also Prat *v.* Phanner, Moore 477, Yelv. 227 note.

Description of person.— A defendant may claim under a deed of settlement for her benefit, the deed not being signed by her, in which she is described as the wife of B, without being estopped to deny that she is the wife of B. Brown *v.* Beckett, 6 D. C. 253.

81. Ambs *v.* Chicago, etc., R. Co., 44 Minn. 266, 46 N. W. 321. See also Mooney *v.* Cooledge, 30 Ark. 640.

82. *Kansas.*— King *v.* Mead, 60 Kan. 539, 57 Pac. 113.

Massachusetts.— Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; Merrifield *v.* Parritt, 11 Cush. 590, *semble.*

New York.— Edmonston *v.* Edmonston, 13 Hun 133; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. 484.

Texas.— Stephenson *v.* Martin, 68 Tex. 483, 3 S. W. 89.

Washington.— Bingham *v.* Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

England.—Burnand *v.* Rodocanachi, 7 App. Cas. 333, 51 L. J. Q. B. 548, 47 L. T. Rep. N. S. 277, 31 Wkly. Rep. 65; *Ex p.* Morgan, 2 Ch. D. 72, 45 L. J. Bankr. 36, 34 L. T. Rep. N. S. 329, 24 Wkly. Rep. 414; South Eastern R. Co. *v.* Warton, 6 H. & N. 520, 31 L. J. Exch. 515; Carter *v.* Carter, 4 Jur. N. S. 63, 3 Kay & J. 618, 27 L. J. Ch. 74; Fraser *v.* Pendlebury, 31 L. J. C. P. 1, 10 Wkly. Rep. 104; Carpenter *v.* Buller, 10 L. J. Exch. 393, 8 M. & W. 209.

Canada.— Fullerton *v.* Brydges, 10 Manitoba 431; Whitman *v.* Jones, 17 Nova Scotia 443; Archibald *v.* Blois, 2 Nova Scotia 307; *Re* Bain, 25 Ont. 136; Minaker *v.* Ash, 10 U. C. C. P. 363; Macaulay *v.* Marshall, 20 U. C. Q. B. 273.

83. See also PRINCIPAL AND SURETY.

Particular kinds of bonds see APPEAL AND ERROR; ATTACHMENT, 4 Cyc. 700; COUNTIES, 11 Cyc. 566; DETINUE; EXECUTIONS; GUARDIAN AND WARD; INJUNCTIONS; MUNICIPAL CORPORATIONS; OFFICERS; REPLEVIN.

84. *Alabama.*— Plowman *v.* Henderson, 59 Ala. 559; Mitchell *v.* Ingram, 38 Ala. 395; Williamson *v.* Woolf, 37 Ala. 298; Henderson *v.* Montgomery Bank, 11 Ala. 855; Whitted *v.* Governor, 6 Port. 335; Strain *v.* Weir, 3 Stew. & P. 421. See Wallis *v.* Long, 16 Ala. 738.

Arkansas.— Hortsell *v.* State, 45 Ark. 59; Nortin *v.* Miller, 25 Ark. 108; Norris *v.* State, 22 Ark. 524; Edwards *v.* State, 22 Ark. 303; Fowler *v.* Scott, 11 Ark. 675; Sullivan *v.* Pierce, 10 Ark. 500; Outlaw *v.* Yell, 8 Ark. 345.

California.— Moore *v.* Earl, 91 Cal. 632, 27 Pac. 1087; Pierce *v.* Whiting, 63 Cal. 538; McMillan *v.* Dana, 18 Cal. 339.

Colorado.— Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779; Schradsky *v.* Dunklee, 9 Colo. App. 6, 48 Pac. 666; Klippel *v.* Oppenstein, 8 Colo. App. 187, 45 Pac. 224.

Connecticut.—Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607; Washington County Ins. Co. *v.* Colton, 26 Conn. 42.

Delaware.— Pickering *v.* Day, 2 Del. Ch. 333.

Florida.— May *v.* May, 19 Fla. 373.

Idaho.— State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

Illinois.— Kepley *v.* People, 123 Ill. 367, 13 N. E. 512; Meserve *v.* Clark, 115 Ill. 580, 4 N. E. 770; Lucas *v.* Beebe, 88 Ill. 427; Mix *v.* People, 86 Ill. 312; Herrick *v.* Swartwout, 72 Ill. 340; George *v.* Bischoff, 68 Ill. 236; Arnott *v.* Friel, 50 Ill. 174; Allbee *v.* People, 22 Ill. 533; Crisman *v.* Matthews, 2 Ill. 148, 26 Am. Dec. 417.

Indiana.— State *v.* Mills, 82 Ind. 126; Reeves *v.* Andrews, 7 Ind. 207; May *v.* Johnson, 3 Ind. 449; Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475.

Iowa.— Phenix Ins. Co. *v.* Findley, 59 Iowa 591, 13 N. W. 738.

Kansas.— Case *v.* Steele, 34 Kan. 90, 8 Pac. 242; Case *v.* Schultz, 31 Kan. 96, 1 Pac. 269; Wolf *v.* Hahn, 28 Kan. 588; Haxtun *v.* Sizer, 23 Kan. 310.

Kentucky.— Brown *v.* Grover, 6 Bush 1; Sparks *v.* Shropshire, 4 Bush 550; Wayman *v.* Taylor, 1 Dana 527; Stockton *v.* Turner, 7 J. J. Marsh. 192; Kellar *v.* Beeler, 4 J. J. Marsh. 655; Allen *v.* Lucket, 3 J. J. Marsh. 164; Rudd *v.* Hanna, 4 T. B. Mon. 528; Crump *v.* Bennett, 2 Litt. 209.

Louisiana.— Wallace *v.* Burnham, 28 La. Ann. 791; Frost *v.* White, 14 La. Ann. 140.

Maine.— Williamson *v.* Woodman, 73 Me. 163; Augusta Bank *v.* Hamblet, 35 Me. 491; Cordis *v.* Sager, 14 Me. 475; Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513.

Maryland.— Keen *v.* Whittington, 40 Md. 489; State *v.* Horner, 34 Md. 569; Hamilton *v.* State, 32 Md. 348; Billingsley *v.* State, 14 Md. 369; Lloyd *v.* Burgess, 4 Gill 187.

Massachusetts.— Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003; Cutler *v.* Dickinson, 8 Pick. 386.

Michigan.— Healy *v.* Newton, 96 Mich. 228,

2. Recitals of Particular Facts[85]**— a. Consideration.** According to a few early cases the recital of consideration in a deed is conclusive.[86] The true rule, however, would appear to be that the recital is binding for the purpose of giving

55 N. W. 666; Wheeler *v.* Meyer, 95 Mich. 36, 54 N. W. 689; Brockway *v.* Petted, 79 Mich. 620, 45 N. W. 61, 7 L. R. A. 740.

Minnesota.— Greengard *v.* Fretz, 64 Minn. 10, 65 N. W. 949; Meeker County *v.* Butler, 25 Minn. 363.

Mississippi.— Hauenstein *v.* Gillespie, 73 Miss. 742, 19 So. 673, 55 Am. St. Rep. 569 [*overruling* Thomas *v.* Burnes, 23 Miss. 550, 55 Am. Dec. 154].

Missouri.— Lionberger *v.* Krieger, 88 Mo. 160 [*affirming* 13 Mo. App. 313]; Hundley *v.* Filbert, 73 Mo. 34; Dickson *v.* Anderson, 9 Mo. 156; Jones *v.* Snedecor, 3 Mo. 390; Miller *v.* Bryden, 34 Mo. App. 602; Schnaider Brewing Co. *v.* Niederweiser, 28 Mo. App. 233; Father Matthew Young Men's Total Abstinence, etc., Soc. *v.* Fitzwilliam, 12 Mo. App. 445 [*affirmed* in 84 Mo. 406].

Montana.— Parrott *v.* Kane, 14 Mont. 23, 35 Pac. 243.

Nebraska.— Dunterman *v.* Storey, 40 Nebr. 447, 58 N. W. 949; Hayden *v.* Cook, 34 Nebr. 670, 52 N. W. 165.

New Hampshire.— Hall *v.* Brackett, 62 N. H. 509, 13 Am. St. Rep. 588.

New Jersey.— Hoboken *v.* Harrison, 30 N. J. L. 73; Seipee *v.* Elizabeth, 27 N. J. L. 407; Hardwick Tp. *v.* Cox, 21 N. J. L. 247; State Bank *v.* Chetwood, 8 N. J. L. 1.

New York.— Metropolitan L. Ins. Co. *v.* Bender, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708 [*reversing* 41 Hun 142]; Diossy *v.* Morgan, 74 N. Y. 11; Harrison *v.* Wilkin, 69 N. Y. 412; Decker *v.* Judson, 16 N. Y. 439; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Fake *v.* Whipple, 39 Barb. 339; People *v.* McCumber, 27 Barb. 632; Higgins *v.* Healy, 47 N. Y. Super. Ct. 207; Blake *v.* McNamara, 9 Misc. 212, 29 N. Y. Suppl. 676; Coleman *v.* Bean, 14 Abb. Pr. 38; Levi *v.* Dorn, 28 How. Pr. 217; Wisconsin F. & M. Ins. Co.'s Bank *v.* Hobbs, 22 How. Pr. 494; Tallmadge *v.* Richmond, 9 Johns. 85.

North Carolina.— Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

Ohio.— Johnston *v.* Oliver, 51 Ohio St. 6, 36 N. E. 458; Shroyer *v.* Richmond, 16 Ohio St. 455.

Rhode Island.— Easton *v.* Driscoll, 18 R. I. 318, 27 Atl. 445.

South Dakota.— Custer County *v.* Albrin, 7 S. D. 482, 64 N. W. 533.

Tennessee.— Goodrich *v.* Bryant, 5 Sneed 325.

Texas.— Parker *v.* Campbell, 21 Tex. 763; Burnett *v.* Henderson, 21 Tex. 588; Portis *v.* Parker, 8 Tex. 23, 58 Am. Dec. 95; Borden *v.* Houston, 2 Tex. 594; Kingsland *v.* Harrell, 1 Tex. App. Civ. Cas. § 736.

Vermont.— Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

Virginia.— Monteith *v.* Com., 15 Gratt. 172; Cordle *v.* Burch, 10 Gratt. 480; Cecil *v.* Early, 10 Gratt. 198; Cox *v.* Thomas, 9 Gratt. 312.

Washington.—Price *v.* Scott, 13 Wash. 574, 43 Pac. 634.

West Virginia.— Northwestern Bank *v.* Fleshman, 22 W. Va. 317; Baltimore, etc., R. Co. *v.* Vanderwarker, 19 W. Va. 265; Hoke *v.* Hoke, 3 W. Va. 561.

Wisconsin.— Sprague *v.* Brown, 40 Wis. 612.

United States.— Bruce *v.* U. S., 17 How. 437, 15 L. ed. 129; U. S. *v.* McNeily, 72 Fed. 972, 19 C. C. A. 318; Lombard Invest. Co. *v.* American Surety Co., 65 Fed. 476; Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248; Allen *v.* Magruder, 1 Fed. Cas. No. 230, 3 Cranch C. C. 6.

England.— Lainson *v.* Tremere, 1 A. & E. 792, 4 L. J. K. B. 207, 3 N. & M. 603, 28 E. C. L. 367; Bonner *v.* Wilkinson, 5 B. & Ald. 682, 1 D. & R. 328, 7 E. C. L. 372; Cullingworth's Case, Godb. 177; Carpenter *v.* Buller, 10 L. J. Exch. 393, 8 M. & W. 209.

Canada.— Moffatt *v.* Merchants' Bank, 11 Can. Supreme Ct. 46; Queen Ins. Co. *v.* Boyd, 7 Ont. Pr. 379; Fortune *v.* Cockburn, 22 U. C. Q. B. 359. See also Kiely *v.* Smyth, 27 Grant Ch. (U. C.) 220.

See 19 Cent. Dig. tit. "Estoppel," § 46 *et seq.*

Death of obligee.— A bond reciting that the obligor was a prisoner at the suit of a nominal plaintiff will not estop the sureties to show that the latter died before the bond was executed. Tait *v.* Frow, 8 Ala. 543.

Recitals in an additional and accumulative bond which show no agreement that the sureties thereon shall be primarily liable will not operate as an estoppel in favor of the sureties on the original obligation. Rudolf *v.* Malone, 104 Wis. 470, 80 N. W. 743. However, the obligors in an underwriting bond are estopped by its recitals to set up the invalidity of the original bond by reason of formal defects. Brown, etc., Co. *v.* Ligon, 92 Fed. 851.

Recitals of authority.— Where a contractor's bond recites that the principal has entered into the contract with the obligee through its board of commissioners, the sureties are estopped, in an action on the bond, to deny the authority of the board to represent the obligee, both as to the contract and as to what was done in execution of it. Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397. The surety in a bond in which it is stated that the principal has been appointed as auctioneer is estopped from denying that fact. Duchamp *v.* Nicholson, 2 Mart. N. S. (La.) 672.

85. See Deeds, 13 Cyc. 613.

Conclusiveness of receipts see Evidence.

86. *Kentucky.*— Thompson *v.* Buckhannon, 2 J. J. Marsh. 416.

Maine.— Emery *v.* Chase, 5 Me. 232; Steele *v.* Adams, 1 Me. 1.

Maryland.— Dixon *v.* Swiggett, 1 Harr.

effect to the operative words of the deed, and that the grantor may not question the reality or adequacy of the consideration for the purpose of defeating the conveyance;[87] but that for any other purpose it may be shown that the consideration was not paid in whole or in part, or that it was not paid as expressed in the deed but in some other manner.[88]

& J. 252; O'Neale *v.* Lodge, 3 Harr. & M. 433, 1 Am. Dec. 377.

New York.— Maigley *v.* Hauer, 7 Johns. 341; Schemerhorn *v.* Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304. See also Dennison *v.* Ely, 1 Barb. 610.

North Carolina.— Spiers *v.* Clay, 11 N. C. 22; Graves *v.* Carter, 9 N. C. 576, 11 Am. Dec. 786; Brocket *v.* Foscue, 8 N. C. 64.

England.— Rountree *v.* Jacob, 2 Taunt. 141; Baker *v.* Dewey, 1 B. & C. 704, 8 E. C. L. 297, 3 D. & R. 99, 16 E. C. L. 140, 1 L. J. K. B. O. S. 193. See also *Re* Forsyth, 11 Jur. N. S. 213, 11 L. T. Rep. N. S. 616, 13 Wkly. Rep. 307 [*affirmed* in 12 L. T. Rep. N. S. 687, 13 Wkly. Rep. 932].

Canada.— Inglis *v.* Gilchrist, 10 Grant Ch. (U. C.) 301; Nelson *v.* Connors, 5 Nova Scotia 406; Harrison *v.* Preston, 22 U. C. C. P. 576; Casey *v.* McCall, 19 U. C. C. P. 90; Sparling *v.* Savage, 25 U. C. Q. B. 259; Ketchum *v.* Smith, 20 U. C. Q. B. 313.

87. *Alabama.*— Goodlett *v.* Hansell, 66 Ala. 151.

California.— Coles *v.* Soulsby, 21 Cal. 47.

Florida.— Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432.

Illinois.— Leonard *v.* Springer, 98 Ill. App. 530. See also Illinois Land, etc., Co. *v.* Bonner, 91 Ill. 114.

Indiana.— German Mut. Ins. Co. *v.* Grim, 32 Ind. 249, 2 Am. Rep. 341; Guard *v.* Bradley, 7 Ind. 600.

Kentucky.— Norris *v.* Norris, 9 Dana 317, 35 Am. Dec. 138.

Maine.— Morrill *v.* Robinson, 71 Me. 24; Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Hammond *v.* Woodman, 41 Me. 177, 66 Am. Dec. 219.

Maryland.— Kreps *v.* Kreps, 91 Md. 692, 47 Atl. 1028.

Michigan.— Quirk *v.* Thomas, 6 Mich. 76.

Mississippi.— Day *v.* Davis, 64 Miss. 253, 8 So. 203.

Missouri.— Winningham *v.* Pennock, 36 Mo. App. 688; Bobb *v.* Bobb, 7 Mo. App. 501.

New Hampshire.— Horn *v.* Thompson, 31 N. H. 562.

New Jersey.— Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263.

New York.— Beach *v.* Cooke, 28 N. Y. 508, 86 Am. Dec. 260; Stackpole *v.* Robbins, 47 Barb. 212; Arthur *v.* Arthur, 10 Barb. 9; Bolton *v.* Jacks, 6 Rob. 166; Grout *v.* Townsend, 2 Hill 554 [*affirmed* in 2 Den. 336]; Commercial Bank *v.* Norton, 1 Hill 501; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103; U. S. Bank *v.* Housman, 6 Paige 526.

South Carolina.— Rountree *v.* Lane, 32 S. C. 160, 10 S. E. 941.

Tennessee.— Mowry *v.* Davenport, 6 Lea 80.

Texas.— Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. 825 [*reversing* (Civ. App. 1900) 56 S. W. 946]; Gould *v.* West, 32 Tex. 338. See also Bunton *v.* Palm, (Sup. 1888) 9 S. W. 182.

United States.— McCalla *v.* Bane, 45 Fed. 828; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

Canada.—Allnutt *v.* Ryland, 11 U. C. C. P. 300.

See 19 Cent. Dig. tit. "Estoppel," §§ 34, 45, 51.

88. *California.*— Rhine *v.* Ellen, 36 Cal. 362; Peck *v.* Vendenberg, 30 Cal. 11; Irvine *v.* McKeon, 23 Cal. 472; Coles *v.* Soulsby, 21 Cal. 47; Spear *v.* Ward, 20 Cal. 659; Bennett *v.* Solomon, 6 Cal. 134.

Colorado.— Hubbard *v.* Mulligan, (App. 1899) 57 Pac. 738.

Connecticut.— Belden *v.* Seymour, 8 Conn. 304, 21 Am. Dec. 661.

Georgia.— Harwell *v.* Fitts, 20 Ga. 723.

Illinois.— Union Mut. L. Ins. Co. *v.* Ketchoff, 133 Ill. 368, 27 N. E. 91; Illinois Land, etc., Co. *v.* Bonner, 91 Ill. 114; Morris *v.* Tillson, 81 Ill. 607.

Indiana.— Aurora *v.* Cobb, 21 Ind. 492; Thompson *v.* Allen, 12 Ind. 539.

Iowa.— Rynear *v.* Neilin, 3 Greene 310.

Kentucky.—Gully *v.* Grubbs, 1 J. J. Marsh. 387; Hutchison *v.* Sinclair, 7 T. B. Mon. 291; Burdit *v.* Burdit, 2 A. K. Marsh. 143.

Maine.— Barter *v.* Greenleaf, 65 Me. 405; Bassett *v.* Bassett, 55 Me. 127; Burbank *v.* Gould, 15 Me. 118; Emmons *v.* Littlefield, 13 Me. 233 [*distinguishing* Steele *v.* Adams, 1 Me. 1]; Schillinger *v.* McCann, 6 Me. 364. See also Marshall *v.* Smith, 15 Me. 17.

Maryland.— Higdon *v.* Thomas, 1 Harr. & G. 139; Lingan *v.* Henderson, 1 Bland 236; Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

Massachusetts.— Goward *v.* Waters, 98 Mass. 596; Clapp *v.* Tirrell, 20 Pick. 247; Wilkinson *v.* Scott, 17 Mass. 249; Davenport *v.* Mason, 15 Mass. 85. See also Bullard *v.* Briggs, 7 Pick. 533, 19 Am. Dec. 292; Webb *v.* Peele, 7 Pick. 247, 19 Am. Dec. 284; Pomeroy *v.* Winsbip, 12 Mass. 514, 7 Am. Dec. 91; Goodwin *v.* Gilbert, 9 Mass. 510.

Mississippi.— Parker *v.* Foy, 43 Miss. 260, 55 Am. Dec. 484.

Missouri.— Wood *v.* Broadley, 76 Mo. 23, 43 Am. Rep. 754; Rabsuhl *v.* Lack, 35 Mo. 316.

New Hampshire.— Buffum *v.* Green, 5 N. H. 71, 20 Am. Dec. 562; Morse *v.* Shattuck, 4 N. H. 229, 17 Am. Dec. 419. See also Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431; Scoby *v.* Blanchard, 3 N. H. 170.

b. Date. It has been held that a party is concluded by his signature to an instrument to show that the date thereof is not the true one.[89]

c. Description. Recitals simply by way of description of the land intended to be conveyed, while admissions as to the identity of the land,[90] do not raise an estoppel as to other matters, such as the quality of the land[91] or the title thereto.[92] A grantee is ordinarily bound by the description contained in his deed and is estopped to claim more land than is therein described.[93]

New Jersey.— Stearns *v.* Stearns, 23 N. J. Eq. 167; Herbert *v.* Scofield, 9 N. J. Eq. 492.

New York.—Arnot *v.* Erie R. Co., 67 N. Y. 315; Baker *v.* Union Mut. L. Ins. Co., 43 N. Y. 283; Halliday *v.* Hart, 30 N. Y. 474; Bingham *v.* Weiderwax, 1 N. Y. 509; Anthony *v.* Harrison, 14 Hun 198; Sanford *v.* Sanford, 61 Barb. 293, 5 Lans. 486; Rosboro *v.* Peck, 48 Barb. 92; Stackpole *v.* Robbins, 47 Barb. 212; McNulty *v.* Prentice, 25 Barb. 204; Fellows *v.* Emperor, 13 Barb. 92; Graves *v.* Porter, 11 Barb. 592; Rose *v.* Rose, 7 Barb. 174; Averill *v.* Loucks, 6 Barb. 19; Frink *v.* Green, 5 Barb. 455; Walcott *v.* Ronalds, 2 Rob. 617; Murray *v.* Smith, 1 Duer 412; Barnum *v.* Childs, 1 Sandf. 58; Baker *v.* Connell, 1 Daly 469; Henderson *v.* Fullerton, 54 How. Pr. 422; Goodell *v.* Pierce, 2 Hill 659; Grout *v.* Townsend, 2 Hill 554; Hull *v.* Adams, 2 Den. 306 [*reversing* 1 Hill 601]; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103; Whitbeck *v.* Whitbeck, 9 Cow. 266, 18 Am. Dec. 503; Bowen *v.* Bell, 20 Johns. 338, 11 Am. Dec. 286; Shephard *v.* Little, 14 Johns. 210; Upson *v.* Badeau, 3 Bradf. Surr. 13.

North Carolina.— Long *v.* Freeman, 114 N. C. 567, 19 S. E. 697; Smith *v.* Arthur, 110 N. C. 400, 15 S. E. 197; Robbins *v.* Love, 10 N. C. 82. See also Lane *v.* Wingate, 25 N. C. 326.

Ohio.— See Steele *v.* Worthington, 2 Ohio 182.

Pennsylvania.— Byers *v.* Mullen, 9 Watts 266; Watson *v.* Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669; Hamilton *v.* McGuire, 3 Serg. & R. 355; Jordan *v.* Cooper, 3 Serg. & R. 564.

South Carolina.— Curry *v.* Lyles, 2 Hill 404. See also Garrett *v.* Stuart, 1 McCord 514.

Tennessee.— Perry *v.* Central Southern R. Co., 5 Coldw. 138.

Texas.— Smith *v.* Dunman, 9 Tex. Civ. App. 319, 29 S. W. 432.

Vermont.— Thayer *v.* Viles, 23 Vt. 494; Lazell *v.* Lazell, 12 Vt. 443, 36 Am. Dec. 352.

Virginia.— Wilson *v.* Shelton, 9 Leigh 342; Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

United States.— U. S. Bank *v.* Lee, 2 Fed. Cas. No. 922, 5 Cranch C. C. 319; Godfrey *v.* Beardsley, 10 Fed. Cas. No. 5,497, 2 McLean 412; Taggart *v.* Stanbery, 23 Fed. Cas. No. 13,724, 2 McLean 543.

England.— Baker *v.* Dewey, 1 B. & C. 704, 8 E. C. L. 297, 3 D. & R. 99, 16 E. C. L. 140, 1 L. J. K. B. O. S. 193; Rex *v.* Scammonden, 3 T. R. 474, 1 Rev. Rep. 752; Potts *v.* Nixon, Ir. R. 5 C. L. 45.

Canada.—Bishop *v.* Robinson, 12 N. Brunsw. 68; Smith *v.* McCallum, 34 U. C. Q. B. 479; McBride *v.* Parnell, 4 U. C. Q. B. O. S. 152. See also Coram *v.* Wheten, 9 N. Brunsw. 293; McAllister *v.* Day, 9 N. Brunsw. 37; Carrall *v.* Montreal Bank, 21 U. C. Q. B. 18.

89. Riley *v.* Johnson, 10 Ga. 414; Russell *v.* Peyton, 4 Ill. App. 473; Wilson *v.* Winter, 6 Fed. 16. *Contra*, Comings *v.* Wellman, 14 N. H. 287; Tompkins *v.* Corvin, 9 Cow. (N. Y.) 255; Jackson *v.* Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267.

90. Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444; Crosswaite *v.* Gage, 32 U. C. Q. B. 196, holding that one who conveys land by certain metes and bounds is estopped to say against his deed that the land conveyed is not the land specifically defined by those metes and bounds.

91. Skipworth *v.* Green, 11 Mod. 388.

92. *Illinois.*— Blair *v.* Carr, 162 Ill. 362, 44 N. E. 720.

Iowa.— Getchell *v.* Benedict, 57 Iowa 121, 10 N. W. 321.

Louisiana.— Toledano's Succession, 42 La. Ann. 914, 8 So. 604.

Massachusetts.— Doane *v.* Willcutt, 16 Gray 368.

Michigan.— See Harris *v.* Scovel, 85 Mich. 32, 48 N. W. 173.

New York.— Edmonston *v.* Edmondston, 13 Hun 133; Prindle *v.* Beveridge, 7 Lans. 225. See 19 Cent. Dig. tit. "Estoppel," § 31.

Title of adjacent owner.— Bounding the premises conveyed by the land of a person named will not estop the grantee to deny the title of such person to the adjoining land. Great Falls Co. *v.* Worster, 15 N. H. 412.

93. *Delaware.*— See Doe *v.* Howell, 1 Houst. 178.

Illinois.— Mann *v.* Elgin, 24 Ill. App. 419.

Michigan.— Thompson *v.* Smith, 96 Mich. 258, 55 N. W. 886, holding that a claimant under a deed describing the property conveyed as a certain designated block is estopped to show that the land is not a part of such block.

Texas.— Smith *v.* Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559, holding that where the land conveyed is clearly defined, the deed does not pass by estoppel land without its description which the grantor mistakenly thought he had conveyed to others by a former deed.

Washington.— State *v.* Forrest, 12 Wash. 483, 41 Pac. 194 (holding that a deed conveying property by reference to a plot or map thereof adopts such plot or map, and one holding thereunder is estopped from claiming any rights beyond the plotted boundaries of his lot); Dearborn *v.* Moran,

E. Requisites, Validity, and Construction of Deed[94] — **1. Execution — a. In General.** The principle governing the doctrine of estoppel by recitals in sealed instruments is applicable only where the existence of the instrument as the act of the party is admitted or proved.[95] Furthermore the execution of the deed must be the voluntary act of the grantor. A party will not be prejudiced by the recitals in a deed executed under judicial compulsion.[96]

b. Seal. To create an estoppel by deed the instrument must be under seal,[97] unless an unsealed instrument is by statute placed on the same footing as a sealed instrument.[98]

2. Delivery and Acceptance. An estoppel by deed cannot arise against the grantor until the instrument which is claimed to create the estoppel has become effective by delivery;[99] but one holding a deed to himself and others and claiming the land under it cannot deny its validity as a conveyance to the other grantees for want of delivery.[1] A grantee is not estopped by a deed which he has never accepted or authorized to be accepted.[2]

3. Validity — a. In General. A deed having no validity cannot be made the basis of an estoppel;[3] and a void instrument will not operate by way of estoppel

2 Wash. 405, 27 Pac. 230; Kenyon *v.* Squire, 2 Wash. 404, 28 Pac. 1025; Kenyon *v.* Knipe, 2 Wash. 394, 27 Pac. 227, 13 L. R. A. 142.

See 19 Cent. Dig. tit. "Estoppel," § 31.

94. **Estoppel by deed not duly acknowledged** see Acknowledgments, 1 Cyc. 526 *et seq.*

Estoppel to assert invalidity of deed because blanks were filled in after delivery see Alterations of Instruments, 2 Cyc. 171.

95. Singer Mfg. Co. *v.* Elizabeth, 42 N. J. L. 249; Hudson *v.* Winslow Tp., 35 N. J. L. 437; New York, etc., R. Co. *v.* Van Horn, 57 N. Y. 473; Shapley *v.* Abbott, 42 N. Y. 443, 1 Am. Rep. 548; Starin *v.* Genoa, 23 N. Y. 439; Chisholm *v.* Montgomery, 5 Fed. Cas. No. 2,686, 2 Woods 584; Fairtitle *v.* Gilbert, 2 T. R. 169, 1 Rev. Rep. 455.

Execution by agent.— A deed executed by an agent with authority to that end is as binding as one personally executed, and such authority may be proved by parol. Harris *v.* Neely, 1 Ky. L. Rep. 55.

Deed executed without authority.—A party is not estopped by a deed executed in his behalf without sufficient authority, and which he subsequently never assents to, recognizes, or acts under. Lawrence *v.* Anderson, 17 Can. Supreme Ct. 349. So a grantor is not estopped to deny the authority of one who assumed to convey as his attorney in fact, as set out in the deed; nor from denying that it was executed pursuant to another valid and existing authority. Earle *v.* Earle, 20 N. J. L. 347.

A recital in a bond will not estop the obligor to deny that the instrument is his deed. Singer Mfg. Co. *v.* Elizabeth, 42 N. J. L. 249.

A party signing a deed under an assumed name will be estopped from taking advantage of it. Davis *v.* Callahan, 78 Me. 313, 5 Atl. 73.

Sureties are estopped to deny their signatures to a bond after its acceptance by the obligee. Shelburne *v.* Marshall, 19 Nova Scotia 171, 7 Can. L. T. 248.

96. McDougald *v.* Dougherty, 11 Ga. 570.

97. Gerrish *v.* Union Wharf, 26 Me. 384, 40 Am. Dec. 568; Cobb *v.* Fisher, 121 Mass. 169; Whitney *v.* Holmes, 15 Mass. 152; Davis *v.* Tyler, 18 Johns. (N. Y.) 490; Talcott *v.* Belding, 46 How. Pr. (N. Y.) 419.

A simple contract may, however, create an estoppel similar in some respects to estoppel by deed. See *infra*, IV, B, 2.

Misrecital as to seal.— A grantor is not estopped to insist on the want of a seal, because of a recital that the instrument was sealed. Davis *v.* Judd, 6 Wis. 85.

98. Hall *v.* Hann, 5 Dana (Ky.) 55.

Where a seal is not essential to a conveyance of the legal estate in lands, the conveyance retains all the operation and effect of a sealed deed at common law, and the estoppel arising at common law out of the recitals or covenants of a sealed instrument still attaches to the unsealed conveyance, executed according to the requirements of the statute. Jones *v.* Morris, 61 Ala. 518.

99. Nourse *v.* Nourse, 116 Mass. 101; Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539.

1. Glover *v.* Thomas, 75 Tex. 506, 12 S. W. 684.

2. Dougherty County *v.* Tift, 75 Ga. 815; St. Louis, etc., R. Co. *v.* Belleville, 122 Ill. 376, 12 N. E. 680.

3. *Alabama.*— Burroughs *v.* Pacific Guano Co., 81 Ala. 255, 1 So. 212; Harden *v.* Darwin, 77 Ala. 472; Bentley *v.* Cleaveland, 22 Ala. 814.

Arkansas.— Josey *v.* Davis, (1892) 18 S. W. 185.

California.— Tewksbury *v.* O'Connell, 21 Cal. 60.

Connecticut.— Winsted Sav. Bank, etc., Assoc. *v.* Spencer, 26 Conn. 195.

Indiana.— Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Doe *v.* Hays, 1 Ind. 247, 48 Am. Dec. 359.

Iowa.— Langan *v.* Sankey, 55 Iowa 52, 7 N. W. 393.

Kansas.— O'Brien *v.* Bugbee, 46 Kan. 1, 26 Pac. 428.

Kentucky.— Kercheval *v.* Triplett, 1 A. K.

so as to vest a subsequently acquired estate in the grantee.[4] Neither does it inure by way of estoppel to the benefit of a person in adverse possession of the land at the time it was conveyed.[5] Nevertheless a deed which is valid as between the parties to it, although invalid as to third persons, may operate as an estoppel against the grantor and those in privity with him;[6] and it is also well settled that,

Marsh. 493; Porter *v.* Green, 9 S. W. 401, 10 Ky. L. Rep. 484; McDowell *v.* Neal, 5 Ky. L. Rep. 331.

Louisiana.— Levy *v.* Wise, 15 La. Ann. 38.

Maine.— Monson *v.* Tripp, 81 Me. 24, 16 Atl. 327, 10 Am. St. Rep. 235.

Maryland.— Tucker *v.* State, 11 Md. 322.

Massachusetts.— Pells *v.* Webquish, 129 Mass. 469; Conant *v.* Newton, 126 Mass. 105; Nourse *v.* Nourse, 116 Mass. 101; Wheelock *v.* Henshaw, 19 Pick. 341; Parker *v.* Parker, 17 Mass. 376; Gould *v.* Newman, 6 Mass. 239.

Minnesota.— Alt *v.* Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681; James *v.* Wilder, 25 Minn. 305.

Mississippi.— Fairley *v.* Fairley, 34 Miss. 18.

Missouri.— Sturgeon *v.* Hampton, 88 Mo. 203; Dougal *v.* Fryer, 3 Mo. 40, 22 Am. Dec. 458.

New Jersey.— Wooden *v.* Shotwell, 24 N. J. L. 789.

New York.— Brick *v.* Campbell, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259 [*reversing* 55 N. Y. Super. Ct. 569]; Wiles *v.* Peck, 26 N. Y. 42; Sinclair *v.* Jackson, 8 Cow. 543; Jackson *v.* Wright, 14 Johns. 193.

North Carolina.— Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.

Ohio.— Wallace *v.* Miner, 6 Ohio 366, 7 Ohio 249; Patterson *v.* Pease, 5 Ohio 190; Ohio State University *v.* Ayer, 10 Ohio Dec. (Reprint) 125, 19 Cinc. L. Bul. 11; Ohio State University *v.* Satterfield, 2 Ohio Cir. Ct. 86, 1 Ohio Cir. Dec. 377.

Pennsylvania.— McGeary's Appeal, 72 Pa. St. 365; Raudenbush *v.* Bushong, (1886) 3 Atl. 808. See Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

South Carolina.— Heyward *v.* Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42; Tinsley *v.* Kirby, 17 S. C. 1; Miller *v.* Bagwell, 3 McCord 429.

Tennessee.— McSpadden *v.* Starrs Mountain Iron Co., (Ch. App. 1897) 42 S. W. 497.

Texas.— Hickman *v.* Stewart, 69 Tex. 255, 5 S. W. 833.

Virginia.— Cecil *v.* Early, 10 Gratt. 198; Wilson *v.* Spender, 1 Rand. 76, 10 Am. Dec. 491.

West Virginia.—Calfee *v.* Burgess, 3 W. Va. 274.

Wisconsin.— Noonan *v.* Ilsley, 22 Wis. 27.

United States.— Smythe *v.* Henry, 41 Fed. 705.

England.— *In re* Companies Acts, 21 Q. B. D. 301, 52 J. P. 742, 57 L. J. Q. B. 609, 59 L. T. Rep. N. S. 401, 36 Wkly. Rep. 829; Barton *v.* North Staffordshire R. Co., 38 Ch. D. 458, 57 L. J. Ch. 800, 58 L. T. Rep. N. S. 549, 36 Wkly. Rep. 75. See Foligno *v.* Martin, 22 L. J. Ch. 502; Dunn *v.* Wyman, 51 L. J. Q. B. 623.

Canada.— Atty.-Gen. *v.* Niagara Falls International Bridge Co., 20 Grant Ch. (U. C.) 490; Chapiewski *v.* Campbell, 29 Ont. 343; Canada Southern R. Co. *v.* Niagara Falls, 22 Ont. 41; Thorne *v.* Torrance, 18 U. C. C. P. 29. See also McCoppin *v.* McGuire, 34 U. C. Q. B. 157.

See 19 Cent. Dig. tit. "Estoppel," § 25.

Neither party to a conveyance which violates legal rules or principles can allege his own unlawful act for the purpose of securing an advantage to himself. Rice *v.* Boston, etc., R. Corp., 12 Allen (Mass.) 141.

The estoppel of a party to a delivery bond exists only while the bond remains in force. Jemison *v.* Cozens, 3 Ala. 636; Norris *v.* Norton, 19 Ark. 319; Syme *v.* Montague, 4 Hen. & M. (Va.) 180.

4. *California.*— Powell *v.* Patison, 100 Cal. 236, 34 Pac. 677.

Kentucky.— Altemus *v.* Nickell, 115 Ky. 506, 74 S. W. 221, 24 Ky. L. Rep. 2401.

Nebraska.— Troxell *v.* Stevens, 57 Nebr. 329, 77 N. W. 781.

Texas.— Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 45; Holmes *v.* Johns, 56 Tex. 41; Atkinson *v.* Bell, 18 Tex. 474.

United States.— Harkness *v.* Underhill, 1 Black 316, 17 L. ed. 208; Viele *v.* Van Steenberg, 31 Fed. 249.

5. Jackson *v.* Brinckerhoff, 3 Johns. Cas. (N. Y.) 101.

6. Stockton *v.* Williams, 1 Dougl. (Mich.) 546; Obert *v.* Bordine, 20 N. J. L. 394; Nance *v.* Thompson, 1 Sneed (Tenn.) 321; Wilson *v.* Nance, 11 Humphr. (Tenn.) 189; Jenkins *v.* Collard, 145 U. S. 546, 12 S. Ct. 868, 36 L. ed. 812; Mason *v.* Muncaster, 9 Wheat. (U. S.) 445, 6 L. ed. 131.

Illustrations.— A release may found an estoppel as between the parties, although invalid as to the person having title because infected with maintenance (Jackson *v.* Demont, 9 Johns. (N. Y.) 55, 6 Am. Dec. 259); and although a deed by a tenant in common of a portion of the estate in severalty is invalid as against the cotenants, yet it may estop the grantor and his heirs as against the grantee (Frost *v.* Courtis, 172 Mass. 401, 52 N. E. 515; De Witt *v.* Harvey, 4 Gray (Mass.) 486). So a deed executed by an executor under a will before the emanation of the patent can convey no legal title; but if the patent issue in the name of the executor, it operates in favor of the prior conveyance by way of estoppel, and this effect follows whether the will authorizes the executor to convey or not. Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56.

where a deed is valid as to one of several grantors, he may be estopped, although it is void as to the others.[7] So it has been held that an inoperative conveyance by one tenant in common which is rendered effectual by a release from the other tenants in common will operate as an estoppel.[8]

b. Fraud and Mistake.[9] The general rule that a party will be estopped to question his own deed does not apply where the deed has been procured by fraud.[10] So a recital inserted in a deed through mistake will not in equity be permitted to operate as an estoppel, so as to exclude the truth.[11] It has been held, however, that where a tract of land is granted in clear and unmistakable terms, the grantor and those claiming under him are estopped to say in a court of law that the land thus described in the deed was inserted by mistake, and that another piece was intended.[12]

c. Incompetency of Parties. In order to work an estoppel the parties to a deed must be *sui juris*, competent to made it effectual as a contract.[13] Specific

7. Chapman *v.* Abrahams, 61 Ala. 108; Doe *v.* Finley, 52 N. C. 228; North *v.* Henneberry, 44 Wis. 306.

8. Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112.

9. Estoppel of parties to fraudulent conveyance to impeach it see FRAUDULENT CONVEYANCES.

10. *Iowa.*— Rynear *v.* Neilin, 3 Greene 310.

Kentucky.—Peddicord *v.* Hill, 4 T. B. Mon. 370; Call *v.* Shewmaker, 69 S. W. 749, 24 Ky. L. Rep. 686.

Maine.— Harding *v.* Randall, 15 Me. 332.

New York.— Marden *v.* Dorthy, 12 N. Y. App. Div. 188, 42 N. Y. Suppl. 827.

Texas.— Hickman *v.* Stewart, 69 Tex. 255, 5 S. W. 833.

At law a grantor cannot avoid his deed for fraud of the grantee in its procurement. Furguson *v.* Coleman, 5 Heisk. (Tenn.) 378. *Contra,* Peddicord *v.* Hill, 4 T. B. Mon. (Ky.) 370.

Fraudulent representations of grantor.— A grantee is not estopped by a statement of acreage in a deed from showing the falsity of such statement and setting up the preliminary fraudulent representations of the grantor in reference thereto in defense to a foreclosure of a purchase-money mortgage. McMichael *v.* Webster, 54 N. J. Eq. 478, 35 Atl. 663.

If fraud or duress was not used in procuring a deed, the heirs of the grantor cannot avoid the estoppel by impeaching the consideration of the deed. Gould *v.* West, 32 Tex. 338. See also Garrett *v.* Stuart, 1 McCord (S. C.) 514.

Estoppel by negligence.— A party may by his own negligence lose his right to set up the fraud. Charleston *v.* Ryan, 22 S. C. 339, 53 Am. Rep. 713. See *infra,* V, B, 3.

11. *Connecticut.*— Rich *v.* Atwater, 16 Conn. 409.

Iowa.— Cook *v.* Prindle, 97 Iowa 464, 66 N. W. 781, 59 Am. St. Rep. 424.

Michigan.—Wheeler *v.* Meyer, 95 Mich. 36, 54 N. W. 689.

New Hampshire.—Porter *v.* Nelson, 4 N. H. 130.

New York.— Stoughton *v.* Lynch, 2 Johns. Ch. 209.

North Carolina.— Raiford *v.* Raiford, 41 N. C. 490.

North Dakota.— Gjerstadengen *v.* Hartzell, 9 N. D. 268, 83 N. W. 230, 81 Am. St. Rep. 575.

Pennsylvania.— Schettiger *v.* Hopple, 3 Grant 54; Leshey *v.* Gardner, 3 Watts & S. 314, 38 Am. Dec. 764.

Tennessee.— Helm *v.* Wright, 2 Humphr. 72.

Texas.— Long *v.* Cruger, 9 Tex. Civ. App. 208, 28 S. W. 568.

Virginia.— Bower *v.* McCormack, 23 Gratt. 310.

United States.— Brown *v.* Cranberry Iron, etc., Co., 72 Fed. 96, 18 C. C. A. 444.

England.— Scholefield *v.* Lockwood, 9 Jur. N. S. 738, 8 L. T. Rep. N. S. 409, 11 Wkly. Rep. 555.

Contra.— Jones *v.* Prewit, 3 A. K. Marsh. (Ky.) 302.

12. Brown *v.* Allen, 43 Me. 590 (holding that such a mistake may be corrected, if at all, only in a court of equity); Schillinger *v* McCann, 6 Me. 364. See, however, Leland *v.* Stone, 10 Mass. 459; Barns *v.* Learned, 5 N. H. 264 (both holding that the mistake may be shown by the grantor for the purpose of reducing the damages for covenants broken); Meriwether *v.* Asbeck, (Tex. Civ. App. 1894) 25 S. W. 1100 (holding that in trespass to try title, where the dispute is as to a boundary, and defendant's deed calls for land adjoining that of plaintiff, but describes the disputed line as running a certain distance north of the boundary claimed by defendant, the deed does not estop defendant from showing that the latter description was a mistake); Pell *v.* Morse, 6 N. H. 205; Fullerton *v.* Ibbitson, 12 Nova Scotia 225.

13. Bank of America *v.* Banks, 101 U. S. 240, 25 L. ed. 850; Rice *v.* Dignowitty, 4 Sm. & M. (Miss.) 57; Foott *v.* Rice, 4 Ont. 94; Foott *v.* McGeorge, 12 Ont. App. 351.

Conveyance to churchwardens.— Although the churchwardens of a parish are not capable of holding lands, and the deed to them and their successors does not operate by way of grant, yet, if it contains a covenant of warranty binding the grantors and their heirs, it may operate in favor of the church by way

applications of this doctrine will be found treated elsewhere in other titles in this work.[14]

d. Estoppel by Covenants in Invalid Deed. A deed which is void as a conveyance for want of words of inheritance[15] or grant,[16] but containing a covenant of warranty, may operate by way of estoppel to prevent circuity of action. But a covenant of warranty cannot operate by estoppel to confer upon the grantee a greater title than the deed itself would have conferred if effective.[17]

4. Construction — a. In General. In determining whether a deed creates an estoppel, every part of it should be given effect, if this can be done, and if the deed evidences conflicting intentions on its face, the object of the grant being considered, effect should be given to what may appear to be the controlling intention of the grantor.[18] The estoppel will be limited by the intention of the parties.[19]

b. Truth Apparent From Whole Instrument. Where the truth is apparent upon the deed or instrument, the parties shall not be estopped from taking advantage of it,[20] as for instance that the grantor had no title,[21] or only a naked possibility.[22]

c. Certainty. In order to create an estoppel the instrument by which the estoppel is claimed must be precise and certain and the intention clear and unambiguous.[23] It has been held, however, that an estoppel may be sustained by

of estoppel. Mason *v.* Muncaster, 9 Wheat. (U. S.) 445, 6 L. ed. 131.

14. Estoppel of: Infant see Infants. Married Woman see Husband and Wife.

15. Shaw *v.* Galbraith, 7 Pa. St. 111.

16. Brown *v.* Manter, 21 N. H. 528, 53 Am. Dec. 223.

17. Chace *v.* Gray, 88 Tex. 552, 32 S. W. 520.

18. Pugh *v.* Mays, 60 Tex. 191; Hancock *v.* Butler, 21 Tex. 804.

Estoppel inconsistent with document. — No estoppel can be raised on a document inconsistent with the document itself. Colonial Bank *v.* Hepworth, 36 Ch. D. 36, 56 L. J. Ch. 1089, 57 L. T. Rep. N. S. 148, 36 Wkly. Rep. 259.

19. Schettiger *v.* Hopple, 3 Grant (Pa.) 54; Blake *v.* Tucker, 12 Vt. 39; McCullough *v.* Dashiell, 78 Va. 634; Hosier *v.* Searle, 2 B. & P. 299.

Intention as governing recitals see *supra*, III, D, 1, a, b.

20. *New Jersey.* — Wolling *v.* Camp, 19 N. J. L. 148.

New York. — Warren *v.* Leland, 2 Barb. 613; Pelletreau *v.* Jackson, 11 Wend. 110; Sinclair *v.* Jackson, 8 Cow. 543.

Pennsylvania. — Frick *v.* Fiscus, 164 Pa. St. 623, 30 Atl. 515; Noble *v.* Cope, 50 Pa. St. 17.

Rhode Island. — Ball *v.* Ball, 20 R. I. 520, 40 Atl. 234.

Vermont. — Probate Ct. *v.* Matthews, 6 Vt. 269.

England. — Doe *v.* Lumley, 3 A. & E. 2, 4 L. J. K. B. 172, 4 N. & M. 724, 30 E. C. L. 25. See also Coke Litt. 352*b*; Comyns Dig. tit. "Estoppel" E, 2.

21. Pelletreau *v.* Jackson, 11 Wend. (N. Y.) 110; Todd *v.* Cain, 16 U. C. Q. B. 516; Doe *v.* Shea, 2 U. C. Q. B. 483.

22. Pelletreau *v.* Jackson, 11 Wend. (N. Y.) 110; Coke Litt. 352*b*.

23. *Alabama.* — Miller *v.* Hampton, 37 Ala. 342; Ware *v.* Cowles, 24 Ala. 446, 60 Am. Dec. 482; Wallis *v.* Long, 16 Ala. 738.

California. — Zimmler *v.* San Luis Water Co., 57 Cal. 221.

Connecticut. — Rich *v.* Atwater, 16 Conn. 409; Hubbard *v.* Norton, 10 Conn. 422; Smith *v.* Sherwood, 4 Conn. 276, 10 Am. Dec. 143.

Illinois. — Kerns *v.* Brockway, 96 Ill. App. 273.

Iowa. — Gill *v.* Patton, 118 Iowa 88, 91 N. W. 904.

Maine. — Miller *v.* Moses, 56 Me. 128; Hardy *v.* Nelson, 27 Me. 525; Campbell *v.* Knights, 24 Me. 332.

Massachusetts. — Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; Guild *v.* Richardson, 6 Pick. 364.

Mississippi. — McComb *v.* Gilkey, 29 Miss. 146.

Missouri. — Lajoye *v.* Primm, 3 Mo. 529.

New York. — Edmonston *v.* Edmonston, 13 Hun 133; Dempsey *v.* Tyler, 3 Duer 73. See Griffin *v.* Chase, 23 Barb. 278; Warren *v.* Leland, 2 Barb. 613.

Pennsylvania. — Muhlenberg *v.* Druckenmiller, 103 Pa. St. 631; Naglee *v.* Ingersoll, 7 Pa. St. 185; Ingersoll *v.* Sergeant, 1 Whart. 337; Mehaffy *v.* Dobbs, 9 Watts 363; Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516, 3 Pa. L. J. 203. See Pennsylvania, etc., Canal, etc., Co. *v.* Billings, 94 Pa. St. 40.

Tennessee. — Memphis Water Co. *v.* Magens, 15 Lea 37; McDonald *v.* Lusk, 9 Lea 654.

Virginia. — Bower *v.* McCormick, 23 Gratt. 310; Griffin *v.* Macaulay, 7 Gratt. 476.

Vermont. — Probate Ct. *v.* Matthews, 6 Vt. 269.

United States. — Wallace *v.* McClung, 74 Fed. 376, 20 C. C. A. 463; Mitchell *v.* Barclay, 17 Fed. Cas. No. 9,659.

England. — Heath *v.* Crealock, L. R. 10 Ch.

necessary implication and upon a direct and irresistible inference from the words of the deed.[24]

d. Extent of Estoppel. An estoppel cannot be extended beyond the exact terms of the admission so as to preclude a party from establishing facts not inconsistent therewith.[25] It is confined to the subject-matter of the conveyance,[26] and will not extend to objects that the parties cannot reasonably be supposed to have had in view.[27]

F. Persons For and Against Whom Estoppel Arises — 1. General Rule. Estoppel by deed is operative only between parties to the deed and their privies;

22, 44 L. J. Ch. 157, 31 L. T. Rep. N. S. 650; Right *v.* Bucknell, 2 B. & Ad. 278, 22 E. C. L. 122; Kepp *v.* Wiggett, 10 C. B. 35, 14 Jur. 1137, 20 L. J. C. P. 49, 100 E. C. L. 35; Onward Bldg. Soc. *v.* Smithson, [1893] 1 Ch. 1, 62 L. J. Ch. 138, 68 L. T. Rep. N. S. 125, 2 Reports 106, 41 Wkly. Rep. 53; General Finance, etc., Co. *v.* Liberator Permanent Ben. Bldg. Soc., 10 Ch. D. 15, 39 L. T. Rep. N. S. 600, 27 Wkly. Rep. 210; Crofts *v.* Middleton, 1 Jur. N. S. 1133, 1 Kay & J. 194; Bottrell *v.* Summers, 2 Y. & J. 407, 31 Rev. Rep. 613.

Canada.— *Re* Bain, 25 Ont. 136; Doe *v.* Breakenridge, 1 U. C. C. P. 492; McKay *v.* McKay, 25 U. C. Q. B. 133; Gamble *v.* Rees, 6 U. C. Q. B. 396; Doe *v.* Piquotte, 4 U. C. Q. B. 101.

See 19 Cent. Dig. tit. "Estoppel," § 18.

Certainty of recitals see *supra*, III, D, 1, b.

24. Archibald *v.* Blois, 2 Nova Scotia 307, 313, in which it was said: "There may be an affirmation of a fact in a deed by necessary implication and irresistible inference, as clear and strong as it could be made by direct words."

25. *Alabama.*— East Alabama R. Co. *v.* Tennessee, etc., R. Co., 78 Ala. 274.

Louisiana.— Farelly *v.* Metairie Cemetery Assoc., 44 La. Ann. 28, 10 So. 386.

Maine.— Farrar *v.* Cooper, 34 Me. 394; Camphell *v.* Knights, 24 Me. 332.

New Jersey.— Hoboken *v.* Harrison, 30 N. J. L. 73.

New York.—Christie *v.* Gage, 71 N. Y. 189; Learned *v.* Tallmadge, 26 Barb. 443.

North Carolina.— Kissam *v.* Gaylord, 46 N. C. 294. See also Worsley *v.* Johnson, 50 N. C. 72.

South Carolina.—Marion *v.* Aiken, 39 S. C. 33, 17 S. E. 511; Smith *v.* Asbell, 2 Strobh. 141.

Wisconsin.—Hanley *v.* Kraftczyk, 119 Wis. 352, 96 N. W. 820.

Applications of rule.— One who specifically conveys a life-estate is not estopped by the conveyance thereafter to assert an undivided interest in fee. Holman *v.* Dukes, 110 Ind. 195, 10 N. E. 629. So a deed purporting to convey only such title as was acquired through tax deeds, with covenants limited to the estate acquired under such deeds, will not estop the grantor to set up a title otherwise acquired, or to deny the validity of the tax-sale. Sanford *v.* Sanford, 135 Mass. 314. A conveyance by a trustee to the beneficiary with warranty will not estop him to enforce the lien of a prior judgment obtained against the latter. Thompson *v.* Sankey, 175 Pa. St. 594, 34 Atl. 1104. One who conveys with warranty and a covenant against encumbrances is not estopped to claim from the grantee rents of the premises due by the latter for occupation prior to the conveyance. Woodcock *v.* Baldwin, 110 La. 270, 34 So. 440. One taking a conveyance of lots subject "to all special assessments" is not estopped to question the validity of an assessment of which he did not know, and which did not enter into the determination of the purchase-price. Gill *v.* Patton, 118 Iowa 88, 91 N. W. 904. An estoppel by deed precludes the grantor from denying the title thereby conveyed and the setting up any other title to the injury of the grantee, but does not prevent him from showing that the title was already in the grantee and that the object of the deed was merely to confirm the grantee's title. Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

Easements.— A conveyance with covenants for title without reservation estops the grantor from asserting an easement in the premises. De Roachmont *v.* Boston, etc., R. Co., 64 N. H. 500, 15 Atl. 131; Hodges *v.* Goodspeed, 20 R. I. 537, 40 Atl. 373. It has been held, however, that a warranty deed will not estop the grantor to claim a way of necessity over the land conveyed. Brigham *v.* Smith, 4 Gray (Mass.) 297, 64 Am. Dec. 76. So a proviso that any existing right of way in favor of the grantor shall extend over the land conveyed, and that such right shall be unaffected by the conveyance, will not estop the grantee to deny the existence of any such right. Knowlton *v.* New York, etc., R. Co., 72 Conn. 188, 44 Atl. 8.

26. Holman *v.* Dukes, 110 Ind. 195, 10 N. E. 629; Pillsbury *v.* Elliott, 56 N. H. 422; Fisher *v.* Cid Copper Min. Co., 97 N. C. 95, 4 S. E. 772; Staton *v.* Mullis, 92 N. C. 623. The rule that a grantor is estopped to deny that his deed actually conveyed what it purports to convey will not estop him to deny that it did purport to convey the interest alleged by the grantee. Walbridge *v.* Hammack, 18 D. C. 154.

An estoppel arising out of the acceptance of a deed is restricted to the estate as well as to the *corpus* which it undertakes to transfer. Moore *v.* Lord, 50 Miss. 229; Fisher *v.* Cid Copper Min. Co., 94 N. C. 397; Staton *v.* Mullis, 92 N. C. 623; Kissam *v.* Gaylord, 46 N. C. 294.

27. McCullough *v.* Dashiell, 78 Va. 634.

strangers to the deed are not bound by, nor can they invoke, the estoppel.[28] The

28. *Alabama.*—Stapp *v.* Wilkinson, 80 Ala. 47; East Alabama R. Co. *v.* Tennessee, etc., R. Co., 78 Ala. 274; Cooper *v.* Watson, 73 Ala. 252.

California.— Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111.

Connecticut.— Hungerford *v.* Hicks, 39 Conn. 259.

District of Columbia.— Morris *v.* Wheat, 8 App. Cas. 379; Thaw *v.* Ritchie, 5 Mackey 200, 4 Mackey 347.

Georgia.— Cruger *v.* Tucker, 69 Ga. 557.

Illinois.— Cross *v.* Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902; Graves *v.* Colwell, 90 Ill. 612; Massure *v.* Noble, 11 Ill. 531; Brewster *v.* Peter Schoenhofer Brewing Co., 66 Ill. App. 276.

Indiana.— McKinney *v.* Lanning, 139 Ind. 170, 38 N. E. 601; Simpson *v.* Pearson, 31 Ind. 1, 99 Am. Dec. 577; Laglow *v.* Neilson, 10 Ind. 183; Goodwin *v.* Kensett, Smith 126.

Kansas.— Wolf *v.* Hahn, 28 Kan. 588.

Kentucky.— Hume *v.* Breck, 4 Litt. 284; Hall *v.* Ditto, 12 S. W. 941, 11 Ky. L. Rep. 667. See, however, Perkins *v.* Coleman, 90 Ky. 611, 14 S. W. 640, 12 Ky. L. Rep. 540, holding that a stranger in possession of land may, when sued in ejectment, show that plaintiff before he acquired title conveyed the land to a third person and is so disentitled to recover.

Maine.— French *v.* Lord, 69 Me. 537; Hovey *v.* Woodward, 33 Me. 470; Wilkins *v.* Dingley, 29 Me. 73; Pierce *v.* Odlin, 27 Me. 341.

Maryland.— Nutwell *v.* Tongue, 22 Md. 419; Cecil *v.* Negro Rose, 17 Md. 92.

Massachusetts.— Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; Manners *v.* Haverhill, 135 Mass. 165; Buffum *v.* Hutchinson, 1 Allen 58; Merrifield *v.* Parritt, 11 Cush. 590; Holt *v.* Sargent, 15 Gray 97; Cram *v.* Bailey, 10 Gray 87; Robinson *v.* Bates, 3 Metc. 40; Housatonic Banks *v.* Martin, 1 Metc. 294; Blanchard *v.* Brooks, 12 Pick. 47; Worcester *v.* Green, 2 Pick. 425; Braintree *v.* Hingham, 17 Mass. 432.

Michigan.— Gorton *v.* Roach, 46 Mich. 294, 2 N. W. 422.

Mississippi.— Robbins *v.* McMillan, 26 Miss. 434; Stevenson *v.* McReary, 12 Sm. & M. 9, 51 Am. Dec. 102.

Missouri.— Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206; Bradley *v.* Missouri Pac. R. Co., 91 Mo. 493, 4 S. W. 427; Hempstead *v.* Easton, 33 Mo. 142; Cottle *v.* Sydnor, 10 Mo. 763; Curtis *v.* Browne, 63 Mo. App. 431.

New Hampshire.— Corbett *v.* Norcross, 35 N. H. 99; Glidden *v.* Unity, 30 N. H. 104; Wark *v.* Willard, 13 N. H. 389; Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476. See Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584.

New Jersey.— Osborne *v.* Tunis, 25 N. J. L. 633; Griggs *v.* Smith, 12 N. J. L. 22.

New York.— Pope *v.* O'Hara, 48 N. Y. 446; Walrath *v.* Redfield, 18 N. Y. 457; Stackpole *v.* Robbins, 47 Barb. 212; Borst *v.* Corey, 16 Barb. 136; Averill *v.* Wilson, 4 Barb. 180; Fox *v.* Heath, 16 Abb. Pr. 163; Jewell *v.* Harrington, 19 Wend. 471; Jackson *v.* Bradford, 4 Wend. 619; Jackson *v.* Perkins, 2 Wend. 308; Jackson *v.* Woodruff, 1 Cow. 276, 15 Am. Dec. 525; Overseers of Poor *v.* Overseers of Poor, 10 Johns. 229; Jackson *v.* Brinckerhoff, 3 Johns. Cas. 101; Kellog *v.* Rand, 11 Paige 59; Lee *v.* Hunter, 1 Paige 519; Dickinson *v.* Codwise, 1 Sandf. Ch. 214.

North Carolina.— Brittian *v.* Daniels, 94 N. C. 781; Griffin *v.* Richardson, 33 N. C. 439; Langston *v.* McKinnie, 6 N. C. 67; Nesbit *v.* Nesbit, 1 N. C. 403. See, however, Hodges *v.* Latham, 98 N. C. 239, 3 S. E. 495, 2 Am. St. Rep. 333, holding that if a person conveys the same land at different times to different persons, he is estopped, in an action by the second grantee for breach of warranty, to assert that the first grantee obtained no title.

Ohio.— Kitzmiller *v.* Van Rensselaer, 10 Ohio St. 63; Daiber *v.* Scott, 3 Ohio Cir. Ct. 313, 2 Ohio Cir. Dec. 179; Hartry *v.* Pennsylvania, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

Pennsylvania.— Sunderlin *v.* Struthers, 47 Pa. St. 411; Allen *v.* Allen, 45 Pa. St. 468; Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Hendrickson's Appeal, 24 Pa. St. 363; Dean *v.* Connelly, 6 Pa. St. 239; Miller *v.* Halman, 1 Grant 243, 2 Phila. 118; Langer *v.* Felton, 1 Rawle 141; Weidman *v.* Kohr, 4 Serg. & R. 174; Thompson *v.* Cathcart, 17 Leg. Int. 364.

Rhode Island.— Knowles *v.* Carpenter, 8 R. I. 548.

South Carolina.— Townes *v.* Augusta, 52 S. C. 396, 29 S. E. 851; Reeves *v.* Brayton, 36 S. C. 384, 15 S. E. 658; Davis *v.* Townsend, 32 S. C. 112, 10 S. E. 837; Archer *v.* Munday, 17 S. C. 84; Bauskett *v.* Holsonback, 2 Rich. 624; McKenzie *v.* Roper, 2 Strobh. 306.

Texas.— Illy *v.* Garcia, 92 Tex. 251, 47 S. W. 717 [*reversing* (Civ. App. 1898) 45 S. W. 857]; Davis *v.* Agew, 67 Tex. 206, 2 S. W. 43, 376; Williams *v.* Chandler, 25 Tex. 4; Bartell *v.* Kelsey, (Civ. App. 1900) 59 S. W. 631; Mayfield *v.* Robinson, 22 Tex. Civ. App. 385, 55 S. W. 399; Lumpkins *v.* Coates, (Civ. App. 1897) 42 S. W. 580.

Utah.— Rogers *v.* Donnellan, 11 Utah 108, 39 Pac. 494.

Virginia.— McCulloch *v.* Dashiell, 78 Va. 634.

Washington.— Bingham *v.* Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

Wisconsin.— Mabie *v.* Matteson, 17 Wis. 1.

United States.—Branson *v.* Wirth, 17 Wall. 32, 21 L. ed. 566; Deery *v.* Cray, 5 Wall. 795, 18 L. ed. 653; Traver *v.* Baker, 15 Fed. 186, 8 Sawy. 535; Burr *v.* Duryee, 4 Fed. Cas. No. 2,190 [*affirmed* in 1 Wall. 531, 17 L. ed. 650, 660, 661].

England.— Doe *v.* Errington, 6 Bing. N. Cas. 79, 3 Jur. 1126, 9 L. J. C. P. 9, 8 Scott 210, 37 E. C. L. 518; *Re* Ghost, 49 L. T. Rep. N. S. 588.

Canada.— Boulton *v.* Boulton, 28 Can. Su-

rule is the same as to an estoppel to assert an after-acquired title; the parties and their privies are estopped, but strangers are not.[29]

2. Parties — a. In General. It is commonly said that the parties to a deed are estopped to assert anything in derogation of it. This is generally true as against the grantor, but not as against the grantee, as appears in other connections.[30]

b. Parties Acting in Different Rights or Capacities. It is well settled that a deed made by a person individually does not estop him in a representative capacity.[31] As to whether a deed made in a representative capacity estops the grantor individually the cases are not in accord. Some of the courts have held that the grantor is not estopped to assert an individual right or title in derogation of the deed,[32] but the weight of authority is to the contrary, at least where there are general covenants,[33] unless the deed expressly excepts or recognizes an interest

preme Ct. 592; Doe *v.* Wetmore, 8 N. Brunsw. 140; Archibald *v.* Blois, 2 Nova Scotia 307; *Re* Bain, 25 Ont. 136; Miller *v.* Wiley, 17 U. C. C. P. 368; Iler *v.* Elliott, 32 U. C. Q. B. 434; Trust, etc., Co. *v.* Covert, 32 U. C. Q. B. 222; McKay *v.* McKay, 25 U. C. Q. B. 133; Macaulay *v.* Marshall, 20 U. C. Q. B. 273; Gamble *v.* Rees, 6 U. C. Q. B. 396; Doe *v.* Piquotte, 4 U. C. Q. B. 101; McLean *v.* Laidlaw, 2 U. C. Q. B. 222.

See 19 Cent. Dig. tit. "Estoppel," § 61.

One signing a deed as a witness conveying a part of a tract of land that he himself owned will be estopped from asserting title to that part, but not from asserting title to the other part, although the deed recites that the land adjacent to that conveyed belongs to the grantor. College Point Sav. Bank *v.* Vollmer, 44 N. Y. App. Div. 619, 60 N. Y. Suppl. 389.

29. *Kentucky.*— Fitzhugh *v.* Tyler, 9 B. Mon. 559.

New York.— Jackson *v.* Hoffman, 9 Cow. 271.

North Carolina.— Langston *v.* McKinnie, 6 N. C. 67.

Pennsylvania.— Ruston *v.* Lippincott, 119 Pa. St. 12, 12 Atl. 761.

United States.— Lownsdale *v.* Portland, 15 Fed. Cas. Nos. 8,578, 8,579, Deady 1, 39, 1 Oreg. 381, 397.

See 19 Cent. Dig. tit. "Estoppel," § 110 *et seq.*

The estoppel operates against strangers who come in after it has become effective. Somes *v.* Skinner, 3 Pick. (Mass.) 52.

30. See *supra*, III, B, 1, 2; III, C, 1; III, D, 1, a.

31. Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111 (holding that a deed by a person in his individual capacity does not estop him as agent for a third person who has put him in possession); Dewhurst *v.* Wright, 29 Fla. 223, 10 So. 682; Knorr *v.* Raymond, 73 Ga. 749 (holding that an individual deed by a trustee will not estop him in his representative capacity); Hall *v.* Matthews, 68 Ga. 490 (holding that a deed of homestead property by the head of a family as an individual does not estop him from resisting, in his capacity as head of the family and in behalf of the beneficiaries of the homestead, an action of ejectment founded on such deed); Metters *v.* Brown, 1 H. & C. 686, 9 Jur. N. S. 416, 32 L. J. Ch. 138, 7 L. T. Rep. N. S. 795, 11 Wkly. Rep. 429 (administrator).

Community property.— But a deed by one in his individual capacity, with general covenants of warranty, passes title vested in him as survivor of the community. Phœnix Assur. Co. *v.* Deavenport, 16 Tex. Civ. App. 283, 41 S. W. 399.

32. **Deed by administrator or executor.**— Wright *v.* De Groff, 14 Mich. 164 (holding also that the covenant in a deed by an administratrix against her own acts referred to her representative character only); Jackson *v.* Hoffman, 9 Cow. (N. Y.) 271.

Deed by agent or attorney in fact.— Smith *v.* Penny, 44 Cal. 161. An attorney in fact who executes a deed as such is not estopped by the covenants or recitals therein. Kern *v.* Chalfant, 7 Minn. 487. And a conveyance by an agent made after the principal's death, of which the agent was ignorant, will not estop the latter personally, where its language shows no such intention. Harper *v.* Little, 2 Me. 14, 11 Am. Dec. 25.

33. **Deed by administrator or executor.**— Jones *v.* King, 25 Ill. 383; Kellerman *v.* Miller, 5 Pa. Super. Ct. 443 (holding that an administrator who sells land under order of court to pay debts is estopped from asserting an individual title as against that made by him as administrator); Johnson *v.* Brauch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857; Corzine *v.* Williams, 85 Tex. 499, 22 S. W. 399; Prouty *v.* Mather, 49 Vt. 415. In Allen *v.* Sayward, 5 Me. 227, 17 Am. Dec. 221, it is held that if an executor as such conveys land in which he has an individual title he is estopped to assert it against the grantee, but that if he does not acquire title individually until after his official conveyance, he is not estopped. A conveyance by an executrix and life-tenant, executed by an attorney in fact in her name, adding the word "executrix," and in his name as agent, will estop her as to her life-estate. Phillips *v.* Hornsby, 70 Ala. 414. One who has the legal title and assumes to convey as administrator of one having no title and of whose estate he has no legal administration is estopped to deny that title passes. Brown *v.* Edson, 23 Vt. 435. A conveyance with covenants by an executor who is also sole legatee operates as an effectual conveyance by way of estoppel as against the executor. Carbee

in the grantor individually.[34] A deed accepted in a representative capacity does not estop the grantee individually.[35] As a rule the doctrine of title by estoppel does not apply, in the absence of personal covenants, to a title subsequently acquired in a different right.[36] A deed executed by one as agent for another, particularly where it recites that he has authority to convey, estops him and his subsequent grantees from denying such authority.[37] One who conveys land as executor is estopped to deny that he was executor and had received letters testa-

v. Hopkins, 41 Vt. 250. That a devisee who is also executor, and who makes an unauthorized conveyance in his latter capacity, may be estopped to assert that his individual interest did not pass see Allen *v.* De Witt, 3 N. Y. 276. But where on a judgment obtained against two executors by confession, land was sold by the sheriff, and at the same time the executors made an indorsement on the sheriff's deed confirming the deed "by virtue of the power vested in us by the last will of the deceased," it was held that such indorsement, being under an express reference to the powers confided to the indorsers as executors by the will of the testator, did not estop them to claim in their own right the lands contained in the deed. Hendricks *v.* Mendenhall, 4 N. C. 371. An unauthorized conveyance by a devisee and executor in his latter capacity, although it may operate by way of estoppel to pass his estate, will not affect the rights of the other heirs and devisees. Tarver *v.* Haines, 55 Ala. 503.

Deed by agent.— Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99 (agent of corporation); Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57 (lease); Carothers *v.* Alexander, 74 Tex. 309, 12 S. W. 4 (where there is *dictum* to the effect that a deed of a corporation signed by its president will estop him from claiming an interest in the land individually, if the deed purports to convey the entire interest in the land); North *v.* Henneberry, 44 Wis. 306. Where an agent signs a deed conveying property of his principal, he is estopped from asserting against the grantee any adverse right based on an interest outstanding in him at the execution of the deed. American Freehold Land Mortg. Co. *v.* Walker, 119 Ga. 341, 46 S. E. 426. One who as president of a corporation conveys its entire realty to a trustee to secure a debt, and then acquires, as an individual, an outstanding interest, after which the corporation conveys its equity to a second company, which assumes the debt, is estopped to set up his individual interest as against the second company. Central Coal, etc., Co. *v.* Walker, 73 S. W. 778, 24 Ky. L. Rep. 2191.

Deed by assignee in bankruptcy.— An assignee in bankruptcy who, although not so required by the bankrupt act, incorporates into his deed as assignee a personal covenant of warranty of title, estops himself, and likewise a grantee of his devisee, to claim any interest which he personally then had in the land. Hitchcock *v.* Southern Iron, etc., Co., (Tenn. Ch. App. 1896) 38 S. W. 588.

Deed by guardian.— Morris *v.* Wheat, 8 App. Cas. (D. C.) 379; Heard *v.* Hall, 16 Pick. (Mass.) 457; Foote *v.* Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861. A guardian who conveys with covenants of seizin and warranty "for herself, her heirs, executors," etc., is estopped as to her individual rights. Foster *v.* Young, 35 Iowa 27. But an unauthorized deed by a natural guardian will not estop his individual grantee to set up the subsequent title derived from him. Shanks *v.* Seamonds, 24 Iowa 131, 92 Am. Dec. 465. A provision in a mortgage that the interest thereon should be paid from rents of land in charge of the mortgagor as guardian will not estop the latter to assert title to the land subsequently acquired. Bowen *v.* McCarthy, 25 Ill. App. 549 [*affirmed* in 127 Ill. 17, 18 N. E. 757].

Deed by partner.— Sutlive *v.* Jones, 61 Ga. 676.

Deed by trustee.— See Rogers *v.* Donnellan, 11 Utah 108, 39 Pac. 494. A trustee who assumes to convey with warranty is estopped to set up a legal title subsequently acquired. Barton *v.* Morris, 15 Ohio 408. A trustee who by deed divests the legal estate vested in him cannot, in a court of law, deny the title so created. Perth Amboy *v.* Ramsay, 60 N. J. L. 1, 37 Atl. 446.

Where heirs convey with covenants of ownership, power to convey, warranty, and against encumbrances, they are estopped, as heirs of legatees, from petitioning that the land be sold to pay the legacies, there being no personal property. Shields *v.* Lakin, 21 Ohio St. 660.

34. Carothers *v.* Alexander, 74 Tex. 309, 12 S. W. 4, holding that a deed of a corporation signed by its president, conveying the right of the corporation to an undefined interest in land and at the same time recognizing an undefined interest in the same land in the president individually, which it does not convey, does not estop the president as to his individual interest.

35. Seabury *v.* Doe, 22 Ala. 207, 58 Am. Dec. 254.

36. Consolidated Republican Mountain Min. Co. *v.* Lebanon Min. Co., 9 Colo. 343, 12 Pac. 212.

37. Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370 (officer of corporation signing appeal-bond); Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99 (agent of corporation); Lee *v.* Getty, 26 Ill. 76 (holding that an attorney in fact and those claiming under him are estopped to dispute his authority to execute a conveyance in that capacity); Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429 (sheriff as private agent of mortgagee).

Estoppel by corporate seal to deny authority of officers see CORPORATIONS, 10 Cyc. 1019.

mentary from the probate court;[38] and the principle also applies to administrators.[39] Whether it applies to public officers depends upon the circumstances.[40]

c. State or Municipality and Corporations. Generally speaking the doctrine of estoppel by deed applies against the state, and it will not be allowed to assert anything in derogation of its grant.[41] A municipal corporation is estopped by its grants the same as the state.[42] Private corporations are estopped in like manner as individuals.[43]

38. Larco *v.* Casaneuava, 30 Cal. 560.

39. Corzine *v.* Williams, 85 Tex. 499, 22 S. W. 399.

40. See Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429. It has been held that a deed by a public officer as such will not estop him individually (Kissock *v.* Jarvis, 9 U. C. C. P. 156, sheriff); that a trustee for the public deriving his authority by statute is not estopped by his deed to deny that the statute gave him power to convey (Fairtitle *v.* Gilbert, 2 T. R. 169, 1 Rev. Rep. 455); and that a certificate of the land-office register on a grant prepared by him for signing by the governor and secretary of state that the person named as grantee has title to the within tract of land does not estop him individually to claim a superior title, since the statute requires him to make such a certificate merely as a guarantee to the governor and secretary that the proper preliminary steps have been taken (Hitchcock *v.* Southern Iron, etc., Co., (Tenn. Ch. App. 1896) 38 S. W. 588). On the other hand it was held that the trustee under the "town-site" act of the territorial legislature of Minnesota of March 3, 1855, and his representatives, were estopped to deny the title of an occupant to whom such trustee had executed a deed under the act. Morris *v.* Watson, 15 Minn. 212.

41. *Alabama.*— State *v.* Brewer, 64 Ala. 287.

Louisiana.— State *v.* Vicksburg, etc., R. Co. 44 La. Ann. 981, 11 So. 865; State *v.* Ober, 34 La. Ann. 359.

Massachusetts.—Atty.-Gen. *v.* Boston Wharf Co., 12 Gray 553; Com. *v.* Andre, 3 Pick. 224, holding that the commonwealth was estopped to set up the alienage of its grantee or of his heirs as the ground of an escheat.

New Hampshire.— Enfield *v.* Permit, 5 N. H. 280, 20 Am. Dec. 580, holding that a statute establishing the line of a township estops the state to assert that the title of the proprietors of the township does not extend to such line.

New York.— People *v.* Hagadorn, 104 N. Y. 516, 10 N. E. 891.

South Carolina.— Heyward *v.* Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 717, 28 L. R. A. 42.

United States.—Branson *v.* Wirth, 17 Wall. 32, 21 L. ed. 566; Vidal *v.* Girard, 2 How. 127, 11 L. ed. 205 (holding that a statute empowering a municipality to execute a trust created by a will estops the state to deny the competency of the corporation to take the property and execute the trust); Fletcher *v.* Peck, 6 Cranch 87, 3 L. ed. 162; Vermont *v.* Society for Propagation, etc., 28 Fed. Cas. No. 16,919, 1 Paine 652 [*cited* in Indiana *v.* Milk, 11 Fed. 389, 397, 11 Biss. 197].

See 19 Cent. Dig. tit. "Estoppel," § 62.

Contra.— Wallace *v.* Maxwell, 32 N. C. 110, 51 Am. Dec. 380; Candler *v.* Lunsford, 20 N. C. 407; Taylor *v.* Shufford, 11 N. C. 116, 15 Am. Dec. 512.

After-acquired title.— The doctrine of estoppel does not apply to a grant from the state so as to pass an after-acquired title; the grant passes only the title that the state then has. Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658. *Contra,* Com. *v.* Smith, 2 Pa. L. J. Rep. 335, 4 Pa. L. J. 121.

Recitals in a deed by the government are binding on it. Magee *v.* Hallett, 22 Ala. 699; St. Paul, etc., R. Co. *v.* First Div. St. Paul, etc., R. Co., 26 Minn. 31, 49 N. W. 303. See also Nieto *v.* Carpenter, 7 Cal. 527.

Tax deeds.— The deed of a state officer to land sold for taxes which contains no covenants and does not purport to convey any right, title, or interest of the state other than its lien for the taxes assessed will not preclude it from asserting a claim to the land in question. Reid *v.* State, 74 Ind. 252; Crane *v.* Reeder, 25 Mich. 303.

Unauthorized grants.— The state is not estopped by the unauthorized deeds of its officers. Slattery *v.* Heilperin, 110 La. 86, 34 So. 139; Heyward *v.* Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 46 Am. St. Rep. 702, 28 L. R. A. 42; Childress County Land, etc., Co. *v.* Baker, 23 Tex. Civ. App. 451, 56 S. W. 756.

The legislature has no power by the terms and conditions of an act to conclude the state itself from inquiring judicially into the constitutionality of the act. State *v.* Graham, 23 La. Ann. 402.

42. *In re* Laplante, 5 Ont. 634, holding that a municipality is estopped to assert that its grantee has no interest in the land.

Ultra vires.— The trustees of a public turnpike who make a mortgage beyond their powers are not estopped by the deed from asserting the want of power. Fairtitle *v.* Gilbert, 2 T. R. 169, 1 Rev. Rep. 455. See, generally, MUNICIPAL CORPORATIONS.

Police power.— A grant of land by a municipal corporation will not estop it from passing laws in the exercise of the police power, by which that land will be rendered useless for the purposes of the grant. *In re* Opening of Albany St., 6 Abb. Pr. (N. Y.) 273; Stuyvesant *v.* New York, 7 Cow. (N. Y.) 588; Coates *v.* New York, 7 Cow. (N. Y.) 585; Brick Presb. Church Corp. *v.* New York, 5 Cow. (N. Y.) 538.

43. Jones *v.* Green, 41 Ark. 363. See, generally, CORPORATIONS.

d. Mutuality of Estoppel. It is usual to say that an estoppel must be mutual else it will not operate as a bar, and that unless both parties are bound neither will be concluded.[44] So far as the parties to the deed and their privies are concerned this statement of the rule is subject to important exceptions and limitations.[45] In respect to strangers to the deed, however, the rule is given full application. A stranger is not estopped by the deed, nor may he take advantage of the estoppel created by it.[46]

3. Privies — a. General Rule. The privies of a grantor[47] or grantee[48] are estopped to the same extent as the original parties to the deed, and may in like

44. *Alabama.*— Bentley *v.* Cleaveland, 22 Ala. 814; Edmondson *v.* Montague, 14 Ala. 370.

California.— Gordon *v.* San Diego, (1893) 32 Pac. 885; Schuhman *v.* Garratt, 16 Cal. 100.

Illinois.— Brewster *v.* Peter Schoenhofen Brewing Co., 66 Ill. App. 276.

Maine.— Freeman *v.* Thayer, 29 Me. 369; Campbell *v.* Knights, 24 Me. 332; Ham *v.* Ham, 14 Me. 351.

Maryland.— Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688.

Michigan.— Blackwood *v.* Van Vleit, 30 Mich. 118; Chope *v.* Lorman, 20 Mich. 327.

Mississippi.— Stevenson *v.* McReary, 12 Sm. & M. 9, 51 Am. Dec. 102.

Missouri.— Hempstead *v.* Easton, 33 Mo. 142; Schenck *v.* Stumpf, 6 Mo. App. 381.

New York.— Sparrow *v.* Kingman, 1 N. Y. 242; Dempsey *v.* Tylee, 3 Duer 73; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103; Jackson *v.* Brinckerhoff, 3 Johns. Cas. 101.

North Carolina.— Peebles *v.* Pate, 90 N. C. 348; Ray *v.* Gardner, 82 N. C. 146; Griffin *v.* Richardson, 33 N. C. 439; Moore *v.* Willis, 9 N. C. 555.

Pennsylvania.— Longwell *v.* Bentley, 3 Grant 177; Cramer *v.* Carlisle Bank, 2 Grant 267.

Virginia.— Bower *v.* McCormick, 23 Gratt. 310.

United States.— Hughes *v.* Clarksville, 6 Pet. 369, 8 L. ed. 430; Gardner *v.* Sharp, 9 Fed. Cas. No. 5,236, 4 Wash. 609.

England.— Bowman *v.* Taylor, 2 A. & E. 278, 4 L. J. K. B. 58, 4 N. & M. 264, 29 E. C. L. 142; Hartcup *v.* Bell, 1 Cab. & E. 19, holding that the estoppel which enables a landlord who is mortgagor without the legal estate to sue for rent is mutual, and renders him liable on the covenants in the lease.

If a grantor attempts to defeat his deed by going behind it, the grantee is not estopped by the recitals to adduce evidence to support it. Crosby *v.* Chase, 17 Me. 369. So the party who seeks to nullify a contract cannot claim that it estops the other party thereto. Burr *v.* Duryee, 4 Fed. Cas. No. 2,190.

45. See *supra*, III, B, 1, 2; III, C, 1; III, D, 1, a.

Estoppel by deed poll see *supra*, III, B, 3, c.

46. See cases cited *supra*, notes 28, 29.

47. *Alabama.*— East Alabama R. Co. *v.* Tennessee, etc., R. Co., 78 Ala. 274; Carter *v.* Doe, 21 Ala. 72.

California.— Simson *v.* Eckstein, 22 Cal. 580.

Connecticut.— Coe *v.* Talcott, 5 Day 88.

Florida.— Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432.

Illinois.— Lee *v.* Getty, 26 Ill. 76.

Indiana.— Cashman *v.* Brownlee, 128 Ind. 266, 27 N. E. 560; Wright *v.* Tichenor, 104 Ind. 185, 3 N. E. 853.

Kentucky.—Upshaw *v.* McBride, 10 B. Mon. 202; Strohmier *v.* Leahy, 9 S. W. 238, 10 Ky. L. Rep. 333.

Louisiana.— Calhoun *v.* Pierson, 44 La. Ann. 584, 10 So. 880.

Maine.— Craig *v.* Franklin County, 58 Me. 479; Fairbanks *v.* Williamson, 7 Me. 96.

Maryland.— Phelps *v.* Phelps, 17 Md. 120.

Massachusetts.— White *v.* Patten, 24 Pick. 324.

New Hampshire.— Corbett *v.* Norcross, 35 N. H. 99; Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

New York.— Union Dime Sav. Inst. *v.* Wilmot, 94 N. Y. 221, 46 Am. Rep. 137; Corry First Nat. Bank *v.* Stiles, 22 Hun 339; Hill *v.* Hill, 4 Barb. 419; Dennison *v.* Ely, 1 Barb. 610; Jackson *v.* Waldron, 13 Wend. 178.

North Carolina.— Gadsby *v.* Dyer, 91 N. C. 311; Ross *v.* Durham, 20 N. C. 182.

Ohio.— Kinsman *v.* Loomis, 11 Ohio 475; McChesney *v.* Wainwright, 5 Ohio 452; Bond *v.* Swearingen, 1 Ohio 395.

Texas.— Martin *v.* Weyman, 26 Tex. 460.

Vermont.— Reed *v.* Shepley, 6 Vt. 602.

Wisconsin.— Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

United States.— Carver *v.* Astor, 4 Pet. 1, 7 L. ed. 761; McCalla *v.* Bane, 45 Fed. 828.

Canada.—Scratch *v.* Jackson, 26 U. C. Q. B. 189.

See 19 Cent. Dig. tit. "Estoppel," § 63 *et seq.*

48. *Arkansas.*— Dismukes *v.* Halpern, 47 Ark. 317, 1 S. W. 554.

New York.— McBurney *v.* Cutler, 18 Barb. 203; Hill *v.* Hill, 4 Barb. 419; Chautauqua County Bank *v.* Risley, 4 Den. 480.

North Carolina.— Sikes *v.* Basnight, 19 N. C. 157; Phelps *v.* Blount, 13 N. C. 177; Doe *v.* Brenon, 13 N. C. 174; Den *v.* Newson, 12 N. C. 208, 17 Am. Dec. 565.

Pennsylvania.— Cowton *v.* Wickersham, 54 Pa. St. 302.

South Carolina.— Stone *v.* Fitts, 38 S. C. 393, 17 S. E. 136.

Texas.— Waco Bridge Co. *v.* Waco, 85 Tex. 320, 20 S. W. 137.

manner take advantage of the estoppel.[49] The estoppel of a grantor as to an after-acquired title applies against those in privity with him the same as in other cases of estoppel.[50]

b. What Constitutes Privity. In the law of estoppel by deed, privity means: (1) Mere succession of rights, that is, the devolution, in whole or in part, of the rights and duties of one person upon another; or (2) the derivation of rights by one person from another and the holding in subordination to the latter.[51]

c. Who Are Privies — (i) *In General.* It follows from the definition of privity that a person is not bound as a privy by an estoppel against another, nor may he urge it, unless he succeeds to that other's possession or holds in subordination to it; persons claiming under an independent title are not estopped.[52] If, on the other hand, he does so succeed or does so hold, he is bound by the estoppel and may urge it the same as the original party to the deed.[53] Thus a creditor levying on land may not take advantage of an estoppel created by a deed thereof to the debtor, unless he buys in the property;[54] but a levying creditor is bound by an estoppel against the debtor as grantor.[55] So a purchaser at execution sale may take advantage of an estoppel arising from the deed by which the debtor acquired title,[56] and he is estopped by a deed made by the debtor before the sale.[57]

(ii) *Grantees.* A grantee is not in privity with the grantor so as to be bound by and entitled to take advantage of the estoppel created by the deed.[58] Thus

See 19 Cent. Dig. tit. "Estoppel," § 69 *et seq.*

49. See *infra*, III, F, 3, c.

50. *Delaware.*— Doe *v.* Dowdall, 3 Houst. 369, 11 Am. Rep. 757.

Illinois.— Gochenour *v.* Mowry, 33 Ill. 331; Jones *v.* King, 25 Ill. 383; Phelps *v.* Kellogg, 15 Ill. 131.

Massachusetts.— Knight *v.* Thayer, 125 Mass. 25; White *v.* Patten, 24 Pick. 324.

Missouri.— Dodd *v.* Williams, 3 Mo. App. 278.

New Hampshire.— Wark *v.* Willard, 13 N. H. 389.

New York.— Utica Bank *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

Ohio.— Philly *v.* Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Allen *v.* Parish, 3 Ohio 107.

Pennsylvania.— McWilliams *v.* Nisly, 2 Serg. & R. 507, 7 Am. Dec. 654.

Rhode Island.— McCusker *v.* McEvey, 9 R. I. 528, 11 Am. Rep. 295.

Texas.— Hale *v.* Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288.

Vermont.— Jarvis *v.* Aikens, 25 Vt. 635.

United States.— French *v.* Spencer, 21 How. 228, 16 L. ed. 97; Corcoran *v.* Brown, 6 Fed. Cas. No. 3,226, 3 Cranch C. C. 143.

See 19 Cent. Dig. tit. "Estoppel," § 110 *et seq.*

51. Bigelow Estop. (5th ed.) 347, where it is said: "In the law of estoppel privity signifies (1) merely *succession* of rights, that is, the devolution, in whole or in part, of the rights and duties of one person upon another, as in the case of the succession of an assignee in bankruptcy to the estate of the bankrupt on the one hand, and to the rights of the creditors on the other, or (2) the derivation of rights by one person from and *holding* in subordination to those of another, as in the case of a tenant." See also Taylor *v.* Needham, 2 Taunt. 278, 11 Rev. Rep. 572.

Privity by mere succession of rights includes privity in estate, in blood, and in law. Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Tefft *v.* Munson, 57 N. Y. 97; Leeming *v.* Skirrow, 2 Nev. & P. 123.

52. Gorton *v.* Roach, 46 Mich. 294, 9 N. W. 422; Kerbough *v.* Vance, 6 Baxt. (Tenn.) 110; New Orleans *v.* Gaines, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297, 13 L. ed. 703; Archibald *v.* Blois, 2 Nova Scotia 307.

Bankrupt and assignee.— A patentee is not estopped to deny the validity of a patent granted to him as against one to whom it was assigned by his assignee in bankruptcy. Smith *v.* Cropper, 10 App. Cas. 249, 55 L. J. Ch. 12, 53 L. T. Rep. N. S. 330, 33 Wkly. Rep. 753.

53. Dennison *v.* Ely, 1 Barb. (N. Y.) 610, holding that an executor or administrator can maintain only such claim as the testator or intestate might successfully have adopted while living.

A tenant is bound by an estoppel against the landlord, where his title as tenant is derived after the estoppel arises. Den *v.* Newsom, 12 N. C. 208, 17 Am. Dec. 565. See also Tew *v.* Henderson, 117 Ala. 545, 23 So. 128; Jackson *v.* Parkhurst, 9 Wend. (N. Y.) 209.

54. Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354.

55. Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

56. Dodge *v.* Walley, 22 Cal. 224, 83 Am. Dec. 61.

57. Morrison *v.* Caldwell, 5 T. B. Mon. (Ky.) 426, 17 Am. Dec. 84; Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Den *v.* Bird, 30 N. C. 280, 49 Am. Dec. 379.

58. *Alabama.*— Cooper *v.* Watson, 73 Ala. 252.

Georgia.— Gwinn *v.* Smith, 55 Ga. 145.

one of two grantees of the same grantor may connect himself with and assert against the other a title paramount to that of the common grantor.[59] If a grantee asserts no other right or title than that conveyed by the deed, however, he cannot deny his grantor's title as against another person claiming under a deed from the same grantor.[60] An estoppel arising against a grantor may be urged by persons claiming under the grantee.[61] The right of a grantee to assert an estoppel as to after-acquired property inures to those claiming under him by deed.[62] This is allowed, however, not because of privity between the grantee and the subgrantee, but because the covenant of warranty in the original deed runs with the land.[63] If a person without title, having conveyed with warranty, subsequently acquires

Kentucky.—Winlock *v.* Hardy, 4 Litt. 272.

Maine.— McLeery *v.* McLeery, 65 Me. 172, 20 Am. Rep. 683. See also Fox *v.* Widgery, 4 Me. 214, holding that where a disseizee releases to a disseizor, neither is placed in subordination to the other.

Minnesota.— Preiner *v.* Meyer, 67 Minn. 197, 69 N. W. 887.

Missouri.— Cummings *v.* Powell, 97 Mo. 524, 10 S. W. 819; Page *v.* Hill, 11 Mo. 149; Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

New York.— Osterhout *v.* Schoemaker, 3 Hill 513, holding that there is no estoppel on the ground of privity except where the occupant is under an obligation, express or implied, to restore the possession at some time or upon some event.

North Carolina.— See Frey *v.* Ramsour, 66 N. C. 466 (holding that the grantee of an execution debtor is not estopped to deny that his grantor had title at the date of the execution sale and sheriff's deed thereunder); Den *v.* Lunsford, 20 N. C. 447 (holding that the grantee is not estopped where the estoppel is not operative as to his grantor); Moore *v.* Willis, 9 N. C. 555.

See, however, Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99; Coe *v.* Talcott, 5 Day (Conn.) 88 (holding that an estoppel to deny authority to convey as stated in a covenant runs with the land and is binding on subsequent grantees of the grantor); Broadwell *v.* Merritt, 87 Mo. 95 (holding that one who holds under a grantor by subsequent conveyances which are in effect quitclaim deeds is in no better position than the grantor, and is estopped by the facts which estop the grantor).

59. Frey *v.* Ramsour, 66 N. C. 466; Rice *v.* St. Louis, etc., R. Co., 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72.

60. *Alabama.*— Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297; Gardner *v.* Boothe, 31 Ala. 186.

District of Columbia.— Anderson *v.* Reid, 10 App. Cas. 426.

Florida.— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Illinois.— Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541.

Louisiana.— Rocques *v.* Levecque, 110 La. 306, 34 So. 454.

New Hampshire.— Goodwin *v.* Folsom, 66 N. H. 626, 32 Atl. 159.

New Jersey.— American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 409.

New York.— Jackson *v.* Hinman, 10 Johns. 292.

North Carolina.— Reid *v.* Chatham, 75 N. C. 86; Doe *v.* Osborne, 47 N. C. 163; Den *v.* Barnett, 6 N. C. 251. See also Sinclair *v.* Huntley, 131 N. C. 243, 42 S. E. 605.

Ohio.— Foster *v.* Dugan, 8 Ohio 87, 31 Am. Dec. 432.

South Dakota.— McCarthy *v.* Speed, 12 S. D. 7, 80 N. W. 135, 50 L. R. A. 184.

Tennessee.— Royston *v.* Wear, 3 Head 8.

Texas.— Dycus *v.* Hart, 2 Tex. Civ. App. 354, 21 S. W. 299.

Wisconsin.— Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

Canada.— Doe *v.* Breakenridge, 1 U. C. C. P. 492.

Contra.— Landes *v.* Perkins, 12 Mo. 238; Joeckel *v.* Easton, 11 Mo. 118, 47 Am. Dec. 142. See also Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314, holding that a claimant under a tax deed is not estopped to assert that a prior tax deed to another conveyed no title.

Title from common source see also EJECTMENT; ENTRY, WRIT OF; PARTITION; QUIETING TITLE; TRESPASS; TRESPASS TO TRY TITLE; TROVER AND CONVERSION.

61. Dodge *v.* Walley, 22 Cal. 224, 83 Am. Dec. 61 (purchaser at execution sale against grantee); Neely *v.* Boyes, 128 Ind. 1, 27 N. E. 169 (mortgagee of grantee); Cameron *v.* Hunter, 34 U. C. Q. B. 121 (subgrantee).

62. *Kansas.*— Scoffins *v.* Grandstaff, 12 Kan. 467.

Maine.— Powers *v.* Patten, 71 Me. 583.

Massachusetts.— Comstock *v.* Smith, 13 Pick. 116, 23 Am. Dec. 670, *semble.*

Missouri.— Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748.

Nebraska.— Pillsbury *v.* Alexander, 40 Nebr. 242, 58 N. W. 859.

New York.— Coleman *v.* Bresnaham, 54 Hun 619, 8 N. Y. Suppl. 158.

Ohio.— Douglass *v.* Scott, 5 Ohio 194.

Texas.— Stone *v.* Dodge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65.

However, one to whom the grantee conveys subject to all encumbrances is not entitled to a title acquired by the original grantor through a sheriff's sale under a judgment existing against him when he conveyed with warranty. Skinner *v.* Starner, 24 Pa. St. 123.

63. Boyd *v.* Longworth, 11 Ohio 235, opinion by Birchard, J.

title and conveys to another, the second grantee is not in privity with the grantor, and he may accordingly in some states assert the after-acquired title against the first grantee. In many states indeed the second grantee is bound by the estoppel on the grantor, and hence is not entitled to the property as against the first grantee; not, however, because of privity between the grantor and the second grantee, but because the estoppel operates to transfer the after-acquired title to the first grantee immediately on its acquisition by the grantor.[64]

(III) *Heirs and Devisees.* Heirs and devisees are in privity with the ancestor or testator and may urge an estoppel arising in his favor.[65] For the same reason they are bound by an estoppel against the ancestor or testator.[66] They are thus bound, however, only where they claim through him. An heir or devisee claiming an independent title in himself is not estopped,[67] unless he has received

64. See *supra*, III, C, 4, b.

65. Jones *v.* King, 25 Ill. 383; Logan *v.* Moore, 7 Dana (Ky.) 74; Lawry *v.* Williams, 13 Me. 281; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

66. *Alabama.*— Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637.

Delaware.— Ford *v.* Hays, 1 Harr. 48, 23 Am. Dec. 369.

Kentucky.— Utterback *v.* Phillips, 81 Ky. 62; Nunnally *v.* White, 3 Metc. 584; Massie *v.* Sebastian, 4 Bibb 433.

Louisiana.— Levy *v.* Levy, 107 La. 576, 32 So. 117; Beard *v.* Lufrier, 46 La. Ann. 875, 15 So. 207; Stokes *v.* Shackleford, 12 La. 170.

Maine.— Lawry *v.* Williams, 13 Me. 281.

Massachusetts.—Bates *v.* Norcross, 17 Pick. 14, 28 Am. Dec. 271.

Mississippi.— See Nixon *v.* Carco, 28 Miss. 414, holding that in equity an heir cannot set up a subsequently acquired title as against a deed of bargain and sale by his ancestor.

New Jersey.— Moore *v.* Rake, 26 N. J. L. 574.

New York.— Lacrustine Fertilizer Co. *v.* Lake Guano, etc., Fertilizer Co., 19 Hun 47; Utica Bank *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

North Carolina.— Bell *v.* Adams, 81 N. C. 118; Southerland *v.* Stout, 68 N. C. 446; Spruill *v.* Leary, 35 N. C. 225.

Ohio.— Bond *v.* Swearingen, 1 Ohio 395; Watterson *v.* Ury, 5 Ohio Cir. Ct. 347, 3 Ohio Cir. Dec. 171.

Pennsylvania.— Carson *v.* New Bellevue Cemetery Co., 104 Pa. St. 575; Kesselman *v.* Old, 4 Dall. (Pa.) 168, 2 Yeates (Pa.) 509, 1 L. ed. 786.

South Carolina.— Colton *v.* Galbraith, 35 S. C. 531, 14 S. E. 957; Wingo *v.* Parker, 19 S. C. 9.

Tennessee.— Hitchcock *v.* Southern Iron, etc., Co., (Ch. App. 1896) 38 S. W. 588. See also Robertson *v.* Gaines, 2 Humphr. 367, holding that a devisee under a will by virtue of a power in which the executor makes a deed of land to a purchaser is estopped by a covenant of warranty therein from setting up an outstanding title against such a purchaser.

Texas.— Gould *v.* West, 32 Tex. 338, holding that if a person without title conveys land with warranty against his heirs, a covenant will operate as a rebutter to a claim of heirs to the land.

West Virginia.—Buford *v.* Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854.

United States.— Van Rensselaer *v.* Kearney, 11 How. 297, 13 L. ed. 703; Lamb *v.* Carter, 14 Fed. Cas. No. 8,013, 1 Sawy. 212.

See 19 Cent. Dig. tit. "Estoppel," § 68.

See, however, Goodtitle *v.* Morse, 3 T. R. 365, 1 Rev. Rep. 719; Throop *v.* Edmonds, 12 U. C. Q. B. 33.

67. *Arkansas.*— Jones *v.* Franklin, 30 Ark. 631.

Illinois.— Ebey *v.* Adams, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162.

Indiana.— Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182; Hartman *v.* Lee, 30 Ind. 281; Dean *v.* Doe, 8 Ind. 475.

Iowa.— Dunlap *v.* Thomas, 69 Iowa 358, 28 N. W. 637.

Kentucky.— Bohon *v.* Bohon, 78 Ky. 408.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Massachusetts.— Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464. See Perry *v.* Kline, 12 Cush. 118.

Michigan.— Parker *v.* McMillan, 55 Mich. 265, 21 N. W. 305.

Minnesota.— Goodwin *v.* Kumm, 43 Minn. 403, 45 N. W. 853.

Missouri.— Foote *v.* Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861; Chauvin *v.* Wagner, 18 Mo. 531.

New Jersey.— Staffordville Gravel Co. *v.* Newell, 53 N. J. L. 412, 19 Atl. 209.

New York.— Trolan *v.* Rogers, 88 Hun 422, 3 N. Y. Suppl. 836 (holding that kinship alone, whether by affinity or consanguinity, does not create privity for the purpose of estoppel; that this arises only where the heir represents the ancestor and continues his estate); Moore *v.* Littel, 40 Barb. 488.

North Carolina.— Myers *v.* Craig, 44 N. C. 169; Moore *v.* Parker, 34 N. C. 123.

Ohio.— Pollock *v.* Speidel, 17 Ohio St. 439.

Pennsylvania.— Dunbar Furnace Co. *v.* Fairchild, 128 Pa. St. 485, 18 Atl. 443, 444, holding that children and heirs at law of a wife are not estopped by a conveyance of her husband, their father, whose only interest was that of tenant by the curtesy.

Tennessee.— Kerbough *v.* Vance, 6 Baxt. 110.

from the estate assets equal in value to the extent of his liability on the ancestor's covenants.[68]

G. Estoppel Against Estoppel. An estoppel against an estoppel sets the matter at large.[69] Thus, if both parties claim under the same person and one is estopped by one deed and the other is estopped by another deed, both made by that person, one estoppel offsets the other, and the rights of the parties are to be adjusted without regard to any estoppel.[70]

IV. ESTOPPEL BY SIMPLE CONTRACT.

A. In General. There are two sorts of what has been termed "estoppel by contract," viz., (1) estoppel to deny the truth of facts agreed upon and settled by force of entering into the contract, and (2) estoppel arising from acts done under or in performance of the contract. The first form of estoppel, if the contract is in writing, is analogous to certain phases of estoppel by deed, and is not in strict propriety a species of estoppel *in pais*, since it is wholly based on a written instrument.[71] The second sort of estoppel by contract seems to be limited to cases where one party goes into possession of another's property in recognition of the latter's title, and it precludes the possessor from denying that title. It rests, whether or not the contract is in writing, on matter *in pais*. It does not, however, seem to fall within the scope of estoppel *in pais*, in the strict sense of that term, although it bears a close resemblance thereto and its practical operation is the same. Elements essential to an estoppel *in pais* are found wanting in this sort of so-called estoppel by contract, and it seems to rest on the broad principle which precludes a party from taking inconsistent positions to another's prejudice. It is therefore treated in this article in connection with that principle as a form of quasi-estoppel.[72]

B. Facts Settled by Contract — 1. General Rule. If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands.[73]

Texas.— Chace *v.* Gregg, 88 Tex. 552, 32 S. W. 520.

Virginia.— Urquhart *v.* Clarke, 2 Rand. 549.

United States.— New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102; Oliver *v.* Pratt, 3 How. 333, 11 L. ed. 622.

England.— Clemow *v.* Geach, L. R. 6 Ch. 147, 40 L. J. Ch. 44, 19 Wkly. Rep. 53, where the owner of an equity of redemption demised it in trust, and thereafter devised it in fee, and the devisees paid the mortgage, took a reconveyance to the uses of the will, and conveyed to a purchaser who had no knowledge of the trust, and it was held that the devisees were not estopped by the demise in trust, inasmuch as they acquired their legal estate through the reconveyance.

See 19 Cent. Dig. tit. "Estoppel," § 68.

68. Bigelow Estop. (5th ed.) 389. See Willson *v.* Louisville Trust Co., 102 Ky. 522, 44 S. W. 121, 19 Ky. L. Rep. 1590; Colton *v.* Galbraith, 35 S. C. 531, 14 S. E. 957.

69. Kimball *v.* Schoff, 40 N. H. 190; Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. ed. 543; Branson *v.* Wirth, 17 Wall. (U. S.) 32, 21 L. ed. 566; James *v.* McGibney, 24 U. C. Q. B. 155. Thus where the grantee of a void grant reconveys part of the granted premises to the grantor, with intent that the one interest shall be satisfied out of the other, there is no estoppel which would fill an after-acquired title of the second grantor in favor of the first grantor. In such case each party is estopped by his own deed, and the one estoppel neutralizes the other. Emeric *v.* Alvarado, 90 Cal. 444, 447, 27 Pac. 356.

70. Carpenter *v.* Thompson, 3 N. H. 204, 14 Am. Dec. 348.

71. See *supra*, I, A, 13; *infra*, IV, B.

If the contract is not in writing, the bar rests *in pais*, and yet it does not possess all the marks of an estoppel *in pais*. It would serve no useful purpose, however, to divide and separately discuss this sort of bar according to whether the contract on which it rests is oral or written, since its practical operation is in either case the same; and the present division of this article therefore includes all cases of preclusion to dispute the truth of facts settled by contract, whether or not the contract is in writing.

72. See *infra*, VI, B, 1, f, (III).

73. *Michigan.*— Grand Rapids Fourth Nat. Bank *v.* Onley, 63 Mich. 58, 29 N. W. 513.

Minnesota.— Delaney *v.* Dutcher, 23 Minn. 373.

New York.— St. John *v.* Roberts, 31 N. Y. 441, 88 Am. Dec. 287; McGaw *v.* Adams, 14 How. Pr. 461.

Wisconsin.— Hoeger *v.* Chicago, etc., R.

2. Necessity of Seal. Since a deed is a writing under seal, it is self-evident that an unsealed writing cannot give rise to an estoppel by deed;[74] but it does not follow that a simple written contract cannot create an estoppel analogous to estoppel by deed and of the same force and effect, in so far as it is sufficient in law to effectuate the purpose for which it was made, and indeed there is positive authority that it may.[75]

3. Validity of Contract. An estoppel by simple contract cannot be predicated on an invalid contract.[76] However, it has been held that a party to an

Co., 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271; Mackey *v.* Stafford, 43 Wis. 653.

England.— Atkinson *v.* Folkes, 1 Anstr. 67, 3 Rev. Rep. 548; Else *v.* Barnard, 6 Jur. N. S. 621, 2 L. T. Rep. N. S. 203.

See 19 Cent. Dig. tit. "Estoppel," § 204 *et seq.*

"Estoppel by contract" is a term which is intended to embrace all cases in which there is an actual or virtual undertaking to treat a fact as settled, "as, for example, 'a contract based upon one's having a certain title to property will estop the parties, in the performance of the contract from claiming a different title.'" Bigelow Estop. (5th ed.) 450 [*quoted* in Bricker *v.* Stroud, 56 Mo. App. 183, 188].

Estoppel to deny liability.— Where one who purchases stock and obligations of a corporation from a creditor of the company assumes payment of certain of the company's bonds secured by its mortgage, he is estopped, on foreclosure of the mortgage, to deny the company's liability on the bonds. Old Colony Trust Co. *v.* Allentown, etc., Rapid-Transit Co., 192 Pa. St. 596, 44 Atl. 319.

Estoppel to deny lien.— An agreement by the holder of a mechanic's lien with a person claiming a mechanic's lien on the same property that, in consideration of the latter's forbearing to bring suit to foreclose his lien, it shall be prior to that of the former, concedes the validity of the latter lien, and estops the holder of the former from attacking it. Cain *v.* Texas Bldg., etc., Assoc., 21 Tex. Civ. App. 61, 51 S. W. 879. So one who purchases an assignment of a contract to buy reclaimed tide-lands of the state which expresses an obligation to take title subject to the lien of a water-way contractor cannot deny the validity of the lien. Mississippi Valley Trust Co. *v.* Hofius, 20 Wash. 272, 55 Pac. 54.

Estoppel to deny title.— One who executes and delivers a bill of sale is estopped as against the buyer to assert that at the time of the transaction the title was outstanding in a third person. McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760. And where one of two contesting claimants to public lands, after having been beaten in a contest before the interior department, signs an agreement with the successful entryman's grantee that for a consideration received he will make no claim to the land, he is thereby estopped to claim title under a previous settlement, on the ground that the entryman's possession was not in good faith and that his title was acquired by fraud. McCord *v.* Hill, 117 Wis. 306, 94 N. W. 65. However, a seller in an oral contract is not estopped to deny the buyer's title. Boies *v.* Witherell, 7 Me. 162.

Estoppel to deny trade-mark.— Defendants having agreed for a valuable consideration that certain labels should thereafter be the property of plaintiff, and that defendants would not infringe on their use, they are estopped from asserting that the symbols and devices composing the labels are not such as are subject to protection solely as trademarks. Ft. Stanwix Canning Co. *v.* William McKinley Canning Co., 49 N. Y. App. Div. 566, 63 N. Y. Suppl. 704.

Admission of capacity: Implied from acceptance of bill of exchange see Commercial Paper, 7 Cyc. 781. Of corporation see Corporations, 10 Cyc. 1065 *et seq.*, 1137, 1139, 1146 *et seq.*, 1346.

Admission of genuineness implied from acceptance of bill of exchange or indorsement of bill or note see Commercial Paper, 7 Cyc. 781, 833.

Estoppel to deny: Existence of corporation see Corporations, 10 Cyc. 199, 217, 244, 316, 513, 521, 662, 1065, 1345. Powers of corporation see Corporations, 10 Cyc. 1065 *et seq.*, 1137, 1139, 1146 *et seq.*, 1346.

Facts settled by certification of check see Banks and Banking, 5 Cyc. 540 *et seq.*

Recognition of title, character, or capacity as working an estoppel see *infra*, VI, B, 1, f.

74. In fact cases may be found in which it is said that a writing not made under seal cannot found an estoppel as by deed. See *supra*, III, E, 1, b.

75. Carpenter *v.* Buller, 10 L. J. Exch. 393, 8 M. & W. 209, *semble*. And see cases cited *supra*, p. 706 note 98, p. 719 note 73; and *infra*, p. 721 note 78 *et seq.*

76. Hickey *v.* Hinsdale, 12 Mich. 99 (holding that an unauthorized compromise agreement between a creditor's attorney and the debtor, made after levy of execution and providing that the debtor will pay the attorney a certain sum or in default thereof that he will turn out the property levied on in payment, cannot operate as an estoppel against the debtor); Smith *v.* Smith, 62 Mo. App. 596; Saxton *v.* Dodge, 57 Barb. (N. Y.) 84 (holding that if a contract for the sale and purchase of a patent is void for want of consideration, a stipulation that the buyer will not dispute the seller's title or set up any defense against the validity of the patent in an action against him to collect the price is also void and will not work an estoppel).

An illegal contract affords no basis for an estoppel. Shorman *v.* Eakin, 47 Ark. 351, 1

invalid contract which is not illegal and unlawful may be equitably estopped to dispute the validity of the contract.[77]

4. Recitals in Contract — a. In General. A party to a written contract is ordinarily estopped to deny the truth of recitals therein.[78] A recital that does not amount to a precise affirmation of a fact will not estop the party to deny the fact, however;[79] and an estoppel does not arise from a recital unless it is of the essence of the agreement;[80] nor is a recital binding in an action not founded on the contract.[81] In determining the effect of a recital, it must be construed in connection with the whole contract.[82]

b. Acknowledgment of Consideration. While an acknowledgment of receipt of consideration as part of the contract in which it occurs may not be contradicted for the purpose of defeating the operation of the contract,[83] yet it may as a simple receipt be contradicted for collateral purposes.[84] The party making the

S. W. 559; Langan *v.* Sankey, 55 Iowa 52, 7 N. W. 393; Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 33 S. E. 382, 75 Am. St. Rep. 770, 45 L. R. A. 243; Dupas *v.* Wassell, 8 Fed. Cas. No. 4,182, 1 Dill 213.

77. Jennings County *v.* Verbarg, 63 Ind. 107 (holding that, although county commissioners are required to advertise for bids for county contracts, yet they are estopped from setting up their failure to do so in an action by the contractor to recover on the contract); Corbet *v.* Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80. See, however, Workman's Mut. Aid Assoc. *v.* Monroe, (Tex. Civ. App. 1899) 53 S. W. 1029, holding that where, through the invalidity of an acknowledgment, a contract for a lien on a homestead is ineffectual, the owners are not estopped to assert the invalidity as against a third person who advances money to take up the note secured by the contract, there being no misrepresentations.

78. Ettelsohn *v.* Kirkwood, 33 Ill. App. 103; Nenaugh *v.* Chandler, 89 Ind. 94 (holding that a stipulation that a party signs a note as a principal precludes him from asserting that he is a surety); Hunter *v.* Miller, 6 B. Mon. (Ky.) 612; Reddington *v.* Lanahan, 59 Md. 429 (so holding as to a party who claims under the contract). See, however, Ferguson *v.* Millikin, 42 Mich. 441, 4 N. W. 185.

If a party refuses to sign a contract he is not bound by recitals in it. Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110.

Estoppel to assert fraud.— One party to a contract is not estopped from asserting that the inducement to enter into it came from fraudulent representations of the other party, although the contract recites that no representations whatever were made by such other party. Bridger *v.* Goldsmith, 3 Misc. (N. Y.) 535, 23 N. Y. Suppl. 9.

Estoppel to deny recital: In bill of lading see Carriers, 6 Cyc. 418 *et seq.* Of corporate existence see Corporations, 10 Cyc. 513, 521.

79. Jackson *v.* Allen, 120 Mass. 64; O'Brien *v.* Findeisen, 48 Minn. 213, 50 N. W. 1035; Sutton *v.* Dameron, 100 Mo. 141, 13 S. W. 497. See also Bradbury *v.* Cony, 59 Me. 494, in which a recital in a submission to referees of a claim against an adjoining landowner, "for pay for building a part of the brick partition wall, the center line of which is the dividing line between said blocks," and payment of the amount of the award, were held not to estop the claimant in a suit brought by the other party from showing where the true line was.

80. Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568 (holding that recitals in agreements concerning real estate will not estop the parties from denying those facts, except for the execution of the purpose contemplated by the agreement, unless they become a part of or work upon the title); Passmore *v.* Passmore, 60 Mich. 463, 27 N. W. 601 (holding that a statement in a marriage contract is not conclusive of the age of one of the parties).

81. Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476, where it was held that a recital in a contract for the sale of a horse that the horse was sold by defendant does not estop him from showing otherwise in an action founded on a warranty of the horse and not on the contract.

82. McLear *v.* Hapgood, 85 Cal. 555, 557, 24 Pac. 788.

83. Redfield *v.* Haight, 27 Conn. 31 (holding that where the parties have agreed that a legal consideration should be expressed for the purpose of the contract, as one dollar, they are thereby estopped from denying in an action on the contract that such was in fact the consideration); Dyer *v.* Rich, 1 Metc. (Mass.) 180 (holding that where a party to an agreement recites as consideration that the other party has made a certain conveyance of even date of the agreement, he is estopped to show in avoidance of the contract that the conveyance was not made until afterward, although it was dated subsequently); Drury *v.* Fay, 14 Pick. (Mass.) 326 (holding that the promisor in a contract of indemnity is estopped to contradict his acknowledgment therein of having received the sum of money mentioned). See also Brokman *v.* Myers, 59 Hun (N. Y.) 623, 13 N. Y. Suppl. 732.

84. *Connecticut.*— Tucker *v.* Baldwin, 13 Conn. 136, 33 Am. Dec. 384.

Indiana.— Lash *v.* Rendell, 72 Ind. 475; Lapping *v.* Duffy, 65 Ind. 229.

acknowledgment may, however, be equitably estopped by extraneous circumstances to deny the receipt as against third persons who have acted on it to their detriment,[85] and even as against the other party to the contract.[86]

V. ESTOPPEL BY MISREPRESENTATION.

A. General Nature and Essentials — 1. What Constitutes. Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy.[87] This estoppel arises when one by his acts, representations, or admis-

Massachusetts.— Pitt *v.* Berkshire L. Ins. Co., 100 Mass. 500.

New York.— Ensign *v.* Webster, 1 Johns. Cas. 145, 1 Am. Dec. 108.

Pennsylvania.— Megargel *v.* Megargel, 105 Pa. St. 475.

See also Bigelow Estop. (5th ed.) 471 note 2.

For the purpose of upholding a contract which is usurious on its face, the lender will not be allowed to show that he furnished a further consideration than that named in the writing. Barss *v.* Strong, 7 Nova Scotia 450 *semble*. *Compare* Wheeler *v.* McNeil, 101 Fed. 685, 41 C. C. A. 604, in which notes were given on two considerations, and it was held that a subsequent agreement apportioning the notes between the two did not estop the payee, in an action by the maker to cancel the notes based on one of the two considerations, from showing that they were in fact based on both.

Contradicting statement of consideration see CONTRACTS, 9 Cyc. 368.

Parol evidence to contradict or vary recital see EVIDENCE.

Recital of consideration in deed see *supra*, III, D, 2, a.

85. *Illinois.*— Stewart *v.* Metcalf, 68 Ill. 109.

New York.— Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603.

Wisconsin.— Hale *v.* Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

United States.— McNeil *v.* Hill, 16 Fed. Cas. No. 8,914, Woolw. 96.

England.— Bickerton *v.* Walker, 31 Ch. D. 151, 55 L. J. Ch. 227, 53 L. T. Rep. N. S. 731, 34 Wkly. Rep. 141.

86. *California.*— Dresbach *v.* Minnis, 45 Cal. 223.

Connecticut.— Staples *v.* Fillmore, 43 Conn. 510.

Massachusetts.— Dewey *v.* Field, 4 Metc. 381, 38 Am. Dec. 376.

New York.— Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628.

Wisconsin.— Bell *v.* Shafer, 58 Wis. 223, 16 N. W. 628.

87. Pomeroy Eq. Jur. § 804 [*quoted* in Miller-Jones Furniture Co. *v.* Fort Smith Ice, etc., Co., 66 Ark. 287, 291, 50 S. W. 508; Dimond *v.* Manheim, 61 Minn. 178, 181, 63 N. W. 495; Ricketts *v.* Scothorn, 57 Nebr. 51, 57, 77 N. W. 365, 73 Am. St. Rep. 491, 42 L. R. A. 794; Chicago First Nat. Bank *v.* Dean, 60 N. Y. Super. Ct. 299, 303, 17 N. Y. Suppl. 375; Griffith *v.* Rife, 72 Tex. 185, 193, 12 S. W. 168; Security Mortg., etc., Co. *v.* Caruthers, (Tex. Civ. App. 1895) 32 S. W. 837, 843; Whiteselle *v.* Texas Loan Agency, (Tex. Civ. App. 1894) 27 S. W. 309, 315; Richardson *v.* Olivier, 105 Fed. 277, 282, 44 C. C. A. 468, 53 L. R. A. 113; The Alberto, 24 Fed. 379, 382.

Other definitions are: "A right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Bigelow Estop. (4th ed.) 445 [*quoted* in Pope *v.* J. K. Armsby Co., 111 Cal. 159, 164, 43 Pac. 589; Dolbeer *v.* Livingston, 100 Cal. 617, 621, 35 Pac. 328; Boles *v.* Bennington, 136 Mo. 522, 530, 38 S. W. 306; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 126 Mo. 344, 353, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840; Ricketts *v.* Scothorn, 57 Nebr. 51, 57, 77 N. W. 365, 73 Am. St. Rep. 491, 42 L. R. A. 794].

An "estoppel [which] presupposes error upon one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." Anderson L. Dict. [*quoted* in Cornell University *v.* Parkinson, 59 Kan. 365, 373, 53 Pac. 138].

"An indisputable admission, arising from the circumstances, that the party claiming the benefit of it has, while acting in good faith, been induced, by the voluntary and intelligent action of the party against whom it is alleged, to change his position." Bigelow Estop. 345 [*quoted* in Yates *v.* Hurd, 8 Colo. 343, 349, 8 Pac. 575; Chicago Washingtonian Home *v.* Chicago, 157 Ill. 414, 429, 41 N. E. 893, 29 L. R. A. 789].

Such an estoppel is said to arise: "Where, in good conscience and honest dealing, he ought not to be permitted to gainsay" a fact asserted by him. Ridgway *v.* Morrison, 28 Ind. 201, 203 [*quoting* Coke Litt. 352]. "Where one party has been induced by the conduct of the other to do or forbear doing

sions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.[88] It consists in holding for truth

something which he would not or would have done but for such conduct of the other party." Bull *v.* Rowe, 13 S. C. 355, 370 [*citing* Bigelow Estop. 480]. "Where one person has done or said that which has influenced another in such way as to make it inequitable to change or recall what was so said or done." McGregor *v.* Equitable Gas Co., 139 Pa. St. 230, 237, 21 Atl. 13. "Where one person is induced by the assertion of another, to do that which would be prejudicial to his own interest, if the person by whom he had been induced to act in this manner, was allowed to contradict and disprove what he had before affirmed." Frost *v.* Saratoga Mut. Ins. Co., 5 Den. (N. Y.) 154, 157, 49 Am. Dec. 234. See also Branson *v.* Wirth, 17 Wall. (U. S.) 32, 21 L. ed. 566 [*quoted* in Brigham Young Trust Co. *v.* Wagener, 12 Utah 1, 11, 40 Pac. 764]. "When one, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and to act accordingly." Townsend *v.* Johnson, 34 Minn. 414, 415, 26 N. W. 395. "Where a party makes a statement, or admission, either expressly, or by implication, with the intention of influencing the conduct of another, and that other acts upon the confidence of such statement or admission, and will suffer injury if the party is permitted to deny it." Norton *v.* Kearney, 10 Wis. 443, 453.

Statutory definition.— Cal. Code Civ. Proc. § 1962, subd. 3, provides that "whenever a party has, . . . deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, . . . be permitted to falsify it." Barnhart *v.* Falkerth, 90 Cal. 157, 162, 27 Pac. 71.

"What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration." Kirk *v.* Hamilton, 102 U. S. 68, 76, 26 L. ed. 79 [*quoted* in Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 382, 42 S. W. 19].

Application of maxims.— There are many fundamentals of the law which are applicable to and explanatory of the doctrine of equitable estoppel. "'*Volenti non fit injuria*' ('No one can maintain an action for a wrong where he has consented to the wrong which occasions his loss'); '*Qui non prohibit quod prohibere potest assentire videtur*' ('He who does not forbid what he can forbid seems to assent'); and '*Qui tacet, consentire videtur*' ('He who is silent appears to consent')." Herman Estop. § 735 [*quoted* in Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 452, 21 S. E. 755].

88. *Alabama.*—Sullivan *v.* Conway, 81 Ala. 153, 1 So. 647, 60 Am. Rep. 142.

Arkansas.— Jowers *v.* Phelps, 33 Ark. 465.

Connecticut.— C. & C. Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604; Preston *v.* Mann, 25 Conn. 118.

Florida.— Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 66 Am. St. Rep. 167; Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Illinois.— Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Chandler *v.* White, 84 Ill. 435; Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123; Otto *v.* Jackson, 35 Ill. 349; Mullanphy Bank *v.* Schott, 34 Ill. App. 500 [*affirmed* in 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401]; Voge *v.* Breed, 14 Ill. App. 538.

Indiana.— McCabe *v.* Raney, 32 Ind. 309; Ridgway *v.* Morrison, 28 Ind. 201; Fletcher *v.* Holmes, 25 Ind. 458.

Iowa.— Lucas *v.* Hart, 5 Iowa 415.

Louisiana.— Sentell *v.* Hewitt, 49 La. Ann. 1021, 22 So. 242; Marsh *v.* Smith, 5 Rob. 518.

Maine.— American Gas, etc., Co. *v.* Wood, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449; Stanwood *v.* McLellan, 48 Me. 275; Rangeley *v.* Spring, 21 Me. 130.

Maryland.— Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688.

Massachusetts.— Brewer *v.* Boston, etc., R. Corp., 5 Metc. 478, 39 Am. Dec. 694.

Minnesota.— Sanborn *v.* Van Duyne, 90 Minn. 215, 96 N. W. 41; Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192; Berryhill *v.* Resser, 64 Minn. 479, 67 N. W. 542; Hawkins *v.* Cottage Grove M. E. Church, 23 Minn. 256; Pence *v.* Arbuckle, 22 Minn. 417; Chaska County *v.* Carver County, 6 Minn. 204; Combs *v.* Cooper, 5 Minn. 254; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515.

Mississippi.— Staton *v.* Bryant, 55 Miss. 261.

Missouri.— De Berry *v.* Wheeler, 128 Mo. 84, 30 S. W. 338, 49 Am. St. Rep. 538; Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Fowler *v.* Carr, 63 Mo. App. 486; Union Sav. Assoc. *v.* Kehlor, 7 Mo. App. 158.

Nebraska.—Lydick *v.* Gill, (1903) 94 N. W. 109; Cain *v.* Boller, 41 Nebr. 721, 60 N. W. 7.

New Hampshire.— Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157; Stevens *v.* Dennett, 51 N. H. 324; Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Richardson *v.* Chickering, 41 N. H. 380, 77 Am. Dec. 769; Simons *v.* Steele, 36 N. H. 73.

New Jersey.— Church *v.* Florence Iron Works, 45 N. J. L. 129.

New York.— Payne *v.* Burnham, 62 N. Y. 69; Sparrow *v.* Kingman, 1 N. Y. 242; Hobart *v.* Verrault, 74 N. Y. App. Div. 444, 77 N. Y. Suppl. 483; Grange *v.* Palmer, 56 Hun 481, 10 N. Y. Suppl. 201; Reynolds *v.* Garner, 66 Barb. 319; Chapman *v.* O'Brien, 34 N. Y. Super. Ct. 524; Frost *v.* Saratoga Mut. Ins. Co., 5 Den. 154, 49 Am. Dec. 234; Dezell *v.*

a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained.[89]

2. Object and Purpose of Doctrine. The doctrine of estoppel *in pais*, although it has been characterized as odious,[90] a harsh doctrine,[91] and not to be favored,[92] on the ground that it tends to exclude the truth,[93] is no longer so regarded.[94] The doctrine is derived from courts of equity,[95] and is interposed to prevent injustice and to guard against fraud by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to

Odell, 3 Hill 215, 38 Am. Dec. 628; Welland Canal Co. *v.* Hathaway, 8 Wend. 480, 24 Am. Dec. 51.

Ohio.— McKinzie *v.* Steele, 18 Ohio St. 38; Cleveland, etc., R. Co. *v.* Reid, 6 Ohio S. & C. Pl. Dec. 273, 4 Ohio N. P. 127.

Pennsylvania.— Bidwell *v.* Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662; Hill *v.* Epley, 31 Pa. St. 331.

Texas.— Johnson *v.* Byler, 38 Tex. 606; Ragsdale *v.* Gohlke, 36 Tex. 286; Love *v.* Barber, 17 Tex. 312; Baumbach *v.* Cook, 2 Tex. App. Civ. Cas. § 508.

Vermont.— Shaw *v.* Beebe, 35 Vt. 205; Strong *v.* Ellsworth, 26 Vt. 366.

Virginia.— Chesapeake, etc., R. Co. *v.* Walker, 100 Va. 69, 40 S. E. 633, 914.

Washington.— Young *v.* Stampfler, 27 Wash. 350, 67 Pac. 721.

West Virginia.— Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 21 S. E. 765; Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811; Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618; Dair *v.* U. S., 16 Wall. 1, 21 L. ed. 491; Barrett *v.* Twin City Power Co., 118 Fed. 861; Ginne *v.* Times-Republican Printing Co., 114 Fed. 92, 52 C. C. A. 40; Linton *v.* Vermont Nat. L. Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Paxson *v.* Brown, 61 Fed. 874, 10 C. C. A. 135; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Whalen *v.* Sheridan, 29 Fed. Cas. No. 17,476, 17 Blatchf. 9; Willis *v.* Carpenter, 30 Fed. Cas. No. 17,770.

England.— Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31 L. T. Rep. N. S. 785, 23 Wkly. Rep. 747; Pickard *v.* Sears, 6 A. & E. 469, 2 N. & P. 488, 33 E. C. L. 257; White *v.* Greenish, 11 C. B. N. S. 209, 103 E. C. L. 209; Howard *v.* Hudson, 2 E. & B. 1, 17 Jur. 855, 22 L. J. Q. B. 341, 1 Wkly. Rep. 325, 75 E. C. L. 1; Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114; M'Canse *v.* London & N. W. R. Co., 7 Hurl. & N. 477.

See 19 Cent. Dig. tit. "Estoppel," § 121.

The acts in pais which would constitute an estoppel as laid down by Lord Coke were very few, and all were acts of notoriety not less formal and solemn than the execution of a deed; such as livery, entry, acceptance of an estate, and the like. Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285.

An equitable estoppel in the modern sense arises from the conduct of a party using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Pomeroy Eq. Jur. § 802 [*quoted* in Martin *v.* Maine Cent. R. Co., 83 Me. 100, 104, 21 Atl. 740; Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 453, 21 S. E. 755].

An omission, to be an estoppel, must be in reference to some duty devolving upon the person sought to be estopped. Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017.

89. Bigelow Estop. 476 [*quoted* in Crans' Appeal, (Pa. 1887) 9 Atl. 282, 287].

90. *Illinois.*— Penn *v.* Heisey, 19 Ill. 295, 68 Am. Dec. 597.

Maryland.— Collinson *v.* Owens, 6 Gill & J. 4.

Pennsylvania.— Rhodes *v.* Childs, 64 Pa. St. 18.

Virginia.— Bolling *v.* Petersburg, 3 Rand. 563.

England.— Howard *v.* Hudson, 2 E. & B. 1, 17 Jur. 855, 22 L. J. Q. B. 341, 1 Wkly. Rep. 325, 75 E. C. L. 1.

See 19 Cent. Dig. tit. "Estoppel," § 122, and *supra*, I, C.

91. Franklin *v.* Merida, 35 Cal. 558, 95 Am. Dec. 129.

92. Groover *v.* King, 46 Ga. 101; Abbott *v.* Wilbur, 22 La. Ann. 368; Owen *v.* Bartholomew, 9 Pick. (Mass.) 520; Leicester *v.* Rehoboth, 4 Mass. 180.

93. Caldwell *v.* Smith, 77 Ala. 157; Penn *v.* Heisey, 19 Ill. 295, 68 Am. Dec. 597; Martin *v.* Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740. See also cases cited *supra*, p. 683 note 35 *et seq.*

94. Caldwell *v.* Smith, 77 Ala. 157; Caswell *v.* Fuller, 77 Me. 105. See also Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354.

95. Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Odlin *v.* Gove, 41 N. H. 465, 77 Am. Dec. 773.

The common-law doctrine of estoppel was . . . a device which the common-law courts resorted to at a very early period to strengthen and lengthen their arm; and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could attain an end which the court of chancery without any foreign assistance did at all times put into force in order to do justice. Keate *v.* Phillips, 18 Ch. D. 560, 50 L. J. Ch. 664, 44 L. T. Rep. N. S. 731, 29 Wkly. Rep. 710.

and did influence.[96] It will be allowed to shut out the truth only when necessary to do justice,[97] and never where it would itself operate as a fraud or work injustice.[98] The estoppel is a protective, and not an offensive, weapon, and its operation should be limited to saving harmless or making whole the person in whose favor it arises, and should not be made an instrument of gain or profit.[99]

3. Availability at Law. As a general rule an estoppel *in pais* may be set up in actions at law as well as in suits in equity;[1] and it has been said that in order to justify a resort to a court of equity it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law.[2] Where, however, the estoppel sought to be set up involves the title to land or interests therein which

96. *Alabama.*— Alder *v.* Pin, 80 Ala. 351.

California.— Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157. See also Farish *v.* Coon, 40 Cal. 33.

Connecticut.— West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66.

Indiana.— Fletcher *v.* Holmes, 25 Ind. 458.

Kansas.— Cornell University *v.* Parkinson, 59 Kan. 365, 53 Pac. 138.

Maryland.— Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688.

Mississippi.— Thomas *v.* Romano, 82 Miss. 256, 33 So. 969.

New Hampshire.— Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111.

New York.— Hazard *v.* Wilson, 22 Misc. 397, 50 N. Y. Suppl. 280.

Pennsylvania.— Bitting's Appeal, 17 Pa. St. 211.

Texas.— Johnson *v.* Byler, 38 Tex. 606.

See 19 Cent. Dig. tit. "Estoppel," § 122.

Equitable estoppel rests upon the fundamental principles of right and fair dealing; its creed is justice between man and man. Its objects are not punishment; its remedies are not penal. Its mission is to protect the innocent and blameless. Westbrook *v.* Guderian, 3 Tex. Civ. App. 406, 22 S. W. 59.

The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct has denied, when, on the faith of that denial, others have acted. Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19; Gregg *v.* Von Phul, 1 Wall. (U. S.) 274, 17 L. ed. 536. See also Cornell University *v.* Parkinson, 59 Kan. 365, 53 Pac. 138.

The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618 [*quoted* in Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 381, 42 S. W. 19; Brigham Young Trust Co. *v.* Wagener, 12 Utah 1, 11, 40 Pac. 764].

97. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

98. Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; McRae *v.* Bennett, 113 Mich. 47, 71 N. W. 529. See also Royce *v.* Watrous, 73 N. Y. 597.

99. Lindsay *v.* Cooper, 94 Ala. 170, 11 So. 325, 33 Am. St. Rep. 105, 16 L. R. A. 813; Adler *v.* Pin, 80 Ala. 351; Green *v.* Stevenson, (Tenn. Ch. App. 1899) 54 S. W. 1011. See also McRae *v.* Bennett, 113 Mich. 47, 71 N. W. 529.

The equity of a party who relies upon an estoppel to give validity to an inefficient contract is not to have the contract made binding, but to put his adversary to an election between performance of the contract and its repudiation upon equitable terms. American Dock, etc., Co. *v.* Public School Trustees, 35 N. J. Eq. 181.

1. *Michigan.*— Barnard *v.* German American Seminary, 49 Mich. 444, 13 N. W. 811.

New Hampshire.— Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111. See also Marshall *v.* Pierce, 12 N. H. 127.

Oregon.— Moore *v.* Frazer, 15 Oreg. 635, 16 Pac. 869.

Texas.— Guess *v.* Lubbock, 5 Tex. 535.

Vermont.— Vermont Copper Min. Co. *v.* Ormsby, 47 Vt. 709.

West Virginia.— Jones *v.* Fox, 20 W. Va. 370.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 9 S. Ct. 657, 29 L. ed. 811; Phœnix Mut. L. Ins. Co. *v.* Doster, 106 U. S. 30, 1 S. Ct. 18, 27 L. ed. 65; Daniels *v.* Tearney, 102 U. S. 415, 26 L. ed. 187; Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618; New York L. Ins. Co. *v.* Eggleston, 96 U. S. 572, 24 L. ed. 841; Shilito Co. *v.* McClung, 45 Fed. 778; Drexel *v.* Berney, 16 Fed. 522, 21 Blatchf. 348; Concord *v.* Norton, 16 Fed. 477.

England.— Keate *v.* Phillips, 18 Ch. D. 560, 50 L. J. Ch. 664, 44 L. T. Rep. N. S. 731, 29 Wkly. Rep. 710.

See 19 Cent. Dig. tit. "Estoppel," § 123. See also *infra*, VII, A, 3, b, (I).

See, however, Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222; Cox *v.* McKenney, 32 Ala. 461.

2. Drexel *v.* Berney, 122 U. S. 241, 7 S. Ct. 1200, 30 L. ed. 1219. See also Jones *v.* Fox, 20 W. Va. 370; Keate *v.* Phillips, 18 Ch. D. 560, 577, 50 L. J. Ch. 664, 44 L. T. Rep. N. S. 731, 29 Wkly. Rep. 710.

can only be transferred by deed, it is held in some jurisdictions that it cannot be taken advantage of in an action at law.[3]

4. Essential Elements — a. In General. In order to constitute an equitable estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice.[4]

b. Materiality of Representation. It is essential to an equitable estoppel that the false representation, howsoever it may arise, whether by declarations, acts, or conduct, shall be of a material fact.[5]

c. Intent — (I) *In General.* It is an essential element of an equitable estoppel that the acts, representations, or silence relied on to create the estoppel must have been wilfully intended to lead the party setting up the estoppel to act upon them.[6] The word "wilfully" as used in this connection is not, however, to

3. *Alabama.*— Standifer *v.* Swann, 78 Ala. 88; Morgan *v.* Casey, 73 Ala. 222; Taylor *v.* Agricultural Assoc., 68 Ala. 229; Hendricks *v.* Kelly, 64 Ala. 388; Thompson *v.* Campbell, 57 Ala. 183; Walker *v.* Murphy, 34 Ala. 591; Smith *v.* Mundy, 18 Ala. 182, 52 Am. Dec. 221; McPherson *v.* Walters, 16 Ala. 714, 50 Am. Dec. 200.

Connecticut.— Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Illinois.— Winslow *v.* Cooper, 104 Ill. 235; St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 102 Ill. 514; Blake *v.* Fash, 44 Ill. 302; Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; Illinois Cent. R. Co. *v.* Baltimore, etc., R. Co., 23 Ill. App. 531 [*affirmed* in 137 Ill. 9, 27 N. E. 38].

Kentucky.— Wimmer *v.* Ficklin, 14 Bush 193.

Maine.— Hamlin *v.* Hamlin, 19 Me. 141.

Michigan.— De Mill *v.* Moffat, 49 Mich. 125, 13 N. W. 387; Nims *v.* Sherman, 43 Mich. 45, 4 N. W. 434; Kalamazoo First Nat. Bank *v.* McAllister, 46 Mich. 397, 9 N. W. 446; Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988; White *v.* Hapeman, 43 Mich. 267, 5 N. W. 313, 38 Am. Rep. 178; Hays *v.* Livingston, 34 Mich. 384, 22 Am. Rep. 533.

New Hampshire.— See Marshall *v.* Pierce, 12 N. H. 127, where the question was said to be doubtful. But see Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111.

North Carolina.— West *v.* Tilghman, 31 N. C. 163; Knight *v.* Wall, 19 N. C. 125.

Virginia.— Suttle *v.* Richard, etc., R. Co., 76 Va. 284.

West Virginia.— Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536.

See 19 Cent. Dig. tit. "Estoppel," § 123. See also *infra*, V, C, 2, b; and, generally, Frauds, Statute of.

4. See Denver F. Ins. Co. *v.* McClelland, 9 Colo. 11, 25, 9 Pac. 771, 59 Am. Rep. 134; Griffith *v.* Wright, 6 Colo. 248; Brigham Young Trust Co. *v.* Wagner, 12 Utah 1, 40 Pac. 764; Bigelow Estop. 569 [*quoted* in Patterson *v.* Hitchcock, 3 Colo. 533, 536; Roberts *v.* Trammel, 15 Ind. App. 445, 40 N. E. 162, 44 N. E. 321; Acton *v.* Dooley, 74 Mo. 63, 67; Stevens *v.* Dennett, 51 N. H. 324, 334; Cran's Appeal, (Pa. 1887) 9 Atl. 282, 287; Westbrook *v.* Guderian, 3 Tex. Civ. App. 406, 411, 22 S. W. 59; Taylor *v.* Cussen, 90 Va. 40, 43, 17 S. E. 721]; 2 Pomeroy Eq. Jur. 805 [*quoted* in Chicago First Nat. Bank *v.* Dean, 60 N. Y. Super. Ct. 299, 303, 17 N. Y. Suppl. 375; Whiteselle *v.* Texas Loan Agency, (Tex. Sup. 1894) 27 S. W. 309, 315; Chesapeake, etc., R. Co. *v.* Walker, 100 Va. 69, 93, 40 S. E. 633].

5. *Colorado.*— Griffith *v.* Wright, 6 Colo. 248.

Illinois.— Phelps *v.* Illinois Cent. R. Co., 94 Ill. 548; Frame *v.* Badger, 79 Ill. 441.

Indiana.— Roberts *v.* Abbott, 127 Ind. 83, 26 N. E. 565; McGirr *v.* Sell, 60 Ind. 249.

Louisiana.— Brian *v.* Bonvillian, 111 La. 441, 35 So. 632.

Missouri.— Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Hammerslough *v.* Kansas City Bldg., etc., Assoc., 79 Mo. 81.

New Hampshire.— Pittsburg *v.* Danforth, 56 N. H. 272.

North Carolina.— Estis *v.* Jackson, 111 N. C. 145, 16 S. E. 7, 32 Am. St. Rep. 784.

Ohio.— Cleveland, etc., R. Co. *v.* Reid, 6 Ohio S. & C. Pl. Dec. 285, 4 Ohio N. P. 127.

Washington.— Lyons *v.* Fowler, 15 Wash. 618, 47 Pac. 16.

Representations: *de futuro* see *infra*, V, B, 1, a, (III). Of matters of opinion see *infra*, V, B, 1, a, (II).

6. *Alabama.*— Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585.

Arizona.— Wiser *v.* Lawler, (1900) 62 Pac. 695.

Arkansas.—Watson *v.* Murray, 54 Ark. 499, 16 S. W. 293; McLain *v.* Buliner, 49 Ark. 218, 4 S. W. 768, 4 Am. St. Rep. 36.

California.—Lackmann *v.* Kearney, 142 Cal. 112, 75 Pac. 668; Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Montgomery *v.* Keppel, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125; Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Smith *v.* Penny, 44 Cal. 161; Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157.

be taken in the limited sense of the term "maliciously" or "fraudulently"; nor does it necessarily imply an active desire to produce a particular impression or to

Colorado.— Birch *v.* Steppler, 11 Colo. 407, 18 Pac. 530; Griffith *v.* Wright, 6 Colo. 248; Patterson *v.* Hitchcock, 3 Colo. 533.

Connecticut.— McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 22 Atl. 568, 25 Am. St. Rep. 323, 13 L. R. A. 737; Farist's Appeal, 39 Conn. 150; Danforth *v.* Adams, 29 Conn. 107; Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371; Dyer *v.* Cady, 20 Conn. 563; Middleton Bank *v.* Jerome, 18 Conn. 443; Roe *v.* Jerome, 18 Conn. 138; Kinney *v.* Farnsworth, 17 Conn. 355; Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550.

Delaware.— Wilmington, etc., Bank *v.* Wollaston, 3 Harr. 90.

Florida.— Booth *v.* Lenox, (1903) 34 So. 566.

Georgia.— Southern Bauxite Min., etc., Co. *v.* Fuller, 116 Ga. 695, 43 S. E. 64; Morgan *v.* Jones, 24 Ga. 155.

Illinois.— Winslow *v.* Cooper, 104 Ill. 235; Chandler *v.* White, 84 Ill. 435; Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123; Mullanphy Bank *v.* Schott, 34 Ill. App. 500 [*affirmed* in 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401]; Lambert *v.* Borden, 16 Ill. App. 431; Dinet *v.* Eilert, 13 Ill. App. 99.

Indiana.—Hosford *v.* Johnson, 74 Ind. 479; McCabe *v.* Raney, 32 Ind. 309; Berry *v.* Anderson, 22 Ind. 36.

Indian Territory.— Robinson *v.* Nail, 2 Indian Terr. 509, 52 S. W. 49.

Kansas.— Chellis *v.* Coble, 37 Kan. 558, 15 Pac. 505; Clark *v.* Coolidge, 8 Kan. 189.

Kentucky.— McAdams *v.* Hawes, 9 Bush 15; Rudd *v.* Matthews, 3 Ky. L. Rep. 286.

Louisiana.— Marsh *v.* Smith, 5 Rob. 518.

Maine.— Piper *v.* Gilmore, 49 Me. 149; Cummings *v.* Webster, 43 Me. 192; Morton *v.* Hodgdon, 32 Me. 127; Copeland *v.* Copeland, 28 Me. 525; Rangeley *v.* Spring, 21 Me. 130.

Massachusetts.— Beacon Trust Co. *v.* Souther, 183 Mass. 413, 67 N. E. 345; Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Nourse *v.* Nourse, 116 Mass. 101; Carroll *v.* Manchester, etc., Corp., 111 Mass. 1; Zuchtmann *v.* Roberts, 109 Mass. 53, 12 Am. Rep. 663; Pierce *v.* Chace, 108 Mass. 254; Turner *v.* Coffin, 12 Allen 401; Andrews *v.* Lyons, 11 Allen 349; Langdon *v.* Doud, 10 Allen 433; Plumer *v.* Lord, 9 Allen 455, 85 Am. Dec. 773; Audenried *v.* Betteley, 5 Allen 382, 81 Am. Dec. 755; Northfield *v.* Taunton, 4 Metc. 433.

Michigan.— Conrad *v.* Smith, 32 Mich. 429.

Minnesota.—Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192; Sutton *v.* Wood, 27 Minn. 362, 7 N. W. 365; Whitacre *v.* Culver, 8 Minn. 133; Chasha County *v.* Carver County, 6 Minn. 204; Combs *v.* Cooper, 5 Minn. 254; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515; Califf *v.* Hillhouse, 3 Minn. 311.

Mississippi.— Stockner *v.* Wilczinski, 71 Miss. 340, 14 So. 470; Staton *v.* Bryant, 55 Miss. 261.

Missouri.— Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510; Taylor *v.* Zepp, 14 Mo. 482, 55 Am. Dec. 113; Fowler *v.* Carr, 63 Mo. App. 486; Ford *v.* Fellows, 34 Mo. App. 630; Union Sav. Assoc. *v.* Kehlor, 7 Mo. App. 158.

Nebraska.— Laing *v.* Evans, 64 Nebr. 454, 90 N. W. 246; Cain *v.* Boller, 41 Nebr. 721, 60 N. W. 7.

Nevada.— Gardner *v.* Pierce, 22 Nev. 146, 36 Pac. 782.

New Hampshire.— Parker *v.* Moore, 59 N. H. 454.

New Jersey.— Richman *v.* Baldwin, 21 N. J. L. 395.

New York.—Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259 [*affirming* 6 Lans. 472]; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; Brown *v.* Bowers, 30 N. Y. 519, 86 Am. Dec. 406; Plumb *v.* Cattaraugus County Mut. Ins. Co., 18 N. Y. 392, 72 Am. Dec. 526; Todd *v.* Kerr, 42 Barb. 317; Carpenter *v.* Stilwell, 12 Barb. 128; Griffith *v.* Beecher, 10 Barb. 432; Otis *v.* Sill, 8 Barb. 102; Martin *v.* Angell, 7 Barb. 407; Chapman *v.* O'Brien, 34 N. Y. Super. Ct. 524; Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628.

North Carolina.— Devereux *v.* Burgwyn, 40 N. C. 351.

Ohio.— McKinzie *v.* Steele, 18 Ohio St. 38; Morgan *v.* Spangler, 14 Ohio St. 102; Welty *v.* Vulgamore, 24 Ohio Cir. Ct. 572.

Oregon.— Pacific Lumber Co. *v.* Prescott, 40 Oreg. 374, 67 Pac. 207, 416.

Pennsylvania.— Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Eldred *v.* Hazlett, 33 Pa. St. 307; Hill *v.* Epley, 31 Pa. St. 331; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243.

South Carolina.— Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157.

Tennessee.— Morris *v.* Moore, 11 Humphr. 433.

Texas.— Ragsdale *v.* Gohlke, 36 Tex. 286; Reagan *v.* Holliman, 34 Tex. 403; Love *v.* Barber, 17 Tex. 312; Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; Taylor *v.* Tompkins, 1 Tex. App. Civ. Cas. § 1050.

Utah.—Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024; Brigham Young Trust Co. *v.* Wagener, 12 Utah 1, 40 Pac. 764.

Virginia.— Taylor *v.* Cussen, 90 Va. 40, 17 S. E. 721.

West Virginia.—Pocahontas Light, etc., Co. *v.* Browning, 53 W. Va. 436, 44 S. E. 267; Atkinson *v.* Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788.

United States.— M. W. of A. *v.* Union Nat. Bank, 108 Fed. 753, 47 C. C. A. 667; New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532; Willis *v.* Carpenter, 30 Fed. Cas. No. 17,770.

England.— Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31

induce a particular line of conduct;[7] it is sufficient if the acts, representations, or silence relied on are of such a character as to induce a reasonable and prudent man to believe that they were meant to be acted on.[8] Negligent, as distinguished from intentionally fraudulent, misrepresentations may operate as an estoppel.[9] On the other hand, ordinary, casual declarations or admissions, not made for the purpose of inducing any specific action, and on the faith of which no one has been misled, are not conclusive in their character and are entitled to have only such weight attached to them as under all the circumstances they may fairly deserve.[10]

(11) *Fraud or Deceit.* Except in the case of an estoppel affecting the title

L. T. Rep. N. S. 785, 23 Wkly. Rep. 747; Gregg *v.* Wells, 10 A. & E. 90, 2 P. & D. 296, 37 E. C. L. 71; Pickard *v.* Sears, 6 A. & E. 469, 2 N. & P. 488, 33 E. C. L. 257.

See 19 Cent. Dig. tit. "Estoppel," § 126.

7. Preston *v.* Mann, 25 Conn. 118; The Ottumwa Belle, 78 Fed. 643. See also White *v.* Greenish, 11 C. B. N. S. 209, 103 E. C. L. 209; Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114 [*explaining* and *qualifying* Gregg *v.* Wells, 10 A. & E. 90, 2 P. & D. 296, 37 E. C. L. 71; Pickard *v.* Sears, 6 A. & E. 469, 2 N. & P. 488, 33 E. C. L. 257].

8. *Alabama.*— Knowles *v.* Street, 87 Ala. 357, 6 So. 273.

California.— Boggs *v.* Merced Min. Co., 14 Cal. 279; Mitchell *v.* Reed, 9 Cal. 204, 70 Am. Dec. 647.

Connecticut.— Kinney *v.* Whiton, 44 Conn. 262, 26 Am. Rep. 462; Taylor *v.* Ely, 25 Conn. 250; Preston *v.* Mann, 25 Conn. 118; Whitaker *v.* Williams, 20 Conn. 98.

Illinois.— Hill *v.* Blackwelder, 113 Ill. 283; Hefner *v.* Vandolah, 57 Ill. 520, 11 Am. Rep. 39.

Indiana.—Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394.

Iowa.— Sessions *v.* Rice, 70 Iowa 306, 30 N. W. 735; Tiffany *v.* Anderson, 55 Iowa 405, 7 N. W. 683.

Maine.— Martin *v.* Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740; Piper *v.* Gilmore, 49 Me. 149; Copeland *v.* Copeland, 28 Me. 525.

Maryland.— Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Hambleton *v.* Central Ohio R. Co., 44 Md. 551; Brown *v.* Howard F. Ins. Co., 42 Md. 384, 20 Am. Rep. 90; Bramble *v.* State, 41 Md. 435; Homer *v.* Grosholz, 38 Md. 520; Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688.

Massachusetts.— Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Brewer *v.* Boston, etc., R. Corp., 5 Metc. 478, 39 Am. Dec. 694.

Minnesota.— Ambs *v.* Chicago, etc., R. Co., 44 Minn. 266, 46 N. W. 321; Beebe *v.* Wilkinson, 30 Minn. 548, 16 N. W. 450; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515.

Missouri.— Raley *v.* Williams, 73 Mo. 310.

Nebraska.—Lydick *v.* Gill, (1903) 94 N. W. 109.

New Hampshire.— Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157; Stevens *v.* Dennett, 51 N. H. 324; Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Drew *v.* Kimball, 43 N. H. 282, 80 Am. Dec. 163; Odlin *v.* Gove, 41 N. H. 465, 77 Am. Dec. 773; Davis *v.* Handy, 37 N. H. 65.

New Jersey.— Kuhl *v.* Jersey City, 23 N. J. Eq. 84.

New York.— Thompson *v.* Simpson, 128 N. Y. 270, 28 N. E. 627; Blair *v.* Wait, 69 N. Y. 113; Phillip *v.* Gallant, 62 N. Y. 256; Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259; McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239; Continental Nat. Bank *v.* National Bank, 50 N. Y. 575; Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Manufacturers', etc., Bank *v.* Hazard, 30 N. Y. 226; Gilbert *v.* Groff, 28 Hun 50; Brookman *v.* Metcalf, 4 Rob. 568; Kingsley *v.* Vernon, 4 Sandf. 361; Frost *v.* Saratoga Mut. Ins. Co., 5 Den. 154, 49 Am. Dec. 234; Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628; Storrs *v.* Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316.

Pennsylvania.— Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354.

Texas.— Ragsdale *v.* Gohlke, 36 Tex. 286; Love *v.* Barber, 17 Tex. 312; Westbrook *v.* Guderian, 3 Tex. Civ. App. 406, 22 S. W. 59; Kiersky *v.* Nichols, (Civ. App. 1895) 29 S. W. 71.

Vermont.— Strong *v.* Ellsworth, 26 Vt. 366.

West Virginia.— Atkinson *v.* Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811; Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743; Brant *v.* Virginia Coal, etc., Co., 93 U. S. 326, 23 L. ed. 927; The Ottumwa Belle, 78 Fed. 643.

England.— Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114; Cornish *v.* Abington, 4 H. & N. 549, 28 L. J. Exch. 262, 7 Wkly. Rep. 504; Sarat Chunder Dey *v.* Gopal Chunder Lala, 56 J. P. 741.

See 19 Cent. Dig. tit. "Estoppel," § 126.

Estoppel does not always rest on the intention of the party to be affected by it, but is dependent rather upon the reasonable or legitimate effect of his statement or conduct in the particular matter upon the course of other persons. Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19.

9. See *infra*, V, B, 3; and, generally, cases cited *supra*, note 7.

10. *Alabama.*— Planters', etc., Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585; Townsend *v.* Cowles, 31 Ala. 428.

to land[11] the rule, which in many cases is laid down apparently without qualification, that an estoppel must possess an element of fraud,[12] does not mean that there

Arkansas.— Reutzel *v.* McKinney, 54 Ark. 465, 16 S. W. 265.

Connecticut.— Nichols *v.* Peck, 70 Conn. 439, 39 Atl. 803, 66 Am. St. Rep. 122, 40 L. R. A. 81; Fawcett *v.* New Haven Organ Co., 47 Conn. 224; Farist's Appeal, 39 Conn. 150; Danforth *v.* Adams, 29 Conn. 107; Kinney *v.* Farnsworth, 17 Conn. 355. See also Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Georgia.— Harvey *v.* West, 87 Ga. 553, 13 S. E. 693.

Illinois.— Chandler *v.* White, 84 Ill. 435; Flower *v.* Elwood, 66 Ill. 438; Davidson *v.* Young, 38 Ill. 145; Needles *v.* Hanifan, 11 Ill. App. 303.

Indiana.— Cravens *v.* Kitts, 64 Ind. 581; Long *v.* Anderson, 62 Ind. 537; Williams *v.* Jackson, 28 Ind. 334.

Iowa.— Near *v.* Green, 113 Iowa 647, 85 N. W. 799; Kirchman *v.* Standard Coal Co., 112 Iowa 668, 84 N. W. 939, 52 L. R. A. 318.

Kentucky.—McAdams *v.* Hawes, 9 Bush 15.

Louisiana.— Easum's Succession, 49 La. Ann. 1345, 22 So. 364.

Maine.— Allum *v.* Perry, 68 Me. 232.

Massachusetts.— Shepard, etc., Lumber Co. *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 68 Am. St. Rep. 446, 41 L. R. A. 617; Traders' Nat. Bank *v.* Rogers, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, 36 L. R. A. 539; Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Stiff *v.* Ashton, 155 Mass. 130, 29 N. E. 203; Tyler *v.* Odd-Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360; Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. 827; Zuchtmann *v.* Roberts, 109 Mass. 53, 12 Am. Rep. 663; Northfield *v.* Taunton, 4 Metc. 433.

Michigan.— Robb *v.* Shephard, 50 Mich. 189, 15 N. W. 76.

Missouri.— St. Louis *v.* Schulenberg, etc., Lumber Co., 98 Mo. 613, 12 S. W. 248; Hull *v.* Cavanaugh, 6 Mo. App. 143.

Montana.— Sweetman *v.* Ramsey, 22 Mont. 323, 56 Pac. 361.

New Hampshire.— Parker *v.* Moore, 59 N. H. 454.

New Jersey.—Kuhl *v.* Jersey City, 23 N. J. Eq. 84.

New York.— Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259; Graham *v.* Fitzgerald, 4 Daly 178; Donaldson *v.* Hall, 2 Daly 325.

Pennsylvania.— Hebner *v.* Shirk, 2 Walk. 165.

Vermont.— Durant *v.* Pratt, 55 Vt. 270; Holden *v.* Torrey, 31 Vt. 690.

Virginia.— Stebbins *v.* Bruce, 80 Va. 389.

West Virginia.—Pocahontas Light, etc., Co. *v.* Browning, 53 W. Va. 436, 44 S. E. 267.

And see *infra*, V, A, 4, j.

Estoppels are founded on intention and cannot be extended to objects and purposes which the parties cannot reasonably be supposed to have had in view. Needles *v.* Hanifan, 11 Ill. App. 303.

A mere random statement made without any fraudulent intent to one who so far as the speaker has any reason to know is without any present or prospective interest in the matter referred to will not estop the latter from afterward asserting against the person to whom the statement is made any rights he may have had, even though such rights are inconsistent with his statement. Near *v.* Green, 113 Iowa 647, 85 N. W. 799.

11. *California.*— Boggs *v.* Merced Min. Co., 14 Cal. 279. See also Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

New York.— Trenton Banking Co. *v.* Duncan, 86 N. Y. 221; Sahler *v.* Signer, 44 Barb. 606.

North Carolina.— May *v.* Hanks, 62 N. C. 310.

Pennsylvania.— Ludwig *v.* Highley, 5 Pa. St. 132.

West Virginia.— Western Min., etc., Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406.

United States.— Brant *v.* Virginia Coal, etc., Co., 93 U. S. 326, 23 L. ed. 927. See also Henshaw *v.* Bissell, 18 Wall. 255, 21 L. ed. 835.

To authorize the finding of an estoppel in pais against the legal owner of lands there must be shown either actual fraud, or fault or negligence equivalent to fraud on his part, in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in Storrs *v.* Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316, so as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss. Trenton Banking Co. *v.* Duncan, 86 N. Y. 221.

12. *Illinois.*— Vail *v.* Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 N. E. 651 [*affirming* 92 Ill. App. 655]; Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503]; Wilson *v.* Roots, 119 Ill. 379, 10 N. E. 204; Dorlarque *v.* Cress, 71 Ill. 380; McCully *v.* Hardy, 13 Ill. App. 631.

Indiana.— Tinsley *v.* Fruits, 20 Ind. App. 534, 51 N. E. 111.

Minnesota.— Combs *v.* Cooper, 5 Minn. 254.

Missouri.— Rice *v.* Bunce, 49 Mo. 231, 8 Am. Rep. 129.

Pennsylvania.— Hill *v.* Epley, 31 Pa. St. 331.

Texas.— Williams *v.* Chandler, 25 Tex. 4.

Utah.—Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024; Brigham Young Trust Co. *v.* Wagener, 12 Utah 1, 40 Pac. 764.

United States.— McCormack *v.* James, 36 Fed. 14; Wyckoff *v.* Page, 30 Fed. Cas. No. 18,106b.

England.— Coleman *v.* North, 47 Wkly. Rep. 57.

Canada.— Andrews *v.* Bonnett, 14 Nova Scotia 313; McGee *v.* Kane, 14 Ont. 226.

See 19 Cent. Dig. tit. "Estoppel," § 127.

A purchaser at an execution sale who gives notice at the sale that the execution defendant has no title, the statement being true and

should be an actual fraudulent intent or design to deceive on the part of the party sought to be estopped, but only that the case should be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon.[13] It has been said, however, that fraud or bad faith is a necessary ingredient of misrepresentation by passivity.[14]

d. Knowledge of Facts — (I) *In General.* Knowledge of the truth as to the material facts represented or concealed is generally indispensable to the application of the doctrine of equitable estoppel.[15] It is not, however, indispensable

made in good faith, is not estopped to set up the title thus purchased as a defense to an action of ejectment. Porter *v.* McGinnis, 6 Watts & S. (Pa.) 502.

13. Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394; Stevens *v.* Dennett, 51 N. H. 324; Blair *v.* Wait, 69 N. Y. 113; Continental Nat. Bank *v.* National Bank, 50 N. Y. 575; Manufacturers', etc., Bank *v.* Hazard, 30 N. Y. 226; Crawford *v.* Lockwood, 9 How. Pr. (N. Y.) 547; The Ottumwa Belle, 78 Fed. 643. See also *supra*, V, A, 4, d, (I). And see Pomeroy Eq. Jur. §§ 803, 806.

Intentional fraud is not the essence of the doctrine of equitable estoppel. Hazard *v.* Wilson, 22 Misc. (N. Y.) 397, 50 N. Y. Suppl. 280.

The element of fraud appears when the effort is made to gainsay or deny the previous conduct. This is sufficient to work an estoppel and bring in the element of moral wrong, and there need be no precedent, corrupt motive, or evil design. If the effort to deny ought not in good conscience to be successful, then emerges the moral wrong which the court denominates fraud. Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394. See also Wishard *v.* McNeill, 85 Iowa 474, 52 N. W. 484.

14. Insurance Co. of North America *v.* Miller, 24 Ohio Cir. Ct. 667. See also *infra*, V, B, 2, a.

15. *Alabama.*— Colbert *v.* Daniel, 32 Ala. 314; Gamble *v.* Gamble, 11 Ala. 966; Clements *v.* Loggins, 2 Ala. 514.

Arizona.— Wiser *v.* Lawler, (1900) 62 Pac. 695.

Arkansas.— Bates *v.* Duncan, 64 Ark. 339, 42 S. W. 410, 62 Am. St. Rep. 190.

California.— Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Bigelow *v.* Ballerino, 111 Cal. 559, 44 Pac. 307; Breeze *v.* Brooks, 71 Cal. 169, 9 Pac. 670, 11 Pac. 885; Smith *v.* Penny, 44 Cal. 161; Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Boggs *v.* Merced Min. Co., 14 Cal. 279; Burritt *v.* Dickson, 8 Cal. 113.

Colorado.— Birch *v.* Steppler, 11 Colo. 400, 18 Pac. 530; Griffith *v.* Wright, 6 Colo. 248; Patterson *v.* Hitchcock, 3 Colo. 533.

Connecticut.— Keifer *v.* Bridgeport, 68 Conn. 401, 36 Atl. 801; McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 22 Atl. 568, 25 Am. St. Rep. 323, 3 L. R. A. 737; Clinton *v.* Haddam, 50 Conn. 84; Farist's Appeal, 39 Conn. 150; Preston *v.* Mann, 25 Conn. 118; Whitaker *v.* Williams, 20 Conn. 98.

Georgia.— Henderson Warehouse Co. *v.* Brand, 105 Ga. 217, 31 S. E. 551; Estes *v.* Odom, 91 Ga. 600, 18 S. E. 355; Daniel *v.* Wilson, 91 Ga. 238, 18 S. E. 134; Rasberry *v.* Harville, 90 Ga. 530, 16 S. E. 299; Jenkins *v.* Means, 59 Ga. 55; Allen *v.* Solomon, 54 Ga. 483; Upchurch *v.* Lewis, 53 Ga. 621; Davis *v.* Bagley, 40 Ga. 181, 2 Am. Rep. 570.

Illinois.— Fay *v.* Slaughter, 194 Ill. 157, 62 N. E. 592, 88 Am. St. Rep. 148, 56 L. R. A. 564 [*reversing* 94 Ill. App. 111]; Weber *v.* Hertz, 188 Ill. 68, 58 N. E. 676 [*affirming* 87 Ill. App. 601]; Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71; Weaver *v.* Peasley, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469; Gillespie *v.* Gillespie, 159 Ill. 84, 42 N. E. 305; Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470; Reiss *v.* Hanchett, 141 Ill. 419, 31 N. E. 165; Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82; Winslow *v.* Cooper, 104 Ill. 235; Gray *v.* Agnew, 95 Ill. 315; Pease *v.* Trench, 98 Ill. App. 24 [*affirmed* in 197 Ill. 101, 64 N. E. 368]; Weigley *v.* Gray, 91 Ill. App. 435; Ullman *v.* Eggert, 30 Ill. App. 310; Dinet *v.* Eilert, 13 Ill. App. 99.

Indiana.— Weston Paper Co. *v.* Pope, 155 Ind. 394, 57 N. E. 719, 56 L. R. A. 899; Hays *v.* Reger, 102 Ind. 524, 1 N. E. 386; Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394; Buck *v.* Milford, 90 Ind. 291; Koons *v.* Davis, 84 Ind. 387; Robbins *v.* Magee, 76 Ind. 381; Hosford *v.* Johnson, 74 Ind. 479; Lee *v.* Templeton, 73 Ind. 315; Lash *v.* Rendell, 72 Ind. 475; Hudson *v.* Densmore, 68 Ind. 391; Long *v.* Anderson, 62 Ind. 537; Stewart *v.* Hartman, 46 Ind. 331; Greensburgh, etc., Turnpike Co. *v.* Sidener, 40 Ind. 424; Fletcher *v.* Holmes, 25 Ind. 458; Junction R. Co. *v.* Harpold, 19 Ind. 347; Morrison *v.* Weaver, 16 Ind. 344; Gatling *v.* Rodman, 6 Ind. 289; Ellis *v.* Diddy, 1 Ind. 561; State *v.* Holloway, 8 Blackf. 45; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784; Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

Indian Territory.— Robinson *v.* Nail, 2 Indian Terr. 509, 52 S. W. 49.

Iowa.— Lake City *v.* Fulkerson, 122 Iowa 569, 98 N. W. 376; Griffith *v.* Bergeson, 115 Iowa 279, 88 N. W. 451; Baldwin *v.* German Ins. Co., 113 Iowa 314, 85 N. W. 26; Kirchman *v.* Standard Coal Co., 112 Iowa 668, 84 N. W. 939, 52 L. R. A. 318; Grumme *v.* Firminich Mfg. Co., 110 Iowa 505, 81 N. W. 791; Decorah Woolen Mill Co. *v.* Greer, 49 Iowa 490; Morris *v.* Sargent, 18 Iowa 90.

Kansas.— Chellis *v.* Coble, 37 Kan. 558, 15 Pac. 505; Clark *v.* Coolidge, 8 Kan. 189.

Kentucky.— Ford *v.* Mayo, 91 Ky. 83, 15

that the knowledge shou.d be actual if the circumstances are such that a knowl-

S. W. 2, 12 Ky. L. Rep. 665; Honore *v.* Dougherty, 4 Bibb 280; Shipp *v.* Swann, 2 Bibb 82; Crow *v.* Brown, Ky. Dec. 102; Dean *v.* Skinner, 3 Ky. L. Rep. 336.

Louisiana.— Landry *v.* Landry, 105 La. 362, 29 So. 900; Carroll *v.* Cockerham, 38 La. Ann. 813; Levy *v.* Ward, 33 La. Ann. 1033.

Maine.— Stubbs *v.* Pratt, 85 Me. 429, 27 Atl. 341; Copeland *v.* Copeland, 28 Me. 525.

Maryland.— Lamotte *v.* Wisner, 51 Md. 543; Hambleton *v.* Central Ohio R. Co., 44 Md. 551; Howard *v.* Carpenter, 11 Md. 259.

Massachusetts.— Commercial Nat. Bank *v.* Bemis, 177 Mass. 95, 58 N. E. 476; Brown *v.* Baron, 162 Mass. 56, 37 N. E. 772, 44 Am. St. Rep. 331; Birch *v.* Hutchings, 144 Mass. 561, 12 N. E. 192; Pierce *v.* Chace, 108 Mass. 254; Newcomb *v.* Stebbins, 9 Metc. 540.

Michigan.—Murray *v.* Rugg, 116 Mich. 519, 74 N. W. 878; Auditor-Gen. *v.* Midland County, 84 Mich. 121, 47 N. W. 579; Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; Bringard *v.* Stellwagen, 41 Mich. 54, 1 N. W. 909.

Minnesota.— Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151.

Mississippi.— Thomas *v.* Romano, 82 Miss. 256, 33 So. 969; Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 626, 21 So. 748; Houston *v.* Witherspoon, 68 Miss. 188, 190, 8 So. 515.

Missouri.— Byers *v.* Jacobs, 164 Mo. 141, 64 S. W. 156; Bramwell *v.* Adams, 146 Mo. 70, 47 S. W. 931; Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Frederick *v.* Missouri River, etc., R. Co., 82 Mo. 402; Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510; Acton *v.* Dooley, 74 Mo. 63 [*reversing* 6 Mo. App. 323]; Smith *v.* Hutchinson, 61 Mo. 83; Smith *v.* Dowling, 85 Mo. App. 514.

Montana.—Rausch *v.* Rausch, 14 Mont. 325, 36 Pac. 312.

Nebraska.— McGinley *v.* Brechtel, (1903) 95 N. W. 32; Decker *v.* Decker, 64 Nebr. 239, 89 N. W. 795; Foss *v.* Streator, 57 Nebr. 389, 77 N. W. 764; Hamilton *v.* Home F. Ins. Co., 42 Nebr. 883, 61 N. W. 93; Nash *v.* Baker, 40 Nebr. 294, 58 N. W. 706; Scharman *v.* Scharman, 38 Nebr. 39, 56 N. W. 704.

New Hampshire.— Rice *v.* Connelly, 71 N. H. 382, 52 Atl. 446; Allen *v.* Shaw, 61 N. H. 95; Smith *v.* Gibbs, 44 N. H. 335; Odlin *v.* Grove, 41 N. H. 465, 77 Am. Dec. 773; Watkins *v.* Peck, 13 N. H. 360, 40 Am. Dec. 156.

New Jersey.— Vreeland *v.* Vreeland, 49 N. J. Eq. 322, 24 Atl. 551; Perkins *v.* Moorestown, etc., Turnpike Co., 48 N. J. Eq. 499, 22 Atl. 180; Besson *v.* Eveland, 26 N. J. Eq. 468; Crawford *v.* Bertholf, 1 N. J. Eq. 458.

New York.— Viele *v.* Judson, 82 N. Y. 32 [*overruling* Costello *v.* Meade, 55 How. Pr. 356]; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; Jones *v.* Garrigues, 75 N. Y. App. Div. 539, 78 N. Y. Suppl. 400; Mulrein *v.* Weisbecker, 37 N. Y. App. Div. 545, 56 N. Y. Suppl. 240; Jones *v.* Duerk, 25 N. Y. App. Div. 551, 49 N. Y. Suppl. 987; Hayden *v.* Mathews, 4 N. Y. App. Div. 338, 38 N. Y. Suppl. 905; Bowditch *v.* Ayrault, 63 Hun 23, 17 N. Y. Suppl. 281; Gouverneur *v.* National Ice Co., 57 Hun 474, 11 N. Y. Suppl. 87, 25 Abb. N. Cas. 276; Platt *v.* Grubb, 41 Hun 447; McCulloch *v.* Wellington, 21 Hun 5; Tilton *v.* Nelson, 27 Barb. 595; Martin *v.* Martin, 1 Misc. 181, 20 N. Y. Suppl. 685; Gennerich *v.* Ulrich, 12 N. Y. Suppl. 353.

North Carolina.— Bishop *v.* Minton, 112 N. C. 524, 17 S. E. 436; Holmes *v.* Crowell, 73 N. C. 613, 629; Tilghman *v.* West, 43 N. C. 183.

Ohio.— Sackett *v.* Kellar, 22 Ohio St. 554; Buckingham *v.* Smith, 10 Ohio 288.

Pennsylvania.— Jutte *v.* Hutchinson, 189 Pa. St. 218, 42 Atl. 123; Hays *v.* Hays, 179 Pa. St. 277, 36 Atl. 311; Sensinger *v.* Boyer, 153 Pa. St. 628, 26 Atl. 222; Wright's Appeal, 99 Pa. St. 425; Davidson *v.* Barclay, 63 Pa. St. 406; Newman *v.* Edwards, 34 Pa. St. 32; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Robinson *v.* Justice, 2 Penr. & W. 19, 21 Am. Dec. 407; Enterprise Transit Co. *v.* Hazelwood Oil Co., 20 Pa. Super. Ct. 127; Keenan *v.* Van Dusen, 19 Pa. Co. Ct. 282; Perrine *v.* Holcomb, 3 Luz. Leg. Reg. 32.

Rhode Island.— Stone *v.* Engstrom, 19 R. I. 201, 32 Atl. 916.

South Carolina.—Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157; Snelgrove *v.* Snelgrove, 4 Desauss. 274.

Tennessee.— Parkey *v.* Ramsey, 111 Tenn. 302, 76 S. W. 812; Collins *v.* Williams, 98 Tenn. 525, 41 S. W. 1056; Taylor *v.* Nashville, etc., R. Co., 86 Tenn. 228, 6 S. W. 393; Allen *v.* Westbrook, 16 Lea 251; Young *v.* Young, 12 Lea 335; Webb *v.* Brandon, 4 Heisk. 285; Morris *v.* Moore, 11 Humphr. 433; Shultz *v.* Elliott, 11 Humphr. 183.

Texas.— Smith *v.* Miller, 66 Tex. 74, 17 S. W. 399; Turner *v.* Ferguson, 58 Tex. 6; Reagan *v.* Holliman, 34 Tex. 403; Lewis *v.* San Antonio, 7 Tex. 288; Davis *v.* Bingham, (Civ. App. 1898) 46 S. W. 840; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 861, 44 S. W. 10; Stratton-White Co. *v.* Castleberry, 15 Tex. Civ. App. 149, 38 S. W. 835; Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; Smith *v.* Huckaby, 4 Tex. Civ. App. 80, 23 S. W. 397; Shattuck *v.* McCartney, 1 Tex. App. Civ. Cas. § 557.

Utah.—Centennial Eureka Min. Co. *v.* Jaub County, 22 Utah 395, 62 Pac. 1024; Norton *v.* Tufts, 19 Utah 470, 57 Pac. 409; Brigham Young Trust Co. *v.* Wagener, 12 Utah 1, 40 Pac. 764.

Vermont.— Lyndon Mill Co. *v.* Lyndon Literary, etc., Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783; Kelley *v.* Seward, 51 Vt. 436; Thrall *v.* Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Strong *v.* Ellsworth, 26 Vt. 366.

Virginia.— Mercantile Co-operative Bank *v.* Brown, 96 Va. 614, 32 S. E. 64; Hale *v.* Hale, 90 Va. 728, 19 S. E. 739; Taylor *v.* Cussen, 90 Va. 40, 17 S. E. 721; Hughes *v.* Harvey, 75 Va. 200.

edge of the truth is necessarily imputed to the party sought to be estopped;[16] or if he has actively and recklessly interfered to the prejudice of another;[17] or if his ignorance is due to culpable negligence.[18]

(II) *Purpose of Inquiry or Interest of Person Claiming Estoppel.* In order that a person may be estopped by his declarations or conduct he must

Washington.— Bardsley *v.* Sternberg, 17 Wash. 243, 49 Pac. 499.

West Virginia.— Cautley *v.* Morgan, 51 W. Va. 304, 41 S. E. 201.

Wisconsin.— Fay *v.* Tower, 58 Wis. 286, 16 N. W. 558; Le Saulnier *v.* Loew, 53 Wis. 207, 10 N. W. 145; Anderson *v.* Coburn, 27 Wis. 558.

Wyoming.—Hogan *v.* Peterson, 8 Wyo. 549, 59 Pac. 162.

United States.— Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305 [*affirming* 26 Fed. 586]; Anthony *v.* Campbell, 112 Fed. 212, 50 C. C. A. 195; M. W. of A. *v.* Union Nat. Bank, 108 Fed. 753, 47 C. C. A. 667; Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113; Young *v.* Mahoning County, 51 Fed. 585.

England.— Hindustan, etc., Bank *v.* Alison, L. R. 6 C. P. 54; Lynch *v.* London Sewer Com'rs, 32 Ch. D. 72, 50 J. P. 548, 55 L. J. Ch. 409, 54 L. T. Rep. N. S. 699; *Ex p.* Davies, 19 Ch. D. 86, 45 L. T. Rep. N. S. 632, 30 Wkly. Rep. 237.

Canada.— Wallace *v.* Orangeville, 5 Ont. 37; Hunt *v.* McArthur, 24 U. C. Q. B. 254; Miller *v.* Thomas, 11 U. C. Q. B. 302; Bays *v.* Ruttan, 6 U. C. Q. B. 263.

See 19 Cent. Dig. tit. "Estoppel," §§ 128–132.

Where there is no relation of trust or contract between the parties it is of the essence of an estoppel *in pais* that the party against whom it is set up should have knowledge of the facts at the time of the conduct by which it is claimed he is estopped. Ullman *v.* Eggert, 30 Ill. App. 310.

Expressions of satisfaction by a party unaware of mistakes or fraud practised upon him will not be allowed to prejudice his rights. Shipp *v.* Swann, 2 Bibb (Ky.) 82.

Declarations as to boundaries with which he was unfamiliar will not estop a landowner, since he never understandingly admitted that his title did not cover the land in question. Hayden *v.* Mathews, 4 N. Y. App. Div. 338, 38 N. Y. Suppl. 905.

Deficiency in quantity of land.— If at the time of purchasing a tract of land a vendee was aware of a deficiency in the quantity but believed it to be much less than it really was, and did not ascertain the true extent of the deficiency until afterward, he would not be estopped from seeking redress from the vendor. Estes *v.* Odom, 91 Ga. 600, 18 S. E. 355.

Invalidity of will.— A devisee who has joined in a suit for partition and has been defeated is not thereby estopped from contesting the validity of the will on the ground that the testator was of unsound mind, if at the time the partition suit was brought he had no notice of such mental unsoundness of the testator. Lee *v.* Templeton, 73 Ind. 315.

16. *Illinois.*— McIntire *v.* Yates, 104 Ill. 491; Stone *v.* Great Western Oil Co., 41 Ill. 85.

Iowa.— Davenport Cent. R. Co. *v.* Davenport Gas Light Co., 43 Iowa 301.

Massachusetts.— Swett *v.* Boyce, 134 Mass. 381; Wright *v.* Newton, 130 Mass. 552; Morse *v.* Dearborn, 109 Mass. 593; Zuchtman *v.* Roberts, 109 Mass. 53, 12 Am. Rep. 663.

Michigan.— Harlow *v.* Marquette, etc., R. Co., 41 Mich. 336, 2 N. W. 48; Payment *v.* Church, 38 Mich. 776.

Minnesota.— Coleman *v.* Pearce, 26 Minn. 123, 1 N. W. 846.

Mississippi.— Madison County *v.* Paxton, 57 Miss. 701.

New Jersey.— Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549; New York Mut. L. Ins. Co. *v.* Norris, 31 N. J. Eq. 583.

New York.— Conable *v.* Smith, 61 Hun 185, 15 N. Y. Suppl. 924.

Tennessee.— Simpson *v.* Moore, 5 Lea 372.

Texas.— Weinstein *v.* Jefferson Nat. Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

Vermont.— Greene *v.* Smith, 57 Vt. 268; Louks *v.* Kenniston, 50 Vt. 116.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811; Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743; Cooke *v.* U. S., 91 U. S. 389, 23 L. ed. 237; U. S. Bank *v.* Georgia Bank, 10 Wheat. 333, 6 L. ed. 334.

England.— Jarrett *v.* Kennedy, 6 C. B. 319, 60 E. C. L. 319.

What a person is bound to know has regard to his particular means of knowledge and to the nature of the representation, and is then subject to the test of the knowledge which a man paying that attention which every man owes to his neighbor in making a representation would have acquired in the particular case by the use of such means. Doyle *v.* Hort, 4 L. R. Ir. 661 [*quoted* in Bigelow Estop. (5th ed.) 611].

17. *Connecticut.*— Preston *v.* Mann, 25 Conn. 118.

Maine.— Martin *v.* Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740.

Massachusetts.— Morse *v.* Dearborn, 109 Mass. 593.

Michigan.— Stone *v.* Covell, 29 Mich. 359; Beebe *v.* Knapp, 28 Mich. 53.

Missouri.— Longworth *v.* Aslin, 106 Mo. 155, 17 S. W. 294.

New York.— Trenton Banking Co. *v.* Duncan, 86 N. Y. 221; Storrs *v.* Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316.

Pennsylvania.— Chapman *v.* Chapman, 59 Pa. St. 214; Hill *v.* Epley, 31 Pa. St. 331.

Vermont.— Twitchell *v.* Bridge, 42 Vt. 68.

England.—Evans *v.* Edmonds, 13 C. B. 777, 1 C. L. R. 653, 17 Jur. 883, 22 L. J. C. P. 211, 1 Wkly. Rep. 412, 76 E. C. L. 777.

And see *infra*, V, B, 1, b.

18. See *infra*, V, A, 4, d, (III), (B).

have knowledge of the purpose of the inquiry, in response to which his statement was made and of the interest of the person claiming the estoppel.[19]

(III) *Effect of Ignorance or Mistake* — (A) *In General.* No estoppel arises where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake.[20] So the acts and declara-

Effect of negligence generally see *infra*, V, B, 3.

19. *California.*— Breeze *v.* Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257.

Connecticut.— Walker *v.* Vaughn, 33 Conn. 577.

Indiana.— Cravens *v.* Kitts, 64 Ind. 581.

Iowa.— Near *v.* Green, 113 Iowa 647, 85 N. W. 799; Kirchman *v.* Standard Coal Co., 112 Iowa 668, 84 N. W. 939, 52 L. R. A. 318; Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286; Watters *v.* Connelly, 59 Iowa 217, 13 N. W. 82.

Maine.—Fountain *v.* Whelpley, 77 Me. 132; Allum *v.* Perry, 68 Me. 232. See also Sullivan *v.* Park, 33 Me. 438, to the effect that the declarations must be made to one who has a right to know the relation of the party making the declarations to the property.

Maryland.— Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

Massachusetts.—Pierce *v.* Andrews, 6 Cush. 4, 52 Am. Dec. 748.

Michigan.— Robb *v.* Shephard, 50 Mich. 189, 15 N. W. 76.

Minnesota.— Erickson *v.* Roehm, 33 Minn. 53, 21 N. W. 861.

New York.— Friedlander *v.* Delaware, etc., Canal Co., 13 N. Y. Suppl. 323.

Pennsylvania.— Keating *v.* Orne, 77 Pa. St. 89.

Tennessee.—Chester *v.* Greer, 5 Humphr. 26.

Vermont.— Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35; Durant *v.* Pratt, 55 Vt. 270; Bates *v.* Leclair, 49 Vt. 229; Hackett *v.* Callender, 32 Vt. 97; Wakefield *v.* Crossman, 25 Vt. 298; Wooley *v.* Chamberlain, 24 Vt. 270.

United States.— Farmers', etc., Bank *v.* Farwell, 58 Fed. 633, 7 C. C. A. 391; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,757, 1 Blatchf. 488. But see The Ottumwa Belle, 78 Fed. 643.

See 19 Cent. Dig. tit. "Estoppel," § 133.

Where a person is inquired of as to a matter in respect to which his answer may affect his pecuniary interests, he has a right to know whether the person making the inquiry has an interest which entitles him to make it and what the object of the inquiry is and that his answer will be relied on. Unless correctly informed upon these points, his answers will not affect his legal rights or pecuniary interests. Hackett *v.* Callender, 32 Vt. 97.

Silence generally see *infra*, V, B, 2, a.

20. *California.*— Breeze *v.* Brooks, 71 Cal. 169, 9 Pac. 670, 11 Pac. 885.

Connecticut.— Clinton *v.* Haddam, 50 Conn. 84; Blake Crusher Co. *v.* New Haven, 46 Conn. 473; Preston *v.* Mass., 25 Conn. 118.

Illinois.—Tillotson *v.* Mitchell, 111 Ill. 518; Gray *v.* Agnew, 95 Ill. 315; Follansbee *v.* Parker, 70 Ill. 11.

Indiana.— Pitcher *v.* Dove, 99 Ind. 175; Buck *v.* Milford, 90 Ind. 291; Robbins *v.* Magee, 76 Ind. 381; Marion, etc., Gravel Road Co. *v.* McClure, 66 Ind. 468; Stewart *v.* Hartman, 46 Ind. 331.

Iowa.— Van Horn *v.* Overman, 75 Iowa 421, 39 N. W. 679; Decoral Woolen Mill *v.* Greer, 49 Iowa 490; Hager *v.* Burlington, 42 Iowa 661.

Kentucky.— Lively *v.* Ball, 8 Dana 312.

Maryland.—Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649.

Massachusetts.— Wright *v.* Newton, 130 Mass. 552; Liverpool Wharf *v.* Prescott, 7 Allen 494; Brewer *v.* Boston, etc., R. Corp., 5 Metc. 478, 39 Am. Dec. 694.

Michigan.— Beecher *v.* Ferris, 112 Mich. 584, 70 N. W. 1106.

Minnesota.— Ward *v.* Dean, 69 Minn. 466, 72 N. W. 710.

Mississippi.— Illinois Cent. R. Co. *v.* La Blanc, 74 Miss. 626, 21 So. 748; Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313.

Missouri.— Huffman *v.* Nixon, 152 Mo. 303, 53 S. W. 1078, 75 Am. St. Rep. 454; Frederick *v.* Missouri River, etc., R. Co., 82 Mo. 402; Burke *v.* Adams, 80 Mo. 504, 58 Am. Rep. 510; Acton *v.* Dooley, 74 Mo. 63.

New Jersey.—Stanwood *v.* Beck, (Ch. 1902) 52 Atl. 353.

New York.— Maloney *v.* Iroquois Brewing Co., 63 N. Y. App. Div. 454, 71 N. Y. Suppl. 1098; Young *v.* Bushnell, 21 Bosw. 1.

North Carolina.— Estis *v.* Jackson, 111 N. C. 145, 16 S. E. 7, 32 Am. St. Rep. 784; Holmes *v.* Crowell, 73 N. C. 613, 629.

Ohio.— McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57.

Pennsylvania.— Lawrence *v.* Luhr, 65 Pa. St. 236; Stroup *v.* McCloskey, (1886) 10 Atl. 421. *Compare* Millingar *v.* Sorg, 55 Pa. St. 215.

Tennessee.— Maloney *v.* Moore, (Ch. App. 1897) 42 S. W. 805.

England.— Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31 L. T. Rep. N. S. 785, 23 Wkly. Rep. 747. But see Sarat Chuader Dey *v.* Gopal Chuader Lala, 56 J. P. 741.

See 19 Cent. Dig. tit. "Estoppel," § 135.

Ignorance unaccompanied with culpability ought to excuse conduct and language which would otherwise render the author responsible for their effect. Preston *v.* Mann, 25 Conn. 118.

Mutual error regarding a particular fact affords no ground for a plea of estoppel. Soules *v.* Soules, 104 La. 796, 29 So. 342; Dixfield *v.* Newton, 41 Me. 221; Crabtree *v.* Winchester Bank, (Tenn. Sup. 1902) 67 S. W. 797.

A mistake due to the failure of the adverse party to give certain information which it was his duty to give will not work an

tions of a party based upon an innocent mistake as to his legal rights will not estop him to assert the same.[21]

(B) *Wilful or Negligent Ignorance.* Ignorance or mistake if it arises from culpable negligence will not prevent an estoppel.[22]

e. Reliance on Person Sought to Be Estopped — (I) *In General.* It is an essential element of equitable estoppel that the person invoking it has been influenced by and relied on the representations or conduct of the person sought to be estopped;[23] but in all cases the representation or conduct must of itself

estoppel. See Lyon *v.* Travelers' Ins. Co., 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354.

Mistake in boundaries see BOUNDARIES, 5 Cyc. 937.

21. *California.*— Ludom *v.* Ham, (1897) 48 Pac. 222.

Georgia.— Davis *v.* Bagley, 40 Ga. 181, 2 Am. Rep. 570.

Illinois.— Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503].

Kentucky.— Craig *v.* Baker, Hard. 281.

Louisiana.— Brian *v.* Bonvillain, 111 La. 441, 35 So. 632.

Maryland.—Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649; Lammot *v.* Bowly, 6 Harr. & J. 500.

Michigan.— Smith *v.* Sprague, 119 Mich. 148, 77 N. W. 689, 75 Am. St. Rep. 384; Gorham *v.* Arnold, 22 Mich. 247.

Missouri.— Huffman *v.* Nixon, 152 Mo. 303, 53 S. W. 1078, 75 Am. St. Rep. 454.

New York.— Bowery Sav. Bank *v.* Belt, 66 Hun 57, 20 N. Y. Suppl. 746; Cooke *v.* De Graw, 55 N. Y. Super. Ct. 548, 14 N. Y. St. 727.

Ohio.— Eggers *v.* Reemelin, 10 Ohio S. & C. Pl. Dec. 588, 8 Ohio N. P. 352.

Pennsylvania.— Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612.

See 19 Cent. Dig. tit. "Estoppel," § 135.

A mutual mistake as to the law, the facts being known to all the parties, is no ground for an estoppel *in pais.* Brian *v.* Bonvillain, 111 La. 441, 35 So. 632; Gjerstadengen *v.* Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 665.

Ignorance of one's legal rights does not prevent an equitable estoppel when the circumstances would otherwise create an equitable bar to the legal title. Tilton *v.* Nelson, 27 Barb. (N. Y.) 595.

One acting under bad advice in adopting wrong proceedings will not be estopped thereby. Wright *v.* Douglass, 10 Barb. (N. Y.) 97 [*reversed* on other grounds in 7 N. Y. 546].

22. *Colorado.*— Griffith *v.* Wright, 6 Colo. 248; Petterson *v.* Hitchcock, 3 Colo. 533.

Connecticut.— Preston *v.* Mann, 25 Conn. 118; Whitaker *v.* Williams, 20 Conn. 98.

Illinois.— Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71.

Iowa.— Sweezey *v.* Collins, 40 Iowa 540.

New York.— Conable *v.* Smith, 61 Hun 185, 15 N. Y. Suppl. 924.

Texas.—Ward *v.* Cameron, (Civ. App. 1903) 76 S. W. 240.

United States.— Sullivan *v.* Colby, 71 Fed. 460, 18 C. C. A. 193.

See 19 Cent. Dig. tit. "Estoppel," § 134.

Forgetfulness is no excuse and will not prevent an estoppel. See Bullis *v.* Noble, 36 Iowa 618; Raley *v.* Williams, 73 Mo. 310; Coventry *v.* Great Eastern R. Co., 11 Q. B. D. 776, 52 L. J. Q. B. 694, 49 L. T. Rep. N. S. 641; Slim *v.* Croucher, 1 De G. F. & J. 518, 6 Jur. N. S. 437, 29 L. J. Ch. 273, 8 Wkly. Rep. 347, 62 Eng. Ch. 401, 45 Eng. Reprint 462 [*affirming* 2 Giff. 37]. But see Spencer *v.* Carr, 45 N. Y. 406, 6 Am. Rep. 112.

23. *Alabama.*— Garner *v.* Hall, 122 Ala. 221, 25 So. 187; Seals *v.* Carroll, 114 Ala. 511, 21 So. 982; Bain *v.* Wells, 107 Ala. 562, 19 So. 774; Myers *v.* Byars, 99 Ala. 484, 12 So. 430; Weaver *v.* Bell, 87 Ala. 385, 6 So. 298; Prickett *v.* Sibert, 75 Ala. 315; Ware *v.* Cowles, 24 Ala. 446, 60 Am. Dec. 482; Pounds *v.* Richards, 21 Ala. 424; Hunley *v.* Hunley, 15 Ala. 91; Gamble *v.* Gamble, 11 Ala. 966.

Arizona.— Campbell *v.* Shivers, 1 Ariz. 161, 25 Pac. 540.

Arkansas.— Miller Lumber Co. *v.* Wilson, 56 Ark. 380, 19 S. W. 974; Graham *v.* Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40; Hope Lumber Co. *v.* Foster, etc., Hardware Co., 53 Ark. 196, 13 S. W. 731; Mattock *v.* Reppy, 47 Ark. 148, 14 S. W. 546; Franklin *v.* Meyer, 36 Ark. 96; Crump *v.* Starke, 23 Ark. 131; Prater *v.* Frazier, 11 Ark. 249.

California.— Lackmann *v.* Kearney, 142 Cal. 112, 75 Pac. 668; MacDonald *v.* Cool, 134 Cal. 502, 66 Pac. 727; Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44; Leedon *v.* Ham, (1897) 48 Pac. 222; Paden *v.* Goldbaum, (1894) 37 Pac. 759; Barahart *v.* Falkerth, 93 Cal. 497, 29 Pac. 50; Angell *v.* Hopkins, 79 Cal. 181, 21 Pac. 729; Morgan *v.* Lones, 78 Cal. 58, 20 Pac. 248; Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111; Carpentier *v.* Thirston, 24 Cal. 268; Boggs *v.* Merced Min. Co., 14 Cal. 279; Hardy *v.* Hunt, 11 Cal. 343, 70 Am. Dec. 787; Ferris *v.* Coover, 10 Cal. 589; Mitchell *v.* Reed, 9 Cal. 204, 70 Am. Dec. 647; Burritt *v.* Dickson, 8 Cal. 113; Goodale *v.* Scannell, 8 Cal. 27; Duell *v.* Bear River, etc., Min. Co., 5 Cal. 846.

Colorado.— Strahl *v.* Smith, 30 Colo. 392, 70 Pac. 677; Davis *v.* Bower, 29 Colo. 422, 68 Pac. 292; Birsh *v.* Steppler, 11 Colo. 400, 18 Pac. 530; Griffith *v.* Wright, 6 Colo. 248; Patterson *v.* Hitchcock, 3 Colo. 533.

Connecticut.—Larkin *v.* Parmelee, 69 Conn. 79, 36 Atl. 1009; Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 804; Hull *v.* Hall, 48 Conn.

have been sufficient to warrant the action of the party setting up the estoppel, and

250, 40 Am. Rep. 167; Daniels *v.* Equitable F. Ins. Co., 48 Conn. 101; Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371; Warner *v.* Middlesex Mut. Assur. Co., 21 Conn. 444; Dyer *v.* Cady, 20 Conn. 563; Whitaker *v.* Williams, 20 Conn. 98; Middletown Bank *v.* Jerome, 18 Conn. 443; Roe *v.* Jerome, 18 Conn. 138; Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Bushnell *v.* Church, 15 Conn. 406.

Delaware.— Wilmington, etc., Bank *v.* Wollaston, 3 Harr. 90; Marvel *v.* Orblip, 3 Del. Ch. 9.

Georgia.— American Freehold Land Mortg. Co. *v.* Walker, 119 Ga. 341, 46 S. E. 426; Stewart *v.* Brown, 102 Ga. 836, 30 S. E. 264; Whechel *v.* Green, 102 Ga. 113, 29 S. E. 169; Tillman *v.* Georgia Loan, etc., Co., 97 Ga. 337, 22 S. E. 983; Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294; Rice *v.* Warren, 91 Ga. 759, 17 S. E. 1030; Wilkins *v.* McGehee, 86 Ga. 764, 13 S. E. 84; Roberts *v.* Hinson, 77 Ga. 589, 2 S. E. 752; McCune *v.* McMichael, 29 Ga. 312; Goodson *v.* Beacham, 24 Ga. 150.

Illinois.— Richolson *v.* Maloney, 195 Ill. 575, 63 N. E. 188; Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193; Vail *v.* Northwestern Mut. Nat. L. Ins. Co., 192 Ill. 567, 61 N. E. 651 [*affirming* 92 Ill. App. 655]; Davis *v.* McCullough, 192 Ill. 277, 61 N. E. 377; Walls *v.* Ritter, 180 Ill. 616, 54 N. E. 565; Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503]; Comer *v.* Comer, 120 Ill. 420, 11 N. E. 848; Gray *v.* Agnew, 95 Ill. 315; Ward *v.* Johnson, 95 Ill. 215; Chandler *v.* White, 84 Ill. 435; Frame *v.* Badger, 79 Ill. 441; Ely *v.* Hanford, 65 Ill. 267; Rothgerber *v.* Dupuy, 64 Ill. 452; Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123; Fetrow *v.* Merriwether, 53 Ill. 275; Schmitt *v.* Merriman, 101 Ill. App. 443; Bruner *v.* Campbell, 90 Ill. App. 632; Hawley *v.* Florsheim, 44 Ill. App. 320; Mullanphy Bank *v.* Schott, 34 Ill. App. 500 [*affirmed* in 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401]; Ehrler *v.* Braun, 22 Ill. App. 391; Dinet *v.* Eilert, 13 Ill. App. 99; Kadish *v.* Bullen, 10 Ill. App. 566.

Indiana.— Co-operative Bldg., etc., Assoc. *v.* State, 156 Ind. 463, 60 N. E. 146; Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; McKinney *v.* Lanning, 139 Ind. 170, 38 N. E. 601; Blue Ridge Marble Co. *v.* Duffy, 128 Ind. 79, 27 N. E. 430; Robbins *v.* Magee, 76 Ind. 381; Hosford *v.* Johnson, 74 Ind. 479; McCabe *v.* Raney, 32 Ind. 309; Voorhees *v.* Hushaw, 30 Ind. 488; Simpson *v.* Pearson, 31 Ind. 1, 99 Am. Dec. 577; Fletcher *v.* Holmes, 25 Ind. 458; Evans *v.* Odem, 30 Ind. App. 207, 65 N. E. 755; Olson *v.* Chism, 21 Ind. App. 40, 51 N. E. 373.

Iowa.— Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31; Hershey *v.* Botna Valley State Bank, 89 Iowa 740, 54 N. W. 342; Botna Valley State Bank *v.* Silver City Bank, 87 Iowa 479, 54 N. W. 472; Devore *v.* Jones, 82 Iowa 66, 47 N. W. 885; Van Horn *v.* Overman, 75 Iowa 421, 39 N. W. 679; Guest *v.* Burlington Opera-House Co., 74 Iowa 457, 38 N. W. 158; Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263; Lamb *v.* Trowbridge, 71 Iowa 396, 32 N. W. 394; Eikenberry *v.* Edwards, 67 Iowa 14, 24 N. W. 570.

Kansas.— King *v.* Mead, 60 Kan. 539, 57 Pac. 113; Neve *v.* Allen, 55 Kan. 638, 41 Pac. 966; Coffelt *v.* Holton First Nat. Bank, 52 Kan. 600, 35 Pac. 289; Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5; Hill *v.* Wand, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288; Palmer *v.* Meiners, 17 Kan. 478; Clark *v.* Coolidge, 8 Kan. 189.

Kentucky.— Ratcliff *v.* Bellfonte Iron Works Co., 87 Ky. 559, 10 S. W. 365, 10 Ky. L. Rep. 643; Deppen *v.* German American Title Co., 70 S. W. 868, 24 Ky. L. Rep. 1110, 72 S. W. 768, 24 Ky. L. Rep. 1876; Taylor *v.* Jenkins, 65 S. W. 601, 23 Ky. L. Rep. 1574; Smither *v.* McGinnis, 35 S. W. 630, 18 Ky. L. Rep. 134; Wilson *v.* Scott, 11 Ky. L. Rep. 370.

Louisiana.— Dwyer *v.* Woulfe, 39 La. Ann. 423, 1 So. 868; Chaffe *v.* Morgan, 30 La. Ann. 1307; Marqueze *v.* Fernandez, 30 La. Ann. 195; Benner *v.* Michel, 23 La. Ann. 489; Fullerton *v.* Geddes, 6 La. Ann. 316; Fullerton *v.* Kennedy, 6 La. Ann. 312; Marsh *v.* Smith, 5 Rob. 518.

Maine.— Tower *v.* Haslam, 84 Me. 86, 24 Atl. 587; McClure *v.* Livermore, 78 Me. 390, 6 Atl. 11; Caswell *v.* Fuller, 77 Me. 105; Graves *v.* Blondell, 70 Me. 190; Allen *v.* Perry, 68 Me. 232; Casco Bank *v.* Keene, 53 Me. 103; Cummings *v.* Webster, 43 Me. 192; Dixfield *v.* Newton, 41 Me. 221; Morton *v.* Hodgdon, 32 Me. 127; Copeland *v.* Copeland, 28 Me. 525.

Maryland.— Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484; Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Hambleton *v.* Central Ohio R. Co., 44 Md. 551; Brown *v.* Howard F. Ins. Co., 42 Md. 384, 20 Am. Rep. 90; Bramble *v.* State, 41 Md. 435; Homer *v.* Grosholz, 38 Md. 520; Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688; Isaac *v.* Williams, 3 Gill 278.

Massachusetts.— Oliver Ditson Co. *v.* Bates, 181 Mass. 455, 63 N. E. 908, 92 Am. St. Rep. 424, 57 L. R. A. 289; Nickerson *v.* Massachusetts Title Ins. Co., 178 Mass. 308, 59 N. E. 814; Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Murphy *v.* Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; Tyler *v.* Odd-Fellows Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360; Birch *v.* Hotchings, 144 Mass. 561, 12 N. E. 192; Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. 827; Butchers' Slaughtering, etc., Assoc. *v.* Boston, 139 Mass. 290, 30 N. E. 94; Hinchley *v.* Greany, 118 Mass. 595; Fall River Nat. Bank *v.* Buffinton, 97 Mass. 498; Tobey *v.* Chipman, 13 Allen 123; Turner *v.* Coffin, 12 Allen 401; Murphy *v.* People's Equitable Mut. F. Ins. Co., 7 Allen 239; Bigelow *v.* Woodward, 15 Gray 560, 77 Am. Dec. 389.

Michigan.— Church *v.* Case, 122 Mich. 554,

if notwithstanding such representation or conduct he was still obliged to inquire

81 N. W. 334; Barney *v.* Rutledge, 104 Mich. 289, 62 N. W. 369; Dean *v.* Crall, 98 Mich. 591, 57 N. W. 813, 30 Am. St. Rep. 571; Northern Michigan Lumber Co. *v.* Lyon, 95 Mich. 584, 55 N. W. 438; Stanton *v.* Estey Mfg. Co., 90 Mich. 12, 51 N. W. 101; Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578; Michigan State Ins. Co. *v.* Soule, 51 Mich. 312, 16 N. W. 662; Canning *v.* Harlan, 50 Mich. 320, 15 N. W. 492; Alpena Lumber Co. *v.* Fletcher, 48 Mich. 555, 12 N. W. 849; Maxwell *v.* Bay City Bridge Co., 46 Mich. 278, 9 N. W. 410; Vanneter *v.* Crossman, 42 Mich. 465, 4 N. W. 216; Meister *v.* Burney, 24 Mich. 435; Lee *v.* Lake, 14 Mich. 12, 90 Am. Dec. 220.

Minnesota.—Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192; Bates *v.* A. E. Johnson Co., 79 Minn. 354, 82 N. W. 649; Norman *v.* Eckern, 60 Minn. 531, 63 N. W. 130; Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270; Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812; Hodge *v.* Ludlum, 45 Minn. 290, 47 N. W. 805; Welsh *v.* Cooley, 44 Minn. 446, 46 N. W. 908; Stuart *v.* Lowry, 42 Minn. 473, 44 N. W. 532; Hopkins *v.* Swensen, 41 Minn. 292, 42 N. W. 1062; Brown *v.* Grant, 39 Minn. 404, 40 N. W. 268; O'Mulcahy *v.* Holley, 28 Minn. 31, 8 N. W. 906; McAbe *v.* Thompson, 27 Minn. 134, 6 N. W. 479; Northern Line Packet Co. *v.* Platt, 22 Minn. 413; Whitacre *v.* Culver, 8 Minn. 133; Chaska County *v.* Carver County, 6 Minn. 204; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515; Califf *v.* Hillhouse, 3 Minn. 311.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769; Stockner *v.* Wilczinski, 71 Miss. 340, 14 So. 460; Davis *v.* Bowmar, 55 Miss. 671; Staton *v.* Bryant, 55 Miss. 261; Sulphine *v.* Dunbar, 55 Miss. 255; Tobin *v.* Allen, 53 Miss. 563.

Missouri.—Mexico First Nat. Bank *v.* Ragsdale, 171 Mo. 168, 71 S. W. 178; Western Storage, etc., Co. *v.* Glasner, 169 Mo. 38, 68 S. W. 917; Scrutchfield *v.* Sauter, 119 Mo. 615, 24 S. W. 137; State Bank *v.* Frame, 112 Mo. 502, 20 S. W. 620; Ellerbe *v.* Kansas City Nat. Exch. Bank, 109 Mo. 445, 19 S. W. 241; Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 897, 10 Am. St. Rep. 307; Monks *v.* Belden, 80 Mo. 639; Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510; Raley *v.* Williams, 73 Mo. 310; Rogers *v.* Marsh, 73 Mo. 64; Wright *v.* Mt. Pike, 70 Mo. 175; Eitelgeorge *v.* Mutual House Bldg. Assoc., 69 Mo. 52; State *v.* Laies, 52 Mo. 396; Bales *v.* Perry, 51 Mo. 449; McDermott *v.* Barnum, 16 Mo. 114; Taylor *v.* Zepp, 14 Mo. 482, 55 Am. Dec. 113; State *v.* O'Neil Lumber Co., 77 Mo. App. 538; Rosenthal *v.* Jenkins, 67 Mo. App. 295; Fowler *v.* Carr, 63 Mo. App. 486; Smith *v.* Roach, 59 Mo. App. 115; Ford *v.* Fellows, 34 Mo. App. 630; Weise *v.* Moore, 22 Mo. App. 530; Hydraulic Press Brick Co. *v.* Neumeister, 15 Mo. App. 592; Bangert *v.* Bangert, 13 Mo. App. 144; State Sav. Assoc. *v.* Boatmen's Sav. Bank, 11 Mo. App. 292; Union Sav. Assoc. *v.* Kehlor, 7 Mo. App. 158; Hull *v.* Cavanaugh, 6 Mo. App. 143.

Nebraska.— McGinley *v.* Brechtel, (1903) 95 N. W. 32; Decker *v.* Decker, 64 Nebr. 239, 89 N. W. 795; Stuart *v.* Stonebraker, 63 Nebr. 554, 88 N. W. 653; Blue Valley Lumber Co. *v.* Conro, 61 Nebr. 39, 84 N. W. 402; Oak Creek Valley Bank *v.* Helmer, 59 Nebr. 176, 80 N. W. 891; H. T. Clark Drug Co. *v.* Boardman, 50 Nebr. 687, 70 N. W. 248; Lingonner *v.* Ambler, 44 Nebr. 316, 62 N. W. 486.

New Hampshire.— Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157; Lawrence *v.* Towle, 59 N. H. 28; Barney *v.* Keniston, 58 N. H. 168; Stevens *v.* Dennett, 51 N. H. 324; Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Moore *v.* Bowman, 47 N. H. 494; Austin *v.* Thomson, 45 N. H. 113; Carpenter *v.* Cummings, 40 N. H. 158; Davis *v.* Handy, 37 N. H. 65; Simons *v.* Steele, 36 N. H. 73; Hildreth *v.* Pinkerton Academy, 29 N. H. 227; Fitts *v.* Brown, 20 N. H. 393; Jenness *v.* Berry, 17 N. H. 549; Parker *v.* Brown, 15 N. H. 176; White *v.* Phelps, 12 N. H. 382.

New Jersey.— Harris *v.* Kirkpatrick, 35 N. J. L. 392; Mills *v.* Kelley, 62 N. J. Eq. 213, 50 Atl. 144; Borden *v.* Hutchinson, (Ch. 1901) 49 Atl. 1088; White *v.* Tide Water Oil Co., (Ch. 1895) 33 Atl. 47; Mott *v.* Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757; Ruckelshaus *v.* Borcherling, 54 N. J. Eq. 344, 34 Atl. 977; Turner *v.* Houpt, 53 N. J. Eq. 526, 33 Atl. 28; Magie *v.* Reynolds, 51 N. J. Eq. 113, 26 Atl. 150; Robeson *v.* Robeson, 50 N. J. Eq. 465, 26 Atl. 563; Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501; Woodruff *v.* Lounsberry, 40 N. J. Eq. 545, 5 Atl. 99; Holmdel, etc., Turnpike Co. *v.* Conover, 34 N. J. Eq. 364; New York Mut. L. Ins. Co. *v.* Norris, 31 N. J. Eq. 583; Besson *v.* Eveland, 26 N. J. Eq. 468; Kuhl *v.* Jersey City, 23 N. J. Eq. 84; Martin *v.* Righter, 10 N. J. Eq. 510.

New York.— Mattes *v.* Frankel, 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804 [*affirming* 65 Hun 203, 20 N. Y. Suppl. 145]; Geiler *v.* Littlefield, 148 N. Y. 603, 43 N. E. 66 [*reversing* 4 Misc. 152, 23 N. Y. Suppl. 869]; Woodhaven Junction Land Co. *v.* Solly, 148 N. Y. 42, 42 N. E. 404 [*affirming* 74 Hun 637, 26 N. Y. Suppl. 150]; Welsh *v.* Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; Lee *v.* Tower, 124 N. Y. 370, 26 N. E. 943 [*modifying* 12 N. Y. Suppl. 240]; Andrews *v.* Ætna L. Ins. Co., 85 N. Y. 334; Winegar *v.* Fowler, 82 N. Y. 315; Stryker *v.* Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; Barnard *v.* Campbell, 55 N. Y. 456, 14 Am. Rep. 289; McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Frost *v.* Koon, 30 N. Y. 428; Ford *v.* Williams, 24 N. Y. 359; Seeber *v.* People's Bldg., etc., Assoc., 36 N. Y. App. Div. 312, 55 N. Y. Suppl. 364; Mc-

for the existence of other facts and to rely upon them also to sustain the course of

Gowan *v.* Supreme Council Catholic Mut. Ben. Assoc., 76 Hun 534, 28 N. Y. Suppl. 177; Syracuse Solar Salt Co. *v.* Rome, etc., R. Co., 67 Hun 153, 22 N. Y. Suppl. 321; Vellum *v.* Demerle, 65 Hun 543, 20 N. Y. Suppl. 516; Jones *v.* Merchants' Nat. Bank, 55 Hun 290, 8 N. Y. Suppl. 382; Platt *v.* Grubb, 41 Hun 447; Hawley *v.* Griswold, 42 Barb. 18; Carpenter *v.* Stilwell, 12 Barb. 128; Ryerss *v.* Farwell, 9 Barb. 615; Otis *v.* Sill, 8 Barb. 102; Martin *v.* Angell, 7 Barb. 407; Truscott *v.* Davis, 4 Barb. 495; Bowers *v.* Smith, 5 Silv. Supreme 107, 8 N. Y. Suppl. 226; Duncan *v.* Berlin, 38 N. Y. Super. Ct. 31; Eitel *v.* Bracken, 38 N. Y. Super. Ct. 7; Chapman *v.* O'Brien, 34 N. Y. Super. Ct. 524; Lawrence *v.* Delano, 3 Sandf. 333; Smith *v.* Ferris, 1 Daly 18; Catlin *v.* Grote, 4 E. D. Smith 296; Carland *v.* Day, 4 E. D. Smith 251; Van Leeuwen *v.* Fish, 30 Misc. 419, 62 N. Y. Suppl. 518; Farrell *v.* Higley, Lalor 87; Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628; Stephens *v.* Baird, 9 Cow. 274; Davison *v.* Bramly, 2 Alb. L. J. 49.

North Carolina.— Bishop *v.* Minton, 112 N. C. 524, 17 S. E. 436; Dameron *v.* Eskridge, 104 N. C. 621, 17 S. E. 700; Johnson *v.* Woddy, 76 N. C. 397; Holmes *v.* Crowell, 73 N. Y. 613; Gill *v.* Denton, 71 N. C. 341, 17 Am. Rep. 8; Devries *v.* Haywood, 64 N. C. 83; Devereux *v.* Burgwyn, 40 N. C. 351; Jones *v.* Sasser, 18 N. C. 452.

Ohio.— Combes *v.* Chandler, 33 Ohio St. 178; Rosenthal *v.* Mayhugh, 33 Ohio St. 155; McKinzie *v.* Steele, 18 Ohio St. 38; Welty *v.* Vulgamore, 24 Ohio Cir. Ct. 572; Yanney *v.* Hine, 13 Ohio Cir. Ct. 585, 5 Ohio Cir. Dec. 301; Cleveland, etc., R. Co. *v.* Reid, 6 Ohio S. & C. Pl. Dec. 273; Rawson *v.* Bogen, 6 Ohio Dec. (Reprint) 1022, 9 Am. L. Rec. 553 [*affirmed* in 11 Cinc. L. Bul. 136].

Oregon.— Larch Mountain Inv. Co. *v.* Garbade, 41 Oreg. 123, 68 Pac. 6; Scott *v.* Lewis, 40 Oreg. 37, 66 Pac. 299; Hallock *v.* Suitor, 37 Oreg. 9, 60 Pac. 384; Parker *v.* Taylor, 7 Oreg. 435.

Pennsylvania.— Perkiomen Brick Co. *v.* Dyer, 187 Pa. St. 470, 41 Atl. 326; Comegys *v.* Russell, 175 Pa. St. 166, 34 Atl. 657; Eifert *v.* Lytle, 172 Pa. St. 356, 33 Atl. 573; Irwin *v.* Patchen, 164 Pa. St. 51, 30 Atl. 436; Wessels *v.* Weiss, 156 Pa. St. 591, 27 Atl. 535; McKnight *v.* Bell, 135 Pa. St. 358, 19 Atl. 1036; Wright's Appeal, 99 Pa. St. 425; Weist *v.* Grant, 71 Pa. St. 95; Erb *v.* Brown, 69 Pa. St. 216; Ream *v.* Harnish, 45 Pa. St. 376; Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Eldred *v.* Hazlett, 33 Pa. St. 307; Hill *v.* Epley, 31 Pa. St. 331; Com. *v.* Moltz, 10 Pa. St. 527, 51 Am. Dec. 499; Buchanan *v.* Moore, 13 Serg. & R. 304, 15 Am. Dec. 601; Beech *v.* Kuder, 15 Pa. Super. Ct. 89; Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243; Mecouch *v.* Loughery, 12 Phila. 416; Epley *v.* Witherow, 17 Leg. Int. 356; *In re* Wells, 2 Del. Co. 172; Brown *v.* Spalding, 1 Pittsb. 361; Perrine *v.* Holcomb, 3 Luz. Leg. Reg. 32; Harris *v.* Stevens, 1 Luz. Leg. Reg. 588.

Rhode Island.— Goodell *v.* Bates, 14 R. I. 65; Mowry *v.* Sheldon, 2 R. I. 369.

South Carolina.— Carter *v.* Kaufman, 67 S. C. 456, 45 S. E. 1017; Whitmire *v.* Boyd, 53 S. C. 315, 31 S. E. 306; Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157; Ryttenberg *v.* Keels, 39 S. C. 203, 17 S. E. 441; Moore *v.* Trimmier, 32 S. C. 511, 11 S. E. 548, 552; Shuford *v.* Shingler, 30 S. C. 612, 8 S. E. 799; Hardin *v.* Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423; Winsmith *v.* Winsmith, 15 S. C. 611.

South Dakota.— Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908; Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323; Eickelberg *v.* Soper, 1 S. D. 563, 47 N. W. 953.

Tennessee.— Polk *v.* Williams, 102 Tenn. 370, 52 S. W. 34; Taylor *v.* Nashville, etc., R. Co., 86 Tenn. 228, 6 S. W. 393; Askins *v.* Coe, 12 Lea 672; Lowery *v.* Petree, 8 Lea 674; Gilbert *v.* Richardson, (Ch. App. 1898) 51 S. W. 134; Hewitt *v.* Pulaski, (Ch. App. 1895) 36 S. W. 878.

Texas.— Waggoner *v.* Dodson, 96 Tex. 415, 73 S. W. 517 [*reversing* (Civ. App. 1902) 71 S. W. 400]; Koppelmann *v.* Koppelmann, 94 Tex. 40, 57 S. W. 570; Wortham *v.* Thompson, 81 Tex. 348, 16 S. W. 1059; Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22; Gulf, etc., R. Co. *v.* Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788; Brown *v.* Watson, 72 Tex. 216, 10 S. W. 395; Grigsby *v.* Caruth, 57 Tex. 269; Peters *v.* Clements, 52 Tex. 140; Watson *v.* Hewitt, 45 Tex. 472; Ragsdale *v.* Gohlke, 36 Tex. 286; Reagan *v.* Holliman, 34 Tex. 403; Grooms *v.* Rust, 27 Tex. 231; Love *v.* Barber, 17 Tex. 312; Hampton *v.* Alford, (App. 1889) 14 S. W. 1072; Roach *v.* Springer, (Civ. App. 1903) 75 S. W. 933; Oliver *v.* Collins, 20 Tex. Civ. App. 385, 49 S. W. 682; Lumkins *v.* Coates, (Civ. App. 1897) 42 S. W. 580; Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; McGregor *v.* Sima, 12 Tex. Civ. App. 105, 33 S. W. 1014; Marsalis *v.* Garrison, (Civ. App. 1894) 27 S. W. 929; Arlington First Nat. Bank *v.* Lynch, 6 Tex. Civ. App. 590, 25 S. W. 1042; Baumbach *v.* Cook, 2 Tex. App. Civ. Cas. § 508.

Utah.— Clark *v.* Kirby, 18 Utah 258, 55 Pac. 372; Poynter *v.* Chipman, 8 Utah 442, 32 Pac. 690.

Vermont.— Drouin *v.* Boston, etc., R. Co., 74 Vt. 343, 52 Atl. 957; Holman *v.* Boyce, 65 Vt. 318, 26 Atl. 632, 36 Am. St. Rep. 861; Robinson *v.* Morgan, 65 Vt. 37, 25 Atl. 899; Clement *v.* Gould, 61 Vt. 573, 18 Atl. 453; Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405; Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569; Earl *v.* Stevens, 57 Vt. 474; Washington Dist. Probate Ct. *v.* St. Clair, 52 Vt. 24; Allen *v.* Hodge, 51 Vt. 392; Clark *v.* Hayward, 51 Vt. 14; Turner *v.* Waldo, 40 Vt. 51; Burnell *v.* Maloney, 39 Vt. 579, 94 Am. Dec. 358; Elmore *v.* Marks, 39 Vt. 538; Wooley *v.* Edson, 35 Vt. 214; Shaw *v.* Beebe, 35 Vt. 205; Mason *v.* Hutchins, 32 Vt. 780; White *v.* Langdon, 30 Vt. 599; Strong *v.*

action adopted, he cannot claim that the conduct of the other party was the cause of his action and no estoppel will arise.[24]

(II) *Necessity of Lack of Knowledge or of Means of Knowledge.* As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is as a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge.[25] A public record is an available means of information as to ques-

Ellsworth, 26 Vt. 366; Hicks *v.* Cram, 17 Vt. 449.

Virginia.— Jordan *v.* Buena Vista Co., 95 Va. 285, 28 S. E. 321; Taylor *v.* Cussen, 90 Va. 40, 17 Va. 721; Dickenson *v.* Davis, 2 Leigh 401.

Washington.— Girault *v.* A. P. Hotaling Co., 7 Wash. 90, 34 Pac. 471; Shoufe *v.* Griffiths, 4 Wash. 161, 30 Pac. 93, 31 Am. St. Rep. 910.

West Virginia.—Pocahontas Light, etc., Co. *v.* Browning, 53 W. Va. 436, 44 S. E. 267; Standard Mercantile Co. *v.* Ellis, 48 W. Va. 309, 37 S. E. 593; Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874; Lorentz *v.* Lorentz, 14 W. Va. 761.

Wisconsin.— Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904; Walker *v.* Grand Rapids Flouring-Mill Co., 70 Wis. 92, 35 N. W. 332; Conkey *v.* Hawthorne, 69 Wis. 199, 33 N. W. 435; Morgan *v.* Pierron, 64 Wis. 523, 25 N. W. 543; Guichard *v.* Brande, 57 Wis. 534, 15 N. W. 764; Warder *v.* Baldwin, 51 Wis. 450, 8 N. W. 257; Anderson *v.* Coburn, 27 Wis. 558; Collins *v.* Case, 23 Wis. 230; Noonan *v.* Ilsley, 22 Wis. 27; Norton *v.* Kearney, 10 Wis. 443; Green *v.* Dixon, 9 Wis. 532; Campbell *v.* Smith, 9 Wis. 305.

United States.— Schroeder *v.* Young, 161 U. S. 334, 16 S. Ct. 512, 40 L. ed. 721; Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 14 S. Ct. 94, 37 L. ed. 106 [*reversing* 6 Dak. 113, 50 N. W. 829]; Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868; Davis *v.* Pryor, 112 Fed. 274, 50 C. C. A. 579; Kendall *v.* De Forest, 101 Fed. 167, 41 C. C. A. 259; Mundy *v.* Louisville, etc., R. Co., 67 Fed. 633, 14 C. C. A. 583; Paxson *v.* Brown, 61 Fed. 874, 10 C. C. A. 135; Parlin *v.* Stone, 48 Fed. 808; Fuller *v.* Harris, 29 Fed. 814; Willis *v.* Carpenter, 30 Fed. Cas. No. 17,770.

England.— Farquharson *v.* King, [1901] 2 K. B. 697, 70 L. J. K. B. 985, 85 L. T. Rep. N. S. 264, 49 Wkly. Rep. 673; Stimson *v.* Farnham, L. R. 7 Q. B. 175, 41 L. J. Q. B. 52, 25 L. T. Rep. N. S. 747, 20 Wkly. Rep. 183; Cairncross *v.* Lorimer, 7 Jur. N. S. 149, 3 L. T. Rep. N. S. 130, 3 Macq. 829.

Canada.— Pelton *v.* Temple, 12 N. Brunsw. 274; McGee *v.* Kane, 14 Ont. 226; Ingalls *v.* Reid, 15 U. C. C. P. 490; Canadian Bank of Commerce *v.* Wilson, 36 U. C. Q. B. 9; Peers *v.* Carrall, 19 U. C. Q. B. 229; Lines *v.* Grange, 12 U. C. Q. B. 209; Tomlinson *v.* Jarvis, 11 U. C. Q. B. 60.

See 19 Cent. Dig. tit. "Estoppel," §§ 136, 137, 196, 230.

Representations before trial.— A party is not estopped from asserting a claim on the trial by the fact that he made a different representation in regard thereto to the adverse party before the trial, where the latter was not misled thereby. Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658.

24. McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239. See also Deer Lodge Bank *v.* Hope Min. Co., 3 Mont. 146, 35 Am. Rep. 458; Lock Haven First Nat. Bank *v.* Peltz, 186 Pa. St. 204, 40 Atl. 470.

25. *Alabama.*— Mary Lee Coal, etc., Co. *v.* Winn, 97 Ala. 495, 12 So. 607.

Arkansas.— Walker *v.* Towns, 23 Ark. 147; Pettit *v.* Johnson, 15 Ark. 55. See also Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

California.— Murphy *v.* Clayton, 113 Cal. 153, 45 Pac. 267; Huse *v.* Den, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232; Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Smith *v.* Penny, 44 Cal. 161; Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Bowman *v.* Cudworth, 31 Cal. 148; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Carpentier *v.* Thirston, 24 Cal. 268; McCracken *v.* San Francisco, 16 Cal. 591; Boggs *v.* Merced Min. Co., 14 Cal. 279; Ferris *v.* Coover, 10 Cal. 589.

Connecticut.— Williams *v.* Wadsworth, 51 Conn. 277; Whitaker *v.* Williams, 20 Conn. 98.

Georgia.— Perkins Lumber Co. *v.* Thomas, 117 Ga. 441, 43 S. E. 692; Southern Bauxite Min., etc., Co. *v.* Fuller, 116 Ga. 695, 43 S. E. 64; Carroll *v.* Turner, 54 Ga. 177; Brown *v.* Tucker, 47 Ga. 485.

Illinois.— Vail *v.* Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 N. E. 651 [*affirming* 92 Ill. App. 655]; Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503]; Smith *v.* Cremer, 71 Ill. 185; Home Ins. Co. *v.* Bethel, 42 Ill. App. 475 [*affirmed* in 142 Ill. 537, 32 N. E. 510]; Dinet *v.* Eilert, 13 Ill. App. 99.

Indiana.— Bowles *v.* Trapp, 139 Ind. 55, 38 N. E. 406; Hoosier Stone Co. *v.* Malott, 130 Ind. 21, 29 N. E. 412; Spray *v.* Burk, 123 Ind. 565, 24 N. E. 588; Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Logansport *v.* La Rose, 99 Ind. 117; Buck *v.* Milford, 90 Ind. 291; Robbins *v.* Magee, 76 Ind. 381; Hosford *v.* Johnson, 74 Ind. 479; Long *v.* Anderson, 62 Ind. 537; Junction R. Co. *v.* Harpold, 19 Ind. 347; Wright *v.* Bundy, 11 Ind. 398.

tions of title, and one who does not take advantage of it cannot claim an estoppel

Indian Territory.— Robinson *v.* Nail, 2 Indian Terr. 509, 52 S. W. 49.

Iowa.— Shanks *v.* Seamonds, 24 Iowa 131, 92 Am. Dec. 465; Nichols *v.* Levins, 15 Iowa 362.

Kansas.— Gray *v.* Zellmer, 66 Kan. 514, 72 Pac. 228; Farm Land Mortg., etc., Co. *v.* Hopkins, 63 Kan. 678, 66 Pac. 1015; Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5; Clark *v.* Coolidge, 8 Kan. 189.

Kentucky.— Louisville *v.* Harlan, 97 Ky. 286, 30 S. W. 646, 17 Ky. L. Rep. 168; Farra *v.* Adams, 12 Bush 515.

Louisiana.— Brian *v.* Bonvillain, 111 La. 441, 35 So. 632.

Maryland.— Mountain Lake Park Assoc. *v.* Shartzer, 83 Md. 10, 34 Atl. 536; Schardt *v.* Blaul, 66 Md. 141, 6 Atl. 669; Hambleton *v.* Central Ohio R. Co., 44 Md. 551; Browne *v.* Baltimore M. E. Church, 37 Md. 108; Hoffman *v.* Smith, 1 Md. 475; Casey *v.* Inloes, 1 Gill 430, 39 Am. Dec. 658.

Massachusetts.—Hale *v.* Skinner, 117 Mass. 474; Robbins *v.* Potter, 11 Allen 588, 98 Mass. 532; Gray *v.* Bartlett, 20 Pick. 186, 32 Am. Dec. 208.

Michigan.— Cook *v.* Foster, 96 Mich. 610, 55 N. W. 1019.

Minnesota.— Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192; Minneapolis Trust Co. *v.* Eastman, 47 Minn. 301, 50 N. W. 82, 930; Shillock *v.* Gilbert, 23 Minn. 386; Plummer *v.* Mold, 22 Minn. 15; Chaska County *v.* Carver County, 6 Minn. 204; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515.

Missouri.— Rosencranz *v.* Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445, 97 Am. St. Rep. 609; Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69 [*affirming* 5 Mo. App. 484]; Taylor *v.* Zepp, 14 Mo. 482, 55 Am. Dec. 113; St. Louis Safe Deposit, etc., Bank *v.* Kennett, 101 Mo. App. 370, 74 S. W. 474.

Nebraska.— Union State Bank *v.* Hutton, 62 Nebr. 664, 87 N. W. 533; Nash *v.* Baker, 40 Nebr. 294, 58 N. W. 706; Burlingim *v.* Warner, 39 Nebr. 493, 58 N. W. 132; Holmes *v.* Bailey, 16 Nebr. 300, 20 N. W. 304.

New Hampshire.— Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157; Stevens *v.* Dennett, 51 N. H. 334; Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Moore *v.* Bowman, 47 N. H. 494; Wood *v.* Griffin, 46 N. H. 230; Odlin *v.* Gove, 41 N. H. 465, 77 Am. Dec. 773.

New Jersey.— Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. 746; Johnston *v.* Hyde, 33 N. J. Eq. 632.

New York.— New York *v.* Law, 125 N. Y. 380, 26 N. E. 471 [*affirming* 6 N. Y. Suppl. 628]; Woodhull *v.* Rosenthal, 61 N. Y. 382; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; Hutchins *v.* Hebbard, 34 N. Y. 24; Welsh *v.* Taylor, 50 Hun 137, 2 N. Y. Suppl. 815; Jones *v.* Butler, 11 Hun 413; Carpenter *v.* Stilwell, 12 Barb. 128; Otis *v.* Sill, 8 Barb. 102; Martin *v.* Angell, 7 Barb. 407; Sparks *v.* Leavy, 1 Rob. 530; Christianson *v.* Sinfard, 19 Abb. Pr. 221.

North Carolina.— Bishop *v.* Minton, 112 N. C. 524, 17 S. E. 436; Exum *v.* Cogdell, 74 N. C. 139; Holmes *v.* Crowell, 73 N. C. 613, 629.

Ohio.— See Adams *v.* Brown, 16 Ohio St. 75.

Pennsylvania.— Adams *v.* Ashman, 203 Pa. St. 536, 53 Atl. 375; Bright *v.* Allan, 203 Pa. St. 394, 53 Atl. 251, 93 Am. St. Rep. 769; Powell's Appeal, 98 Pa. St. 403; Duquesne Bank's Appeal, 74 Pa. St. 426; Darrah *v.* Bryant, 56 Pa. St. 69; Troxell *v.* Lehigh Crane Iron Co., 42 Pa. St. 513; Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Eldred *v.* Hazlett, 33 Pa. St. 307; Com. *v.* Moltz, 10 Pa. St. 527, 51 Am. Dec. 499; McCormick *v.* McMurtrie, 4 Watts 192; Crest *v.* Jack, 3 Watts 238, 27 Am. Dec. 353; Keenan *v.* Van Dusen, 19 Pa. Co. Ct. 282.

South Carolina.— Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157.

South Dakota.— State *v.* Mellette, 16 S. D. 297, 92 N. W. 395.

Tennessee.— Cooper *v.* Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353; Morris *v.* Moore, 11 Humphr. 433.

Texas.— Wortham *v.* Thompson, 81 Tex. 348, 16 S. W. 1059; Smith *v.* Miller, 66 Tex. 74, 17 S. W. 399; Page *v.* Arnim, 29 Tex. 53; Burleson *v.* Burleson, 28 Tex. 383; Bacon *v.* O'Connor, 25 Tex. 213; Cartwell *v.* Chambers, (Civ. App. 1899) 54 S. W. 362; Sun Mut. Ins. Co. *v.* Campbell, 3 Tex. App. Civ. Cas. § 407.

Utah.—Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024; Brigham Young Trust Co. *v.* Wagner, 12 Utah 1, 40 Pac. 764.

Virginia.— Rorer Iron Co. *v.* Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285.

West Virginia.— Atkinson *v.* Plume, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788.

Wisconsin.— Brothers *v.* Kaukauna Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Gove *v.* White, 20 Wis. 425.

United States.— Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; Brant *v.* Virginia Coal, etc., Co., 93 U. S. 326, 23 L. ed. 927; Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

England.— Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31 L. T. Rep. N. S. 785, 23 Wkly. Rep. 747; Proctor *v.* Bennis, 36 Ch. D. 740, 57 L. J. Ch. 11, 57 L. T. Rep. N. S. 662, 36 Wkly. Rep. 456; Standish *v.* Ross, 3 Exch. 527, 19 L. J. Exch. 185.

Canada.— McLean *v.* Clark, 20 Ont. App. 660 [*reversed* in part in 21 Ont. 683]; Henderson *v.* Fortune, 18 U. C. Q. B. 520.

See 19 Cent. Dig. tit. "Estoppel," § 138.

The party setting up the estoppel is bound to the exercise of reasonable diligence under the circumstances; and if he really decides

against one who merely fails to furnish such information.[26] There are, however, cases in which the representation, by actively misleading the person setting up the estoppel and preventing him from having recourse to available means of information, has been held to excuse his failure to inform himself of the facts,[27]

upon the matter with a careless indifference to the means of information reasonably within his reach he will not be entitled to complain. Moore *v.* Bowman, 47 N. H. 494.

A person in the actual occupancy of land gives thereby all the information of his claim which is required, unless specially interrogated. Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314. See also Jowers *v.* Phelps, 33 Ark. 465; Berry *v.* Anderson, 22 Ind. 36.

26. *Alabama.*— Porter *v.* Wheeler, 105 Ala. 451, 17 So. 221.

Arkansas.— Mayo *v.* Cartwright, 30 Ark. 407.

Florida.— Neal *v.* Gregory, 19 Fla. 356.

Illinois.— Campbell *v.* Jacobson, 145 Ill. 389, 34 N. E. 39; Thor *v.* Oleson, 125 Ill. 365, 17 N. E. 780.

Indiana.— Adkins *v.* Adkins, 48 Ind. 12.

Iowa.— Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310; Bradley *v.* Gelkinson, 57 Iowa 300, 10 N. W. 743.

Kansas.— Farm Land Mfg., etc., Co. *v.* Hopkins, 63 Kan. 678, 66 Pac. 1015.

Maine.— Mason *v.* Philbrook, 69 Me. 57; Woodman *v.* Bodfish, 25 Me. 317.

Maryland.— Frazee *v.* Frazee, 79 Md. 27, 28 Atl. 1105; Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649.

Michigan.— Cook *v.* Foster, 96 Mich. 610, 55 N. W. 1019.

Minnesota.— Ogden *v.* Ball, 40 Minn. 94, 41 N. W. 453.

Mississippi.—Millsaps *v.* Shotwell, 76 Miss. 923, 25 So. 359; Murphy *v.* Jackson, 69 Miss. 403, 13 So. 728; Evans *v.* Forstall, 58 Miss. 30; Staton *v.* Bryant, 55 Miss. 261; Sulphine *r.* Dunbar, 55 Miss. 255.

Missouri.— Dameron *v.* Jamison, 143 Mo. 483, 45 S. W. 258; Throckmorton *v.* Peace, 121 Mo. 50, 25 S. W. 843; McShane *v.* Moberly, 79 Mo. 41; Bales *v.* Perry, 51 Mo. 449. *Compare* Olden *r.* Hendrick, 100 Mo. 533, 13 S. W. 821.

Montana.— Griswold *v.* Boley, 1 Mont. 545.

Nevada.— Gardner *r.* Pierce, 22 Nev. 146, 36 Pac. 782.

New Hampshire.— Quimby *r.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Marston *v.* Brackett, 9 N. H. 336.

New York.— James *r.* Morey, 2 Cow. 246, 14 Am. Dec. 475.

Ohio.— Fisher *v.* Mossman, 11 Ohio St. 42.

Pennsylvania.— Hill *v.* Meyers, 43 Pa. St. 170; Knouff *v.* Thompson, 16 Pa. St. 357.

Tennessee.— Crabtree *v.* Winchester Bank, 108 Tenn. 483, 67 S. W. 797; Askins *r.* Coe, 12 Lea 672.

Vermont.— Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264.

Wisconsin.— Kingman *r.* Graham, 51 Wis. 232, 8 N. W. 181.

United States.— McCormack *r.* James, 36 Fed. 14.

Canada.— Bell *v.* Walker, 20 Grant Ch. (U. C.) 558.

See 19 Cent. Dig. tit. "Estoppel," §§ 141, 273, 274, 282.

In Georgia it is held, under the code provisions of that state relating to constructive fraud, that if a mortgagee is present at a sale of the property by the mortgagor, and it is announced at the sale that the title is clear, and he fails to correct such announcement, he is estopped from setting up his mortgage even though it was duly recorded at the time of the sale. Markham *v.* O'Connor, 52 Ga. 183, 21 Am. Rep. 249.

27. *Arkansas.*— Graham *r.* Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40; Gammill *r.* Johnson, 47 Ark. 335, 1 S. W. 610.

Colorado.— Birch *r.* Steppler, 11 Colo. 400, 18 Pac. 530.

Illinois.— Robbins *r.* Moore, 129 Ill. 30, 21 N. E. 934.

Indiana.— Dodge *v.* Pope, 93 Ind. 480; Campbell *r.* Frankem, 65 Ind. 591; Keller *r.* Equitable F. Ins. Co., 28 Ind. 170.

Massachusetts.— David *v.* Park, 103 Mass. 501.

Michigan.— Webster *v.* Bailey, 31 Mich. 36.

Minnesota.— Kiefer *r.* Rogers, 19 Minn. 32.

Mississippi.— Wynne *r.* Mason, 72 Miss. 424, 18 So. 422; Evans *r.* Forstall, 58 Miss. 30; Staton *r.* Bryant, 55 Miss. 261; Sulphine *r.* Dunbar, 55 Miss. 255; Parham *v.* Randolph, 4 How. 435, 35 Am. Dec. 403.

Missouri.—Olden *r.* Hendrick, 100 Mo. 533, 13 S. W. 821; Wannell *r.* Kem, 57 Mo. 478; Holland *v.* Anderson, 38 Mo. 55.

New York.— Mead *v.* Bunn, 32 N. Y. 275; Blakeslee *r.* Sincepaugh, 71 Hun 412, 24 N. Y. Suppl. 947.

North Carolina.— Morris *r.* Herndon, 113 N. C. 236, 18 S. E. 203.

Pennsylvania.— Knouff *r.* Thompson, 16 Pa. St. 357.

South Dakota.—Eickelberg *r.* Soper, 1 S. D. 563, 47 N. W. 953.

England.— Redgrave *v.* Hurd, 20 Ch. D. 1, 51 L. J. Ch. 113, 45 L. T. Rep. N. S. 485.

See 19 Cent. Dig. tit. "Estoppel," § 138.

The very representations relied upon may have caused the party to desist from inquiry and neglect his means of information, and it does not rest with him who made them to say that their falsity might have been ascertained, and it was wrong to credit them. Graham *v.* Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40.

The law distinguishes between silence and encouragement, and while silence may be innocent and lawful, to encourage and mislead another into expenditures on a bad or doubtful title would be a positive fraud that should bar and estop the party, the author of that encouragement and deception, from disturb-

even in the case of constructive notice by matter of record.[28] But when the foundation of the estoppel insisted upon is silence and omission to give notice of one's rights, the party relying upon the same must not have had means of ascertaining the true state of the title by reference to the public records.[29] No estoppel arises where the party setting it up is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself.[30]

(III) *Equality of Knowledge or Notice With Adverse Party.* There can be no equitable estoppel short of one arising from actual contract,[31] where the truth is known to both parties or where they both have equal means of knowledge.[32]

(IV) *After-Acquired Knowledge or Subsequent Acts.* Acts done or knowledge acquired subsequent to the transaction out of which the estoppel is claimed to arise can have no bearing upon the question. The representations or conduct relied on to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced.[33] If, however, a party

ing the title of the person whom he misled, by any claim of title in himself. Knouff *v.* Thompson, 16 Pa. St. 357.

28. Graham *v.* Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40; Morris *v.* Herndon, 113 N. C. 236, 18 S. E. 203.

29. Thor *v.* Oleson, 125 Ill. 365, 17 N. E. 780.

30. Edwards *v.* McEnhill, 51 Mich. 160, 16 N. W. 322.

31. Stoddard *v.* Johnson, 75 Ind. 20.

32. *Florida.*— Price *v.* Stratton, (1903) 33 So. 644.

Illinois.— Siegel *v.* Colby, 176 Ill. 210, 52 N. E. 917 [*affirming* 61 Ill. App. 315]; Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503]; Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314.

Indiana.— Barden *v.* Overmeyer, 134 Ind. 660, 34 N. E. 439; Sims *v.* Frankfort, 79 Ind. 446; Stoddard *v.* Johnson, 75 Ind. 20; Hosford *v.* Johnson, 74 Ind. 479; Lash *v.* Rendell, 72 Ind. 475; Suman *v.* Springate, 67 Ind. 115; Foster *v.* Albert, 42 Ind. 40; Schipper *v.* St. Palais, 37 Ind. 505; Fletcher *v.* Holmes, 25 Ind. 458; Tinsley *v.* Fruits, 20 Ind. App. 534, 51 N. E. 111.

Iowa.— Schoonover *v.* Osborne, 117 Iowa 427, 90 N. W. 844.

Kansas.— Farm Land Mortg., etc., Co. *v.* Hopkins, 63 Kan. 678, 66 Pac. 1015.

Louisiana.— Soules *v.* Soules, 104 La. 796, 29 So. 342. See also Brian *v.* Bonvillain, 111 La. 441, 35 So. 632.

Maryland.—Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649.

Massachusetts.— Robbins *v.* Potter, 98 Mass. 532.

Michigan.— Gorham *v.* Arnold, 22 Mich. 247.

Minnesota.— Sanborn *v.* Van Duyne, 90 Minn. 215, 96 N. W. 41; Cornish, etc., Co. *v.* Antrim Co-operative Dairy Assoc., 82 Minn. 215, 84 N. W. 724; Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192; Plummer *v.* Mold, 22 Minn. 15.

Missouri.— Mueller *v.* Kaessmann, 84 Mo. 318.

New Hampshire.— Jones *v.* Portsmouth Aqueduct, 62 N. H. 488.

New York.— General Contracting Co. *v.* Jones, 61 N. Y. App. Div. 548, 70 N. Y. Suppl. 569; Martin *v.* Angell, 7 Barb. 407; Bowers *v.* Smith, 5 Silv. Supreme 107, 8 N. Y. Suppl. 226; Driscoll *v.* Brooklyn Union El. Co., 42 Misc. 120, 85 N. Y. Suppl. 1000 [*affirmed* in 95 N. Y. App. Div. 146, 88 N. Y. Suppl. 745].

North Carolina.— Estis *v.* Jackson, 111 N. C. 145, 16 S. E. 7, 32 Am. St. Rep. 784; Mayo *v.* Leggett, 96 N. C. 237; Loftin *v.* Crossland, 94 N. C. 76, 1 S. E. 622; Exum *v.* Cogdell, 74 N. C. 139; Holmes *v.* Crowell, 73 N. C. 613.

North Dakota.— Gjerstadengen *v.* Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679.

Pennsylvania.— Hill *v.* Epley, 31 Pa. St. 331; Enterprise Transit Co. *v.* Hazelwood Oil Co., 20 Pa. Super. Ct. 127.

South Carolina.— Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800.

Tennessee.— Crabtree *v.* Winchester Bank, 108 Tenn. 483, 67 S. W. 797; Collins *v.* Williams, 98 Tenn. 525, 41 S. W. 1056.

Texas.— Cuellar *v.* Dewitt, 5 Tex. Civ. App. 568, 24 S. W. 671.

Virginia.— Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

West Virginia.— Cautley *v.* Morgan, 51 W. Va. 304, 41 S. E. 201.

Wisconsin.— Edwards *v.* Evans, 16 Wis. 181.

United States.— Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; Brant *v.* Virginia Coal, etc., Co., 93 U. S. 326, 23 L. ed. 927.

See 19 Cent. Dig. tit. "Estoppel," § 139.

Equality of knowledge from record see *supra*, V, A, 4, e, (II).

33. *Alabama.*— McCall *v.* Powell, 64 Ala. 254; Stokes *v.* Jones, 18 Ala. 734.

California.— Bushnell *v.* Simpson, 119 Cal. 658, 51 Pac. 1080.

Connecticut.—Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Illinois.— Straus *v.* Minzesheimer, 78 Ill. 492; Rothgerber *v.* Dupuy, 64 Ill. 452; Campau *v.* Bemis, 35 Ill. App. 37.

Indiana.—Hoover *v.* Kilander, 83 Ind. 420; Crossan *v.* May, 68 Ind. 242; Reagan *v.* Had-

having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.[34]

f. Acts Done or Omitted and Change of Position. It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped.[35]

ley, 57 Ind. 509; Stutsman *v.* Thomas, 39 Ind. 384; Patrick *v.* Jones, 21 Ind. 249; Windle *v.* Canaday, 21 Ind. 248, 83 Am. Dec. 348; Ray *v.* McMurtry, 20 Ind. 307, 83 Am. Dec. 322; Jones *v.* Dorr, 19 Ind. 384, 81 Am. Dec. 406.

Iowa.— Near *v.* Green, 113 Iowa 647, 85 N. W. 799; Gee *v.* Moss, 68 Iowa 318, 27 N. W. 268; Behrens *v.* Germania F. Ins. Co., 64 Iowa 19, 19 N. W. 838.

Massachusetts.— Moors *v.* Albro, 129 Mass. 9; Melley *v.* Casey, 99 Mass. 241.

New York.— Hamlin *v.* Sears, 82 N. Y. 327; McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239; Garlinghouse *v.* Whitwell, 51 Barb. 208.

Ohio.— Workman *v.* Wright, 33 Ohio St. 405, 31 Am. Rep. 546.

Pennsylvania.— Williamsport *v.* Williamsport Pass. R. Co., 203 Pa. St. 1, 52 Atl. 51.

Tennessee.— See Shugart *v.* Shugart, 111 Tenn. 179, 76 S. W. 821.

Texas.— Grinnan *v.* Dean, 62 Tex. 218; Mutual Ben. L. Ins. Co. *v.* Collin County Nat. Bank, 17 Tex. Civ. App. 477, 43 S. W. 831.

Virginia.— Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

See 19 Cent. Dig. tit. "Estoppel," § 140.

34. Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 113, 6 S. Ct. 657, 29 L. ed. 811 [*quoting* Cairncross *v.* Lorimer, 7 Jur. N. S. 149, 3 L. T. Rep. N. S. 130, 3 Macq. 829]. See also *infra*, VI, B, 1, c.

35. *Alabama.*— Miller *v.* Hampton, 37 Ala. 342; Ware *v.* Cowles, 24 Ala. 446, 60 Am. Dec. 482; Pounds *v.* Richards, 21 Ala. 424; Brewer *v.* Brewer, 19 Ala. 481; Carter *v.* Darby, 15 Ala. 696, 50 Am. Dec. 156; Hunley *v.* Hunley, 15 Ala. 91.

Arkansas.— Patty *v.* Goolsby, 51 Ark. 61, 9 S. W. 846; Franklin *v.* Meyer, 36 Ark. 96; Norris *v.* Norton, 19 Ark. 319.

Colorado.— Yates *v.* Hurd, 8 Colo. 343, 8 Pac. 575; Colorado Fuel, etc., Co. *v.* Lenhart, 6 Colo. App. 511, 41 Pac. 834.

Connecticut.— Hull *v.* Hull, 48 Conn. 250, 40 Am. Rep. 165; Healey *v.* New Haven, 47 Conn. 305; Taylor *v.* Ely, 25 Conn. 250; Preston *v.* Mann, 25 Conn. 118; Pond *v.* Hine, 21 Conn. 519; Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371; Dyer *v.* Cady, 20 Conn. 563; Whitaker *v.* Williams, 20 Conn. 98; Middletown Bank *v.* Jerome, 18 Conn. 443; Roe *v.* Jerome, 18 Conn. 138; Kinney *v.* Farnsworth, 17 Conn. 355; Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550.

Florida.— Booth *v.* Lenox, (1903) 34 So. 566.

Georgia.— Cain *v.* Busby, 30 Ga. 714; Gaither *v.* Gaither, 23 Ga. 521; Reeves *v.* Matthews, 17 Ga. 449; Jones *v.* Morgan, 13 Ga. 515.

Hawaii.— Kahanaiki *v.* Kohala Sugar Co., 6 Hawaii 694.

Illinois.— People *v.* Blocki, 203 Ill. 363, 67 N. E. 809; Siegel *v.* Colby, 176 Ill. 210, 52 N. E. 917 [*affirming* 61 Ill. App. 315]; Gillespie *v.* Gillespie, 159 Ill. 84, 42 N. E. 305; Holcomb *v.* Boynton, 151 Ill. 294, 37 N. E. 1031 [*affirming* 49 Ill. App. 503]; Hill *v.* Blackwelder, 113 Ill. 283; Ball *v.* Hooten, 85 Ill. 159; Chandler *v.* White, 84 Ill. 435; Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123; Young *v.* Foute, 43 Ill. 33; Davidson *v.* Young, 38 Ill. 145; Mullanphy Bank *v.* Schott, 34 Ill. App. 500 [*affirmed* in 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401]; Dinet *v.* Eilert, 13 Ill. App. 99; Kadish *v.* Bullen, 10 Ill. App. 566; Carpenter *v.* Falter, 4 Ill. App. 45.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Copeland *v.* Summers, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; Roberts *v.* Abbott, 127 Ind. 83, 26 N. E. 565; Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360; Maxon *v.* Lane, 102 Ind. 364, 1 N. E. 796; Stringer *v.* Northwestern Mut. L. Ins. Co., 82 Ind. 100; Hosford *v.* Johnson, 74 Ind. 479; Junction R. Co. *v.* Harpold, 19 Ind. 347.

Indian Territory.— Robinson *v.* Nail, 2 Indian Terr. 509, 52 S. W. 49.

Iowa.— Brown *v.* Lambe, 119 Iowa 404, 93 N. W. 486; Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441; King *v.* Chicago, etc., R. Co., 71 Iowa 696, 29 N. W. 406; Eikenberry *v.* Edwards, 67 Iowa 14, 24 N. W. 570; Shepard *v.* Pratt, 32 Iowa 296.

Kentucky.— Thomas *v.* Sweet, 111 Ky. 467, 63 S. W. 787, 65 S. W. 827, 23 Ky. L. Rep. 1599; Eastern Kentucky R. Co. *v.* Whitington, 13 Ky. L. Rep. 47; Garrott *v.* Ratliff, 6 Ky. L. Rep. 72.

Louisiana.— Sentell *v.* Hewitt, 49 La. Ann. 1021, 22 So. 242; Chaffe *v.* Morgan, 30 La. Ann. 1307; Marsh *v.* Smith, 5 Rob. 518.

Maine.— McClure *v.* Livermore, 78 Me. 390, 6 Atl. 11; Copeland *v.* Copeland, 28 Me. 525; Steele *v.* Putney, 15 Me. 327.

Maryland.— Bramble *v.* State, 41 Md. 435; Homer *v.* Grosholz, 38 Md. 520; McClellan *v.* Kennedy, 8 Md. 230.

Massachusetts.— Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Carroll *v.* Manchester, etc., R. Corp., 111 Mass. 1; Andrews *v.* Lyons, 11 Allen 349; Plumer

g. Benefit to Person Against Whom Estoppel Is Asserted. It is not necessary that a special benefit should be shown to have accrued to the party sought to be

v. Lord, 9 Allen 455, 5 Allen 463, 85 Am. Dec. 773; Audenried *v.* Betteley, 5 Allen 382, 81 Am. Dec. 755; Bigelow *v.* Woodward, 15 Gray 560, 77 Am. Dec. 389; Jackson *v.* Pixley, 9 Cush. 490, 57 Am. Dec. 64; Wallis *v.* Truesdell, 6 Pick. 455.

Michigan.— Dallavo *v.* Richardson, (1903) 96 N. W. 20; Godding *v.* Underwood, 89 Mich. 187, 50 N. W. 818; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 47 N. W. 330.

Minnesota.—Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192; Hennepin County Com'rs *v.* Robinson, 16 Minn. 381; Whitacre *v.* Culver, 6 Minn. 297, 8 Minn. 133; Califf *v.* Hillhouse, 3 Minn. 311.

Mississippi.— Staton *v.* Bryant, 55 Miss. 261; Chew *v.* Calvert, Walk. 54.

Missouri.— Rosencranz *v.* Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445; Petring *v.* Chrisler, 90 Mo. 649, 3 S. W. 405; Monks *v.* Belden, 80 Mo. 639; Rogers *v.* Marsh, 73 Mo. 64; Spurlock *v.* Sproule, 72 Mo. 503; Eitelgeorge *v.* Mutual House Bldg. Assoc., 69 Mo. 52; Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462; Fowler *v.* Carr, 63 Mo. App. 486; Reichla *v.* Gruensfelder, 52 Mo. App. 43; Ford *v.* Fellows, 34 Mo. App. 630; Leeser *v.* Boekhoff, 33 Mo. App. 223; Union Sav. Assoc. *v.* Kehlor, 7 Mo. App. 158. See also Cornwall *v.* Ganser, 85 Mo. App. 678.

Nebraska.— Lingonner *v.* Amhler, 44 Nebr. 316, 62 N. W. 486; Cain *v.* Boller, 41 Nebr. 721, 60 N. W. 7.

New Hampshire.—Thompson *v.* Currier, 70 N. H. 259, 47 Atl. 76; Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157; Stevens *v.* Dennett, 51 N. H. 324; Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Odlin *v.* Gove, 41 N. H. 465, 77 Am. Dec. 773; Simons *v.* Steele, 36 N. H. 73; Hildreth *v.* Pinkerton Academy, 29 N. H. 227.

New Jersey.— Oram *v.* New Brunswick, 64 N. J. L. 19, 44 Atl. 883; Kempson *v.* Kempson, 61 N. J. Eq. 303, 48 Atl. 244; Hollins *v.* American Union Electric Co., (Ch. 1903) 56 Atl. 1041; Dunham *v.* Ewen, (Ch. 1888) 15 Atl. 245; Thorne *v.* Mosher, 20 N. J. Eq. 257.

New York.— Bennett *v.* Bates, 94 N. Y. 354; Blair *v.* Wait, 69 N. Y. 113; Continental Nat. Bank *v.* National Bank, 50 N. Y. 575; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; Manufacturers', etc., Bank *v.* Hazard, 30 N. Y. 226; Jewett *v.* Miller, 10 N. Y. 402, 65 Am. Dec. 751; Lawrence *v.* Brown, 5 N. Y. 394; Jones *v.* Merchants' Nat. Bank, 55 Hun 290, 8 N. Y. Suppl. 382; Gilbert *v.* Groff, 28 Hun 50; Voorhees *v.* Olmstead, 3 Hun 744; Todd *v.* Kerr, 42 Barb. 317; Griffith *v.* Beecher, 10 Barb. 432; Ryerss *v.* Farwell, 9 Barb. 615; Otis *v.* Sill, 8 Barb. 102; Real Estate Trust Co. *v.* Balch, 45 N. Y. Super. Ct. 528; Eitel *v.* Bracken, 38 N. Y. Super. Ct. 7; Chapman *v.* O'Brien, 34 N. Y. Super. Ct. 524; Brookman *v.* Metcalf, 4 Rob. 568; Graham *v.* Fitzgerald, 4 Daly 178; Snyder *v.* Brooks, 18 N. Y. Suppl. 369; Mutual L. Ins. Co. *v.* Holloday, 13 Abb. N. Cas. 16. See also Dierig *v.* Callahan, 35 Misc. 30, 70 N. Y. Suppl. 210 [*reversing* 34 Misc. 218, 68 N. Y. Suppl. 1131]; Hoffman House *v.* Jordan, 28 Misc. 193, 58 N. Y. Suppl. 1091.

North Carolina.— Etheridge *v.* Davis, 111 N. C. 293, 16 S. E. 232; Devereux *v.* Burgwyn, 40 N. C. 351.

Ohio.— McKinzie *v.* Steele, 18 Ohio St. 38; Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126.

Pennsylvania.— Brady *v.* Elliott, 181 Pa. St. 259, 37 Atl. 343; Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564; Hill *v.* Epley, 31 Pa. St. 331; Dunn's Appeal, 90 Pa. St. 367; Helser *v.* McGrath, 52 Pa. St. 531; *In re* Treffeison, 3 Kulp 308; Loughery's Appeal, 37 Leg. Int. 341 [*affirming* 12 Phila. 416]; Hawkins *v.* Oswald, 2 Woodw. 395; Perrine *v.* Holcomb, 3 Luz. Leg. Reg. 32.

South Carolina.— Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800; Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157; Hardin *v.* Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423; Whitman *v.* Bowden, 27 S. C. 53, 2 S. E. 630; Douglass *v.* Craig, 13 S. C. 371; Bull *v.* Rowe, 13 S. C. 355.

South Dakota.— State *v.* Mellette, 16 S. D. 297, 92 N. W. 395.

Tennessee.— Lockett *v.* Kinzell, 99 Tenn. 713, 42 S. W. 442; Decherd *v.* Blanton, 3 Sneed 373; Chester *v.* Greer, 5 Humphr. 26.

Texas.— Gulf, etc., R. Co. *v.* Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788; Ragsdale *v.* Gohlke, 36 Tex. 286; Burleson *v.* Burleson, 28 Tex. 383; Lewis *v.* Castleman, 27 Tex. 407; Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242; Love *v.* Barber, 17 Tex. 312; Shattuck *v.* McCartney, 1 Tex. App. Civ. Cas. § 557; Baumbach *v.* Cook, 2 Tex. App. Civ. Cas. § 508.

Vermont.— Drouin *v.* Boston, etc., R. Co., 74 Vt. 343, 52 Atl. 957; Batchelder *v.* Blake, 70 Vt. 197, 40 Atl. 34; Holman *v.* Boyce, 65 Vt. 318, 26 Atl. 632, 36 Am. St. Rep. 861; Earl *v.* Stevens, 57 Vt. 474; Wheelock *v.* Hardwick, 48 Vt. 19; Burnell *v.* Maloney, 39 Vt. 579, 94 Am. Dec. 358; Wooley *v.* Edson, 35 Vt. 214; Shaw *v.* Beebe, 35 Vt. 205; White *v.* Langdon, 30 Vt. 599; Strong *v.* Ellsworth, 26 Vt. 366.

West Virginia.— Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827.

Wisconsin.— Ashland *v.* Northern Pac. R. Co., 119 Wis. 204, 96 N. W. 688; St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

United States.— Reynolds *v.* Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. ed. 360; Turner *v.* Edwards, 24 Fed. Cas. No. 14,254, 2 Woods 435; Willis *v.* Carpenter, 30 Fed. Cas. No. 17,770.

England.— Simm *v.* Anglo-American Tel. Co., 5 Q. B. D. 188, 49 L. J. Q. B. 392, 42 L. T. Rep. N. S. 37, 28 Wkly. Rep. 290; Heane *v.* Rogers, 9 B. & C. 577, 17 E. C. L. 260; *Ex p.* Adamson, 8 Ch. D. 807, 47 L. J. Bankr. 106, 38 L. T. Rep. N. S. 920, 26 Wkly.

estopped; it is sufficient to raise the estoppel if the other party has been induced to take upon himself burdens which he would not otherwise have taken.[36]

h. Prejudice to Person Setting Up Estoppel. In order to create an estoppel *in pais* the party pleading it must have been misled to his injury;[37]

Rep. 892; Woodley *v.* Coventry, 2 H. & C. 164, 9 Jur. N. S. 548, 32 L. J. Exch. 185, 8 L. T. Rep. N. S. 249, 11 Wkly. Rep. 599; Cairncross *v.* Lorimer, 7 Jur. N. S. 149, 3 L. T. Rep. N. S. 130, 3 Macq. 829.

Canada.— Montgomery *v.* Hellyar, 9 Manitoba 551 [*distinguishing* Pickard *v.* Sears, 6 A. & E. 469, 2 N. & P. 488, 33 E. C. L. 257]; McManus *v.* Blakeney, 25 N. Brunsw. 216; Cain *v.* Junkin, 6 Ont. 532; Morse *v.* Thompson, 19 U. C. C. P. 94.

See 19 Cent. Dig. tit. "Estoppel," § 142.

To estop one from declaring the truth, his conduct must not only have been such as would lead the other party to believe the fact was otherwise than the truth, but such other party must show affirmatively that he has relied upon the conduct of the party against whom he invokes the doctrine of estoppel and been induced by it to act or refrain from doing so. Drouin *v.* Boston, etc., R. Co., 74 Vt. 343, 52 Atl. 957.

Admissions equivalent to disclaimer of title do not necessarily amount to an estoppel *in pais* against the party making them, unless it appears that the party claiming the estoppel has so acted upon such admissions that an advantage will be gained of him or an injury result to him without it. Reeves *v.* Matthews, 17 Ga. 449. See also Jones *v.* Morgan, 13 Ga. 515.

An erroneous admission of counsel on a former trial as to the proper construction of a written contract will not estop his client from insisting on the correct construction on a subsequent trial, where the adverse party has not acted on the admission or changed his position hy reason thereof. Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564.

Where an adverse party acts in spite of open opposition on the part of the interested party, the equitable rule granting relief against interested parties who stand by without disclosing their rights and see another do an act in ignorance of them cannot be invoked. Ashby *v.* Ashby, 59 N. J. Eq. 547, 46 Atl. 522.

Inducing a party to do an act he is legally bound to do will not raise an estoppel. Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192. See also St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

36. Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130. It has been said that it is essential to an estoppel *in pais* that there should be either a benefit to the person sought to be estopped or some prejudice to the person setting up the estoppel. Hunley *v.* Hunley, 15 Ala. 91; Yates *v.* Hurd, 8 Colo. 343, 8 Pac. 575; Goodwyn *v.* Goodwyn, 20 Ga. 600.

37. *Alabama.*— Moore *v.* Robinson, 62 Ala. 537; Hopper *v.* McWhorton, 18 Ala. 229; Carter *v.* Darby, 15 Ala. 696, 50 Am. Dec. 156. See also Hunley *v.* Hunley, 15 Ala. 91.

Arizona.— Barry *v.* Kirkland, (1898) 52 Pac. 771.

California.— Conway *v.* Supreme Council C. K. of A., 137 Cal. 384, 70 Pac. 223; Scott *v.* Jackson, 89 Cal. 258, 26 Pac. 898; Dresbach *v.* Minnis, 45 Cal. 223; Smith *v.* Penny, 44 Cal. 161; Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Wilson *v.* Castro, 31 Cal. 420; Bowman *v.* Cudworth, 31 Cal. 148; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Carpentier *v.* Thirston, 24 Cal. 268; Boggs *v.* Merced Min. Co., 14 Cal. 279.

Colorado.— Great West Min. Co. *v.* Woodmas, etc., Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11. See also Yates *v.* Hurd, 8 Colo. 343, 8 Pac. 575.

Connecticut.— Keifer *v* Bridgeport, 68 Conn. 401, 36 Atl. 801; National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646; Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550; Whittemore *v.* Hamilton, 51 Conn. 153; Fawcett *v.* New Haven Organ Co., 47 Conn. 224; Townsend Sav. Bank *v.* Todd, 47 Conn. 190; Bassett *v.* Holbrook, 24 Conn. 453; Whitaker *v.* Williams, 20 Conn. 98.

Delaware.—Wilmington, etc., Bank *v.* Wollaston, 3 Harr. 90.

Florida.— Neal *v.* Gregory, 19 Fla. 356.

Georgia.— American Freehold Land Mortg. Co. *v.* Walker, 119 Ga. 341, 46 S. E. 426; Stewart *v.* Hall, 106 Ga. 172, 32 S. E. 14; Watertown Steam-Engine Co. *v.* Palmer, 84 Ga. 368, 10 S. E. 969, 20 Am. St. Rep. 368; Davis *v.* Collier, 13 Ga. 485. See also Goodwyn *v.* Goodwyn, 20 Ga. 600.

Idaho.— Leland *v.* Isenbeck, 1 Ida. 469.

Illinois.— Penn Mut. L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273; Wilson *v.* Roots, 119 Ill. 379, 10 N. E. 204; Taylor *v.* Farmer, (1886) 4 N. E. 370; Chandler *v.* White, 84 Ill. 435; Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123; Pusheck *v.* Frances E. Willard N. T. H. Assoc., 94 Ill. App. 192; Mullanphy Bank *v.* Schott, 34 Ill. App. 500 [*affirmed* in 135 Ill. 686, 26 N. E. 640, 25 Am. St. Rep. 401]; Pitt's Sons Mfg. Co. *v.* Poor, 7 Ill. App. 24.

Indiana.— Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394; McCabe *v.* Raney, 32 Ind. 309; Junction R. Co. *v.* Harpold, 19 Ind. 347; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Barnes *v.* McKay, 7 Ind. 301; Gatling *v.* Rodman, 6 Ind. 289.

Iowa.—Winegardner *v.* Equitable Loan Co., 120 Iowa 485, 94 N. W. 1110; Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441; Wishard *v.* McNeill, 85 Iowa 474, 52 N. W. 484; King *v.* Gustafson, 80 Iowa 207, 45 N. W. 565; Merrill *v.* Welsher, 50 Iowa 61; Page County *v.* Burlington, etc., R. Co., 40 Iowa 520; Tufts *v.* McClure, 40 Iowa 317.

that is, he must have suffered a loss of a substantial character or have

Kansas.— Clark *v.* Coolidge, 8 Kan. 189; Carithers *v.* Weaver, 7 Kan. 110.

Kentucky.— Louisville Banking Co. *v.* Asher, 112 Ky. 138, 65 S. W. 133, 831, 23 Ky. L. Rep. 1180, 1661, 99 Am. St. Rep. 283; Ratcliff *v.* Bellfonte Iron Works Co., 87 Ky. 559, 10 S. W. 365, 10 Ky. L. Rep. 643; O'Malley *v.* Wagner, 76 S. W. 356, 25 Ky. L. Rep. 810; Garrott *v.* Ratliff, 6 Ky. L. Rep. 72.

Louisiana.— Marsh *v.* Smith, 5 Rob. 518.

Maine.— Goodwin *v.* Norton, 92 Me. 532, 43 Atl. 111; Allum *v.* Perry, 68 Me. 232; Cummings *v.* Webster, 43 Me. 192; Copeland *v.* Copeland, 28 Me. 525; Rangeley *v.* Spring, 21 Me. 130.

Massachusetts.— Birch *v.* Hutchings, 144 Mass. 561, 12 N. E. 192; Haven *v.* Grand Junction R., etc., Co., 109 Mass. 88; Murphy *v.* People's Equitable Mut. F. Ins. Co., 7 Allen 239; Bigelow *v.* Woodward, 15 Gray 560, 77 Am. Dec. 389.

Michigan.— Manistee First Nat. Bank *v.* Marshall, etc., Bank, 108 Mich. 114, 65 N. W. 604; Montreal Bank *v.* J. E. Potts Salt, etc., Co., 101 Mich. 546, 60 N. W. 40; Dean *v.* Crall, 98 Mich. 591, 57 N. W. 813, 39 Am. St. Rep. 571; Hughes *v.* Tanner, 96 Mich. 113, 55 N. W. 661; Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578; De Mill *v.* Moffat, 49 Mich. 125, 13 N. W. 387; Burdick *v.* Michael, 32 Mich. 246; Palmer *v.* Williams, 24 Mich. 328; Cicotte *v.* Gagnier, 2 Mich. 381.

Minnesota.—Western Land Assoc. *v.* Banks, 80 Minn. 317, 83 N. W. 192; Stong *v.* Lane, 66 Minn. 94, 68 N. W. 765; Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270; Nell *v.* Dayton, 43 Minn. 242, 45 N. W. 229; Beebe *v.* Wilkinson, 30 Minn. 548, 16 N. W. 450; Conger *v.* Nesbitt, 30 Minn. 436, 15 N. W. 875; Coleman *v.* Pearce, 26 Minn. 123, 1 N. W. 846; Hennepin County Com'rs *v.* Robinson, 16 Minn. 381; Whitacre *v.* Culver, 8 Minn. 133; Chaska County *v.* Carver County, 6 Minn. 204; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769; Love *v.* Stone, 56 Miss. 449; Staton *v.* Bryant, 55 Miss. 261; Sulphine *v.* Dunbar, 55 Miss. 255.

Missouri.— Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; St. Louis *v.* Wiggins Ferry Co., 88 Mo. 615 [*affirming* 15 Mo. App. 227]; Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462; Taylor *v.* Zepp, 14 Mo. 482, 55 Am. Dec. 113; Brinkerhoff-Faris Trust, etc., Co. *v.* Horn, 83 Mo. App. 114; Fowler *v.* Carr, 63 Mo. App. 486; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Union Sav. Assoc. *v.* Kehlor, 7 Mo. App. 158.

Nebraska.— National Aid Assoc. *v.* Bratcher, 65 Nebr. 378, 91 N. W. 379, 93 N. W. 1122; Gallaher *v.* Lincoln, 63 Nebr. 339, 88 N. W. 505; People's Nat. Bank *v.* Geisthardt, 55 Nebr. 232, 75 N. W. 582; Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30; Cain *v.* Boller, 41 Nebr. 721, 60 N. W. 7.

New Hampshire.— Lawrence *v.* Towle, 59 N. H. 28; Barney *v.* Keniston, 58 N. H. 168; Carpenter *v.* Cummings, 40 N. H. 158.

New Jersey.— Hollins *v.* American Union Electric Co., (Ch. 1903) 56 Atl. 1041; Kempson *v.* Kempson, 61 N. J. Eq. 303, 48 Atl. 244; Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Besson *v.* Eveland, 26 N. J. Eq. 468.

New York.— Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; Batavia First Nat. Bank *v.* Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431; Waring *v.* Somborn, 82 N. Y. 604; Winegar *v.* Fowler, 82 N. Y. 315; Voorhis *v.* Olmstead, 66 N. Y. 113; Voorhees *v.* Burchard, 55 N. Y. 98; Garlinghouse *v.* Whitwell, 51 Barb. 208; Todd *v.* Kerr, 42 Barb. 317; Ackley *v.* Dygert, 33 Barb. 176; Carpenter *v.* Stilwell, 12 Barb. 128; Otis *v.* Sill, 8 Barb. 102; Martin *v.* Angell, 7 Barb. 407; Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628.

North Carolina.— Faison *v.* Grandy, 128 N. C. 438, 38 S. E. 897, 83 Am. St. Rep. 693, 126 N. C. 827, 36 S. E. 276; Rainey *v.* Hines, 120 N. C. 376, 27 S. E. 92; Beckham *v.* Wittkowski, 64 N. C. 464.

North Dakota.— Gjerstadengen *v.* Hartzell, 9 N. D. 268, 83 N. W. 230, 81 Am. St. Rep. 575.

Ohio.— McKinzie *v.* Steele, 18 Ohio St. 38; First German Reformed Church *v.* Summit County, 23 Ohio Cir. Ct. 553.

Pennsylvania.— Atkins *v.* Payne, 200 Pa. St. 557, 50 Atl. 158; Brady *v.* Elliott, 181 Pa. St. 259, 37 Atl. 343; Stewart *v.* Parnell, 147 Pa. St. 523, 23 Atl. 838; Linnard's Appeal, (1886) 3 Atl. 840; Zell's Appeal, 103 Pa. St. 344; Miller's Appeal, 84 Pa. St. 391; McGregor *v.* Sibley, 69 Pa. St. 388; Diller *v.* Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Allen *v.* Allen, 45 Pa. St. 468; Keen *v.* Kleckner, 42 Pa. St. 529; Patton *v.* Hollidaysburg, 40 Pa. St. 206; Brubaker *v.* Okeson, 36 Pa. St. 519; Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Eldred *v.* Hazlett, 33 Pa. St. 307; Hill *v.* Epley, 31 Pa. St. 331; Com. *v.* Moltz, 10 Pa. St. 527, 51 Am. Dec. 499; Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243; Kennedy *v.* Klaw, 6 Pa. Dist. 243; Rhoades' Estate, 1 Lanc. Bar, Dec. 11, 1869; Perrine *v.* Holcomb, 3 Luz. Leg. Reg. 32.

Rhode Island.— Sheldon *v.* Hamilton, 22 R. I. 230, 47 Atl. 316, 84 Am. St. Rep. 839; Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47.

South Carolina.— Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800; Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157.

South Dakota.— Hulst *v.* Doerstler, 11 S. D. 14, 75 N. W. 270.

Tennessee.— McLemore *v.* Memphis, etc., R. Co., (Sup. 1902) 69 S. W. 338; Lockett *v.* Kinzell, 99 Tenn. 713, 42 S. W. 442; Furnish *v.* Burge, (Ch. App. 1899) 54 S. W. 90; Nashville, etc., R. Co. *v.* McReynolds, (Ch. App. 1898) 48 S. W. 258.

Texas.— Waxahachie Nat. Bank *v.* Bielharz, 94 Tex. 493, 62 S. W. 743; Robertson *v.* Gourley, 84 Tex. 575, 19 S. W. 1006; Dun-

been induced to alter his position for the worse in some material respect.[38]

ham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; Ward *v.* Cameron, (Civ. App. 1903) 76 S. W. 240; Graham *v.* Miller, 26 Tex. Civ. App. 5, 62 S. W. 113; Southern Home Bldg., etc., Assoc. *v.* Winans, 24 Tex. Civ. App. 544, 60 S. W. 825; McGregor *v.* Sima, 12 Tex. Civ. App. 105, 33 S. W. 1014.

Utah.—Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024; Clark *v.* Kirby, 18 Utah 258, 55 Pac. 372.

Vermont.— Lyon *v.* Witters, 65 Vt. 396, 26 Atl. 588; Goodell *v.* Brandon Nat. Bank, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766; Earl *v.* Stevens, 57 Vt. 474; Wooley *v.* Edson, 35 Vt. 214; Shaw *v.* Beebe, 35 Vt. 205; White *v.* Langdon, 30 Vt. 599; Strong *v.* Ellsworth, 26 Vt. 366.

Virginia.— Baltimore Dental Assoc. *v.* Fuller, 101 Va. 627, 44 S. E. 771; Repass *v.* Richmond, 99 Va. 508, 39 S. E. 160; Smith *v.* Powell, 98 Va. 431, 36 S. E. 522; Stuart *v.* Luddington, 1 Rand. 403, 10 Am. Dec. 550.

Wisconsin.— Ashland *v.* Northern Pac. R. Co., 119 Wis. 204, 96 N. W. 688; Davis *v.* Appleton, 109 Wis. 580, 85 N. W. 515; Guichard *v.* Brande, 57 Wis. 534, 15 N. W. 764; Warder *v.* Baldwin, 51 Wis. 450, 8 N. W. 257.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811; Morgan *v.* Chicago, etc., R. Co., 96 U. S. 716, 24 L. ed. 743; Swain *v.* Seamens, 9 Wall. 254, 19 L. ed. 554; Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; Humphreys *v.* Cincinnati Third Nat. Bank, 75 Fed. 852, 21 C. C. A. 538; Hurt *v.* Riffle, 11 Fed. 790; Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp. 692; Griffin *v.* Clinton Line Extension R. Co., 11 Fed. Cas. No. 5,816; Willis *v.* Carpenter, 30 Fed. Cas. No. 17,770.

England.— Schumaltz *v.* Avery, 16 Q. B. 655, 15 Jur. 291, 20 L. J. Q. B. 228, 71 E. C. L. 655; Seton *v.* Lafone, 19 Q. B. D. 68, 56 L. J. Q. B. 415, 57 L. T. Rep. N. S. 547, 35 Wkly. Rep. 749 [*affirming* 18 Q. B. D. 139]; Thomas *v.* Brown, 1 Q. B. D. 714, 45 L. J. Q. B. 811, 35 L. T. Rep. N. S. 237, 24 Wkly. Rep. 821; Aaron's Reefs *v.* Twiss, [1896] A. C. 273, 65 L. J. P. C. 54, 74 L. T. Rep. N. S. 794; Ogilvie *v.* West Australian Mortg., etc., Corp., [1896] A. C. 256, 65 L. J. P. C. 146, 74 L. T. Rep. N. S. 201; Stimson *v.* Farnham, L. R. 7 Q. B. 175, 41 L. J. Q. B. 52, 25 L. T. Rep. N. S. 747, 20 Wkly. Rep. 183; Knights *v.* Wiffen, L. R. 5 Q. B. 660; Skyring *v.* Greenwood, 4 B. & C. 281, 10 E. C. L. 580, 1 C. & P. 517, 12 E. C. L. 298, 6 D. & R. 401, 28 Rev. Rep. 264; Horsfall *v.* Halifax, etc., Union Banking Co., 52 L. J. Ch. 599.

See 19 Cent. Dig. tit. "Estoppel," § 144.

It is of the essence of estoppel that the act relied upon as such should have been injurious and to the prejudice of him who relies upon it as estoppel. Smith *v.* Powell, 98 Va. 431, 36 S. E. 522.

An act clearly beneficial to the person setting up the estoppel cannot be relied on. Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11.

Agreement to perform binding contract.— No estoppel arises respecting an agreement, not otherwise binding, made to induce a party voluntarily to perform a contract which he could be compelled to perform, although he performed it relying on and in consequence of the agreement. Organ *v.* Stewart, 60 N. Y. 413.

Expenditures in litigation may as reasonably constitute the basis of an estoppel as any other expenditure. Meister *v.* Birney, 24 Mich. 435 [*quoted* in Heyn *v.* O'Hagen, 60 Mich. 150, 155, 26 N. W. 861]. But see Frei *v.* McMurdo, 101 Wis. 423, 77 N. W. 915, where it was held that representations as to the ownership of property for the purpose of inducing another to act on the faith of such representations, or with knowledge that he will probably be so induced, by commencing an action and incurring costs in respect to such property, are admissible as evidence against the former as to the title but do not constitute an estoppel *in pais*. See also Eikenberry *v.* Edwards, 67 Iowa 14, 24 N. W. 570; St. Louis Exch. Bank *v.* Cooper, 40 Mo. 169; Conkey *v.* Hawthorne, 69 Wis. 199, 33 N. W. 435.

Silence which causes no prejudice does not estop. Traun *v.* Keiffer, 31 Ala. 136; Durlam *v.* Steele, 88 Iowa 498, 55 N. W. 509; Hyde *v.* Powell, 47 Mich. 156, 10 N. W. 181; Hill *v.* Epley, 31 Pa. St. 331.

Location of street.— That a city surveyed a street, fixed its supposed width, and constructed a sidewalk on the line surveyed does not estop it to claim an additional strip as part of the street as against one who made no expenditures nor erected buildings in reliance on the city's action. Davis *v.* Appleton, 109 Wis. 580, 85 N. W. 515.

The assessment of a tax without enforcing its collection will not estop a county from setting up the claim that the land was its own property at the time of the levy. Page County *v.* Burlington, etc., R. Co., 40 Iowa 520.

38. *Alabama.*— Adler *v.* Pin, 80 Ala. 351.

California.— McCarthy *v.* Petaluma Mut. Relief Assoc., 81 Cal. 584, 22 Pac. 933.

Connecticut.—Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Illinois.— Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899.

Indiana.— Cox *v.* Vickers, 35 Ind. 27; Lewis *v.* Prenatt, 24 Ind. 98, 87 Am. Dec. 321.

Iowa.— Guest *v.* Burlington Opera-House Co., 74 Iowa 457, 38 N. W. 158; Laub *v.* Trowbridge, 71 Iowa 396, 32 N. W. 394; Eikenberry *v.* Edwards, 67 Iowa 14, 24 N. W. 570; Jamison *v.* Miller, 64 Iowa 402, 20 N. W. 491. See also Lyon *v.* Aiken, 70 Iowa 16, 29 N. W. 785.

Kentucky.— Crockett *v.* Lashbrook, 5 T. B. Mon. 530, 17 Am. Dec. 98.

Michigan.— Ladd *v.* Brown, 94 Mich. 136, 53 N. W. 1048; Gooding *v.* Underwood, 89

i. Default or Wrongful Act of Person Setting Up Estoppel. An estoppel *in pais* is never allowed to be used as an instrument of fraud, but only to prevent injustice,[39] and it is therefore essential that the party claiming the benefit of the estoppel must have proceeded in good faith.[40]

j. Mutuality. An estoppel *in pais* to be binding must be mutual and reciprocal.[41]

Mich. 187, 50 N. W. 818; Palmer *v.* Williams, 24 Mich. 328.

New York.— Voorhees *v.* Olmstead, 3 Hun 744, 6 Thomps. & C. 172; Ryder *v.* Commonwealth F. Ins. Co., 52 Barb. 447; Garlinghouse *v.* Whitwell, 51 Barb. 208.

North Carolina.— East *v.* Dolihite, 72 N. C. 562.

Texas.— Anderson *v.* Walker, (Civ. App. 1899) 49 S. W. 937.

Utah.—Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024; Brigham Young Trust Co. *v.* Wagener, 12 Utah 1, 40 Pac. 764.

Washington.— Hughes *v.* New York L. Ins. Co., 32 Wash. 1, 72 Pac. 452.

See 19 Cent. Dig. tit. "Estoppel," § 145.

Damage to support an estoppel in pais against the owner of land so as to convert him into a trustee thereof in favor of the party claiming the estoppel must be something more than a technical consideration in a contract. It must be substantial and such that the party sustaining it cannot be put back in his former condition, nor be adequately compensated in money. East *v.* Dolihite, 72 N. C. 562.

Individual and particular interest.— A party setting up an estoppel must be personally misled or deceived by the acts which constitute the estoppel alleged, and he must have a particular interest in such acts more than the public at large. He must have trusted to them and confided in them in some particular business transaction. Garlinghouse *v.* Whitwell, 51 Barb. (N. Y.) 208.

39. Pierrepont *v.* Barnard, 5 Barb. (N. Y.) 364; Pendleton *v.* Richey, 32 Pa. St. 58. See also Needles *v.* Hanifan, 11 Ill. App. 303.

40. *Arkansas.*— Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592.

Colorado.— Lemond *v.* Harrison, 18 Colo. App. 246, 70 Pac. 956.

Connecticut.— Calhoun *v.* Richardson, 30 Conn. 210.

Illinois.— Whitlock *v.* McClusky, 91 Ill. 582; Quincy First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104; Chicago, etc., R. Co. *v.* Vipond, 101 Ill. App. 607; Needles *v.* Hanifan, 11 Ill. App. 303.

Indiana.— Shedd *v.* Webb, 157 Ind. 585, 61 N. E. 233.

Iowa.— Sinnett *v.* Moles, 38 Iowa 25.

Kentucky.—Benton *v.* Ragan, 11 S. W. 430, 12 S. W. 155, 11 Ky. L. Rep. 298.

Minnesota.—Wayzata *v.* Great Northern R. Co., 46 Minn. 505, 49 N. W. 205; Rochester Ins. Co. *v.* Martin, 13 Minn. 59.

Missouri.— Garesche *v.* Levering Invest. Co., 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232; Campbell *v.* Hoff, 129 Mo. 317, 31 S. W. 603; Gray *v.* Gray, 83 Mo. 106.

New Jersey.— McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25; Stanford *v.* Lyon, 37 N. J. Eq. 94.

New York.— Lorillard *v.* Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113 [*reversing* 61 N. Y. Super. Ct. 428, 20 N. Y. Suppl. 433]; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1, 7 Am. Rep. 287; Pierrpont *v.* Barnard, 5 Barb. 364; Wyckoff *v.* Lagrange, 12 Misc. 108, 32 N. Y. Suppl. 1134.

Pennsylvania.—Pendleton *v.* Richey, 32 Pa. St. 58.

South Carolina.— De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 365, 35 S. E. 441.

South Dakota.—Dunn *v.* Canton Nat. Bank, 15 S. D. 454, 90 N. W. 1045.

West Virginia.—Calfee *v.* Burgess, 3 W. Va. 274.

Wisconsin.— Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904.

United States.— Anvil Min. Co. *v.* Humble, 153 U. S. 540, 14 S. Ct. 876, 38 L. ed. 814.

England.— Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 197, 42 L. J. Exch. 115, 21 Wkly. Rep. 774.

Canada.— Davis *v.* Browne, 9 U. C. Q. B. 193.

See 19 Cent. Dig. tit. "Estoppel," § 146.

A contract induced by fraud cannot estop the party deceived. Rochester Ins. Co. *v.* Martin, 13 Minn. 59.

One who by the ambiguity of his inquiries has induced an erroneous statement of the legal rights of the party questioned, or who has by an artful silence entrapped him into an admission, cannot invoke as against such party the principle of equitable estoppel. Stanford *v.* Lyon, 37 N. J. Eq. 94.

41. *Alabama.*— Sullivan *v.* Louisville, etc., R. Co., 128 Ala. 77, 30 So. 528.

Illinois.— Siegel *v.* Colby, 176 Ill. 210, 52 N. E. 917 [*affirming* 61 Ill. App. 315]; Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; Campbell *v.* Goodall, 54 Ill. App. 24. See also Chicago, etc., R. Co. *v.* Vipond, 101 Ill. App. 607.

Minnesota.— State *v.* School Dist. No. 108, 85 Minn. 230, 88 N. W. 751.

Nebraska.— Gallaher *v.* Lincoln, 63 Nebr. 339, 88 N. W. 505; People's Nat. Bank *v.* Geishardt, 55 Nebr. 232, 75 N. W. 582.

New York.— Todd *v.* Kerr, 42 Barb. 317; Cohoes Co. *v.* Goss, 13 Barb. 137; Wright *v.* Douglass, 10 Barb. 97 [*reversed* on other grounds in 7 N. Y. 564]; Green *v.* Russell, 5 Hill 183. See also Dwight *v.* Williams, 25 Misc. 667, 55 N. Y. Suppl. 201.

Pennsylvania.— Smith *v.* Knowles, 2 Grant 413.

Texas.— Lewis *v.* Castleman, 27 Tex. 407;

k. Certainty. Before an estoppel can be raised there must be certainty to every intent, and the facts alleged to constitute it are not to be taken by argument or inference.[42]

5. Estoppel Against Estoppel. Where an estoppel exists against an estoppel, the matter is set at large.[43]

6. Laches or Delay in Asserting Estoppel. An equitable estoppel is not lost by delay in asserting it as would be the operation of limitations on the corresponding action for deceit growing out of the transaction;[44] but, in order to justify a person setting up an estoppel against the legal owner of land, he must be free from the imputation of laches in acting upon the belief of ownership by one who has no right.[45]

Shattuck *v.* McCartney, 1 Tex. App. Civ. Cas. § 557.

Virginia.— Montague *v.* Massey, 76 Va. 307; Bolling *v.* Petersburg, 3 Rand. 563.

See 19 Cent. Dig. tit. "Estoppel," § 125.

Contra.— Bigelow Estop. (5th ed.) 652.

42. *Alabama.*— Sullivan *v.* Louisville, etc., R. Co., 128 Ala. 77, 30 So. 528; Miller *v.* Hampton, 37 Ala. 342; Jones *v.* Cowles, 26 Ala. 612; Ware *v.* Cowles, 24 Ala. 446, 60 Am. Dec. 482.

Colorado.— Patterson *v.* Hitchcock, 3 Colo. 533.

Connecticut.— Fuller *v.* Foote, 56 Conn. 341, 15 Atl. 760; Townsend Sav. Bank *v.* Todd, 47 Conn. 190; Seymour *v.* Page, 33 Conn. 61.

Illinois.— Tillotson *v.* Mitchell, 111 Ill. 518; Walker *v.* Carleton, 97 Ill. 582; Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; Keith *v.* Lynch, 19 Ill. App. 574.

Indiana.—Fletcher *v.* McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779; Robbins *v.* Magee, 76 Ind. 381; Lash *v.* Rendell, 72 Ind. 475; Tinsley *v.* Fruits, 20 Ind. App. 534, 51 N. E. 111.

Iowa.— Davenport Cent. R. Co. *v.* Davenport Gas Light Co., 43 Iowa 301; Johnson *v.* Owen, 33 Iowa 512.

Maine.— Martin *v.* Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740.

Massachusetts.—Moors *v.* Albro, 129 Mass. 9.

Michigan.— Bennett *v.* Dean, 41 Mich. 472, 2 N. W. 680; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639; Rust *v.* Bennett, 39 Mich. 521; Michigan Paneling Mach., etc., Co. *v.* Parsell, 38 Mich. 475; Fredenburg *v.* Lyon Lake M. E. Church, 37 Mich. 476.

Minnesota.— Cannon River Manufacturers' Assoc. *v.* Rogers, 51 Minn. 388, 53 N. W. 759.

Mississippi.— Roach *v.* Brannon, 57 Miss. 490; Turnipseed *v.* Hudson, 50 Miss. 429, 19 Am. Rep. 15.

New York.— Mojarrieta *v.* Saenz, 80 N. Y. 547; Merritt *v.* American Dock, etc., Co., 59 N. Y. Super. Ct. 83, 13 N. Y. Suppl. 234; Van Ness *v.* Bush, 14 Abb. Pr. 33, 22 How. Pr. 481. See also Muller *v.* Pondir, 6 Lans. 472 [*affirmed* in 55 N. Y. 325, 14 Am. Rep. 259].

North Carolina.— Horne *v.* People's Bank, 108 N. C. 109, 12 S. E. 840; Hays *v.* Askew, 50 N. C. 63.

Pennsylvania.—Keating *v.* Orne, 77 Pa. St. 89; Thompson *v.* Cathcart, 17 Leg. Int. 364.

Rhode Island.— Glezen *v.* Farrington, 7 R. I. 277.

Texas.— Grinnan *v.* Dean, 62 Tex. 218; Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

Vermont.— Ripley *v.* Billings, 46 Vt. 542.

Virginia.— Bolling *v.* Petersburg, 3 Rand. 563.

Washington.— Pacific Cable Constr. Co. *v.* McNatt, 2 Wash. 216, 27 Pac. 869.

West Virginia.— Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Vanbibber *v.* Beirne, 6 W. Va. 168.

Canada.— McGee *v.* Kane, 14 Ont. 226; Reg. *v.* Law Soc., 21 U. C. C. P. 229.

See 19 Cent. Dig. tit. "Estoppel," § 148.

Every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference. Coke Litt. 352*b* [*quoted* in Vanbibber *v.* Beirne, 6 W. Va. 168, 178].

If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel. Ware *v.* Cowles, 24 Ala. 446, 60 Am. Dec. 482.

A mere refusal to pay, based solely on the ground of inability by a party to an instrument for the payment of money to a person then in possession thereof, does not estop him from showing that the instrument is not legally binding upon him. Van Ness *v.* Bush, 14 Abb. Pr. (N. Y.) 33, 22 How. Pr. (N. Y.) 481.

43. Tibbetts *v.* Shapleigh, 60 N. H. 487; Page *v.* Smith, 13 Oreg. 410, 10 Pac. 833. See also Fehlig *v.* Busch, 165 Mo. 144, 65 S. W. 542.

The assertion of estoppel by deed may be prevented by the existence of an estoppel *in pais*. See Platt *v.* Squire, 12 Metc. (Mass.) 494.

The conduct of one which has been induced by the misrepresentation or fraud of another cannot be relied on by the latter as an estoppel. Dangerfield *v.* Atchison, etc., R. Co., 62 Kan. 85, 61 Pac. 405.

44. Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385, where Yaple, J., said: "The longer a party has acquired a right by estoppel *in pais* the stronger is his right to avail himself of it when his right is denied."

45. Trenton Banking Co. *v.* Duncan, 86 N. Y. 221.

B. Grounds — 1. Express Misrepresentation — a. Representations — (i) *In General.* Where a person wilfully makes a representation intended to induce another to act upon the faith of it, or where, whatever his intention, a reasonable man in the situation of that other would believe that it was meant that he should act upon it, and in either case that other does act upon it as true and alters his position, there is an estoppel *in pais* to conclude the former from averring against the latter a different state of things as existing at the same time.[46]

46. *Alabama.*— Fields *v.* Killion, 129 Ala. 373, 29 So. 797; Bain *v.* Wells, 107 Ala. 562, 19 So. 774; Giddens *v.* Bolling, 99 Ala. 319, 13 So. 511; Foreman *v.* Weil, 98 Ala. 495, 12 So. 815; Nelson *v.* Kelly, 91 Ala. 569, 8 So. 690; Larkin *v.* Mead, 77 Ala. 485; Guthrie *v.* Quinn, 43 Ala. 561; David *v.* Shepard, 40 Ala. 587. *Compare* Faulk *v.* Calloway, 123 Ala. 325, 26 So. 504.

Arizona.— Schultz *v.* Allyn, (1897) 48 Pac. 960; Campbell *v.* Shivers, 1 Ariz. 161, 25 Pac. 540.

Arkansas.— Katz *v.* Goldman, 69 Ark. 637, 65 S. W. 432; Graham *v.* Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40.

California.— Newhall *v.* Hatch, (1901) 64 Pac. 250; Gerlach *v.* Turner, 89 Cal. 446, 26 Pac. 870.

Colorado.— American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090; Murphy *v.* Gumaer, 18 Colo. App. 183, 70 Pac. 800.

Connecticut.— Hawley *v.* Middlebrook, 28 Conn. 527. See also Warner *v.* Middlesex Mut. Assur. Co., 21 Conn. 444.

Georgia.— Berg *v.* Baer, 104 Ga. 587, 30 S. E. 744; Fulton Bldg., etc., Assoc. *v.* Greenlea, 103 Ga. 376, 29 S. E. 932; Whelchel *v.* Green, 102 Ga. 113, 29 S. E. 169; Tillman *v.* Georgian Loan, etc., Co., 97 Ga. 337, 22 S. E. 983; Empire Lumber Co. *v.* Kiser, 91 Ga. 643, 17 S. E. 972; Veal *v.* Robinson, 76 Ga. 838; Roberts *v.* Davis, 72 Ga. 819; Crine *v.* Davis, 68 Ga. 138; Osborn *v.* Elder, 65 Ga. 360; Kirkpatrick *v.* Brown, 59 Ga. 450.

Illinois.— Mann *v.* Bergmann, 203 Ill. 406, 67 N. E. 814; Blackman *v.* Preston, 123 Ill. 381, 15 N. E. 42; Moshier *v.* Frost, 110 Ill. 206; Mayer *v.* Erhardt, 88 Ill. 452; Lewis *v.* Lanphere, 79 Ill. 187; Colwell *v.* Brower, 75 Ill. 516; Tucker *v.* Conwell, 67 Ill. 552; Trotter *v.* Smith, 59 Ill. 240; Moser *v.* Kreigh, 49 Ill. 84; Higgins *v.* Ferguson, 14 Ill. 269; Brayton *v.* Harding, 56 Ill. App. 362; Neibauer *v.* Sackett, 53 Ill. App. 521; Lichty *v.* Lower, 28 Ill. App. 199; Talcott *v.* Brackett, 5 Ill. App. 60.

Indiana.— Magel *v.* Milligan, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 582; Thiebaud *v.* Tait, (1892) 31 N. E. 1052; Wisehart *v.* Hedrick, 118 Ind. 341, 21 N. E. 30; Kelley *v.* Fisk, 110 Ind. 552, 11 N. E. 453; Pitcher *v.* Dove, 99 Ind. 175; Barnes *v.* McKay, 7 Ind. 301; Moore *v.* Smith, 29 Ind. App. 503, 64 N. E. 623.

Iowa.— Cleaver *v.* Mahanke, 120 Iowa 77, 94 N. W. 279; Rath *v.* Orr, 119 Iowa 511, 93 N. W. 489; Riegel *v.* Ormsby, 111 Iowa 10, 82 N. W. 432; Keys *v.* Whitlock Mfg. Co., 105 Iowa 742, 75 N. W. 658; Gillette *v.* Meredith, 103 Iowa 155, 72 N. W. 443; Ellsworth *v.* Campbell, 87 Iowa 532, 54 N. W. 477; Blake *v.* Barrett, 61 Iowa 79, 15 N. W. 845; Bonnell *v.* Allerton, 51 Iowa 166, 49 N. W. 857; Renkin *v.* Hill, 49 Iowa 270; Wilson *v.* Vaughn, 40 Iowa 179; Peck *v.* Lusk, 38 Iowa 93; Davidson *v.* Follett, 27 Iowa 217, 99 Am. Dec. 648.

Kansas.— Hubbell *v.* South Hutchinson, 64 Kan. 645, 68 Pac. 52; Hill *v.* Wand, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288; Schotthauer *v.* Baxter, 38 Kan. 359, 16 Pac. 743; Kraft *v.* Baxter, 38 Kan. 351, 16 Pac. 739; Hardin *v.* Joice, 21 Kan. 318; Palmer *v.* Meiners, 17 Kan. 478.

Kentucky.— American Nat. Bank *v.* Smallhouse, 113 Ky. 147, 67 S. W. 260, 23 Ky. L. Rep. 2382; Ratcliff *v.* Bellefont Iron Works Co., 87 Ky. 559, 10 S. W. 365, 10 Ky. L. Rep. 643; Alexander *v.* Ellison, 79 Ky. 148; Wimmer *v.* Ficklin, 14 Bush 193; Howell *v.* Commercial Bank, 5 Bush 93; Shackleford *v.* Smith, 5 Dana 232; Harrison *v.* Edwards, 3 Litt. 340; Aills *v.* Grahams, Litt. Sel. Cas. 440; Wright *v.* Williams, 77 S. W. 1128, 25 Ky. L. Rep. 1377; York *v.* East Jellico Coal Co., 76 S. W. 532, 25 Ky. L. Rep. 927; Davidson *v.* Kelley, 64 S. W. 623, 23 Ky. L. Rep. 1011; Kendall *v.* Webber, 6 Ky. L. Rep. 513.

Louisiana.— Beugnot *v.* Tremoulet, 111 La. 1, 35 So. 362; Dwyer *v.* Woulfe, 39 La. Ann. 423, 1 So. 868; Dean *v.* Martin, 24 La. Ann. 103; Laski *v.* Goldman, 18 La. Ann. 294; Hailey *v.* Franks, 18 La. Ann. 559; Webb *v.* Deeson, 11 La. Ann. 84; Gales *v.* Christy, 4 La. Ann. 293.

Maine.— Allen *v.* Goodnow, 71 Me. 420; Colby *v.* Norton, 19 Me. 412.

Maryland.— Pott *v.* Schmucker, 84 Md. 535, 36 Atl. 592, 57 Am. St. Rep. 415, 35 L. R. A. 392.

Massachusetts.— Driscoll *v.* Smith, 184 Mass. 221, 68 N. E. 210; Nickerson *v.* Massachusetts Title Ins. Co., 178 Mass. 308, 59 N. E. 814; O. Sheldon Co. *v.* Cooke, 177 Mass. 441, 59 N. E. 77; Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Short *v.* Currier, 150 Mass. 372, 23 N. E. 106; May *v.* Gates, 137 Mass. 389; Grant *v.* Clapp, 106 Mass. 453; Ladrick *v.* Briggs, 105 Mass. 508.

Michigan.— National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623; Scofield *v.* Farmer, 125 Mich. 470, 84 N. W. 723; Preston Nat. Bank *v.* Geo. T. Smith Middlings Purifier Co., 102 Mich. 462, 60 N. W. 981; Kinney *v.* Service, 101 Mich. 185, 59 N. W. 403; Curtis *v.* Wilcox, 91 Mich. 229, 51 N. W. 992; Chicago, etc., R. Co. *v.* Miller, 91 Mich. 166, 51 N. W. 981; Judd *v.* Burton, 51 Mich. 74, 16 N. W. 237; Van-

(II) *Matters of Fact or of Opinion.* A representation, to constitute an

neter *v.* Crossmann, 42 Mich. 465, 4 N. W. 216; Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230. See also Meisel *v.* Welles, 107 Mich. 453, 65 N. W. 289; Corbitt *v.* Brong, 44 Mich. 150, 6 N. W. 213.

Minnesota.— Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515.

Mississippi.— Mask *v.* Allen, (1894) 17 So. 82; Money *v.* Ricketts, 62 Miss. 209.

Missouri.— Suddarth *v.* Robertson, 118 Mo. 286, 24 S. W. 151; Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901; Raley *v.* Williams, 73 Mo. 310; Melton *v.* Smith, 65 Mo. 315; Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462; Exchange Real Estate, etc., Co. *v.* Schuchmann Realty Co., 103 Mo. App. 24, 78 S. W. 75; Churchill *v.* Lammers, 60 Mo. App. 244; McLemore *v.* McNeley, 56 Mo. App. 556.

Montana.— Cobban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805.

Nebraska.— Likes *v.* Kellogg, 37 Nebr. 259, 55 N. W. 878; Wise *v.* Newatney, 26 Nebr. 88, 42 N. W. 339; Little *v.* Giles, 25 Nebr. 313, 41 N. W. 186; Towne *v.* Sparks, 23 Nebr. 142, 36 N. W. 375; Central City First Nat. Bank *v.* Lucas, 21 Nebr. 280, 31 N. W. 805.

Nevada.— Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

New Hampshire.— Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Moore *v.* Bowman, 47 N. H. 494; Chase *v.* Deming, 42 N. H. 274; Wyman *v.* Perkins, 39 N. H. 218; Davis *v.* Handy, 37 N. H. 65; Jenness *v.* Berry, 17 N. H. 549.

New Jersey.— Bordin *v.* Hutchinson, (Ch. 1901) 49 Atl. 1088; Van Syckel *v.* O'Hearn, 50 N. J. Eq. 173, 24 Atl. 1024; Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549; Mattison *v.* Young, 24 N. J. Eq. 535.

New York.— Woodhaven Junction Land Co. *v.* Solly, 148 N. Y. 42, 42 N. E. 404 [*affirming* 74 Hun 637, 26 N. Y. Suppl. 150]; Blair *v.* Wait, 69 N. Y. 113; L'Amoreux *v.* Vischer, 2 N. Y. 278; Guthrie *v.* Martin, 76 N. Y. App. Div. 385, 78 N. Y. Suppl. 913; Seeber *v.* People's Bldg., etc., Assoc., 54 N. Y. App. Div. 626, 66 N. Y. Suppl. 1144 [*affirming* 36 N. Y. App. Div. 312, 55 N. Y. Suppl. 364]; Davis *v.* Myers, 86 Hun 236, 33 N. Y. Suppl. 352; Moore *v.* Nye, 21 N. Y. Suppl. 94; Vellum *v.* Demerle, 65 Hun 543, 20 N. Y. Suppl. 516; Mattes *v.* Frankel, 65 Hun 203, 20 N. Y. Suppl. 145; Center *v.* Weed, 63 Hun 560, 18 N. Y. Suppl. 554; Hurst *v.* Elliott, 52 Hun 273, 5 N. Y. Suppl. 218; People *v.* Chase, 28 Hun 310; Murdock *v.* Prospect Park, etc., R. Co., 10 Hun 598; Chautauque County Bank *v.* White, 6 Barb. 589; Dennison *v.* Ely, 1 Barb. 610; Duncan *v.* Berlin, 38 N. Y. Super. Ct. 31; Chapman *v.* O'Brien, 34 N. Y. Super. Ct. 524; Kingsley *v.* Vernon, 6 N. Y. Super. Ct. 361; Breidert *v.* Vincent, 1 E. D. Smith 542; White *v.* O'Brien, 31 Misc. 770, 64 N. Y. Suppl. 387; Ottoman *v.* Gardner, 19 Misc. 143, 43 N. Y. Suppl. 276; Grauwiller *v.* Culver, 57 N. Y. Suppl. 197; Stillings *v.* Haggerty, 12 N. Y. Suppl. 813; Metropolitan Mfg. Co. *v.* McDonald, 7 N. Y. Suppl. 500; Stephens *v.* Baird, 9 Cow. 274; Davison *v.* Bramly, 2 Alb. L. J. 49.

North Carolina.— Redman *v.* Graham, 80 N. C. 231; Belo *v.* Forsythe County Com'rs, 76 N. C. 489; Gill *v.* Denton, 71 N. C. 341, 17 Am. Rep. 8; Mason *v.* Williams, 53 N. C. 478; Hay *v.* Spillar, 3 N. C. 155.

Ohio.— Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Raymond *v.* Foster, 4 Ohio Dec. (Reprint) 240, 1 Clev. L. Rep. 149.

Oregon.— Larch Mountain Invest. Co. *v.* Garbade, 41 Oreg. 123, 68 Pac. 6; Kirkwood *v.* Ford, 34 Oreg. 552, (1899) 56 Pac. 411. See also Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623.

Pennsylvania.— McClain *v.* Smith, 158 Pa. St. 49, 27 Atl. 853; Kramer *v.* Goodlander, 98 Pa. St. 353; Green's Appeal, 97 Pa. St. 342; Mowry's Appeal, 94 Pa. St. 376; Dock *v.* Boyd, 93 Pa. St. 92; Chapman *v.* Chapman, 59 Pa. St. 214; *In re* Darlington, 13 Pa. St. 430; Bixler *v.* Gilleland, 4 Pa. St. 156; Buchanan *v.* Moore, 13 Serg. & R. 304, 15 Am. Dec. 601; Peters *v.* Wainright, 4 Pennyp. 418; Rettig *v.* Becker, 11 Pa. Super. Ct. 395; Gray's Appeal, 10 Wkly. Notes Cas. 458; Verrier *v.* Guillou, 14 Phila. 2; Johnson *v.* Sharon Bldg. Assoc., 7 Del. Co. 525; Hickernell *v.* Stoner, 1 Dauph. Co. Rep. 133.

Rhode Island.— Goodell *v.* Bates, 14 R. I. 65; Nowry *v.* Sheldon, 2 R. I. 369.

South Carolina.— Jennings *v.* Harrison, 33 S. C. 206, 11 S. E. 695; Moore *v.* Trimmier, 32 S. C. 511, 11 S. E. 548, 552; Shuford *v.* Shingler, 30 S. C. 612, 8 S. E. 799; Winsmith *v.* Winsmith, 15 S. C. 611.

South Dakota.— Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908; Eickelberg *v.* Soper, 1 S. D. 563, 47 N. W. 953.

Tennessee.— Baird *v.* Vaughn, (Sup. 1890) 15 S. W. 734; Smith *v.* Carmack, (Ch. App. 1901) 64 S. W. 372; Gallagher *v.* Riley, (Ch. App. 1895) 35 S. W. 451.

Texas.— Nichols-Steuart *v.* Crosby, 87 Tex. 443, 29 S. W. 380 [*affirming* (Civ. App. 1894) 26 S. W. 651]; Dupree *v.* Woodruff, (Sup. 1892) 19 S. W. 469; Guest *v.* Guest, 74 Tex. 664, 12 S. W. 831; Hess *v.* Dean, 66 Tex. 663, 2 S. W. 727; Fielding *v.* Du Bose, 63 Tex. 631; Colonial, etc., Mortg. Co. *v.* Tubbs, (Civ. App. 1898) 45 S. W. 623; Hico First Nat. Bank *v.* Hamilton Nat. Bank, 17 Tex. Civ. App. 555, 43 S. W. 613; New York, etc., Land Co. *v.* Gardner, 11 Tex. Civ. App. 404, 32 S. W. 786; Harmsen *v.* Wesche, (Civ. App. 1895) 32 S. W. 192; Whiteselle *v.* Texas Loan Agency, (Civ. App. 1894) 27 S. W. 309; Long *v.* Cude, (Civ. App. 1894) 26 S. W. 1000; McCabe *v.* Brown, (Civ. App. 1894) 25 S. W. 134. *Compare* Texas Cent. R. Co. *v.* Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

Vermont.— Patterson *v.* Burnham, 52 Vt. 20; Wheeler *v.* Willard, 44 Vt. 640; Halloran *v.* Whitcomb, 43 Vt. 306; Troy Manufacturers' Bank *v.* Scofield, 39 Vt. 590; Spiller *v.* Scrib-

equitable estoppel, must ordinarily be as to a matter of fact and not a mere matter of opinion.[47]

ner, 36 Vt. 245; Shaw *v.* Beebe, 35 Vt. 205; Judevine *v.* Goodrich, 35 Vt. 19; Hicks *v.* Cram, 17 Vt. 449.

Virginia.—Anderson *v.* Phlegar, 93 Va. 415, 25 S. E. 107; Dickerson *v.* Davis, 2 Leigh 401.

Washington.— State *v.* Whitworth, 30 Wash. 47, 70 Pac. 254; Phinney *v.* Campbell, 16 Wash. 203, 47 Pac. 502; Walker *v.* Baxter, 6 Wash. 244, 33 Pac. 426.

West Virginia.— Bodkin *v.* Arnold, 45 W. Va. 90, 30 S. E. 154; Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874.

Wisconsin.— Two Rivers Mfg. Co. *v.* Day, 102 Wis. 328, 78 N. W. 440; Telford *v.* Frost, 76 Wis. 172, 44 N. W. 835; Buckwheat *v.* St. Croix Lumber Co., 75 Wis. 194, 43 N. W. 1130; Peabody *v.* Leach, 18 Wis. 657; Briggs *v.* Seymour, 17 Wis. 255; Mosher *v.* Chapin, 12 Wis. 453. See also Neubauer *v.* Gabriel, 86 Wis. 200, 56 N. W. 733.

United States.— Schroeder *v.* Young, 161 U. S. 334, 16 S. Ct. 512, 40 L. ed. 721; Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Given *v.* Times-Republican Print. Co., 114 Fed. 92, 52 C. C. A. 40 [*affirming* 106 Fed. 253]; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; *In re* Matthews, 109 Fed. 603; Mohrenstecher *v.* Westervelt, 87 Fed. 157, 30 C. C. A. 584; Mississippi Coal, etc., Co. *v.* The Ottumwa Belle, 78 Fed. 643; Union Pac. R. Co. *v.* U. S., 67 Fed. 975, 15 C. C. A. 123; Wachusett Nat. Bank *v.* Sioux City Stove Works, 63 Fed. 366; Parlin *v.* Stone, 48 Fed. 808; Fuller *v.* Harris, 29 Fed. 814; The Wm. Kraft, 24 Fed. 191; McBane *v.* Wilson, 8 Fed. 734; Smith *v.* Schroeder, 22 Fed. Cas. No. 13,103, Brunn. Col. Cas. 672; Willis *v.* Carpenter, 30 Fed. Cas. No. 17,770.

England.— Seton *v.* Lafone, 19 Q. B. D. 68, 56 L. J. Q. B. 415, 57 L. T. Rep. N. S. 547, 35 Wkly. Rep. 749 [*affirming* 18 Q. B. D. 139]; Bloomenthal *v.* Ford, [1897] A. C. 156, 66 L. J. Ch. 253, 76 L. T. Rep. N. S. 205, 4 Manson 156, 45 Wkly. Rep. 449; Balkis Consol. Co. *v.* Tomkinson, [1893] A. C. 396, 63 L. J. Q. B. 134, 69 L. T. Rep. N. S. 598, 1 Reports 178, 42 Wkly. Rep. 204; Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31 L. T. Rep. N. S. 785, 23 Wkly. Rep. 747; Skyring *v.* Greenwood, 4 B. & C. 281, 10 E. C. L. 580, 1 C. & P. 517, 12 E. C. L. 298, 6 D. & R. 401, 28 Rev. Rep. 264; Price *v.* Harwood, 3 Campb. 108; Middleton *v.* Pollock, 4 Ch. D. 49, 46 L. J. Ch. 39, 35 L. T. Rep. N. S. 608, 25 Wkly. Rep. 94; Piggott *v.* Stratton, 1 De G. F. & J. 33, 6 Jur. N. S. 129, 29 L. J. Ch. 1, 1 L. T. Rep. N. S. 111, 8 Wkly. Rep. 13, 62 Eng. Ch. 25, 45 Eng. Reprint 271; Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114; Smith *v.* Kay, 7 H. L. Cas. 750, 11 Eng. Reprint 299; Cornish *v.* Abington, 4 H. & N. 549, 28 L. J. Exch. 262, 7 Wkly. Rep. 504; *Ex p.* Leslie, 2 Jur. N. S. 822, 25 L. J. Ch. 37, 4 Wkly. Rep. 706; Deutsche Bank *v.* Beriro, 73 L. T. Rep. N. S. 669; Ashby *v.* Day, 54 L. T. Rep. N. S. 408, 34 Wkly. Rep. 312 [*affirming* 54 L. J. Ch. 935].

Canada.— Zwicker *v.* Feindel, 29 Can. Supreme Ct. 516; Gibson *v.* North Easthope Tp., 24 Can. Supreme Ct. 707 [*reversing* 21 Ont. 504]; Ball *v.* McCaffrey, 20 Can. Supreme Ct. 319; McCarty *v.* McMurray, 18 Grant Ch. (U. C.) 604; Graham *v.* Meneilly, 16 Grant. Ch. (U. C.) 661; Doe *v.* Estey, 8 N. Brunsw. 489; Fitzrandolph *v.* Shanly, 14 Nova Scotia 199, 1 Can. L. T. 705; Fraser *v.* Wallace, 11 Nova Scotia 339; *Re* Collingwood Dry Dock Ship Bldg., etc., Co., 20 Ont. 107; Browne *v.* Smith, 1 Ont. Pr. 347; Ingalls *v.* Reid, 15 U. C. C. P. 490; La Pointe *v.* Grand Trunk R. Co., 26 U. C. Q. B. 479; Robinson *v.* Reynolds, 23 U. C. Q. B. 560; Tomlinson *v.* Jarvis, 11 U. C. Q. B. 60.

See 19 Cent. Dig. tit. "Estoppel," §§ 218, 231, 234.

If a person represents that he has no title in land and thereby induces another to purchase it from a third person, he is estopped, as against the grantee, to assert title. Fleming *v.* West, 14 Nova Scotia 294.

The representation must have been made to the party setting up the estoppel, or must have been of such a character and made under such circumstances that the party making it must be taken to have contemplated that it would be communicated to and acted on by him. Hodge *v.* Ludlum, 45 Minn. 290, 47 N. W. 805.

If the representation is not such as should induce a prudent person to rely thereon, the person making it will not be estopped thereby. McLain *v.* Buliner, 49 Ark. 218, 4 S. W. 768, 4 Am. St. Rep. 36. See *supra*, V, A, 4, e.

In an action to recover land, it has been held that there must be something more than the mere declarations of the party sought to be estopped, and that it must be shown that he claims a title or interest in the land, however defective, evidenced by a deed, bond, or written contract. Grayheal *v.* Davis, 95 N. C. 508. See *infra*, V, C, 2, b.

47. *Arkansas.*— McLain *v.* Buliner, 49 Ark. 218, 4 S. W. 768, 4 Am. St. Rep. 36.

California.— Boggs *v.* Merced Min. Co., 14 Cal. 279.

Connecticut.— Marsh *v.* Bridgeport, 75 Conn. 495, 54 Atl. 196.

Illinois.— Hefner *v.* Vandolah, 57 Ill. 520, 11 Am. Rep. 39.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Mitchell *v.* Fisher, 94 Ind. 108.

Iowa.— Sylvester *v.* Henrich, 93 Iowa 489, 61 N. W. 942.

Kentucky.— Lynn *v.* Bradley, 1 Metc. 232.

Maine.— Washburn *v.* Blake, 47 Me. 316.

Massachusetts.— Cartwright *v.* Gardner, 5 Cush. 273.

Michigan.— Grand Rapids Fifth Nat. Bank

(III) *As to Future Events.* The doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as contracts.[48] The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act.[49]

(IV) *As to Validity of Bills, Notes, or Bonds* — (A) *In General.* Where a person liable on a bill, note, bond, or other security promises a prospec-

v. Pierce, 117 Mich. 376, 75 N. W. 1058; Chafey *v.* Mathews, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558.

Mississippi.— Parker *v.* McBee, 61 Miss. 134; Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313.

Missouri.— Hazell *v.* Tipton Bank, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22; Hammerslough *v.* Kansas City Bldg., etc., Assoc., 79 Mo. 80.

New York.—Akin *v.* Kellogg, 119 N. Y. 441, 23 N. E. 1046; Hayden *v.* Mathews, 4 N. Y. App. Div. 338, 38 N. Y. Suppl. 905 [*affirmed* in 158 N. Y. 735, 53 N. E. 1126]; Inderlied *v.* Whaley, 65 Hun 407, 20 N. Y. Suppl. 183.

Pennsylvania.— Coleman *v.* Rowland, 1 Pittsb. 122.

Tennessee.— Taylor *v.* Nashville, etc., R. Co., 86 Tenn. 228, 6 S. W. 393.

Texas.— Hart *v.* Bullion, 48 Tex. 278. But see Meade *v.* Boone, (Civ. App. 1896) 35 S. W. 483.

Washington.— Skavdale *v.* Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

West Virginia.— Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639.

United States.— Bohl *v.* Carson, 63 Fed. 26, 11 C. C. A. 16; Huart *v.* Riffle, 11 Fed. 790.

England.— Martin *v.* Douglas, 16 Wkly. Rep. 268.

Canada.—Fairweather *v.* Archibald, 15 Grant Ch. (U. C.) 255; *In re* Peck, 46 U. C. Q. B. 211.

See 19 Cent. Dig. tit. "Estoppel," § 219.

Opinion of attorney.— Where an attorney at law purchased a lot from one who had previously purchased in reliance on the attorney's opinion that the title was good, it was held in a suit to recover the price of the lot that the attorney was estopped to claim that his vendor had no title. Soward *v.* Johnston, 65 Mo. 102.

Representations made through mistake of law see *supra*, V, A, 4, d, (III), (A).

48. *Alabama.*— Jelks *v.* McRae, 25 Ala. 440.

Connecticut.—Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Indiana.— Roose *v.* McDonald, 23 Ind. 157. But see Wire *v.* Wyman, 93 Ind. 392.

Iowa.— Starry *v.* Korah, 65 Iowa 267, 21 N. W. 600.

Kentucky.— Travis *v.* Davis, 15 S. W. 525, 12 Ky. L. Rep. 825.

Maine.— Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568.

Massachusetts.—Langdon *v.* Doud, 10 Allen 433.

Missouri.— Tracy *v.* Union Iron Works, 29 Mo. App. 342. See also Williams *v.* Verity, 98 Mo. App. 654, 73 S. W. 732.

New York.— White *v.* Ashton, 51 N. Y. 280; Hollins *v.* Hubbard, 91 Hun 375, 36 N. Y. Suppl. 846; Shreve *v.* Holbrook, 87 Hun 621, 34 N. Y. Suppl. 317; Elliott *v.* Lewis, 3 Edw. 40.

North Carolina.— Vick *v.* Vick, 126 N. C. 123, 35 S. E. 257; East *v.* Dolihite, 72 N. C. 562.

Pennsylvania.— Keating *v.* Orne, 77 Pa. St. 89.

Texas.— Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124. See also Edwards *v.* Dickson, 66 Tex. 613, 2 S. W. 718.

Utah.— Elliot *v.* Whitmore, 23 Utah 342, 65 Pac. 70.

United States.— Union Mut. L. Ins. Co. *v.* Mowry, 96 U. S. 544, 24 L. ed. 674. *Compare* New York American Surety Co. *v.* Ballman, 115 Fed. 292, 53 C. C. A. 152.

England.—Whitechurch *v.* Cavanagh, [1902] A. C. 117, 71 L. J. K. B. 400, 85 L. T. Rep. N. S. 349, 9 Manson 351, 50 Wkly. Rep. 218; Citizens' Bank *v.* New Orleans First Nat. Bank, L. R. 6 H. L. 352, 43 L. J. Ch. 269, 22 Wkly. Rep. 194; Maddison *v.* Alderson, 8 App. Cas. 473, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820 [*disapproving* Loffus *v.* Maw, 3 Giff. 592]; Gillman *v.* Carbutt, 61 L. T. Rep. N. S. 281, 37 Wkly. Rep. 437; McEvoy *v.* Drogheda Harbour Com'rs, 16 Wkly. Rep. 34.

See 19 Cent. Dig. tit. "Estoppel," §§ 220, 221.

Compare Poague *v.* Spriggs, 21 Gratt. (Va.) 220.

A delivery order given by the vendor of goods is a mere promise to do something *in futuro* and is not a representation upon which to found an estoppel. Gillman *v.* Carbutt, 61 L. T. Rep. N. S. 281, 37 Wkly. Rep. 437.

Representations made by a building and loan association in its advertising literature and certificates of stock that stock matured after a certain number of payments, and that the latter would then be entitled to the payment of the face value of the shares, are not representations of a future fact or probability, so that estoppel cannot be predicated thereon. Williamson *v.* Syracuse Eastern Bldg., etc., Assoc., (S. C. 1901) 38 S. E. 616.

49. Union Mut. L. Ins. Co. *v.* Mowry, 96 U. S. 544, 24 L. ed. 674. See also Johnson *v.* Blair, 132 Ala. 128, 31 So. 92; Faxton *v.* Faxton, 28 Mich. 159; Elliot *v.* Whitmore, 23

tive purchaser or assignee to pay the same, or represents to him that the obligation is valid and that there is no defense to it, he is estopped to resist payment in an action by such person, who has taken the paper in reliance on his representation.[50] The representations must be outside of the face of the obligation,[51] and even though they are thus disconnected, if they are made simultaneously with the execution of the obligation, so that there is in effect but a single transaction, no

Utah 342, 65 Pac. 70, 90 Am. St. Rep. 700. And see *supra*, V, B, 1, c.

50. *Alabama.*— Wilkinson *v.* Searcy, 74 Ala. 243; Auerbach *v.* Pritchett, 58 Ala. 451; Brooks *v.* Martin, 43 Ala. 360, 94 Am. Dec. 686; Cloud *v.* Whiting, 38 Ala. 57; Plant *v.* Voegelin, 30 Ala. 160; Drake *v.* Foster, 28 Ala. 649; Clements *v.* Loggins, 2 Ala. 514.

Arkansas.— Harrison *v.* Luce, 64 Ark. 583, 43 S. W. 970.

California.— See McAfee *v.* Fisher, 64 Cal. 246, 30 Pac. 811.

Connecticut.—Feltz *v.* Walker, 49 Conn. 93; Preston *v.* Mann, 25 Conn. 118.

District of Columbia.— Howles *v.* Tanner, 21 App. Cas. 530; Cropley *v.* Eyster, 9 App. Cas. 373.

Georgia.— Smith *v.* Wood, 111 Ga. 221, 36 S. E. 649; Martin *v.* Walker, 102 Ga. 72, 29 S. E. 132; Henry *v.* McAllister, 99 Ga. 557, 26 S. E. 469.

Illinois.— International Bank *v.* Bowen, 80 Ill. 541; Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123; Heitner *v.* Linsenbarth, 90 Ill. App. 227; Casler *v.* Byers, 28 Ill. App. 128 [*affirmed* in 129 Ill. 657, 22 N. E. 507]; Litzelman *v.* Howell, 20 Ill. App. 588.

Indiana.— Krathwohl *v.* Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; Plummer *v.* Farmers' Bank, 90 Ind. 386; Reagan *v.* Hadley, 57 Ind. 509; Rose *v.* Hurley, 39 Ind. 77; Morrison *v.* Weaver, 16 Ind. 344; Wright *v.* Allen, 16 Ind. 284; Rose *v.* Teeple, 16 Ind. 37, 79 Am. Dec. 403; Rose *v.* Wallace, 11 Ind. 112; Powers *v.* Talbott, 11 Ind. 1; Paul *v.* Baugher, 8 Ind. 501. *Compare* Glass *v.* Murphy, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545.

Iowa.— Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076.

Kentucky.— Tichenor *v.* Owenboro Sav. Bank, etc., Co., 113 Ky. 275, 68 S. W. 127, 24 Ky. L. Rep. 145; Mix *v.* Fidelity Trust, etc., Co., 103 Ky. 77, 44 S. W. 393, 19 Ky. L. Rep. 1714; Crabtree *v.* Atchison, 93 Ky. 338, 20 S. W. 260, 14 Ky. L. Rep. 313; McBrayer *v.* Collins, 18 B. Mon. 833; Morrison *v.* Beckwith, 4 T. B. Mon. 73, 16 Am. Dec. 136; Lane *v.* Lockridge, 48 S. W. 975, 20 Ky. L. Rep. 1102; Blades *v.* Newman, 43 S. W. 176, 19 Ky. L. Rep. 1062; Gaines *v.* Frankfort Deposit Bank, 39 S. W. 438, 19 Ky. L. Rep. 171; Denham *v.* Somerset Banking Co., 13 Ky. L. Rep. 976.

Maine.— Tainter *v.* Winter, 53 Me. 348; Haskell *v.* Monmouth F. Ins. Co., 52 Me. 128.

Massachusetts.— See Traders' Nat. Bank *v.* Rogers, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, 36 L. R. A. 539.

Mississippi.— Hamer *v.* Johnston, 5 How. 698.

Missouri.— Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332; Jamison *v.* Griswold, 2 Mo. App. 150.

New Hampshire.— Carey *v.* Dunsmore, 58 N. H. 357; Libbey *v.* Pierce, 47 N. H. 309.

New York.— Fleischmann *v.* Stern, 90 N. Y. 110; Irving Bank *v.* Wetherald, 36 N. Y. 335; Lynch *v.* Kennedy, 34 N. Y. 151; Blair *v.* Hagemeyer, 26 N. Y. App. Div. 219, 49 N. Y. Suppl. 965; Johannessen *v.* Munroe, 9 N. Y. App. Div. 409, 41 N. Y. Suppl. 586; Baker *v.* Seely, 17 How. Pr. 297; Petrie *v.* Feeter, 21 Wend. 172; Foster *v.* Newland, 21 Wend. 94; Watson *v.* McLaren, 19 Wend. 557.

Pennsylvania.— Eldred *v.* Hazlett, 38 Pa. St. 16; Weaver *v.* Lynch, 25 Pa. St. 449, 64 Am. Dec. 713; Elliott *v.* Callan, 1 Penr. & W. 24; Ludwick *v.* Croll, 2 Yeates 464, 1 Am. Dec. 362; Buchanan *v.* Taylor, Add. 154; Grove *v.* Nes, 11 York Leg. Rec. 9. See also Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411.

Tennessee.— Simpson *v.* Moore, 5 Lea 372; Ingham *v.* Vaden, 3 Humphr. 51.

Texas.— Henry *v.* Bounds, (Civ. App. 1898) 46 S. W. 120.

Vermont.— Sargeant *v.* Sargeant, 18 Vt. 371.

Virginia.— Nicholas *v.* Austin, 82 Va. 817, 1 S. E. 132; Davis *v.* Thomas, 5 Leigh 1.

England.— *In re* Romford Canal Co., 24 Ch. D. 85, 52 L. J. Ch. 729, 49 L. T. Rep. N. S. 118.

Canada.— Perry *v.* Lawless, 5 U. C. Q. B. 514.

See 19 Cent. Dig. tit. "Estoppel," §§ 222, 224.

A party who states merely that he has no defense to a note does not thereby estop himself from setting up a defense arising subsequently, but if the note is purchased by a third person on the faith of an absolute promise to pay the same, such defense is not available. Cloud *v.* Whiting, 38 Ala. 57.

If there was no absolute promise to pay, the party will not be estopped to set up a defense arising subsequently to the representations relied on. Jennings *v.* Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373.

Representation to agent of payee.— Where one holding a note informs the maker that he holds it merely for collection, and the maker states that he will pay it, the maker, in an action on the note by the holder, is not estopped to set up a counter-claim against the payee. Stuart *v.* Harmon, 72 S. W. 365, 24 Ky. L. Rep. 1829.

51. Schnitzer *v.* Husted, 18 N. Y. Suppl. 156.

estoppel will arise.[52] The representation, to constitute an estoppel, must also be made prior to the transfer of the instrument.[53]

(B) *Validity of Signature.* A person whose name has been signed to an obligation without his authority as maker, accepter, or indorser, will be estopped to deny his liability if he so act or speak that the holder or intending purchaser is misled as to the validity of the signature, and purchases or relinquishes some right, or otherwise suffers an injury in consequence;[54] and this is true although he may not actually have intended to ratify or adopt the signature.[55]

(C) *Want, Failure, or Illegality of Consideration.* If a person liable on a security for the payment of money represents to an intending purchaser or assignee that he has no defense and will pay the obligation, he precludes himself from afterward setting up a defense of want, failure, or illegality of consideration then existing to his knowledge;[56] but if instead of an absolute promise to pay he

52. Dow *v.* Higgins, 72 Ill. App. 302; Hill *v.* Thixton, 94 Ky. 96, 23 S. W. 947, 14 Ky. L. Rep. 900; Wilson *v.* Riddler, 92 Mo. App. 335. But see Crabtree *v.* Atchison, 93 Ky. 338, 20 S. W. 260, 14 Ky. L. Rep. 313.

53. Talladega First Nat. Bank *v.* Chaffin, 118 Ala. 246, 24 So. 80; Hoover *v.* Kilander, 83 Ind. 420; Windle *v.* Canaday, 21 Ind. 248, 83 Am. Dec. 348; Jones *v.* Dorr, 19 Ind. 384, 81 Am. Dec. 406; Carter *v.* Harris, 16 Ind. 387; Eldred *v.* Hazlett, 33 Pa. St. 307; Weaver *v.* Lynch, 25 Pa. St. 449, 64 Am. Dec. 713; Ludwick *v.* Croll, 2 Yeates (Pa.) 464, 1 Am. Dec. 362. *Compare* Ingham *v.* Vaden, 3 Humphr. (Tenn.) 51.

If the note was not purchased on the faith of the representation no estoppel will arise. Black *v.* Mitchell, 14 Ind. 397; Buhrman *v.* Baylis, 14 Hun (N. Y.) 608.

54. *Connecticut.*— Salomon *v.* Hopkins, 61 Conn. 47, 23 Atl. 716.

Georgia.— Freeny *v.* Hall, 93 Ga. 706, 21 S. E. 163.

Illinois.— Hafner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123; Lizelman *v.* Howell, 20 Ill. App. 588.

Kentucky.— Rudd *v.* Matthews, 79 Ky. 479, 42 Am. Rep. 231; Forsythe *v.* Bonta, 5 Bush 547; Union Cent. L. Ins. Co. *v.* Johnson, 76 S. W. 335, 25 Ky. L. Rep. 682.

Maine.— Forsyth *v.* Day, 46 Me. 176.

Massachusetts.— See Traders' Nat. Bank *v.* Rogers, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, 36 L. R. A. 539.

New York.— Power *v.* Pinkerton, 1 E. D. Smith 30.

Rhode Island.— Crout *v.* De Wolf, 1 R. I. 393.

See 19 Cent. Dig. tit. "Estoppel," § 225.

If the representations were not relied and acted upon, the party making them will not be estopped to deny the validity of the signature. Thorn *v.* Bell, Lalor (N. Y.) 430.

The fact of having paid or recognized similar notes will not estop one from contesting his liability upon a promissory note on the ground of forgery. Cohen *v.* Teller, 93 Pa. St. 123.

An admission in relation to an obligation not produced or identified, even if unexplained, does not warrant a finding that the alleged maker or indorser has ratified the forgery of his signature or estopped himself from denying his liability. Sheller *v.* McKenney, 17 Ill. App. 185. See also Shields *v.* Bell, 19 N. J. L. 93; J. B. Watkins Land, etc., Co. *v.* Howeth, 1 Tex. Civ. App. 277, 21 S. W. 315.

55. Forsyth *v.* Day, 46 Me. 176.

56. *Alabama.*— Tapscott *v.* Gibson, 129 Ala. 503, 30 So. 23.

Arkansas.— Brown *v.* Wright, 17 Ark. 9.

Colorado.— See Ayer *v.* Younker, 10 Colo. App. 27, 50 Pac. 218.

Georgia.— Freeny *v.* Hall, 93 Ga. 706, 21 S. E. 163; Reedy *v.* Brunner, 60 Ga. 107.

Illinois.— Cullen *v.* Borders, 17 Ill. App. 334.

Indiana.— Vanderpool *v.* Brake, 28 Ind. 130; Rose *v.* Wallace, 11 Ind. 112; Powers *v.* Talbott, 11 Ind. 1; Pritchett *v.* Ahrens, 26 Ind. App. 56, 59 N. E. 42, 84 Am. St. Rep. 274; Stephenson *v.* Clayton, 14 Ind. App. 76, 42 N. E. 491.

Iowa.— French *v.* Rowe, 15 Iowa 563.

Kansas.— McCreary *v.* Parsons, 31 Kan. 447, 2 Pac. 570.

Kentucky.— Crabtree *v.* Atchison, 93 Ky. 338, 20 S. W. 260, 13 Ky. L. Rep. 321, 14 Ky. L. Rep. 313; Wells *v.* Lewis, 4 Metc. 269; Smith *v.* Stone, 17 B. Mon. 168; Short *v.* Jackson, Ky. Dec. 192; Hill *v.* Thixton, 13 Ky. L. Rep. 333.

Louisiana.— Jacobs *v.* Butler, 6 La. Ann. 274.

Michigan.— Hall *v.* Jackson, 41 Mich. 286, 2 N. W. 55.

Mississippi.— Laand *v.* Lacoste, 5 How. 471.

Missouri.— Hammett *v.* Barnum, 30 Mo. App. 289.

New York.— Jobannessen *v.* Munroe, 84 Hun 594, 32 N. Y. Suppl. 863; Fleischmann *v.* Stern, 24 Hun 265, 61 How. Pr. 124; Chamberlain *v.* Townsend, 26 Barb. 611, 7 Abb. Pr. 31; Brown *v.* Martin, 10 N. Y. St. 846.

Pennsylvania.— Wilcox *v.* Rowley, (1887) 11 Atl. 397; Edgar *v.* Kline, 6 Pa. St. 327.

South Carolina.— Carter Merchandise Co. *v.* Dickson, 39 S. C. 433, 17 S. E. 996; Lites *v.* Addison, 27 S. C. 226, 3 S. E. 214. *Compare* Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743.

Vermont.— Sargeant *v.* Sargeant, 18 Vt. 371.

merely states that he has no defense to the note, he will not be estopped from setting up a failure of consideration arising subsequently to such statement.[57]

(v) *As to Mortgages and Judgments.* A mortgagor or judgment debtor who makes a false statement, orally or in writing, to influence the assignment of the security or judgment, is estopped from taking advantage of it as against an innocent assignee who has relied thereon,[58] and the same is true of a grantee of a mortgagor who has taken subject to the mortgage.[59] So too the holder of mortgage notes who induces a purchaser to take them by representation that the mortgage is a paramount lien is estopped to assert that there is a prior mortgage.[60]

b. Admissions and Receipts — (i) *Admissions* — (a) *In General.* Admissions made with a knowledge actual or constructive of the facts, and with the intention, or reasonably calculated, to influence the conduct of another, and which have been relied and acted upon to his prejudice by that other, are conclusive against the party making them as between him and the person whose conduct he has thus influenced.[61] The admission must refer to the existence or non-existence of some

See 19 Cent. Dig. tit. "Estoppel," § 226.

The fact that a bill of exchange contains the words "value received" does not make the offering of such a bill for sale by the drawer or accepter a representation that it was accepted for value, which will estop either of them from proving the contrary, as against a party who discounts it usuriously without any inquiry into the consideration on which it was founded. Clark *v.* Loomis, 5 Duer (N. Y.) 468.

A statement that the signature "is all right" does not estop an accommodation maker from interposing the defense of usury as against the purchaser. Whedon *v.* Hogan, 8 Misc. (N. Y.) 323, 28 N. Y. Suppl. 554.

Where the directors of a bank execute a note payable to its order to make good a deficiency of assets and to enable the bank to continue business they cannot, when the assets are being collected, assert as against persons who have dealt with the bank relying on this as a security, that the note was without consideration. Skordal *v.* Stanton, 89 Minn. 511, 95 N. W. 449. See also Tecumseh Nat. Bank *v.* Chamberlain Banking House, 63 Nebr. 163, 88 N. W. 186.

57. Maury *v.* Coleman, 24 Ala. 381, 60 Am. Dec. 478; Clements *v.* Loggins, 2 Ala. 514.

58. *Indiana.*— Lane *v.* Schlemmer, 114 Ind. 296, 15 N. E. 454, 5 Am. St. Rep. 621.

Iowa.— Gillette *v.* Meredith, 103 Iowa 155, 72 N. W. 443.

Nebraska.— Viergutz *v.* Aultman, etc., Co., 46 Nebr. 141, 64 N. W. 693.

New Jersey.— Coult *v.* McCarty, 23 N. J. Eq. 126; Diercks *v.* Kennedy, 16 N. J. Eq. 210.

New York.— Weyh *v.* Boylan, 85 N. Y. 394, 39 Am. Rep. 669; Smyth *v.* Munroe, 84 N. Y. 354 [*affirming* 19 Hun 550]; Hubbard *v.* Briggs, 31 N. Y. 518; Platt *v.* Newcomb, 27 Hun 186; Schenck *v.* O'Neill, 23 Hun 209; Smyth *v.* Knickerbocker L. Ins. Co., 21 Hun 241; Smyth *v.* Lombardo, 15 Hun 415; Nichols *v.* Nussbaum, 10 Hun 214; Payne *v.* Burnham, 2 Hun 143, 4 Thomps. & C. 678; Lesley *v.* Johnson, 41 Barb. 359; Eilet *v.* Bracken, 38 N. Y. Super. Ct. 7; Rae *v.* Sawser, 9 Abb. Pr. 380, 18 How. Pr. 23; Real Estate Trust Co. *v.* Seagreave, 49 How. Pr. 489; Hills *v.* Varet, 3 N. Y. Leg. Obs. 105. See also Purdy *v.* Coar, 13 Daly 449.

Ohio.— Mack *v.* Friez, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385; Dickson *v.* Vail, 2 Cinc. Super. Ct. 103.

Pennsylvania.— Hedden's Appeal, (1889) 17 Atl. 29; Griffiths *v.* Sears, 112 Pa. St. 523, 4 Atl. 492; Leedom *v.* Lombaert, 80 Pa. St. 381; Scott *v.* Sadler, 52 Pa. St. 211.

Tennessee.— Howell *v.* Hale, 5 Lea 405.

Wisconsin.— Marr *v.* Howland, 20 Wis. 282; Cary *v.* Wheeler, 14 Wis. 281.

See 19 Cent. Dig. tit. "Estoppel," §§ 228, 229.

A mortgagor who conceals an equitable defense when applied to for information by a person intending to purchase the mortgage is estopped from setting up such defense against the innocent assignee who has been misled. Lee *v.* Kirkpatrick, 14 N. J. Eq. 264.

If the false statement was not designed to influence the assignment of the security, and was not relied upon by the person setting up the estoppel, the party making it will not be estopped thereby. Wilcox *v.* Howell, 44 Barb. (N. Y.) 396.

One merely guaranteeing the payment of a mortgage, void for usury, does not thereby make any representation of fact which would estop him from denying the validity of the mortgage. Tiedemann *v.* Ackerman, 16 Hun (N. Y.) 307.

59. *Connecticut.*— Lewis *v.* Hinman, 56 Conn. 55, 13 Atl. 143.

Illinois.— Smith *v.* Newton, 38 Ill. 230.

New York.— Brinsmade *v.* Hurst, 3 Duer 206.

Pennsylvania.— Taylor *v.* Mayer, 93 Pa. St. 42.

Vermont.— Holman *v.* Boyce, 65 Vt. 318, 26 Atl. 632, 36 Am. St. Rep. 861.

See 19 Cent. Dig. tit. "Estoppel," § 228.

A grantor cannot after conveying land estop his grantees and their successors to deny the validity of a mortgage by a certificate that it is valid and binding on the land. Purdy *v.* Coar, 109 N. Y. 448, 17 N. E. 352, 4 Am. St. Rep. 491.

60. Dodge *v.* Pope, 93 Ind. 480.

61. *Alabama.*— McCravey *v.* Remson, 19 Ala. 430, 54 Am. Dec. 194.

material fact,[62] with reference to the matter as to which the estoppel is asserted.[63] No estoppel as a rule arises from admissions made to third persons who are strangers to the controversy.[64]

(B) *As to Matters of Law.* An admission, in order to constitute an estoppel, must relate to a matter of fact, and a person will not be estopped by an admission

Colorado.— Herr *v.* Sullivan, 25 Colo. 190, 54 Pac. 637.

Connecticut.— New York State Bank *v.* Waterhouse, 70 Conn. 76, 38 Atl. 904, 66 Am. St. Rep. 82; Kinney *v.* Farnsworth, 17 Conn. 355.

Georgia.— Northington *v.* Granade, 118 Ga. 584, 45 S. E. 447; Wolff *v.* Hawes, 105 Ga. 153, 31 S. E. 425.

Illinois.— Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Jebb *v.* Sexton, 84 Ill. App. 45.

Indiana.— Ridgway *v.* Morrison, 28 Ind. 201.

Iowa.— Bower *v.* Stewart, 30 Iowa 579.

Kansas.— Thayer *v.* Martin, 9 Kan. App. 467, 61 Pac. 511.

Kentucky.— Rudd *v.* Matthews, 3 Ky. L. Rep. 286.

Louisiana.— Lachman *v.* Block, (1894) 15 So. 649.

Maine.— Stanwood *v.* McLellan, 48 Me. 275.

Maryland.— McClellan *v.* Kennedy, 8 Md. 230.

Massachusetts.— O. Sheldon Co. *v.* Cooke, 177 Mass. 441, 59 N. E. 77.

New York.— Lambertson *v.* Van Boskerck, 4 Hun 628; Geneva Mineral Spring Co. *v.* Coursey, 45 N. Y. App. Div. 268, 61 N. Y. Suppl. 98; Salters *v.* Genin, 7 Abb. Pr. 193.

Pennsylvania.— Ormsby *v.* Ihmsen, 34 Pa. St. 462.

South Carolina.— McGowan *v.* Reid, 27 S. C. 262, 3 S. E. 337.

United States.— Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74.

England.— Reeves *v.* Slater, 7 B. & C. 486, 6 L. J. K. B. O. S. 77, 1 M. & R. 265, 31 Rev. Rep. 259; Meredith *v.* Hodges, 2 B. & P. 453; Fisher *v.* Magnay, 1 D. & L. 40, 12 L. J. C. P. 276, 5 M. & G. 778, 6 Scott N. R. 588; Macgregor *v.* Rhodes, 6 E. & B. 266, 2 Jur. N. S. 834, 25 L. J. Q. B. 318, 4 Wkly. Rep. 483, 88 E. C. L. 266; Anonymous, Lofft. 82.

Canada.— Bank of British North America *v.* Gibson, 21 Ont. 613.

See 19 Cent. Dig. tit. "Estoppel," § 235.

Admissions affecting a right or title to real property will estop a party making them from asserting such right or title against one whose conduct has been influenced thereby.

Illinois.— Evanston *v.* Clark, 77 Ill. App. 234.

Mississippi.— Gentry *v.* Gamblin, 79 Miss. 437, 28 So. 809.

New York.—Pike *v.* Acker, Lalor 90; Sayles *v.* Smith, 12 Wend. 57, 27 Am. Dec. 117; Miller v. Watson, 4 Wend. 267.

North Carolina.— Miller *v.* Asheville, 112 N. C. 759, 16 S. E. 762.

Washington.— Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

Canada.— Nelson *v.* Cook, 12 U. C. Q. B. 22.

See 19 Cent. Dig. tit. "Estoppel," § 236.

Admissions, whether by acts or declarations, which come under an estoppel in pais, consist of those, on the faith of which, a person, properly relying upon them, has been induced by the party making them, to act differently from what presumptively he otherwise would have done. Having been the means designedly of leading others to a particular course of action, they cannot afterward be conscientiously retracted, by the one who made them. Kinney *v.* Farnsworth, 17 Conn. 355.

Where a party has led another to give credit to a third person by an admission of funds belonging to the latter, and a promise to assume the liability, he is estopped to deny that he has such funds. Hiltz *v.* Scully, 1 Cinc. Super. Ct. 555.

Where a person has procured another to make an admission for a particular purpose, he having knowledge of the actual facts, he cannot, in a suit against the party making the admission, insist upon it as an estoppel. Davis *v.* Sanders, 11 N. H. 259.

The mere payment of part of a debt by one not legally bound, which does not prejudice any one, will not estop him to deny liability for the balance. O'Malley *v.* Wagner, 76 S. W. 356, 25 Ky. L. Rep. 810.

The fact that an admission is made under oath does not make it conclusive as an estoppel if it would not otherwise operate as such. Smith *v.* Ferris, 1 Daly (N. Y.) 18.

Judicial admissions, made in the interest of a person not a party to the suit in which they are made, operate between the parties in interest like stipulations *pour autrui* in contracts, and they cannot be recalled by the party making them, after they have been acted on by the party in whose favor they are made. Lachman *v.* Block, (La. 1894) 15 So. 649.

62. Illinois Cent. R. Co. *v.* Phelps, 4 Ill. App. 238. See also Troy *v.* Rogers, 113 Ala. 131, 20 So. 999. And see *supra*, V, A, 4, b.

63. Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365 [*reversing* 9 Kan. App. 301, 61 Pac. 327].

64. *California.*— Moore *v.* Boyd, 74 Cal. 167, 15 Pac. 670.

Georgia.— Harvey *v.* West, 87 Ga. 553, 13 S. E. 693.

New York.— Pennell *v.* Hinman, 7 Barb. 644; Catlin *v.* Grote, 4 E. D. Smith 296.

Vermont.— Robinson *v.* Hawkins, 38 Vt. 693.

Wisconsin.— Husbrook *v.* Strawser, 14 Wis. 403.

See 19 Cent. Dig. tit. "Estoppel," § 240. And see *infra*, V, C, 1, a.

as to the law;[65] and the same rule applies to admissions as to the legal effect of a contract.[66]

(II) *Receipts.* Receipts are not *per se* estoppels, but are open to explanation between the original parties and others not acting to their injury upon the faith of them;[67] but to the extent of such action and any consequent injury parties are conclusively estopped from disputing the validity of their own writings made for the purpose of inducing action.[68]

c. Renunciation, Disavowal, or Disclaimer of Title or Right. One who, by his renunciation or disclaimer of a right or title, has induced another to believe and act thereon, is estopped afterward to assert such right or title.[69] Such an

65. English *v.* Dycus, 8 Ky. L. Rep. 331; Brewster *v.* Striker, 2 N. Y. 19; Crawford *v.* Lockwood, 9 How. Pr. (N. Y.) 547. But see Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74.

An admission of a mixed conclusion of law and fact will not estop the party making it. Daub *v.* Northern Pac. R. Co., 18 Fed. 625.

66. Boston Hat Manufactory *v.* Messinger, 2 Pick. (Mass.) 223; Crawford *v.* Lockwood, 9 How. Pr. (N. Y.) 547; Skavdale *v.* Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

67. *California.*— Pugh *v.* Porter Bros. Co., 118 Cal. 628, 50 Pac. 772.

Illinois.— Needles *v.* Hanifan, 11 Ill. App. 303.

Kentucky.— Peddicord *v.* Hill, 4 T. B. Mon. 370.

Louisiana.— Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860.

Massachusetts.— Shepard, etc., Lumber Co. *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 68 Am. St. Rep. 446, 41 L. R. A. 617.

Missouri.— Carroll *v.* People's R. Co., 14 Mo. App. 490.

New Hampshire.— Brown *v.* Massachusetts Mut. L. Ins. Co., 59 N. H. 298, 47 Am. Rep. 205.

New Jersey.— Kuhl *v.* Jersey City, 23 N. J. Eq. 84; Bird *v.* Davis, 14 N. J. Eq. 467.

New York.— Baker *v.* Union Mut. L. Ins. Co., 43 N. Y. 283 [*reversing* 6 Abb. Pr. N. S. 144]; Monell *v.* Northern Cent. R. Co., 16 Hun 585; Sanford *v.* Sanford, 2 Thomps. & C. 641; Balz *v.* Shaw, 11 Misc. 643, 32 N. Y. Suppl. 791.

Pennsylvania.—Atkins *v.* Payne, 190 Pa. St. 5, 42 Atl. 378; Schroeder *v.* Waters, 3 Pa. Dist. 775, 15 Pa. Co. Ct. 561.

Tennessee.— Fulton *v.* Davidson, 3 Heisk. 614.

Texas.—Allen *v.* Baker, 39 Tex. 220.

United States.— Harris *v.* Davis, 44 Fed. 172.

England.— Skaife *v.* Jackson, 3 B. & C. 421, 5 D. & R. 290, 10 E. C. L. 196; Holding *v.* Elliott, 5 H. & N. 117, 29 L. J. Exch. 134, 1 L. T. Rep. N. S. 381, 8 Wkly. Rep. 192; Bowes *v.* Foster, 2 H. & N. 779, 4 Jur. N. S. 95, 27 L. J. Exch. 262, 6 Wkly. Rep. 257 [*disapproving* Alner *v.* George, 1 Campb. 392].

Canada.— Western Assur. Co. *v.* Provincial Ins. Co., 5 Ont. App. 190; Mason *v.* Bickle, 2 Ont. App. 291; Bigelow *v.* Staley, 14 U. C. C. P. 276; Agricultural Invest. Co. *v.* Federal Bank, 45 U. C. Q. B. 214; Horseman *v.* Grand Trunk R. Co., 31 U. C. Q. B. 535 [*affirming* 30 U. C. Q. B. 130]; McBride *v.* Silverthorne, 11 U. C. Q. B. 545.

See 19 Cent. Dig. tit. "Estoppel." § 241.

A receipt is an admission only; and the general rule is that an admission, although evidence against the person who made it and those claiming under him, is not conclusive evidence except as to the person who may have been induced by it to alter his condition. A receipt may therefore be contradicted or explained. Graves *v.* Key, 3 B. & Ad. 313, 23 E. C. L. 143 [*citing* Heane *v.* Rogers, 9 B. & C. 577, 17 E. C. L. 260; Wyatt *v.* Hertford, 3 East 147; Straton *v.* Rastall, 2 T. R. 366].

Evidence only.— In Farrar *v.* Hutchinson, 9 A. & E. 641, 642, 8 L. J. Q. B. 107, 1 P. & D. 437, 2 W. W. & H. 106, 36 E. C. L. 340, Lord Denman said: "It appears to us that in all cases a receipt signed by a party, . . . and produced afterwards to affect him, is evidence, but evidence only, and capable of being explained."

Acknowledgment of receipt of consideration: In contract see *supra*, IV, B, 4, b. In deed see *supra*, III, D, 2, a.

Parol evidence to vary receipt see EVIDENCE.

68. *Illinois.*— Heidenbluth *v.* Rudolph, 152 Ill. 316, 38 N. E. 930; Long *v.* Long, 30 Ill. App. 559 [*affirmed* in 132 Ill. 72, 23 N. E. 591].

New Jersey.— Moore *v.* Vail, 13 N. J. Eq. 295.

New York.—Voorhis *v.* Olmstead, 66 N. Y. 113 [*affirming* 3 Hun 744, 6 Thomps. & C. 172]; Odell *v.* Montross, 6 Hun 155; Gillespie *v.* Carpenter, 1 Rob. 65.

Ohio.— Ensel *v.* Levy, 46 Ohio St. 255, 19 N. E. 597; Miller *v.* Sullivan, 26 Ohio St. 639 [*affirming* 1 Cinc. Super. Ct. 271]; Young *v.* Steamboat Virginia, 2 Handy 137, 12 Ohio Dec. (Reprint) 369.

Pennsylvania.— Ebert *v.* Johns, 206 Pa. St. 395, 55 Atl. 1064; Atkins *v.* Payne, 190 Pa. St. 5, 42 Atl. 378 [*reversing* 9 Pa. Dist. 401]; Skinner's Appeal, (1888) 15 Atl. 435.

United States.— Berwind *v.* Schultz, 25 Fed. 912.

See 19 Cent. Dig. tit. "Estoppel," § 241.

Estoppel by: Bill of lading see CARRIERS, 6 Cyc. 418. Warehouse receipt see WAREHOUSEMEN.

69. *Alabama.*— Hoots *v.* Williams, 116 Ala. 372, 22 So. 497.

Arkansas.— Shields *v.* Smith, 37 Ark. 47.

estoppel may arise from parol statements and declarations,[70] from a written

California.— Wallace *v.* Dodd, 136 Cal. 210, 68 Pac. 693.

District of Columbia.— Gilmore *v.* Devlin, McArthur & M. 306.

Florida.— Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167.

Illinois.— Robbins *v.* Moore, 129 Ill. 30, 21 N. E. 934; Keys *v.* Test, 33 Ill. 316.

Iowa.— Nodle *v.* Hawthorne, (1899) 77 N. W. 1062; Stivers *v.* Gardner, 101 Iowa 85, 69 N. W. 1140.

Kentucky.— Wimmer *v.* Ficklin, 14 Bush 193; Amyx *v.* Hurt, 68 S. W. 420, 24 Ky. L. Rep. 291; Gartland *v.* Connor, 59 S. W. 29, 22 Ky. L. Rep. 920.

Maine.— Morton *v.* Hodgdon, 32 Me. 127.

Michigan.— Beatty *v.* Sweeney, 26 Mich. 217.

Missouri.— Huntsucker *v.* Clark, 12 Mo. 333; Ford *v.* Fellows, 34 Mo. App. 630.

Nebraska.— Bankers' Bldg., etc., Assoc. *v.* Thomas, (1902) 92 N. W. 1044; Frenzer *v.* Dufrene, 58 Nebr. 432, 78 N. W. 719.

North Carolina.— Devereux *v.* Burgwyn, 40 N. C. 351.

Pennsylvania.— Gratz *v.* Beates, 45 Pa. St. 495; Beaver Bldg., etc., Assoc. *v.* Badders, 5 Pa. Super. Ct. 462.

South Carolina.— Cox *v.* Buck, 3 Strobh. 367; Jackson *v.* Inabnit, 2 Hill Eq. 411.

Tennessee.— Long *v.* Gilbert, (Ch. App. 1900) 59 S. W. 414.

Texas.— Mayer *v.* Ramsey, 46 Tex. 371.

Vermont.— Downer *v.* Flint, 28 Vt. 527.

United States.— Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

See 19 Cent. Dig. tit. "Estoppel," §§ 173-179.

It must appear that when the party sought to be estopped made the declarations he was apprised of the true state of his title; that he made the declarations with the intention to deceive, or with such culpable negligence as amounts to constructive fraud; that the other party relied upon such declarations, and will be injured by allowing their truth to be disproved; and that such other party was not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge. Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157. See also *supra*, V, A, 4.

Retraction of disclaimer.— One who has denied owning certain property may afterward retract such disclaimer, provided no one is injured thereby. Frith *v.* Siler, 32 Ga. 665. See also Chicago Sanitary Dist. *v.* Cook, 169 Ill. 184, 48 N. E. 461, 61 Am. St. Rep. 161, 39 L. R. A. 369 [*affirming* 67 Ill. App. 286].

A refusal to accept a right or title estops the party so refusing from subsequently asserting the same, under a change of circumstances, to the prejudice of an adverse party. White *v.* Florence Bridge Co., 4 Ala. 464; Joseph *v.* Davenport, 116 Iowa 268, 89 N. W. 1081.

A prior grantee by consenting to and aiding in a new conveyance will be estopped in equity from setting up his prior legal title against the defective title of the second grantee. Dennison *v.* Ely, 1 Barb. (N. Y.) 610.

One who represents to another that he has parted with all interest in land to a third person, in reliance on which the other purchases the property from the third person, is estopped to assert title against the grantee. Tucker *v.* Pullman, (Tenn. Ch. App. 1900) 58 S. W. 873.

A disclaimer of title to property seized or sold under judicial process estops the party from subsequently asserting title thereto.

California.— Baruhart *v.* Fulkerth, 90 Cal. 157, 27 Pac. 71.

Idaho.— Lick *v.* Munro, 8 Ida. 510, 69 Pac. 285.

Illinois.— Kinnear *v.* Mackey, 85 Ill. 96; Curyea *v.* Berry, 84 Ill. 600; Mateer *v.* Green, 31 Ill. App. 467.

Michigan.— Sebright *v.* Moore, 33 Mich. 92.

Minnesota.— See Tyler *v.* Hanscom, 28 Minn. 1, 8 N. W. 825.

Nebraska.— Kirkendall *v.* Davis, 41 Nebr. 285, 59 N. W. 915.

New York.— Maloney *v.* Horan, 53 Barb. 29.

See 19 Cent. Dig. tit. "Estoppel," § 178.

Election not abandonment.— Where defendant's decedent bound himself and his heirs to convey land to plaintiff, and on his death without conveying his heirs sued to quiet title to the land in which plaintiff appeared and disclaimed interest, she was not prevented thereby from maintaining an action for breach of the contract, such disclaimer being a mere election not to ask for a specific performance, and not an abandonment of her claim for damages. Doddridge *v.* Doddridge, 24 Ind. App. 60, 56 N. E. 112.

The surrender of a certificate of entry on demand of the officer of the government and the return of the money paid does not work an estoppel to deny that the cancellation of the certificate was legally made. Ives *v.* Ely, 57 Mich. 569, 24 N. W. 812.

70. *Alabama.*— Grace *v.* McKissack, 49 Ala. 163; Miller *v.* Jones, 26 Ala. 247.

Colorado.— Birch *v.* Steppler, 11 Colo. 400, 18 Pac. 530.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Georgia.— Rabun *v.* Rabun, 61 Ga. 647.

Illinois.— Wade *v.* Bunn, 84 Ill. 117; Keys *v.* Test, 33 Ill. 316; Stout *v.* Ellison, 15 Ill. App. 222.

Indiana.— Little *v.* Koerner, (App. 1902) 63 N. E. 766. *Compare* Botts *v.* Fultz, 70 Ind. 396.

Kentucky.— Nunnally *v.* White, 3 Metc. 584.

Michigan.— Cook *v.* Finkler, 9 Mich. 131.

Mississippi.— Dickson *v.* Green, 24 Miss. 612.

Nebraska.—Blodgett *v.* McMurtry, 34 Nebr. 782, 52 N. W. 706.

New Jersey.— Jennings *v.* Dixey, 36 N. J. Eq. 490.

instrument other than a specialty,[71] or from testimony or deposition;[72] and a representation as to the construction and effect of an instrument of obscure and doubtful character is equally good as an estoppel, if believed and acted upon, as is a disclaimer of title to a person about to purchase.[73]

2. Implied Misrepresentation — a. Silence in General. To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence.[74] In other words, when the silence is of such a character and under such

New York.— Creque *v.* Sears, 17 Hun 123; Tisdale *v.* Grant, 12 Barb. 411.

Pennsylvania.—Smith *v.* McNeal, 68 Pa. St. 164.

Tennessee.— Boles *v.* Smith, 1 Tenn. Cas. 149, Thomps. Cas. 214.

Texas.— Chapman *v.* McLemore, 68 Tex. 654, 5 S. W. 682.

Vermont.— Greene *v.* Smith, 57 Vt. 268; Downer *v.* Flint, 28 Vt. 527.

See 19 Cent. Dig. tit "Estoppel," § 174.

71. Beltran *v.* Leche, 50 La. Ann. 385, 23 So. 203; Morey *v.* Orford Bridge, Smith (N. H.) 91; Dovale *v.* Ackerman, 60 Hun (N. Y.) 584, 15 N. Y. Suppl. 196; Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618.

72. Cooley *v.* Steele, 2 Head (Tenn.) 605; McCoy *v.* Pearce, 1 Tenn. Cas. 87, Thomps. Cas. (Tenn.) 145.

73. Mattoon *v.* Young, 2 Hun (N. Y.) 559, 5 Thomps. & C. (N. Y.) 109.

74. *Alabama.*— Thornton *v.* Savage, 120 Ala. 449, 25 So. 27; Colbert *v.* Daniel, 32 Ala. 314.

Arkansas.— Simpson *v.* Biffle, 63 Ark. 289, 38 S. W. 345; Lafargue *v.* Markley, 55 Ark. 423, 18 S. W. 542.

California.— Randol *v.* Rowe, (1896) 44 Pac. 1068; Deane *v.* Gray Bros., etc., Co., 109 Cal. 433, 42 Pac. 443; Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Stockman *v.* Riverside Land, etc., Co., 64 Cal. 57, 28 Pac. 116.

Colorado.— Great West. Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Ayer *v.* Younker, 10 Colo. App. 27, 50 Pac. 218.

Connecticut.— Taylor *v.* Ely, 25 Conn. 250; Giddings *v.* Emerson, 24 Conn. 538; Hickox *v.* Parmelee, 21 Conn. 86.

Florida.— Hollingsworth *v.* Handcock, 7 Fla. 338.

Georgia.— Palmer *v.* McNatt, 97 Ga. 435, 25 S. E. 406.

Illinois.— Chester *v.* Wabash, etc., R. Co., 182 Ill. 382, 55 N. E. 524; McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37; Mullaney *v.* Duffy, 145 Ill. 559, 33 N. E. 750; Hill *v.* Blackwelder, 113 Ill. 283; Noble *v.* Chrisman, 88 Ill. 186; Commercial Ins. Co. *v.* Ives, 56 Ill. 402; Smith *v.* Newton, 38 Ill. 230.

Indiana.— Farmers' Bank *v.* Orr, 25 Ind. App. 71, 55 N. E. 35.

Kansas.— Sullivan *v.* Davis, 29 Kan. 28; Donnell *v.* Reese, 6 Kan. App. 563, 51 Pac. 584.

Kentucky.— Wyeth *v.* Renz-Bowles Co., 66 S. W. 825, 23 Ky. L. Rep. 2337; Watson *v.* Prather, (1901) 65 S. W. 439; Milby *v.* Akridge, 59 S. W. 18, 22 Ky. L. Rep. 867; Newell *v.* Dunnegan, 1 Ky. L. Rep. 354. See also Dennis *v.* Warder, 3 B. Mon. 173.

Maine.— Bonney *v.* Greenwood, 96 Me. 335, 52 Atl. 786; Leavitt *v.* Fairbanks, 92 Me. 521, 43 Atl. 115; Abbot *v.* Hermon Third School Dist., 7 Me. 118; Hayden *v.* Madison, 7 Me. 76.

Massachusetts.—Oliver Ditson Co. *v.* Bates, 181 Mass. 455, 63 N. E. 908, 92 Am. St. Rep. 424, 57 L. R. A. 289; Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347; Bragg *v.* Boston, etc., R. Corp., 9 Allen 54; Cambridge Sav. Inst. *v.* Littlefield, 6 Cush. 210; Holbrook *v.* Burt, 22 Pick. 546.

Michigan.— Belding Mfg. Co. *v.* Drury, 111 Mich. 41, 69 N. W. 77.

Mississippi.— Staton *v.* Bryant, 55 Miss. 261.

Missouri.— Anderson *v.* Baumgertner, 27 Mo. 80; Farley *v.* Pettes, 5 Mo. App. 262.

Montana.— Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590.

Nebraska.— Columbus State Bank *v.* Carrig, (1902) 92 N. W. 324; Smith *v.* White, 62 Nebr. 56, 86 N. W. 930; Scharman *v.* Scharman, 38 Nebr. 39, 56 N. W. 704.

New Hampshire.— Allen *v.* Shaw, 61 N. H. 95; Manning *v.* Cogan, 49 N. H. 331; Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

New Jersey.— Borden *v.* Hutchinson, (Ch. 1901) 49 Atl. 1088; Pressey *v.* H. B. Smith Mach. Co., 45 N. J. Eq. 872, 19 Atl. 618; Ross *v.* Elizabeth-Town, etc., R. Co., 2 N. J. Eq. 422.

New Mexico.— Trambley *v.* Luterman, 6 N. M. 15, 27 Pac. 312.

New York.— Ackerman *v.* True, 175 N. Y. 353, 67 N. E. 629, 13 N. Y. Annot. Cas. 206 [*reversing* 71 N. Y. App. Div. 143, 75 N. Y. Suppl. 695]; Mattes *v.* Frankel, 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804 [*affirming* 65 Hun 203, 20 N. Y. Suppl. 145]; New York Rubber Co. *v.* Rothery, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822; Hamlin *v.* Sears, 82 N. Y. 327; Viele *v.* Judson, 82 N. Y. 32 [*overruling* Costello *v.* Meade, 55 How. Pr. 356]; Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191 [*affirming* 39 Barb. 311]; Krantz Mfg. Co. *v.* Gould Storage Battery Co., 83 N. Y. App. Div. 133, 82 N. Y. Suppl. 474; Syracuse Solar Salt Co. *v.* Rome, etc., R. Co., 67 Hun 153, 22 N. Y. Suppl. 321; Hall *v.* Fisher, 9 Barb. 17; Giraud *v.* Giraud, 58 How. Pr. 175.

circumstances that it would become a fraud upon the other party to permit the

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746; Francis *v.* Edwards, 77 N. C. 271; West *v.* Tilghman, 31 N. C. 163.

Ohio.— Deiringer *v.* Carlisle Bldg. Assoc., 2 Ohio S. & C. Pl. Dec. 543.

Pennsylvania.— Paul *v.* Kunz, 188 Pa. St. 504, 41 Atl. 610 [*citing In re* Huston, 167 Pa. St. 217, 31 Atl. 553; Danner's Appeal, 148 Pa. St. 159, 23 Atl. 1057]; Danville, etc., R. Co. *v.* Kase, (1898) 39 Atl. 301; Cambria Iron Co. *v.* Tomb, 48 Pa. St. 387; Larkins' Appeal, 38 Pa. St. 457; Folk *v.* Beidelman, 6 Watts 339; Robinson *v.* Justice, 2 Penr. & W. 19, 21 Am. Dec. 407; Bucher *v.* Meixell, 5 Pa. Dist. 375; Mecouch *v.* Loughery, 12 Phila. 416 [*affirmed* in 37 Leg. Int. 341].

South Carolina.—Duncan *v.* Richardson, 64 S. C. 301, 42 S. E. 108; Scaife *v.* Thomson, 15 S. C. 337.

Texas.— Stanley *v.* Schwalby, 85 Tex. 348, 19 S. W. 264; Powers *v.* McKnight, (Civ. App. 1903) 73 S. W. 549; Burns *v.* True, 5 Tex. Civ. App. 74, 21 S. W. 338.

Utah.— Norton *v.* Tufts, 19 Utah 470, 57 Pac. 409; Clark *v.* Kirby, 18 Utah 258, 55 Pac. 372.

Vermont.— Flint *v.* Babbitt, 59 Vt. 190, 9 Atl. 364; Boynton *v.* Braley, 54 Vt. 92; Strong *v.* Ellsworth, 26 Vt. 366.

West Virginia.— Cautley *v.* Morgan, 51 W. Va. 304, 41 S. E. 201.

Wisconsin.— Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904; Sanger *v.* Guenther, 73 Wis. 354, 41 N. W. 436; Fox River Flour, etc., Co. *v.* Kelley, 70 Wis. 287, 35 N. W. 744.

United States.— Wiser *v.* Lawler, 189 U. S. 260, 23 S. Ct. 624, 47 L. ed. 802 [*affirming* (Ariz. 1900) 62 Pac. 695]; Philadelphia, etc., R. Co. *v.* Dubois, 12 Wall. 47, 20 L. ed. 265; Given *v.* Times-Republican Printing Co., 114 Fed. 92, 52 C. C. A. 40; Manistee First Nat. Bank *v.* Marshall, etc., Bank, 83 Fed. 725, 28 C. C. A. 42; Hook *v.* Ayers, 80 Fed. 978, 26 C. C. A. 287; Indianapolis Water Co. *v.* American Strawboard Co., 57 Fed. 1000; Simmons *v.* Taylor, 23 Fed. 849; Alvord *v.* U. S., 8 Ct. Cl. 364.

England.— Coventry *v.* Great Eastern R. Co., 11 Q. B. D. 776, 52 L. J. Q. B. 694, 49 L. T. Rep. N. S. 776; Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31 L. T. Rep. N. S. 785, 23 Wkly. Rep. 747; McKenzie *v.* British Linen Co., 6 App. Cas. 82, 44 L. T. Rep. N. S. 431, 29 Wkly. Rep. 477 [*approving dictum* of Parke, B., in Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114]; Gregg *v.* Wells, 10 A. & E. 90, 2 P. & D. 296, 37 E. C. L. 71; Pickard *v.* Sears, 6 A. & E. 469, 2 N. & P. 488, 33 E. C. L. 257.

See 19 Cent. Dig. tit. "Estoppel," § 285.

For application of rule in cases of silence as to statements made by another see the following cases:

Alabama.— Collier *v.* White, 97 Ala. 615, 12 So. 385.

Connecticut.—Main *v.* Brown, 56 Conn. 345, 75 Atl. 743.

Indiana.— Anderson *v.* Hubble, 93 Ind. 570, 47 Am. Rep. 394.

Iowa.— George *v.* Swafford, 75 Iowa 491, 39 N. W. 804.

Kentucky.— Ballinger *v.* Worley, 1 Bibb 195.

Michigan.— Manistee First Nat. Bank *v.* Marshall, etc., Bank, 108 Mich. 114, 65 N. W. 604; Michigan Paneling Mach., etc., Co. *v.* Parsell, 38 Mich. 475.

New Jersey.— Carpenter *v.* Carpenter, 25 N. J. Eq. 194; Security Trust, etc., Co. *v.* Burleigh, (Ch. 1896) 34 Atl. 14.

New York.— Blanchard *v.* Evans, 55 N. Y. Super. Ct. 543.

North Carolina.— Guy *v.* Manuel, 89 N. C. 83.

Pennsylvania.— Pettebone *v.* Beardslee, 3 Kulp 406.

Texas.— Powers *v.* McKnight, (Civ. App. 1903) 73 S. W. 549.

Virginia.— Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500; Allen *v.* Winston, 1 Rand. 65.

Wisconsin.— Hinton *v.* Wells, 45 Wis. 268.

Canada.— Turner *v.* Wilson, 23 U. C. C. P. 87.

See 19 Cent. Dig. tit. "Estoppel," § 286.

The true test is whether or not the circumstances are such as to impose upon one in equity and good conscience the duty to speak. As to when this duty devolves, there is not and from the nature of the case cannot be any established or uniform rules. It depends to a great extent upon the circumstances attending each particular case, and it is rare that two are alike. Generally speaking, if a person is present at the time of a transaction, he must speak. or he will be estopped. If absent his silence or other conduct must at least be of a nature to have an obvious and direct tendency to cause the omission or the step taken. Ayer *v.* Younker, 10 Colo. App. 27, 50 Pac. 218.

The estoppel requires, as to the person against whom it is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure. Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904. See also Viele *v.* Judson, 82 N. Y. 32; Bragg *v.* Boston, etc., R. Corp., 9 Allen (Mass.) 54; Great Falls Co. *v.* Worster, 15 N. H. 412.

The party maintaining silence must have known that someone was relying thereon, and was either acting or about to act as he would not have done had the truth been told. Scharman *v.* Scharman, 38 Nebr. 39, 56 N. W. 704; Allen *v.* Shaw, 61 N. H. 95; Viele *v.* Judson, 82 N. Y. 32 [*overruling* Cotello *v.* Meade, 55 How. Pr. (N. Y.) 356].

Fraud or bad faith is a necessary ingredient in misrepresentation by passivity. North America Ins. Co. *v.* Miller, 24 Ohio Cir. Ct. 667.

The fact that it is real estate that is concerned, the title to which and the rights in

party who has kept silent to deny what his silence has induced the other to believe and act upon it will operate as an estoppel.[75]

b. Failure to Assert Title or Right — (i) *General Rule.* Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights and fails to assert his title or right, he will be estopped afterward to assert it;[76] but it must appear that it was his duty to speak, and that his silence or passive conduct actually misled the other to his prejudice.[77]

which are generally to be affected by instruments in writing formally executed, does not prevent the operation of the estoppel. De Herques *v.* Marti, 85 N. Y. 609. See also Mattes *v.* Frankel, 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804. See, generally, Frauds, Statute of.

75. Staton *v.* Bryant, 55 Miss. 261; Lee *v.* Kirkpatrick, 14 N. J. Eq. 264. See also Sullivan *v.* Connell, 73 Fed. 130, 19 C. C. A. 400.

76. *Alabama.*— Stephens *v.* Head, 119 Ala. 511, 24 So. 738; Ashurst *v.* Ashurst, 119 Ala. 219, 24 So. 760; Sanford *v.* Hammer, 115 Ala. 406, 22 So. 117; Lindsay *v.* Cooper, 94 Ala. 170, 11 So. 325, 33 Am. St. Rep. 105, 16 L. R. A. 813 [*distinguishing* Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745]; Pool *v.* Harrison, 18 Ala. 514.

Arkansas.— Bramble *v.* Kingsbury, 39 Ark. 131.

Colorado.— Arapahoe County *v.* Denver, 30 Colo. 13, 69 Pac. 586; Sliney *v.* Davis, 11 Colo. App. 480, 53 Pac. 686.

Georgia.—Harris *v.* Amoskeag Lumber Co., 101 Ga. 641, 29 S. E. 302. See also Ashley *v.* Cook, 109 Ga. 653, 35 S. E. 89.

Illinois.— Rice *v.* Gould, 73 Ill. App. 538; Beaver *v.* Danville Shirt Co., 69 Ill. App. 320.

Indiana.—De Pauw Plate Glass Co. *v.* Alexandria, 152 Ind. 443, 52 N. E. 608; Galvin *v.* Britton, 151 Ind. 1, 49 N. E. 1064; Roach *v.* Clark, 28 Ind. App. 250, 62 N. E. 634; Stambrough *v.* Stambrough, 27 Ind. App. 25, 60 N. E. 714.

Kentucky.— Lawson *v.* Biller, 88 Ky. 599, 11 S. W. 602, 11 Ky. L. Rep. 115, 318; Churchill *v.* Hohn, 45 S. W. 498, 20 Ky. L. Rep. 200; Wilson *v.* Scott, 15 S. W. 130, 12 Ky. L. Rep. 693.

Louisiana.— Ledoux *v.* Lavedan, 52 La. Ann. 311, 27 So. 196; Jones *v.* Jones, 51 La. Ann. 636, 25 So. 368.

Michigan.— Lucas *v.* Parks, 84 Mich. 202, 47 N. W. 550; Ford *v.* Loomis, 33 Mich. 121.

Minnesota.— Tousley *v.* Board of Education, 39 Minn. 419, 40 N. W. 509.

Missouri.— Price *v.* Hallett, 138 Mo. 561, 38 S. W. 451; Oliver *v.* Beard, 72 Mo. App. 181; State *v.* Staed, 65 Mo. App. 487.

New Jersey.— Ruckelshaus *v.* Borcherling, 54 N. J. Eq. 344, 34 Atl. 977.

New York.— Jones *v.* Duerk, 25 N. Y. App. Div. 551, 49 N. Y. Suppl. 987; Matter of Public Parks Dep't, 60 Hun 576, 14 N. Y. Suppl. 347; McAllister *v.* Stumpp, etc., Co., 25 Misc. 438, 55 N. Y. Suppl. 693.

North Carolina.— Burns *v.* Womble, 131 N. C. 173, 42 S. E. 573; Sasser *v.* Jones, 38 N. C. 19.

Rhode Island.— Randall *v.* Rhode Island Lumber Co., 20 R. I. 625, 40 Atl. 763.

Tennessee.— Dewey *v.* Goodman, 107 Tenn. 244, 64 S. W. 45; Tennessee Coal, etc., R. Co. *v.* McDowell, 100 Tenn. 565, 47 S. W. 153; Nixon *v.* Russell, (Ch. App. 1901) 64 S. W. 297; Call *v.* Cozart, (Ch. App. 1898) 48 S. W. 312; Hale *v.* Dykes, (Ch. App. 1897) 42 S. W. 64.

Utah.— Murphy *v.* Ganey, 23 Utah 633, 66 Pac. 190.

Vermont.— Montpelier, etc., R. Co. *v.* Coffrin, 52 Vt. 17.

Washington.— *In re* Alfstad, 27 Wash. 175, 67 Pac. 593.

United States.— Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167; The New York Cent. No. 19, 127 Fed. 473; Cowley *v.* Spokane, 99 Fed. 840; Robb *v.* Day, 90 Fed. 337, 33 C. C. A. 84; Kuhn *v.* Morrison, 78 Fed. 16, 23 C. C. A. 619; Muse *v.* Arlington Hotel Co., 68 Fed. 637; Caulk *v.* Pace, 53 Fed. 709, 3 C. C. A. 631.

England.— De Bussche *v.* Alt, 8 Ch. D. 286, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370.

Canada.—*Re* Shaver, 3 Ch. Chamb. (U. C.) 379.

See 19 Cent. Dig. tit. "Estoppel," § 183 *et seq.*

77. *Alabama.*— Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888.

Arkansas.— Watson *v.* Murray, 54 Ark. 499, 16 S. W. 293.

California.— Newhall *v.* Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673, 64 Pac. 250.

Colorado.— Lower Latham Ditch Co. *v.* Loudon Irrigating Canal Co., 27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80.

Illinois.— Sullivan *v.* Tichenor, 179 Ill. 97, 53 N. E. 561; Peadro *v.* Carriker, 168 Ill. 570, 48 N. E. 102; Tillotson *v.* Mitchell, 111 Ill. 518.

Indiana.—Carrico *v.* Shepherd, 26 Ind. App. 207, 59 N. E. 347.

Iowa.— Gwynn *v.* Turner, 18 Iowa 1.

Kentucky.— Robertson *v.* Robertson, 72 S. W. 813, 24 Ky. L. Rep. 2020.

Michigan.— Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84.

Missouri.— Dameron *v.* Jamison, 143 Mo. 483, 45 S. W. 258; Ingals *v.* Ferguson, 138 Mo. 358, 39 S. W. 801; Bright *v.* Miller, 95 Mo. App. 270, 68 S. W. 1061.

Montana.— Griswold *v.* Boley, 1 Mont. 545.

New Hampshire.— Watkins *v.* Peck, 13 N. H. 360, 40 Am. Dec. 156.

New Jersey.— Philhower *v.* Todd, 11 N. J. Eq. 312.

(II) *Permitting Sale or Mortgage of Property* — (A) *In General* — (1) Real Property. An owner of property who stands by and sees a third person selling or mortgaging it under claim of title without asserting his own title or giving the purchaser or mortgagee any notice thereof is estopped, as against such purchaser or mortgagee, from afterward asserting his title.[78] To constitute this estoppel it is necessary that the subject-matter of the sale or mortgage be some-

New York.— Goldschmid *v.* New York, 14 N. Y. App. Div. 135, 43 N. Y. Suppl. 447; Chapman *v.* Syracuse Rapid Transit R. Co., 25 Misc. 626, 56 N. Y. Suppl. 250; Giraud *v.* Giraud, 58 How. Pr. 175.

Pennsylvania.— Lehman *v.* Murtoff, 7 Pa. Super. Ct. 485.

Tennessee.— Borches *v.* Arbuckle, 111 Tenn. 498, 78 S. W. 266.

Texas.— Soell *v.* Hadden, 85 Tex. 182, 19 S. W. 1087; Huff *v.* Maroney, 23 Tex. Civ. App. 465, 56 S. W. 754; Stanger *v.* Dorsey, 22 Tex. Civ. App. 573, 55 S. W. 129; Neal *v.* Minor, (Civ. App. 1894) 26 S. W. 882; Wilderman *v.* Harrington, 2 Tex. App. Civ. Cas. § 820.

Utah.— Kimball *v.* Salisbury, 19 Utah 161, 56 Pac. 973.

Virginia.— Chesapeake, etc., R. Co. *v.* Walker, 100 Va. 69, 40 S. E. 633, 914; Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

United States.— Barrett *v.* Turn City Power Co., 118 Fed. 861; Coleman *v.* Peshtigo Lumber Co., 30 Fed. 317; Diebolt *v.* The Chester Hair, 4 Fed. 571.

See also 19 Cent. Dig. tit. "Estoppel," § 183 *et seq.*

78. *Alabama.*— Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Steele *v.* Adams, 21 Ala. 534. But see Bishop *v.* Blair, 36 Ala. 80, where it is held that this estoppel in the case of real estate can only be invoked in equity. And see *supra*, V, A, 3.

Arkansas.— Gill *v.* Hardin, 48 Ark. 409, 3 S. W. 519; Trapnall *v.* Burton, 24 Ark. 371; Shall *v.* Biscoe, 18 Ark. 142; Ryburn *v.* Pryor, 14 Ark. 505; Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242.

California.— Blood *v.* La Serena Land, etc., Co., 134 Cal. 361, 66 Pac. 317; Meley *v.* Collins, 41 Cal. 663, 10 Am. Rep. 279; Snodgrass *v.* Ricketts, 13 Cal. 359; Bryan *v.* Ramirez, 8 Cal. 461, 68 Am. Dec. 340; Goldeffroy *v.* Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

Connecticut.— Whitaker *v.* Williams, 20 Conn. 98.

Florida.— Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167.

Georgia.— Pool *v.* Lewis, 41 Ga. 162, 5 Am. Rep. 526; Burton *v.* Black, 32 Ga. 53; Burkhalter *v.* Edwards, 16 Ga. 593, 60 Am. Dec. 744. *Compare* Christie *v.* Whaley, 79 Ga. 188, 3 S. E. 896.

Illinois.— Sutter *v.* Rose, 169 Ill. 66, 48 N. E. 411 [*affirming* 64 Ill. App. 263]; Whipple *v.* Whipple, 109 Ill. 418; Walker *v.* Walker, 42 Ill. 311, 89 Am. Dec. 445; Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; Doan *v.* Manzey, 33 Ill. 227; Cochran *v.* Harrow, 22 Ill. 345.

Indiana.— Hunt *v.* Coon, 9 Ind. 537; Gatling *v.* Rodman, 6 Ind. 289.

Iowa.— Hart *v.* Mt. Pleasant Park Stock Co., 97 Iowa 353, 66 N. W. 190; McPherson *v.* Berry, 92 Iowa 64, 60 N. W. 241; Jordan *v.* Brown, 56 Iowa 281, 9 N. W. 200; Foster *v.* Bigelow, 24 Iowa 379.

Kansas.— Gray *v.* Crockett, 35 Kan. 66, 10 Pac. 452, 35 Kan. 686, 12 Pac. 129; Knaggs *v.* Mastin, 9 Kan. 532.

Kentucky.— Louisville, etc., R. Co. *v.* Taylor, 96 Ky. 241, 28 S. W. 666, 16 Ky. L. Rep. 579; Cocanougher *v.* Green, 93 Ky. 519, 20 S. W. 542, 14 Ky. L. Rep. 507; Rusk *v.* Featon, 14 Bush 490, 28 Am. Rep. 413; Morris *v.* Shannon, 12 Bush 89; Sale *v.* Crutchfield, 8 Bush 635; Foster *v.* Shreve, 6 Bush 519; Davis *v.* Tringle, 8 B. Mon. 539; Ringo *v.* Barber, 6 B. Mon. 514; Brothers *v.* Porter, 6 B. Mon. 106; Louisville *v.* U. S. Bank, 3 B. Mon. 138; Hampton *v.* France, 32 S. W. 950, 33 S. W. 826, 17 Ky. L. Rep. 980; Bowen *v.* Stone, 13 S. W. 361, 11 Ky. L. Rep. 944; Lawson *v.* Biller, 10 Ky. L. Rep. 80.

Louisiana.— Gayoso *v.* Delaroderie, 9 La. Ann. 278; Blanchard *v.* Allain, 5 La. Ann. 367, 52 Am. Dec. 594; Thomson *v.* Mylne, 11 Rob. 349; Marsh *v.* Smith, 5 Rob. 518; Beach *v.* McDonough, 5 Rob. 352; Cook *v.* West, 3 Rob. 331.

Maine.— Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883; Chapman *v.* Pingree, 67 Me. 198; Matthews *v.* Light, 32 Me. 305; Rangeley *v.* Spring, 21 Me. 130; Colby *v.* Norton, 19 Me. 412; Hatch *v.* Kimball, 16 Me. 146.

Maryland.— Funk *v.* Newcomer, 10 Md. 301; Doub *v.* Mason, 2 Md. 380; Doub *v.* Barnes, 1 Md. Ch. 127.

Michigan.— Burt *v.* Mason, 97 Mich. 127, 56 N. W. 365; Morse *v.* Byam, 55 Mich. 594, 22 N. W. 54.

Minnesota.— Coursolle *v.* Weyerhauser, 69 Minn. 328, 72 N. W. 697; Brown *v.* Union Depot St. R., etc., Co., 65 Minn. 508, 68 N. W. 107.

Mississippi.— Vicksburg, etc., R. Co. *v.* Barrett, 67 Miss. 579, 7 So. 549; Hafter *v.* Strange, 65 Miss. 323, 3 So. 190, 7 Am. St. Rep. 659; Nixon *v.* Carco, 28 Miss. 414; Dickson *v.* Green, 24 Miss. 612.

Missouri.— Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; Skinner *v.* Stouse, 4 Mo. 93. *Compare* Swon *v.* Stevens, 143 Mo. 384, 45 S. W. 270.

Nebraska.— Schade *v.* Bessinger, 3 Nebr. 140.

Nevada.— Simpson *v.* Harris, 21 Nev. 353, 31 Pac. 1009.

New Hampshire.— Stevens *v.* Dennett, 51 N. H. 324; Corbett *v.* Norcross, 35 N. H. 99; Thompson *v.* Sanborn, 11 N. H. 201, 35 Am.

thing in which the interest of the party sought to be estopped is direct and

Dec. 490. See also Marshall *v.* Pierce, 12 N. H. 127.

New Jersey.— Kelley *v.* Repetto, 62 N. J. Eq. 246, 49 Atl. 429; Briskerhoff *v.* Briskerhoff, 23 N. J. Eq. 477; Crawford *v.* Bertholf, 1 N. J. Eq. 458.

New York.— Brookhaven *v.* Smith, 118 N. Y. 634, 23 N. E. 1002, 7 L. R. A. 755; Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Champlin *v.* Stoddard, 30 Hun 300; Carpenter *v.* O'Dougherty, 67 Barb. 397; Cornell *v.* Masten, 35 Barb. 157; Tilton *v.* Nelson, 27 Barb. 595; Cheeney *v.* Arnold, 18 Barb. 434; Dennison *v.* Ely, 1 Barb. 610; Duffy *v.* Work, 59 N. Y. Super. Ct. 592, 15 N. Y. Suppl. 143; Rider *v.* Union India Rubber Co., 17 Bosw. 169; Willis *v.* McKinnon, 37 Misc. 386, 75 N. Y. Suppl. 770; Niven *v.* Belknap, 2 Johns. 573; Storrs *v.* Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316; Lee *v.* Porter, 5 Johns. Ch. 268; Wendell *v.* Van Rensselaer, 1 Johns. Ch. 344.

North Carolina.—Womble *v.* Leach, 83 N. C. 84; Sherrill *v.* Sherrill, 73 N. C. 8; Mason *v.* Williams, 66 N. C. 564; Blackwood *v.* Jones, 57 N. C. 54; Saunderson *v.* Ballance, 55 N. C. 322, 47 Am. Dec. 218; Brame *v.* Brame, 55 N. C. 280.

Pennsylvania.—Schlegel *v.* Herbein, 174 Pa. St. 504, 34 Atl. 118; Moreland *v.* H. C. Frick Coke Co., 170 Pa. St. 33, 32 Atl. 634; Taggart's Appeal, 99 Pa. St. 627; Maple *v.* Kussart, 53 Pa. St. 348, 91 Am. Dec. 214; Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Carr *v.* Wallace, 7 Watts 394.

South Carolina.—Marines *v.* Goblet, 31 S. C. 153, 9 S. E. 803, 17 Am. St. Rep. 22. See also Skirving *v.* Neufville, 2 Desauss. 194.

South Dakota.— Shelby *v.* Bowden, 16 S. D. 531, 94 N. W. 416.

Tennessee.— Gates *v.* Card, 93 Tenn. 334, 24 S. W. 486; Keys *v.* Keys, 11 Heisk. 425; Morris *v.* Moore, 11 Humphr. 433; Henderson *v.* Overton, 2 Yerg. 394, 24 Am. Dec. 492; Hale *v.* Morgan, (Ch. App. 1901) 63 S. W. 506; Schmitton *v.* McFall, (Ch. App. 1896) 39 S. W. 886.

Texas.— Hardeman *v.* Maud, 78 Tex. 84, 14 S. W. 287; Stanley *v.* Epperson, 45 Tex. 644; Luter *v.* Rose, 20 Tex. 639; Moore *v.* Tarrant County Agricultural, etc., Assoc., (Civ. App. 1895) 31 S. W. 709. *Compare* Bragg *v.* Lockhart, 11 Tex. 160.

Utah.— Allen *v.* Cannon, 8 Utah 8, 28 Pac. 868.

Vermont.— Fairhaven First Nat. Bank *v.* Hammond, 51 Vt. 203; Cady *v.* Owen, 34 Vt. 598; Ivers *v.* Chandler, 1 D. Chipm. 48.

Virginia.— Engle *v.* Burns, 5 Call 463, 2 Am. Dec. 593.

Washington.— Roeder *v.* Fouts, 5 Wash. 135, 31 Pac. 432.

West Virginia.— Stone *v.* Tyree, 30 W. Va. 687, 5 S. E. 878.

Wisconsin.— Vilas *v.* Mason, 25 Wis. 310; Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602.

United States.— Close *v.* Glenwood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. ed. 408; Kirk *v.* Hamilton, 102 U. S. 68, 26 L. ed. 79; Baker *v.* Humphrey, 101 U. S. 494, 25 L. ed. 1065; The Sarah Ann, 21 Fed. Cas. No. 12,342, 2 Sumn. 206; Shapley *v.* Rangeley, 21 Fed. Cas. No. 12,707, 1 Woodb. & M. 213.

Canada.— *Re* Shaver, 3 Ch. Chamb. 379; Boyle *v.* Arnold, 16 Grant Ch. (U. C.) 501; Leary *v.* Rose, 10 Grant Ch. (U. C.) 346; Robinson *v.* Cook, 6 Ont. 590; Boys *v.* Wood, 39 U. C. Q. B. 495; Halpenny *v.* Pennock, 33 U. C. Q. B. 229; Nelson *v.* Cook, 12 U. C. Q. B. 22. *Compare* Powell *v.* Watters, 28 Can. Supreme Ct. 133; Bell *v.* Walker, 20 Grant Ch. (U. C.) 558.

See 19 Cent. Dig. tit. "Estoppel," §§ 245, 277.

"Standing by" does not import actual presence, but implies "knowledge under such circumstances as to render it the duty of the possessor to communicate it."- Gatling *v.* Rodman, 6 Ind. 289.

A person who has title by adverse possession is estopped from asserting it, if he stands by and allows another to change his position, to his injury, on the faith of a conveyance from the owner of the paper title. McDiarmid *v.* Hughes, 16 Ont. 570.

Mere knowledge by the owner of land that the purchaser at a void execution sale has sold to a third person, and silence, without any declaration or act actually influencing the conduct of the other party, will not estop the owner to assert his rights. Mays *v.* Wherry, 3 Tenn. Ch. 80.

By signing as an attesting witness to a deed one is not estopped to assert an adverse claim to the land conveyed. Coker *v.* Ferguson, 70 Ala. 284. See also Marshall *v.* Pierce, 12 N. H. 127; Driscoll *v.* Brooklyn Union El. Co., 42 Misc. (N. Y.) 120, 85 N. Y. Suppl. 1000 [*affirmed* in 95 N. Y. App. Div. 146, 88 N. Y. Suppl. 745]. *Contra*, College Point Sav. Bank *v.* Vollmer, 44 N. Y. App. Div. 619, 60 N. Y. Suppl. 389; Hale *v.* Morgan, (Tenn. Ch. App. 1900) 63 S. W. 506.

The fact that a party wrote the deed under which another claims will not estop him from showing that there was no consideration therefor. Jamison *v.* Bagot, 106 Mo. 240, 16 S. W. 697.

Merely knowing of a mortgage at the time of its execution will not create an estoppel. Brown *v.* Bolt, 116 Mich. 52, 74 N. W. 295.

A mere appraiser, serving gratuitously for the benefit of others, will not be allowed to suffer by reason of an innocent mistake respecting the description of land, and he can be estopped only in a case where fraud or gross negligence is proved. Gum *v.* Equitable Trust Co., 11 Fed. Cas. No. 5,867, 1 McCrary 51.

Extent of estoppel.— Acquiescence, and uniting in a conveyance, by one having a contingent interest in the land, will not estop him from asserting his claim against another who bought without his encouragement other

immediate,[79] and it is also essential that he should at the time have had knowledge of such interest.[80]

(2) Personal Property. Where one who owns or has an interest in personal property, with full knowledge of his rights, suffers another to deal with it as his own by selling or pledging it, or otherwise disposing of it, he will be estopped to assert his title or right as against a third person who has acted on the faith of and been misled by his acquiescence.[81]

(B) *Judicial Sale*—(1) In General. When a person having title to or an interest in property knowingly stands by and suffers it to be sold under a judgment or decree, without asserting his title or right or making it known to the bidders, he cannot afterward set up his claim.[82] So too if he has knowledge of an

lands in which he had a like interest. Sale *v.* Crutchfield, 8 Bush (Ky.) 636.

79. Watkins *v.* Peck, 13 N. H. 360, 40 Am. Dec. 156. See also Genobles *v.* West, 23 S. C. 154.

80. Page *v.* Arnim, 29 Tex. 53. See also Brown *v.* Goodwin, 75 N. Y. 409.

81. *Alabama.*— Howard *v.* Coleman, 36 Ala. 721; Harrison *v.* Pool, 16 Ala. 167; Butler *v.* O'Brien, 5 Ala. 316.

California.— Carpy *v.* Dowdell, 115 Cal. 677, 47 Pac. 695.

Connecticut.— Chapman *v.* Shepard, 39 Conn. 413; Parker *v.* Crittenden, 37 Conn. 148.

Maine.— Gragg *v.* Brown, 44 Me. 157.

Maryland.— Troup *v.* Appleman, 52 Md. 456.

Michigan.— Miller *v.* Ross, 107 Mich. 538, 65 N. W. 562; Dann *v.* Cudney, 13 Mich. 239, 87 Am. Dec. 755.

Mississippi.— Richardson *v.* Toliver, 71 Miss. 966, 16 So. 213.

Missouri.— Camp *v.* St. Louis, etc., R. Co., 62 Mo. App. 85.

Nebraska.— Sayre *v.* Thompson, 18 Nebr. 33, 24 N. W. 383.

New Hampshire.—Thompson *v.* Sanborn, 11 N. H. 201, 35 Am. Dec. 490.

New Jersey.— Waln *v.* Hance, 53 N. J. Eq. 660, 32 Atl. 169, 35 Atl. 1130.

New York.— Hogan *v.* Brooklyn, 52 N. Y. 282; Thompson *v.* Blanchard, 4 N. Y. 303.

North Carolina.— Governor *v.* Freeman, 15 N. C. 472; Bird *v.* Benton, 13 N. C. 179.

Pennsylvania.— Troxell *v.* Lehigh Crane Iron Co., 42 Pa. St. 513.

South Carolina.— Quattlebaum *v.* Taylor, 45 S. C. 512, 23 S. E. 617.

United States.— Lacombe *v.* Forstall, 123 U. S. 562, 8 S. Ct. 247, 31 L. ed. 255; Alabama Iron, etc., Co. *v.* Anniston L. & T. Co., 57 Fed. 25, 6 C. C. A. 242; Empire State Nail Co. *v.* Faulkner, 55 Fed. 819; Gilmer *v.* Billings, 55 Fed. 775; Hartje *v.* Vulcanized Fibre Co., 44 Fed. 648; Detweiler *v.* Voege, 8 Fed. 600, 19 Blatchf. 482; *In re* Binford, 3 Fed. Cas. No. 1,411*a*, 3 Hughes 304 [*reversing* 3 Fed. Cas. No. 1,411, 3 Hughes 295].

England.— *In re* Wheal Unity Wood Min. Co., 15 Ch. D. 13, 42 L. T. Rep. N. S. 636, 28 Wkly. Rep. 897; Waller *v.* Drakeford, 1 E. & B. 749, 17 Jur. 853, 22 L. J. Q. B. 274, 72 E. C. L. 749.

Canada.— Gray *v.* McLennan, 3 Manitoba 337. See also Loucks *v.* McSloy, 29 U. C. C. P. 54.

See 19 Cent. Dig. tit. "Estoppel," § 278.

The owner may be estopped, although not actually present at the time the sale of the property is made. Thompson *v.* Blanchard, 4 N. Y. 303.

If the facts are known to all the parties, a person will not be estopped to assert his interest in the property by having failed to do so at the time the property was sold. Martin *v.* Angell, 7 Barb. (N. Y.) 407.

82. *Florida.*— Ponder *v.* Moseley, 2 Fla. 207, 48 Am. Dec. 194; Camp *v.* Moseley, 2 Fla. 171.

Georgia.— Osborn *v.* Elder, 65 Ga. 360; Whitman *v.* Bolling, 47 Ga. 125; Burkhalter *v.* Edwards, 16 Ga. 593, 60 Am. Dec. 744; Whittington *v.* Doe, 9 Ga. 23; Irwin *v.* Morell, Dudley 72.

Illinois.— Reiss *v.* Hanchett, 141 Ill. 419, 31 N. E. 165; McConnell *v.* People, 84 Ill. 583.

Kentucky.— Morford *v.* Bliss, 12 B. Mon. 255; Arnold *v.* Stephens, 17 S. W. 859, 13 Ky. L. Rep. 622; Wallender *v.* Wintersmith, 2 Ky. L. Rep. 232.

Louisiana.— Finlay *v.* Peres, 48 La. Ann. 16, 18 So. 702; Lippmins *v.* McCranie, 30 La. Ann. 1251; Weedon *v.* Landreaux, 26 La. Ann. 729; Littell *v.* Wackerhagen, 25 La. Ann. 529; Smith *v.* Taylor, 14 La. Ann. 663; Gottschalk *v.* De Santos, 12 La. Ann. 473.

New York.— McConnell *v.* Sherwood, 19 Hun 519; Otis *v.* Sill, 8 Barb. 102; Frost *v.* Quackenbush, 18 Abb. Pr. 3.

North Carolina.— Lentz *v.* Chambers, 27 N. C. 587, 44 Am. Dec. 63. *Compare* Hodges *v.* Spicer, 79 N. C. 223.

Pennsylvania.—Greenhoe *v.* College, 144 Pa. St. 131, 22 Atl. 905; Keeler *v.* Vantuyle, 6 Pa. St. 250; Epley *v.* Witherow, 7 Watts 163; McDonald *v.* Lindall, 3 Rawle 492; Willing *v.* Brown, 7 Serg. & R. 467; Covert *v.* Irwin, 3 Serg. & R. 283.

South Carolina.— *Ex p.* Carraway, 28 S. C. 233, 5 S. E. 597; Jackson *v.* Irabinit, Riley Eq. 9.

United States.— Conklin *v.* Wehrman, 38 Fed. 874.

See 19 Cent. Dig. tit. "Estoppel," § 279.

But see Doe *v.* Baxter, 8 N. Brunsw. 232.

In case of the sale of realty it is held in some jurisdictions that the estoppel is available only in equity. Smith *v.* Mundy, 18 Ala.

irregularity in the proceedings, but permits the sale to be made without objection, he is estopped to contest its validity afterward.[83]

(2) EFFECT OF BID BY OWNER. If the owner of property with knowledge of the facts bids on it at a judicial sale without giving notice of his title, he will be estopped thereafter to assert his title or contest the validity of the sale, to the prejudice of one who has acted in reliance on his conduct and in ignorance of the facts.[84]

(c) *Foreclosure Sale.* The fact that the mortgagor of property was present at its sale under foreclosure without objecting thereto will not estop him as against the mortgagee or his assignee, from contesting the validity of the sale,[85] but will estop him as against a purchaser if the latter has relied on and been misled by his silence.[86] A third person who fails to assert his title or right at a foreclosure sale will be estopped to assert his claim against one who in ignorance of the facts has relied on his conduct.[87]

(III) *PERMITTING IMPROVEMENTS OR EXPENDITURES* — (A) *In General.* One who with knowledge of the facts and without objection suffers another to make improvements or expenditures on or in connection with his property, or in dero-

182, 52 Am. Dec. 221; McPherson *v.* Walters, 16 Ala. 714, 50 Am. Dec. 200. See *supra*, V, A, 3. See, generally, FRAUDS, STATUTE OF.

Tax-sale.— An owner of land sold for taxes is not estopped to deny the validity of the sale because he allowed it to be made and the purchaser to make improvements without objection. Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238. But see Bean *v.* Brownwood, 91 Tex. 684, 45 S. W. 897; Claxton *v.* Shibley, 9 Ont. 451.

83. *Colorado.*— Fallon *v.* Worthington, 13 Colo. 559, 22 Pac. 960, 16 Am. St. Rep. 231, 6 L. R. A. 708.

Georgia.— Lackey *v.* Pool, 97 Ga. 718, 25 S. E. 174; Mock *v.* Stuckey, 96 Ga. 187, 23 S. E. 307; Allen *v.* Brown, 83 Ga. 161, 9 S. E. 674; Reichert *v.* Voss, 78 Ga. 54, 2 S. E. 558.

Illinois.— Pease *v.* Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

Kentucky.— Neal *v.* Robinson, 28 S. W. 335, 16 Ky. L. Rep. 435.

Missouri.— Slagel *v.* Murdock, 65 Mo. 522.

New York.— Carpenter *v.* Stilwell, 12 Barb. 128.

Pennsylvania.— Weaver *v.* Lutz, 102 Pa. St. 593; Crowell *v.* Meconkey, 5 Pa. St. 168.

See 19 Cent. Dig. tit. "Estoppel," § 279.

But see Friedman *v.* Waldrop, 97 Ala. 434, 12 So. 427; Doe *v.* Hazen, 8 N. Brunsw. 87.

Mere absence of a party from a sale of his property to enforce a lien thereon, of which sale he has full notice, will not estop him to assert its illegality. Hale *v.* Wigton, 20 Nebr. 83, 29 N. W. 177.

84. Derouen *v.* Hebert, 46 La. Ann. 1388, 16 So. 160; Hayden *v.* Sheriff, 43 La. Ann. 385, 8 So. 919; Chiapella *v.* Brown, 14 La. Ann. 189; Mullen *v.* Follain, 12 La. Ann. 838; Wilber *v.* Goodrich, 34 Mich. 84; Spence *v.* Renfro, 179 Mo. 417, 78 S. W. 597; Rice *v.* Bunce, 49 Mo. 231, 8 Am. Rep. 129; Miller *v.* Hamlin, 2 Ont. 103; Ruttan *v.* Weller, 14 U. C. Q. B. 44. *Compare* Reed *v.* Crapo, 127 Mass. 39; West Newbury First Parish *v.* Dow, 3 Allen (Mass.) 369; McAuliffe *v.* Mann, 37 Mich. 539.

85. Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356; Canning *v.* Harlan, 50 Mich. 320, 15 N. W. 492.

86. *California.*— Ferguson *v.* Miller, 4 Cal. 97.

Iowa.— Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356.

Kentucky.— Herd *v.* Cist, (1889) 12 S. W. 466.

Michigan.— Canning *v.* Harlan, 50 Mich. 320, 15 N. W. 492.

Minnesota.— Dimond *v.* Manheim, 61 Minn. 178, 63 N. W. 495; Bausman *v.* Faue, 45 Minn. 412, 48 N. W. 13.

Nebraska.— Fried *v.* Stone, 14 Nebr. 398, 15 N. W. 698.

North Carolina.— Lamb *v.* Goodwin, 32 N. C. 320.

South Carolina.— Eason *v.* Miller, 25 S. C. 555.

United States.— Cromwell *v.* Pittsburg Bank, 6 Fed. Cas. No. 3,409, 2 Wall. Jr. 569.

See 19 Cent. Dig. tit. "Estoppel," § 281.

87. *Illinois.*— Bradley *v.* Luce, 99 Ill. 234.

Kentucky.— Schweitzer *v.* Wagner, 94 Ky. 458, 22 S. W. 883, 15 Ky. L. Rep. 229.

Michigan.— Walker *v.* Bottomley, 110 Mich. 127, 67 N. W. 1083.

Minnesota.— Wilson *v.* Sherffbillich, 30 Minn. 422, 15 N. W. 876.

New Jersey.— Baldwin *v.* Howell, 45 N. J. Eq. 519, 15 Atl. 236; Collier *v.* Pfenning, 34 N. J. Eq. 22.

See 19 Cent. Dig. tit. "Estoppel," § 281.

Dower rights.— That the widow of a mortgagee was present at the foreclosure sale, at which the officer making the sale announced that it was under a purchase-money mortgage and that she made no claim of dower in the land, will not estop her from subsequently claiming dower as against the purchaser. Fern *v.* Osterhout, 11 N. Y. App. Div. 319, 42 N. Y. Suppl. 450.

The owner of chattels which are not a part of the realty will not be estopped by his failure to assert his title at a foreclosure sale of the house in which they are situated; there being no announcement at the sale that the chattels are to be included therein. McKeage

gation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of that other who has acted in reliance on and been misled by his conduct.[88] It has been held, however, that while an owner who fails to object to the erection of improvements upon his land may be estopped to

v. Hanover F. Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471.

88. *Alabama.*— Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 80 Am. St. Rep. 27; Cowan *v.* Southern R. Co., 118 Ala. 554, 23 So. 754.

Arizona.— Biggs *v.* Utah Irrigating Ditch Co., (1901) 64 Pac. 494; Bryan *v.* Pinney, 3 Ariz. 412, 31 Pac. 548.

Arkansas.— Morris *v.* Fletcher, 67 Ark. 105, 56 S. W. 1072, 77 Am. St. Rep. 87; Gibson *v.* Herriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17.

California.— Beardsley *v.* Clem, 137 Cal. 328, 70 Pac. 175; Sullivan *v.* Jobnson, 127 Cal. 230, 59 Pac. 583; Escolle *v.* Franks, 67 Cal. 137, 7 Pac. 425; McGarrity *v.* Byington, 12 Cal. 426; Parke *v.* Kilham, 8 Cal. 77, 68 Am. Dec. 310; Godeffroy *v.* Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

Colorado.— Broadmoor Dairy, etc., Co. *v.* Brookside Water, etc., Co., 24 Colo. 541, 52 Pac. 792; Brown *v.* Wilson, 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 228; Mellor *v.* Valentine, 3 Colo. 255.

Connecticut.— Mitchell *v.* Leavitt, 30 Conn. 587. But see Seymour *v.* Page, 33 Conn. 61; Hickox *v.* Parmelee, 21 Conn. 86.

Delaware.— Burton *v.* Duffield, 2 Del. Ch. 130.

Florida.— Price *v.* Stratton, (1903) 33 So. 644.

Georgia.— Georgia Pac. R. Co. *v.* Strickland, 80 Ga. 776, 6 S. E. 27, 12 Am. St. Rep. 282; Georgia R., etc., Co. *v.* Hamilton, 59 Ga. 171.

Illinois.— Rodemeier *v.* Brown, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176; Noble *v.* Chrisman, 88 Ill. 186; Eldridge *v.* Walker, 80 Ill. 270; O'Neal *v.* Auten, 58 Ill. 148; Donaldson *v.* Holmes, 23 Ill. 85.

Indiana.— Ross *v.* Thompson, 78 Ind. 90.

Iowa.— Schafer *v.* Wilson, 113 Iowa 475, 85 N. W. 789; Bradley *v.* Appanoose County, 106 Iowa 105, 76 N. W. 519; Bourne *v.* Ragan, 96 Iowa 566, 65 N. W. 826; Slocumb *v.* Chicago, etc., R. Co., 57 Iowa 675, 11 N. W. 641; Bullis *v.* Noble, 36 Iowa 618.

Kansas.— Parker *v.* Atchison, 58 Kan. 29, 48 Pac. 631; McKinnis *v.* Scottish American Mortg. Co., 55 Kan. 259, 39 Pac. 1018.

Kentucky.— Welford *v.* Gerard, 108 Ky. 322, 56 S. W. 416, 22 Ky. L. Rep. 203; Riggs *v.* Stevens, 92 Ky. 393, 17 S. W. 1016, 13 Ky. L. Rep. 631; Alexander *v.* Woodford Spring Lake Fish. Co., 90 Ky. 215, 14 S. W. 80, 12 Ky. L. Rep. 107; Phillips *v.* Clark, 4 Metc. 348, 83 Am. Dec. 471; Stith *v.* Carter, 60 S. W. 725, 22 Ky. L. Rep. 1488; Kern *v.* Raunser, 50 S. W. 838, 20 Ky. L. Rep. 1954; Hoskins *v.* J. B. Wather Co., 47 S. W. 595, 20 Ky. L. Rep. 814; Watson *v.* Braun, 4 Ky. L. Rep. 981; Klump *v.* Liebold, 3 Ky. L. Rep. 684; Ramsey *v.* Clark, etc., Turnpike Co., 1 Ky. L. Rep. 308.

Maine.— Martin *v.* Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740.

Maryland.— Browne *v.* Baltimore M. E. Church, 37 Md. 108.

Massachusetts.— Bragg *v.* Boston, etc., R. Co., 9 Allen 54; Pratt *v.* Lamson, 2 Allen 275; Gray *v.* Bartlett, 20 Pick. 186, 32 Am. Dec. 208.

Michigan.— Pittsburgh, etc., Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395; Barrie *v.* Smith, 47 Mich. 130, 10 N. W. 168; Jacox *v.* Clark, Walk. 249.

Minnesota.—Holcomb *v.* Independent School Dist., 67 Minn. 321, 69 N. W. 1067.

Mississippi.— Wynne *v.* Mason, 72 Miss. 424, 18 So. 422; Evans *v.* Forstall, 58 Miss. 30; Nixon *v.* Carco, 28 Miss. 414.

Missouri.— Craddock *v.* Short, 134 Mo. 449, 35 S. W. 1141; Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048; Stevenson *v.* Saline County, 65 Mo. 425; Evans *v.* Snyder, 64 Mo. 516; Collins *v.* Rogers, 63 Mo. 515; Thomas *v.* Pullis, 56 Mo. 211.

Nebraska.— Coleridge Creamery Co. *v.* Jenkins, 66 Nebr. 129, 92 N. W. 123; Fremont Ferry, etc., Co. *v.* Dodge County, 6 Nebr. 18.

New Jersey.— Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Scharr *v.* Camden, (Ch. 1901) 49 Atl. 817; Lellett *v.* Kamble, 23 N. J. Eq. 58; Fell, etc., Co. *v.* Pennsylvania R. Co., (Ch. 1840) 20 Atl. 63; Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283; Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Southard *v.* Morris Canal, etc., Co., 1 N. J. Eq. 518.

New York.— Hudson River Water Power Co. *v.* Glens Falls Gas, etc., Co., 90 N. Y. App. Div. 513, 85 N. Y. Suppl. 577 [*reversing* 41 Misc. 254, 84 N. Y. Suppl. 62]; Horton *v.* Erie Preserving Co., 90 N. Y. App. Div. 255, 85 N. Y. Suppl. 503; Munson *v.* Magee, 22 N. Y. App. Div. 333, 47 N. Y. Suppl. 942; Hall *v.* Fisher, 9 Barb. 17; Granville *v.* Needham, 3 Paige 545; Verplanck *v.* New York, 2 Edw. 220; Higinbotham *v.* Burent, 5 Johns. Ch. 184.

Ohio.— First German Reformed Church *v.* Summit County, 23 Ohio Cir. Ct. 553; Mondle *v.* Toledo Plow Co., 9 Ohio S. & C. Pl. Dec. 281, 6 Ohio N. P. 294. *Compare* Fox *v.* Fostoria, 14 Ohio Cir. Ct. 471, 8 Ohio Cir. Dec. 39.

Oregon.— McBroom *v.* Thompson, 25 Oreg. 559, 37 Pac. 57, 42 Am. St. Rep. 806; Curtis *v.* La Grande Hydraulic Water Co., 20 Oreg. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484; Budd *v.* Multnomah St. R. Co., 15 Oreg. 404, 15 Pac. 654; McCann *v.* Oregon R., etc., Co., 13 Oreg. 455, 11 Pac. 236.

Pennsylvania.— Redmond *v.* Excelsior Sav. Fund, etc., Assoc., 194 Pa. St. 643, 45 Atl. 422, 75 Am. St. Rep. 714; Wahl *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 257, 27 Atl. 965; Woodward *v.* Tudor, 81* Pa. St. 382; Meigs'

claim the improvements, the principle cannot be carried to the extent of estopping him to claim title to the land in an action at law.[89] If the owner, as soon as he is informed of the expenditures or improvements, protests against their con-

Appeal, 62 Pa. St. 28, 1 Am. Rep. 372; Miller *v.* Miller, 60 Pa. St. 16, 100 Am. Dec. 538; Chapman *v.* Chapman, 59 Pa. St. 214; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23; Woods *v.* Wilson, 37 Pa. St. 379; McKelvey *v.* Truby, 4 Watts & S. 323; Robinson *v.* Justice, 2 Penr. & W. 19, 21 Am. Dec. 407; Potter *v.* Rend, 31 Pittsb. Leg. J. N. S. 223; Shimer *v.* Easton, etc., St. R. Co., 7 North Co. Rep. 249; Quay *v.* Hartman, 1 Chest. Co. Rep. 486. See also Corbet *v.* Oil City Fuel Supply Co., 21 Pa. Super Ct. 80.

South Carolina.—See Caldwell *v.* Williams, Bailey Eq. 175.

South Dakota.— Wampol *v.* Kountz, 14 S. D. 334, 85 N. W. 595, 86 Am. St. Rep. 765; Sweatman *v.* Deadwood, 9 S. D. 380, 69 N. W. 582; Scott *v.* Toomey, 8 S. D. 639, 67 N. W. 838.

Tennessee.— Moses *v.* Sanford, 2 Lea 655; Heiskell *v.* Cobb, 11 Heisk. 638; Patton *v.* McClure, Mart. & Y. 333; Bloomstein *v.* Clees, 3 Tenn. Ch. 433.

Utah.— Clark *v.* Kirby, 18 Utah 258, 55 Pac. 372; Morrison *v.* Winn, 18 Utah 15, 54 Pac. 761.

Vermont.— Dodge *v.* Stacy, 39 Vt. 558; Wright *v.* Whithead, 14 Vt. 268.

Washington.— Bell *v.* Groves, 20 Wash. 602, 56 Pac. 401.

West Virginia.— Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027.

Wisconsin.— Radant *v.* Werheim Mfg. Co., 106 Wis. 600, 82 N. W. 562.

United States.— Kirk *v.* Hamilton, 102 U. S. 68, 26 L. ed. 79; Irwin *v.* U. S., 16 How. 513, 14 L. ed. 1038; Pokegama Sugar Pine Lumber Co. *v.* Klamat River Lumber, etc., Co., 96 Fed. 34; Foster *v.* Bear Valley Irr. Co., 65 Fed. 836. *Compare* Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113.

England.— Ramsden *v.* Dyson. L. R. 1 H. L. 129, 12 Jur. N. S. 506, 15 Wkly. Rep. 926; Mold *v.* Wheatcroft, 27 Beav. 510; Willmott *v.* Barber, 15 Ch. D. 96, 49 L. J. Ch. 792, 43 L. T. Rep. N. S. 95, 28 Wkly. Rep. 911; Rennie *v.* Young, 2 De G. & J. 136, 57 L. J. Ch. 753, 59 Eng. Ch. 108, 44 Eng. Reprint 939; Civil Service Musical Instrument Assoc. *v.* Whiteman, 63 J. P. 441, 68 L. J. Ch. 484, 80 L. T. Rep. N. S. 685.

Canada.— Lafrance *v.* Lafontaine, 30 Can. Supreme Ct. 20; Boyle *v.* Arnold, 16 Grant Ch. (U. C.) 501.

See 19 Cent. Dig. tit. "Estoppel," §§ 264–267.

This estoppel can be only invoked to uphold an interest acquired through the purchase or improvement of the property on the true owner's acquiescence in the apparent condition of the title, the ownership of which is concealed. Whitlock *v.* Gould, 30 Misc. (N. Y.) 521, 62 N. Y. Suppl. 792.

Conduct such as amounts to fraud must be shown. Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694. See also Fox *v.* Fostoria, 14 Ohio Cir. Ct. 471, 8 Ohio Cir. Dec. 39; Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

Silence while not interested will not operate as an estoppel after interest is obtained. Dillett *v.* Kemble, 25 N. J. Eq. 66.

Expenditures must be substantial in comparison with value of property. See Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71.

Expenses of maintenance.— The fact that a transferee allowed minor expenses for the maintenance of the property to be paid by the grantor's estate without asserting his title will not estop him from claiming the property. Whitlock *v.* Gould, 30 Misc. (N. Y.) 521, 62 N. Y. Suppl. 792.

Acquiescence on condition that the work shall be so done as not to cause injury will not estop the party to maintain an action for damages. Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406. See also Pennsylvania, etc., R. Co. *v.* Trimmer, (N. J. Ch. 1895) 31 Atl. 310.

If the person making the improvements or expenditures did not rely in so doing upon the failure of the owner to object thereto the owner will not be estopped. Strahl *v.* Smith, 30 Colo. 392, 70 Pac. 677; Powell *v.* Rogers, 105 Ill. 318; Pocahontas Light, etc., Co. *v.* Browning, 53 W. Va. 436, 44 S. E. 267.

If the owner is ignorant of his rights he will not be estopped unless his ignorance was the result of gross negligence. Pocahontas Light, etc., Co. *v.* Browning, 53 W. Va. 436, 44 S. E. 267.

A failure of the heirs to object to improvements made by a husband on lands belonging to his wife during her lifetime will not estop them to claim title to the property. Snyder *v.* Elliott, 171 Mo. 362, 71 S. W. 826.

A non-resident owner will not be estopped to claim title to property on account of the failure of an agent of such owner to object to improvements made thereon under an invalid city ordinance, it not appearing that such action was within the agent's duties. Pettis *v.* Johnson, 56 Ind. 139.

Where the improvements were made under an unconstitutional law, which the owner of the property did not know to be unconstitutional, he will not be estopped by his failure to object to the improvements. Andrews *v.* Settles, 16 Ohio Cir. Ct. 638, 9 Ohio Cir. Dec. 191.

Where the title is equally well known to both parties, the owner will not be estopped. Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658. 659.

89. St. Louis Smelting, etc., Co. *v.* Green, 13 Fed. 208. See also Christianson *v.* Linford, 3 Rob. (N. Y.) 215; Miller *v.* Platt, 5 Duer (N. Y.) 272.

Enforceability at law where title to land is involved see, generally, *supra*, V, A, 3.

tinuance and asserts his ownership to the property on which they are being made, no estoppel arises.[90]

(B) *Construction of Railroad.* Where an owner permits the construction of a railroad on his land, he cannot after the road is completed and large sums of money are expended on the faith of his apparent acquiescence, deny to the railroad company the right to use the property.[91] Similarly, where a tax in aid of the construction of a railroad has been voted by the taxpayers of a municipality, and the company has constructed its road through the municipality at an expense greatly in excess of the amount of the tax, the taxpayers making no objection to the legality of the vote until after the completion of the road, they are estopped to object to the validity of the election,[92] unless it is shown that the vote was obtained by fraud of which they were ignorant at the time of such construction.[93] So too railroad companies, their stock-holders and directors, are mutually estopped by agreements between themselves in reliance on which large expenditures have been made without objection.[94] This estoppel, however, does not preclude a recovery of damages by the landowner for injuries arising from the construction and operation of the road.[95]

(C) *Improvements or Expenditures by Purchaser.* One who knowingly stands by and without objection suffers the purchaser of land to make improve-

90. Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Burlingim *v.* Warner, 39 Nebr. 493, 58 N. W. 132; Perkins *v.* Moorestown, etc., Turnpike Co., 48 N. J. Eq. 499, 22 Atl. 180. See also Blashfield *v.* Empire State Tel., etc., Co., 18 N. Y. Suppl. 250.

91. *Alabama.*— Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27; Pollard *v.* Maddox, 28 Ala. 321.

Arkansas.— Reichert *v.* St. Louis, etc., R. Co., 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183.

Illinois.— Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

Indiana.— Evansville, etc., R. Co. *v.* Nye, 113 Ind. 223, 15 N. E. 261.

Kentucky.— Louisville, etc., R. Co. *v.* Pittsburg, etc., Coal Co., 111 Ky. 960, 64 S. W. 969, 23 Ky. L. Rep. 1318, 98 Am. St. Rep. 447, 55 L. R. A. 601; Louisville, etc., R. Co. *v.* Stephens, 14 Ky. L. Rep. 919. *Compare* Long *v.* Louisville, 98 Ky. 67, 32 S. W. 271, 17 Ky. L. Rep. 642; Louisville, etc., R. Co. *v.* Liebfried, 92 Ky. 407, 17 S. W. 870, 13 Ky. L. Rep. 645.

Louisiana.— Mitchell *v.* New Orleans, etc., R. Co., 41 La. Ann. 363, 6 So. 522; Tilton *v.* New Orleans City R. Co., 35 La. Ann. 1062.

Maryland.— Baltimore, etc., R. Co. *v.* Strauss, 37 Md. 237.

Missouri.— Alexander *v.* Kansas City, etc., R. Co., 138 Kan. 464, 40 S. W. 104; Scarritt *v.* Kansas City, etc., R. Co., 127 Mo. 298, 29 S. W. 1024; Planet Property, etc., Co. *v.* St. Louis, etc., R. Co., 115 Mo. 613, 22 S. W. 616; Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. 234; Dodd *v.* St. Louis, etc., R. Co., 108 Mo. 581, 18 S. W. 1117; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126; Kanaga *v.* St. Louis, etc., R. Co., 76 Mo. 207; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

Ohio.— Goodin *v.* Cincinnati, etc., Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95.

Pennsylvania.— *In re* Melon St., 192 Pa. St. 331, 43 Atl. 1013; People's Pass. R. Co. *v.* Union Pass. R. Co., 3 Pa. Dist. 717, 15 Pa. Co. Ct. 498; Bell *v.* Ohio, etc., R. Co., 2 Pittsb. L. J. 42. See also Allegheny Valley R. Co. *v.* Colwell, (1888) 15 Atl. 927.

Texas.— Evans *v.* Gulf, etc., R. Co., 9 Tex. Civ. App. 124, 28 S. W. 903.

West Virginia.— Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 21 S. E. 755.

Wisconsin.— Taylor *v.* Chicago, etc., R. Co., 63 Wis. 327, 24 N. W. 84.

United States.— Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; Pryzbylowicz *v.* Missouri River R. Co., 17 Fed. 492, 3 McCrary 586.

See 19 Cent. Dig. tit. "Estoppel," § 268.

If the landowner is absent at the time the construction of the road is commenced, the fact that he does not immediately reply to a letter by a third person informing him of such construction is not such acquiescence as will estop him from maintaining ejectment to recover the land. Walker *v.* Chicago, etc., R. Co., 57 Mo. 275.

A mortgagee or beneficiary in a deed of trust will not necessarily be estopped by conduct relating to the construction of a railroad which would estop the owner of the land. Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885.

92. Burlington, etc., R. Co. *v.* Stewart, 39 Iowa 267.

93. Sinnett *v.* Moles, 38 Iowa 25.

94. Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663; Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437; Catawissa R. Co.'s Appeal, 2 Walk. (Pa.) 175; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 51 Fed. 309, 2 C. C. A. 174.

95. Louisville, etc., R. Co. *v.* Stephens, 14 Ky. L. Rep. 919; Lake Roland El. R. Co. *v.* Hibernian Soc., 83 Md. 420, 34 Atl. 1017; Knox *v.* Metropolitan El. R. Co., 58 Hun (N. Y.) 517, 12 N. Y. Suppl. 848.

ments and expenditures thereon is estopped to contest such purchaser's title, where the latter has acted in reliance on and been misled by his conduct.[96]

(D) *Improvements on Near-By Property.* The failure of a landowner to object to improvements which he sees being made on property near his own is no ground of estoppel, as he is not bound to complain until his rights are encroached upon,[97] unless he knew or could have foreseen that an injury to his own property would necessarily result therefrom.[98] Permitting buildings to be erected in contravention of restrictive covenants will as a rule estop.[99]

(IV) *Failure of Maker to Assert Invalidity of Note or Mortgage.* A maker who stands by and sees his note or mortgage assigned to a third person, without giving the assignee notice of any existing defense, is estopped from afterward contesting its validity,[1] if the assignee has been misled by his silence,[2] and has not taken under such circumstances as to charge him with notice.[3]

96. *California.*— Pacific Imp. Co. *v.* Carriger, (1902) 68 Pac. 315.

Colorado.— Vaughn *v.* Comet Consol. Min. Co., 21 Colo. 54, 39 Pac. 422.

Indiana.— State *v.* Stanley, 14 Ind. 409.

Nebraska.— Lydick *v.* Gill, (1903) 94 N. W. 109.

New Jersey.— Pace *v.* Bartles, 47 N. J. Eq. 170, 20 Atl. 352.

Pennsylvania.— Big Mountain Imp. Co.'s Appeal, 54 Pa. St. 361; Willis *v.* Swartz, 28 Pa. St. 413.

Tennessee.— Patton *v.* McClure, Mart. & Y. 333.

Texas.— Patterson *v.* Patterson, (Civ. App. 1894) 27 S. W. 837.

United States.— Hatch *v.* Ferguson, 66 Fed. 668, 14 C. C. A. 41.

See 19 Cent. Dig. tit. "Estoppel," § 270.

A sheriff who unreasonably delays to sell land for taxes and sees it sold to enforce a vendor's lien, and watches expenditures on it, the original debtor having other property out of which the sheriff might have made the taxes, is estopped to assert his right to sell. Parringin *v.* Pickens, 82 Ky. 449.

Void partition sale.— Where a sale in a partition suit is void because made after the death of one of the tenants in common without revivor, his heirs are not estopped from claiming the land as against the purchasers by the fact that the latter made improvements thereon without their objection. Requa *v.* Holmes, 26 N. Y. 338, 16 N. Y. 193.

Where property is purchased at a judicial sale and the purchaser is permitted to make valuable improvements thereon without objection, the owner will be estopped to afterward question the validity of the sale. Lucas *v.* Hart, 5 Iowa 415; Perry *v.* Hall, 74 Mo. 503; Kelly *v.* Hurt, 74 Mo. 561; St. Bartholomew's Church *v.* Wood, 80 Pa. St. 219 [*affirming* 4 Leg. Gaz. 18]; Hamilton *v.* Hamilton, 4 Pa. St. 193.

97. Stewart *v.* Stevens, 10 Colo. 440, 15 Pac. 786; Consumers' Gas Trust Co. *v.* Huntsinger, 14 Ind. App. 156, 42 N. E. 640; Louisville, etc., R. Co. *v.* Walton, 67 S. W. 988, 24 Ky. L. Rep. 9. See also Corning *v.* Troy Iron, etc., Factory, 44 N. Y. 577.

A failure to object to expenditures made upon the public domain against which the adjoining landowner could make no legal resistance will not constitute an estoppel. Gray *v.* Bartlett, 20 Pick. (Mass.) 186, 32 Am. Dec. 208.

98. See Hudson *v.* Densmore, 68 Ind. 391; Knight *v.* Hallinger, 58 N. J. Eq. 223, 42 Atl. 1045.

If buildings are erected so as to encroach upon a street, the owner of another lot abutting on the same street is not estopped to object to such encroachment by reason of not objecting to the construction of the buildings, where he was ignorant that his rights were being interfered with, and it is not shown that the owner of the buildings was misled by his non-interference. Ackerman *v.* True, 71 N. Y. App. Div. 143, 75 N. Y. Suppl. 695 [*reversing* 31 Misc. 597, 66 N. Y. Suppl. 140].

99. Ware *v.* Smith, 156 Mass. 186, 30 N. E. 609. See also First German Reformed Church *v.* Summit County, 23 Ohio Cir. Ct. 553; Keichline *v.* Hornung, 189 Pa. St. 293, 42 Atl. 293. But see Graham *v.* Hite, 93 Ky. 474, 20 S. W. 506, 14 Ky. L. Rep. 502.

1. *Maine.*— Buch *v.* Wood, 85 Me. 204, 27 Atl. 103.

Minnesota.— Downer *v.* Read, 17 Minn. 493.

New Jersey.— Lee *v.* Kirkpatrick, 14 N. J. Eq. 264.

New York.— Best *v.* Thiel, 79 N. Y. 15; Hubbard *v.* Briggs, 31 N. Y. 518; Tylee *v.* Yates, 3 Barb. 222; Petrie *v.* Feeter, 21 Wend. 172; Watson *v.* McLaren, 19 Wend. 557. See also Conable *v.* Keeney, 16 N. Y. Suppl. 719.

Pennsylvania.— Decker *v.* Eisenhauer, 1 Penr. & W. 476.

See 19 Cent. Dig. tit. "Estoppel," § 283.

2. Morris *v.* Alston, 92 Ala. 502, 9 So. 315; Grabill *v.* Bearden, 62 Mo. App. 459.

If the note has been already purchased at the time of notice to the maker of its sale, his failure to deny its execution will not estop him. Smith *v.* Roach, 59 Mo. App. 115.

3. Bailey *v.* Lumpkin, 1 Ga. 392, holding that the maker of an overdue note who stands by when it is transferred by the holder without giving any notice that it is usurious is not thereby precluded from afterward defending against the indorsee on the ground of usury.

(v) *Failure of Judgment Debtor to Assert Invalidity of Judgment.* A judgment debtor who without objection stands by and suffers the assignment of the judgment against him to an innocent third person will be estopped afterward to assert the invalidity of such judgment.[4]

c. Failure to Assert Claim — (i) *In General.* Where a person having a claim sees another doing an act inconsistent therewith, and stands by in such a manner as to induce the person doing the act, and who might otherwise have abstained from it, to believe that he assents to its doing, he cannot afterward be heard to complain of it.[5] To constitute the estoppel, however, there must have been a duty to speak, and the adverse party must have been actually misled.[6]

(ii) *When Asked Concerning It.* When a person having a claim is asked concerning it under such circumstances as to render it his duty to speak, and fails or refuses to make it known, and another is thereby actually misled to his prejudice, he will be thereafter estopped to assert such claim.[7]

d. Failure to Assert Lien. If a mortgagee or other lien-holder stands by while another acquires an interest in the property, and fails to make known or assert his lien, he will be afterward estopped to do so to the prejudice of that other;[8] but he will not be estopped if his conduct did not mislead the other party or in any way affect the transaction.[9]

4. Dawson *v.* Melvin, 2 L. T. N. S. (Pa.) 203.

5. *California.*— Garber *v.* Gianella, 98 Cal. 527, 33 Pac. 458.

District of Columbia.— U. S. *v.* Lamont, 2 App. Cas. 532.

Illinois.— Taylor *v.* Dawson, 65 Ill. App. 232.

Indiana.— Routh *v.* Spencer, 38 Ind. 393.

Kentucky.— Crawford *v.* Colyer, 12 Ky. L. Rep. 990. See also Doss *v.* Kincheloe, 36 S. W. 1127, 18 Ky. L. Rep. 452.

Michigan.— Gingrass *v.* Iron Cliffs Co., 48 Mich. 413, 12 N. W. 633.

Mississippi.— Coxwell *v.* Prince, (1896) 19 So. 237.

New Jersey.— Race *v.* Groves, 43 N. J. Eq. 284, 7 Atl. 667; Philhower *v.* Todd, 11 N. J. Eq. 312.

New York.— Erie County Sav. Bank *v.* Roop, 48 N. Y. 292; Weaver *v.* Hutchins, 12 N. Y. St. 661.

Pennsylvania.— Bogert *v.* Batterton, 6 Pa. Super. Ct. 468.

England.— Rule *v.* Jewell, 18 Ch. D. 660, 29 Wkly. Rep. 755.

Canada.— Hoig *v.* Gordon, 17 Grant Ch. 599. See also Detlor *v.* Grand Trunk R. Co., 15 U. C. Q. B. 595.

See 19 Cent. Dig. tit. "Estoppel," § 184.

6. *Iowa.*— Blumenthal *v.* Stahle, 98 Iowa 722, 68 N. W. 447.

Kansas.— Abilene First Nat. Bank *v.* Naill, 52 Kan. 211, 34 Pac. 797.

Michigan.— Bates *v.* Kuney, 124 Mich. 596, 83 N. W. 612; Riley *v.* Conner, 79 Mich. 497, 44 N. W. 1040.

Pennsylvania.— Moncure *v.* Hanson, 15 Pa. St. 385.

South Carolina.— McGee *v.* Hall, 26 S. C. 179, 1 S. E. 711.

Vermont.— Kendall *v.* Tracy, 64 Vt. 522, 24 Atl. 1118; Joslyn *v.* Grand Trunk R. Co., 51 Vt. 92.

West Virginia.— Lorentz *v.* Lorentz, 14 W. Va. 809.

See 19 Cent. Dig. tit. "Estoppel," § 184.

7. *Colorado.*— Patterson *v.* Hitchcock, 3 Colo. 533.

Connecticut.— See Taylor *v.* Ely, 25 Conn. 250.

Illinois.— Riley *v.* Quigley, 50 Ill. 304, 99 Am. Dec. 516.

Minnesota.— Barchent *v.* Selleck, 89 Minn. 513, 95 N. W. 455.

Virginia.— Kelly *v.* Fairmount Land Co., 97 Va. 227, 33 S. E. 598.

See 19 Cent. Dig. tit. "Estoppel," § 287.

A mortgagee in possession under an unrecorded mortgage will be estopped from setting up his mortgage to the injury of a purchaser to whom he has refused information concerning it. Riley *v.* Quigley, 50 Ill. 304, 99 Am. Dec. 516.

A person in possession of personal property who fails or refuses to disclose the nature of his claim against the property is not estopped to assert the same when sued for the possession of the property. Cunningham *v.* Milner, 56 Ala. 522.

8. *Illinois.*— Niccols *v.* Pool, 89 Ill. 491.

Indiana.— Kelley *v.* Fisk, 110 Ind. 552, 11 N. E. 453.

Michigan.— Barkworth *v.* Isbell, 101 Mich. 40, 59 N. W. 408.

Nebraska.— Forbes *v.* McCoy, 24 Nebr. 702, 40 N. W. 132.

New York.— Minton *v.* New York El. R. Co., 130 N. Y. 332, 29 N. E. 319 [*affirming* 57 N. Y. Super. Ct. 601, 8 N. Y. Suppl. 959].

North Carolina.— Morris *v.* Herndon, 113 N. C. 236, 18 S. E. 203.

Pennsylvania.— Buckley *v.* Union Canal Co., 3 Phila. 152.

South Dakota.— Sutton *v.* Consolidated Apex Min. Co., 14 S. D. 33, 84 N. W. 211.

Wisconsin.— McLean *v.* Dow, 42 Wis. 610.

See 19 Cent. Dig. tit. "Estoppel," § 186.

9. Askins *v.* Coc, 12 Lea (Tenn.) 672. See also Hughes *v.* Tanner, 96 Mich. 113, 55 N. W. 661.

e. Concealment of Facts. Where a person by concealing facts in his possession induces another to act in a manner other than he would have acted had he known such facts, he will afterward be estopped to set up such facts to the other's prejudice.[10]

f. Surrender of Possession of Property. The mere surrender of the possession of property to another is not sufficient to estop the party surrendering it from subsequently asserting a right or title thereto,[11] but he may be estopped when the circumstances are such as to indicate a disclaimer of such right or title and it would be inequitable to permit him to assert the contrary.[12]

g. Conveyance With Reference to Street or Way. A grantor of land who describes the same by a boundary on a street or way, if he be the owner of such adjacent land, is estopped from setting up any claim or doing any acts inconsistent with the grantee's use of the street or way, and such estoppel applies to his heirs or those claiming under him.[13] Where land has been divided into lots and a plat thereof is made showing such lots and streets and the owner sells lots so designated on the plat, he is estopped from depriving the purchaser of the use of the street. He has an easement in such street to be enjoyed in connection with the lot of which the grantor cannot deprive him.[14]

A mortgagee who permits property to be sold under an inferior claim or lien, and does not assert his right under the mortgage, is not estopped from recovering the indebtedness secured thereby in an action against the mortgagor. Jones *v.* Turck, 33 Iowa 246.

An officer selling property under execution must ascertain from the records whether the property is subject to mortgage, and a mortgagee is not estopped by failing to assert his claim from maintaining an action against the officer for failing to retain possession of the property until the purchaser has complied with the conditions of the mortgage. McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739.

10. *Iowa.*— Williams *v.* Wells, 62 Iowa 740, 10 N. W. 513.

Louisiana.— Chamberlin *v.* Milbank, 6 La. Ann. 383.

New York.— L'Amoureux *v.* Vandenburgh, 7 Paige 316, 32 Am. Dec. 635. *Compare* Harbeck *v.* Pupin, 145 N. Y. 70, 39 N. E. 722.

Wisconsin.— Mihills Mfg. Co. *v.* Camp, 49 Wis. 130, 5 N. W. 1.

England.— Dalbiac *v.* Dalbiac, 16 Ves. Jr. 116, 33 Eng. Reprint 928.

Canada.— Hoig *v.* Gordon, 17 Grant Ch. 599; Scott *v.* New Brunswick Bank, 31 N. Brunsw. 21 [appeal *dismissed* in 23 Can. Supreme Ct. 277].

See 19 Cent. Dig. tit. "Estoppel," § 185.

Concealment: As fraud see CONTRACTS, 9 Cyc. 412; FRAUD. Defined see CONCEALMENT, 8 Cyc. 544.

11. Turnipseed *v.* Hudson, 50 Miss. 429, 19 Am. Rep. 15.

Surrender under void execution.— A debtor who surrenders in writing a tract of land to be sold by the sheriff under a void execution against him is not estopped from controverting the title of the purchaser. Geoghegan *v.* Ditto, 2 Metc. (Ky.) 433, 74 Am. Dec. 413.

Effect of acquiring legal title.— The holder of an equity under an elder patent, although he may have surrendered possession to a junior patentee, is not estopped after acquiring the legal title to assert his legal claim, unless twenty years' possession has been had under the surrender. Calboon *v.* Baird, 3 A. K. Marsh. (Ky.) 168.

12. See Schneitman *v.* Nohle, 75 Iowa 120, 39 N. W. 224, 9 Am. St. Rep. 467; Conner *v.* Mason, 2 Litt. (Ky.) 254.

A grantor who conveys land by description too vague for it to be located, but at the time located it and put the grantee in possession, is estopped from recovering the land because the description was insufficient to convey title. Barker *v.* Southern R. Co., 125 N. C. 596, 34 S. E. 701, 74 Am. St. Rep. 658.

13. *Arkansas.*— Rogers *v.* Bollinger, 59 Ark. 12, 26 S. W. 12.

Hawaii.— Kamai *v.* Trask, 8 Hawaii 75.

Massachusetts.— Howe *v.* Alger, 4 Allen 206. See also Rodgers *v.* Parker, 9 Gray 445; Thomas *v.* Poole, 7 Gray 83.

Michigan.— Karrer *v.* Berry, 44 Mich. 391, 6 N. W. 853; Smith *v.* Lock, 18 Mich. 56. See also Bell *v.* Todd, 51 Mich. 21, 16 N. W. 304.

New York.— *In re* St. Nicholas Terrace, 143 N. Y. 621, 37 N. E. 635.

Ohio.— Kneisel *v.* Krug, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38 [*distinguishing* Satchell *v.* Doram, 4 Ohio St. 542]. See also Lowe *v.* Redgate, 42 Ohio St. 329.

Canada.— Pugh *v.* Peters, 11 Nova Scotia 139.

See, however, Albert *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 664, 21 S. W. 779.

14. Cleaver *v.* Mahanke, (Iowa 1903) 94 N. W. 279. See also McFarland *v.* Lindekugel, 107 Wis. 474, 477, 83 N. W. 757, in which it is said: "Some few of the cases put the right of the grantee upon the ground that there is an implied covenant to the use of the street, but the great majority, and with the better reason, base it upon the ground of estoppel *in pais*."

The owners of city real estate, who plat it into lots and streets, and sell the lots with reference to the plat are estopped, as against

3. Negligence — a. In General. A recognized proposition as to estoppel *in pais* is that if in the transaction itself which is in dispute a party has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, he cannot be heard afterward as against that other to show that the state of facts referred to did not exist.[15] Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the party into mistake, and also must be the neglect of some duty which is owing to such party or to the general public.[16]

their vendees, from denying the existence of such streets as public highways, although there has been no acceptance thereof by the city. Overland Machinery Co. *v.* Alpenfels, 30 Colo. 163, 69 Pac. 574.

Conversely, a person who buys a lot and accepts a conveyance according to a recorded plat on which a street appears bounding the property is estopped to deny the existence of the street. Moore *v.* Walla Walla, 2 Wash. Terr. 184, 2 Pac. 187. See *infra*, VI, B, 1, b, (II), (B).

Covenant implied from conveying lands as bounded on street or way see COVENANTS, 11 Cyc. 1049.

Dedication of streets by estoppel see DEDICATION, 13 Cyc. 454 *et seq.*

Ways created by sale by reference to map or plat or bounding on road or highway see EASEMENTS, 14 Cyc. 1176.

15. *Georgia.*—Williams *v.* Allen, 17 Ga. 81.

Illinois.—Cheatle *v.* MacVeagh, 83 Ill. App. 336.

Iowa.— Miles *v.* Lefi, 60 Iowa 168, 14 N. W. 233; McCormack *v.* Molburg, 43 Iowa 561.

Kansas.— See Guernsy *v.* Fulmer, 66 Kan. 767, 71 Pac. 578.

Kentucky.— Davis *v.* Ramage, 65 S. W. 340, 23 Ky. L. Rep. 1420.

Maryland.— Donovan *v.* Firemen's Ins. Co., 30 Md. 155.

Missouri.— Billings Bank *v.* Wade, 73 Mo. App. 558; Taylor *v.* Fox, 16 Mo. App. 527.

New Jersey.— New Jersey Cent. R. Co. *v.* MacCartney, 68 N. J. L. 165, 52 Atl. 575; Woodruff *v.* Morristown Sav. Inst., 34 N. J. Eq. 174.

Pennsylvania.— Willis *v.* Philadelphia, etc., R. Co., 6 Wkly. Notes Cas. 461.

Tennessee.— Kelly *v.* Kelly, (Ch. App. 1900) 58 S. W. 870.

Texas.— Ragsdale *v.* Robinson, 48 Tex. 379.

Virginia.— Mercantile Co-operative Bank *v.* Brown, 96 Va. 614, 32 S. E. 64.

United States.—Andrus *v.* Bradley, 102 Fed. 54.

England.— Pilcher *v.* Rawlins, L. R. 11 Eq. 53, 40 L. J. Ch. 105, 23 L. T. Rep. N. S. 756, 19 Wkly. Rep. 217; Carr *v.* London, etc., R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31 L. T. Rep. N. S. 785, 23 Wkly. Rep. 747, where the rule as stated in the text is laid down by Brett, J.

See 19 Cent. Dig. tit. "Estoppel," § 288.

Limitation of rule.— The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterward disputing the contents of such writing is not applicable in a suit between the original parties thereto, or where the defense thereto is that such writing, by reason of fraud, does not embrace the contract actually made. Spelts *v.* Ward, (Nebr. 1901) 96 N. W. 56; Ward *v.* Spelts, 39 Nebr. 809, 58 N. W. 426. See also State Ins. Co. *v.* Jordan, 29 Nebr. 514, 45 N. W. 792.

16. *California.*— Gould *v.* Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323.

Maryland.— Brown *v.* Howard F. Ins. Co., 42 Md. 384, 20 Am. Rep. 90.

Massachusetts.— O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498.

Minnesota.— Clarke *v.* Milligan, 58 Minn. 413, 59 N. W. 955.

Missouri.— Wannell *v.* Kem, 57 Mo. 478; Breckenridge *v.* White, 93 Mo. App. 681, 67 S. W. 715.

Nebraska.— State *v.* Bank of Commerce, 61 Nebr. 22, 84 N. W. 406.

New York.— Austin *v.* Wilson, 11 N. Y. Suppl. 565; Lighte *v.* Finan, 3 N. Y. Suppl. 148.

North Carolina.— Rawls *v.* White, 127 N. C. 17, 37 S. E. 68.

Ohio.— Dean *v.* King, 22 Ohio St. 118; Nye *v.* Denny, 18 Ohio St. 246, 98 Am. Dec. 118.

Wisconsin.— Tisher *v.* Beckwith, 30 Wis. 55, 11 Am. Rep. 546.

United States.— Farrand *v.* Land, etc., Imp. Co., 86 Fed. 393, 30 C. C. A. 128.

England.— Scholfield *v.* Londesborough, [1896] A. C. 514, 65 L. J. Q. B. 593, 75 L. T. Rep. N. S. 254, 45 Wkly. Rep. 124; Vagliano *v.* Bank of England, 23 Q. B. D. 243, 53 J. P. 564, 58 L. J. Q. B. 357, 61 L. T. Rep. N. S. 419, 37 Wkly. Rep. 640; Baxendale *v.* Bennett, 3 Q. B. D. 525, 47 L. J. Q. B. 624, 26 Wkly. Rep. 899; Hall *v.* West-End Advance Co., 1 Cab. & E. 161; Johnson *v.* Credit Lyonnais Co., 3 C. P. D. 32, 47 L. J. C. P. 241, 37 L. T. Rep. N. S. 657, 26 Wkly. Rep. 195; Arnold *v.* Cheque Bank, 1 C. P. D. 578, 45 L. J. C. P. 562, 34 L. T. Rep. N. S. 729, 24 Wkly. Rep. 759 (where the language of the text is laid down by Coleridge, C. J., as the correct rule in such cases); Sivan *v.* North British Australasian Co., 2 H. & C. 175, 10 Jur. N. S. 102, 32 L. J. Exch. 273, 11 Wkly. Rep. 862.

Canada.—Agricultural Invest. Co. *v.* Federal Bank, 45 U. C. Q. B. 214 [*affirmed* in 6 Ont. App. 192]. See also Saderquist *v.* On-

b. Acts Causing Injury to One of Two Innocent Parties — (I) *In General.* Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.[17] This rule does not apply, however, in cases where the wrong was accomplished through the instrumentality of a criminal act; it being held that in such cases the crime, and not the negligent act, is the proximate cause of the injury.[18]

(II) *Clothing Another With Apparent Title or Authority* — (A) *In General.* Where the true owner of property holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, or person having such apparent power of disposition, they will be protected.[19] Their

tario Bank, 14 Ont. 586 [*affirmed* in 15 Ont. App. 609].

See 19 Cent. Dig. tit. "Estoppel," § 288.

Where the wrong was accomplished by a criminal act, the crime, and not the negligent act of the party which made it possible, is the proximate cause. See *infra*, V, B, 3, b, (I).

17. *Alabama.*— Noble *v.* Moses, 74 Ala. 604.

California.— Ballard *v.* Nye, (1902) 69 Pac. 481.

District of Columbia.— Hill *v.* Lowe, 6 Mackey 428.

Illinois.— Milwaukee Harvester Co. *v.* Glidden, 106 Ill. App. 319; Wilcox *v.* Tetherington, 103 Ill. App. 404; Delfosse *v.* Metropolitan Nat. Bank, 98 Ill. App. 123; Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365; McClelland *v.* Bartlett, 13 Ill. App. 236.

Michigan.— Peake *v.* Thomas, 39 Mich. 584.

Minnesota.— Scanlon-Gipson Lumber Co. *v.* Germania Bank, 90 Minn. 478, 97 N. W. 380.

New Jersey.— Baldwin *v.* Richman, 9 N. J. Eq. 394.

New York.— Follett Wool Co. *v.* Utica Trust, etc., Co., 84 N. Y. App. Div. 151, 82 N. Y. Suppl. 597; Hertell *v.* Bogert, 9 Paige 52.

Ohio.— Wilson *v.* Hicks, 40 Ohio St. 418.

Pennsylvania.— Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Jeffers *v.* Gill, 91 Pa. St. 290; Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Millingar *v.* Sorg, 61 Pa. St. 471; Grasselli Chemical Co. *v.* Biddle Purchasing Co., 22 Pa. Super. Ct. 426.

South Dakota.— Persons *v.* Van Tassel, 15 S. D. 362, 89 N. W. 861.

Tennessee.— Coles *v.* Anderson, 8 Humphr. 489.

Utah.— Heavy *v.* Commercial Nat. Bank, 27 Utah 222, 75 Pac. 727.

West Virginia.— Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 21 S. E. 755.

England.— Farquharson *v.* King, [1901] 2 K. B. 697, 70 L. J. K. B. 985, 85 L. T. Rep. N. S. 264, 49 Wkly. Rep. 673; Nash *v.* De Freville, [1900] 2 Q. B. 72, 69 L. J. Q. B. 484, 82 L. T. Rep. N. S. 642, 48 Wkly. Rep. 434; Rimmer *v.* Webster, [1902] 2 Ch. 163, 71 L. J. Ch. 561, 86 L. T. Rep. N. S. 491, 50 Wkly. Rep. 517; Oliver *v.* Bank of England, [1902] 1 Ch. 610, 71 L. J. Ch. 388, 86 L. T. Rep. N. S. 248, 50 Wkly. Rep. 340.

See 19 Cent. Dig. tit. "Estoppel," § 188.

18. *California.*— Walsh *v.* Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697.

Iowa.— Knoxville Nat. Bank *v.* Clark, 51 Iowa 264, 1 N. W. 491.

Maryland.— Burrows *v.* Klunk, 70 Md. 451, 17 Atl. 378, 14 Am. St. Rep. 371, 3 L. R. A. 576.

Michigan.— Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661.

Pennsylvania.— Worrall *v.* Gheen, 39 Pa. St. 388.

England.— Scholfield *v.* Londesborough, [1896] A. C. 514, 65 L. J. Q. B. 593, 75 L. T. Rep. N. S. 254, 45 Wkly. Rep. 124; England *v.* Bank of England, 21 Q. B. D. 160, 52 J. P. 580, 57 L. J. Q. B. 418, 36 Wkly. Rep. 880; Baxendale *v.* Bennett, 3 Q. B. D. 525, 47 L. J. Q. B. 624, 26 Wkly. Rep. 899.

An early English case (Young *v.* Grote, 4 Bing. 253, 5 L. J. C. P. O. S. 165, 12 Moore C. P. 484, 29 Rev. Rep. 552, 13 E. C. L. 491) which has been much relied on as supporting a contrary doctrine is expressly disapproved of by the cases cited in support of the text.

19. *Alabama.*— Hoene *v.* Pollak, 118 Ala. 617, 24 So. 349, 72 Am. St. Rep. 189.

California.— Hostler *v.* Hays, 3 Cal. 302.

Illinois.— Anderson *v.* Armstead, 69 Ill. 452.

Kentucky.— Craig *v.* Turley, 86 Ky. 636, 6 S. W. 648, 9 Ky. L. Rep. 769; Wells *v.* Higgins, 1 Litt. 299, 13 Am. Dec. 235; Butler *v.* Stark, 90 S. W. 204, 25 Ky. L. Rep. 1886; Wilson *v.* Scott, 13 Ky. L. Rep. 926.

Louisiana.— Curl *v.* Ruston State Bank, 104 La. 548, 29 So. 234; Dozer *v.* Squires, 13 La. 130.

Michigan.— Christian *v.* Michigan Debenture Co., (1903) 96 N. W. 22.

Minnesota.— Wrigley *v.* Watson, 81 Minn. 251, 83 N. W. 989.

Missouri.— Peery *v.* Hall, 75 Mo. 503; McDermott *v.* Barnum, 19 Mo. 204; Ratican *v.* Union Depot Co., 80 Mo. App. 528.

New Hampshire.— Dow *v.* Epping, 48 N. H. 75.

New York.— Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Butcher *v.* Quinn, 86 N. Y. App. Div. 391, 83 N. Y. Suppl. 700; Rigney *v.* Smith, 39 Barb. 383.

Pennsylvania.— Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Wood's Appeal, 92 Pa. St. 379, 37

rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance.[20]

(B) *Real Property*—(1) IN GENERAL. The owner of real property may by clothing another with an apparent title thereto or with an apparent authority over it estop himself to deny such title or authority.[21]

Am. Rep. 694; Hildeburn *v.* Nathans, 1 Phila. 567.

Texas.— Missouri, etc., R. Co. *v.* Yale, 27 Tex. Civ. App. 10, 65 S. W. 57.

England.— Farquharson *v.* King, [1901] 2 K. B. 697, 70 L. J. K. B. 985, 85 L. T. Rep. N. S. 264, 49 Wkly. Rep. 673; Miles *v.* Furber, L. R. 8 Q. B. 77, 42 L. J. Q. B. 41, 27 L. T. Rep. N. S. 756, 21 Wkly. Rep. 262.

Canada.— Toronto Bank *v.* Cobourg, etc., R. Co., 7 Ont. 1.

See 19 Cent. Dig. tit. "Estoppel," § 189.

A person who has a mere equitable interest in property is not allowed to question the validity of a sale of it, when he permitted the legal title to remain in another and when it passed into the hands of *bona fide* purchasers without notice. Dozer *v.* Squires, 13 La. 130.

Where the consideration for the transfer is only an antecedent indebtedness on the part of the assignee to the apparent owner, the true owner is not estopped to assert his ownership. Culmer *v.* American Grocery Co., 21 N. Y. App. Div. 556, 48 N. Y. Suppl. 431.

Negligence of a state officer in failing to discover that a clerk had forged the indorsement of drafts and diverted the proceeds does not amount to such a clothing of him with authority as to estop the state. People *v.* Bank of North America, 75 N. Y. 547.

Property is not liable for debts of the person in whose custody it is placed unless there is some wrongful or fraudulent intent on the part of the owner, or that which is regarded as its equivalent. Robinson *v.* Chaplin, 9 Iowa 91.

20. Anderson *v.* Armstead, 69 Ill. 452; McNeil *v.* New York City Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Pickering *v.* Busk, 15 East 38, 13 Rev. Rep. 364.

21. *California.*— Filipini *v.* Trobock, 134 Cal. 441, 66 Pac. 587, (1900) 62 Pac. 1066.

Florida.— Levy *v.* Cox, 22 Fla. 546, 580.

Georgia.— Wright *v.* McCord, 113 Ga. 881, 39 S. E. 510; Equitable Mortg. Co. *v.* Butler, 105 Ga. 555, 31 S. E. 395; Morris *v.* Rogers, 104 Ga. 705, 30 S. E. 937.

Indiana.— Love *v.* Wells, 25 Ind. 503, 87 Am. Dec. 375.

Iowa.— Lindley *v.* Martindale, 78 Iowa 379, 43 N. W. 233.

Kansas.—Lawrence *v.* Guaranty Invest. Co., 51 Kan. 222, 32 Pac. 816; McNeil *v.* Jordan, 28 Kan. 7; Marysville Invest. Co. *v.* Holle, 5 Kan. App. 408, 49 Pac. 332.

Kentucky.— Butler *v.* Stark, 79 S. W. 204, 25 Ky. L. Rep. 1886.

Louisiana.— Joubert *v.* Sampson, 49 La. Ann. 1002, 22 So. 203; Stewart *v.* Mix, 30 La. Ann. 1036; Richardson *v.* Hyams, 1 La. Ann. 286.

Massachusetts.— Shattuck *v.* Gragg, 23 Pick. 88.

Minnesota.— Esty *v.* Cummings, 80 Minn. 516, 83 N. W. 420; Lowry *v.* Mayo, 41 Minn. 388, 43 N. W. 78.

Missouri.— George *v.* Somerville, 153 Mo. 7, 54 S. W. 491; Rieschick *v.* Klingelhoefer, 91 Mo. App. 430; Snodgrass *v.* Emery, 66 Mo. App. 462.

Nevada.— Stonecifer *v.* Yellow Jacket Silver Min. Co., 3 Nev. 38.

New Jersey.— Groton Sav. Bank *v.* Batty, 30 N. J. Eq. 126.

New York.— Multz *v.* Price, 91 N. Y. App. Div. 116, 86 N. Y. Suppl. 480; Simson *v.* Bank of Commerce, 43 Hun 156.

North Carolina.— Shattuck *v.* Cauley, 119 N. C. 292, 25 S. E. 872.

Ohio.— Diehl *v.* Stine, 1 Ohio Cir. Ct. 515, 1 Ohio Cir. Dec. 287.

Pennsylvania.— Miller's Appeal, 84 Pa. St. 391; Bair's Estate, 20 Pa. Super. Ct. 85.

Rhode Island.— East Greenwich Sav. Inst. *v.* Kenyon, 20 R. I. 110, 37 Atl. 632.

Tennessee.— Polk *v.* Gunther, 107 Tenn. 16, 64 S. W. 25; Susong *v.* Williams, 1 Heisk. 625; Wilkins *v.* May, 3 Head 173; Harding *v.* Montague, (Ch. App. 1876) 36 S. W. 958.

Texas.— Beard *v.* Blum, 64 Tex. 59; Henry *v.* Thomas, (Civ. App. 1903) 74 S. W. 599; Allen *v.* Exchange Nat. Bank, 21 Tex. Civ. App. 450, 52 S. W. 575, 53 S. W. 364; Biccochi *v.* Casey, etc., Co., (Civ. App. 1897) 40 S. W. 209; Elmendorf *v.* Tejada, (Civ. App. 1893) 23 S. W. 935.

Washington.— Brown *v.* Baruch, 24 Wash. 572, 64 Pac. 789.

West Virginia.— McConnell *v.* Rowland, 48 W. Va. 276, 37 S. E. 586; Greer *v.* Mitchell, 42 W. Va. 494, 26 S. E. 302.

Wisconsin.— Schnee *v.* Schnee, 23 Wis. 377, 99 Am. Dec. 183.

Canada.— McDonald *v.* Weeks, 8 Grant Ch. (U. C.) 297; Davis *v.* Snyder, 1 Grant Ch. (U. C.) 134.

See 19 Cent. Dig. tit. "Estoppel," § 190.

Specific performance of a contract to convey made by the apparent owner will be decreed against the real owner. See Davis *v.* Snyder, 1 Grant Ch. (U. C.) 134.

By leaving an undelivered deed in the hands of a third person the grantor does not clothe such person with apparent authority to give effect to the instrument by delivery to another than the grantee therein, and no estoppel arises in favor of a person whose name is substituted for that of the grantee without

(2) APPARENT TITLE IN HUSBAND. Where the apparent title to or authority over real property belonging to a wife is by her permitted to be in her husband, and third persons on the strength of such apparent title or authority acquire rights therein, she will be estopped to deny such title or authority.[22]

(c) *Personal Property* — (1) IN GENERAL. The owner of personal property may, by clothing another with an apparent title to, or authority over, it, estop himself to deny such title or authority.[23] This rule applies with reference to

the grantor's consent. Hollis *v.* Harris, 96 Ala. 288, 11 So. 377.

Where parties have executed a power of attorney, and under its authority a deed is executed, neither they nor their heirs can defeat the title of the grantee in such deed by proof that such power of attorney was not recorded as required by law. Diehl *v.* Stine, 1 Ohio Cir. Ct. 515, 1 Ohio Cir. Dec. 287. But see Earle *v.* Earle, 20 N. J. L. 347.

Listing lands for taxation.— A collector by listing lands for taxation to another is not estopped subsequently to claim title in himself. Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

22. *Colorado.*— Sliney *v.* Davis, 11 Colo. App. 480, 53 Pac. 686.

Florida.— Warner *v.* Watson, 35 Fla. 402, 17 So. 654.

Georgia.— Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806; Kennedy *v.* Lee, 72 Ga. 39.

Illinois.— Smith *v.* Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Lowentrout *v.* Campbell, 130 Ill. 503, 22 N. E. 744; Hauk *v.* Van Ingen, 97 Ill. App. 642 [*affirmed* in 196 Ill. 20, 63 N. E. 705].

Indiana.— Pierce *v.* Hower, 142 Ind. 626, 42 N. E. 223; Le Coil *v.* Armstrong-Landon-Hunt Co., 140 Ind. 256, 39 N. E. 922; Long *v.* Crosson, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783.

Iowa.— Iseminger *v.* Criswell, 98 Iowa 382, 67 N. W. 289; Hendershott *v.* Henry, 63 Iowa 744, 19 N. W. 665; McHenry *v.* Day, 13 Iowa 445, 81 Am. Dec. 438.

Louisiana.— Thompson *v.* Whitbeck, 47 La. Ann. 49, 16 So. 570.

Nebraska.— David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877; Roy *v.* McPherson, 11 Nebr. 197, 7 N. W. 873.

New Jersey.— City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

South Carolina.—Holland *v.* Jones, 48 S. C. 267, 26 S. E. 606.

Vermont.— Spaulding *v.* Drew, 55 Vt. 253.

Wisconsin.— Hopkins *v.* Joyce, 78 Wis. 443, 47 N. W. 722.

Wyoming.— Culver *v.* Graham, 3 Wyo. 211, 21 Pac. 694.

See 19 Cent. Dig. tit. "Estoppel," § 191; and HUSBAND AND WIFE.

The mere fact of the husband's holding the title to land purchased with the money of his wife at the time debts are contracted by him will not estop the wife to assert her interest as against the creditors of the husband. Bennet *v.* Strait, 63 Iowa 620, 19 N. W. 806; De Berry *v.* Wheeler, 128 Mo. 84, 30 S. W. 338, 49 Am. St. Rep. 538. See also Ray *v.* Teabout, 65 Iowa 157, 21 N. W. 497; Hay *v.* Martin, (Pa. 1888) 14 Atl. 333; Feig *v.* Meyers, 102 Pa. St. 10.

Where a wife merely allows her husband the management of her property she is not estopped to assert her title as against the husband's creditors where she has done no act to deceive them as to the true ownership of the property. Hoag *v.* Martin 80 Iowa 714, 45 N. W. 1058.

Where property is put in the name of the husband for the purpose of managing it, and not for the purpose of giving him credit, and the wife makes no representations that the property is his, and does not know that credit was given him on the faith of his apparent title, she is not estopped to assert her title thereto. Marston *v.* Dreson, 85 Wis. 530, 55 N. W. 896.

Representations made by the husband, without the knowledge or consent of the wife, to the effect that he is the sole owner of certain land, will not estop the wife to assert title thereto. *In re* Garner, 110 Fed. 123.

23. *Connecticut.*— New York State Bank *v.* Waterhouse, 70 Conn. 76, 38 Ill. 904, 66 Am. St. Rep. 82.

Georgia.— Hill *v.* Williams, 33 Ga. 39.

Illinois.— Delfosse *v.* Metropolitan Nat. Bank, 98 Ill. App. 123.

Indiana.—Preston *v.* Witherspoon, 109 Ind. 457, 9 N. E. 585, 58 Am. Rep. 417.

Iowa.— McMurray *v.* Hughes, 82 Iowa 47, 47 N. W. 883.

Kentucky.— Douglas *v.* People's Bank, 86 Ky. 176, 5 S. W. 420, 10 Ky. L. Rep. 243, 9 Am. St. Rep. 276.

Louisiana.— Lowber *v.* McCoy, 12 La. Ann. 795.

Maine.— Lewenberg *v.* Hayes, 91 Me. 104, 39 Atl. 469, 64 Am. St. Rep. 215.

Maryland.— Maryland Sav. Inst. *v.* Schroeder, 8 Gill & J. 93, 29 Am. Dec. 528.

Massachusetts.— Savage *v.* Darling, 151 Mass. 5, 23 N. E. 234.

Michigan.— Rogers *v.* Robinson, 104 Mich. 329, 62 N. W. 402; Stebbins *v.* Walker, 46 Mich. 5, 8 N. W. 521.

Minnesota.— Armstrong *v.* Freimuth, 78 Minn. 94, 80 N. W. 862.

New Jersey.— Sonn *v.* Steinhauser, (Ch. 1892) 24 Atl. 397.

New York.— Rawls *v.* Deshler, 4 Abb. Dec. 12, 3 Keyes 572, 3 Transcr. App. 91; McCauley *v.* Brown, 2 Daly 426; McCotter *v.* McCotter, 16 Abb. Pr. 265, 25 How. Pr. 478; Chemung Canal Bank *v.* Chemung, 5 Den. 517; Shearer *v.* Barrett, Lalor 70; Craig *v.* Ward, 9 Johns. 197.

North Dakota.— Peabody *v.* Lloyds Bankers, 6 N. D. 27, 68 N. W. 92.

shares of stock,[24] and also to notes and mortgages.[25] But in order that the real owner of personal property may be estopped to assert his title against one who has dealt with the apparent owner on the faith of his apparent ownership of or authority over it, something more is required than mere possession on the part of the apparent owner.[26] There must be a fraudulent or deceptive purpose in view,

Pennsylvania.— Rapp *v.* Crawford, 146 Pa. St. 21, 23 Atl. 319, 28 Am. St. Rep. 780; Wylie's Appeal, 90 Pa. St. 210.

South Carolina.— Dunlap *v.* Gooding, 22 S. C. 548; Ayer *v.* Mordecai, 10 Rich. 287; James *v.* Wilmington, etc., R. Co., 9 Rich. 416; Jaudon *v.* Gourdin, Rich. Eq. Cas. 246.

Tennessee.— Rice *v.* Crow, 6 Heisk. 28.

Texas.— Neale *v.* Sears, 31 Tex. 105; Clack *v.* Wood, (Civ. App. 1898) 46 S. W. 1132.

Vermont.— Davis *v.* Bradley, 24 Vt. 55.

Washington.— Standard Furniture Co. *v.* Van Alstine, 31 Wash. 499, 72 Pac. 119.

Wisconsin.— Klœty *v.* Delles, 45 Wis. 484.

United States.— Baker *v.* Wood, 157 U. S. 212, 15 S. Ct. 577, 39 L. ed. 677; Sanders *v.* Peck, 77 Fed. 353; Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 850, 1 C. C. A. 116 [*reversing* 48 Fed. 32]; Gleason *v.* District of Columbia, 19 Ct. Cl. 430.

Canada.— Halpenny *v.* Pennock, 33 U. C. Q. B. 229; McDonald *v.* Weeks, 8 Grant Ch. (U. C.) 297.

See 19 Cent. Dig. tit. "Estoppel," § 192.

24. *Indiana.*— Hirsch *v.* Norton, 115 Ind. 341, 17 N. E. 612.

Massachusetts.— Russell *v.* American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751.

New Jersey.— Young *v.* Vough, 23 N. J. Eq. 325.

New York.— Williams *v.* Walker, 9 N. Y. St. 60.

Pennsylvania.—Burton's Appeal, 93 Pa. St. 214; Larkins *v.* Cohocksink Bldg. Assoc., 4 Phila. 95.

England.— Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194, 46 L. J. Q. B. 346, 36 L. T. Rep. N. S. 240, 25 Wkly. Rep. 366; Goodwin *v.* Robarts, 1 App. Cas. 476, 45 L. J. Exch. 748, 35 L. T. Rep. N. S. 179, 24 Wkly. Rep. 987; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120, 62 L. J. Ch. 358, 68 L. T. Rep. N. S. 315, 3 Reports 120, 42 Wkly. Rep. 140. *Compare* Swan *v.* North British Australasian Co., 2 H. & C. 175, 10 Jur. N. S. 102, 32 L. J. Exch. 273, 11 Wkly. Rep. 862.

See 19 Cent. Dig. tit. "Estoppel," § 193.

25. *Connecticut.*— Bassett *v.* Holbrook, 24 Conn. 453.

Illinois.— Marshall *v.* Ender, 20 Ill. App. 312 [*affirmed* in 125 Ill. 370, 17 N. E. 464].

Kentucky.— Prather *v.* Weissiger, 10 Bush 117.

Mississippi.— Gross *v.* Oatis, 74 Mass. 357, 20 So. 843.

New Jersey.— Sweeny *v.* Williams, 36 N. J. Eq. 627; Martin *v.* Righter, 10 N. J. Eq. 510.

New York.— Roosevelt *v.* Land, etc., Imp. Co., 11 Misc. 595, 33 N. Y. Suppl. 536. *Compare* Hill *v.* Hoole, 116 N. Y. 299, 22 N. E. 547, 5 L. R. A. 620.

Pennsylvania.— Com. *v.* Manufacturers' Mut. F. Ins. Co., 11 Phila. 550; Insurance Co. *v.* Strahl, 25 Pittsb. Leg. J. 131.

Tennessee.— Atlanta Guano Co. *v.* Hunt, 100 Tenn. 89, 42 S. W. 482; Fields *v.* Carney, 4 Baxt. 137.

Texas.— Kempner *v.* Huddleston, 90 Tex. 182, 37 S. W. 1066.

United States.— Stewart *v.* Armstrong, 56 Fed. 167.

Canada.— Burton *v.* Goffin, 5 Brit. Col. 454.

See 19 Cent. Dig. tit. "Estoppel," § 194.

26. *California.*—Warren *v.* Connor, (1896) 47 Pac. 48.

Georgia.— Freeman *v.* Flood, 16 Ga. 528.

Indiana.— Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; McGirr *v.* Sell, 60 Ind. 249.

Iowa.— Everson *v.* Sinclair, 110 Iowa 135, 81 N. W. 187; Van Horn *v.* Overman, 75 Iowa 421, 39 N. W. 679; Hinkson *v.* Morrison, 47 Iowa 167.

Kansas.— Hill *v.* Van Sandt, 1 Kan. App. 367, 40 Pac. 676.

Louisiana.— Greening *v.* Elliott, 38 La. Ann. 290.

Maine.— Staples *v.* Bradbury, 8 Me. 181, 23 Am. Dec. 494.

Maryland.— Johnson *v.* Frisbie, 29 Md. 76, 96 Am. Dec. 508.

Massachusetts.— Rogers *v.* Dutton, 182 Mass. 187, 65 N. E. 56; Commercial Nat. Bank *v.* Bemis, 177 Mass. 95, 58 N. E. 476.

Michigan.— Schoolcraft *v.* Simpson, 123 Mich. 215, 81 N. W. 1076.

Minnesota.— Baker *v.* Taylor, 54 Minn. 71, 55 N. W. 823.

New York.— Hentz *v.* Miller, 94 N. Y. 64; Buffalo Mar. Bank *v.* Fiske, 71 N. Y. 353; Collins *v.* Ralli, 20 Hun 246; Craig *v.* Marsh, 2 Daly 61; Craig *v.* Ward, 9 Johns. 197.

Pennsylvania.— O'Connor *v.* Clark, 170 Pa. St. 318, 32 Atl. 1029, 29 L. R. A. 607; Malone's Estate, 8 Wkly. Notes Cas. 179; Hildeburn *v.* Nathans, 1 Phila. 567.

United States.— Diebolt *v.* The Chester Hair, 4 Fed. 571.

England.—Meggy *v.* Imperial Discount Co., 3 Q. B. D. 711, 47 L. J. Q. B. 119, 38 L. T. Rep. N. S. 309, 26 Wkly. Rep. 342.

See 19 Cent. Dig. tit. "Estoppel," § 192.

Before possession can constitute an estoppel it must be accompanied with claim of ownership and the true owner must have allowed the possession to continue, knowing such possession and claim. Van Horn *v.* Overman, 75 Iowa 421, 39 N. W. 679.

Allowing furniture to remain in a house to be used is not holding it out as the property of the occupant so as to estop the owner to claim title thereto as against a creditor of the occupant. Giannone *v.* Fleetwood, 93 Ga. 491, 21 S. E. 76.

or implied from the special circumstances of the case on the part of the true owner.[27]

(2) Apparent Title in Husband. A wife who knowingly permits her husband to deal with her property as his own will be estopped to assert her ownership against persons who have dealt with the husband in reliance on his apparent ownership or authority.[28]

C. Operation and Effect — 1. Persons Affected — a. To Whom Available. Estoppels operate only between parties and privies,[29] and the party who pleads

An authorized but long continued possession does not estop the owner from claiming title against a *bona fide* purchaser under an unauthorized sale. Diebolt *v.* The Chester Hair, 4 Fed. 571.

Merely intrusting goods to another, without knowledge that they were to be put on sale, will not raise an estoppel (Staples *v.* Bradbury, 8 Me. 181, 23 Am. Dec. 494); but knowledge that they are to be put on sale and acquiescence in allowing them to be so exposed is equivalent to authority to sell them and will raise an equitable estoppel (Lewenberg *v.* Hayes, 91 Me. 104, 39 Atl. 469, 64 Am. St. Rep. 215. See also Baker *v.* Taylor, 54 Minn. 71, 55 N. W. 823).

27. Craig *v.* Ward, 9 Johns. (N. Y.) 197.

28. *Illinois.*— Dewees *v.* Osborne, 178 Ill. 39, 52 N. E. 942 [*affirming* 78 Ill. App. 314]; Hockett *v.* Bailey, 86 Ill. 74.

Louisiana.— Chase *v.* Hibernia Nat. Bank, 44 La. Ann. 69, 10 So. 379.

Missouri.— Leete *v.* State Bank, 115 Mo. 184, 21 S. W. 788; McClain *v.* Abshire, 63 Mo. App. 333; Ingals *v.* Ferguson, 59 Mo. App. 299; Cottrell *v.* Spiess, 23 Mo. App. 35.

New Jersey.— Hamlen *v.* Bennett, 52 N. J. Eq. 70, 27 Atl. 651.

New York.— Sherman *v.* Elder, 1 Hilt. 178, 476.

United States.— National Feather-Duster Co. *v.* Hibbard, 9 Fed. 558, 11 Biss. 76. See also Norris *v.* McCanna, 29 Fed. 757. But see U. S. Bank *v.* Lee, 13 Pet. (U. S.) 107, 10 L. ed. 81, holding that mere passivity and silence on the part of the wife without any affirmative act are not sufficient to estop her, although she knows that the husband is dealing with her property as his own and obtaining credit upon the faith of his apparent ownership.

See 19 Cent. Dig. tit. "Estoppel," § 195; and Husband and Wife.

Compare Kiefer *v.* Klinsick, 144 Ind. 46, 42 N. E. 447; Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310.

Affidavit of ownership.— A wife is not estopped from maintaining trespass against an officer for abuse of a writ of retorno habendo by her affidavit in replevin that the property was her husband's. It is for the jury to determine the sufficiency of her explanation of the affidavit. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551.

Listing the wife's property for taxation in the name of the husband, with her knowledge and consent, is not such an act of ownership on the part of the husband as will estop the wife from asserting title to the property. Deck *v.* Smith, 12 Nebr. 389, 11 N. W. 852.

29. *Alabama.*— Farley Nat. Bank *v.* Henderson, 118 Ala. 441, 24 So. 428; Sanders *v.* Robertson, 57 Ala. 465; Catterlin *v.* Hardy, 10 Ala. 511.

Arkansas.— Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314.

California.— Figg *v.* Handley, 52 Cal. 244; Mahoney *v.* Van Winkle, 33 Cal. 448.

Connecticut.—Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Georgia.— Murray *v.* Sells, 53 Ga. 257.

Illinois.— Union Nat. Bank *v.* Post, 55 Ill. App. 369; Dinet *v.* Eilert, 9 Ill. App. 644; Campbell *v.* Goodall, 8 Ill. App. 266.

Indiana.— Krathwohl *v.* Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; Simpson *v.* Pearson, 31 Ind. 1, 99 Am. Dec. 577; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Kentucky.— Gaines *v.* Frankfort Deposit Bank, 39 S. W. 438, 19 Ky. L. Rep. 171; Short *v.* Jackson, Ky. Dec. 192.

Michigan.— Ten Eyck *v.* Pontiac, etc., R. Co., 74 Mich. 226, 41 N. W. 905, 16 Am. St. Rep. 633, 3 L. R. A. 378.

Mississippi.—Hamer *v.* Johnston, Sm. & M. Ch. 563.

Missouri.— Citizens' Bank *v.* Burrus, 178 Mo. 716, 77 S. W. 748; Anderson *v.* McPike, 86 Mo. 293; Glasgow *v.* Baker, 72 Mo. 441 [*reversed* on other grounds in 85 Mo. 559].

Nebraska.— Omaha *v.* Gsanter, (1903) 93 N. W. 407; Oliver *v.* Lansing, 59 Nebr. 219, 80 N. W. 829.

New York.— Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464, 50 N. Y. Suppl. 691; Vellum *v.* Demerle, 65 Hun 543, 20 N. Y. Suppl. 516; Dudley *v.* Hawley, 40 Barb. 397; New York, etc., R. Co. *v.* Schuyler, 38 Barb. 534; Averill *v.* Wilson, 4 Barb. 180; Reynolds *v.* Lounsbury, 6 Hill 534.

Ohio.— Toledo Second Nat. Bank *v.* Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408; Sohn *v.* Freiberg, 6 Ohio Dec. (Reprint) 1175, 11 Am. L. Rec. 736, 9 Cinc. L. Bul. 290 [*reversing* 8 Ohio Dec. (Reprint) 674, 9 Cinc. L. Bul. 183].

Pennsylvania.— Griffiths *v.* Sears, 112 Pa. St. 523, 4 Atl. 492; Cuttle *v.* Brockway, 32 Pa. St. 45.

Texas.— Taylor *v.* Tompkins, 1 Tex. App. Civ. Cas. § 1050.

Vermont.— Wright *v.* Hazen, 24 Vt. 143.

Wisconsin.— Russell *v.* Andrae, 79 Wis. 108, 48 N. W. 117, 84 Wis. 374, 54 N. W. 792.

United States.—People's Sav. Inst. *v.* Miles, 76 Fed. 252, 22 C. C. A. 152; De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 49 Fed. 916; Owens *v.* Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75.

an estoppel must be one who has in good faith been misled to his injury.[30] Where, however, an express declaration to a third person is not confidential but general, and it is afterward acted on by others, the party making the declaration will be estopped,[31] if the circumstances are such that he is fairly chargeable with knowledge that his declaration may induce the action taken.[32] A party cannot set up in his own favor an estoppel against himself created by his own act;[33] nor can a complainant in a suit to recover real estate, being required to establish title in himself, assert that defendant is estopped from showing a paramount title which is necessarily brought out by complainant's efforts to establish his title.[34]

b. Against Whom Available — (i) *In General.* Estoppels *in pais* are avail-

Canada.— Ross *v.* Sutherland, 32 Nova Scotia 243.

See 19 Cent. Dig. tit. "Estoppel," § 289.

A stranger or third person cannot avail himself of an estoppel by a mere writing or a matter *in pais*. Jackson *v.* Brinckerhoff, 3 Johns. Cas. (N. Y.) 101.

Mutuality see *supra*, V, A, 4, j.

30. *California.*— Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111.

Idaho.— Leland *v.* Isnebeck, 1 Ida. 469.

Indiana.— Jones *v.* Dorr, 19 Ind. 384, 81 Am. Dec. 406.

Kansas.— Vaughn *v.* Hixon, 50 Kan. 773, 32 Pac. 358.

Louisiana.— Rabb *v.* Pillot, 52 La. Ann. 1534, 28 So. 120; Bonnecaze *v.* Lieux, 52 La. Ann. 285, 26 So. 832.

Maryland.— Starr *v.* Yourtee, 17 Md. 341.

Michigan.— Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625.

Minnesota.— Selover *v.* Minneapolis First Nat. Bank, 77 Minn. 140, 79 N. W. 666; Dickson *v.* Kittson, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447; Alexander *v.* Thompson, 42 Minn. 498, 44 N. W. 534.

New Hampshire.— Hazelton *v.* Batchelder, 44 N. H. 40.

New York.—Mayenborg *v.* Haynes, 50 N. Y. 675.

Ohio.— Morgan *v.* Spangler, 14 Ohio St. 102.

Pennsylvania.— Cuttle *v.* Brockway, 32 Pa. St. 45; Miles *v.* Miles, 8 Watts & S. 135; Hawkins *v.* Oswald, 2 Woodw. 395; Reid *v.* Anderson, 6 Lanc. L. Rev. 26.

Utah.— Poynter *v.* Chipman, 8 Utah 442, 32 Pac. 690.

Washington.— Medical Lake *v.* Landis, 7 Wash. 615, 34 Pac. 836; Medical Lake *v.* Smith, 7 Wash. 195, 34 Pac. 835.

United States.— Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868; Hubbard *v.* Mutual Reserve Fund L. Assoc., 80 Fed. 681; John Shillitto Co. *v.* McClung, 51 Fed. 868, 2 C. C. A. 526.

England.— Lovett *v.* Lovett, [1898] 1 Ch. 82, 67 L. J. Ch. 20, 77 L. T. Rep. N. S. 650, 46 Wkly. Rep. 105.

See 19 Cent. Dig. tit. "Estoppel," § 289. And see *supra*, V, A, 4, g, h.

A volunteer cannot plead an estoppel. Lovett *v.* Lovett, [1898] 1 Ch. 82, 67 L. J. Ch. 20, 77 L. T. Rep. N. S. 650, 46 Wkly. Rep. 105. See also Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638, holding that a devisee, although he takes as a purchaser, is not a purchaser for value, who alone can claim the benefit of an estoppel.

Good faith on the part of the person setting up the estoppel is essential. See Vaughn *v.* Hixon, 50 Kan. 773, 32 Pac. 358; Rabb *v.* Pillot, 52 La. Ann. 1534, 28 So. 120; Dickson *v.* Kittson, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447.

An estoppel in pais can only be invoked by a person who has relied upon the statements or declarations made to him, and, relying on them, has changed his condition with reference to the subject-matter of the statements or declarations upon which the estoppel is based. Walls *v.* Ritter, 180 Ill. 616, 54 N. E. 565. See *supra*, V, A, 4, e.

31. Mitchell *v.* Reed, 9 Cal. 204, 70 Am. Dec. 647. See also Alexander *v.* Beresford, 27 Miss. 747, 61 Am. Dec. 538; McMullen *v.* Wenner, 16 Serg. & R. (Pa.) 18, 16 Am. Dec. 543.

One obtaining knowledge of a private communication addressed to another party cannot claim to estop the person making the communication by admissions therein contained. Muller *v.* Pondir, 6 Lans. (N. Y.) 472 [*affirmed* in 55 N. Y. 325, 14 Am. Rep. 259].

The right of patrons of a commercial agency to claim an estoppel, as against a person who had made statements to such agency relating to his own business or the affairs of a concern with which he is connected, is not general to all patrons, but is confined to those who have applied for and received a report relative to the person or concern in question. Irish-American Bank *v.* Ludlum, 49 Minn. 344, 51 N. W. 1046. See also Sohn *v.* Freiberg, 6 Ohio Dec. (Reprint) 1175, 11 Am. L. Rec. 736, 9 Cinc. L. Bul. 290 [*reversing* 8 Ohio Dec. (Reprint) 674, 9 Cinc. L. Bul. 183].

32. Kinney *v.* Whiton, 44 Conn. 262, 26 Am. Rep. 462. See also Brickley *v.* Edwards, 131 Ind. 3, 30 N. E. 708; Sohn *v.* Freiberg, 6 Ohio Dec. (Reprint) 1175, 11 Am. L. Rec. 736, 9 Cinc. L. Bul. 290 [*reversing* 8 Ohio Dec. (Reprint) 674, 9 Cinc. L. Bul. 183]. And see *supra*, V, A, 4, c.

33. Western Land Assoc. *v.* Ready, 24 Minn. 350. See also Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161.

34. McLemore *v.* Memphis, etc., R. Co., (Tenn. Sup. 1902) 69 S. W. 338.

able against parties and privies,[35] but not against strangers.[36] A grantee will not

35. *Alabama.*— Larkin *v.* Mead, 77 Ala. 485; Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475; Potts *v.* Coleman, 67 Ala. 221; McCravey *v.* Remson, 19 Ala. 430, 54 Am. Dec. 194; Inge *v.* Murphy, 10 Ala. 885.

California.— *In re* McKeag, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80; Filippini *v.* Trobock, (1900) 62 Pac. 1066; Ramboz *v.* Stowell, 103 Cal. 588, 37 Pac. 519; Snodgrass *v.* Ricketts, 13 Cal. 359.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Illinois.— Richards *v.* Cline, 176 Ill. 431, 52 N. E. 907; Ellsworth *v.* Ellsworth, 140 Ill. 509, 30 N. E. 672.

Indiana.— Maxon *v.* Lane, 124 Ind. 592, 24 N. E. 683; Mull *v.* Ormc, 67 Ind. 95; Blakemore *v.* Taber, 22 Ind. 466.

Kentucky.— Stephens *v.* Benton, 1 Duv. 112; Johnston *v.* Breckenridge, 2 B. Mon. 301; Brown *v.* Dinwiddie, 68 S. W. 421, 24 Ky. L. Rep. 269.

Louisiana.— Alexander *v.* Bourdier, 43 La. Ann. 321, 8 So. 876; Girault *v.* Zuntz, 15 La. Ann. 684; Mardis *v.* Mardis, 13 La. Ann. 236.

Maine.—Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524.

Maryland.— Stallings *v.* Ruby, 27 Md. 149.

Massachusetts.— Francis *v.* Boston, etc., Mill Corp., 4 Pick. 365.

Michigan.— Quirk *v.* Thomas, 6 Mich. 76.

Minnesota.— Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568; Bausman *v.* Eads, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201; Gill *v.* Russell, 23 Minn. 362.

Missouri.— Thistle *v.* Buford, 50 Mo. 278.

Nebraska.— Grant *v.* Cropsey, 8 Nebr. 205.

New Jersey.— Trout *v.* Lucas, 54 N. J. Eq. 361, 35 Atl. 153.

New York.— Wilson *v.* Parshall, 4 Silv. Supreme 374, 7 N. Y. Suppl. 479; Cowing *v.* Greene, 45 Barb. 585; Parshall *v.* Lamoreaux, 37 Barb. 189; Dunlap *v.* Gill, 23 Misc. 418, 51 N. Y. Suppl. 265.

South Carolina.— Wardlaw *v.* Rayford, 27 S. C. 178, 3 S. E. 71.

Texas.— Grace *v.* Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482 [*modifying* (Civ. App. 1901) 61 S. W. 1103]; Portis *v.* Hill, 30 Tex. 529, 98 Am. Dec. 481; Luter *v.* Rose, 20 Tex. 639; Thomas *v.* Greer, 6 Tex. 372.

United States.— Continental Wire Fence Co. *v.* Pendergast, 126 Fed. 381; Knevals *v.* Florida Cent., etc., R. Co., 66 Fed. 224, 13 C. C. A. 410.

England.— *In re* South Essex Estuary Co., L. R. 11 Eq. 157, 40 L. J. Ch. 153, 19 Wkly. Rep. 430; Roberts *v.* Madocks, 13 Sim. 549, 36 Eng. Ch. 549.

Canada.— Merchants Bank *v.* Monteith, 10 Ont. Pr. 467.

See 19 Cent. Dig. tit. "Estoppel," § 290.

The acts of an administrator may be set up by way of estoppel to bar a recovery by the estate which he represents. Thomas *v.* Greer, 6 Tex. 372.

An agent who makes a false representation as to the title of his principal upon the faith of which another is induced to act is not a stranger to the transaction and is estopped to assert any title inconsistent with such representation to the prejudice of the person acting thereon. Crosby *v.* Meeks, 108 Ga. 126, 33 S. E. 913.

Attorneys holding moneys of their client are estopped to attack his title, or deny the right of his creditors to have it applied to the satisfaction of their debts, on any ground not available to the client. Cowing *v.* Greene, 45 Barb. (N. Y.) 585.

Creditors may be barred by an estoppel of the debtor.

Alabama.— Goetter *v.* Norman, 107 Ala. 585, 19 So. 56; Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229.

Illinois.— Thomas *v.* Citizens' Horse R. Co., 104 Ill. 462.

Nebraska.—Arlington State Bank *v.* Paulsen, 59 Nebr. 94, 80 N. W. 263 [*vacating* on rehearing 57 Nebr. 717, 78 N. W. 303].

Wisconsin.— Austin *v.* Buckman, (1903) 95 N. W. 128.

United States.— McBane *v.* Wilson, 8 Fed. 734.

See 19 Cent. Dig. tit. "Estoppel," § 290.

Compare Starr *v.* Estey, 69 N. H. 619, 45 Atl. 590; Richards *v.* Jenkins, 18 Q. B. D. 451, 56 L. J. Q. B. 293, 56 L. T. Rep. N. S. 591, 35 Wkly. Rep. 355.

A forced heir is not estopped by the act of his ancestor. Westmore *v.* Harz, 111 La. 305, 35 So. 578.

Estoppels affect parties to actions for the use of another. Peddicord *v.* Hill, 4 T. B. Mon. (Ky.) 370.

36. *Alabama.*—Wilson *v.* Holt, 91 Ala. 204, 8 So. 794.

California.— Prey *v.* Stanley, 110 Cal. 423, 42 Pac. 908.

Connecticut.— Billings' Appeal, 49 Conn. 456.

Illinois.— Davenport, etc., Bridge, etc., Co. *v.* Johnson, 188 Ill. 472, 59 N. E. 497.

Iowa.— Coe College *v.* Cedar Rapids, 120 Iowa 541, 95 N. W. 267.

Kentucky.— Darnaby *v.* Watts, (1893) 21 S. W. 333.

Louisiana.— Boyle *v.* West, 107 La. 347, 31 So. 794; Simpson *v.* People's Ice Mfg. Co., 44 La. Ann. 612, 10 So. 814; Sagory *v.* Bouny, 42 La. Ann. 618, 7 So. 785.

Massachusetts.— De la Vergne Refrigerating Mach. Co. *v.* Hub Brewing Co., 175 Mass. 419, 56 N. E. 584.

Michigan.— Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146.

Minnesota.— Beede *v.* Pabody, 70 Minn. 174, 72 N. W. 970.

Nebraska.— Oberfelder *v.* Kavanaugh, 29 Nebr. 427, 45 N. W. 471.

New Jersey.— Hopler *v.* Cutler, (Ch. 1896) 34 Atl. 746; *In re* Voorhees, 3 N. J. L. J. 211.

New York.— Duryea *v.* Mackey, 151 N. Y. 204, 45 N. E. 458; Myers *v.* Cronk, 113 N. Y.

be estopped by any act or conduct of his grantor of which he has no notice,[37] or which is subsequent to his conveyance.[38] An act done in a representative capacity will not estop one in his individual capacity,[39] and *vice versa*.[40]

(II) *Public Government, or Public Officers*—(A) *In General.* The weight of authority is to the effect that the doctrine of equitable estoppel does not apply to the government,[41] at all events, in the case of unauthorized acts or

608, 21 N. E. 984; Lewis *v.* Woodworth, 2 N. Y. 512, 51 Am. Dec. 319; Lord *v.* Seymour, 85 N. Y. App. Div. 617, 83 N. Y. Suppl. 88; Lyon *v.* Morgan, 64 Hun 111, 19 N. Y. Suppl. 201; Parshall *v.* Lamoreaux, 37 Barb. 189; Outterson *v.* Fonda Lake Paper Co., 20 N. Y. Suppl. 980.

North Carolina.— Fleming *v.* Barden, 126 N. C. 450, 36 S. E. 17, 78 Am. St. Rep. 671, 53 L. R. A. 316; Maxwell *v.* Todd, 112 N. C. 677, 16 S. E. 926.

Pennsylvania.— Pontius *v.* Walls, 197 Pa. St. 223, 47 Atl. 203; Kline *v.* McCandless, 139 Pa. St. 223, 20 Atl. 1045; Shearer *v.* Woodburn, 10 Pa. St. 511; Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243.

South Carolina.— Croker *v.* Beaufort, 45 S. C. 269, 22 S. E. 885; Giles *v.* Pratt, Dudley 54; Brown *v.* Wood, 6 Rich. Eq. 155.

Texas.— Snow *v.* Walker, 42 Tex. 154; Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. 1011.

Wisconsin.— Heyl *v.* Goelz, 97 Wis. 327, 72 N. W. 626.

United States.— American Coat Pad Co. *v.* Phœnix Pad Co., 113 Fed. 629, 51 C. C. A. 339; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481 [*affirming* 89 Fed. 235]; Lyon *v.* Tonawanda, 98 Fed. 361; Young *v.* Dunn, 10 Fed. 717, 4 Woods 331.

See 19 Cent. Dig. tit. "Estoppel," § 290.

The fact that one of two joint owners of stock is estopped from denying the validity of transfers thereof forged by him does not prevent the other from asserting the invalidity of the transfer. Barton *v.* North Staffordshire R. Co., 38 Ch. D. 458, 57 L. J. Ch. 800, 58 L. T. Rep. N. S. 549, 36 Wkly. Rep. 75.

Unauthorized acts of a predecessor in office will not estop his successor when sued in his official capacity. Mather *v.* Crawford, 36 Barb. (N. Y.) 564.

An estoppel against a member of a firm by reason of an individual transaction will not bind the firm of which he is a member. Hook *v.* Ayers, 80 Fed. 978, 26 C. C. A. 287.

A stranger who performs acts in regard to land which, if done by the owner, would amount to a dedication to public uses is not thereby estopped after acquiring title to said land from showing that the land has never been so dedicated. Bushnell *v.* Scott, 21 Wis. 451, 94 Am. Dec. 555.

No unauthorized act of a trustee under a will in executing a mortgage on property purchased with trust funds can estop the beneficiary from maintaining an action to recover the same. Marx *v.* Clisby, 126 Ala. 107, 28 So. 388. See also Keate *v.* Phillips, 18 Ch. D. 560, 50 L. J. Ch. 664, 44 L. T. Rep. N. S. 731, 29 Wkly. Rep. 710, where it is said that there is no case in which a trustee having made a fraudulent representation by which he was bound, or even a fraudulent conveyance after his legal title was confirmed, he still being a trustee only, has thereby deprived the beneficiaries of their property.

37. *California.*— Snodgrass *v.* Ricketts, 13 Cal. 359.

Illinois.— Rutz *v.* Kehr, (1890) 25 N. E. 957.

Louisiana.— Brian *v.* Bonvillain, 52 La. Ann. 1794, 28 So. 261.

Missouri.— Thistle *v.* Buford, 50 Mo. 278.

North Carolina.— Boyden *v.* Clarke, 109 N. C. 664, 14 S. E. 52.

Vermont.— Hodges *v.* Eddy, 41 Vt. 485, 98 Am. Dec. 612.

See 19 Cent. Dig. tit. "Estoppel," § 290.

A grantee with notice will be estopped. Ions *v.* Harbinson, 112 Cal. 260, 44 Pac. 572; Mull *v.* Orme, 67 Ind. 95; Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524; Verdier *v.* Port Royal R. Co., 15 S. C. 476.

38. Stuart *v.* Lowry, 42 Minn. 473, 44 N. W. 532; Mattis *v.* Hosmer, 37 Oreg. 523, 62 Pac. 17, 632. See also Rogers *v.* Lawrence, 79 Ga. 185, 3 S. E. 559, where the *bona fide* assignee of a mortgage was held not to be estopped by a declaration of his assignor subsequent to his assignment.

39. Rohn *v.* Rohn, 98 Ill. App. 509; Simpson *v.* People's Ice Mfg. Co., 44 La. Ann. 612, 10 So. 814; Chapman *v.* Gates, 54 N. Y. 132; Kissock *v.* Jarvis, 9 U. C. C. P. 156; Barker *v.* Tabor, 5 U. C. Q. B. O. S. 570. *Compare* American Paper-Bag Co. *v.* Van Nortwick, 52 Fed. 752, 3 C. C. A. 274.

40. *Louisiana.*— De Poret *v.* Gusman, 30 La. Ann. 930.

Michigan.— Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146; Cullen *v.* O'Hare, 4 Mich. 132.

Mississippi.— Magee *v.* Gregg, 11 Sm. & M. 70.

Nebraska.— Arlington State Bank *v.* Paulsen, 59 Nebr. 94, 80 N. W. 263 [*vacating* on rehearing 57 Nebr. 717, 78 N. W. 303].

United States.— Micon *v.* Lamar, 1 Fed. 14, 17 Blatchf. 378.

See 19 Cent. Dig. tit. "Estoppel," § 290.

41. *Illinois.*— People *v.* Brown, 67 Ill. 435.

North Carolina.— State *v.* Bevers, 86 N. C. 588; Wallace *v.* Maxwell, 32 N. C. 110, 51 Am. Dec. 380; Den *v.* Lunsford, 20 N. C. 542. See also Taylor *v.* Shufford, 11 N. C. 116, 15 Am. Dec. 512.

Ohio.— State *v.* Lake Shore, etc., R. Co., 2 Ohio S. & C. Pl. 300, 1 Ohio N. P. 292.

Pennsylvania.— Com. *v.* Pittsburgh Forge, etc., Co., 2 Pearson 374. But see Com. *v.* Smith, 4 Pa. L. J. 121.

omissions on the part of its officers and agents.[42] Nor are public officers concluded by acts done in their official capacity.[43] So too it has been held that the doctrine of estoppel will not apply to a private individual where the public interest is concerned.[44]

(B) *Municipal Corporations.*[45] The doctrine of estoppel *in pais* applies to municipal corporations;[46] but where they represent public rights and interests,

Virginia.— See Montague *v.* Massey, 76 Va. 307.

Canada.— Reg. *v.* Black, 6 Can. Exch. 236; Humphrey *v.* Reg., 2 Can. Exch. 386; Reg. *v.* Law Soc., 21 U. C. C. P. 229.

See 19 Cent. Dig. tit. "Estoppel," §§ 151, 152.

Contra.— State *v.* Ober, 34 La. Ann. 359; State *v.* Taylor, 28 La. Ann. 460; *In re* Governor, 49 Mo. 216; U. S. *v.* Stinson, 125 Fed. 907, 60 C. C. A. 615; Indiana *v.* Milk, 11 Fed. 389, 11 Biss. 197; Gibbons *v.* U. S., 5 Ct. Cl. 416.

The government is not ordinarily bound by an estoppel, and while individuals may be estopped by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents; but, while it is true that for the neglect or the illegal or the unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject-matter thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped. U. S. *v.* Willamette Valley, etc., Wagon-Road Co., 54 Fed. 807. But see U. S. *v.* Stinson, 125 Fed. 907, 60 C. C. A. 615, where it is said that the substantial considerations underlying the doctrine of estoppel apply to the government as well as to individuals.

Where the right of a corporation to assert its corporate existence is questioned by a state because of some defect or irregularity in the proceedings for organization, the doctrine of waiver operating by way of estoppel *in pais* is applicable as against the state. State *v.* Dakota County School Dist. No. 108, 85 Minn. 230, 88 N. W. 751.

42. *Alabama.*— State *v.* Brewer, 64 Ala. 287.

Arkansas.— Pulaski County *v.* State, 42 Ark. 118.

Illinois.— Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33.

Indiana.—Indiana Cent. Canal Co. *v.* State, 53 Ind. 575.

Louisiana.— State *v.* Dubuclet, 23 La. Ann. 267.

Oregon.— Salem Imp. Co. *v.* McCourt, 26 Oreg. 93, 41 Pac. 1105.

Wisconsin.— Grunert *v.* Spalding, (1899) 78 N. W. 606.

United States.— Filor *v.* U. S., 9 Wall. 45, 19 L. ed. 549 [*affirming* 3 Ct. Cl. 25]; Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 44 Fed. 819. See also U. S. *v.* Willamette Valley, etc., Wagon-Road Co., 54 Fed. 807.

Estoppels in pais against the state are not favored, and while they may arise from express grants, they cannot arise from the laches of its officers. State *v.* Brewer, 64 Ala. 287.

Proprietary as distinguished from public acts of a municipal corporation will not estop the general public. Simplot *v.* Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158.

43. *Illinois.*— Tyler *v.* Baily, 71 Ill. 34.

Indiana.— State *v.* Hauser, 63 Ind. 155; Baldwin *v.* Shill, 3 Ind. App. 291, 29 N. E. 619.

New Jersey.— American Dock, etc., Co. *v.* Public School Trustees, 35 N. J. Eq. 181.

New York.— People *v.* Seward Highway Com'rs, 27 Barb. 94.

Ohio.— Clements *v.* Hamilton County, 5 Ohio Dec. (Reprint) 126, 2 Am. L. Rec. 729.

England.— MacAllister *v.* Rochester, 5 C. P. D. 194, 49 L. J. C. P. 114, 42 L. T. Rep. N. S. 22.

Canada.— Reg. *v.* Standish, 6 Ont. 408.

A public officer who accepts a less amount for his services than the compensation fixed by law is not estopped as against a state, county, or city which has received the benefit of his services to claim the full amount of compensation to which he is entitled. Gallaher *v.* Lincoln, 63 Nebr. 339, 88 N. W. 505.

44. Reg. *v.* Brewster, 8 U. C. C. P. 208; Reg. *v.* Ewing, 21 U. C. Q. B. 523.

Public nuisance.— That a person has come to live within the scope of a nuisance after the same had been created will not estop him from complaining of it as a public nuisance. Reg. *v.* Brewster, 8 U. C. C. P. 208. *Compare* Heenan *v.* Dewar, 17 Grant Ch. (U. C.) 638, 18 Grant. Ch. (U. C.) 438.

45. See, generally, MUNICIPAL CORPORATIONS.

46. *Colorado.*— Arapahoe County *v.* Denver, 30 Colo. 13, 69 Pac. 586.

Illinois.— Joliet *v.* Werner, 166 Ill. 34, 46 N. E. 780; Martel *v.* East St. Louis, 94 Ill. 67; Logan County *v.* Lincoln, 81 Ill. 156; Litchfield *v.* Litchfield Water Supply Co., 95 Ill. App. 647.

Kansas.— Troy *v.* Atchison, etc., R. Co., 13 Kan. 70.

Louisiana.— Moore *v.* New Orleans, 32 La. Ann. 726. See also New Orleans, etc., R. Co. *v.* New Orleans, 109 La. 194, 33 So. 192.

Missouri.— Union Depot Co. *v.* St. Louis, 76 Mo. 393 [*affirming* 8 Mo. App. 412]. *Com-*

they will be estopped or not, with respect to such public right or interest as justice and right may require. Such an estoppel can be set up only as a means of preventing injustice or a fraudulent result where there has been a change of conduct induced by the act of the municipal corporation.[47] In some cases it has been said that a municipal corporation may be estopped by the action of its proper officers, when the corporation is acting in its private as distinguished from its governmental capacity, and has lawful power to act.[48]

2. Matters Precluded — a. Extent of Estoppel Generally. Equitable estoppels may be given in evidence, and when established operate as effectively as estoppels by deed or record.[49] They cannot, however, in the nature of things be subjected to fixed and settled rules of universal application like legal estoppels or limited by a technical formula, but are entitled to a fair and liberal application like other equitable doctrines that are admitted to suppress fraud and promote

pare Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932.

New Jersey.— Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782.

New York.— Curnen *v.* New York, 79 N. Y. 511 [*reversing* 7 Daly 544].

Ohio.— Cincinnati *v.* Covington, etc., Bridge Co., 20 Ohio Cir. Ct. 396, 10 Ohio Cir. Dec. 792.

United States.— Marshall County *v.* Schenck, 5 Wall. 772, 18 L. ed. 556 [*affirming* 21 Fed. Cas. No. 12,449, 1 Biss. 533].

Canada.— In re Pictou R. Damages, 13 Nova Scotia 448; Ingersoll *v.* Chadwick, 19 U. C. Q. B. 286.

See 19 Cent. Dig. tit. "Estoppel," § 153.

Contra.— Hennepin County *v.* Dickey, 86 Minn. 331, 342, 90 N. W. 775, where it is said that "it is the well-settled doctrine in this country, founded upon the most substantial dictates of reason and sound policy, that the government cannot be affected by the laches of its agents, or estopped from asserting its rights against an official servant by the acts or omissions of auditors, trustees, supervisors, or other guardians of public rights." And see Heidelberg *v.* St. Francois County, 100 Mo. 69, 12 S. W. 914, holding that the doctrine of estoppel does not apply to counties.

Mere non-action of corporate officers will not work an estoppel. Logan County *v.* Lincoln, 81 Ill. 156.

Ultra vires acts will not raise an estoppel. Snyder *v.* Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407 [*affirming* 69 Ill. App. 474]; Hall *v.* Jackson County, 95 Ill. 352 [*affirming* 5 Ill. App. 609]; Uniontown *v.* Berry, 72 S. W. 295, 24 Ky. L. Rep. 1692, 73 S. W. 774, 24 Ky. L. Rep. 2248. See also Day *v.* Green, 4 Cush. (Mass.) 433; St. Mary's Parish *v.* Urban Dist. Council, [1900] 1 Ch. 695, 69 L. J. Ch. 324, 82 L. T. Rep. N. S. 580, 48 Wkly. Rep. 401; Jameison *v.* Fredericton, 7 N. Brunsw. 128.

Unauthorized acts of officers will not create an estoppel. Axt *v.* Jackson School Tp., 90 Ind. 101; Uniontown *v.* Berry, 72 S. W. 295, 24 Ky. L. Rep. 1692, 73 S. W. 774, 24 Ky. L. Rep. 2248; Rossire *v.* Boston, 4 Allen (Mass.) 57; Berry *v.* Bickford, 63 N. H. 328.

47. Arapahoe County *v.* Denver, 30 Colo. 13, 69 Pac. 586; Russell *v.* Lincoln, 200 Ill. 511, 65 N. E. 1088; Shirk *v.* Chicago, 195 Ill. 298, 63 N. E. 193; De Kalb *v.* Luney, 193 Ill. 185, 61 N. E. 1036; Itasca *v.* Schroeder, 182 Ill. 192, 55 N. E. 50; Sullivan *v.* Tichenor, 179 Ill. 97, 53 N. E. 561; Jordan *v.* Chenoa, 166 Ill. 530, 47 N. E. 191; Chicago *v.* Sawyer, 166 Ill. 290, 46 N. E. 759; Joliet *v.* Werner, 166 Ill. 34, 46 N. E. 780; Martel *v.* East St. Louis, 94 Ill. 67; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Reuter *v.* Lawe, 94 Wis. 300, 68 N. W. 955, 59 Am. St. Rep. 892, 34 L. R. A. 733; Paine Lumber Co. *v.* Oshkosh, 89 Wis. 449, 61 N. W. 1108; Simplot *v.* Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158.

An ordinance which did not influence the conduct of the person setting up the estoppel will not estop the municipal corporation by which it was passed. McCracken *v.* San Francisco, 16 Cal. 591.

A prior wrong construction of an ordinance is not binding upon a city. Chicago Telephone Co. *v.* Illinois Manufacturers' Assoc., 106 Ill. App. 54.

An ordinance in form repealing a prior ordinance ordering an election for and authorizing the assessment of a tax in aid of a railroad and declaring all rights thereunder forfeited for failure of the company to comply with the conditions of the contract, even if it estops the municipality from disputing the right of the company to the tax, does not bind the taxpayers. Reynolds, etc., Constr. Co. *v.* Monroe, 45 La. Ann. 1024, 13 So. 400.

The doctrine of estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of its agents or officers which has been relied on by a third party to his detriment. Philadelphia Mortg., etc., Co. *v.* Omaha, 63 Nebr. 280, 88 N. W. 523, 93 Am. St. Rep. 442.

48. Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; Litchfield *v.* Litchfield Water Supply Co., 95 Ill. App. 647; Philadelphia Mortg., etc., Co. *v.* Omaha, 63 Nebr. 280, 88 N. W. 523, 93 Am. St. Rep. 442.

49. Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51. See also Lucas *v.* Hart, 5 Iowa 415.

honesty and fair dealing.[50] As a general rule the estoppel is commensurate with the thing represented and operates to put the party entitled to its benefit in the same position as if the thing represented were true;[51] and can neither be extended beyond or cut below the natural and reasonable import of the representation.[52] It in no case extends beyond the act done or omitted in reliance on the conduct or representation of the party sought to be estopped,[53] nor can it be applied to make good an act forbidden by law,[54] or, it has been held, to debar a party from availing himself in a court of law of the statute of limitations.[55]

b. Title or Claim to Property. An estoppel affecting the title or right to property is coextensive with and limited by the scope of the act or conduct relied on as creating it.[56] Estoppels *in pais* usually operate only upon existing rights, and do not apply to an after-acquired right or title,[57] or to one derived in another

50. Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; Johnson *v.* Byler, 38 Tex. 606. See also Preston *v.* Mann, 25 Conn. 118; Lucas *v.* Hart, 5 Iowa 415; Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111.

Personal status.— The doctrine of estoppel cannot be so used to enable a married woman to deprive herself of income settled to her separate use with a restraint on anticipation. Bateman *v.* Faber, [1898] 1 Ch. 144, 67 L. J. Ch. 130, 77 L. T. Rep. N. S. 576, 46 Wkly. Rep. 215. See HUSBAND AND WIFE.

51. Grissler *v.* Powers, 81 N. Y. 57, 37 Am. Rep. 475 [*explaining* and *distinguishing* Payne *v.* Burnham, 62 N. Y. 69; Freeman *v.* Auld, 44 N. Y. 50]. See also Bryan *v.* Ramirez, 8 Cal. 461, 68 Am. Dec. 340.

52. *Michigan.*— Fredenburg *v.* Lyon Lake M. E. Church, 37 Mich. 476; Bennett *v.* Dean, 35 Mich. 306, 41 Mich. 472, 2 N. W. 680.

Nebraska.— Hall *v.* Moore, 3 Nebr. (Unoff.) 574, 92 N. W. 294; Burke *v.* Utah Nat. Bank, 47 Nebr. 247, 66 N. W. 295.

New Jersey.— Hulme *v.* Shreve, 4 N. J. Eq. 116.

New York.— McAllister *v.* Stumpp, etc., Co., 25 Misc. 438, 55 N. Y. Suppl. 693.

Tennessee.— Maloney *v.* Wilson, 9 Baxt. 403.

United States.— Hunt *v.* Fisher, 29 Fed. 801. See also Southern Pac. Co. *v.* Board of R. Com'rs, 87 Fed. 21.

See 19 Cent. Dig. tit. "Estoppel," § 291.

Statements made in one transaction will not preclude the party making them from retracting them in another. Whitacre *v.* Culver, 6 Minn. 297.

53. Merrill *v.* Tyler, Seld. Notes (N. Y.) 83; Griffiths *v.* Sears, 112 Pa. St. 523, 4 Atl. 492; White *v.* Greenish, 11 C. B. N. S. 209, 8 Jur. N. S. 563, 31 L. J. C. P. 93, 103 E. C. L. 209; Dunston *v.* Paterson, 2 C. B. N. S. 495, 3 Jur. N. S. 982, 26 L. J. C. P. 267, 89 E. C. L. 495.

54. New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534; Battersby *v.* Odell, 23 U. C. Q. B. 482. See also Friedlander *v.* New York Plate Glass Ins. Co., 38 N. Y. App. Div. 146, 56 N. Y. Suppl. 583; *In re* Stapleford Colliery Co., 14 Ch. D. 432, 49 L. J. Ch. 498, 41 L. T. Rep. N. S. 755, 28 Wkly. Rep. 270; Peterborough County, etc., Municipal Council *v.* Grand Trunk R. Co., 18 U. C. Q. B. 220.

No estoppel to deny the existence of a law can arise. State *v.* Little Rock, etc., R. Co., 31 Ark. 701. See also Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

55. Hartford County Bank *v.* Waterman, 26 Conn. 324. See also LIMITATIONS OF ACTIONS.

56. *Alabama.*—Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27; Powers *v.* Harris, 68 Ala. 409.

Iowa.— Co-operative Sav., etc., Assoc. *v.* Kent, 108 Iowa 146, 78 N. W. 911.

Kentucky.— Loeb *v.* Struck, 42 S. W. 401, 19 Ky. L. Rep. 935.

Massachusetts.— Tracy *v.* Lincoln, 145 Mass. 357, 14 N. E. 122.

Michigan.— Brown *v.* Avery, 119 Mich. 384, 78 N. W. 331; Mosher *v.* Lansing Lumber Co., 112 Mich. 517, 71 N. W. 161.

Pennsylvania.— Ross *v.* Pleasants, 19 Pa. St. 157; Miller *v.* Cresson, 5 Watts & S. 284.

Vermont.— Smith *v.* Rock, 59 Vt. 232, 9 Atl. 551.

United States.— Sullivan *v.* Colby, 71 Fed. 460, 18 C. C. A. 193.

See 19 Cent. Dig. tit. "Estoppel," § 293.

A vendor who undertakes to deliver a sufficient conveyance cannot take advantage of a defect in his own deed. American Stave, etc., Co. *v.* Butler County, 93 Fed. 301.

Estoppel applies only where the second title is in the party falsely or incautiously alleging the first, and the opposite party is ignorant of the former title. It does not apply where the sufficient title is outstanding in a third person, and was known to both of the contesting parties. Moncure *v.* Hanson, 15 Pa. St. 385.

57. *California.*— Marquart *v.* Bradford, 43 Cal. 526; Gluckauf *v.* Reed, 22 Cal. 468.

Georgia.— Fleming *v.* Ray, 86 Ga. 533, 12 S. E. 944.

Iowa.— Davidson *v.* Dwyer, 62 Iowa 332, 17 N. W. 575.

Kentucky.— Kentucky Union Co. *v.* Patton, 69 S. W. 791, 24 Ky. L. Rep. 701.

Missouri.— Donaldson *v.* Hibner, 55 Mo. 492. *Compare* Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135, holding that where plaintiff had been in possession of land seven or eight years under an agreement for it with his father, and while in possession agreed with an adjoining owner as to the boundary, he had sufficient interest to estop him from after-

and different manner than that as to which the representation is made;[58] but where a person induces another to purchase property by asserting that it is free from encumbrance, it has been held that he will be estopped afterward to claim under a mortgage or judgment lien existing at the time but subsequently purchased.[59] In some jurisdictions it is held that the title to land cannot be affected in an action at law by an estoppel *in pais*.[60]

c. Rights and Liabilities Under Contract. As a general rule the doctrine of equitable estoppel applies to rights and liabilities under contracts.[61] It cannot be applied where the party claiming the estoppel changed his position before the representation was made by the other;[62] or with regards to rights or liabilities under an illegal contract,[63] or to enforce in an action at law a parol change in an executory contract under seal.[64] Nor can facts and circumstances relating only to the consideration for a note raise an estoppel as to the right to deny its execution.[65]

d. Remedies. The doctrine of estoppel does not extend to matters affecting the remedy only, which are foreign to and disconnected from the contract or the character in which the parties entered into it;[66] and when applied it should be only to the extent of protecting the party who has been misled against the loss actually occasioned thereby.[67]

VI. QUASI-ESTOPPEL.

A. In General. The term "quasi-estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel *in pais* and which have the same practical operation as an estoppel *in pais*, but which nevertheless differ from that form of estoppel in essential particulars.[68] The term includes the doctrine of

ward repudiating the agreement when he became the owner of the land.

New York.— Wells *v.* Pierce, 4 Abb. Dec. 559, 3 Keyes 102, 33 How. Pr. 421; Corning *v.* Troy Iron, etc., Factory, 34 Barb. 485, 32 How. Pr. 217.

See 19 Cent. Dig. tit. "Estoppel," § 293.

58. McCormack *v.* Woods, 14 Bush (Ky.) 78; Barrett *v.* Johannes, 70 Mo. 439; Grigsby *v.* Caruth, 57 Tex. 269; Grigsby *v.* Peck, 57 Tex. 142.

59. Briggs *v.* Langford, 12 N. Y. Suppl. 657 [*affirming* 7 N. Y. Suppl. 358, 8 N. Y. Suppl. 944]; Bitting's Appeal, 17 Pa. St. 211.

60. Nashville, etc., R. Co. *v.* Hobbs, 120 Ala. 600, 24 So. 933; Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888; Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568; Hamlin *v.* Hamlin, 19 Me. 141; Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417; Huyck *v.* Bailey, 100 Mich. 223, 58 N. W. 1002; Leland *v.* Wilson, 34 Tex. 79. *Contra*, Shaw *v.* Beebe, 35 Vt. 205. See, generally, *supra*, V, A, 3; FRAUDS, STATUTE OF.

The doctrine of estoppel by actions, oral statements, or silence can never pass a title which under the statutes can only be transferred by deed. Nims *v.* Sherman, 43 Mich. 45, 4 N. W. 434.

61. Marshall *v.* Murphy, 5 Kan. App. 718, 46 Pac. 973; Brown *v.* Eno, 48 Nebr. 538, 67 N. W. 434; Dunn *v.* Sharpe, 9 Misc. (N. Y.) 636, 30 N. Y. Suppl. 353; Schickle, etc., Iron Co. *v.* Hazard, 12 N. Y. Suppl. 874; Illinois Trust, etc., Bank *v.* Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. See also Burke *v.* Utah Nat. Bank, 47 Nebr. 247, 66 N. W. 295.

The execution of a note by contractors in full payment for material furnished them, with full knowledge of a delay in its delivery, precludes them, in an action on the note, from setting up a counter-claim for damages arising from such delay. Schickle, etc., Iron Co. *v.* Hazard, 12 N. Y. Suppl. 874. But see Hancock *v.* Palmer, 17 Abb. Pr. (N. Y.) 335.

62. De Moss *v.* Economy Furniture, etc., Co., 74 Mo. App. 117; Dunn *v.* Sharpe, 9 Misc. (N. Y.) 636, 30 N. Y. Suppl. 353; Fredericks *v.* Goodman St. Homestead Assoc., 29 N. Y. Suppl. 1041. See also *supra*, V, A, 4, e, (IV).

63. Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960.

64. Starin *v.* Kraft, 174 Ill. 120, 50 N. E. 1059 [*affirming* 73 Ill. App. 371, and *distinguishing* Worrell *v.* Forsyth, 141 Ill. 22, 30 N. E. 673 (on the ground that there the parol agreement had been fully executed); Moses *v.* Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194; Defenbaugh *v.* Weaver, 87 Ill. 132; Fisher *v.* Smith, 48 Ill. 184; Vroman *v.* Darrow, 40 Ill. 171; White *v.* Walker, 31 Ill. 422 (on the ground that in them the facts constituted a waiver of the terms or conditions in question which was in the nature of a release, surrender, or discharge, without any attempted substitution of new matter)].

65. Sanders *v.* Chartrand, 158 Mo. 352, 59 S. W. 95.

66. Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527.

67. Campbell *v.* Nichols, 33 N. J. L. 81.

68. Bigelow Estop. (5th ed.) 673 *et seq.*

election,[69] the principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him,[70] and certain forms of waiver.[71]

B. Grounds of Estoppel — 1. Prior Acts, Claims, or Conduct Inconsistent With Right Asserted — a. General Rule. Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterward assume a position inconsistent with such act, claim, or conduct to the prejudice of another.[72] It is upon this

"Estoppel by election or inconsistent positions . . . is a subdivision of the general subject of estoppel *in pais*." Bigelow Estop. 345 [*quoted* in Yates *v.* Hurd, 8 Colo. 343, 349, 8 Pac. 575].

69. See Equitable Election, 15 Cyc. 1086.

Election between: Counts see Indictments and Informations; Pleading. Defenses see Pleading. Remedies see Election of Remedies, 15 Cyc. 251. Testamentary provisions and other rights see Wills.

Election by: Owner of land to accept its value or pay for improvements see Ejectment, 15 Cyc. 218 *et seq.* Surviving husband or wife see Descent and Distribution, 14 Cyc. 85; Executors and Administrators; Wills.

Election to: Rescind contract see Contracts, 9 Cyc. 388, 406, 431, 443, 464, 554. Take nonsuit see Dismissal and Nonsuit, 14 Cyc. 394 *et seq.*

70. See *infra*, VI, B, 1.

71. See *infra*, VI, B, 2.

72. *Alabama.*— Durr *v.* Wilson, 116 Ala. 125, 22 So. 536; Cooper *v.* Berney Nat. Bank, 99 Ala. 119, 11 So. 760; Sullivan *v.* McLaughlin, 99 Ala. 60, 11 So. 447; Lehman *v.* Clark, 85 Ala. 109, 4 So. 651.

Arkansas.— Sumpter *v.* Arkansas Nat. Bank, 69 Ark. 224, 62 S. W. 577.

California.— Davis *v.* National Surety Co., 139 Cal. 223, 72 Pac. 1001; Herbert Craft Co. *v.* Bryan, (1902) 68 Pac. 1020.

District of Columbia.— Williams *v.* Paine, 7 App. Cas. 116.

Georgia.— Knox *v.* Yow, 91 Ga. 367, 17 S. E. 654.

Idaho.— Wells *v.* Alturas Commercial Co., 6 Ida. 506, 56 Pac. 165.

Illinois.— Norris *v.* Downing, 196 Ill. 91, 63 N. E. 627; Chicago Sanitary Dist. *v.* Adam, 179 Ill. 406, 53 N. E. 743; Fish *v.* Seeberger, 47 Ill. App. 580.

Indiana.— Frain *v.* Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Strosser *v.* Ft. Wayne, 100 Ind. 443; Dutton *v.* Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340.

Iowa.— Farmers', etc., Bank *v.* Johnson, 118 Iowa 282, 91 N. W. 1074; Simplot *v.* Dubuque, 49 Iowa 630; McDonald *v.* Johnson, 48 Iowa 72; Audubon County *v.* American Emigrant Co., 40 Iowa 460; Griffin *v.* Iowa Homestead Co., 21 Iowa 282.

Kansas.— Deiderick *v.* Alexander, 58 Kan. 56, 48 Pac. 594; Goodman *v.* Malcolm, 4 Kan. App. 285, 48 Pac. 439.

Kentucky.— Givens *v.* Providence Coal Co., 60 S. W. 304, 22 Ky. L. Rep. 1217.

Louisiana.— Kronenberger *v.* Hopkins, 111 La. 405, 35 So. 618; Granger *v.* Sallier, 110 La. 250, 34 So. 431; Ray *v.* McLain, 106 La. 780, 31 So. 315; Mendelsohn *v.* Blaise, 52 La. Ann. 1104, 27 So. 707; Conery *v.* Clark, 13 La. Ann. 313; Palfrey *v.* Stinson, 11 La. 77; Decuir *v.* Ferrier, 1 McGloin 205.

Massachusetts.— Lilley *v.* Adams, 108 Mass. 50.

Michigan.— Schmoltz *v.* Schmoltz, 116 Mich. 692, 75 N. W. 135; Miles *v.* McNaughton, 111 Mich. 350, 69 N. W. 481; Jacobs *v.* Miller, 50 Mich. 119, 15 N. W. 42.

Mississippi.— Barrier *v.* Kelly, 82 Miss. 233, 33 So. 974, 62 L. R. A. 421.

Missouri.— Curtis *v.* Moore, 162 Mo. 442, 63 S. W. 80; Langsdorf *v.* Field, 36 Mo. 440.

Nebraska.— Lincoln *v.* Lincoln St. R. Co., (1903) 93 N. W. 766; Cruzen *v.* Pottle, 3 Nebr. (Unoff.) 453, 91 N. W. 858; Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 77 N. W. 346.

Nevada.— McNamara *v.* Keating, 23 Nev. 236, 45 Pac. 464.

New York.— Griggs *v.* Day, 158 N. Y. 1, 52 N. E. 692 [*reversing* 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609]; Saltus *v.* Belford Co., 133 N. Y. 499, 31 N. E. 518; Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Davis *v.* True, 89 N. Y. App. Div. 319, 85 N. Y. Suppl. 843; Sheets *v.* Wilgus, 56 Barb. 662; Waterman *v.* Waterman, 42 Misc. 195, 85 N. Y. Suppl. 377; White *v.* Kenyon, 53 N. Y. Suppl. 13. *Compare* Desmond *v.* Schenck, 36 N. Y. App. Div. 317, 55 N. Y. Suppl. 251.

North Carolina.— Williams *v.* Scott, 122 N. C. 545, 29 S. E. 877; Chard *v.* Warren, 122 N. C. 75, 29 S. E. 373.

Oklahoma.— Guthrie Nat. Bank *v.* Dosbaugh, 11 Okla. 664, 69 Pac. 797.

Pennsylvania.— Church *v.* Winton, 196 Pa. St. 107, 46 Atl. 363; Banks *v.* Ammon, 27 Pa. St. 172.

South Carolina.— Carter *v.* Kaufman, 67 S. C. 456, 45 S. E. 1017; Greenville *v.* Mauldin, 64 S. C. 438, 42 S. E. 200; Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948.

Tennessee.— Poindexter *v.* Rawlings, 106 Tenn. 97, 59 S. W. 766, 82 Am. St. Rep. 869; Perry *v.* Calhoun, 8 Humphr. 551; Charlton *v.* Lay, 5 Humphr. 496; Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215. *Compare* Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 204, 15 S. W. 737.

Texas.— Masterson *v.* Heitmann, (Civ. App. 1903) 77 S. W. 983.

Utah.— Boyle *v.* Ogden City, 24 Utah 443, 68 Pac. 153.

Vermont.— Ford *v.* Flint, 40 Vt. 382.

principle that a person is said to be estopped to take advantage of his own fraud or wrong.[73] So where a person has acted or refrained from acting in a particular manner upon the request or advice of another, the latter is estopped to take any position inconsistent with his own request or advice, to the prejudice of the person so induced to act.[74] So too where a person by his request or advice has

Virginia.— Simpson *v.* Dugger, 88 Va. 963, 14 S. E. 760.

Washington.— Hopkins *v.* International Lumber Co., 33 Wash. 181, 73 Pac. 113; Smithson Land Co. *v.* Brautigan, 14 Wash. 89, 43 Pac. 1096; Seattle *v.* Columbia, etc., R. Co., 6 Wash. 379, 33 Pac. 1048.

West Virginia.— See Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639.

Wisconsin.— Fleischer *v.* Klumn, 56 Wis. 439, 14 N. W. 607; Jarstadt *v.* Morgan, 48 Wis. 245, 4 N. W. 27; Hutchinson *v.* Lord, 1 Wis. 286, 60 Am. Dec. 381.

United States.— Daniels *v.* Tearney, 102 U. S. 415, 26 L. ed. 187; Scholey *v.* Rew, 23 Wall. 331, 23 L. ed. 99; Turner *v.* Flanigan, 1 Black 491, 17 L. ed. 106; Barrett *v.* Twin City Power Co., 118 Fed. 861; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535; Lemmon *v.* U. S., 106 Fed. 650, 45 C. C. A. 518; Harkrader *v.* Carroll, 76 Fed. 474; Hawes *v.* Marchant, 11 Fed. Cas. No. 6,240, 1 Curt. 136.

England.— Board *v.* Board, L. R. 9 Q. B. 48, 43 L. J. Q. B. 4, 29 L. T. Rep. N. S. 459, 22 Wkly. Rep. 206; *In re* Chesham, 31 Ch. D. 466, 55 L. J. Ch. 401, 54 L. T. Rep. N. S. 154, 34 Wkly. Rep. 321. See also Asher *v.* Whitlock, L. R. 1 Q. B. 1, 11 Jur. N. S. 925, 35 L. J. Q. B. 17, 13 L. T. Rep. N. S. 254, 14 Wkly. Rep. 26.

Canada.— Ross *v.* Doyle, 4 Manitoba 434.

See 19 Cent. Dig. tit. "Estoppel," §§ 155, 158, 163.

One who promises another to lend him money to redeem his property from a tax-sale cannot, after the other has acted thereon to his prejudice, redeem from the sale and acquire the property himself. McConnell *v.* Ory, 46 La. Ann. 564, 15 So. 424.

Estoppel to: Assert unconstitutionality of statute see CONSTITUTIONAL LAW, 8 Cyc. 791 *et seq.*; CORPORATIONS, 10 Cyc. 199. Claim damages resulting from municipal improvement see MUNICIPAL CORPORATIONS.

73. *California.*— Turner *v.* Billagram, 2 Cal. 520.

Indian Territory.— Poplin *v.* Clausen, 1 Indian Terr. 157, 38 S. W. 974.

Louisiana.— Hood *v.* Frellsen, 31 La. Ann. 577.

Maine.— Williamson *v.* Williamson, 71 Me. 442; Phillips *v.* Moor, 71 Me. 78; Hughes *v.* Littlefield, 18 Me. 400.

Maryland.— Ridgeley *v.* Crandall, 4 Md. 435.

North Carolina.— Wilson *v.* Western North Carolina Land Co., 77 N. C. 445.

Pennsylvania.— Sickman *v.* Lapsley, 13 Serg. & R. 224, 15 Am. Dec. 596; Coyle's Estate, 9 Pa. Dist. 405; *In re* Knox, 14 York Leg. Rec. 29, 31 Pittsb. Leg. J. 5.

Texas.— Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99.

Wisconsin.— Austin *v.* Buckman, (1903) 95 N. W. 128; Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904.

Canada.— Leary *v.* Rose, 10 Grant Ch. (U. C.) 346; Northern R. Co. *v.* Lister, 27 U. C. Q. B. 57; McPhatter *v.* Leslie, 23 U. C. Q. B. 573; Bell *v.* Peel, 15 U. C. Q. B. 594. See also Cinq Mars *v.* Moodie, 15 U. C. Q. B. 601.

See 19 Cent. Dig. tit. "Estoppel," § 147.

See, however, Baker *v.* Arnot, 67 N. Y. 448.

Estoppel to oppose continuance.— Where defendant in an action for divorce was directed by the court to pay plaintiff a counsel fee to enable her to prepare for trial and to subpœna witnesses, but he failed to do so until the morning of the trial, when it was too late for her to procure the necessary witnesses, he was estopped from opposing plaintiff's motion for a postponement on the ground that she was negligent in making preparations for the trial. Church *v.* Church, 81 N. Y. App. Div. 349, 80 N. Y. Suppl. 770.

Illegality.— If the transaction is illegal, however, the rule is different. While neither party may ordinarily urge the illegality as a ground for affirmative relief, yet he may set it up as a defense. Summerlin *v.* Livingston, 15 La. Ann. 519. See CONTRACTS, 9 Cyc. 546.

Persons entitled to urge fraud see also FRAUD; FRAUDULENT CONVEYANCES.

74. *California.*— Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254.

Florida.— Sherrell *v.* Shepard, 19 Fla. 300.

Illinois.— Mexican Amole Soap Co. *v.* Clarke, 72 Ill. App. 655; Humiston *v.* School Trustees, 7 Ill. App. 122.

Iowa.— Lyon *v.* Aiken, 70 Iowa 16, 29 N. W. 785; Davis *v.* Williams, 49 Iowa 83.

Kentucky.— Givens *v.* Providence Coal Co., 60 S. W. 304, 22 Ky. L. Rep. 1217.

Maine.— Rangely *v.* Spring, 28 Me. 127.

Massachusetts.— Griffin *v.* Lawrence, 135 Mass. 365.

Missouri.— Bunce *v.* Beck, 46 Mo. 327; Ratcliff *v.* Lumpee, 82 Mo. App. 335.

New Jersey.— Sheridan *v.* Langstaff, 45 N. J. L. 42; Cregar *v.* Cramer, 31 N. J. Eq. 375; Bush *v.* Cushman, 27 N. J. Eq. 131.

New York.— Jarvis *v.* Sewall, 40 Barb. 449; Goldman *v.* Ehrenreich, 33 Misc. 433, 68 N. Y. Suppl. 424.

Pennsylvania.— McCullough *v.* Wilson, 21 Pa. St. 436; McKelvey *v.* Truby, 4 Watts & S. 323; Rice *v.* Bixler, 1 Watts & S. 445; Ashworth *v.* Brown, 15 Phila. 207. *Compare* Patterson *v.* Lytle, 11 Pa. St. 53.

Rhode Island.— Putnam Foundry, etc., Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033.

induced another to sell or purchase property, he will be estopped to assert any claim thereto inconsistent with such request or advice.[75] Where the positions taken are not necessarily antagonistic, however, no estoppel arises,[76] and in taking the former position the party must have acted with knowledge of his rights.[77]

b. Acceptance of Benefits — (i) *In General.* Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith.[78] Thus it has been repeatedly held that a person by the

South Carolina.— Ross *v.* Gafney City, 57 S. C. 105, 35 S. E. 439.

Texas.— Bowden *v.* Kelley, 1 Tex. App. Civ. Cas. § 480.

Utah.— Goldthwait *v.* Lynch, 9 Utah 186, 33 Pac. 699.

Washington.— Moore *v.* Brownfield, 10 Wash. 439, 39 Pac. 113.

United States.— Clark Thread Co. *v.* Armitage, 67 Fed. 896; *In re* Bear, 8 Fed. 428.

Canada.— Miller *v.* Thomas, 11 U. C. Q. B. 302.

See 19 Cent. Dig. tit. "Estoppel," § 216.

Where there has been no change of position by reason of the request made, the party making it will not be estopped thereby. Perrin *v.* Perrin, 62 Tex. 477.

If the request did not authorize the particular action taken the party making it will not be estopped thereby. Idaho Bank *v.* Malheur County, 30 Oreg. 420, 45 Pac. 781, 35 L. R. A. 141. See also McLain *v.* Buliner, 49 Ark. 218, 4 S. W. 768, 4 Am. St. Rep. 36.

A party at whose request another has instituted a suit is not estopped from setting up therein any claim or defense which is not inconsistent with his previous request. Bigelow *v.* Woodward, 15 Gray (Mass.) 560, 77 Am. Dec. 389.

If the party setting up the estoppel was fully informed as to the legal consequences of his action, he cannot avoid the same on the ground that he was requested to take such action by the adverse party. Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

75. *Alabama.*— Swift *v.* Stovall, 105 Ala. 571, 17 So. 186.

Arkansas.— Youngblood *v.* Cunningham, 38 Ark. 571.

Illinois.— Winchell *v.* Edwards, 57 Ill. 41.

Iowa.— Miles *v.* Lefi, 60 Iowa 168, 14 N. W. 233.

Kentucky.— Sale *v.* Crutchfield, 8 Bush 636; Reid *v.* Heasley, 2 B. Mon. 254; Barclay *v.* Hendrick, 3 Dana 378.

Maine.— Stevens *v.* McNamara, 36 Me. 176, 58 Am. Dec. 740.

Mississippi.— Smith *v.* Walsh, 63 Miss. 584.

Missouri.— Longworth *v.* Aslin, 106 Mo. 155, 17 S. W. 294; Peery *v.* Hall, 75 Mo. 503; Taylor *v.* Elliott, 32 Mo. 172; Snodgrass *v.* Emery, 66 Mo. App. 462.

New Hampshire.— Wells *v.* Pierce, 27 N. H. 503.

New Jersey.— Vanness *v.* Vanness, 1 N. J. Eq. 248.

Pennsylvania.— Maple *v.* Kussart, 53 Pa. St. 348, 91 Am. Dec. 214; *In re* Seybert, 5 Kulp 172.

South Carolina.— Dutart *v.* Cox, Riley Eq. 213.

Tennessee.— Gheen *v.* Osborne, 11 Heisk. 61.

Texas.— Johnson *v.* Hamilton, 36 Tex. 270.

Virginia.— Phelps *v.* Seely, 22 Gratt. 573.

Canada.— *Re* Shaver, 3 Ch. Chamb. 379.

See 19 Cent. Dig. tit. "Estoppel," § 217.

Compare Swick *v.* Sears, 1 Hill (N. Y.) 17.

After-acquired title.—A person who has advised the purchase of property is not thereby estopped from setting up against the purchaser a title subsequently acquired. Stevens *v.* McNamara, 36 Me. 176, 58 Am. Dec. 740.

76. Sanders *v.* Stokes, 30 Ala. 432; Desmond *v.* Schenck, 36 N. Y. App. Div. 317, 55 N. Y. Suppl. 251; Raht *v.* Southern R. Co., (Tenn. Ch. App. 1897) 50 S. W. 72.

Filing a will for probate does not estop the person so filing it from presenting a claim against the estate. Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436.

Offering an instrument in evidence for the purpose of getting it before the court in passing on a request to set it aside will not estop the person offering it to deny its validity. Bardell *v.* Brady, 172 Ill. 420, 50 N. E. 124.

The acceptance of a bill of sale without any rescission of a former verbal sale under which the vendee has acquired title to personal property does not estop him from relying on the title acquired under the verbal sale, since the intention in executing the bill of sale may have been merely to furnish more certain and permanent evidence of the subsisting contract. Sanders *v.* Stokes, 30 Ala. 432.

The exercise of a void license until its expiration will not estop the licensee from afterward asserting the same right under a franchise given by its charter. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228.

77. Seattle *v.* Liberman, 9 Wash. 276, 37 Pac. 433. See, however, Wells *v.* Pierce, 27 N. H. 503, holding that the fact that the party did not know of his right at the time he advised the purchase will not prevent his being estopped thereafter to assert the same. *Compare* Bishop *v.* Minton, 112 N. C. 524, 17 S. E. 436.

78. *Alabama.*— Hobbs *v.* Nashville, etc., R. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103; Smith *v.* Lusk, 119 Ala. 394, 24 So. 256; Dunham *v.* Milhous, 70 Ala. 596.

California.— Ryer *v.* Oesting, 119 Cal. 564, 51 Pac. 857.

acceptance of benefits may be estopped from questioning the existence, validity, and

Colorado.— Poole *v.* Lowe, 24 Colo. 475, 52 Pac. 741; Jones *v.* Langhorne, 19 Colo. 206, 34 Pac. 997.

District of Columbia.— Richards *v.* Bippus, 18 App. Cas. 293.

Georgia.— Pike *v.* Stallings, 71 Ga. 860. *Compare* Fraley *v.* Thomas, 98 Ga. 375, 25 S. E. 446.

Idaho.— Fremont County *v.* Warner, 7 Ida. 367, 63 Pac. 106.

Illinois.— Gardner *v.* Ladue, 47 Ill. 211, 95 Am. Dec. 487; Sammis *v.* Poole, 89 Ill. App. 118 [*affirmed* in 188 Ill. 396, 58 N. E. 934].

Indiana.— Ballard *v.* Camplin, 161 Ind. 16, 67 N. E. 505 [*reversing* (App. 1902) 64 N. E. 931]; Gross *v.* Whitley County, 158 Ind. 531, 64 N. E. 25.

Kansas.— Farmers' Nat. Bank *v.* Robinson, (Sup. 1898) 53 Pac. 762.

Kentucky.— Harrison Land, etc., Co. *v.* Nashville, etc., R. Co., 76 S. W. 9, 25 Ky. L. Rep. 523; Rhodes *v.* Rhodes, 38 S. W. 706, 18 Ky. L. Rep. 916.

Louisiana.— Calhoun *v.* Pierson, 44 La. Ann. 584, 10 So. 880; Monette's Succession, 26 La. Ann. 26.

Massachusetts.— Wood *v.* Bullard, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304.

Michigan.— Stoddard *v.* Gallagher, (1903) 94 N. W. 1051; Marquette *v.* Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 840; Gladstone Exch. Bank *v.* Keating, 94 Mich. 429, 53 N. W. 1110; Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973.

Minnesota.— Deering Harvester Co. *v.* Donovan, 82 Minn. 162, 84 N. W. 745, 83 Am. St. Rep. 417; Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568.

Mississippi.— White *v.* Jenkins, (1903) 33 So. 287.

Missouri.— Cadematori *v.* Gauger, 160 Mo. 352, 61 S. W. 195; Light *v.* St. Louis, etc., R. Co., 89 Mo. 108, 1 S. W. 380; Browne *v.* Appleman, 83 Mo. App. 79.

Nebraska.— Ayres *v.* McConahey, 65 Nebr. 588, 91 N. W. 494; State *v.* Home Ins. Co., 59 Nebr. 524, 81 N. W. 443.

New Jersey.— Lindsley *v.* McGrath, 62 N. J. Eq. 478, 50 Atl. 236.

New York.— Conde *v.* Lee, 171 N. Y. 662, 64 N. E. 1119 [*affirming* 55 N. Y. App. Div. 401, 67 N. Y. Suppl. 157]; Burhans *v.* Union Free School Dist. No. 1, 165 N. Y. 661, 59 N. E. 1119 [*affirming* 24 N. Y. App. Div. 429, 48 N. Y. Suppl. 702]; Pettit *v.* Pettit, 107 N. Y. 677, 14 N. E. 500; New York *v.* Gorman, 26 N. Y. App. Div. 191, 49 N. Y. Suppl. 1026; Bedell *v.* Kennedy, 38 Hun 510; Ladue *v.* Cooper, 32 Misc. 544, 67 N. Y. Suppl. 319; Lambert *v.* Huber, 22 Misc. 462, 50 N. Y. Suppl. 793; Brown *v.* Johnston, 7 Abb. N. Cas. 188.

Ohio.—Brenzinger *v.* American Exch. Bank, 66 Ohio St. 242, 64 N. E. 118 [*affirming* 10 Ohio S. & C. Pl. Dec. 208].

Pennsylvania.— *In re* Stough, 196 Pa. St. 358, 46 Atl. 512; Bigley's Estate, 30 Pittsb. Leg. J. N. S. 65.

Rhode Island.— Providence Gas Co. *v.* Thurber, 2 R. I. 15, 55 Am. Dec. 621.

South Carolina.— Parker *v.* Parker, 52 S. C. 382, 29 S. E. 805; McDaniel *v.* Anderson, 19 S. C. 211.

South Dakota.— Gionnonatti *v.* Michelletti, 15 S. D. 126, 87 N. W. 587. *Compare* Kidder *v.* Aaron, 10 S. D. 256, 72 N. W. 893.

Texas.— Pryor *v.* Pendleton, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212; Greer *v.* Ford, 31 Tex. Civ. App. 389, 72 S. W. 73; Williams *v.* Meyer, (Civ. App. 1901) 64 S. W. 66; Moor *v.* Moor, (Civ. App. 1901) 63 S. W. 347.

Washington.— Potvin *v.* Denny Hotel Co., 26 Wash. 309, 66 Pac. 376; California Bank *v.* Puget Sound Loan, etc., Co., 20 Wash. 636, 56 Pac. 395; Muldoon *v.* Seattle City R. Co., 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787.

West Virginia.— Miller *v.* Hare, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491; Rogers *v.* Coal River Boom, etc., Co., 39 W. Va. 272, 19 S. E. 401.

Wisconsin.— Sholes *v.* State, 2 Pinn. 499, 2 Chandl. 182.

United States.—Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635 [*reversing* 18 App. Cas. (D. C.) 438]; Brickell *v.* Farrell, 82 Fed. 220; Nome *v.* Reed, 1 Alaska 395.

England.— *In re* Coltman, 19 Ch. D. 64, 51 L. J. Ch. 3, 45 L. T. Rep. N. S. 392, 30 Wkly. Rep. 342; Hull Flax, etc., Co. *v.* Wellesley, 6 H. & N. 38, 30 L. J. Exch. 5.

Canada.— Hastings County *v.* Ponton, 5 Ont. App. 543.

See 19 Cent. Dig. tit. "Estoppel," § 260.

It is only where a party may accept or reject without serious inconvenience that an estoppel arises from the acceptance of benefits. Cincinnati *v.* Cameron, 33 Ohio St. 336; Bigelow Estop. (5th ed.) 686.

Conditional acceptance.—The estoppel arises, although the benefits are accepted on condition that it shall not prejudice the accepter's rights (People *v.* Cortland County, 15 N. Y. Suppl. 748), unless the other party agrees to the condition (Nelson *v.* Hagen, 72 Iowa 705, 31 N. W. 875. See, however, People *v.* Cortland County, *supra*).

No estoppel arises where the person accepting the benefits is entitled thereto regardless of the transaction in question. Hays *v.* Heidelberg, 9 Pa. St. 203.

Inconsistency of position.—The transaction and the acceptance of benefits must be inconsistent with the claim subsequently asserted. Hartman *v.* Hornsby, 142 Mo. 568, 44 S. W. 242 [*distinguishing* Clyburn *v.* McLaughlin, 106 Mo. 521, 17 S. W. 692, 27 Am. St. Rep. 369; Austin *v.* Loring, 63 Mo. 19]; White *v.* Com., 110 Pa. St. 90, 1 Atl. 33. See also Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110.

effect of a contract.[79] So too under similar circumstances one may be estopped

The acceptance of purchase-money under a quitclaim deed will not estop the grantor from setting up a title subsequently acquired. Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52; Avery *v.* Akins, 74 Ind. 283.

Where property is sold, to be paid for in instalments, the title being reserved until full payment is made, and the purchaser assigns his interest, and the assignee fails to pay an instalment of the price, the original vendor is not estopped to assert title to the property by his receipt of benefits under the assignment, there having been no fraud practised upon the assignee. Wiser *v.* Lawler, (Ariz. 1900) 62 Pac. 695.

A stranger to the transaction cannot take advantage of the acquiescence or ratification (Canale *v.* Copello, 137 Cal. 22, 69 Pac. 698), unless he has changed his position in reliance thereon (Crutchfield *v.* Hudson, 23 Ala. 393; Letcher *v.* Morrison, 27 Ill. 209).

Estoppel against statute.— If an assignment for the benefit of creditors is void because it requires creditors becoming parties thereto to release their demands except so far as provided for in the assignment, a release embodied in the assignment is also void, and the releasing creditor is not estopped from repudiating it by the fact that he has received payments under the assignment, where he did not induce the debtor to make the assignment or to believe that it would be a legal one. Vose *v.* Holcomb, 31 Me. 407.

"**Ratification** is the approval by act, word or conduct of that which was attempted (of accomplishment) but which was improperly or unauthorizedly performed in the first instance." Hartmann *v.* Hornsby, 142 Mo. 368, 375, 44 S. W. 242. It is not properly speaking a species of estoppel (Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Bigelow Estop. (5th ed.) 457, 694), although it is sometimes so called (see, for instance, CORPORATIONS, 10 Cyc. 1083).

Ratification as affecting: Liability of members for associated debts see ASSOCIATIONS, 4 Cyc. 311. Right to cancellation of instrument see CANCELLATION OF INSTRUMENTS, 6 Cyc. 297 *et seq.* Right to reformation of instrument see REFORMATION OF INSTRUMENTS.

Ratification by: Infant see GUARDIAN AND WARD; INFANTS. Insane persons see INSANE PERSONS. Married women see HUSBAND AND WIFE.

Ratification by acceptance of benefit see CONTRACTS, 9 Cyc. 436; MONEY PAID.

Ratification of: Alteration of instrument see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 172 *et seq.* Award see ARBITRATION AND AWARD, 3 Cyc. 718 *et seq.* Cancellation of policy see INSURANCE; and particular insurance titles. Confession of judgment see JUDGMENTS. Construction or repair of highway see STREETS AND HIGHWAYS. Conveyance of city property see MUNICIPAL CORPORATIONS. County bond see COUNTIES, 11 Cyc. 569. Debts and expenditures of city see MUNICIPAL CORPORATIONS. Deed see DEEDS, 13 Cyc. 553, 565, 591; LANDLORD AND TENANT; MORTGAGES. Employment by city see MUNICIPAL CORPORATIONS. Employment of factor or broker see FACTORS AND BROKERS. Escrow see ESCROWS, 16 Cyc. 560. Fraudulent contract see CONTRACTS, 9 Cyc. 436 *et seq.* Gift see GIFTS. Foreclosure see MORTGAGES. Instrument defectively acknowledged see ACKNOWLEDGMENTS, 1 Cyc. 524, 533. Judgment see JUDGMENTS. Judicial sale see JUDICIAL SALES. Land grant see PUBLIC LANDS. Lease see LANDLORD AND TENANT. Marriage see MARRIAGE. Mining location see MINES AND MINERALS. Mortgage or secured debt see MORTGAGES. Municipal acts by legislature see MUNICIPAL CORPORATIONS. Municipal bonds see COUNTIES, 11 Cyc. 569; MUNICIPAL CORPORATIONS. Of parol partition see PARTITION. Pledge see PLEDGES. Release see MORTGAGES; RELEASE. Sale by personal representative see EXECUTORS AND ADMINISTRATORS. Sale of property subject to landlord's lien see LANDLORD AND TENANT. Satisfaction of debt by third person see ACCORD AND SATISFACTION, 1 Cyc. 317. Subscription to stock see CORPORATIONS, 10 Cyc. 425. Surrender of policy see INSURANCE; and particular insurance titles. Ultra vires act see CORPORATIONS, 10 Cyc. 1069 *et seq.*, 1146 *et seq.* Voidable contract see CONTRACTS, 9 Cyc. 436; HUSBAND AND WIFE; INFANTS; INSANE PERSONS.

Ratification of act of: Agent generally see PRINCIPAL AND AGENT. Corporate officer or agent see CORPORATIONS, 10 Cyc. 309 *et seq.* County board see COUNTIES, 11 Cyc. 397. Factor or broker see FACTORS AND BROKERS. Guardian generally see GUARDIAN AND WARD. Insurance agent see INSURANCE; and particular insurance titles. Municipal officer see MUNICIPAL CORPORATIONS. Partner see PARTNERSHIP. Servant or independent contractor see MASTER AND SERVANT. Trustee see TRUSTS. Wife see HUSBAND AND WIFE.

Ratification of agency: In general see PRINCIPAL AND AGENT. Of child for parent see PARENT AND CHILD. Of husband or wife see HUSBAND AND WIFE.

Ratification of contract: As to partition see PARTITION. For city see MUNICIPAL CORPORATIONS. For necessaries furnished child see PARENT AND CHILD. For public improvements see MUNICIPAL CORPORATIONS. For work or materials see MECHANICS' LIENS. Of corporation see CORPORATIONS, 10 Cyc. 100 *et seq.* Of county see COUNTIES, 11 Cyc. 478. Of officer of joint stock companies see JOINT STOCK COMPANIES. Of sale see SALES; VENDOR AND PURCHASER. Of suretyship see PRINCIPAL AND SURETY. Sunday contract see SUNDAY.

Estoppel of devisee or legatee by acceptance of devise or legacy see WILLS.

79. *California.*— Brown *v.* Scott, 25 Cal. 189.

from questioning the existence, validity, and effect of a deed, mortgage, or bond,[80]

Idaho.— Lane *v.* Pacific, etc., R. Co., 8 Ida. 230, 67 Pac. 656.

Illinois.— Miller *v.* McManis, 57 Ill. 126; Collins *v.* Cobe, 104 Ill. App. 142 [*affirmed* in 202 Ill. 469, 66 N. E. 1079]; Chicago, etc., R. Co. *v.* Moran, 85 Ill. App. 543 [*affirmed* in 187 Ill. 316, 58 N. E. 335]; Bonny *v.* Bonny, 36 Ill. App. 129.

Indiana.— Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

Kentucky.— Harper *v.* Cincinnati, etc., R. Co., 22 S. W. 849, 15 Ky. L. Rep. 223.

Louisiana.— Clover *v.* Gottlieb, 50 La. Ann. 568, 23 So. 459.

Michigan.— Richardson *v.* Welch, 47 Mich. 309, 11 N. W. 172.

Minnesota.— State *v.* Germania Bank, 90 Minn. 150, 95 N. W. 1116.

Nebraska.— Green *v.* Lancaster County, 61 Nebr. 473, 85 N. W. 439.

New Hampshire.— Howe *v.* Wadsworth, 59 N. H. 397.

New Jersey.— Gibbs *v.* Craig, 58 N. J. L. 661, 33 Atl. 1052; Scott *v.* Gamble, 9 N. J. Eq. 218.

New York.— Hathaway *v.* Payne, 34 N. Y. 92; Bonta *v.* Gridley, 77 N. Y. App. Div. 33, 78 N. Y. Suppl. 961; O'Connor *v.* Green, 60 N. Y. App. Div. 553, 69 N. Y. Suppl. 1097; Jones *v.* Duff, 47 Hun 170; Arnot *v.* Erie R. Co., 5 Hun 608; Brewster *v.* Baker, 16 Barb. 613; Sickels *v.* Herold, 15 Misc. 116, 36 N. Y. Suppl. 488 [*affirming* 11 Misc. 583, 32 N. Y. Suppl. 1083].

North Carolina.— Moore *v.* Hill, 85 N. C. 218; Washburn *v.* Washburn, 39 N. C. 306.

Ohio.— Herrick *v.* Wardwell, 58 Ohio St. 294, 50 N. E. 903; Columbus, etc., R. Co. *v.* Williams, 53 Ohio St. 268, 41 N. E. 261.

Oregon.— Flower *v.* Barnekoff, 20 Oreg. 132, 25 Pac. 370, 11 L. R. A. 149.

Pennsylvania.— Dyer *v.* Walker, 40 Pa. St. 157; Philadelphia *v.* Passenger R. Co., 1 Leg. Gaz. 163.

Texas.—Martin *v.* Rotan Grocery Co., (Civ. App. 1902) 66 S. W. 212 [writ of error *denied* in (Sup. 1902) 67 S. W. 883]; Larkin *v.* Wilsford, (Civ. App. 1894) 29 S. W. 548; Halbert *v.* Carroll, (Civ. App. 1894) 25 S. W. 1102.

Washington.— Commercial Electric Light, etc., Co. *v.* Tacoma, 17 Wash. 661, 50 Pac. 592; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666.

United States.— Allen-West Commission Co. *v.* Patillo, 90 Fed. 628, 33 C. C. A. 194.

England.— Roe *v.* Mutual Loan Fund, 19 Q. B. D. 347, 56 L. J. Q. B. 541, 35 Wkly. Rep. 723. See also Gandy *v.* Gandy, 30 Ch. D. 57, 54 L. J. Ch. 1154, 53 L. T. Rep. N. S. 306, 33 Wkly. Rep. 803.

Canada.— Haldimand County *v.* Hamilton, etc., R. Co., 27 U. C. C. P. 228.

See 19 Cent. Dig. tit. "Estoppel," § 261.

Where work done under an unauthorized contract is wholly worthless, it is not a benefit which will estop a corporation from repudiating the contract. Thomasson *v.* Grace M. E. Church, 113 Cal. 558, 45 Pac. 838.

Where the contract is void as against public policy, a person who has accepted a benefit thereunder will not be estopped to defend against the contract when it is sought to be enforced against him. Brown *v.* Columbus First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; Pullman Palace-Car Co. *v.* Central Transp. Co., 171 U. S. 138, 18 S. Ct. 808, 43 L. ed. 108. See, however, Fearnley *v.* De Mainville, 5 Colo. App. 441, 39 Pac. 73.

80. *Alabama.*— Kahn *v.* Peter, 104 Ala. 523, 16 So. 524.

California.— Baker *v.* Bartol, 7 Cal. 551.

Connecticut.— Ansonia *v.* Cooper, 66 Conn. 184, 33 Atl. 905.

District of Columbia.— Baltimore, etc., R. Co. *v.* Winslow, 18 App. Cas. 438.

Illinois.— Jeneson *v.* Jeneson, 66 Ill. 259; Cross *v.* Weane Commission Co., 45 Ill. App. 255.

Indiana.— Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Ellis *v.* Baker, 116 Ind. 408, 19 N. E. 193.

Iowa.— Reichelt *v.* Seal, 76 Iowa 275, 11 N. W. 16.

Kentucky.— Breeding *v.* Stamper, 18 B. Mon. 175.

Louisiana.— Smith *v.* Elliott, 9 Rob. 3.

Michigan.— Grand Rapids Fourth Nat. Bank *v.* Olney, 63 Mich. 58, 29 N. W. 513; Waldron *v.* Toledo, etc., R. Co., 55 Mich. 420, 21 N. W. 870.

Minnesota.— Jones *v.* Bliss, 48 Minn. 307, 51 N. W. 375.

Missouri.— Anthony *v.* Ray, 28 Mo. 109; Jamison *v.* Griswold, 2 Mo. App. 150.

New Jersey.— Seymour *v.* Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108.

New York.— Thompson *v.* Angell, 13 N. Y. Suppl. 90.

Ohio.— Conover *v.* Porter, 14 Ohio St. 450.

Pennsylvania.— Egbert *v.* Darr, 3 Watts & S. 517.

South Carolina.— Charleston *v.* Caulfield, 19 S. C. 201.

Texas.— Devine *v.* U. S. Mortgage Co., (Civ. App. 1898) 48 S. W. 585.

West Virginia.— Hall *v.* Wadsworth, 35 W. Va. 375, 14 S. E. 4.

Wisconsin.— Kercheval *v.* Doty, 31 Wis. 476.

England.— Yarmouth Exch. Bank *v.* Blethen, 10 App. Cas. 293, 54 L. J. P. C. 27, 53 L. T. Rep. N. S. 537, 33 Wkly. Rep. 801.

Canada.— Bank of British North America *v.* Jones, 8 U. C. Q. B. 86.

See 19 Cent. Dig. tit. "Estoppel," § 262.

A creditor who receives his pro rata share of the proceeds of sale under a deed of trust is not thereby estopped from attaching the deed for fraud. Crutchfield *v.* Hudson, 23 Ala. 393. See also Vose *v.* Holcomb, 31 Me. 407; Moore *v.* Rees, 7 Ohio Dec. (Reprint) 633, 4 Cinc. L. Bul. 475.

If the facts as to the title of land are known to all the parties, and no one has been

or of proceedings under which his property has been taken for a public or quasi-public use.[81] In order to constitute an estoppel, however, the benefit received must be direct,[82] and must have been voluntarily received,[83] and with a knowledge on the part of the person receiving it of his rights.[84]

(II) *Partial Disaffirmance of Transaction* — (A) *In General.* A party to a transaction cannot ordinarily affirm it in part and in part disaffirm it. Thus with regard to rights claimed under a contract, a party will not be allowed to assume the inconsistent position of affirming the contract in part and disaffirming it in part.[85]

(B) *Rejecting Condition, Exception, or Reservation in Deed.* A person claiming under a deed containing a condition, exception, or reservation is bound thereby and cannot take the conveyance without assuming its obligations.[86]

c. Acquiescence — (I) *In Acts of Others.* Where a person with actual or

induced to believe anything that is not true, a person will not be estopped by his receipt of a part of the purchase-money to deny that a deed, executed by another and purporting to be for him, is his deed. Shillock *v.* Gilbert, 23 Minn. 386.

The fact that a bond taken in payment has been sold does not estop the seller as between himself and the corporation issuing the bond, to assert that the bond is valueless. Chaska Co. *v.* Carver County, 6 Minn. 204.

81. *Colorado.*— Allen *v.* Colorado Cent. R. Co., 22 Colo. 238, 43 Pac. 1015.

Connecticut.— Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Hitchcock *v.* Danbury, etc., R. Co., 25 Conn. 516.

Illinois.— Hartshorn *v.* Potroff, 89 Ill. 509; Kile *v.* Yellowhead, 80 Ill. 208; Town *v.* Blackberry, 29 Ill. 137. See also Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222.

Indiana.— Holland *v.* Spell, 144 Ind. 561, 42 N. E. 1014; Test *v.* Larsh, 76 Ind. 452.

Massachusetts.— Hatch *v.* Hawkes, 126 Mass. 177; Norton Eighth School Dist. *v.* Copeland, 2 Gray 414.

New York.— Sherman *v.* McKeon, 30 N. Y. 266 [*affirming* 21 N. Y. Super. Ct. 103].

Wisconsin.— Burns *v.* Milwaukee, etc., R. Co., 9 Wis. 450.

United States.— St. Louis, etc., R. Co. v. Foltz, 52 Fed. 627.

Canada.— Bertrand *v.* Reg., 2 Can. Exch. 285.

See 19 Cent. Dig. tit. "Estoppel," § 263.

82. Ayres *v.* Probasco, 14 Kan. 175. See also Burkett *v.* Athens, (Tenn. Ch. App. 1900) 59 S. W. 667.

83. Ayres *v.* Probasco, 14 Kan. 175.

84. Garesche *v.* Levering Invest. Co., 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232; Moore *v.* Rees, 7 Ohio Dec. (Reprint) 633, 4 Cinc. L. Bul. 475. See, however, Kahn *v.* Peters, 104 Ala. 523, 16 So. 524.

85. *Georgia.*—Wyche *v.* Greene, 26 Ga. 415.

Indiana.— Hadley *v.* Pickett, 25 Ind. 450.

Louisiana.— Buckner *v.* Beaird, 32 La. Ann. 226; New Orleans *v.* Moseal, 24 La. Ann. 102.

Missouri.— Ramm *v.* Kaltwasser, 4 Mo. App. 574.

New York.— Woodward *v.* Harris, 2 Barb. 439.

Pennsylvania.— Fidelity Ins., etc., Co.'s Appeal, 106 Pa. St. 144; French *v.* Seely, 7 Watts 231, 32 Am. Dec. 758.

South Carolina.— Walker *v.* Frazier, 2 Rich. Eq. 99.

Vermont.— Clifford *v.* Richardson, 18 Vt. 620.

See 19 Cent. Dig. tit. "Estoppel," § 164.

86. *California.*— Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

Delaware.— Doe *v.* Wright, 2 Houst. 49.

Georgia.— Houser *v.* Christian, 108 Ga. 469, 34 S. E. 126, 75 Am. St. Rep. 72; McLendon *v.* Horton, 95 Ga. 54, 22 S. E. 45.

Illinois.— Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302.

Kansas.— O'Brien *v.* Wetherell, 14 Kan. 616.

Kentucky.— Sandy River Cannel Coal Co. *v.* White House Cannel Coal Co., 78 S. W. 298, 24 Ky. L. Rep. 1653.

Maine.— Knight *v.* Mains, 12 Me. 41.

Massachusetts.— Goddard *v.* Dakin, 10 Metc. 94.

Michigan.— Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973.

New Hampshire.— Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451.

New Jersey.— Hagerty *v.* Lee, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631; Sheppard *v.* Hunt, 4 N. J. Eq. 277.

New York.— Bedell *v.* Kennedy, 38 Hun 510; Kinyon *v.* Kinyon, 6 Misc. 584, 27 N. Y. Suppl. 627; Maynard *v.* Maynard, 4 Edw. 711.

Tennessee.— Toof *v.* Rosenplanter, (Sup. 1897) 41 S. W. 336.

Washington.— Hughes *v.* South Bay School Dist. No. 11, 32 Wash. 678, 73 Pac. 778, 74 Pac. 333; Boston Clothing Co. *v.* Solberg, 28 Wash. 262, 68 Pac. 715.

United States.— Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547.

England.— Dalton *v.* Fitzgerald, [1897] 2 Ch. 86, 66 L. J. Ch. 604, 76 L. T. Rep. N. S. 700, 45 Wkly. Rep. 685.

One who purchases with reference to a map or plan which designates certain public ways or streets is estopped to deny the servitude imposed thereby. Sheen *v.* Stothart, 29 La. Ann. 630; Ehret *v.* Gunn, 3 Pa. Dist. 311; Providence Steam Engine Co. *v.* Providence, etc., Steamship Co., 12 R. I. 348, 34 Am. Rep. 652. See also *supra*, V, B, 2, g. See, how-

constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice.[87]

ever, Bond *v.* Pennsylvania Co., 171 Ill. 508, 49 N. E. 545 [*reversing* 69 Ill. App. 507]; Porter *v.* Stone, 51 Iowa 373, 1 N. W. 601.

87. *Alabama.*— Harris *v.* American Bldg., etc., Assoc., 122 Ala. 545, 25 So. 200.

Arkansas.— Crossland *v.* Powers, (1890) 13 S. W. 722; Harmon *v.* Kline, 52 Ark. 251, 12 S. W. 496; Moore *v.* Robinson, 35 Ark. 293.

California.— Nicholson *v.* Randall Banking Co., 130 Cal. 533, 62 Pac. 930; Taylor *v.* Woodward, 10 Cal. 90.

Georgia.— Walker *v.* Pope, 101 Ga. 665, 29 S. E. 8.

Illinois.— Winnetka *v.* Chicago, etc., Electric R. Co., 204 Ill. 297, 68 N. E. 407; Richards *v.* Cline, 176 Ill. 431, 52 N. E. 907; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Noble *v.* Illinois Cent. R. Co., 111 Ill. 437; Johnson *v.* Waters, 78 Ill. App. 418; Steel *v.* Fitz Henry, 78 Ill. App. 400; Bradshaw *v.* Sawyer, 23 Ill. App. 521 [*affirmed* in 125 Ill. 440, 17 N. E. 812].

Indiana.— Sutton *v.* Baldwin, 146 Ind. 361, 45 N. E. 518; Blakemore *v.* Taber, 22 Ind. 466.

Iowa.— Carter *v.* Riggs, 112 Iowa 245, 83 N. W. 905; Goldizen *v.* Goldizen, 107 Iowa 280, 77 N. W. 1053; Knapp *v.* Paine, 95 Iowa 64, 63 N. W. 575. *Compare* Davis *v.* Hull, 67 Iowa 479, 25 N. W. 740.

Kentucky.— Ashland Second Nat. Bank *v.* Ferguson, 114 Ky. 516, 71 S. W. 429, 24 Ky. L. Rep. 1298; Beale *v.* Barnett, 64 S. W. 838, 23 Ky. L. Rep. 1118.

Louisiana.— Hibernia Nat. Bank *v.* Sarah Planting, etc., Co., 107 La. 650, 31 So. 1031; State *v.* New Orleans City, etc., R. Co., 104 La. 685, 29 So. 312; Kimbro *v.* Sarah Planting, etc.. Co., 52 La. Ann. 1556, 28 So. 161; Wilson Sewing Mach. Co. *v.* Southern Express Co., 42 La. Ann. 593, 7 So. 710; Meux *v.* Martin, 5 La. Ann. 107.

Maine.— Warren *v.* Milliken, 57 Me. 97; Booker *v.* Stinchfield, 47 Me. 340.

Maryland.— Goldman *v.* Brinton, 90 Md. 259, 44 Atl. 1029; Daingerfield *v.* May, 31 Md. 340.

Michigan.— Great Hive L. of M. *v.* Supreme Hive, L. of M. of W., (1904) 97 N. W. 779, 99 N. W. 26; Grand Rapids Fifth Nat. Bank *v.* Dunham, 109 Mich. 23, 66 N. W. 870; Sessions *v.* Sherwood, 78 Mich. 234, 44 N. W. 263; Peake *v.* Thomas, 39 Mich. 584; Truesdail *v.* Ward, 24 Mich. 117.

Minnesota.— Moore *v.* Cloquet Lumber Co., 87 Minn. 264, 91 N. W. 1104.

Missouri.— Hannibal, etc., R. Co. *v.* Frowein, 163 Mo. 1, 63 S. W. 500; Barnett *v.* Smart, 158 Mo. 167, 59 S. W. 235; Alleman *v.* Manning, 44 Mo. App. 4.

New Hampshire.— Hilliard *v.* Beattie, 67 N. H. 571, 39 Atl. 897.

New Jersey.— Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283; Higbee *v.* Camden, etc., Transp. Co., 20 N. J. Eq. 435; Kirkpatrick *v.* Winans, 16 N. J. Eq. 407; Doughaday *v.* Crowell, 11 N. J. Eq. 201; Miller *v.* Craig, 11 N. J. Eq. 175.

New York.— Mt. Morris *v.* Thomas, 158 N. Y. 450, 53 N. E. 214 [*affirming* 8 N. Y. App. Div. 495, 40 N. Y. Suppl. 709]; L'Amoreux *v.* Vischer, 2 N. Y. 278; U. S. Life Ins. Co. *v.* Oswego Canal Co., 57 Hun 204, 10 N. Y. Suppl. 663, 25 Abb. N. Cas. 307; Scholey *v.* Worcester, 4 Hun 302, 6 Thomps. & C. 574; Lewis v. Utica, 67 Barb. 456.

North Carolina.— Boyden *v.* Clarke, 109 N. C. 664, 14 S. E. 52.

North Dakota.— McDonald *v.* Beatty, 10 N. D. 511, 88 N. W. 281.

Ohio.— Pierson *v.* Cincinnati, etc., Canal Co., 2 Disn. 100; Meridian Nat. Bank *v.* McConica, 8 Ohio Cir. Ct. 442, 4 Ohio Cir. Dec. 106.

Oregon.— McBee *v.* Ceasar, 15 Oreg. 62, 13 Pac. 652.

Pennsylvania.—Paine *v.* Monongahela Nat. Bank, 194 Pa. St. 403, 45 Atl. 312; *In re* Powel, 163 Pa. St. 349, 30 Atl. 373, 381; Richardson's Estate, 132 Pa. St. 292, 19 Atl. 82; Kraut's Appeal, 71 Pa. St. 64; Beaver Borough *v.* Davidson, 9 Pa. Super. Ct. 159; Garrett *v.* Mulligan, 10 Phila. 339.

Tennessee.— Nashville First Nat. Bank *v.* Shook, 100 Tenn. 436, 45 S. W. 338.

Texas.— Chandler *v.* Peters, (Civ. App. 1898) 44 S. W. 867; Halbert *v.* De Bode, 15 Civ. App. 615, 40 S. W. 1011; Leake *v.* Cleburne, (Civ. App. 1896) 36 S. W. 97; Goggin *v.* Kelly, (Civ. App. 1894) 25 S. W. 1133; Albert *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 664, 21 S. W. 779.

Utah.— Boyle *v.* Ogden City, 24 Utah 443, 68 Pac. 153; Wells *v.* Wells, 7 Utah 68, 24 Pac. 752.

Vermont.— Troy, etc., R. Co. *v.* Potter, 42 Vt. 265, 1 Am. Rep. 325; Thrall *v.* Seward, 37 Vt. 573.

West Virginia.— Despard *v.* Despard, 53 W. Va. 443, 44 S. E. 448; Mann *v.* Peck, 45 W. Va. 18, 30 S. E. 206; Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536.

Wisconsin.— Grunert *v.* Speich, 114 Wis. 355, 89 N. W. 496.

United States.— Washington Irr. Co. *v.* California Safe Deposit, etc., Co., 115 Fed. 20, 52 C. C. A. 614; Pacific Mill, etc., Co. *v.* Leete, 94 Fed. 968, 36 C. C. A. 587 [*affirming* 88 Fed. 957].

England.—York Tramways Co. *v.* Willows, 8 Q. B. D. 685, 51 L. J. Q. B. 257, 46 L. T. Rep. N. S. 296, 30 Wkly. Rep. 624; Jennings *v.* Great Northern R. Co., L. R. 1 Q. B. 7, 12 Jur. N. S. 331, 35 L. J. Q. B. 15, 13 L. T. Rep. N. S. 231, 14 Wkly. Rep. 28.

Canada.— Lovell *v.* Gibson, 19 Grant Ch.

This rule is of wide application and has been invoked in the case among others of bills and notes,[88] contracts generally,[89] accounts and settlements,[90] division and par-

(U. C.) 280; Gardner *v.* Kleopfer, 7 Ont. 603; Milligan *v.* Grand Trunk R. Co., 17 U. C. C. P. 115.

See 19 Cent. Dig. tit. "Estoppel," § 242.

Acquiescence is an intentional failure to resist the assertion of an adverse right. Babb *v.* Sullivan, 43 S. C. 436, 21 S. E. 277.

Knowledge and intent.— In order to constitute an acquiescence in or ratification of a transaction between third parties, the acts relied on must have been done with full knowledge of all the facts, and with the intention to adopt and be bound by that which is claimed to have been acquiesced in or ratified. Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. 1011.

If a party acquiesces only because of his inability to prevent a violation of his right, he is not estopped to assert the same when he is in a condition to enforce it. Booth *v.* Bunce, 31 N. Y. 246; McMillin *v.* Barclay, 16 Fed. Cas. No. 8,902, 5 Fish. Pat. Cas. 189.

Oral denial of right.— If the assertion of a right by one party is instantly denied by the other, even if such assertion is made in writing, while the denial is merely oral, there will be no estoppel. Wilson *v.* Cobb, 28 N. J. Eq. 177.

Mere non-action or passivity will not constitute an estoppel where no one has been misled thereby to act to his injury. Markland Min., etc., Co. *v.* Kimmel, 87 Ind. 560; Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468; Chafee *v.* Aiken, 57 S. C. 507, 35 S. E. 800. Thus the mere non-mention of a claim for a partial breach of a contract at the time of settlement between the parties to the contract will not estop the party from setting up such claim. Winans *v.* Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952. So a mere failure to repudiate a void and unauthorized act of an agent will not raise an estoppel. Eldred *v.* Peterson, 80 Iowa 264, 45 N. W. 755, 20 Am. St. Rep. 416.

Ratification of one unauthorized act will not estop the party from denying another authority to do a similar act for a different purpose. Deer Lodge Bank *v.* Hope Min. Co., 3 Mont. 146, 35 Am. Rep. 458.

Accepting a report of an auditing committee which had approved the accounts of its treasurer, or making a report founded thereon to the legislature, will not estop a corporation from maintaining an action on his bond. Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371.

Acquiescence in: Act of executor or administrator see EXECUTORS AND ADMINISTRATORS. Boundary see BOUNDARIES, 5 Cyc. 940. Highways see STREETS AND HIGHWAYS. Judgment see JUDGMENTS.

Ratification see also *supra*, note 78.

88. Robinson *v.* Barnett, 19 Fla. 670, 45 Am. Rep. 24; Bremen Sav. Bank *v.* Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209; Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770; Barber *v.* Gingell, 3 Esp. 60. See, generally, COMMERCIAL PAPER, 7 Cyc. 495 *et seq.*

89. *Alabama.*— Gilmer *v.* Ware, 19 Ala. 252. See also McGar *v.* Williams, 26 Ala. 469, 62 Am. Dec. 739.

Iowa.— Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422.

Maryland.—Frazier *v.* Gelston, 35 Md. 298.

Massachusetts.— Congress Constr. Co. *v.* Worcester Brewing Co., 182 Mass. 355, 65 N. E. 792.

New Jersey.— Jones *v.* Davis, 48 N. J. Eq. 493, 21 Atl. 1035.

New York.— Studer *v.* Bleistein, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702 [*affirming* 48 Hun 577, 1 N. Y. Suppl. 190]; Williams *v.* Whittell, 69 N. Y. App. Div. 340, 74 N. Y. Suppl. 820; Bronson *v.* Wiman, 10 Barb. 406; Jenks *v.* Robertson, 2 Thomps. & C. 255; Oregon Imp. Co. *v.* Roach, 57 N. Y. Super. Ct. 228, 6 N. Y. Suppl. 502.

Texas.— Couch *v.* Parker, 1 Tex. App. Civ. Cas. § 436.

West Virginia.— Dodson *v.* Hays, 29 W. Va. 577, 2 S. E. 415.

Wisconsin.— Moller *v.* J. L. Gates Land Co., 119 Wis. 548, 97 N. W. 174.

United States.— Davis, etc., Mfg. Co. *v.* Dix, 64 Fed. 406.

See 19 Cent. Dig. tit. "Estoppel," § 244; and CONTRACTS, 9 Cyc. 213 *et seq.*

Where the owner of property has placed it in the hands of another to be repaired, his acceptance of the return of the property will not estop him from showing that such repairs were not made in accordance with the contract. The Isaac Newton, 13 Fed. Cas. No. 7,089, Abb. Adm. 11.

90. *Connecticut.*— Winton *v.* Hart, 39 Conn. 16.

Michigan.— Taylor *v.* Butters, etc., Salt, etc., Co., 103 Mich. 1, 61 N. W. 5; Dousman *v.* Peters, 85 Mich. 488, 48 N. W. 697. See also Turnbull *v.* Boggs, 78 Mich. 158, 43 N. W. 1050.

Missouri.— Combs *v.* Sullivan County, 105 Mo. 230, 16 S. W. 916. See also Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.

Pennsylvania.— Scott *v.* Strawn, 85 Pa. St. 471; *In re* Bacon, 1 Phila. 430. See also Shaw *v.* Fleming, 174 Pa. St. 52, 34 Atl. 555.

Virginia.— American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466.

United States.— Philadelphia, etc., R. Co. *v.* U. S., 103 U. S. 703, 26 L. ed. 454; U. S. *v.* Kuhn, 26 Fed. Cas. No. 15,545, 4 Cranch C. C. 401.

Canada.— See Young *v.* Taylor, 25 U. C. Q. B. 583.

See 19 Cent. Dig. tit. "Estoppel," § 248; and ACCOUNTS AND ACCOUNTING, 1 Cyc. 351 *et seq.*; COMPROMISE AND SETTLEMENT, 8 Cyc. 499 *et seq.*

tition of property,[91] participation in elections and proceedings subsequent thereto,[92] the use and appropriation of water-rights,[93] the delivery of an instrument held in escrow,[94] and the employment of infants.[95] In the case of forged signatures,[96] and

91. *Illinois.*— Best *v.* Jenks, 123 Ill. 447, 15 N. E. 173; Gilmore *v.* Gilmore, 109 Ill. 277.

Iowa.— McGregor *v.* Reynolds, 19 Iowa 228. See also Independent School Dist. *v.* Hobson, 25 Iowa 275.

Kansas.— Crimmins *v.* Morrisey, 36 Kan. 447, 13 Pac. 748.

Kentucky.— Smith *v.* Payne, 2 Bush 583.

Massachusetts.— White *v.* Clapp, 8 Metc. 365.

Michigan.— Mitchell *v.* Mitchell, 68 Mich. 106, 35 N. W. 844.

Pennsylvania.— Snavely *v.* Musselman, 3 Lanc. Bar, March 23, 1872.

South Carolina.— Smith *v.* Winn, 27 S. C. 591, 4 S. E. 240.

Texas.— Stafford *v.* Harris, 82 Tex. 178, 17 S. W. 530; Galbraith *v.* Howard, 11 Tex. Civ. App. 230, 32 S. W. 803; Lemonds *v.* Stratton, 5 Tex. Civ. App. 403, 24 S. W. 370.

Vermont.— Bowen *v.* King, 34 Vt. 156. See also Smith *v.* Meacham, 1 D. Chipm. 424.

See 19 Cent. Dig. tit. "Estoppel," § 249; and PARTITION. See also *infra*, note 98.

Acquiescence in the division of an estate under an agreement of indemnity against a certain liability will not estop a party from contesting the rights of the other heirs under the division upon their failure to comply with the agreement. Seymour *v.* Seymour, 22 Conn. 272. So acquiescence in a partial division under an agreement based on a mistake of law will not estop a party from refusing to divide the remainder of the property according to the agreement. Pegues *v.* Haden, 76 Tex. 94, 13 S. W. 171.

92. See Thatcher *v.* People, 98 Ill. 632; Chicago, etc., R. Co. *v.* Coyer, 79 Ill. 373; People *v.* Waite, 70 Ill. 25; Reg. *v.* Parker, 2 U. C. C. P. 15. *Compare* Tate *v.* Erlanger Dist. No. 32, 49 S. W. 337, 20 Ky. L. Rep. 1370, holding that the fact that one has participated in an election to vote a tax does not estop him from questioning its validity. See, generally, ELECTIONS, 15 Cyc. 268 *et seq.*

A person is not estopped from moving to quash a by-law of a municipal corporation by having voted at an election held thereunder, he having in no way participated in the passage of such by-law. Fenton *v.* Simcoe County, 10 Ont. 127. So a person who has voted against the passage of a by-law is not estopped to question its validity. *Re* Armstrong, 17 Ont. 766.

93. *California.*— Churchill *v.* Baumann, 95 Cal. 541, 30 Pac. 770.

Georgia.— Southern Marble Co. *v.* Darnell, 94 Ga. 231, 21 S. E. 531.

Montana.— Fabian *v.* Collins, 3 Mont. 215.

New Jersey.— Useful Manufactures' Soc. *v.* Lehigh Valley R. Co., 32 N. J. Eq. 329.

Pennsylvania.— Swartz *v.* Swartz, 4 Pa. St. 353, 45 Am. Dec. 697.

Texas.— Risien *v.* Brown, 73 Tex. 135, 10 S. W. 661.

Utah.— Lehi Irr. Co. *v.* Moyle, 4 Utah 327, 9 Pac. 867.

Wisconsin.— West *v.* Fox River Paper Co., 82 Wis. 647, 52 N. W. 803; Cobb *v.* Smith, 16 Wis. 661.

See 19 Cent. Dig. tit. "Estoppel," § 252; and WATERS.

Acquiescence in the use of a stream as a sewer will not estop the abutting owners from objecting to the construction of other sewers emptying therein by which the pollution of the water would be increased. Gale *v.* Syracuse, 35 Misc. (N. Y.) 465, 71 N. Y. Suppl. 986.

Permitting incurrence of expense.— Where a person claiming under a conveyance of water-rights for the purposes of a grist-mill and a cotton or woolen factory uses water for other purposes, one claiming under the grantor is not estopped from suing therefor by knowingly permitting defendant to incur expense in preparing for such use without making known his rights in the water. Clement *v.* Gould, 61 Vt. 573, 18 Atl. 453.

Simple acquiescence alone of a party for several years in the overflow of his land or his failure to notify defendant of his injury will not estop him to recover damages therefor. Knight *v.* Albemarle, etc., R. Co., 111 N. C. 80, 15 S. E. 929.

The failure of one proprietor to object to the use of water by another when there is an abundant supply will not estop him from objecting to such use at a time when the supply is insufficient for the use of both. Anaheim Water Co. *v.* Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623.

94. Haven *v.* Kramer, 41 Iowa 382; Racine Seeder Co. *v.* Joliet Wire-Check Rower Co., 27 Fed. 367. But see Berry *v.* Anderson, 22 Ind. 36. See also ESCROWS, 16 Cyc. 582 *et seq.*

95. Smith *v.* Smith, 30 Conn. 111; Boulton *v.* Black, 68 Ind. 269, both holding that where a parent or guardian, knowing that his child or ward has been employed under an agreement that his wages are to be paid to him, makes no objection and gives no notice to the employer that he will claim the wages but allows the agreement to be executed, he is estopped from demanding the wages of the employer. See also PARENT AND CHILD.

96. *Indiana.*— Kuriger *v.* Joest, 22 Ind. App. 633, 52 N. E. 764, 54 N. E. 414.

Louisiana.— De Feriet *v.* Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597.

Maine.—Lovejoy *v.* Richardson, 68 Me. 386.

Pennsylvania.— West Philadelphia Bank *v.* Green, 3 Pennyp. 456.

Rhode Island.— Goodell *v.* Bates, 14 R. I. 65.

Canada.— Pratt *v.* Drake, 17 U. C. Q. B. 27.

See 19 Cent. Dig. tit. "Estoppel," § 253.

To create an estoppel against one whose name has been forged, there must be some act

in the case of the acquiescence of stock-holders and creditors in corporate acts,[97] the rule has also been applied.

(II) *In Judicial Proceedings.* Where a party with knowledge of the facts assents to or participates in judicial proceedings without objection, he is bound by such proceedings as against one who has been misled by his conduct.[98]

or declaration indicating an authorization of the use of his name, by which the adverse party is misled, or a subsequent approval by the acceptance of benefits received with knowledge of the facts. Western Union Tel. Co. *v.* Davenport, 97 U. S. 369, 24 L. ed. 1047.

Unless another has been induced to act to his injury, a person will not be estopped to deny a previous admission of the genuineness of a forged signature. Garrott *v.* Ratliff, 6 Ky. L. Rep. 72.

An assent to an extension of time for the payment of a note on the part of one whose name appears thereon as an indorser is not such a ratification of the signature as will estop him from subsequently setting up as a defense that the indorsement is a forgery. Thorn *v.* Bell, Lalor (N. Y.) 430.

Acknowledgment obtained by fraud.— Where without fault of the mortgagee the mortgagor induces the officer taking the acknowledgment of a forged discharge to believe that an acknowledgment of a verbal extension of another mortgage was an acknowledgment of the discharge, the mortgagee is not estopped to deny the signature. O'Neil *v.* Webster, 150 Mass. 572, 23 N. E. 235.

Estoppel of indorser of note to plead forgery see COMMERCIAL PAPER, 7 Cyc. 783 note 73.

97. *Illinois.*— Whalen *v.* Stephens, 193 Ill. 121, 61 N. E. 921 [*affirming* 92 Ill. App. 235]; Crane Bros. Mfg. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030 [*affirming* 37 Ill. App. 94]; McDowell *v.* Chicago Steel Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381.

Iowa.— State Bank Bldg. Co. *v.* Pierce, 92 Iowa 668, 61 N. W. 426.

Louisiana.— Schleider *v.* Dielman, 44 La. Ann. 462, 10 So. 934; Hope *v.* Board of Liquidation, 43 La. Ann. 738, 9 So. 754.

Missouri.— See Kuhl *v.* Meyer, 42 Mo. App. 474.

New Jersey.— Keasbey *v.* Wilkinson, 51 N. J. Eq. 29, 27 Atl. 642; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 233.

New York.— Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456; Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

Tennessee.— Deaderick *v.* Wilson, 8 Baxt. 108.

Utah.— Pyper *v.* Salt Lake Amusement Assoc., 20 Utah 9, 57 Pac. 533.

Wisconsin.— Reed *v.* Leups, 38 Wis. 352.

England.— Barrow Mut. Ship Ins. Co. *v.* Ashhurner, 5 Aspin. 527, 54 L. J. Q. B. 377, 54 L. T. Rep. N. S. 58.

Canada.— Petrie *v.* Guelph Lumber Co., 2 Ont. 218 [*affirmed* in 11 Ont. App. 336 (*affirmed* in 11 Can. Supreme Ct. 450)]; London Gas Co. *v.* Campbell, 14 U. C. Q. B. 143.

See 19 Cent. Dig. tit. "Estoppel," § 256; and CORPORATIONS, 10 Cyc. 1 *et seq.*

98. *Alabama.*— Harrison *v.* Pool, 16 Ala. 167.

Colorado.—Consolidated Home-Supply, etc., Co. *v.* New Loveland, etc., Irr., etc., Co., 27 Colo. 521, 62 Pac. 364.

Connecticut.— Bronson *v.* Taylor, 33 Conn. 116.

Georgia.— Carr *v.* Neal Loan, etc., Co., 99 Ga. 322, 25 S. E. 655.

Illinois.— Humphreys *v.* Allen, 101 Ill. 490.

Kansas.— Carr *v.* Farrell, 62 Kan. 565, 64 Pac. 22; Ogden *v.* Stokes, 25 Kan. 517.

Kentucky.— Loeb *v.* Struck, 42 S. W. 401, 19 Ky. L. Rep. 935; Rodman *v.* Moody, 14 Ky. L. Rep. 202.

Louisiana.— Ledoux *v.* Lavedan, 52 La. Ann. 311, 27 So. 196; Campbell *v.* Woolfolk, 37 La. Ann. 320.

Maine.— Thurston *v.* Doane, 47 Me. 79.

Maryland.— Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322; Farmers' Bank *v.* Thomas, 37 Md. 246; Boulden *v.* Lanahan, 29 Md. 200.

Mississippi.— Thompson *v.* McGill, Freem. 401.

Missouri.— Hereford *v.* State Nat. Bank, 53 Mo. 330.

Nebraska.— Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677.

New York.— Phelps *v.* Borland, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755; Lacey *v.* Lacey, 38 Misc. 196, 77 N. Y. Suppl. 235; Matter of Mount, 27 Misc. 411, 59 N. Y. Suppl. 176; Saratoga Springs First Nat. Bank *v.* Rock City Falls Paper Co., 22 Misc. 599, 50 N. Y. Suppl. 746; Judson *v.* Gray, 17 How. Pr. 289.

Ohio.— Beall *v.* Price, 13 Ohio 368, 42 Am. Dec. 204.

Pennsylvania.— Kreamer *v.* Fleming, 200 Pa. St. 414, 50 Atl. 233; National Gas Co.'s Appeal, 1 Pennyp. 100.

South Carolina.— Carrigan *v.* Drake, 36 S. C. 354, 15 S. E. 339; State *v.* Spartanburg, etc., R. Co., 8 S. C. 129.

South Dakota.— State *v.* Pierre, 15 S. D. 559, 90 N. W. 1047.

Tennessee.—Richardson *v.* Marshall County, 100 Tenn. 346, 45 S. W. 440; Watterson *v.* Lyons, 9 Lea 566; Broyles *v.* Nowlin, 3 Baxt. 191.

Vermont.— Rutland *v.* Pierpoint, 61 Vt. 306, 17 Atl. 714.

Virginia.— Williams *v.* Reynolds, (1897) 27 S. E. 600; Marrow *v.* Brinkley, 85 Va. 55, 6 S. E. 605.

Washington.— Daly *v.* Everett Pulp, etc., Co., 31 Wash. 252, 71 Pac. 1014; California Bank *v.* Puget Sound Loan, etc., Co., 20 Wash. 636, 56 Pac. 395. *Compare* Stossel *v.* Van de Vanter, 16 Wash. 9, 47 Pac. 221.

United States.— Stow *v.* U. S., 5 Ct. Cl. 362.

England.— Andrews *v.* Elliott, 6 E. & B.

d. Prior Claim or Position in Judicial Proceedings — (i) *In Same Proceeding* — (A) *In General.* A party who has, with knowledge of the facts,[99] assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.[1] It is necessary, how-

338, 2 Jur. N. S. 663, 25 L. J. Q. B. 336, 4 Wkly. Rep. 527, 88 E. C. L. 338; Tyerman *v.* Smith, 6 E. & B. 719, 2 Jur. N. S. 860, 25 L. J. Q. B. 359, 88 E. C. L. 719.

Canada.— Wilson *v.* Port Hope Municipal Council, 10 U. C. Q. B. 405. See also Pidgeon *v.* Martin, 25 U. C. C. P. 233.

See 19 Cent. Dig. tit. "Estoppel," § 257.

If no one has been misled or caused to act differently from what he would otherwise have done by such participation, a party will not be estopped thereby. Stossel *v.* Van de Vanter, 16 Wash. 9, 47 Pac. 221.

A person whose failure to assert a claim in one action has not caused any loss or injury to the adverse party is not estopped to assert the same in a subsequent action. Matthews *v.* Duryee, 45 Barb. (N. Y.) 69.

Failure to make a defense in a proceeding in which it is not available will not estop the party from making it in a subsequent proceeding in which it is available. Allen *v.* Wolford, (Pa. 1886) 6 Atl. 752.

Fraudulent levies.— A creditor is not estopped to allege that levies under attachments by other creditors were fraudulent, although he did not take action to prevent prosecution of the attachment suits to judgment, sale of the property, and distribution of the proceeds. Glasser *v.* Meyrovitz, 119 Ala. 152, 24 So. 514.

A mortgagee who permits the assignee of a fire-insurance policy to sue thereon is not estopped to claim the proceeds, where he intervened in the suit and his intervention was dismissed at the request of such assignee. Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345.

Testifying in proceeding.— Where, in condemnation proceedings by a railroad company, counsel for defendant states that defendant does not claim the land sought to be condemned, the fact that the real owner, not a party to the proceedings, testifies to the value of the land, will not estop him from subsequently maintaining ejectment against the railroad company for the land. Owen *v.* St. Paul, etc., R. Co., 12 Wash. 313, 41 Pac. 44.

Acceptance of payment into court.— Where a complainant brings money into court insisting that it is all that is due defendant, and the court makes an order that it be paid the latter on his executing a refunding bond, if defendant executes the bond and receives the money he will not be estopped from showing that a larger amount is due him, and this although he does not bring into court the note which the money was intended to pay. Byrd *v.* Odem, 9 Ala. 755.

Partition proceedings.— A party who participates and acquiesces in proceedings for partition will be estopped to subsequently deny the validity thereof. Hurst *v.* Whitly, 47 Ga. 366; Akers *v.* Hobbs. 105 Mo. 127, 16 S. W. 682; Young *v.* Babilon, 91 Pa. St. 280. *Compare* Moore *v.* Blagge, (Tex. Civ. App. 1896) 34 S. W. 311 [*following* 6 Tex. Civ. App. 359, 23 S. W. 466, 26 S. W. 305]; McCarty *v.* Merry, (Tex. Civ. App. 1900) 59 S. W. 304. See also *supra*, VI, B, 1, c, (I).

Estoppel to object to jurisdiction see Courts, 11 Cyc. 698 note 38.

Stipulations and consents see *infra*, VI, B, 1, d, (I), (B).

99. See *supra*, V, A, 4, d.

1. *Alabama.*— Taylor *v.* Crook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26; Sheats *v.* Scott, 133 Ala. 642, 32 So. 573; Eldridge *v.* Grice, 132 Ala. 667, 32 So. 683; Farley Nat. Bank *v.* Henderson, 118 Ala. 441, 24 So. 428; Hodges *v.* Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241.

California.— Dreyfous *v.* Adams, 48 Cal. 131.

Colorado.— McMurray *v.* Marsh, 12 Colo. App. 95, 54 Pac. 852.

District of Columbia.— Pepper *v.* Shepherd, 4 Mackey 269, holding that an estoppel cannot be predicated on an act which the party claiming the estoppel charges to be void.

Georgia.— Georgia Cent. R. Co. *v.* James, 117 Ga. 832, 45 S. E. 223; Lynn *v.* New England Mortg. Security Co., 98 Ga. 442, 26 S. E. 750.

Illinois.— Long *v.* Fox, 100 Ill. 43; Bradley *v.* Coolbaugh, 91 Ill. 148; Evanston *v.* Clark, 77 Ill. App. 234; McCaffrey *v.* Knapp, etc., Co., 74 Ill. App. 80; Zinn *v.* Hazlett, 67 Ill. App. 410.

Indiana.— Skelton *v.* Sharp, 161 Ind. 383, 67 N. E. 535; Lewis *v.* Stanley, 148 Ind. 351, 45 N. E. 693, 47 N. E. 677; Smith *v.* Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000.

Iowa.— McCormick *v.* McCormick Harvesting Mach. Co., 120 Iowa 593, 95 N. W. 181; Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510; Turrill *v.* McCarthy, 114 Iowa 681, 87 N. W. 667; Zalesky *v.* Home Ins. Co., 114 Iowa 516, 87 N. W. 428; Shropshire *v.* Ryan, 111 Iowa 677, 82 N. W. 1035; Murdy *v.* Sykes, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411; Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986.

Kansas.— List *v.* Jockheck, 59 Kan. 143, 52 Pac. 420.

Kentucky.— Linville *v.* Langford, 47 S. W. 248, 20 Ky. L. Rep. 590.

Louisiana.— Frellsen *v.* Strader Cypress Co., 110 La. 877, 34 So. 857; Emonot's Succession, 109 La. 359, 33 So. 368; State *v.* New Orleans, 106 La. 469, 31 So. 55; Abbot *v.* Wilbur, 22 La. Ann. 368; Hemken *v.* Farmer, 3 Rob. 155. *Compare* Ware *v.* Morris, 23 La. Ann. 665.

Maine.— Thurlough *v.* Kendall, 62 Me. 166.

Maryland.— Baker *v.* Baker, 94 Md. 627, 51 Atl. 566; Presstman *v.* Mason, 68 Md. 78, 11 Atl. 764.

Michigan.— Post *v.* Voorhees, 118 Mich. 366, 76 N. W. 912; Marquette, etc., R. Co.

ever, that the claim or position previously asserted or taken should have been

v. Marcott, 41 Mich. 433, 2 N. W. 795; McQueen *v.* Gamble, 33 Mich. 344.

Missouri.— Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; McClanahan *v.* West, 100 Mo. 309, 13 S. W. 674; Smiley *v.* Cockrell, 92 Mo. 105, 4 S. W. 443; Brown *v.* Bowen, 90 Mo. 184, 2 S. W. 184; Tower *v.* Moore, 52 Mo. 118; Callaway *v.* Johnson, 51 Mo. 33; Dutcher *v.* Hill, 29 Mo. 271, 77 Am. Dec. 572; Potter *v.* Adams, 24 Mo. 159; Cogswell *v.* Freudenau, 93 Mo. App. 482, 67 S. W. 744.

Montana.— Stagg *v.* St. Jean, 29 Mont. 288, 74 Pac. 740; Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943; Maul *v.* Schultz, 19 Mont. 335, 48 Pac. 626; Tuttle *v.* Merchants' Nat. Bank, 19 Mont. 11, 47 Pac. 203.

Nebraska.— Pawnee City First Nat. Bank *v.* Avery Planter Co., (1903) 95 N. W. 622.

New Hampshire.—Hart *v.* Folsom, 70 N. H. 213, 47 Atl. 603.

New York.— Smith *v.* Rathbun, 75 N. Y. 122; Washburn *v.* Benedict, 46 N. Y. App. Div. 484, 61 N. Y. Suppl. 387; Beardsley *v.* McCutcheon, 25 N. Y. App. Div. 409, 49 N. Y. Suppl. 535; Griggs *v.* Day, 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609; Postal Tel. Cable Co. *v.* Robertson, 36 Misc. 785, 74 N. Y. Suppl. 876; Grieve *v.* McGovern, 18 N. Y. Suppl. 444.

North Carolina.— Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748.

Ohio.— Mott *v.* Hubbard, 59 Ohio St. 199, 53 N. E. 47; Tone *v.* Columbus, 39 Ohio St. 281, 48 Am. Rep. 438; Bulkley *v.* Stephens, 29 Ohio St. 620; Bramlage *v.* Winder, 6 Ohio S. & C. Pl. Dec. 319.

Oklahoma.— Territory *v.* Cooper, 11 Okla. 699, 69 Pac. 813.

Pennsylvania.— Garber *v.* Doersom, 117 Pa. St. 162, 11 Atl. 777; Corey *v.* Edgewood Borough, 18 Pa. Super. Ct. 228; Matter of Bacon, 1 Phila. 430; Frisard's Estate, 1 Del. Co. 113.

South Carolina.— Bonham *v.* Bishop, 23 S. C. 96.

Texas.— Dalton *v.* Rust, 22 Tex. 133.

Utah.— Hall *v.* McNally, 23 Utah 606, 65 Pac. 724.

Virginia.— Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871.

United States.— Iron Gate Bank *v.* Brady, 184 U. S. 665, 22 S. Ct. 529, 46 L. ed. 739; Davis *v.* Wakelee, 156 U. S. 680, 15 S. Ct. 555, 39 L. ed. 578; Robb *v.* Vos, 155 U. S. 13, 15 S. Ct. 4, 39 L. ed. 52; Mootry *v.* Grayson, 104 Fed. 613, 44 C. C. A. 83; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; Sullivan *v.* Colby, 71 Fed. 460, 18 C. C. A. 193; Jones *v.* The St. Nicholas, 49 Fed. 671.

England.— Daniel *v.* Morton, 16 Q. B. 198, 71 E. C. L. 198; Tinkler *v.* Hilder, 7 D. & L. 61, 4 Exch. 187, 13 Jur. 684, 18 L. J. Exch. 429.

Canada.— Exchange Bank *v.* Springer, 29 Grant Ch. (U. C.) 270; Reg. *v.* Hefferman, 13 Ont. 616; Black *v.* Allan, 17 U. C. C. P. 240; Reg. *v.* Smith, 46 U. C. Q. B. 442; Matter of Board of Education, 39 U. C. Q. B. 34; Sherboneau *v.* Beaver Mut. F. Ins. Co., 33 U. C. Q. B. 1 [*affirming* 30 U. C. Q. B. 472]; Allan *v.* Garratt, 30 U. C. Q. B. 165. *Compare* Ray *v.* Isbister, 24 Ont. 497.

See 19 Cent. Dig. tit. "Estoppel," § 165 *et seq.*

A person who relies upon an adjudication as an estoppel cannot dispute the truth of the material fact on which such adjudication is predicated. Buford *v.* Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854.

A defect of parties in a counter-claim is not available to plaintiff, where the omitted party is equally necessary to a determination of his own cause of action. Pawnee City First Nat. Bank *v.* Avery Planter Co., (Nebr. 1903) 95 N. W. 622.

Misjoinder on application of defendant.— Where, on defendant's application, a third person is joined as a necessary party to the action, defendant is estopped to deny that such third person was a necessary party. Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986.

By designating a pleading as a defense, a party is estopped from afterward asserting that it is a counter-claim, and entitled to be treated as such. Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943.

One who induces the dismissal of an appeal on the ground that the decree is not final cannot afterward claim as against a bill of review that it was final. Taylor *v.* Cook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26.

Suing on an award will estop a party from denying the authority of the arbitrators. Black *v.* Allan, 17 U. C. C. P. 240.

Facts otherwise apparent.— A portion of a claim having been satisfied by a transfer of real estate, a claim of the full amount will not amount to a disaffirmance of the transfer where an affidavit for an attachment accompanying the complaint sets forth such transfer as an offset to the whole indebtedness. Colvin *v.* Shaw, 79 Hun (N. Y.) 56, 29 N. Y. Suppl. 644.

Avoidance of estoppel.— An accepter of a bill who by suing the drawer on a note given him as indemnity for the acceptance before maturity of the bill has estopped himself from asserting that he is an accommodation accepter for a special purpose cannot avoid the effect of his act by afterward abandoning the suit. Farley Nat. Bank *v.* Henderson, 118 Ala. 441, 24 So. 428. However, the joinder of a husband as co-plaintiff with the wife, the complaint being afterward amended by striking out his name, will not estop him from claiming that he acted as agent for his wife. American Express Co. *v.* Lankford, 2 Indian Terr. 18, 46 S. W. 183.

Conclusiveness of statements in pleadings, stipulations, admissions in court, affidavits, etc. see EVIDENCE, *post*, p. 121 *et seq.*; PLEADING.

successfully maintained ;[2] that it should be actually inconsistent with the position presently taken,[3] and that it should not have been taken through the fault of the adverse party.[4]

(B) *Stipulations and Consents.* Applying the rule against taking inconsistent positions, parties to stipulations and agreements entered into in the course of judicial proceedings are estopped to take positions inconsistent therewith[5] to

Estoppel by levy to assert ownership see ATTACHMENT, 4 Cyc. 632 note 75, 729.

Estoppel of one who files a claim in admiralty as owner to assert rights as lienor see ADMIRALTY, 1 Cyc. 862 note 67.

Estoppel to deny guardianship see GUARDIAN AND WARD; INSANE PERSONS.

2. Lackmann *v.* Kearney, 142 Cal. 112, 75 Pac. 668; McQueen's Appeal, 104 Pa. St. 595, 49 Am. Rep. 592. And see cases cited in the preceding note.

An unsuccessful attempt to prove by direct evidence the precise cause of an injury does not estop plaintiff from relying on presumptions applicable to the case. Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285.

3. Leidigh *v.* Pribble, 64 Nebr. 860, 90 N. W. 950. See also Reynolds, etc., Constr. Co. *v.* Monroe, 45 La. Ann. 1024, 13 So. 400; Lindsay *v.* Gager, 11 N. Y. App. Div. 93, 42 N. Y. Suppl. 851.

Defendant can be required to elect between defenses only where the facts therein are so inconsistent that if the truth of one defense be admitted it will disprove the other. Davis *v.* Bowman, (Tenn. Ch. App. 1898) 46 S. W. 1039.

4. Potter *v.* Brown, 50 Mich. 436, 15 N. W. 540.

5. *California.*— *In re* Kennedy, 120 Cal. 458, 52 Pac. 820.

Connecticut.— Central Bank *v.* Curtis, 26 Conn. 533.

Illinois.— Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110; People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Sammis *v.* Poole, 89 Ill. App. 118 [*affirmed* in 188 Ill. 396, 58 N. E. 934]; Wineteer *v.* Simonson, 75 Ill. App. 653; Winona Paper Co. *v.* Kalamazoo First Nat. Bank, 33 Ill. App. 630.

Indiana.— Ridgway *v.* Morrison, 28 Ind. 201; Baltimore, etc., R. Co. *v.* Manning, 16 Ind. App. 408, 45 N. E. 526.

Kentucky.— Palmer *v.* Kemp, 2 A. K. Marsh. 355.

Maryland.— Mish *v.* Lechlider, 89 Md. 275, 43 Atl. 57.

Massachusetts.— Eastman *v.* Eveleth, 4 Metc. 137. See also Hudson *v.* J. B. Parker Mach. Co., 173 Mass. 242, 53 N. E. 867. *Compare* Webster *v.* Randall, 19 Pick. 13.

New Jersey.— See Taylor *v.* Brown, 31 N. J. Eq. 163.

New York.— Hirsch *v.* Mayer, 165 N. Y. 236, 59 N. E. 89 [*affirming* 31 N. Y. App. Div. 627, 54 N. Y. Suppl. 1075]; Lane *v.* Lutz, 3 Abb. Dec. 19, 1 Keyes 203; Hempy *v.* Griess, 30 N. Y. App. Div. 434, 51 N. Y. Suppl. 1072; Matter of Pierson, 19 N. Y. App. Div. 478, 46 N. Y. Suppl. 557; Banks *v.* American Tract Soc., 4 Sandf. Ch. 438.

Ohio.— Potter *v.* Myers, 31 Ohio St. 103; Holland *v.* Drake, 29 Ohio St. 441.

Pennsylvania.— Montgomery *v.* Heilman, 96 Pa. St. 44.

South Carolina.— McLaurin *v.* Kelly, 40 S. C. 486, 19 S. E. 143; Jones *v.* Hudson, 23 S. C. 494.

Texas.— Crabtree *v.* Whiteselle, 65 Tex. 111; Dupree *v.* Duke, 30 Tex. Civ. App. 360, 70 S. W. 561; Phelps *v.* Norman, (Civ. App. 1900) 55 S. W. 978. *Compare* Gulf City Trust Co. *v.* Hartley, 20 Tex. Civ. App. 180, 49 S. W. 902.

United States.— Halliday *v.* Stuart, 151 U. S. 229, 14 S. Ct. 302, 38 L. ed. 141; Speake *v.* U. S., 9 Cranch 28, 3 L. ed. 645.

See 19 Cent. Dig. tit. "Estoppel," §§ 211, 212.

Agreement as to date of rendition of judgment see Ridgway *v.* Morrison, 28 Ind. 201.

Consent order.— Where a party consents to an order providing for the advancement of money by a corporation to protect an estate in its possession as receiver, and the money is advanced, he cannot impeach the order, nor question the corporation's appointment or capacity to act as receiver, nor object that the receiver became a creditor by making such advances. Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

Consent to jurisdiction.— Where a suit is instituted of which a justice has no jurisdiction, and by agreement of defendant the case is tried before the justice, and results in a judgment for plaintiff, and defendant takes no appeal, and afterward plaintiff in accordance with a rule of court files a sworn copy of his account and takes a judgment for want of an affidavit of defense, defendant is estopped from objecting to the jurisdiction of the justice in order to destroy the validity of the judgment. Montgomery *v.* Heilman, 96 Pa. St. 44. See also Phelps *v.* Norman, (Tex. Civ. App. 1900) 55 S. W. 978, where it was held that a party who has signed and filed a stipulation in a cause that a judgment may be entered against him by a district court cannot question its jurisdiction.

Consent to order renewing execution estops party to deny validity of judgment, or that it is unpaid. McLaurin *v.* Kelly, 40 S. C. 486, 19 S. E. 143.

Consent to revival in name of executor estops party to deny executorship. Palmer *v.* Kemp, 2 A. K. Marsh. (Ky.) 355.

Stipulation as to exceptions.—Where it appeared that a bill of exceptions had not been filed within the time fixed by the order of the court, but attached to it was a stipula-

the prejudice, injury, or disadvantage of the party or the person setting up the estoppel.[6]

(II) *In Former Proceeding* — (A) *In General.* A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party,[7] where the parties are the

tion signed by appellee's counsel that "the foregoing bill of exceptions may be incorporated in and taken to the Appellate Court as a part of the record herein, as provided by the statute," the appellee was held estopped to deny that all orders necessary to make the bill of exceptions part of the record were entered. Winona Paper Co. *v.* Kalamazoo First Nat. Bank, 33 Ill. App. 630, 632. See also Potter *v.* Myers, 31 Ohio St. 103, which was a consent to a journal entry showing that a bill of exceptions was duly perfected.

6. See Rhoades' Estate, 1 Lanc. Bar (Pa.) Dec. 11, 1869.

7. *Alabama.*— Savage *v.* Johnson, 127 Ala. 401, 28 So. 553.

Arkansas.— Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 157.

California.— Turner *v.* Billagram, 2 Cal. 520.

Colorado.— Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378. *Compare* Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370.

District of Columbia.— Clark *v.* Barber, 21 App. Cas. 274; Dexter *v.* Gordon, 11 App. Cas. 60.

Georgia.— Stroud *v.* Hancock, 116 Ga. 332, 42 S. E. 496; Gentry *v.* Barron, 109 Ga. 172, 34 S. E. 349; Ray *v.* Home, etc., Invest., etc., Co., 106 Ga. 492, 32 S. E. 603; Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95.

Illinois.— Cheney *v.* Ricks, 168 Ill. 533, 48 N. E. 75; Jeffery *v.* Robbins, 167 Ill. 375, 47 N. E. 725 [*affirming* 62 Ill. App. 190]; Montague *v.* Selb, 106 Ill. 49; Ihorn *v.* Wallace, 88 Ill. App. 562; Barrett *v.* Bogardus, 71 Ill. App. 407.

Iowa.— Kirkhart *v.* Roberts, 123 Iowa 137, 98 N. W. 562; Crawford *v.* Nolan, 70 Iowa 97, 30 N. W. 32.

Kansas.— Ard *v.* Pratt, 61 Kan. 775, 60 Pac. 1048 [*reversing* 10 Kan. App. 335, 58 Pac. 283]; Cornell University *v.* Parkinson, 59 Kan. 365, 53 Pac. 138.

Louisiana.— Murray *v.* Spencer, 46 La. Ann. 452, 15 So. 25 (holding that an heir who sues to set aside a will containing a special legacy in his favor on the ground that the notary did not comply with the legal requirements is estopped after judgment in his favor to recover against the notary for damages); Johnson *v.* Flanner, 42 La. Ann. 522, 7 So. 455; Del Bondio *v.* New Orleans Mut. Ins. Assoc., 28 La. Ann. 139.

Maryland.— Edes *v.* Garey, 46 Md. 24.

Massachusetts.—Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49.

Michigan.— Cline *v.* Wixson, 128 Mich. 255, 87 N. W. 207; Tomlinson *v.* Cornett, 128 Mich. 171, 87 N. W. 72; Martin *v.* Boyce, 49 Mich. 122, 13 N. W. 386; Jones *v.* Pashby, 48 Mich. 634, 12 N. W. 884; Cummings *v.* Fearey, 44 Mich. 39, 6 N. W. 98.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96; Nave *v.* Todd, 83 Mo. 601.

New Hampshire.— Hatch *v.* Partridge, 35 N. H. 148; Brown *v.* Roberts, 24 N. H. 131.

New Jersey.—Binns *v.* Slingerland, 55 N. J. Eq. 55, 36 Atl. 277; Ruckelschaus *v.* Oehme, 48 N. J. Eq. 436, 22 Atl. 184 [*affirmed* in 49 N. J. Eq. 340, 24 Atl. 547].

New Mexico.— Daly *v.* Berstein, 6 N. M. 380, 28 Pac. 764.

New York.— Schoellkopf *v.* Coatsworth, 166 N. Y. 77, 59 N. E. 710; Hemmingway *v.* Poucher, 98 N. Y. 281; Johnstown Min. Co. *v.* Butte, etc., Consol. Min. Co., 60 N. Y. App. Div. 344, 70 N. Y. Suppl. 257; Long Island R. Co. *v.* Garvey, 11 N. Y. App. Div. 626, 42 N. Y. Suppl. 155; Garbutt *v.* Smith, 40 Barb. 22; Hutchins *v.* Hutchins, 18 Misc. 633, 42 N. Y. Suppl. 601; Weinstock *v.* Levison, 14 N. Y. Suppl. 64, 20 N. Y. Civ. Proc. 1, 26 Abb. N. Cas. 244.

North Carolina.— Brantly *v.* Kee, 58 N. C. 332.

Ohio.— See Murdock *v.* Lantz, 34 Ohio St. 589.

Pennsylvania.— Aronson *v.* Cleveland, etc., R. Co., 70 Pa. St. 68; Campbell *v.* Stephens, 66 Pa. St. 314; Sheble *v.* Patterson, 5 Kulp 153; Lockwood *v.* Com., 12 Wkly. Notes Cas. 451. See also McQueen's Appeal, 104 Pa. St. 595, 49 Am. Rep. 592.

Tennessee.— Atkinson *v.* Rhea, 7 Humphr. 59; Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215; Bussell *v.* King, (Ch. App. 1897) 48 S. W. 310.

Texas.— Henry *v.* Thomas, (Civ. App. 1903) 74 S. W. 599; Northington *v.* Taylor County, (Civ. App. 1901) 62 S. W. 936; Taffinder *v.* Merrill, (Civ. App. 1901) 61 S. W. 936 [*affirmed* in 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814]; Hitchler *v.* Boyles, 21 Tex. Civ. App. 230, 51 S. W. 648; Scanlan *v.* Hitchler, 19 Tex. Civ. App. 689, 48 S. W. 762.

Washington.— Scott *v.* Mathews, 25 Wash. 486, 65 Pac. 756.

Wisconsin.— Kaehler *v.* Dobberpuhl, 60 Wis. 256, 18 N. W. 841; Mariner *v.* Milwaukee, etc., R. Co., 26 Wis. 84. *Compare* Thrall *v.* Thrall, 60 Wis. 503, 19 N. W. 353.

United States.— *In re* Wiessner, 116 Fed. 68; Lafayette Bridge Co. *v.* Streator, 105 Fed. 729; Ætna L. Ins. Co. *v.* Lyon County, 82 Fed. 929.

Canada.— Gibbs *v.* Crawford, 8 U. C. Q. B. 155. *Compare* Lee *v.* Credit Valley R. Co., 29 Grant. Ch. (U. C.) 480.

same,[8] and the same questions are involved.[9] Thus a party who has successfully interposed a defense or objection in one action or proceeding cannot shift his ground and take a position in another action or proceeding which is so inconsistent with his former defense or objection as necessarily to disprove its truth.[10]

See 19 Cent. Dig. tit. "Estoppel," § 166.

A mere consent to a matter of procedure in a case does not bind the party thereto never to litigate any question involved therein in any other case or court. Sharon *v.* Hill, 26 Fed. 337, 11 Sawy. 291.

An unsuccessful attempt to establish a certain state of facts in one action does not estop the party from alleging a different and inconsistent state of facts in a subsequent action between the same parties and on the same subject-matter. McQueen's Appeal, 104 Pa. St. 595, 49 Am. Rep. 592.

If the positions are not necessarily inconsistent the party will not be estopped thereby. Metzger *v.* Morley, 197 Ill. 208, 64 N. E. 280, 90 Am. St. Rep. 158 [*affirming* 99 Ill. App. 280]; Beck *v.* Avindino, 29 Tex. Civ. App. 500, 68 S. W. 827. See also Smith *v.* Morrill, 12 Colo. App. 233, 55 Pac. 824; Witty *v.* Campbell, 44 N. Y. 410; State *v.* Gramm, 7 Wyo. 329, 52 Pac. 533, 40 L. R. A. 690.

The filing of a petition in bankruptcy against an alleged debtor who was merely an agent is not conclusive against the right to maintain an action against the principal debtor when subsequently discovered. Gardner *v.* Bean, 124 Mass. 347.

A claim of title in fee simple in an action for the possession of real estate is not an election which will estop one from afterward claiming a lease held in trust therein. Campbell *v.* Hunt, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879.

Bringing ejectment is not an admission of defendant's possession which will preclude a subsequent action of trespass. Heck *v.* Knapp, 20 U. C. Q. B. 360. See also Glos *v.* Bouton, 170 Ill. 249, 48 N. E. 949.

What a defendant may do in a criminal court cannot it seems be pleaded as an estoppel against him in a civil action. Halliday *v.* Smith, 67 Ark. 310, 54 S. W. 970.

Where there has been no trial of the former action there is no estoppel in the latter. Goodin *v.* Newcomb, 6 Kan. App. 431, 49 Pac. 821. See also Featherstone *v.* Betlejewski, 75 Ill. App. 59; Wyeth *v.* Renz-Bowles Co., 66 S. W. 825, 23 Ky. L. Rep. 2337.

A party sued for personal property is not estopped to deny plaintiff's ownership because in a prior action against plaintiff he had caused the seizure of the property in question. Hughes *v.* La Variété Assoc., 35 La. Ann. 116.

Arbitration and award.— A party cannot refuse to join in the selection of arbitrators and then when sued defend on the ground that plaintiff's only remedy under the law is by arbitration (Ramsdale *v.* Foote, 55 Wis. 557, 13 N. W. 557); nor can a party revoke a submission and when sued by the other party for expenses thereby incurred deny his own right so to revoke (Miller *v.* Junction Canal Co., 41 N. Y. 98).

Estoppel of prevailing party to attack foreign divorce see DIVORCE, 14 Cyc. 822.

8. *Alabama.*— Jones *v.* McPhillips, 82 Ala. 102, 2 So. 468.

Georgia.— Murray *v.* Sells, 53 Ga. 257.

Iowa.— Le Moyne *v.* Braden, 87 Iowa 739, 55 N. W. 14.

Kentucky.— Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559.

Missouri.— Burnes *v.* Porter, 82 Mo. App. 66.

New York.— Quinby *v.* Carhart, 133 N. Y. 579, 30 N. E. 972 [*affirming* 58 N. Y. Super. Ct. 490, 12 N. Y. Suppl. 556]; Lawrence *v.* Campbell, 32 N. Y. 455; Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464, 50 N. Y. Suppl. 691; Catlin *v.* Grote, 4 E. D. Smith 296.

Ohio.— See Colston *v.* Bishop, 1 Ohio Cir. Ct. 460, 1 Ohio Cir. Dec. 257.

Tennessee.— Hendrick *v.* Fritts, 93 Tenn. 270, 24 S. W. 11.

Texas.— Turner *v.* Phelps, 46 Tex. 251.

See 19 Cent. Dig. tit. "Estoppel," § 166.

9. Knowlton *v.* Providence, etc., Steamship Co., 53 N. Y. 76; La Follett *v.* Mitchell, 42 Oreg. 465, 69 Pac. 916, 95 Am. St. Rep. 780; *Re* Walters, 61 L. T. Rep. N. S. 872 [*reversed* on other grounds in 63 L. T. Rep. N. S. 328].

A matter which was entirely irrelevant to the issues in the former action will not preclude a party in a subsequent proceeding. Upchurch *v.* Anderson, (Tenn. Ch. App. 1898) 52 S. W. 917.

10. *Alabama.*— Lehman *v.* Clark, 85 Ala. 109, 4 So. 651; Jones *v.* McPhillips, 82 Ala. 102, 2 So. 468; Caldwell *v.* Smith, 77 Ala. 157; Hill *v.* Huckabee, 70 Ala. 183.

Connecticut.— Gould *v.* Stanton, 17 Conn. 377.

Iowa.— Sweezey *v.* Stetson, 67 Iowa 481, 25 N. W. 741; Perkins *v.* Jones, 62 Iowa 345, 17 N. W. 573.

Kentucky.— Doniphan *v.* Gill, 1 B. Mon. 199.

Louisiana.— Abbot *v.* Wilbur, 22 La. Ann. 368.

Missouri.— Welch *v.* Dameron, 47 Mo. App. 221.

New Jersey.— Ruckelshaus *v.* Oehme, 48 N. J. Eq. 436, 22 Atl. 184.

New York.— Andrews *v.* Ætna L. Ins. Co., 18 Hun 163; Central City Bank *v.* Dana, 32 Barb. 296; Phinney *v.* Earle, 9 Johns. 352.

Pennsylvania.— Barclay *v.* Deckerhoof, 171 Pa. St. 378, 33 Atl. 71; Wills *v.* Kane, 2 Grant 60; Kelly *v.* Eichman, 3 Whart. 419; Kenner *v.* Postens, 21 Leg. Int. 21.

United States.— Michels *v.* Olmstead, 157 U. S. 198, 15 S. Ct. 580, 39 L. ed. 671; Phila-

(B) *Testimony in Former Proceeding.* A party is not necessarily estopped from contradicting in one action testimony which he has previously given in another.[11] His testimony may, however, work an estoppel, if the party asserting the bar has acted on it to his prejudice.[12] A party is not estopped to contradict the testimony of an adverse witness by reason of his failure to contradict the same testimony when given in a previous trial of the same cause;[13] nor is a party estopped by statements made by his own witness which were not material to the issue joined and could not affect the result.[14]

e. Prior Recognition of Authority, Capacity, Character, or Status. If in a particular transaction or course of dealing the authority, capacity, character, or status of one of the parties is recognized as one of the basic facts on which the transaction proceeds, both parties are as a rule estopped to deny that the one occupied that position or sustained that character.[15]

delphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157.

See 19 Cent. Dig. tit. "Estoppel," § 168.

If the positions are not inconsistent there will be no estoppel. Pittsburg, etc., R. Co. *v.* Swinney, 91 Ind. 399.

A jurisdictional objection which prevails in one proceeding will not estop the party making it from interposing other objections in a subsequent suit on the same subject-matter. Buena Vista County *v.* Iowa Falls, etc., R. Co., 112 U. S. 165, 5 S. Ct. 84, 28 L. ed. 680. See also Weinstock *v.* Levison, 20 N. Y. Civ. Proc. 1, 26 Abb. N. Cas. 244, 14 N. Y. Suppl. 64.

11. *Georgia.*—See Wilkinson *v.* Thigpen, 71 Ga. 497.

Illinois.— Smith *v.* Cremer, 71 Ill. 185.

Kentucky.— Louisville, etc., R. Co. *v.* Miller, 44 S. W. 119, 19 Ky. L. Rep. 1665.

Massachusetts.— See Doolittle *v.* Dwight, 2 Metc. 561.

United States.—Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940.

See 19 Cent. Dig. tit. "Estoppel," § 171.

See, however, Cook *v.* Grant, 16 Serg. & R. (Pa.) 198, 16 Am. Dec. 564; Cleveland Target Co. *v.* U. S. Pigeon Co., 52 Fed. 385.

A man is not bound by a false oath so that he cannot show the truth as between himself and others who have been neither injured nor prejudiced by the original falsehood. Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp. 692.

The statement of an opinion as to the legal effect of a contract, the facts being known to both parties, will not estop the party on a subsequent trial from testifying to a different interpretation. Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093.

In Tennessee the rule has been laid down that a party is estopped to contradict his sworn statement made in a former trial unless the statement was made through inadvertence, ignorance, or mistake. Nelson *v.* Claybrooke, 4 Lea 687; Hamilton *v.* Zimmerman, 5 Sneed 40. But see Lee *v.* Calvert, (Ch. App. 1900) 57 S. W. 627, where the court says that the oath, to be binding as an estoppel, must be wilfully false or must have the effect of misleading the other party to his injury.

Credibility of witness.—Contradictory statements usually go to the jury merely as bearing upon the credibility of the witness. Eichert *v.* Schaeffer, 161 Pa. St. 519, 29 Atl. 393. See also Hebard *v.* Reeves, 112 Mich. 175, 70 N. W. 418.

12. *Alabama.*— Luling *v.* Sheappard, 112 Ala. 588, 21 So. 352.

Iowa.—Hoyt *v.* Hoyt, 68 Iowa 703, 28 N. W. 27.

Louisiana.— Folger *v.* Palmer, 35 La. Ann. 743.

New York.— Anthony *v.* Wise, 130 N. Y. 662, 29 N. E. 225 [*affirming* 4 N. Y. Suppl. 129]; Carver *v.* Wagner, 51 N. Y. App. Div. 47, 64 N. Y. Suppl. 747.

United States.— Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 2 Flipp. 692.

See 19 Cent. Dig. tit. "Estoppel," § 171.

13. McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6.

14. Ayres *v.* Wattson, 57 Pa. St. 360.

15. *Alabama.*— Hill *v.* Huckabee, 52 Ala. 155; Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527.

Georgia.— Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113.

Illinois.— Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110; Frick *v.* School Trustees, 99 Ill. 167; Jeneson *v.* Jeneson, 66 Ill. 259.

Indiana.— Traylor *v.* Dykins, 91 Ind. 229; Hadley *v.* State, 66 Ind. 271; Hart *v.* Miller, 2 Ind. App. 222, 64 N. E. 239.

Iowa.— Burkhardt *v.* Burkhardt, 107 Iowa 369, 77 N. W. 1069; Baker *v.* The Milwaukee, 14 Iowa 214.

Kansas.— Neve *v.* Allen, 55 Kan. 638, 41 Pac. 966.

Kentucky.— Turner *v.* New Farmers' Bank, 39 S. W. 425, 19 Ky. L. Rep. 187.

Louisiana.— Grounx *v.* Abat, 7 La. 31.

Massachusetts.—Case *v.* Benedict, 9 Cush. 540; Bailey *v.* Kilburn, 10 Metc. 176, 43 Am. Dec. 423. But see Conkey *v.* Keagman, 24 Pick. 115.

Michigan.—McWilliams *v.* Doran, 103 Mich. 588, 61 N. W. 881; Fort-St. Union Depot Co. *v.* State R. Crossing Bd., 81 Mich. 248, 45 N. W. 973; Skinner *v.* Lucas, 68 Mich. 424, 36 N. W. 203; Burton *v.* Schildbach, 45 Mich. 504, 8 N. W. 497.

Minnesota.— Wheeler *v.* Benton, 71 Minn. 456, 74 N. W. 154; Cooper *v.* Haywood, 71

f. Prior Recognition of Right or Title — (1) *In General.* If in making a contract or in a course of dealing the title of one party or the other to the property involved in the transaction is recognized, and the dealing proceeds upon that basis, both parties are ordinarily estopped to deny that title or to assert anything in derogation of it.[16] However, to work an estoppel of this character and under

Minn. 374, 74 N. W. 152, 70 Am. St. Rep. 330; Vail *v.* Anderson, 61 Minn. 552, 64 N. W. 47.

Missouri.— Orrick School Dist. *v.* Dorton, 145 Mo. 304, 46 S. W. 948; Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

Montana.— Radford *v.* Gaskill, 20 Mont. 293, 50 Pac. 854.

Nebraska.— Wells *v.* Steckleberg, 50 Nebr. 670, 70 N. W. 242.

New York.— Steele *v.* R. M. Gilmour Mfg. Co., 78 N. Y. Suppl. 1078; Spicer *v.* Spicer, 16 Abb. Pr. N. S. 112. But see Stedman *v.* Davis, 93 N. Y. 32.

North Carolina.— Treadway *v.* Payne, 127 N. C. 436, 37 S. E. 460.

Ohio.— Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

Pennsylvania.— Old Colony Trust Co. *v.* Allentown, etc., Rapid-Transit Co., 192 Pa. St. 596, 44 Atl. 319.

South Carolina.— State *v.* Butler, 21 S. C. 353.

Tennessee.— Fisher *v.* Cunningham, (Ch. App. 1899) 58 S. W. 399.

Texas.— Leon County *v.* Vann, 86 Tex. 707, 27 S. W. 258; Texas, etc., R. Co. *v.* Robards, 60 Tex. 545, 48 Am. Dec. 268; Patterson *v.* True, (Sup. 1886) 2 S. W. 860; Gill *v.* First Nat. Bank, (Civ. App. 1898) 47 S. W. 751.

Vermont.— Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

England.— Faure Electric Accumulator Co. *v.* Phillipart, 58 L. T. Rep. N. S. 525.

Canada.— Liverpool Bank *v.* Bigelow, 12 Nova Scotia 236; Bagley *v.* Curtis, 15 U. C. C. P. 366; Allan *v.* Garratt, 30 U. C. Q. B. 165; Hewitt *v.* Corbett, 15 U. C. Q. B. 39.

See 19 Cent. Dig. tit. "Estoppel," §§ 154, 199, 203.

See, however, Estill *v.* Deckerd, 4 Baxt. (Tenn.) 497 (holding that a party is not estopped from suing to remove from his title a cloud consisting of deeds void for want of authority in the original vendor to sell, because under color of legal proceedings he has received a portion of the proceeds of sale, although he is accountable therefor); Mathews *v.* State, 82 Tex. 577, 18 S. W. 711 (where it was held that the fact that a person signed a petition for the incorporation of a city and afterward made a contract with the city does not estop him from joining as relator in a proceeding to question the validity of the city's incorporation).

One who deals with an association as a legal entity capable of transacting business, and in consequence receives from it money or other thing of value, is estopped from denying the legality of its existence or its right to contract. Petty *v.* Brunswick, etc., R. Co., 109 Ga. 666, 35 S. E. 82.

The recognition of the authority or capacity must be clear and unambiguous in order to create an estoppel. Yore *v.* San Francisco Super. Ct., 108 Cal. 431, 41 Pac. 477.

Admission of capacity: Implied from acceptance of bill of exchange see COMMERCIAL PAPER, 7 Cyc. 781. Of corporation see CORPORATIONS, 10 Cyc. 1065 *et seq.*, 1137, 1139, 1146 *et seq.*, 1346.

16. *California.*— Downer *v.* Ford, 16 Cal. 345.

Colorado.—Nesmith *v.* Martin, (Sup. 1904) 75 Pac. 590.

Connecticut.— Delaware, etc., Canal Co. *v.* Bonnell, 46 Conn. 9.

District of Columbia.— Richards *v.* Bippus, 18 App. Cas. 293.

Georgia.— Petty *v.* Brunswick, etc., R. Co., 109 Ga. 666, 35 S. E. 82.

Illinois.— Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Robison *v.* Roos, 37 Ill. App. 646 [*affirmed* in 138 Ill. 550, 28 N. E. 821].

Kentucky.— Coleman *v.* Morrison, 1 A. K. Marsh. 406.

Louisiana.— Rabb *v.* Pillot, 52 La. Ann. 1534, 28 So. 120; New Iberia *v.* Sterrett, 31 La. Ann. 719, 33 Am. Rep. 229; Cook *v.* Miltenberger, 23 La. Ann. 377; Conrad *v.* Callery, 22 La. Ann. 428.

Maine.— Cary *v.* Whitney, 48 Me. 516.

Michigan.— Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199; Sinclair *v.* Murphy, 14 Mich. 392.

Missouri.— Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563; McClellan *v.* St. Louis, etc., R. Co., 103 Mo. 295, 15 S. W. 546; Zuendt *v.* Doerner, 101 Mo. App. 528, 73 S. W. 873.

Nevada.— Sever *v.* Gregovich, 16 Nev. 325.

New Jersey.— Wolfinger *v.* McFarland, (Ch. 1903) 54 Atl. 862; Fleckenstein Bros. Co. *v.* Fleckenstein, (Ch. 1903) 53 Atl. 1043; Wright *v.* Wright, 51 N. J. Eq. 475, 26 Atl. 166.

New York.— Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297 [*reversing* 2 Silv. Supreme 159, 5 N. Y. Suppl. 809]; Rhoades *v.* Freeman, 9 N. Y. App. Div. 20, 41 N. Y. Suppl. 135; Larremore *v.* Squires, 30 Misc. 62, 62 N. Y. Suppl. 885.

Ohio.— Post *v.* Wilson, 5 Ohio Dec. (Reprint) 368, 5 Am. L. Rec. 235.

Pennsylvania.— Longswamp School Dist. *v.* Trexler, 58 Pa. St. 141.

South Carolina.— McDaniel *v.* Anderson, 19 S. C. 211.

Texas.— Hardy *v.* De Leon, 5 Tex. 211.

Vermont.— McLeran *v.* Stevens, 16 Vt. 616.

Washington.— Norris Safe, etc., Co. *v.* Clark, 28 Wash. 268, 68 Pac. 718, 70 Pac. 129.

Wisconsin.— Flanders *v.* Train, 13 Wis. 596.

United States.— Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed.

such circumstances, it has been held to be necessary that the recognition of title or right be clear and unambiguous.[17]

(II) *By Possession or Acts of Ownership Under Claim of Title.* Where a person has taken possession of or exercised acts of ownership over property under claim of title or right he is estopped to set up a claim inconsistent with that under which he has acted.[18] Thus a person is estopped from setting up

873; Robinson *v.* The Idlewild, 59 Fed. 628.

England.— Edwards *v.* Aberayron Mut. Ship Ins. Soc., 1 Q. B. D. 563, 34 L. T. Rep. N. S. 457; Benson *v.* Hadfield, 4 Hare 32, 30 Eng. Ch. 32.

Canada.— Hardy Lumber Co. *v.* Pickerel River Imp. Co., 29 Can. Supreme Ct. 211.

See 19 Cent. Dig. tit. "Estoppel," § 198 *et seq.*

See, however, Smith *v.* Hollenback, 46 Ill. 252, holding that where one of two persons has the entire title and the other none, the recognition of possession and title in the one having no title, continued for a period insufficient to constitute a bar by the statute of limitations, will not invest the person having no legal title with such title.

Married women.— One who by his dealing recognizes a wife's ownership of property is estopped to assert ownership in the husband. Chicago, etc., R. Co. *v.* Shea, 66 Ill. 471; Pierce *v.* Underwood, 103 Mich. 62, 61 N. W. 344; Newman *v.* Newman, 152 Mo. 398, 54 S. W. 19; Clark *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 346, 17 N. Y. Suppl. 215; Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975. See Husband and Wife.

Municipality.— One who contracts with a county to build a court-house, and receives for the work more than is due him cannot, in defense to an action against him for the overpayment, set up that the money was raised by a tax unlawfully levied and collected, and therefore did not belong to the county. Haralson County *v.* Golden, 104 Ga. 19, 30 S. E. 380. See Municipal Corporations.

Vendee.— One who recognizes a vendee's title by dealing with him as the true owner will be estopped to deny the validity of his title. Ross *v.* Pritchard, 15 La. Ann. 531; Higbie *v.* Rogers, (N. J. Ch. 1901) 48 Atl. 554; Geiler *v.* Littlefield, 4 Misc. (N. Y.) 152, 23 N. Y. Suppl. 869. *Compare* Knapp *v.* White, 40 Wis. 143. But see Heyer *v.* Beatty, 83 N. C. 285.

17. *Connecticut.*— Kimberly *v.* Fox, 27 Conn. 307.

Kentucky.— Dedman *v.* Bridges, 9 B. Mon. 474.

Nebraska.— Shuman *v.* Willets, 17 Nebr. 478, 23 N. W. 358.

Oregon.— Rowland *v.* Williams, 23 Oreg. 515, 32 Pac. 402.

Pennsylvania.— Washabaugh *v.* Entriken, 36 Pa. St. 513.

South Carolina.— Cunningham *v.* Cunningham, 20 S. C. 317.

An offer to buy out a hostile claim will not estop the party making such offer from asserting title by adverse possession previously acquired. Frick *v.* Sinon, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177.

Purchase of part of tract.— The fact that a city purchased part of a tract of land lying in a street is not sufficient to show that the city recognized a right to the street in the person in possession of the land. Mills *v.* Los Angeles, 90 Cal. 522, 27 Pac. 354.

The acceptance of taxes by a municipality will not estop it from afterward setting up its own title to the property on which the taxes were paid.

Arizona.— See Evans *v.* Blankenship, (1895) 39 Pac. 812.

Indiana.— See Rhodes *v.* Brightwood, 145 Ind. 21, 43 N. E. 942.

Iowa.— Hull *v.* Cedar Rapids, 111 Iowa 466, 83 N. W. 28; Getchell *v.* Benedict, 57 Iowa 121, 10 N. W. 321. *Compare* Simplot *v.* Dubuque, 49 Iowa 630.

Michigan.— See Plumb *v.* Grand Rapids, 81 Mich. 381, 45 N. W. 1024.

Ohio.— Myers *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 148, 7 Ohio N. P. 335.

United States.— Bump *v.* Butler County, 93 Fed. 290.

See also Municipal Corporations.

18. *Connecticut.*— Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.

Florida.— Lake *v.* Hancock, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159; Bush *v.* Adams, 22 Fla. 177; Sanford *v.* Cloud, 17 Fla. 557.

Georgia.— Harris *v.* Amoskeag Lumber Co., 101 Ga. 641, 29 S. E. 302.

Indiana.— Tyler *v.* Johnson, 8 Ind. App. 536, 36 N. E. 293.

Kentucky.— Floyd *v.* Sharp, 43 S. W. 253, 19 Ky. L. Rep. 1253; McFarland *v.* Baugh, 15 S. W. 249, 12 Ky. L. Rep. 744.

Louisiana.— Hinrichs *v.* Tulane Educational Fund, 49 La. Ann. 1029, 22 So. 96.

Michigan.— Comstock *v.* Smith, 26 Mich. 306.

Mississippi.— Jefferson County *v.* Grafton, 74 Miss. 435, 21 So. 247, 60 Am. St. Rep. 516, 36 L. R. A. 798.

Missouri.— Pacific R. Co. *v.* McCombs, 39 Mo. 329; Duckett *v.* Keet, etc., Dry Goods Co., 99 Mo. App. 444, 73 S. W. 926.

New Jersey.— South Branch R. Co. *v.* Parker, 41 N. J. Eq. 489, 5 Atl. 641.

New York.— Colligan *v.* Scott, 58 N. Y. 670; Walrath *v.* Redfield, 18 N. Y. 457. *Compare* Bryant *v.* Allen, 54 N. Y. App. Div. 500, 67 N. Y. Suppl. 89; Kingman *v.* Sparrow, 12 Barb. 201.

South Carolina.— See Douglass *v.* Dickson, 11 Rich. 417.

Tennessee.— Perry *v.* Calhoun, 8 Humphr. 551.

Vermont.— Ripley *v.* Yale, 19 Vt. 156.

an invalidity in the title under which he has had possession and exercised acts of ownership.[19] Possession or acts of ownership under a partial or qualified claim, however, will not estop a person to assert his full rights.[20]

(III) *By Possession in Subordination to Another's Title.* One who takes possession of property in subordination of another's title is ordinarily estopped as against that other to deny that title.[21]

Wisconsin.— Smith *v.* Waggoner, 50 Wis. 155, 6 N. W. 568; Schumaker *v.* Hoeveler, 22 Wis. 43.

United States.— Seymour *v.* Slide, etc., Gold Mines, 153 U. S. 523, 14 S. Ct. 847, 38 L. ed. 807.

See 19 Cent. Dig. tit. "Estoppel," § 159.

A widow is not estopped by the possession of her intestate husband, who claimed under the owner but never paid any consideration or received a deed, from acquiring the title for herself instead of the estate. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421. However, a widow who continues in possession of land is estopped to deny the title derived under her husband's deed. Grandy *v.* Bailey, 35 N. C. 221.

Claim under unauthorized survey.— Where one having a grant of an unlocated lot of public lands makes a survey and claims thereunder in good faith but without authority, he is not estopped thereby as against one who enters upon and occupies adjoining land from claiming such land after it has been set off and patented to him under an official survey in place of part of the land which he claimed. Boggs *v.* Merced Min. Co., 14 Cal. 279.

One is not estopped to acquire a tax title to land merely because he went into possession thereof, claiming title prior to the levy of the tax on which the tax title is based. Blackwood *v.* Van Vleit, 30 Mich. 118.

Purchasers holding under conflicting titles. — Where land was purchased by parties whom the vendor assured that he owned all the conflicting titles and would guaranty to them indisputable rights, they could not be considered as holding under any one of the titles exclusively, but must be viewed as holding under that which would give them the best right, and they were not estopped from resisting eviction by relying on the elder grant. Marton *v.* Reynolds, 9 Dana (Ky.) 328.

User or non-user of ways or other incorporeal rights may estop a person to assert or deny title thereto. Bourke *v.* Perry, McGloin (La.) 66; Pennsylvania R. Co. *v.* Jones, 50 Pa. St. 417.

19. *Alabama.*—Wortham *v.* Gurley, 75 Ala. 356.

Arkansas.—Kinsworthy *v.* Mitchell, 21 Ark. 145.

District of Columbia.— See Roller *v.* Caruthers, 5 App. Cas. 368.

Georgia.— Wells *v.* Dillard, 93 Ga. 682, 20 S. E. 263.

Illinois.— Maltman *v.* Chicago, etc., R. Co., 72 Ill. App. 378.

Indiana.— Oldenburg *v.* Baird, 26 Ind. App. 379, 58 N. E. 1073.

Kentucky.— Gill *v.* Fauntleroy, 8 B. Mon. 177; Drane *v.* Gregory, 3 B. Mon. 619; Wall *v.* Hill, 1 B. Mon. 290, 36 Am. Dec. 578.

Massachusetts.— Woburn *v.* Henshaw, 101 Mass. 193, 3 Am. Rep. 333.

See 19 Cent. Dig. tit. "Estoppel," § 160.

Fraud of party setting up estoppel.—Where defendant, being in possession under a title from a third person, purchased a title fraudulently claimed by plaintiff, giving a deed of trust to secure the consideration, under which the land was sold to plaintiff, who went into possession, it was held that as plaintiff's claim was fraudulent and not made in good faith defendant was not estopped to deny it. Mattison *v.* Ausmuss, 50 Mo. 551.

20. *Illinois.*— Golconda *v.* Field, 108 Ill. 419.

Missouri.— Thompson *v.* Renoe, 12 Mo. 157.

New Hampshire.— Bell *v.* Twilight, 22 N. H. 500.

Tennessee.— Young *v.* Young, 12 Lea 335.

Washington.— Bingham *v.* Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

See 19 Cent. Dig. tit. "Estoppel," § 161.

One who treats as his own a note which he has received to hold until a new note can be procured and delivered to him in its stead, in payment for certain property, is not estopped from asserting that he did not take the note in absolute payment. McKenna *v.* Hoy, 76 Iowa 322, 41 N. W. 29.

The inquiry in all such cases is whether or not the claim or title attempted to be set up is inconsistent with that under which the party has acted. Ripley *v.* Yale, 19 Vt. 156.

21. Burrill *v.* Parsons, 73 Me. 286; Sparrow *v.* Kingman, 1 N. Y. 242 [*citing* Coke Litt. 352*a*]; Holmes *v.* Hall, 14 N. C. 98 (holding that a mortgagor of a chattel with the right of possession for a stipulated period cannot upon its expiration dispute the mortgagee's title); Dyer *v.* Walker, 40 Pa. St. 157. See, however, Hazen *v.* Bryson, 8 N. Brunsw. 101 (holding that a party charged with having gone on land by permission and thereafter disputing the title of the owner may disprove the license and show that he entered under a claim of right); Doe *v.* Garnett, 5 N. Brunsw. 535; Smith *v.* Smith, 5 Ont. 690.

A grantee who takes possession under an absolute conveyance is not estopped to deny his grantor's title (San Francisco *v.* Lawton, 18 Cal. 465, 79 Am. Dec. 187; Cobb *v.* Oldfield, 151 Ill. 540, 38 N. E. 142, 42 Am. St. Rep. 263; Whitmire *v.* Wright, 22 S. C. 446, 53 Am. Rep. 725; Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305), but while in peaceable possession under the deed he cannot dispute the grantor's title to avoid payment of the purchase-money

2. Waiver. While waiver is not in the proper sense of the term a species of estoppel,[22] yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled.[23] Questions of waiver, whether or not the adverse party has changed his position to his prejudice, are considered in many other topics in this work.[24]

(Strong *v.* Waddell, 56 Ala. 471; Bramble *v.* Beidler, 38 Ark. 200; Marsh *v.* Thompson, 102 Ind. 272, 1 N. E. 630; Crumb *v.* Wright, 97 Mo. 13, 10 S. W. 74; Smith *v.* Loafman, 145 Pa. St. 628, 23 Atl. 395; Spinning *v.* Drake, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; Robertson *v.* Pickerell, 109 U. S. 608, 3 S. Ct. 407, 27 L. ed. 1049. See Vendor and Purchaser).

Estoppel of: Attorney to deny client's right to funds collected see Attorney and Client, 4 Cyc. 964 note 98, 972. Auctioneer to assert title see Auctions and Auctioneers, 4 Cyc. 1054. Bailee to deny bailor's title see Bailments, 5 Cyc. 172 *et seq.* Beneficiary to deny trustee's title see Trusts. Mortgagor to deny mortgagee's title see Mortgages. Purchaser to deny vendor's title see Vendor and Purchaser. Receiptor to deny debtor's title, validity of levy, return, judgment, qualification of officer, or receipt of goods see Attachment, 4 Cyc. 664, 672; Executions; Replevin. Tenant to deny landlord's title see Landlord and Tenant. Trustee to assert title adverse to trust see Trusts.

22. Bigelow Estop. 660, 669.

Waiver distinguished.— "It seems to me that one difference between waiver and estoppel is that in the former the result was voluntary, while in the latter, the conduct of the party may have been voluntary, but with intention not to lose any existing rights, yet, if such conduct mislead, then estoppel arises. One is the voluntary surrendering of a right, Stewart *v.* Crosby, 50 Me. 134; Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240, and the other is the inhibition to assert it from mischief that it has caused. Shaw *v.* Spencer, 100 Mass. 382, 395, 97 Am. Dec. 107, 1 Am. Rep. 115." Libby *v.* Haley, 91 Me. 331, 333, 39 Atl. 1004. "In strictness, the term 'waiver' is used to designate the act, or the consequences of the act, of one side only, while the term 'estoppel' (*in pais*) is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts." McCormick *v.* Orient Ins. Co., 86 Cal. 260, 262, 24 Pac. 1003; State *v.* Dakota County School Dist. No. 108, 85 Minn. 230, 88 N. W. 751. "A distinction is drawn between waiver and estoppel when the two doctrines are discussed in their purely technical aspects. Waiver involves the notion of an intention entertained by the holder of some right to abandon or relinquish instead of insisting on the right." Fairbanks *v.* Baskett, 98 Mo. App. 53, 64, 71 S. W. 1113. "It is not easy to lay down any general rule as to what acts shall constitute a waiver. That must depend largely upon the circumstances of each particular case. There are, however, principles upon which estoppels proceed." Bull *v.* Rowe, 13 S. C. 355, 369. See also Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716; Metcalf *v.* Phenix Ins. Co., 21 R. I. 307, 43 Atl. 541; Roberts *v.* Northwestern Nat. Ins. Co., 90 Wis. 210, 62 N. W. 1048.

"Waiver belongs to the family of estoppel, and often in such cases they are convertible terms." Maloney *v.* Northwestern Masonic Aid Assoc., 8 N. Y. App. Div. 575, 579, 40 N. Y. Suppl. 918.

23. *Arkansas.*— Youngblood *v.* Cunningham, 38 Ark. 571.

Illinois.— Hyde Park *v.* Borden, 94 Ill. 26.

Massachusetts.— Lydig *v.* Braman, 177 Mass. 212, 58 N. E. 696; Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799. *Compare* Driscoll *v.* Taunton, 160 Mass. 486, 36 N. E. 495.

Michigan.— Watkins *v.* Green, 101 Mich. 493, 60 N. W. 44; Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78; Ganong *v.* Green, 64 Mich. 488, 31 N. W. 461; Detroit Free Press Co. *v.* Board of State Auditors, 47 Mich. 135, 10 N. W. 171. See also Taylor *v.* Burnap, 39 Mich. 739. *Compare* Wayne County Sav. Bank *v.* Airey, 95 Mich. 520, 55 N. W. 355.

Mississippi.— Higgins *v.* Haberstraw, 76 Miss. 627, 25 So. 168; Lucas *v.* American Freehold Land Mortg. Co., 72 Miss. 366, 16 So. 358; McIver *v.* Abernathy, 66 Miss. 79, 5 So. 519.

New York.— Hope *v.* Lawrence, 50 Barb. 258.

North Carolina.— Hedgepeth *v.* Rose, 95 N. C. 41.

Pennsylvania.— Austin Mfg. Co. *v.* Duerr, 19 Pa. Super. Ct. 560; Waters *v.* Wolf, 2 Pa. Super. Ct. 200, 39 Wkly. Notes Cas. 38. *Compare* Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

Tennessee.— Howard *v.* Massengale, 13 Lea 577.

Wisconsin.— Union, etc., Bank *v.* Jefferson, 101 Wis. 452, 77 N. W. 889.

United States.— Baker *v.* Humphrey, 101 U. S. 494, 17 L. ed. 1063; Sigerson *v.* Mathews, 20 How. 496, 15 L. ed. 989.

See 19 Cent. Dig. tit. "Estoppel," § 296.

Knowledge and intent.— Knowledge of the existence of a right and the intention to relinquish it must concur to create an estoppel by waiver. Hamilton *v.* Home F. Ins. Co., 42 Nebr. 883, 61 N. W. 93.

24. Parol evidence of waiver see Evidence.

Waiver by: Abandonment see Abandonment. Answering over or proceeding with

VII. PROCEDURE.

A. Pleading[25] — **1. In General.** At common law an estoppel *in pais* need not be pleaded,[26] but under the statutes of the various jurisdictions it is now almost universally necessary that it should be.[27] If, however, the state of the

trial see APPEAL AND ERROR. Appearance see APPEARANCES. Election of remedies see ELECTION OF REMEDIES. Guardian see INFANTS. Laches see EQUITY. Pleading see ADMIRALTY; APPEAL AND ERROR; ASSUMPSIT, ACTION OF; EQUITY; FRAUDULENT CONVEYANCES; INJUNCTIONS; INSURANCE; and particular insurance titles; PARTITION; PLEADING; QUO WARRANTO; RECOGNIZANCES; REPLEVIN; TRESPASS; TRUSTS; USURY. Release see RELEASE. Submission to arbitration see ARBITRATION AND AWARD.

Waiver in regard to: Claims against decedent's estates see EXECUTORS AND ADMINISTRATORS. Costs see COSTS. Insurance see INSURANCE; and particular insurance titles. Judgment see JUDGMENTS. Notice see NOTICES. Process see PROCESS. Public improvements see MUNICIPAL CORPORATIONS. Summary proceedings see LANDLORD AND TENANT. Taxation see TAXATION. Tender see TENDER.

Waiver of objections to particular acts, instruments, or proceedings see ABATEMENT AND REVIVAL; ABSENTEES; ACCORD AND SATISFACTION; ACCOUNTS AND ACCOUNTING; ACTIONS; ADMIRALTY; AGRICULTURE; AMBASSADORS AND CONSULS; APPEAL AND ERROR; APPEARANCES; ARBITRATION AND AWARD; ARMY AND NAVY; ARREST; ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; ATTACHMENT; ATTORNEY AND CLIENT; AUCTIONS AND AUCTIONEERS; BAIL; BAILMENTS; BANKS AND BANKING; BANKRUPTCY; BONDS; BRIDGES; CANCELLATION OF INSTRUMENTS; CARRIERS; CERTIORARI; CHATTEL MORTGAGES; COMMERCIAL PAPER; COMMON LANDS; COMPOSITIONS WITH CREDITORS; COMPROMISE AND SETTLEMENT; CONTINUANCES IN CIVIL CASES; CONSTITUTIONAL LAW; CONTRACTS; CORPORATIONS; COSTS; COURTS; CRIMINAL LAW; DAMAGES; DEEDS; DEPOSITIONS; DESCENT AND DISTRIBUTION; DISMISSAL AND NONSUIT; DIVORCE; DRAINS; EJECTMENT; ELECTION OF REMEDIES; EMINENT DOMAIN; EQUITY; EXCHANGE OF PROPERTY; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; EXEMPTIONS; FACTORS AND BROKERS; FORCIBLE ENTRY AND DETAINER; FRAUD; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCES; GARNISHMENT; GIFTS; GRAND JURIES; GUARANTY; GUARDIAN AND WARD; HOMESTEADS; HUSBAND AND WIFE; INDEMNITY; INDICTMENTS AND INFORMATIONS; INFANTS; INJUNCTIONS; INSOLVENCY; INSURANCE; and particular insurance titles; JUDGES; JUDGMENTS; JURIES; JUSTICES OF THE PEACE; LANDLORD AND TENANT; LIBEL AND SLANDER; LIMITATIONS OF ACTIONS; LIVERY STABLE KEEPERS; LOGS AND LOGGING; MANDAMUS; MASTER AND SERVANT; MECHANICS' LIENS; MILITIA; MINES AND MINERALS; MORTGAGES; MOTIONS; MUNICIPAL CORPORATIONS; NEW TRIAL; OFFICERS; ORDERS; PARENT AND CHILD; PARTIES; PARTITION; PARTNERSHIP; PARTY-WALLS; PATENTS; PLEADING; PLEDGES; POOR PERSONS; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; PRISONS; PRIVATE ROADS; PROHIBITION; QUIETING TITLE; RAILROADS; RECEIVERS; REFERENCES; REFORMATION OF INSTRUMENTS; RELIGIOUS SOCIETIES; REMOVAL OF CAUSES; REPLEVIN; REVIEW; SALES; SALVAGE; SEAMEN; SEQUESTRATION; SHERIFFS AND CONSTABLES; SHIPPING; SPECIFIC PERFORMANCE; STREETS AND HIGHWAYS; SUBMISSION OF CONTROVERSY; SUBROGATION; SUBSCRIPTIONS; TAXATION; TELEGRAPHS AND TELEPHONES; TOLL ROADS; TORTS; TRIAL; TROVER AND CONVERSION; TRUSTS; VENDOR AND PURCHASER; VENUE; WITNESSES.

Waiver of rights or remedies see ADVERSE POSSESSION; ASSUMPSIT, ACTION OF; ATTACHMENT; AUDITA QUERELA; CERTIORARI; COSTS; DOWER; ESCHEAT; ESTATES; HOMESTEADS; INDICTMENTS AND INFORMATIONS; INSOLVENCY; MARITIME LIENS; MECHANICS' LIENS; NEW TRIAL.

25. See, generally, PLEADING.

26. Babylon *v.* Duttera, 89 Md. 444, 43 Atl. 938; Brooke *v.* Gregg, 89 Md. 234, 43 Atl. 38; Higgins *v.* Carlton, 28 Md. 115, 92 Am. Dec. 666; Yingling *v.* Hoppe, 9 Gill (Md.) 310; Alexander *v.* Walter, 8 Gill (Md.) 239, 50 Am. Dec. 688; Coleman *v.* Pearce, 26 Minn. 123, 1 N. W. 846; Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515; Castalia Trout Club Co. *v.* Castalia Sporting Club, 8 Ohio Cir. Ct. 194, 8 Ohio Cir. Dec. 693; Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385 [*reversed* in 33 Ohio St. 52]; Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114; Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285; Sanderson *v.* Collman, 11 L. J. C. P. 270, 4 M. & G. 209, 4 Scott N. R. 638, 43 E. C. L. 115.

Operation.—Estoppels *in pais*, although not pleadable, may operate as a bar, under the direction of the court. Wilmington, etc., Bank *v.* Wollaston, 3 Harr. (Del.) 90.

27. *Alabama.*— Jones *v.* Peebles, 130 Ala. 269, 30 So. 564.

Arkansas.— Gaines *v.* Mississippi Bank, 12 Ark. 769.

California.— Chapman *v.* Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Newhall *v.* Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673, 64 Pac. 250; Clarke *v.* Huber, 25 Cal. 593. See also Pugh *v.* Porter Bros. Co., 118 Cal. 628, 50 Pac. 772.

Colorado.— Boston, etc., Smelting Co. *v.* Reed, 23 Colo. 523, 48 Pac. 515; Prewitt *v.* Lambert, 19 Colo. 7, 34 Pac. 684; Gaynor *v.*

case is such that the estoppel cannot be pleaded, it may be given in evidence, and

Clements, 16 Colo. 209, 26 Pac. 324; A. Leschen, etc., Rope Co. *v.* Craig, 18 Colo. App. 353, 71 Pac. 885.

Connecticut.— See Shelton *v.* Alcox, 11 Conn. 240.

Georgia.— Maryland Fidelity, etc., Co. *v.* Nisbet, 119 Ga. 316, 46 S. E. 444.

Indiana.— Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632 [*modifying* (1903) 66 N. E. 470]; Adams *v.* Adams, 160 Ind. 61, 66 N. E. 153; International Bldg., etc., Assoc. *v.* Watson, 158 Ind. 508, 64 N. E. 23; Frain *v.* Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Center School Tp. *v.* State, 150 Ind. 168, 49 N. E. 961; Bowles *v.* Trappo, 139 Ind. 55, 38 N. E. 406; Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937; Clauser *v.* Jones, 100 Ind. 123; Robbins *v.* Magee, 76 Ind. 381; Wood *v.* Ostram, 29 Ind. 177.

Iowa.— Cloud *v.* Malvin, 108 Iowa 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209; Brown *v.* Iowa L. of H., 107 Iowa 439, 78 N. W. 73; Sherod *v.* Ewell, 104 Iowa 253, 73 N. W. 493; H. E. Spencer Co. *v.* Papach, 103 Iowa 513, 70 N. W. 748, 72 N. W. 665; Golden *v.* Hardesty, 93 Iowa 622, 61 N. W. 913; Botna Valley State Bank *v.* Silver City Bank, 87 Iowa 479, 54 N. W. 472; Burlington Independent Dist. *v.* Merchants' Nat. Bank, 68 Iowa 343, 27 N. W. 255; Eikenberry *v.* Edwards, 67 Iowa 14, 24 N. W. 570; Folsom *v.* Star Union Line Fast Freight Line, 54 Iowa 490, 6 N. W. 702; Phillips *v.* Van Schaick, 37 Iowa 229; Ransom *v.* Stanberry, 22 Iowa 334. But see Phillips *v.* Blair, 38 Iowa 649, to the effect that the facts constituting an estoppel need not be specially pleaded in an action to recover real property; the averment of the facts constituting defendant's interest being sufficient.

Kansas.— Palmer Oil, etc., Co. *v.* Blodgett, 60 Kan. 712, 57 Pac. 947.

Kentucky.— Faris *v.* Dunn, 7 Bush 276; Keel *v.* Ogden, 3 Dana 103; Burdit *v.* Burdit, 2 A. K. Marsh. 143; Hilton *v.* Colvin, 78 S. W. 890, 25 Ky. L. Rep. 1808; Seibert *v.* Bloomfield, 63 S. W. 584, 23 Ky. L. Rep. 646; Ray *v.* Longshaw, 4 Ky. L. Rep. 904.

Louisiana.— Thomas *v.* Blair, 111 La. 678, 35 So. 811.

Massachusetts.— Guild *v.* Richardson, 6 Pick. 364.

Michigan.— Dean *v.* Crall, 98 Mich. 591, 57 N. W. 813, 39 Am. St. Rep. 571; Gooding *v.* Underwood, 89 Mich. 187, 50 N. W. 818; Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483. *Compare* Mowers *v.* Evers, 117 Mich. 93, 75 N. W. 290, in which acts of plaintiff in disclaiming title and permitting defendant to take possession and build and maintain a fence were held not to be such an estoppel as must be specially pleaded in order to be admissible on the question whether the fence so built was the boundary between the lands of the parties.

Missouri.— Golden *v.* Tyer, 180 Mo. 196, 79 S. W. 143; George B. Loving Co. *v.* Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095; Casler *v.* Gray, 159 Mo. 588, 60 S. W. 1032; Sanders *v.* Chartrand, 158 Mo. 352, 59 S. W. 95; Cockrill *v.* Hutchinson, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564; Throckmorton *v.* Pence, 121 Mo. 50, 25 S. W. 843; Central Nat. Bank *v.* Doran, 109 Mo. 40, 18 S. W. 836; Hammerslough *v.* Cheatham, 84 Mo. 13; Noble *v.* Blount, 77 Mo. 235; Bray *v.* Marshall, 75 Mo. 327; Western Realty Co. *v.* Musser, 97 Mo. App. 114, 71 S. W. 100; Carthage *v.* Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936; McClanahan *v.* Payne, 86 Mo. App. 284; Tyler *v.* Tyler, 78 Mo. App. 240; Ferneau *v.* Whitford, 39 Mo. App. 311; Weise *v.* Moore, 22 Mo. App. 530; Stones *v.* Richmond, 21 Mo. App. 17; Miller *v.* Anderson, 19 Mo. App. 71.

Nebraska.— Union State Bank *v.* Hutton, 1 Nebr. (Unoff.) 795, 95 N. W. 1061; Burwell Irrigation Co. *v.* Lashmett, 59 Nebr. 605, 81 N. W. 617; Boales *v.* Ferguson, 55 Nebr. 565, 76 N. W. 18; Scroggin *v.* Johnston, 45 Nebr. 714, 64 N. W. 236; Nebraska Mortg. Loan Co. *v.* Van Kloster, 42 Nebr. 746, 60 N. W. 1016; Norwegian Plow Co. *v.* Haines, 21 Nebr. 689, 33 N. W. 475; Burlington, etc., R. Co. *v.* Harris, 8 Nebr. 140.

Nevada.— Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459; Hanson *v.* Chiatovich, 13 Nev. 395.

New York.— Dresler *v.* Hard, 57 N. Y. Super. Ct. 192, 6 N. Y. Suppl. 500.

North Carolina.— Wilkins *v.* Suttles, 114 N. C. 550, 19 S. E. 606.

Ohio.— Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4.

Oregon.— Nickum *v.* Burckhardt, 30 Oreg. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822; Remillard *v.* Prescott, 8 Oreg. 37; Rugh *v.* Ottenheimer, 6 Oreg. 231, 25 Am. Rep. 513.

Pennsylvania.— Knight *v.* New York Mut. L. Ins. Co., 14 Phila. 187.

Tennessee.— Read *v.* Citizens' St. R. Co., 110 Tenn. 316, 75 S. W. 1056.

Texas.—Texas Produce Co. *v.* Turner, (Sup. 1894) 27 S. W. 583; Scarbrough *v.* Alcorn, 74 Tex. 358, 12 S. W. 72; Stanger *v.* Dorsey, 22 Tex. Civ. App. 573, 55 S. W. 129; Anderson *v.* Nuckles, (Civ. App. 1896) 34 S. W. 184; Short *v.* Short, 12 Tex. Civ. App. 86, 33 S. W. 682.

Utah.— Reynolds *v.* Pascoe, 24 Utah 219, 66 Pac. 1064; Knudsen *v.* Omanson, 10 Utah 124, 37 Pac. 250.

Vermont.— Brinsmaid *v.* Mayo, 9 Vt. 31; Sawyer *v.* Hoyt, 2 Tyler 288.

Washington.— Walker *v.* Baxter, 6 Wash. 244, 33 Pac. 426.

Wisconsin.— Wisconsin Farm Land Co. *v.* Bullard, 119 Wis. 320, 96 N. W. 833; Warder *v.* Baldwin, 51 Wis. 450, 8 N. W. 257; Gill *v.* Rice, 13 Wis. 549.

United States.— Mabury *v.* Louisville, etc., Ferry Co., 60 Fed. 645, 9 C. C. A. 174.

in such case it will be equally conclusive as if it had been pleaded.[28] An estoppel by deed[29] or by record[30] must be pleaded where there is an opportunity to do so; otherwise not.[31] The failure to plead an estoppel operates as a waiver of it.[32] All pleas in estoppel must be certain in every particular.[33]

2. As Element of Cause of Action. Estoppel as an element of a cause of action is not as a rule available, unless specially pleaded.[34] Where, however, the facts entitling plaintiff to relief are set out, his petition is sufficient as a plea of

Canada.— Evans *v.* Halifax, 15 Nova Scotia 321.

See 19 Cent. Dig. tit. "Estoppel," § 300.

The rule is the same in equity. Central Nat. Bank *v.* Doran, 109 Mo. 40, 18 S. W. 836.

An estoppel by recitals in a contract, being a species of estoppel *in pais*, must be specially pleaded. Mabury *v.* Louisville, etc., Ferry Co., 60 Fed. 645, 9 C. C. A. 174.

28. Shelton *v.* Alcox, 11 Conn. 240; Woodhouse *v.* Williams, 14 N. C. 508; Isaacs *v.* Clark, 12 Vt. 692, 36 Am. Dec. 372.

29. Blood *v.* Marcuse, 38 Cal. 590, 99 Am. Dec. 435; Flandreau *v.* Downey, 23 Cal. 354 (*semble*); Hostler *v.* Hays, 3 Cal. 302 (*semble*); Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401; Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206; Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 117. See Reg. *v.* Haughton, 1 E. & B. 501, 17 Jur. 455, 22 L. J. M. C. 89, 1 Wkly. Rep. 164, 72 E. C. L. 501.

An estoppel which is part of the title may be given in evidence, although not pleaded. Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49; Smith *v.* St. Paul, 72 Minn. 472, 75 N. W. 708. Thus a subsequently acquired title inuring to the vendee by estoppel, being a part of the title, may be given in evidence without being specially pleaded. Farmers' Bank *v.* Glenn, 68 N. C. 35.

Avoidance of estoppel.— A pleading in which a grantor desires to impeach his deed must show in what his equity consists, since, as a question of law, he is estopped from denying his own deed. Payne *v.* Atterbury, Harr. 414.

30. Blood *v.* Marcuse, 38 Cal. 590, 99 Am. Dec. 435; Flandreau *v.* Downey, 23 Cal. 354; Hostler *v.* Hays, 3 Cal. 302 (*semble*); Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114. See Reg. *v.* Haughton, 1 E. & B. 501, 17 Jur. 455, 22 L. J. M. C. 89, 1 Wkly. Rep. 164, 72 E. C. L. 501; Miller *v.* Weldon, 13 N. Brunsw. 188.

Pleading former adjudication see Judgments.

31. Flandreau *v.* Downey, 23 Cal. 354; Carroll County *v.* Collier, 22 Gratt. (Va.) 302; Miller *v.* Weldon, 13 N. Brunsw. 188.

32. Hostler *v.* Hays, 3 Cal. 302; Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401; Freeman *v.* Cooke, 6 D. & L. 187, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114. See, however, Roberts *v.* Roberts, 101 Ga. 765, 29 S. E. 271, holding that where upon the trial of a claim case a special issue of forgery is formed upon the execution of a deed, and this issue is found in favor of claimant, who was the alleged maker of the deed, the adverse party may, even after verdict that the deed was a forgery, broaden the issue formed upon the claim case and plead and prove an estoppel *in pais* arising from representations made by the alleged grantor.

Taking issue on fact in question.— Where a party pleads a fact which he might be estopped to plead and the other party takes issue on the fact instead of relying on the estoppel, and the jury find the fact to be true, judgment will be rendered without regard to the estoppel. Bartholomew *v.* Candee, 14 Pick. (Mass.) 167; Howard *v.* Mitchell, 14 Mass. 241; Tibbetts *v.* Shapleigh, 60 N. H. 487; Anthony *v.* Brayton, 7 R. I. 52. See also Stevenson *v.* Miller, 2 Litt. (Ky.) 306, 13 Am. Dec. 271.

The failure to object when a record is offered in evidence as an estoppel is a waiver of an objection that the estoppel was not specially pleaded. Flandreau *v.* Downey, 23 Cal. 354.

33. Bush *v.* Critchfield, 5 Ohio 109, 112 [*citing* Stephen Pl. 357].

An estoppel is sufficiently pleaded where the pleadings show that the party intends to rely on it if facts alleged by the other party, and denied for want of knowledge, are shown. Schurtz *v.* Colvin, 55 Ohio St. 274, 45 N. E. 527.

34. *Indiana.*— Taylor *v.* Patton, 160 Ind. 4, 66 N. E. 91.

Iowa.— See Phillips *v.* Van Shaick, 37 Iowa 229.

Nebraska.— Nebraska Mortg. Loan Co. *v.* Van Kloster, 42 Nebr. 746, 60 N. W. 1016.

Ohio.— Fries *v.* Mack, 33 Ohio St. 52 [*reversing* 5 Ohio Dec. (Reprint) 174, 3 Am. L. Rec. 385].

Oregon.— Union St. R. Co. *v.* Union First Nat. Bank, 42 Oreg. 606, 72 Pac. 586, 73 Pac. 341.

Tennessee.— Newport Cotton Mill Co. *v.* Mims, 103 Tenn. 465, 53 S. W. 736.

Texas.— Lybrand *v.* Fuller, 24 Tex. Civ. App. 296, 59 S. W. 50; Howard *v.* Metcalf, (Civ. App. 1894) 26 S. W. 449.

Utah.— Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Vermont.— Ripton *v.* McQuivey, 61 Vt. 76, 17 Atl. 44.

Washington.—See Jacobs *v.* Puyallup First Nat. Bank, 15 Wash. 358, 46 Pac. 396; Walker *v.* Baxter, 6 Wash. 244, 33 Pac. 426.

See 19 Cent. Dig. tit. "Estoppel," § 297.

See, however, Larremore *v.* Squires, 30 Misc. (N. Y.) 62, 62 N. Y. Suppl. 885, where it was held that in foreclosure of a mortgage taken on the faith that a lease given the mortgagor was a recognition of his title

estoppel, without a specific designation of it as such;[35] and where plaintiff has had no opportunity to plead an estoppel, he may show it in evidence without having pleaded it;[36] and the same is true where it does not appear that plaintiff knew the facts when his complaint was drawn,[37] or that his demand must ultimately rest upon it.[38]

3. As Defense — a. Raised by Demurrer. Whenever the matter of estoppel is apparent on the face of the pleadings, advantage may be taken of it by demurrer,[39] but not otherwise.[40]

b. Raised by Plea or Answer — (i) *In General.* Equitable estoppel is as available at law as in equity,[41] but no intendments are made in favor of a plea of estoppel, and it is incumbent on the pleader to plead fully all the facts essential to its existence.[42] It has been held that an estoppel *in pais* need not be pleaded, although relied on as a defense;[43] and the same ruling has been made with regard to estoppel by deed.[44] Defendant need not plead a matter of estoppel where the facts constituting it are alleged by plaintiff,[45] or where the estoppel is in rebuttal of evidence introduced by the latter,[46] or where the failure to plead it is waived by plaintiff by proceeding with the trial of the case without objection.[47]

by the lessee, it is not necessary to plead an estoppel to render proof thereof admissible.

After-acquired title.— A petition in a suit to quiet title, alleging that an after-acquired title in plaintiff's vendor inured to the benefit of plaintiff, which failed to allege that plaintiff's deed contained either a covenant of warranty or of seizin, was demurrable. Altemus *v.* Nickell, 115 Ky. 506, 74 S. W. 221, 245, 24 Ky. L. Rep. 2401, 2416.

Amendments.—Where, in an action of trespass to try title, defendant files an affidavit attacking the genuineness of a power of attorney through which plaintiff claims as mortgagor, if plaintiff files the affidavit and gives the statutory notice to produce, the nature of the defense being sufficiently indicated, he may by amended petition allege facts constituting an estoppel against defendant as to the instrument attacked. Ranney *v.* Miller, 51 Tex. 263.

Pleading by exhibit.— An estoppel against sureties executing a bond to deny the legal capacity of the obligee was sufficiently pleaded where the bond was made an exhibit of the complaint. Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397. See also Golden *v.* Hardesty, 93 Iowa 622.

35. Rieschick *v.* Klingelhoefer, 91 Mo. App. 430. See also Carlyle *v.* Sloan, 44 Oreg. 357, 75 Pac. 217, in which the facts were pleaded, and it was held that plaintiff's failure to allege that by reason of such facts defendants were estopped was immaterial in equity after answer and trial.

36. Shelton *v.* Alcox, 11 Conn. 240.

37. Vellum *v.* Demerle, 65 Hun (N. Y.) 543, 20 N. Y. Suppl. 516.

38. Donnelly *v.* San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559.

39. Collins *v.* Mitchell, 5 Fla. 364; Stone *v.* Cook, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 287; McFarland *v.* Rogers, 1 Wis. 452; Post *v.* Beacon Vacuum Pump, etc., Co., 89 Fed. 1, 32 C. C. A. 151 [*reversing* 84 Fed. 371, 28 C. C. A. 431].

Plaintiff may demur to a plea which attempts to set up the same matter as a defense as has been set up in the declaration. Smith *v.* Whitaker, 11 Ill. 417.

40. Deane *v.* Echols, 2 App. Cas. (D. C.) 522.

41. Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Lewenberg *v.* Hayes, 91 Me. 104, 107, 39 Atl. 469, 64 Am. St. Rep. 215 [*citing* Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Milliken *v.* Dockray, 80 Me. 82, 13 Atl. 127; Caswell *v.* Fuller, 77 Me. 105]; Barnard *v.* German American Seminary, 49 Mich. 444, 13 N. W. 811; Allen *v.* Sales, 56 Mo. 28. See also *supra*, V, A, 3.

42. Troyer *v.* Dyar, 102 Ind. 396, 1 N. E. 728.

Under Ill. Pr. Act, § 29 (Ill. Rev. St. (1874) p. 778), defendant may plead an estoppel *in pais* as a matter of right, subject to the same tests and rules of practice as in other cases. Mann *v.* Oberne, 15 Ill. App. 35.

43. Hostler *v.* Hays, 3 Cal. 302.

44. Casey *v.* McCall, 19 U. C. C. P. 90; Ketchum *v.* Smith, 20 U. C. Q. B. 313; Nelson *v.* Connors, 5 Nova Scotia 406. *Contra*, McDonald *v.* Blois, 3 Nova Scotia Dec. 298; Carrall *v.* Montreal Bank, 21 U. C. Q. B. 18.

After-acquired title.— In an action for breach of covenant of seizin defendant may, for the purpose of reducing the damages, show, without pleading it, that he acquired title after the conveyance so that it inured to plaintiff's benefit. Farmers' Bank *v.* Glenn, 68 N. C. 35.

A rebutter by collateral warranty may be given in evidence on the general issue under a writ of entry, or may be pleaded. Bates *v.* Norcross, 17 Pick. (Mass.) 14, 28 Am. Dec. 271.

45. Terry *v.* Buek, 40 N. Y. App. Div. 419, 57 N. Y. Suppl. 980.

Estoppel by deed.— A recital in a bond is a solemn admission by the obligor of the truth of the things recited; and hence, when in an action against him the bond is pleaded *in hæc verba*, the effect is the same as if there was a formal plea of estoppel. State *v.* Williams, 77 Mo. 463.

46. Ess *v.* Griffith, 139 Mo. 322, 40 S. W. 930.

47. McDonnell *v.* De Soto Sav., etc., Assoc., 175 Mo. 250, 75 S. W. 438.

(II) *Mode and Form.* A plea or answer of estoppel must allege that plaintiff ought to be concluded from showing some fact or matter stated in the declaration or complaint to which the estoppel is interposed, because of some other fact or matter alleged in the plea or answer which constitutes the estoppel.[48] It should have a formal commencement and conclusion to mark its special character and a defect in such particulars may be reached by general demurrer.[49] Such a plea may be joined with a general denial where the averments by way of estoppel are not inconsistent with the denial.[50]

(III) *Sufficiency of Allegations.* All the essential facts constituting an equitable estoppel must be pleaded with certainty and particularity;[51] but if the allegations amount to an estoppel, it is sufficient, although the estoppel is not pleaded in so many words.[52]

(IV) *Demurrer or Reply.* If defendant pleads facts sufficient to constitute an estoppel plaintiff may reply.[53] If, on the other hand, the facts pleaded are insufficient, plaintiff must demur or he will be held to waive the question as to their sufficiency.[54]

4. In Avoidance of Defense. As a general rule an estoppel relied on in avoid-

48. Moreland *v.* Marion County, 17 Fed. Cas. No. 9,794.

The form of pleading an estoppel is to rely on the deed as an estoppel, and pray judgment that the party be estopped, or not admitted to deny the facts in the deed, without demanding judgment, *si actio*, etc. Davis *v.* Tyler, 18 Johns. (N. Y.) 490. See also Rawlyns' Case, 4 Coke 53.

49. East St. Louis *v.* Flannigen, 34 Ill. App. 596. See also *infra*, VII, A, 3, b, (IV).

Form of commencement and conclusion see Bigelow Estop. (5th ed.) 724 [*citing* Chitty (3 Eng. ed.) 408].

If pleaded merely as a plea in bar, and the plea is not demurred to, the court will consider it as sufficiently pleaded. Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

50. Blodgett *v.* McMurtry, 39 Nebr. 210, 57 N. W. 985.

51. *Alabama.*—Richards *v.* Daugherty, 133 Ala. 569, 31 So. 934; Hall *v.* Henderson, 126 Ala. 449, 28 So. 531, 85 Am. St. Rep. 53, 61 L. R. A. 621; Tuscaloosa First Nat. Bank *v.* Leland, 122 Ala. 289, 25 So. 195.

California.— Carpy *v.* Dowdell, 115 Cal. 677, 47 Pac. 695.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 93.

Indiana.— Baals *v.* Stewart, 109 Ind. 371, 9 N. E. 403; Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374; Stewart *v.* Beck, 90 Ind. 458; Cole *v.* Lafontaine, 84 Ind. 446; Terre Haute, etc., R. Co. *v.* Norman, 22 Ind. 63; Bell *v.* Hiner, 16 Ind. App. 184, 44 N. E. 576; Lewis *v.* Hodapp, 14 Ind. App. 111, 42 N. E. 649, 56 Am. St. Rep. 295.

Kansas.— Donnell *v.* Reese, 6 Kan. App. 563, 51 Pac. 584.

Kentucky.— Asher *v.* Fuson, 45 S. W. 233, 20 Ky. L. Rep. 33; Wait *v.* Gover, 12 S. W. 1068, 11 Ky. L. Rep. 750. *Compare* Stith *v.* Carter, 60 S. W. 725, 22 Ky. L. Rep. 1488.

Missouri.— Weise *v.* Moore, 22 Mo. App. 530. *Compare* Olden *v.* Hendrick, 100 Mo. 533, 13 S. W. 821, where, no objection having been taken to the answer by demurrer or by motion to make more definite, the estoppel was sufficiently pleaded.

Montana.— Meyendorf *v.* Frohner, 3 Mont. 282, holding that to constitute estoppel *in pais* the answer should allege that the false representations were made with intent that the opposite party should act upon the same.

Nebraska.— Henderson *v.* Keutzer, 56 Nebr. 460, 76 N. W. 881.

Nevada.— Sharon *v.* Minnock, 6 Nev. 377.

Texas.— Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821 [*modifying* (Civ. App. 1899) 49 S. W. 937]; Weinstein *v.* Jefferson Nat. Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23; Childress County Land, etc., Co. *v.* Baker, 23 Tex. Civ. App. 451, 56 S. W. 756, holding that the plea must show that the pleader would be injured or sustain loss if the estoppel should not prevail.

Vermont.— Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

Washington.— Interstate Sav., etc., Assoc. *v.* Knapp, 20 Wash. 225, 55 Pac. 48, 931.

United States.— St. Louis Smelting, etc., Co. *v.* Green, 13 Fed. 208, 4 McCrary 232; Wythe *v.* Salem, 30 Fed. Cas. No. 18,121, 4 Sawy. 88; Gager *v.* Harrison, 9 Fed. Cas. No. 5,171.

See 19 Cent. Dig. tit. "Estoppel," § 302.

For instances of sufficiency of allegation see Hufford *v.* Lewis, 29 Ind. App. 202, 64 N. E. 99; Stephenson *v.* Clayton, 14 Ind. App. 76, 42 N. E. 491; Acker *v.* Massman, 12 Ind. App. 696, 41 N. E. 77; Missouri, etc., R. Co. *v.* Yale, 27 Tex. Civ. App. 10, 65 S. W. 57; Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

Essential elements of estoppel in pais see *supra*, V, A, 4.

52. Cadematori *v.* Gauger, 160 Mo. 352, 61 S. W. 195; Hastings City Nat. Bank *v.* Thomas, 46 Nebr. 861, 65 N. W. 895.

The term "estoppel" in a plea is synonymous with barred or precluded. Stillman *v.* Barney, 4 Vt. 331.

53. Branner *v.* Nichols, 61 Kan. 356, 59 Pac. 633, in which the allegations of the reply were held to avoid the estoppel pleaded in the answer.

54. Atkinson *v.* Lindsey, 39 Ind. 296.

ance of a defense must be specially pleaded by reply.[55] However, the fact that defendant is estopped to set up a defense need not be specially pleaded where the facts requisite to work an estoppel appear from the declaration[56] or answer;[57] but plaintiff may in either case take advantage of the estoppel by demurring to the plea.[58]

B. Issues, Proof, and Variance. To sustain an issue of estoppel the evidence must prove the very facts upon which the alleged estoppel is based. The estoppel pleaded cannot be supported by evidence tending to show another and different estoppel.[59] Before any of the consequences of an estoppel can be claimed the facts constituting it must be found or given in evidence.[60]

C. Evidence[61] — 1. Burden of Proof. Under the rule that he has the burden of proof who has the affirmative of the issue, the burden of proof is on the party alleging and relying on an estoppel to establish all the facts necessary to constitute it,[62]

55. *Illinois.*— Smith *v.* Whitaker, 11 Ill. 417.

Indiana.— Woodward *v.* Begue, 53 Ind. 176.

Kentucky.— Excelsior Coal Min. Co. *v.* Virginia Iron, etc., Co., 66 S. W. 373, 23 Ky. L. Rep. 1834.

Missouri.— Whiteside *v.* Magruder, 75 Mo. App. 364. See also Werner *v.* O'Brien, 40 Mo. App. 483, where it was held that the replication did not plead an estoppel.

Nebraska.— Carnahan *v.* Brewster, (1902) 96 N. W. 590; Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852.

Oregon.— Block *v.* Sammons, 37 Oreg. 600, 55 Pac. 438, 62 Pac. 290.

Texas.— Howe *v.* O'Brien, (Civ. App. 1898) 45 S. W. 813; Bumpas *v.* Zachary, (Civ. App. 1896) 34 S. W. 672.

Wisconsin.— Pratt *v.* Hawes, (1903) 95 N. W. 965.

England.— Feversham *v.* Emerson, 3 C. L. R. 1379, 11 Exch. 385, 24 L. J. Exch. 254, to the effect that a replication by way of estoppel may be replied to a plea of *liberum tenementum*; and if plaintiff does not avail himself of that liberty, but merely joins issue on the plea, the matter which might have been so replied is not conclusive evidence in his favor, but is merely evidence to go to the jury.

Canada.— Haskill *v.* Fraser, 12 U. C. C. P. 383.

See 19 Cent. Dig. tit. "Estoppel," § 304.

Contra.— Lites *v.* Addison, 27 S. C. 226, 3 S. E. 214. And see Hawley *v.* Middlebrook, 28 Conn. 527, in which the plea was *nul tiel record*, with notes that defendant would show that he had never entered into the recognizance sued on, and it was held that it was not necessary for plaintiff to plead specially the facts estopping defendant from denying the truth of the record.

Under statutes, however, which do not allow a replication, plaintiff is allowed to give matters of estoppel in evidence, since the general rule can only apply where he has had an opportunity to plead. Waddle *v.* Morrill, 26 Wis. 611. See also Lites *v.* Addison, 27 S. C. 226, 3 S. E. 214.

In Virginia matter of estoppel may be relied on in evidence by plaintiff, where the only defense is the general issue; but if the matter to which the estoppel replies is specially pleaded, then the estoppel must be specially replied. Hayes *v.* Virginia Mut. Protection Assoc., 76 Va. 225. See also Davis *v.* Thomas, 5 Leigh 1; Chew *v.* Moffat, 6 Munf. 120.

For forms of plea in estoppel by replication see Blue Valley Lumber Co. *v.* Conro, 61 Nebr. 39, 84 N. W. 402; 3 Chitty Pl. 1144; Martin Civ. Proc. 392.

56. Trimble *v.* State, 4 Blackf. (Ind.) 435; Ketchum *v.* Smith, 20 U. C. Q. B. 313.

57. Crawford *v.* Nolan, 70 Iowa 97, 30 N. W. 32; Scott *v.* Luther, 44 Iowa 570; Beckett *v.* Bradley, 2 D. & L. 586, 14 L. J. C. P. 3, 7 M. & G. 994, 8 Scott N. R. 843, 49 E. C. L. 994.

58. Love *v.* Kidwall, 4 Blackf. (Ind.) 553; 1 Chitty Pl. 575; Veale *v.* Warner, 1 Saund. 323*c*, 325*a* note. And see cases cited in the two preceding notes.

59. Parrott *v.* Dyer, 105 Ga. 93, 31 S. E. 417; Donnell *v.* Reese, 6 Kan. App. 563, 51 Pac. 584; Ford *v.* Mayo, 91 Ky. 83, 15 S. W. 2, 12 Ky. L. Rep. 665.

60. Lackman *v.* Wood, 25 Cal. 147, to the effect that it is error for the court to assume in the progress of the trial, for the purpose of deciding on the admissibility of evidence, that an estoppel will be found by the jury.

61. Evidence generally see Evidence.

62. *Alabama.*— Steele *v.* Adams, 21 Ala. 534.

Georgia.— Elliott *v.* Keith, 102 Ga. 117, 29 S. E. 155.

Illinois.— Rutz *v.* Kehr, (Sup. 1890) 25 N. E. 957.

Iowa.— Baldwin *v.* Lowe, 22 Iowa 367.

Maine.— Spear *v.* Spear, 97 Me. 498, 54 Atl. 1106.

Maryland.— Doub *v.* Mason, 2 Md. 380.

North Carolina.— Plummer *v.* Baskerville, 36 N. C. 252.

Pennsylvania.—Cambria Iron Co. *v.* Tomb, 48 Pa. St. 387; Hill *v.* Epley, 31 Pa. St. 331.

South Carolina.— Bethune *v.* McDonald, 35 S. C. 88, 14 S. E. 674.

Texas.—Anderson *v.* Walker, (Civ. App. 1899) 49 S. W. 937.

West Virginia.— Heavner *v.* Morgan, 41 W. Va. 428, 23 S. E. 874.

Wisconsin.— Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897.

United States.— Merrill *v.* Shea, 30 Fed. 743; Merrill *v.* Tobin, 30 Fed. 738.

See 19 Cent. Dig. tit. "Estoppel," § 302.

To prove intention.— Where a purchaser from one without title relies on an estoppel raised by the failure of the owner of the

subject of course to the proper presumptions which may be indulged under the facts of the particular case.[63]

2. Admissibility. Upon an issue of estoppel any evidence is admissible which tends to prove or rebut any of the facts essential to the establishment of the estoppel alleged.[64] Conversely where the doctrine of estoppel applies to the case, any testimony at variance with its full application thereto becomes incompetent.[65]

3. Weight and Sufficiency. Every fact essential to an estoppel *in pais* must be clearly and satisfactorily proved. Beyond this no general rule can be formulated, since from their very nature estoppels *in pais* are wholly dependent upon the peculiar facts of the individual cases.[66]

property to assert his title when the sale was made in his presence, the burden of proof lies on the purchaser to show that the owner's silence was wilful; but this requires no positive proof, as it may be inferred by the jury whenever the surrounding circumstances are such as to warrant the belief that his silence was incompatible with innocence of intention or object. Steele *v.* Adams, 21 Ala. 534.

63. Rittenhouse's Estate, 1 Pars. Eq. Cas. (Pa.) 313, holding that if parties are perfectly aware of what is done in a case in which they are directly interested, and remain silent, and subsequently by their acts acquiesce in the determination of the court, actual notice will be presumed.

No presumption of knowledge as to the contents of a deed arises against an attesting witness, and he is not estopped by his attestation unless he is proved to have known the contents. Plummer *v.* Baskerville, 36 N. C. 252.

64. *California.*— Barnhart *v.* Falkerth, 93 Cal. 497, 29 Pac. 50; Mitchell *v.* Amador Canal, etc., Co., 75 Cal. 464, 17 Pac. 246.

Connecticut.— Calhoun *v.* Richardson, 30 Conn. 210.

Indiana.— Pitcher *v.* Dove, 99 Ind. 175.

Louisiana.— Nichols *v.* McCall, 13 La. Ann. 215.

Maine.— Hatch *v.* Kimball, 16 Me. 146.

Michigan.— Payment *v.* Church, 38 Mich. 776.

New Hampshire.— Drew *v.* Kimball, 43 N. H. 282, 80 Am. Dec. 163.

New York.— Jewett *v.* Miller, 10 N. Y. 402, 61 Am. Dec. 751; Mattes *v.* Frankel, 65 Hun 203, 20 N. Y. Suppl. 145.

Pennsylvania.— Fehley *v.* Barr, 66 Pa. St. 196; Gratz *v.* Beates, 45 Pa. St. 495; Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Hostetter *v.* Hykas, 3 Brewst. 162.

Texas.— Missouri, etc., R. Co. *v.* Yale, 27 Tex. Civ. App. 10, 65 S. W. 57, holding that a party may testify as to his understanding and good faith in a transaction.

See 19 Cent. Dig. tit. "Estoppel," § 307.

For instances of evidence held incompetent see Hannawalt *v.* Equitable L. Assur. Soc., 102 Iowa 667, 72 N. W. 284; Barbee *v.* Hamilton, 67 Iowa 417, 25 N. W. 684; Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483; Payment *v.* Church, 38 Mich. 776; Coursolle *v.* Weyerhauser, 69 Minn. 328, 72 N. W. 697; Kaufmann *v.* Friday, 201 Pa. St. 178, 50 Atl. 942; Reading Second Nat. Bank *v.* Wentzel 151 Pa. St. 142, 24 Atl. 1087.

65. Gaston *v.* Brandenburg, 42 S. C. 348, 20 S. E. 157.

66. *California.*— McCarthy *v.* Petaluma Mut. Relief Assoc., 81 Cal. 584, 22 Pac. 933.

Georgia.— Cheeves *v.* Danielly, 74 Ga. 712.

Kentucky.— Wright *v.* Williams, 77 S. W. 1128, 25 Ky. L. Rep. 1377; Ball *v.* Riggs, 42 S. W. 97, 19 Ky. L. Rep. 829; Thomas *v.* Winchester Bank, 28 S. W. 774, 31 S. W. 732, 17 Ky. L. Rep. 194.

Michigan.— Dull *v.* Merrill, 69 Mich. 49, 36 N. W. 677; Rust *v.* Bennett, 39 Mich. 521.

New York.— Corning *v.* Troy Iron, etc., Factory, 39 Barb. 311; Durfee *v.* Knowles, 2 N. Y. Suppl. 466.

Oregon.— Muldrick *v.* Brown, 37 Oreg. 185, 61 Pac. 428.

South Carolina.— Chambers *v.* Bookman, 67 S. C. 432, 46 S. E. 39.

Vermont.— Church *v.* Fairbrother, 38 Vt. 33.

Virginia.— Robertson *v.* Breckinridge, 98 Va. 569, 37 S. E. 8.

See 19 Cent. Dig. tit. "Estoppel," § 308. And see *supra*, V, A, 4, k.

For instances of insufficient evidence see the following cases:

Arizona.— Hall *v.* Southern Pac. Co., (1899) 57 Pac. 617, in which the evidence was insufficient to charge the parties with knowledge of the facts.

California.— Grosse-Becker *v.* Becker, 102 Cal. 226, 36 Pac. 433, in which the evidence was insufficient to show reliance upon the representations to the prejudice of the party.

Illinois.— Stanley *v.* Marshall, 206 Ill. 20, 69 N. E. 58; Flower *v.* Elwood, 66 Ill. 438 (evidence held insufficient to show fraudulent representation or any change of position); Mackey *v.* Plumb, 29 Ill. App. 245 (failure of evidence to show damage).

Iowa.— Burlington Independent School Dist. *v.* Merchants' Nat. Bank, 68 Iowa 343, 27 N. W. 255, in which the evidence was insufficient to charge the party with knowledge of the facts.

Kansas.— Northrop *v.* Andrews, 39 Kan. 567, 18 Pac. 510, in which the party setting up the estoppel was charged with notice of a recorded deed.

Minnesota.— Lowry *v.* Mayo, 41 Minn. 388, 43 N. W. 78, in which the evidence failed to show that the party setting up the estoppel was influenced by the adverse party.

Missouri.— Bradley *v.* Missouri Pac. R. Co., 91 Mo. 493, 4 S. W. 427, in which the

D. Trial[67]— **1. Questions For Court and Jury.** Ordinarily, where there is no dispute about the facts, it is a question of law whether or not the facts proved constitute an estoppel;[68] otherwise questions of estoppel are peculiarly for the determination of the jury.[69]

2. Instructions. Where there is an issue of estoppel, the court should instruct the jury as to the essential elements of the kind of estoppel relied on.[70]

evidence failed to show acquiescence or notice.

Nebraska.— Betts *v.* Sims, 25 Nebr. 166, 41 N. W. 117, in which the evidence failed to show that the party said or did anything to mislead.

New Jersey.— Carter *v.* Carter, 63 N. J. Eq. 726, 53 Atl. 160 [*affirmed* in (Err. & App. 1903) 55 Atl. 1132], in which there was no testimony as to the amount of loss sustained by the parties setting up the estoppel.

New York.— Lyon *v.* Morgan, 143 N. Y. 505, 38 N. E. 960 [*affirming* 64 Hun 111, 19 N. Y. Suppl. 201] (in which the evidence failed to charge the party with notice of his vendor's representations); Walrath *v.* Redfield, 18 N. Y. 457; Von Arnim *v.* Moore, 82 N. Y. App. Div. 271, 81 N. Y. Suppl. 1007 (in which the evidence failed to show any knowledge on the part of the party sought to be estopped).

Tennessee.— Scott *v.* Johnson, 5 Heisk. 614, in which the evidence was held insufficient to show a ratification.

Wisconsin.— Smith *v.* Konst, 50 Wis. 360, 7 N. W. 293, in which the evidence was held insufficient to show reliance on the adverse party.

For instances of evidence held sufficient see the following cases:

Connecticut.— Chase's Appeal, 57 Conn. 236, 18 Atl. 96.

Iowa.— Des Moines, etc., R. Co. *v.* Lynd, 94 Iowa 368, 62 N. W. 806.

Kansas.— Taylor *v.* Ladd, 53 Kan. 584, 36 Pac. 987.

Kentucky.— Wells *v.* Lewis, 4 Metc. 269.

Missouri.— Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

Nebraska.— Bullis *v.* Drake, 20 Nebr. 167, 29 N. W. 292.

New Jersey.— Ruckelschaus *v.* Oehme, 48 N. J. Eq. 436, 22 Atl. 184.

New York.— Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Conable *v.* Smith, 61 Hun 185, 15 N. Y. Suppl. 924; Tilton *v.* Nelson, 27 Barb. 595.

Pennsylvania.— Lewis *v.* Baker, 162 Pa. St. 510, 29 Atl. 708; Logan *v.* Gardner, 142 Pa. St. 442, 21 Atl. 1083; Arnold *v.* Cornman, 50 Pa. St. 361.

67. Trial generally see Trial.

Availability of estoppel on appeal where not urged in court below see Appeal and Error, 2 Cyc. 662 note 42, 676 note 20.

68. Cox *v.* Rogers, 77 Pa. St. 160; Lewis *v.* Carstairs, 5 Watts & S. (Pa.) 205. See also Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406.

69. *California.*— Gunn *v.* Bates, 6 Cal. 263, effect of standing by and permitting adverse party to settle on land.

Connecticut.— Calhoun *v.* Richardson, 30 Conn. 210, question as to negligence.

Georgia.— Walker *v.* Pope, 101 Ga. 665, 29 S. E. 8; Hill *v.* John P. King Mfg. Co., 79 Ga. 105, 3 S. E. 445.

Massachusetts.— Snow *v.* Hutchins, 160 Mass. 111, 35 N. E. 315.

Michigan.— Ashman *v.* Epsteine, 50 Mich. 360, 15 N. W. 509 (effect of clothing husband with apparent title); Litchfield *v.* Garratt, 10 Mich. 426.

New Hampshire.— Odlin *v.* Gove, 41 N. H. 465, 77 Am. Dec. 773 (whether party setting up estoppel has used reasonable diligence to ascertain state of title); Morrill *v.* Richey, 18 N. H. 295 (question of inference to be drawn from party's conduct and silence when statement was made in his hearing); Russell *v.* Allard, 18 N. H. 222 (question of acquiescence of party in judicial proceedings).

New York.— Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406 (whether the several essential parts of the estoppel are proved); Pratt *v.* Ano, 7 N. Y. App. Div. 494, 40 N. Y. Suppl. 229; Blakeslee *v.* Sincepaugh, 71 Hun 412, 24 N. Y. Suppl. 947 (negligence of party setting up estoppel in not examining record).

North Carolina.— Mason *v.* Williams, 53 N. C. 478, as to whether purchaser was induced to buy by the declarations or acts of adverse party.

Ohio.— Hicks *v.* Cubbon, 4 Ohio Dec. (Reprint) 408, 2 Clev. L. Rep. 121, question of acquiescence by husband in sale by wife.

Pennsylvania.— Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43; Wilcox *v.* Rowley, (1887) 11 Atl. 397 (in which the evidence was wholly verbal and if believed amounted to an estoppel); Brubaker *v.* Okeson, 36 Pa. St. 519 (meaning of conversation); Lewis *v.* Carstairs, 5 Watts & S. 205.

South Carolina.— Hand *v.* Savannah, etc., R. Co., 17 S. C. 219, question of estoppel by conduct.

Texas.— San Antonio Fifth Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368 [*modifying* (Civ. App. 1898) 47 S. W. 533], holding that the question whether prejudice resulted from release of adverse party was for the jury.

Canada.— True *v.* True, 33 N. Brunsw. 403.

See 19 Cent. Dig. tit. "Estoppel," § 309.

70. *California.*— Griffeth *v.* Brown, 76 Cal. 260, 18 Pac. 372; Maine Boys' Tunnel Co. *v.* Boston Tunnel Co., 37 Cal. 40.

Illinois.— Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82; Devine *v.* McMillan, 61 Ill. App. 571; Dinet *v.* Eilert, 13 Ill. App. 99.

Iowa.— Jamison *v.* Miller, 64 Iowa 402, 20 N. W. 491.

Massachusetts.— Stiff *v.* Ashton, 155 Mass. 130, 29 N. E. 203.

Pennsylvania.— Richards *v.* Buffalo, etc.,

Similarly it is the duty of the court where an issue of estoppel is raised to properly instruct the jury as to the burden of proof.[71]

3. VERDICT. A general verdict in favor of the party sought to be estopped establishes the fact that he was not estopped as alleged.[72]

ESTOVERIA SUNT ARDENDI, ARANDI, CONSTRUNDI, ET CLAUDENDI. A maxim meaning "Estovers are for burning, ploughing, building, and inclosing."[1]

ESTOVERS. BOTE,[2] *q. v.* (See, generally, COMMON LANDS; ESTATES; LANDLORD AND TENANT.)

ESTRAYS. See ANIMALS.

ESTREAT. As a noun, an extract or copy from the record;[3] an extract from the records of the criminal courts to serve as a foundation of proceedings against the accused and his bail or surety, to amerce them;[4] a true copy or duplicate of an original writing, especially of amercements or penalties set down in the rolls of court, to be levied by the bailiff or other officer on every offender.[5] As a verb, to draw out, to extract.[6]

ESTREPEMENT, WRIT OF. An ancient common law process to prevent waste.[7] (See, generally, EJECTMENT;[8] WASTE.)

EST UN MAXIME EN NOSTRE LEY "PAROLS POUT PLE.". It is a maxim in our law "Words make the plea."[9]

R. Co., 137 Pa. St. 524, 19 Atl. 931, 21 Am. St. Rep. 892.

Texas.— Miller *v.* Winfree, (App. 1891) 15 S. W. 918.

See 19 Cent. Dig. tit. "Estoppel," § 310.

Compare Bell *v.* Goodnature, 50 Minn. 417, 52 N. W. 908, to the effect that where in trespass defendant claims to own the land, and it appears that plaintiff was induced to buy it from another on defendant's representation that it belonged to such other, the court in charging the jury as to the facts which will estop defendant to claim title need not charge, and the jury need not find, that plaintiff would be injured by allowing the representation to be disproved.

Facts relied on.— The court need only charge the jury as to the facts relied on to create the estoppel, although there may be other facts beyond those stated which would amount to an estoppel. Berg *v.* McLafferty, (Pa. 1888) 12 Atl. 460.

Must be warranted by the evidence.— See Borkenhagen *v.* Paschen, 72 Wis. 272, 39 N. W. 774.

"Wantonly."— An instruction to find an estoppel if plaintiff "knowingly and wantonly suffered and permitted" certain facts to be held out is not misleading, although the word "wantonly" alone would require too great a degree of culpability. Harward *v.* Davenport, 105 Iowa 592, 75 N. W. 487.

Where the evident meaning of an instruction is correct, and it cannot be understood otherwise, it is sufficient. Cox *v.* Matthews, 17 Ind. 367. See also Draffin *v.* Charleston, etc., R. Co., 34 S. C. 464, 468, 13 S. E. 427, in which the court said that "the practical effect of the judge's charge was to leave the questions of fact to the jury, without any intimation whatever as to his own opinion, and then to lay down the law of estoppel, in which we see no error."

71. See Morgan *v.* Hoadley, 156 Ind. 320, 59 N. E. 935.

72. Concord Coal Co. *v.* Ferrin, 71 N. H. 331, 51 Atl. 283, 93 Am. St. Rep. 496.

1. Bouvier L. Dict. [*citing* Heydon's Case, 13 Coke 67, 68].

2. Heydon's Case, 13 Coke 67, 68; 5 Cyc. 860.

3. Burrill L. Dict. [*citing* Fitzherbert Nat. Brev. 75].

4. State *v.* Dunbar, 10 La. 99, 102. See also Louisiana Soc., etc., *v.* Cage, 45 La. Ann. 1394, 1395, 14 So. 422; Anonymus, Hardres 471; Reg. *v.* Creelman, 25 Nova Scotia 404, 418 [*quoting* Chitty Cr. L. p. 92].

5. Webster Dict. [*quoted* in Reg. *v.* Creelman, 25 Nova Scotia 404, 418].

6. Webster Dict. [*quoted* in Reg. *v.* Creelman, 25 Nova Scotia 404, 418].

7. Century Dict.

At the common law there was no process by which a threatened trespass upon a real estate, however great or irreparable, could be prevented. After the act was done the injured owner might bring his action of trespass against the wrong-doer, and recover satisfaction in damages; but, the common law gave him no means of preventing the execution of the designs and threats of anyone, whose declared and settled purpose was to commit a trespass upon his lands. If, however, the claimant was not in possession, and he thought proper to bring an action to establish his right, and recover the estate; then, and in aid of such suit, and to prevent any injury from being done to the property, pending the controversy, the common law gave the writ of estrepement. Duvall *v.* Waters, 1 Bland (Md.) 569, 573, 18 Am. Dec. 350 [*citing* Jacob L. Dict.].

The writ is analogous to the writ of prohibition. Duvall *v.* Waters, 1 Bland (Md.) 569, 573, 18 Am. Dec. 350.

8. See EJECTMENT, 15 Cyc. 89.

9. Adams Gloss. [*citing* Abbott's Case, 2 How. St. Tr. 1160, 1178; Tippet *v.* Eyres, 5 Mod. 457, 458].

ET. The Latin word meaning "and."[10]

ET ADJOURNATUR. See ADJORNATUR.

ET AL. In common and every day use in writs, pleadings, style of cases and entries on the minutes and dockets of the court, a Latin abbreviation known to mean "and another" or "and others" as the case may be.[11]

ETC. or &C.[12] An abbreviation of ET CETERA,[13] *q. v.*; and therefore may mean, and others, and so forth;[14] and the rest;[15] other things;[16] other things of the same character,[17] or only those things *ejusdem generis.*[18] Custom,[19] the intention of the parties,[20] the context,[21] and the manner and place in which the abbre-

10. The original of &, which in old books is used for *et.* Anderson L. Dict.

11. Mutual Bldg., etc., Co. *v.* Dickinson, 112 Ga. 469, 470, 37 S. E. 713; Gordon *v.* Anderson, 83 Iowa 224, 226, 49 N. W. 86, 32 Am. St. Rep. 302, 12 L. R. A. 483; Renkert *v.* Elliott, 11 Lea (Tenn.) 235, 242.

Standing in the place of the names of the parties intended.—The term has been held incapable of standing in the places of the names of the parties or persons intended, and, therefore, when used to designate them, to be without significance. Lyman *v.* Milton, 44 Cal. 630, 633 (in a summons); Orr *v.* Webb, 112 Ga. 806, 808, 38 S. E. 98 (in a bill of exceptions); Swift *v.* Thomas, 101 Ga. 89, 92, 28 S. E. 618 [*citing* Cameron *v.* Sheppard, 71 Ga. 781, 782] (in an exception); Beall *v.* Fox, 4 Ga. 403, 404 (in a writ of error); Pierce *v.* Reed, 3 Nebr. (Unoff.) 874, 93 N. W. 154, 155 (in an appraisement); Brabham *v.* Custer County, 3 Nebr. (Unoff.) 801, 92 N. W. 989, 990 (in a writ of entry); Breidenthal *v.* McKenna, 14 Pa. St. 160, 161 (in a record entry); 7 Cyc. 556 note 57 (in a promissory note); 3 Cyc. 30 note 35 (in a bill of exceptions); 2 Cyc. 986 note 25 (in an assignment of error). But this rule does not seem to be universal. Conery *v.* Webb, 12 La. Ann. 282, 283; Bacchus *v.* Moreau, 4 La. Ann. 313, 314; Renkert *v.* Elliott, 11 Lea (Tenn.) 235, 242.

12. Etc. "is thoroughly incorporated into our language, is defined by our lexicographers, and is a perfect English word in almost common use." Garvin *v.* State, 13 Lea (Tenn.) 162, 169.

"The abbreviation '&c.' [is] equivalent to 'etc.' or 'et cetera.'" *In re* Schouler, 134 Mass. 426, 427. And it "has received in use the same signification as was accorded the phrase 'et cetera.'" Lathers *v.* Keogh, 39 Hun (N. Y.) 576, 579 [*citing* Worcester Dict.]. See 2 Cyc. 286 note 34; 1 Cyc. 138 note 13.

As employed in wills see Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 370, 31 S. E. 629; Tefft *v.* Tillinghast, 7 R. I. 734, 736; Barnaby *v.* Tassell, L. R. 11 Eq. 363, 369, 24 L. T. Rep. N. S. 221, 19 Wkly. Rep. 323; Dean *v.* Gibson, L. R. 3 Eq. 713, 36 L. J. Ch. 657, 658, 15 Wkly. Rep. 809; Gover *v.* Davis, 29 Beav. 222, 225, 7 Jur. N. S. 399, 30 L. J. Ch. 505, 9 Wkly. Rep. 87; Newman *v.* Newman, 26 Beav. 220, 221, 4 Jur. N. S. 1030, 7 Wkly. Rep. 6; Chapman *v.* Chapman, 4 Ch. D. 800, 46 L. J. Ch. 104. See also, generally, WILLS.

13. *Illinois.*— High Ct. I. O. F. *v.* Schweitzer, 70 Ill. App. 139, 143.

Indiana.— State *v.* Arnold, 140 Ind. 628, 630, 38 N. E. 820.

Louisiana.— Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 272, 35 So. 539.

Massachusetts.— *In re* Schouler, 134 Mass. 426, 427.

New York.— Gray *v.* New Jersey Cent. R. Co., 11 Hun 70, 75.

North Carolina.— Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 370, 31 S. E. 629.

Tennessee.— Garvin *v.* State, 13 Lea 162, 168 [*quoting* Webster Dict.].

14. State *v.* Wallichs, 12 Nebr. 407, 408, 11 N. W. 860; Webster Dict. [*quoted* in Garvin *v.* State, 13 Lea (Tenn.) 162, 168].

15. Garvin *v.* State, 13 Lea (Tenn.) 162, 168. See also Shuler *v.* Dutton, 75 Iowa 155, 157, 39 N. W. 359.

16. Gray *v.* New Jersey Cent. R. Co., 11 Hun (N. Y.) 70, 75 [*cited* in Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 273, 35 So. 539; Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 370, 31 S. E. 629]; Garvin *v.* State, 13 Lea (Tenn.) 162, 168.

17. Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199, 210, 81 Am. Dec. 541. See also Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 274, 35 So. 539; Hayes *v.* Wilson, 105 Mass. 21, 22 [*cited* in Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 370, 31 S. E. 629]; Tefft *v.* Tillinghast, 7 R. I. 434, 436 [*citing* Hotham *v.* Sutton, 15 Ves. Jr. 319, 10 Rev. Rep. 83, 33 Eng. Reprint 774]; Cooper *v.* Hood, 28 L. J. Ch. 212, 215 [*cited* in Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 273, 35 So. 539].

18. Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 370, 31 S. E. 629; Tefft *v.* Tillinghast, 7 R. I. 434, 437; Barnaby *v.* Tassell, L. R. 11 Eq. 363, 369, 24 L. T. Rep. N. S. 221, 19 Wkly. Rep. 323; Newman *v.* Newman, 26 Beav. 220, 4 Jur. N. S. 1030, 7 Wkly. Rep. 6; Hertford *v.* Lowther, 7 Beav. 1, 9, 7 Jur. 1167, 13 L. J. Ch. 41. See also Loeser *v.* Liebmann, 14 N. Y. Suppl. 569, 570 [*citing* Lathers *v.* Keogh, 109 N. Y. 583, 17 N. E. 131].

19. Parker *v.* Taswell, 2 De G. & J. 559, 571, 27 L. J. Ch. 812, 6 Wkly. Rep. 608, 59 Eng. Ch. 440, 44 Eng. Reprint 1106. *Compare* Price *v.* Griffith, 1 De G. M. & G. 80, 82, 15 Jur. 1093, 21 L. J. Ch. 78, 50 Eng. Ch. 63, 42 Eng. Reprint 482.

20. Loeser *v.* Liebmann, 14 N. Y. Suppl. 569, 570.

21. Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 370, 31 S. E. 629. See also Shuler *v.* Dutton, 75 Iowa 155, 157, 39 N. W. 239 [*cited* in Bagley *v.* Rose Hill Sugar Co.,

viation is used may govern its meaning;[22] but where it can have but one certain meaning, it will be given that meaning;[23] although as sometimes used it is considered as meaningless and without effect,[24] and is often disregarded as surplusage.[25] (See Abbreviations; Et Al.)

Et cetera.[26] And so forth;[27] and so on;[28] and the rest;[29] and others;[30] other things;[31] other things like the preceding;[32] others of the like kind.[33] In pleading, sometimes used to avoid repetition,[34] and may be allowed to supply what must necessarily be inferred from what is expressed.[35] (See Et Al.; Etc.)

Etching. A distinct art, much older than photography.[36]

Et est pactio duorum plerumque in idem placitum consensus. A maxim meaning "The consent of two or more in the same will (*placitum*, that which is their pleasure to arrange between them) constitutes a paction or bargain."[37]

Ethiopian. A term used in the classification of races.[38] (See African; Colored Persons.)

111 La. 249, 273, 35 So. 539]. *Compare* Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564, 568.

22. Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 274, 35 So. 539.

Construction for the court not for the jury see Gray *v.* New Jersey Cent. R. Co., 11 Hun (N. Y.) 70.

23. Com. *v.* Ross, 6 Serg. & R. (Pa.) 427, 428. See also Com. *v.* Emery, 2 Binn. (Pa.) 431. And *compare* Sayer *v.* Pocock, 1 Cowp. 407, 408.

24. Myers *v.* Dunn, 49 Conn. 71, 76; Ham *v.* Tinchener, 3 T. B. Mon. (Ky.) 196, 197; State *v.* Hackett, 5 La. Ann. 91, 94 [*cited* in State *v.* Arnold, 140 Ind. 628, 630, 38 N. E. 820].

25. Harrison *v.* McCormick, 89 Cal. 327, 331, 26 Pac. 830, 23 Am. St. Rep. 469; Smith *v.* Walker, 98 Pa. St. 133, 140. *Compare* Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 372, 49 S. W. 15, 20 Ky. L. Rep. 1231.

26. A term of importance see Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 271, 35 So. 539.

27. *Indiana.*— State *v.* Arnold, 140 Ind. 628, 630, 38 N. E. 820 [*citing* Agate *v.* Lowenbein, 4 Daly (N. Y.) 62].

Kentucky.— Louisville, etc., R. Co. *v.* Berry, 96 Ky. 604, 610, 29 S. W. 449, 16 Ky. L. Rep. 722.

Louisiana.— Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 272, 35 So. 539 [*quoting* Century Dict.].

New York.— Lathers *v.* Keogh, 39 Hun 576, 579 [*quoting* Worcester Dict., and *citing* Webster Dict.]; Agate *v.* Lowenbein, 4 Daly 62, 68 [*quoting* Cole Dict.].

Tennessee.— See Garvin *v.* State, 13 Lea 162, 168 [*quoting* Webster Dict.].

28. Lathers *v.* Keogh, 39 Hun (N. Y.) 576, 579 [*quoting* Worcester Dict., and *citing* Webster Dict.]; Century Dict. [*quoted* in Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 272, 35 So. 539].

29. Lathers *v.* Keogh, 39 Hun (N. Y.) 576, 579 [*quoting* Worcester Dict., and *citing* Webster Dict.].

30. State *v.* Arnold, 140 Ind. 628, 630, 38 N. E. 820 [*quoting* Bouvier L. Dict., and *citing* Rapalje & L. L. Dict.]; Century Dict. [*quoted* in Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 272, 35 So. 539, where it is said: "This is what people understand in common parlance when they use the word 'etc.'"].

31. State *v.* Arnold, 140 Ind. 628, 630, 38 N. E. 820 [*quoting* Bouvier L. Dict., and *citing* Rapalje & L. L. Dict.]; Gray *v.* New Jersey Cent. R. Co., 11 Hun (N. Y.) 70, 75.

"Lord Coke observed long ago that 'an et cetera doth imply some other necessary matter.'" Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 273, 35 So. 539.

32. Newman *v.* Newman, 26 Beav. 220, 221, 4 Jur. N. S. 1030, 7 Wkly. Rep. 6.

The expression is generally used, "when a number of individuals of a class have been specified, to indicate that more of the same sort might have been mentioned, but for shortness are omitted." Century Dict. [*quoted* in Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 272, 35 So. 539].

33. Lathers *v.* Keogh, 39 Hun (N. Y.) 576, 579 [*quoting* Worcester Dict., and *citing* Webster Dict.]; Todd Johnson Dict. [*quoted* in Agate *v.* Lowenbein, 4 Daly (N. Y.) 62, 68].

Applying the familiar maxim noscitur a sociis, the term imports other purposes of a like character to those which have been named. High Ct. I. O. F. *v.* Schweitzer, 70 Ill. App. 139, 143 [*citing In re* Schouler, 134 Mass. 426, 427; Hayes *v.* Wilson, 105 Mass. 21; Gray *v.* New Jersey Cent. R. Co., 11 Hun (N. Y.) 70]. *Compare* State *v.* Arnold, 140 Ind. 628, 630, 38 N. E. 820 [*citing* Cooley Const. Lim. (5th ed.) p. 176].

The expression will not be extended beyond the class of articles in special connection with which it is used. Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 252, 274, 35 So. 539.

34. State *v.* Arnold, 140 Ind. 628, 630, 38 N. E. 820 [*citing* Com. *v.* Gable, 7 Serg. & R. (Pa.) 423, 427], where it is said: "But the law writers say it is not used in solemn instruments."

35. Cooke *v.* Beale, 1 Wash. (Va.) 313, 318.

36. Snow *v.* Laird, 98 Fed. 813, 816, 39 C. C. A. 311.

37. Adams Gloss. [*citing* Halkerston Max. 43].

38. "In speaking of the various classifications of races, Webster in his dictionary says: 'The common classification is that of Blumenbach, who makes five. . . . 3. The Ethiopian or Negro [black] race, occupying all Africa, except the north.'" *In re* Ah Yup, 1 Fed. Cas. No. 104, 5 Sawy. 155, 157.

ET NON. Literally, "and not." Words used in pleading a denial, instead of *absque hoc*.[39]

ET SEQ. An abbreviation for ET SEQUENTIA,[40] *q. v.*

ET SEQUENTIA. Literally, "and the following."[41]

ET SICUT AD QUÆSTIONEM JURIS NON RESPONDENT JURATORES, SED JUDICES; SIC AD QUÆSTIONEM FACTI NON RESPONDENT JUDICES, SED JURATORES. A maxim meaning "For jurors are to try the fact, and the judges ought to judge according to the law that riseth upon the fact."[42]

EUM, QUI NOCENTEM INFAMAVIT, NON ESSE BONUM ÆQUUM, OB EAM REM CONDEMNARI; PECCATA ENIM NOCENTIUM NOTA ESSE, ET OPORTERE ET EXPEDIRE. A maxim meaning "He who has defamed or accused one who has committed a wicked or criminal act, is not justly or equitably to be condemned on that account; indeed, the marked or notorious sins or transgressions of wicked men ought to be exposed."[43]

EUNUCH. In its primary and general signification, a castrated male of the human species. In its secondary meaning, unproductive, barren.[44]

EUROPEAN PLAN HOTEL. A hotel conducted by renting rooms, separate from the furnishing of meals, and the maintenance of a restaurant for meals;[45] a hotel which furnishes rooms and lodging without board.[46]

EVADE. To avoid by some direct means, by some device or stratagem.[47] (See EVASION; and, generally, FRAUD.)

EVANGELICAL. According to the Gospel; consonant to the doctrines and principles of the Gospel; contained in the Gospel; sound in the doctrines of the Gospel; orthodox.[48] (See EVANGELIST; and, generally, CHARITIES; RELIGIOUS SOCIETIES.)

EVANGELIST. A minister who exercises his office in the organization of church societies and becomes the official and public functionary in setting churches and their officers in order.[49] (See EVANGELICAL; and, generally, RELIGIOUS SOCIETIES.)

EVASION. The act of escaping by means of artifice; a trick or subterfuge.[50] (See EVADE; and, generally, CRIMINAL LAW; FRAUD.)

EVEN. Also or likewise.[51]

39. Rapalje & L. L. Dict. *Compare* 1 Cyc. 211.

40. A reference to "p. 1, *et seq.*" means "page first and the following pages." Black L. Dict.

41. Black L. Dict.

42. Com. *v.* Anthes, 5 Gray (Mass.) 185, 205 [*citing* Coke Litt. 226*a*]; Mitchell *v.* Harmony, 13 How. (U. S.) 115, 144, 14 L. ed. 75.

43. Adams Gloss. [*citing* 3 Blackstone Comm. 125; 3 Broom & H. Comm. 133; 2 Kent Comm. 18 note].

44. Eckert *v.* Van Pelt, (Kan. Sup. 1904) 76 Pac. 909, 910.

45. Bernstein *v.* Sweeny, 33 N. Y. Super. Ct. 271, 272.

46. Vonderbank *v.* Schmidt, 44 La. Ann. 264, 265, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462.

47. Simms *v.* Registrar of Probates, [1900] A. C. 323, 331, 69 L. J. P. C. 51, 82 L. T. Rep. N. S. 433 [*cited* in Bullivant *v.* Atty.-Gen., [1901] A. C. 196, 203, 70 L. J. K. B. 645, 84 L. T. Rep. N. S. 737, 50 Wkly. Rep. 1].

48. Webster Dict. [*quoted* in Young Men's Christian Assoc. *v.* Donohugh, 7 Wkly. Notes Cas. (Pa.) 208, 211].

Use of word in connection with charities see Storrs Agricultural School *v.* Whitney, 54 Conn. 342, 352, 8 Atl. 141; *In re* Hunter, [1897] 2 Ch. 105, 120, 66 L. J. Ch. 545, 76 L. T. Rep. N. S. 725, 45 Wkly. Rep. 610; [1899] A. C. 309, 321, 68 L. J. Ch. 449, 80 L. T. Rep. N. S. 732, 47 Wkly. Rep. 673.

49. *In re* Reinhart, 9 Ohio S. & C. Pl. Dec. 441, 447, as the term is used in the religious body known as the "Disciples of Christ."

50. Wharton L. Lex.

Evasion of act of parliament see Edwards *v.* Hall, 1 Jur. N. S. 1189, 1191, 25 L. J. Ch. 82, 4 Wkly. Rep. 111. See also Yorkshire R. Wagon Co. *v.* Maclure, 21 Ch. D. 309, 318, 51 L. J. Ch. 857, 47 L. T. Rep. N. S. 290, 30 Wkly. Rep. 761.

Evasion of a statute see Harding *v.* Headington, L. R. 9 Q. B. 157, 161, 43 L. J. M. C. 59, 29 L. T. Rep. N. S. 833, 22 Wkly. Rep. 262; 12 Cyc. 1166.

"Evasion of service" see Steinhardt *v.* Baker, 163 N. Y. 410, 415, 57 N. E. 629. See also Smith *v.* State, 43 Ala. 344, 347.

51. Century Dict. [*quoted* in Ulster County Sav. Inst. *v.* Young, 15 N. Y. App. Div. 181, 184, 44 N. Y. Suppl. 493].

"Even grade" has been said to be a term with no special and well-established techni-

EVEN IF. Although.[52]

EVENING. In strictness, that portion of the day which commences at sunset and continues during twilight.[53] (See DAY; and, generally, TIME.)

EVENT.[54] The consequence of anything, the issue, conclusion, end, that in which an action, operation, or series of operations, terminates;[55] issue, hap, chance, success, that follows doing anything.[56] In practice, it may be equivalent to "result";[57] the final success in an action;[58] the final outcome and end of the litigation;[59] the outcome or the result of a trial or proceeding, of which there may be more than one;[60] not merely the finding of the jury, but the event of the cause.[61] (Event: To Abide — Costs, see COSTS; Deposit, see DEPOSITS IN COURT; Stay of Proceeding, see ACTIONS.)

EVENTUAL. Final terminating, ultimate, also happening as a consequence.[62]

EVENTUAL CONDEMNATION MONEY. As used in an indemnity bond in an action or proceeding, whatever amount may be awarded against the principal by the judgment of the court,[63] or by the verdict of the jury upon the trial of the issue involved.[64]

EVENTUALLY. In an eventual manner; finally; ultimately.[65]

EVENTUS EST QUI EX CAUSÂ SEQUITUR; ET DICITUR EVENTUS QUIA EX CAUSIS EVENIT. A maxim meaning "An event is that which follows from the cause, and is called an event because it eventuates from causes."[66]

EVENTUS VARIOS RES NOVA SEMPER HABET. A maxim meaning "A new matter always produces various events."[67]

EVER. At all times; through all time; always; forever.[68]

cal meaning. Job *v.* People, 193 Ill. 609, 614, 61 N. E. 1079.

"Even though," when words of inclusion and not of exclusion, see Ulster County Sav. Inst. *v.* Young, 15 N. Y. App. Div. 181, 184, 44 N. Y. Suppl. 493.

52. Burnstein *v.* Cass Ave., etc., R. Co., 56 Mo. App. 45, 54.

53. State *v.* Griggs, 34 W. Va. 78, 80, 11 S. E. 740 [*citing* Webster Dict.].

54. "Events of horse-races and the like contingencies" as used in an act for the suppression of betting houses see Reg. *v.* Hobbs, [1898] 2 Q. B. 647, 655, 62 J. P. 551, 67 L. J. Q. B. 928, 79 L. T. Rep. N. S. 160, 47 Wkly. Rep. 79.

55. Webster Dict. [*quoted* in Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473].

The death of the tenant, or the devolution of his title during proceedings for enfranchisement, would be an "event" as contemplated by 15 & 16 Vict. c. 51, § 1. Myers *v.* Hodgson, 1 C. P. D. 609, 616, 45 L. J. C. P. 603, 34 L. T. Rep. N. S. 881, 24 Wkly. Rep. 827.

56. State *v.* Cross, 2 Humphr. (Tenn.) 301, 303.

57. State *v.* Cross, 2 Humphr. (Tenn.) 301, 303; Myers *v.* Defries, 5 Ex. D. 180, 185, 49 L. J. Exch. 266, 42 L. T. Rep. N. S. 137, 28 Wkly. Rep. 406.

"Event of the action" see Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 90, 50 N. W. 1022; Bent *v.* Baker, 3 T. R. 27, 32.

"Event of the award" see Reeves *v.* McGregor, 9 A. & E. 576, 580, 8 L. J. Q. B. 177, 1 P. & D. 372, 2 W. W. & H. 127, 36 E. C. L. 308.

"Event of the court and jury" see Saunders *v.* Hughes, 2 Bailey (S. C.) 504, 513.

"Event of the suit" see Ward *v.* Mallinder, 5 East 489, 491; Swinglehurst *v.* Altham, 3 T. R. 138, 140.

58. Benjamin *v.* Ver Nooy, 168 N. Y. 578, 583, 61 N. E. 971.

59. Thus, in a stipulation that certain cases should abide the "event" of the first case tried. Commercial Union Assur. Co. *v.* Scammon, 35 Ill. App. 659, 660.

60. Myers *v.* Defries, 5 Ex. D. 180, 185, 49 L. J. Exch. 266, 42 L. T. Rep. N. S. 137, 28 Wkly. Rep. 406, where Bramwell, L. J., said: "If the plaintiff relies upon several grounds of suit, there may be several 'events,' and in my opinion 'event' may be read as a *nomen collectivum*." And *compare* Ellis *v.* Desilva, 6 Q. B. D. 521, 50 L. J. Q. B. 328, 329, 44 L. T. Rep. N. S. 209, 29 Wkly. Rep. 493, where, in a reference to arbitration the order provided that the costs of the action should "follow the event," etc., Bramwell, L. J., said: "The word 'event' should be taken distributively, because the word 'event' should be read 'events.'"

61. Myers *v.* Defries, 5 Ex. D. 180, 185, 49 L. J. Exch. 266, 42 L. T. Rep. N. S., 137, 28 Wkly. Rep. 406. See also Myers *v.* Defries, 5 Ex. D. 15, 18, where it is said: "The word 'event' cannot mean the verdict of the jury without judgment."

62. Van Emburgh *v.* Ackerman, 3 Redf. Surr. (N. Y.) 499. 502, where the expression "the next eventual estate" is construed.

63. 8 Cyc. 554 note 80.

64. Willis *v.* Bivins, 76 Ga. 745, 748.

65. Webster Int. Dict. See also Dunkin *v.* Lawrence, 1 Barb. (N. Y.) 447, 448.

"Eventually accountable" immediately preceding the name of the payee as indorser of a promissory note see McDonald *v.* Bailey, 14 Me. 101, 103.

66. Wharton L. Lex.

Applied in Gore's Case, 9 Coke 80*b*, 81*b*.

67. Wharton L. Lex. [*citing* Coke Litt. 379].

68. Webster Int. Dict.

EVERY.[69] The whole number, but each separately considered;[70] all the separate individuals which constitute the whole, regarded one by one;[71] EACH,[72] *q. v.*; each one of all;[73] each individual of the whole class.[74] Whether employed in a statute or otherwise,[75] the proper meaning to be given the word as used in any particular connection, it seems, should be governed by the legal rules of interpretation;[76] thus, like the word "all,"[77] by the context this word may be

In a statute regulating the practice of medicine which prohibits any person from practicing medicine "who has ever been convicted of a felony," the court said: "The word 'ever' to our minds clearly indicates the legislative intention to prohibit the practice of medicine on the part of any person who has been convicted of a felony either before or after the passage of the law." People *v.* Hawker, 152 N. Y. 234, 239, 46 N. E. 607.

69. "Dr. Johnson tells us in his dictionary that 'every' was formerly spelt 'everich,' that is, ever each." Brown *v.* Jarvis, 2 De G. F. & J. 168, 172, 6 Jur. N. S. 789, 29 L. J. Ch. 595, 8 Wkly. Rep. 644, 63 Eng. Ch. 131, 45 Eng. Reprint 586.

70. Friedenwald *v.* Baltimore, 74 Md. 116, 124, 21 Atl. 555 [*quoting* Webster Dict.].

71. State *v.* Penny, 19 S. C. 218, 221; Anderson L. Dict. [*quoted* in Geary *v.* Parker, 65 Ark. 521, 525, 47 S. W. 238, 53 S. W. 567].

72. Friedenwald *v.* Baltimore, 74 Md. 116, 124, 21 Atl. 555 [*quoting* Webster Dict.]; Potter *v.* Berthelet, 20 Fed. 240, 243; 14 Cyc. 1129.

73. Johnson Dict. [*quoted* in Cox *v.* Island Min. Co., 65 N. Y. App. Div. 508, 515, 73 N. Y. Suppl. 69; Purdy *v.* People, 4 Hill (N. Y.) 384, 413; Brown *v.* Jarvis, 2 De G. F. & J. 168, 172, 6 Jur. N. S. 789, 29 L. J. Ch. 595, 8 Wkly. Rep. 644, 63 Eng. Ch. 131, 45 Eng. Reprint 586]; Anderson L. Dict. [*quoted* in Geary *v.* Parker, 65 Ark. 521, 525, 47 S. W. 238, 53 S. W. 567].

74. Friedenwald *v.* Baltimore, 74 Md. 116, 124, 21 Atl. 555 [*quoting* Webster Dict.].

75. **"Every action upon the case for words"** see Menter *v.* Stewart, 3 Miss. 698, 699.

"Every allegation in a complaint" see Spaulding *v.* Harvey, 7 Ind. 429, 432.

"Every bill," etc., altering any body politic, etc., see Purdy *v.* People, 4 Hill (N. Y.) 384, 413 [*quoted* in Cox *v.* Island Min. Co., 65 N. Y. App. Div. 508, 515, 73 N. Y. Suppl. 69].

"Every boat or vessel" see A Dark Colored Newly Decked Scow-Boat *v.* Lynn, 1 Pinn. (Wis.) 239, 241.

"Every case" see Waters *v.* Petrovic, 19 La. 584, 591 [*quoted* in D'Apremont *v.* Berry, 6 La. Ann. 464, 465].

"Every copy" see State *v.* Kelsey, 44 N. J. L. 1, 27.

"Every day, day by day" see Lindsay *v.* Cusimano, 12 Fed. 504.

"Every demand and cause of action, in law or equity" see De Long *v.* Stanton, 9 Johns. (N. Y.) 38, 42.

"Every determination by arbitrators" see Knight *v.* Tabernacle Permanent Bldg. Soc., 60 L. J. Q. B. 633, 636.

"Every evening" see Kelly *v.* London Pavilion, 77 L. T. Rep. N. S. 215, 217.

"Every family" see Cone *v.* Lewis, 64 Tex. 331, 333, 53 Am. Rep. 767.

"Every laborer or mechanic" see McLarty *v.* Tibbs, 69 Miss. 357, 360, 12 So. 557.

"Every living creature" see 2 Cyc. 342 note 23.

"Every of them" in a bond see Wood *v.* Hummel, 4 Watts (Pa.) 50; Moser *v.* Libenguth, 1 Rawle (Pa.) 255; Besore *v.* Potter, 12 Serg. & R. (Pa.) 154; Pecker *v.* Julius, 2 Browne (Pa.) 31, 32.

"Every offense" see Apothecaries Co. *v.* Jones, [1893] 1 Q. B. 89, 93, 17 Cox C. C. 588, 57 J. P. 56, 67 L. T. Rep. N. S. 677, 5 Reports 101, 41 Wkly. Rep. 267.

"Every other article of personal property in and about said homestead" see Benton *v.* Benton, 63 N. H. 289, 295, 56 Am. Rep. 512.

"Every person" see Davis *v.* Pierse, 7 Minn. 13, 82 Am. Dec. 65; Nolan *v.* Johns, 108 Mo. 431, 436, 18 S. W. 1107; State *v.* McKenney, 18 Nev. 182, 201, 2 Pac. 171; Winter *v.* Winter, 101 Wis. 494, 497, 77 N. W. 883; Washington *v.* State, 17 Wis. 147, 148; Reg. *v.* Vine, L. R. 10 Q. B. 195, 201, 13 Cox C. C. 43, 44 L. J. M. C. 60, 31 L. T. Rep. N. S. 842, 23 Wkly. Rep. 649; Lester *v.* Torrens, 2 Q. B. D. 403, 404, 46 L. J. M. C. 280, 25 Wkly. Rep. 691; Peters *v.* Cowie, 2 Q. B. D. 131, 133, 46 L. J. M. C. 177, 36 L. T. Rep. N. S. 107; Dargan *v.* Davies, 2 Q. B. D. 118, 119, 46 L. J. M. C. 122, 35 L. T. Rep. N. S. 810, 25 Wkly. Rep. 230; Reg. *v.* Dean, 13 L. J. Exch. 33, 34, 12 M. & W. 39.

"Every property" see *In re* Thompson Glass Co., (Pa. 1898) 40 Atl. 526, 527.

"Every sentence" to imprisonment, etc., see Blackburn *v.* State, 50 Ohio St. 428, 436, 36 N. E. 18.

"Every son now living, or who shall come into existence" as used in a will see Surtees *v.* Surtees, L. R. 12 Eq. 400, 405, 25 L. T. Rep. N. S. 288, 19 Wkly. Rep. 1043.

"Every such case" see Snell *v.* Bray, 56 Wis. 156, 161, 14 N. W. 14.

"Every such overseer" see King *v.* Share, 3 Q. B. 31, 38, 2 G. & D. 453, 6 Jur. 730, 11 L. J. Q. B. 163, 43 E. C. L. 617.

"Every town in the state" see People *v.* Westchester County, 40 Hun (N. Y.) 353, 354.

"Every way fitted for the voyage" see Von Lingen *v.* Davidson, 1 Fed. 178, 180.

"Any and every writ" see Kennedy *v.* Agricultural Ins. Co., 165 Pa. St. 179, 183, 30 Atl. 724.

"Two and every of them" see Southcote *v.* Hoare, 3 Taunt. 87, 90, 12 Rev. Rep. 600.

76. McLarty *v.* Tibbs, 69 Miss. 357, 360, 12 So. 557.

77. See 2 Cyc. 132 note 18.

restrained in its meaning,[78] and in fact it is sometimes used as the equivalent of ANY,[79] *q. v.*

EVERYONE. Every person,[80] including a corporation.[81] (See PERSON.)

EVERYTHING. All things.[82]

EVERYWHERE. When literally used, a term synonymous with "the earth."[83]

EVICTED. In pleading, expelled, amoved, and put out.[84] (See EVICTION.)

EVICTION.[85] In its original and technical meaning, an expulsion by the assertion of a paramount title, and by process of law;[86] a recovery[87] of land, &c., by form of law;[88] a lawful disturbance of possession, or dispossession by judgment of law;[89] an ouster,[90] DISPOSSESSION,[91] *q. v.*; some change in the possession of the party by the disturbance of an actual or constructive possession, which has been displaced by a paramount title to which the party has been compelled by law, or by satisfactory proof of genuineness, to submit;[92] a turning out of possession, or placing the party in such a situation that, his expulsion being inevitable, he voluntarily surrenders the possession to save expulsion.[93] But the idea that the ouster must be by process of law has been long since abandoned.[94] Eliminating the old notion of an eviction, it may now be taken to mean[95] this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises;[96] and the term is now popularly applied to every class of expulsion or amotion.[97] See COVENANTS; LANDLORD.

78. State *v.* McKenney, 18 Nev. 182, 200, 2 Pac. 171.

79. Potter *v.* Berthelet, 20 Fed. 240, 243; Johnson Dict. [*quoted* in Cox *v.* Island Min. Co., 65 N. Y. App. Div. 508, 515, 73 N. Y. Suppl. 69; Purdy *v.* People, 4 Hill (N. Y.) 384, 413].

80. Reg. *v.* Toronto R. Co., 2 Can. Cr. Cas. 471, 480.

81. Union Colliery Co. *v.* Reg., 4 Can. Cr. Cas. 400, 407.

82. Webster Int. Dict.

As used in will see WILLS.

83. Clark Thread Co. *v.* Armitage, 67 Fed. 896, 899.

84. Upton *v.* Greenlees, 17 C. B. 51, 64, 84 E. C. L. 51.

85. The word is derived from evinco, to overcome (Ferriss *v.* Harshea, Mart. & Y. (Tenn.) 48, 54, 17 Am. Dec. 782 [*citing* Jacob L. Dict.]); to evict, to dispossess by judicial course (Upton *v.* Greenlees, 17 C. B. 51, 64, 84 E. C. L. 51).

The word is "borrowed from the feudal law, and [is] . . . often misleading when adopted into our modern systems of conveyancing and of actions." Kramer *v.* Carter, 136 Mass. 504, 507.

Distinguished from condemnation by eminent domain, release, and surrender in Gluck *v.* Baltimore, 81 Md. 315, 324, 32 Atl. 515, 48 Am. St. Rep. 515 [*citing* Coke Litt. 337*b*; Taylor Landl. & Ten. §§ 381, 507].

86. Fritz *v.* Pusey, 31 Minn. 368, 370, 18 N. W. 94; Brass *v.* Vandecar, (Nebr. 1903) 96 N. W. 1035, 1036; Upton *v.* Greenlees, 17 C. B. 51, 64, 84 E. C. L. 51 [*cited* in Walker *v.* Tucker, 70 Ill. 527, 541; Hayner *v.* Smith, 63 Ill. 430, 435, 14 Am. Rep. 124; Edmison *v.* Lowry, 3 S. D. 77, 85, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275].

87. Properly, it applied only to realty. Black L. Dict.

88. Jacob L. Dict. [*quoted* in Moffat *v.* Strong, 9 Bosw. (N. Y.) 57, 72; Ferriss *v.* Harshea, Mart. & Y. (Tenn.) 48, 54, 17 Am. Dec. 782]. See also Clun's Case, 10 Coke 126*b*, 128*a*.

89. Thomas *v.* Stickle, 32 Iowa 71, 76.

90. Mitchell *v.* Warner, 5 Conn. 497, 521; Hamilton *v.* Cutts, 4 Mass. 349, 352, 3 Am. Dec. 222.

91. Mitchell *v.* Warner, 5 Conn. 497, 521.

92. Matteson *v.* Vaughn, 38 Mich. 373, 375. See also Birchhead *v.* Cummins, 33 N. J. L. 44, 45.

"Constructive eviction is caused by the inability of the purchaser to obtain possession by reason of the paramount title." Brass *v.* Vandecar, (Nebr. 1903) 96 N. W. 1035, 1036.

93. Reasoner *v.* Edmundson, 5 Ind. 393, 395.

94. Fritz *v.* Pusey, 31 Minn. 368, 370, 18 N. W. 94; Brass *v.* Vandecar, (Nebr. 1903) 96 N. W. 1035, 1036. See also Thomas *v.* Stickle, 32 Iowa 71, 76; Cowdrey *v.* Coit, 44 N. Y. 382, 392, 4 Am. Rep. 690.

95. As used at the present time, the word is extremely difficult to define with technical accuracy, since it is used to denote that which formerly it was not intended to express. Upton *v.* Greenlees, 17 C. B. 51, 64, 84 E. C. L. 51 [*cited* in Edmison *v.* Lowry, 3 S. D. 77, 85, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275].

96. Upton *v.* Greenlees, 17 C. B. 51, 64, 84 E. C. L. 51 [*quoted* in Rice *v.* Dudley, 65 Ala. 68, 71; Walker *v.* Tucker, 70 Ill. 527, 541; Hayner *v.* Smith, 63 Ill. 430, 435, 14 Am. St. Rep. 124; Royce *v.* Guggenheim, 106 Mass. 201, 203, 8 Am. Rep. 322; Miller *v.* McGuire, 18 R. I. 770, 772, 30 Atl. 966].

97. Upton *v.* Greenlees, 17 C. B. 51, 64, 84 E. C. L. 51 [*cited* in Barrett *v.* Boddie, 158 Ill. 479, 483, 42 N. E. 143, 49 Am. St. Rep. 172; Lynch *v.* Baldwin, 69 Ill. 210, 212; Hayner *v.* Smith, 63 Ill. 430, 435, 14 Am. Rep. 124].

EVIDENCE

By Charles F. Chamberlayne, Charles C. Moore, Wm. Lawrence Clark, A. S. H. Bristow, Hiram Thomas, and Joseph Walker Magrath *

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* The author and editor of particular sections are indicated in a foot-note at the beginning of each section. The entire article was revised and edited by Charles C. Moore and Wm. Lawrence Clark.

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Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS.
Causing Death, see DEATH.
Collection of Taxes, see TAXATION.
Collision, see COLLISION.
Communicating Disease to Animal, see ANIMALS.
Compensation For Property Taken For Public Use, see EMINENT DOMAIN.
Compensation of:
Agent, see PRINCIPAL AND AGENT.
Attorney, see ATTORNEY AND CLIENT.
Broker, see FACTORS AND BROKERS.
Factor, see FACTORS AND BROKERS.
Physician or Surgeon, see PHYSICIANS AND SURGEONS.
Seaman, see SEAMEN.
Servant or Employee, see MASTER AND SERVANT.
Conspiracy, see CONSPIRACY.
Contribution, see CONTRIBUTION.
Conversion, see TROVER AND CONVERSION.
Criminal Conversation, see HUSBAND AND WIFE.
Deceit, see FRAUD.
Delay in or Failure to Transmit Telegram, see TELEGRAPHS AND TELEPHONES.
Demurrage, see SHIPPING.
Discharge of Servant or Employee, see MASTER AND SERVANT.
Dividends, see CORPORATIONS.
Divorce, see DIVORCE.
Dower, see DOWER.
Ejection of Passenger, see CARRIERS.
Enticing or Harboring:
Apprentice, see APPRENTICES.
Child, see PARENT AND CHILD.
Servant, see MASTER AND SERVANT.
Wife or Husband, see HUSBAND AND WIFE.

For Matters Relating to — (*continued*)
Evidence in Action or Suit For — (*continued*)
Establishing of:
Boundary, see BOUNDARIES.
Drain, see DRAINS.
Lost Instrument, see LOST INSTRUMENTS; WILLS.
Mining Rights, see MINES AND MINERALS.
Right as Heir, see DESCENT AND DISTRIBUTION.
False Imprisonment, see FALSE IMPRISONMENT.
Fires Causing Injury, see FIRES; RAILROADS.
Foreclosure of:
Chattel Mortgage, see CHATTEL MORTGAGES.
Liens Generally, see LIENS, and cross-references thereunder.
Mechanic's Lien, see MECHANICS' LIENS.
Mortgage of Real Property, see MORTGAGES.
Fraud, see FRAUD, and cross-references thereunder.
Freight Charges, see CARRIERS; SHIPPING.
Illegal Sale of Liquor, see INTOXICATING LIQUORS.
Improvement, see EJECTMENT; IMPROVEMENTS, and cross-references thereunder.
Infringement of:
Copyright, see COPYRIGHT.
Patent, see PATENTS.
Trade-Mark or Trade-Name, see TRADE-MARKS AND TRADE-NAMES.
Injunction, see INJUNCTIONS, and cross-references thereunder.
Injuries to:
Property, see ANIMALS; ATTACHMENT; BAILMENTS; BOUNDARIES; CARRIERS; COLLISION; CONFUSION OF GOODS; CONSPIRACY; COPYRIGHT; DETINUE; DOWER; EASEMENTS; EJECTMENT; ELECTRICITY; EMINENT DOMAIN; EXECUTIONS; EXPLOSIVES; FIRES; FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT; LOGGING; MINES AND MINERALS; NEGLIGENCE; NUISANCES; PATENTS; PLEDGES; RAILROADS; REPLEVIN; SHIPPING; STREET RAILROADS; STREETS AND HIGHWAYS; TELEGRAPHS AND TELEPHONES; TORTS; TOWAGE; TRADE-MARKS AND TRADE-NAMES; TRESPASS; TROVER AND CONVERSION; WAREHOUSEMEN; WASTE; WATERS; WHARVES.
Reputation, see LIBEL AND SLANDER; MALICIOUS PROSECUTION.
The Person, see ANIMALS; ARREST; ASSAULT AND BATTERY; BRIDGES; CARRIERS; DEATH; DRUGGISTS; ELECTRICITY; EXPLOSIONS; FALSE IMPRISONMENT; LANDLORD AND TENANT; MASTER AND SERVANT; NUISANCES; PHYSICIANS AND SURGEONS; POISONS; RAILROADS; SEDUCTION; STREET RAILROADS.
Injury by or to:
Animal, see ANIMALS.
Waters or Watercourses, see WATERS.
Killing Animal, see ANIMALS.
Libel, see LIBEL AND SLANDER.
Malicious:
Interference With Contract, see TORTS.
Prosecution, see MALICIOUS PROSECUTION.
Money:
Lent, see MONEY LENT.
Paid, see MONEY PAID.
Received, see MONEY RECEIVED.
Negligence, see NEGLIGENCE, and cross-references thereunder.
Nuisance, see NUISANCES.

For Matters Relating to — (*continued*)
Evidence in Action or Suit For — (*continued*)
Obstruction of:
Easement, see EASEMENTS.
Street or Highway, see STREETS AND HIGHWAYS.
Waters and Watercourses, see WATERS.
Overflowing Land, see WATERS.
Partition, see PARTITION.
Price of:
Goods, see SALES.
Land, see VENDOR AND PURCHASER.
Quieting Title, see QUIETING TITLE.
Reformation of Instrument, see REFORMATION OF INSTRUMENTS.
Rent, see LANDLORD AND TENANT.
Salvage Services, see SALVAGE.
Seduction, see SEDUCTION.
Separate Maintenance, see HUSBAND AND WIFE.
Setting Aside Will, see WILLS.
Settlement of:
Account of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.
Partnership, see PARTNERSHIP.
Slander, see LIBEL AND SLANDER.
Specific Performance of Contract, see SPECIFIC PERFORMANCE.
Taking Property For Public Use, see EMINENT DOMAIN.
Taxes, see TAXATION.
Tort, see TORTS, and cross-references thereunder.
Towage, see TOWAGE.
Trespass:
By Animal, see ANIMALS.
Generally, see TRESPASS, and cross-references thereunder.
Use and Occupation, see USE AND OCCUPATION.
Wages, see MASTER AND SERVANT.
Waste, see WASTE.
Work and Labor, see WORK AND LABOR.
Wrongful Attachment or Execution, see ATTACHMENT; EXECUTION.
Evidence in Action or Suit of or on:
Account or Account Stated, see ACCOUNTS AND ACCOUNTING.
Assigned Claim, see ASSIGNMENTS.
Assumpsit, see ASSUMPSIT, ACTION OF; CONTRACTS, and cross-references thereunder.
Award, see ARBITRATION AND AWARD.
Bill or Note, see COMMERCIAL PAPER.
Bond, see BONDS, and cross-references thereunder.
Book-Account, see ACCOUNTS AND ACCOUNTING.
Case, see CASE, ACTION ON.
Contract, see CONTRACTS, and cross-references thereunder.
Covenant, see COVENANT, ACTION OF, and cross-references thereunder.
Debt, see DEBT, ACTION OF.
Deceit, see FRAUD.
Detinue, see DETINUE.
Ejectment, see EJECTMENT.
Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER.
Foreign Judgment, see JUDGMENTS.
Gambling Contract, see GAMING.
Guaranty, see GUARANTY.

For Matters Relating to — (*continued*)
Evidence in Action or Suit of or on — (*continued*)
Indemnity, see INDEMNITY.
Judgment, see JUDGMENTS.
Lease, see LANDLORD AND TENANT.
Policy of Insurance, see EMPLOYERS' LIABILITY INSURANCE; FIDELITY AND GUARANTY INSURANCE; and special insurance titles.
Quieting Title, see QUIETING TITLE.
Real Action, see REAL ACTIONS.
Recognizance, see RECOGNIZANCES.
Replevin, see REPLEVIN.
Subscription:
For Stock, see CORPORATIONS.
Generally, see SUBSCRIPTIONS.
Trespass:
In General, see ANIMALS; TRESPASS, and cross-references thereunder.
To Try Title, see TRESPASS TO TRY TITLE.
Trover, see TROVER AND CONVERSION.
Writ of Entry, see ENTRY, WRIT OF.
Evidence in Particular Proceedings:
Appellate Proceedings in:
Civil Cases, see APPEAL AND ERROR.
Criminal Cases, see CRIMINAL LAW.
Application For Admission to Bail, see BAIL.
Attachment, see ATTACHMENT.
Bankruptcy, see BANKRUPTCY.
Bastardy Proceedings, see BASTARDS
Bill of Review, see EQUITY.
Certiorari, see CERTIORARI.
Claim to Property Taken on:
Attachment, see ATTACHMENT.
Execution, see EXECUTION.
Condemnation Proceedings, see EMINENT DOMAIN.
Contempt Proceedings, see CONTEMPT.
Coroner's Inquest, see CORONERS.
Disbarment Proceedings, see ATTORNEY AND CLIENT.
Election Contests, see ELECTIONS.
Establishing Boundary, see BOUNDARIES.
Extradition Proceedings, see EXTRADITION.
For Alimony, see DIVORCE.
Garnishment, see GARNISHMENT.
Habeas Corpus Proceeding, see HABEAS CORPUS.
Insolvency Proceedings, see BANKRUPTCY; INSOLVENCY.
Mandamus, see MANDAMUS.
Motion, see MOTIONS, and cross-references thereunder.
Probate Proceedings, see WILLS.
Prohibition, see PROHIBITION.
Quo Warranto, see QUO WARRANTO.
Reference to:
Master in Chancery, see EQUITY.
Referee, see REFERENCES.
Supplementary Proceedings, see EXECUTIONS.
To Review or Set Aside Assessments:
For Public Improvement, see MUNICIPAL CORPORATIONS.
Of Taxes, see TAXATION.
Evidence Under Statute of Frauds, see FRAUDS, STATUTE OF.

For Matters Relating to — (*continued*)
Examination of:
Adverse Party, see DISCOVERY.
Witness, see WITNESSES.
Exception to Rulings on Evidence in:
Civil Cases, see APPEAL AND ERROR; TRIAL.
Criminal Cases, see CRIMINAL LAW.
Instructions as to Evidence in:
Civil Cases, see TRIAL.
Criminal Cases, see CRIMINAL LAW.
Motion to Strike Out Evidence in:
Civil Cases, see TRIAL.
Criminal Cases, see CRIMINAL LAW.
Newly-Discovered Evidence as Ground For:
Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES.
New Trial, see CRIMINAL LAW; NEW TRIAL.
Review, see EQUITY; REVIEW.
Setting Aside Award of Arbitrators, see ARBITRATION AND AWARD.
Objections to Evidence and Rulings Thereon in:
Civil Cases, see APPEAL AND ERROR; TRIAL.
Criminal Cases, see CRIMINAL LAW.
Offer of Proof in:
Civil Cases, see TRIAL.
Criminal Cases, see CRIMINAL LAW.
Order of Proof in:
Civil Cases, see TRIAL.
Criminal Cases, see CRIMINAL LAW.
Perpetuation of Testimony, see DEPOSITIONS.
Pleading and Proof in:
Civil Cases, see PLEADING; and particular civil titles.
Criminal Cases, see INDICTMENTS AND INFORMATIONS; and particular criminal titles.
Privileged Communications, see WITNESSES.
Questions of Fact For Jury in:
Civil Cases, see TRIAL; and particular civil titles.
Criminal Cases, see CRIMINAL LAW; and particular criminal titles.
Reception of Evidence in:
Civil Cases, see TRIAL.
Criminal Cases, see CRIMINAL LAW.
Review of Rulings on Evidence in:
Civil Cases, see APPEAL AND ERROR.
Criminal Cases, see CRIMINAL LAW.
Rules of Court as to Evidence, see COURTS.
State Laws as Affecting Evidence in Federal Courts, see COURTS.
Stipulations as to Evidence, see STIPULATIONS.
Testimony of Jurors on Motion For New Trial in:
Civil Cases, see NEW TRIAL.
Criminal Cases, see CRIMINAL LAW.
Variance Between Pleading and Proof in:
Civil Cases, see PLEADING; and particular civil titles.
Criminal Cases, see CRIMINAL LAW; and particular criminal titles.
View by Jury in:
Civil Cases Generally, see TRIAL.
Condemnation Proceedings, see EMINENT DOMAIN.
Criminal Cases, see CRIMINAL LAW.
Witness, see WITNESSES.

I. PRELIMINARY DEFINITIONS.*

A. Evidence — 1. In General. Evidence, broadly defined, is the means from which an inference may logically be drawn as to the existence of a fact. It is that which makes evident or plain.[1]

2. Judicial Evidence. Judicial evidence is that portion of evidence in general which under the rules of legal procedure is received by tribunals as tending to establish the existence of a fact involved in an issue submitted to judicial determination.[2]

3. Rule of Evidence. A "rule of evidence" may be defined to be the mode and manner of proving the competent facts and circumstances upon which a party relies to establish the fact in dispute in judicial procedure.[3]

4. Relevant Evidence. Evidence is "relevant" when it touches upon the

1. **Bentham's definition.**— "Any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact; a persuasion either affirmative or disaffirmative of its existence." 1 Bentham Rationale Jud. Ev. 17.

Best says: "The word 'evidence' signifies, in its original sense, the state of being evident; i. e., plain, apparent, or notorious. But by an almost peculiar inflection of our language, it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law-books, and will be used throughout this work. Evidence, thus understood, has been well defined,— any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." Best Ev. § 11 [*quoted* in State *v.* Ward, 61 Vt. 153, 185, 17 Atl. 483; Gordon *v.* Denison, 24 Ont. 576, 583].

Greenleaf's definition is: "All the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 1 Greenleaf Ev. c. 1, § 1 [*quoted* in Tift *v.* Jones, 77 Ga. 181, 190, 3 S. E. 399; State *v.* Thomas, 50 La. Ann. 148, 153, 23 So. 250; Auditor-Gen. *v.* Menominee County, 89 Mich. 552, 618, 51 N. W. 483; Glenn *v.* State, 64 Miss. 724, 726, 2 So. 109; Lapham *v.* Marshall, 51 Hun (N. Y.) 36, 41, 3 N. Y. Suppl. 601; Hill *v.* Watson, 10 S. C. 268, 274; Horbach *v.* State, 43 Tex. 242, 249].

"**Evidence is defined** to be that which makes a matter in dispute clear, evident." Holland *v.* Ingram, 6 Rich. (S. C.) 50, 52.

"Evidence" and "facts" are not synonymous terms, but they are sometimes so used. Gates *v.* Haw, 150 Ind. 370, 372, 50 N. E. 299.

Definitions as to degrees of proof and weight of evidence, as "*prima facie* evidence," "satisfactory evidence," "conclusive proof," "demonstration," "partial evidence," "preponderance of evidence," "proof beyond a reasonable doubt," etc. See *infra,* XVII.

2. **Best's definition** is: "A species of the genus 'evidence' and for the most part nothing more than natural evidence, restrained or modified by positive law." Best Ev. (Chamberlayne ed.) § 34.

Blackstone's definition is: "That which demonstrates, makes clear, or ascertains. . . . The truth of the very fact or point in issue, either on the one side or on the other." 3 Blackstone Comm.*367. This definition seems incomplete in not recognizing the existence of evidence as to facts which are merely relevant to the facts directly in issue.

Taylor's definition is: "All the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact the truth of which is submitted to judicial investigation." Taylor Ev. (Chamberlayne ed.) § 1.

Professor Thayer's definition is: "Any matter of fact which is furnished to a legal tribunal . . . otherwise than by reasoning or a reference to what is noticed without proof . . . as the basis of inference in ascertaining some other matter of fact." 3 Harv. L. Rev. 142, 147.

Wharton's definition is: "The reproduction, before the determining tribunal, of the admissions of parties, and of facts relevant to the issue." Wharton Ev. § 3.

Stephen says that the term "evidence" as used in his treatise means: "(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called oral evidence: (2) Documents produced for the inspection of the Court or judge; such documents are called documentary evidence." Stephen Dig. Ev. art. 1. This definition seems inaccurate in excluding any consideration of facts which the tribunal learns for itself; "real evidence," so called. See *infra,* XIII.

The California code of civil procedure declares that judicial evidence is: "The means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact." Cal. Code Civ. Proc. § 1823.

3. Lapham *v.* Marshall, 51 Hun (N. Y.) 36, 41, 3 N. Y. Suppl. 601.

* By Charles F. Chamberlayne. Revised and edited by Wm. Lawrence Clark.

issues which the parties have made by their pleadings, so as to assist in getting at the truth of the facts disputed.[4]

5. MATERIAL EVIDENCE. Evidence offered in a cause, or a question propounded, is "material" when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.[5]

6. COMPETENT EVIDENCE. By "competent" evidence is meant that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry.[6] The term has also been used and construed as synonymous with "admissible,"[7] with "relevant,"[8] and with "sufficient" or "adequate."[9]

7. DIRECT AND CIRCUMSTANTIAL EVIDENCE. Direct and circumstantial evidence differ merely in their logical relation to the fact in issue; evidence as to the existence of the fact is direct, while circumstantial evidence relates to the existence of facts which raise a logical inference as to the existence of the fact in issue.[10] The distinction is of little practical value, and has been abandoned by Stephen.[11]

8. POSITIVE AND NEGATIVE EVIDENCE. The term "positive" as applied to evidence has been held in many cases to mean direct as distinguished from circumstantial evidence,[12] but it is also and more accurately used to denote affirmative as distinguished from negative evidence.[13]

4. Platner *v.* Platner, 78 N. Y. 90, 95; Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 215, 41 N. Y. Suppl. 507. See *infra*, VII.

5. Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 215, 41 N. Y. Suppl. 507. See Morrissey *v.* Ingham, 111 Mass. 63.

Materiality of newly-discovered evidence for purpose of new trial or bill of review see CRIMINAL LAW, 12 Cyc. 738; NEW TRIAL; REVIEW.

6. Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 215, 41 N. Y. Suppl. 507 [*quoting* 1 Greenleaf Ev. § 2]; Chapman *v.* McAdams, 1 Lea (Tenn.) 500, 504; Shea *v.* Mabry, 1 Lea (Tenn.) 319, 333; Horbach *v.* State, 43 Tex. 242, 249.

Competency of witness see WITNESSES.

7. State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241.

8. Ryan *v.* Bristol, 63 Conn. 26, 36, 27 Atl. 309. And see Ripple *v.* Ripple, 1 Rawle (Pa.) 386, 389. But see Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 215, 41 N. Y. Suppl. 507; Hart *v.* Newland, 10 N. C. 122, 123.

"Relevant" evidence see *supra*, I, A, 4; *infra*, VII.

9. Niles *v.* Sprague, 13 Iowa 198, 204.

Weight and sufficiency of evidence see *infra*, XVII.

10. *Alabama.*— West *v.* State, 76 Ala. 98.

Dakota.— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Maine.— Reed's Case, 1 Centr. L. J. 219.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 310, 52 Am. Dec. 711.

Mississippi.— McCann *v.* State, 13 Sm. & M. 471.

Missouri.— State *v.* Avery, 113 Mo. 475, 21 S. W. 193.

Nebraska.— Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213.

Nevada.—State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280.

New York.— Pease *v.* Smith, 61 N. Y. 477, 484; People *v.* Kennedy, 32 N. Y. 141, 144; People *v.* Videto, 1 Park. Cr. 603.

Pennsylvania.— Bash *v.* Bash, 9 Pa. St. 260, 262, distinguishing between "direct" evidence and "clear and satisfactory" evidence.

Tennessee.— Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

United States.— U. S. *v.* Cole, 25 Fed. Cas. No. 14,832, 5 McLean 513, 610; U. S. *v.* Gibert, 26 Fed. Cas. No. 15,204, 2 Sumn. 19.

Weight and sufficiency of direct and circumstantial evidence see *infra*, XVII; and CRIMINAL LAW, 12 Cyc. 487.

11. Stephen Dig. Ev. art. 1.

When distinction is valid.— Evidence of facts tending to prove circumstantially the existence of a fact is not cumulative to evidence which tends to establish the same fact directly. Vardeman *v.* Byrne, 7 How. (Miss.) 365.

12. Cooper *v.* Holmes, 71 Md. 20, 28, 17 Atl. 711; Pease *v.* Smith, 61 N. Y. 477, 484 [*citing* Bouvier L. Dict.] (holding that the court properly denied a request to charge that a certain fact must be established by "clear and positive evidence," since it might be proved by circumstantial evidence). See also Davis *v.* Curry, 2 Bibb (Ky.) 238, 239 (distinguishing between positive and presumptive proof); Niles *v.* Rhodes, 7 Mich. 374; Schrack *v.* McKnight, 84 Pa. St. 26, 30 (distinguishing between "positive" and "satisfactory" evidence); Bash *v.* Bash, 9 Pa. St. 260, 262 (distinguishing between "positive" evidence and "clear and satisfactory" evidence).

13. Falkner *v.* Behr, 75 Ga. 671, 674, holding that an instruction requiring "positive" proof of negligence meant "affirmative" proof and did not exclude circumstantial evidence.

"The distinction between positive and negative testimony may be illustrated thus: It

B. Testimony. While "testimony" is frequently employed as equivalent, in legal effect, to "evidence,"[14] it is more accurately used to designate a species of it, viz., that which comes to the tribunal through living witnesses under oath.[15]

C. Proof. Judicial "evidence" stands to "proof," when the latter term is properly employed, in the relation of means to an end. Proof is the result; evidence, the means for attaining it.[16] "Evidence" and "proof" are often used as synonymous terms,[17] and this has caused much of the confusion attending the use of the phrase "burden of proof."[18]

II. JUDICIAL NOTICE.*

A. Definition. Judicial notice or knowledge may be defined as the cognizance of certain facts which judges and jurors[19] may, under the rules of legal procedure or otherwise, properly take and act upon without proof because they already know them.[20] In the case of judges the term "fact" in this definition includes

is positive to say that a thing did or did not happen; it is negative to say that a witness did not see or know of an event's having transpired." McConnell *v.* State, 67 Ga. 633.

Weight and sufficiency of positive and negative testimony see *infra*, XVII.

14. People *v.* Heickler, 137 Ill. 580, 582, 27 N. E. 602; Jones *v.* Gregory, 48 Ill. App. 228, 230; Harris *v.* Tomlinson, 130 Ind. 426, 427, 30 N. E. 214; Woolworth *v.* Parker, 57 Nebr. 417, 423, 77 N. W. 1090; People *v.* Armour, 18 N. Y. App. Div. 584, 586, 46 N. Y. Suppl. 317. And see Mann *v.* Higgins, 83 Cal. 66, 69, 23 Pac. 206; Noyes *v.* Pugin, 2 Wash. 653, 661, 27 Pac. 548. See also TESTIMONY.

15. Woods *v.* State, 134 Ind. 35, 41, 33 N. E. 901; Kleyla *v.* State, 112 Ind. 146, 147, 13 N. E. 255; Gazette Printing Co. *v.* Morss, 60 Ind. 153, 157; Harvey *v.* Smith, 17 Ind. 272, 280; Lindley *v.* Dakin, 13 Ind. 388; Carroll *v.* Bancker, 43 La. Ann. 1078, 1085, 1194, 10 So. 187; Woolworth *v.* Parker, 57 Nebr. 417, 422, 77 N. W. 1090; Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 806, 77 N. W. 346; Nash *v.* Hoxie, 59 Wis. 384, 388, 18 N. W. 408. And see People *v.* Kenyon, 5 Park. Cr. (N. Y.) 254, 288. See also TESTIMONY.

16. Best Ev. § 10. And see the following cases:

California.— Schloss *v.* His Creditors, 31 Cal. 201, 203.

Georgia.— Tift *v.* Jones, 77 Ga. 181, 190, 3 S. E. 399.

Iowa.— Perry *v.* Dubuque, etc., R. Co., 36 Iowa 102, 106.

Kentucky.— Miles *v.* Edelen, 1 Duv. 270, 271, where Robertson, J., said: "To establish a controverted fact, proof is the end; evidence only the means. Proof establishes the truth — circumstantial evidence only leads toward it; and any pertinent and legitimate facts, conducing to the proof of a litigated fact, are evidence of the fact, weaker or stronger, according to the entire character and complexion of it, or as opposed or unopposed by conflicting evidence."

Michigan.— Jastrzenbski *v.* Marxhausen, 120 Mich. 677, 683, 79 N. W. 935.

New York.— Buffalo, etc., R. Co. *v.* Reynolds, 6 How. Pr. 96, 97, 98.

South Carolina.— Hill *v.* Watson, 10 S. C. 268, 273.

"**Proof,** in civil process, is a sufficient reason for the truth of the juridical proposition by which a party seeks either to maintain his own claim or to defeat the claim of another." Wharton Ev. § 1 [*quoted* in Powell *v.* State, 101 Ga. 9, 21, 29 S. E. 309, 65 Am. St. Rep. 277]. "Proof is the effect of evidence, the establishment of a fact by evidence." Cal. Code Civ. Proc. § 1824 [*quoted* in Powell *v.* State, 101 Ga. 9, 21, 29 S. E. 309, 65 Am. St. Rep. 277]. See also *infra*, XVII; and PROOF.

"**Juridical proof**" is defined to be "a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner." Powell *v.* State, 101 Ga. 9, 21, 29 S. E. 309, 65 Am. St. Rep. 277 [*citing* Ayliffe, par. 442].

The words, "evidence without further proof," in a statute making a certain certificate evidence of a fact without further proof thereof, mean that the facts certified shall be proof *per se*. Albany County Sav. Bank *v.* McCarty, 149 N. Y. 71, 83, 43 N. E. 427. See also *infra*, XVII.

17. Hill *v.* Watson, 10 S. C. 268, 273; O'Reilly *v.* Guardian Mut. L. Ins. Co., 60 N. Y. 169, 172, 19 Am. Rep. 151.

18. See *infra*, III, A.

19. Knowledge of jurors see *infra*, II, B, 6.

20. Other definitions are: "That cognizance of matters of common knowledge, such as historical, geographical, and meteorological facts, the general usages of business, etc., which a judge or court may take and act upon without requiring evidence to be adduced." Century Dict.

"The cognizance taken by a court of matters of fact, without the production of evidence thereof. The matters of fact of which judicial notice will be taken are, in general notoriety, immemorial usage, or uniform national occurrence." Shumaker & L. Cyc. L. Dict.

"The act by which a court, in conducting a trial, or framing its decision, will, of its own motion, and without the production of

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

certain constitutional and statutory laws and rules of common law, which will be considered in subsequent sections.[21]

B. Matters of Fact — 1. In General. Judicial knowledge is not reached by the use of evidence; it is a matter pertaining to the judicial function and its existence, like that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the point covered.[22] It is necessary, however, that the community throughout which the fact to be judicially known is supposed to be commonly known should be one whose extent bears some reasonable relation to the territorial jurisdiction of the court itself.[23] It is the duty of the court to charge

evidence, recognize the existence and truth of certain facts, having a bearing on the controversy at bar, and which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e. g., the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc." Black L. Dict.

"Facts as to the existence or truth of which no evidence need be adduced." Rapalje & L. L. Dict.

"That which is judicially known need not be proven." State *v.* Downs, 148 Ind. 324, 328, 47 N. E. 670. And see *infra*, II, B, 1.

"Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts it is therefore superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary." State *v.* Main, 69 Conn. 123, 136, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

21. See *infra*, II, C.

22. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

Connecticut.— State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

Illinois.— Secrist *v.* Petty, 109 Ill. 188; Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538.

Indiana.— State *v.* Downs, 148 Ind. 324, 47 N. E. 670.

Nebraska.— Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431; State *v.* Scott, 59 Nebr. 499, 81 N. W. 305.

United States.— King *v.* Gallun, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870; Brown *v.* Piper, 91 U. S. 37, 32 L. ed. 200; U. S. *v.* American Gold Coin, 24 Fed. Cas. No. 14,439, 1 Woolw. 217.

England.— Crawcour *v.* Salter, 18 Ch. D. 30, 51 L. J. Ch. 495, 45 L. T. Rep. N. S. 62, 30 Wkly. Rep. 21; *Ex p.* Powell, 1 Ch. D. 501, 45 L. J. Bankr. 100, 34 L. T. Rep. N. S. 224, 24 Wkly. Rep. 378; Lumley *v.* Gye, 2 E. & B. 216, 267, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216, where Coleridge, J., said: "Judges are not necessarily to be ignorant in Court of what everyone else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times. We find in the Year Books the Judges reasoning about the ability of knights, esquires, and gentlemen to maintain themselves without wages: distinguishing between private chaplains and parochial chaplains from the nature of their employments: and in later days we have ventured to take judicial cognizance of the moral qualities of Robinson Crusoe's 'man Friday' (Forbes *v.* King, 1 Dowl. P. C. 672), and Esop's 'frozen snake' (Hoare *v.* Silverlock, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624). We may certainly therefore take upon ourselves to pronounce that a singer at operas, or a dramatic *artiste* to the owner and manager of Her Majesty's theatre, is not a *messor, falcator aut alius operarius vel serviens,* within either the letter or the spirit of the Statute of Labourers. And, if we were to hold to the contrary, as to the profession of Garrick and Siddons, we could not refuse to hold the same with regard to the sister arts of Painting, Sculpture, and Architecture."

23. **Banks.**— The court cannot take notice of the presence of banks in a given town. Bartholomew *v.* Everett First Nat. Bank, 18 Wash. 683, 52 Pac. 239.

Irrigation.— Every person in the locality immediately affected may know that a particular tract of land must be irrigated in order to produce crops, and yet the fact be not so generally known through the entire community for which the court is sitting as to authorize or require the judge to know it judicially. Slattery *v.* Harley, 58 Nebr. 575, 79 N. W. 151; McGhee Irr. Ditch Co. *v.* Hudson, 85 Tex. 587, 22 S. W. 398. But a court may judicially notice the more general fact that light sage-brush soil will not produce agricultural crops without irrigation. Prescott Irr. Co. *v.* Flathers, 20 Wash. 454, 55 Pac. 635.

Mail-service.— Every member of the community may know the nature of the local mail service but a state court will not know it judicially. Ferrier *v.* Storer, 63 Iowa 484, 19 N. W. 288, 50 Am. Rep. 752. Yet where a community, although in a sense local, is so large territorially or commercially that the salient facts affecting it may be regarded as of general interest, courts will judicially know them; and a letter mailed in New York city at six-fifty P. M. on May 29 the court knows will be delivered in the due course of mails on the morning of May 30. Morel *v.* Stearns, 37 Misc. (N. Y.) 486, 75 N. Y. Suppl. 1082.

Railroad fences.— The court will not take judicial notice of the fact that a railroad was or was not fenced at a certain point. Texas Cent. R. Co. *v.* Childress, 64 Tex. 346.

the jury in the trial of a cause as to the existence of facts of which judicial cognizance is taken.[24]

2. Facts Once Judicially Known. Facts notorious in a community because connected with protracted or celebrated litigation naturally come within the knowledge of judges and are accepted as true without proof.[25] A judge will assume judicial knowledge of facts which he has learned through former litigation in the same jurisdiction,[26] or at an earlier hearing in the same case.[27] And he may take judicial cognizance of what he has himself done as judge,[28] as for example that he has in his official capacity signed a certain paper.[29]

3. Personal Knowledge of Judge.[30] Early conceptions of the scope of judicial knowledge excluded the personal knowledge of the judge,[31] but in later jurisprudence facts generally known in the legal profession of which he is a member, a judge may judicially know, although such knowledge be largely confined to lawyers.[32] Modern cases permit a judge who knows a rule of common or statutory law in force in a sister state[33] or foreign country[34] to take judicial cognizance of the same. Judicial knowledge, however, is limited to what a judge may properly know in his judicial capacity, and he is not authorized to make his individual knowledge of a fact not generally or professionally known the basis of his action.[35]

4. Agreed Facts. It has been declared doubtful whether a case can properly

Local facts.— A court, especially one of general jurisdiction, cannot notice judicially the state of the weather, condition of the roads, or the price of particular articles at a particular time and place. McCormick Harvesting Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499. But the New York supreme court sitting in New York city took judicial notice of a general depression in the value of real estate in that city. Walker *v.* Walker, 3 Abb. N. Cas. (N. Y.) 12.

24. Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169; Cash *v.* State, 10 Humphr. (Tenn.) 111. See Criminal Law, 12 Cyc. 599; and, generally, Trial.

25. Davies *v.* Hunt, 37 Ark. 574.

26. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Graham *v.* Williams, 21 La. Ann. 594; Hatch *v.* Dunn, 11 Tex. 708.

Illustrations.—Thus a judge, where the fact has been ascertained in previous cases, will take judicial notice of a foreign statute (Graham *v.* Williams, 21 La. Ann. 594; U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353), a colonization contract (Hatch *v.* Dunn, 11 Tex. 708), the procedure in taking up unoccupied lands (U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353), or the mendacity of Chinese witnesses (People *v.* Lon Yeck, 123 Cal. 246, 55 Pac. 984). *Compare infra*, II, B, 16, a, (I).

Where a usage has been proved in a previous case, so as to leave no doubt as to its existence, the court will take judicial notice of the same. Consequa *v.* Willings, 7 Fed. Cas. No. 3,128, Pet. C. C. 225.

Judicial notice of customs and usages see *infra*, II, B, 19.

27. Robertson *v.* Meyers, 7 U. C. Q. B. 423.

28. Sechrist *v.* Petty, 109 Ill. 188; Robertson *v.* Meyers, 7 U. C. Q. B. 423.

29. Sechrist *v.* Petty, 109 Ill. 188.

30. See also *supra*, II, B, 2.

31. Marriot's Case, 1 And. 202, 1 Leon. 159, Moore 228.

32. Thus a judge may know the relative worth of unofficial legal publications (People *v.* McQuaid, 85 Mich. 123, 48 N. W. 161), or that a certain lawyer has ceased to practice (Day *v.* Decousse, 12 L. C. Jur. 265). But a judge is not at liberty to use as judicial knowledge his personal knowledge that certain attorney's fees charged by an administrator in his probate account are higher than customary for like services against the uncontradicted evidence that such fees are reasonable. Matter of Van Nostrand, 3 Misc. (N. Y.) 396, 24 N. Y. Suppl. 850.

33. Herschfeld *v.* Dexel, 12 Ga. 582; Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353; State *v.* Rood, 12 Vt. 396. *Compare infra*, II, C, 1, c; II, C, 2, b.

34. Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286. *Compare infra*, II, C, 1, c; II, C, 2, c.

35. *Illinois.*— Dines *v.* People, 33 Ill. App. 565.

Indiana.— Stephenson *v.* State, 28 Ind. 272.

Mississippi.— Smith *v.* Moore, 3 How. 40.

Nebraska.— State *v.* Chase County School Dist. No. 24, 38 Nebr. 237, 56 N. W. 791.

New Hampshire.— Brown *v.* Lincoln, 47 N. H. 468.

New York.— Purdy *v.* Erie R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 893; Wheeler *v.* Webster, 1 E. D. Smith 1.

United States.— Griffing *v.* Gibb, 2 Black 519, 17 L. ed. 353.

Canada.— Bank of British North America *v.* Sherwood, 6 U. C. Q. B. 213.

See 20 Cent. Dig. tit. "Evidence," § 3.

Applications of the rule.— Thus a judge cannot judicially know a person's age from inspection (Stephenson *v.* State, 28 Ind. 272), nor act on his personal knowledge that facts are not truly stated in a pleading (State *v.* Chase County School Dist. No. 24, 38 Nebr. 237, 56 N. W. 791; Griffing *v.* Gibb, 2 Black (U. S.) 519, 17 L. ed. 353), or that ground exists for abating a writ (Bank of British North America *v.* Sherwood, 6 U. C. Q. B.

be determined on an agreed statement of facts, unless the facts agreed conform to what is judicially known to be the truth;[36] and on the other hand that an appellate court will abstain from exercising judicial knowledge in such a case.[37]

5. JUDICIAL KNOWLEDGE AGAINST EVIDENCE. Uncontroverted evidence produced to establish a fact does not preclude the court from finding the fact to be otherwise by resorting to judicial knowledge.[38]

6. KNOWLEDGE OF JURORS. Jurors may act upon matters of common observation within their general knowledge without any testimony on those matters;[39] but contrary to the ancient doctrine[40] a juror cannot give a verdict founded on fact in his own private knowledge.[41]

7. MATTERS OF COMMON KNOWLEDGE — a. In General. Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence;[42] but not of facts merely because they may be ascertained by reference to dictionaries, ency-

213). This rule applies even in respect of facts which the court gathers from an inspection of its own records, as for example that an account declared on is suitable for a reference as involving the consideration of a long account. Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 893. A judge of probate cannot legally refuse administration to the next of kin of a deceased because he personally knows that such next of kin is afflicted with *mania a potu*. Smith *v.* Moore, 3 How. (Miss.) 40. See also Wheeler *v.* Webster, 1 E. D. Smith (N. Y.) 1. The same strictness, however, is not observed as to proof of collateral matters and those of discretion. Thus it has been held that a judge who knows the handwriting of a signature may admit it as *prima facie* genuine. Brown *v.* Lincoln, 47 N. H. 468.

36. Russ *v.* Boston, 157 Mass. 60, 31 N. E. 708.

37. North Hempstead *v.* Gregory, 53 N. Y. App. Div. 350, 65 N. Y. Suppl. 867, where the court declined to inject into the case by the exercise of judicial knowledge a fact contrary to the facts agreed in the court below, where the matter was first urged in the appellate court. See also Walton *v.* Stafford, 14 N. Y. App. Div. 310, 43 N. Y. Suppl. 1049.

38. Lidwinofsky's Petition, 7 Pa. Dist. 188.

39. Com. *v.* Peckham, 2 Gray (Mass.) 514 (holding that jurors may properly determine without testimony that gin is an intoxicating liquor); Murdock *v.* Sumner, 22 Pick. (Mass.) 156; Spengler *v.* Williams, 67 Miss. 1, 6 So. 613 (holding, in an action for the death of a child seven years of age from the falling of lumber carelessly piled in a street frequented by children, that it was not necessary to prove that the lumber pile was calculated to attract children, and that defendant knew it, as the habits and curiosity of children in this respect are matters of common knowledge).

40. 3 Blackstone Comm. 374 [*cited* in Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529, 535].

41. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529, holding that a juror should not be influenced by his knowledge of the infamous character of a witness not shown by testimony or otherwise appearing in the case. See also Parks *v.* Ross, 11 How. (U. S.) 362, 13 L. ed. 730. And see CRIMINAL LAW, 12 Cyc. 644; TRIAL.

42. *Alabama.*— Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747.

California.— Baker *v.* Hope, 49 Cal. 598, that a fence pole is a heavy club.

Connecticut.— Wordin's Appeal, 71 Conn. 316, 42 Atl. 659, 71 Am. St. Rep. 219.

District of Columbia.— Dye *v.* Virginia Midland R. Co., 20 D. C. 63.

Illinois.— Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698 (use of soft coal in Chicago factories); Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538.

Indiana.— Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.

Kentucky.— Burns *v.* Ingersoll, 6 Ky. L. Rep. 742.

Louisiana.— Youree *v.* Vicksburg, etc., R. Co., 110 La. 791, 34 So. 779.

Maine.— White *v.* Phœnix Ins. Co., 83 Me. 279, 22 Atl. 167, holding that it is common knowledge, of which courts take judicial notice, that vacant buildings as a class are more exposed to damage from fire than they would be if occupied.

Massachusetts.— Com. *v.* Pear, 183 Mass. 242, 66 N. E. 719 (of what vaccination consists); Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228.

Michigan.— Pfeiffer *v.* Board of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536 (use of bible in public schools); Gilbert *v.* Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274.

Minnesota.— Betcher *v.* Capital F. Ins. Co., 78 Minn. 240, 80 N. W. 971, holding that the courts will take judicial notice of the fact that the storage of explosive fireworks in a building increases the risk of the loss of the insured property by fire.

Mississippi.— Spengler *v.* Williams, 67 Miss. 1, 6 So. 613.

Missouri.— State *v.* Hayes, 78 Mo. 307; State *v.* Blands, 101 Mo. App. 618, 74 S. W. 3, that a glass of whisky sold at the price of ten cents contains less than three gallons.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716 (that standard of valuation for purpose of taxation is below actual cash

clopedias, or other publications;[43] nor of facts which the court cannot know without resort to expert testimony or other proof.[44]

b. Matters of Religion. The court will judicially notice the salient facts concerning the bible and the beliefs of various religious denominations.[45] But as to the system termed "christian science" a court is totally ignorant, unless instructed by evidence.[46] Nor can the court take judicial notice of the laws of the Roman catholic church,[47] or of its nature and powers as to its civil rights and duties,[48] or of the authority of vestrymen of the protestant episcopal church over the affairs of their parish.[49]

value); Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431 (in construing statute).

New Jersey.— Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. 746.

New York.— Howard *v.* Moot, 64 N. Y. 262 [*affirming* 2 Hun 475, 5 Thomps. & C. 89]; People *v.* Snyder, 41 N. Y. 397 [*affirming* 51 Barb. 589]; People *v.* Maxwell, 87 N. Y. App. Div. 391, 84 N. Y. Suppl. 947 (that methods of instruction have changed in the last twenty-five years); North Hempstead *v.* Gregory, 53 N. Y. App. Div. 350, 65 N. Y. Suppl. 867; Lenahan *v.* People, 3 Hun 164, 5 Thomps. & C. 265. See also Walker *v.* Walker, 3 Abb. N. Cas. 12, general depression in market value of real estate.

Oregon.— Walsh *v.* Oregon R., etc., Co., 10 Oreg. 250.

Texas.— Smith *v.* Townsend, Dall. 569.

Virginia.— Thomas *v.* Com., 90 Va. 92, 17 S. E. 788.

Washington.— Mullen *v.* Sackett, 14 Wash. 100, 44 Pac. 136 (notice taken that all assessed taxes are not collected until years after they are assessed); Bowman *v.* Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870.

United States.— Minnesota *v.* Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455; King *v.* Gallun, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870; Fowle *v.* Park, 48 Fed. 789; Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570.

England.— Henry *v.* Cole, 2 Ld. Raym. 811, 7 Mod. 103.

See 20 Cent. Dig. tit. "Evidence," § 4 *et seq.*

The commercial importance of large cities of a state, as of Atlanta and Savannah in Georgia, is judicially known to the courts of the state. Wight *v.* Wolff, 112 Ga. 169, 37 S. E. 395.

43. Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444.

44. *Illinois.*— Tunnison *v.* Field, 21 Ill. 108 (that plaintiff has fully performed his part of a contract); Chicago City R. Co. *v.* Smith, 54 Ill. App. 415 (management of horses).

Indiana.— Enders *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056, that a partition fence which will restrain sheep will also restrain hogs.

Iowa.— McCormick Harvesting Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499 (condition of weather and roads and price of mowers at time a note was given); Ferrier *v.* Storer, 63 Iowa 484, 19 N. W. 288, 50 Am. Rep. 752 (whether certain places are post-offices of the writers and the character of mail communication between them).

Louisiana.— Youree *v.* Vicksburg, etc., R. Co., 110 La. 791, 34 So. 779, space required for repair of telegraph line along railroad.

Michigan.— Kotila *v.* Houghton County St. R. Co., (1903) 96 N. W. 437, distance within which an electric car can be stopped or its speed so checked as to avoid injury.

New York.— Baxter *v.* McDonnell, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670 [*reversing* 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765] (nature and powers of Roman catholic church); Porter *v.* Waring, 2 Abb. N. Cas. 230 (what is required for a sidewalk).

Texas.— Texas Cent. R. Co. *v.* Childress, 64 Tex. 346.

Washington.— Hill Estate Co. *v.* Whittlesey, 21 Wash. 142, 57 Pac. 345, authority of vestrymen of protestant episcopal church.

Wisconsin.— Katzer *v.* Milwaukee, (1899) 79 N. W. 745, laws of catholic church.

United States.— Minnesota *v.* Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455, that it is impossible to tell by inspection of fresh beef, etc., whether the animals were diseased when slaughtered.

See 20 Cent. Dig. tit. "Evidence," § 4 *et seq.*

45. *Delaware.*— State *v.* Chandler, 2 Harr. 553.

New York.— People *v.* Ruggles, 8 Johns. 290, 5 Am. Dec. 335.

Pennsylvania.— Updegraph *v.* Com., 11 Serg. & R. 394.

Wisconsin.— State *v.* Edgerton School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

United States.— Vidal *v.* Girard, 2 How. 127, 11 L. ed. 205.

Canada.— Pringle *v.* Napanee, 14 Can. L. J. 219.

Custom as to use of bible in public schools see *infra*, II, B, 19.

History of religious organizations see *infra*, II, B, 14, a.

46. Evans *v.* State, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129.

47. Katzer *v.* Milwaukee, (Wis. 1899) 79 N. W. 745.

48. Baxter *v.* McDonnell, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670 [*reversing* 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765].

49. Hill Estate Co. *v.* Whittlesey, 21 Wash. 142, 57 Pac. 345. And see Beckwith *v.* McBride, 70 Ga. 642.

c. Established Standards[50] — (I) *Of Reasonable Care.* The court will assume to know the standard which the community sets up as to reasonable care.[51] Ordinarily, however, the question of reasonable care under particular circumstances is a question of fact for the jury on the evidence.[52]

(II) *Of Prudent Business Methods.* Judicial notice will also be taken of the community's standard of prudent business methods.[53]

d. Literary Matters. Courts will take the same knowledge as the community at large of matters of literature embraced in average education or reading.[54]

e. Human Conduct. What incentives commonly operate upon human conduct are part of the general information of intelligent persons and may be judicially noticed by the courts.[55]

8. Course and Laws of Nature. Judicial knowledge is taken of the existence of facts which must have happened according to the constant course of nature,[56]

Customs and usages of religious sects or churches see also *infra*, II, B, 19.

50. Weights, measures, and values see *infra*, II, B, 12.

51. Griffith *v.* Denver Consol. Tramway Co., 14 Colo. App. 504, 61 Pac. 46, 48 (where it is said: "Whatever is matter of common knowledge and experience, courts are bound to recognize; and where, in the light of such knowledge and experience, an act is obviously imprudent, the law determines its effect, and the court declares the law"); Jones *v.* Flint, etc., R. Co., 127 Mich. 198, 86 N. W. 838; Gilbert *v.* Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (judicial notice taken that a box freight car standing at a highway crossing is not *per se* an object calculated to frighten horses); Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274, 292 (where it is said: "The laws of nature and of the human mind, at least such of them as are obvious to the common apprehension of mankind, as well as the more obvious dictates of common sense and principles of human action — which are assumed as truths in any process of reasoning by the mass of sane minds — constitute a part of the laws of the land, and may, and must, be assumed by the court, without being found by a jury; indeed, the finding of a jury, which should clearly disregard them, should itself be disregarded by the court. In other words, courts are bound judicially to know and apply such laws and principles as part of the law of the land. They are bound to know that there is a difference between reasonable care and no care at all, or utter negligence, and that a prudent man, in the presence of danger, naturally and ordinarily makes some use of his faculties to ascertain and avoid it; and if, upon any occasion, he does not, when he has good reason to apprehend danger, he does not exercise the ordinary or reasonable care demanded by the circumstances"); Davey *v.* London, etc., R. Co., 12 Q. B. D. 70, 48 J. P. 279, 53 L. J. Q. B. 58, 49 L. T. Rep. N. S. 739 [*affirming* 11 Q. B. D. 213]. See also White *v.* Phœnix Ins. Co., 83 Me. 279, 22 Atl. 167; Betcher *v.* Capital F. Ins. Co., 78 Minn. 240, 80 N. W. 971. The court will take judicial notice that it is the duty of a telegraph company to exercise care to prevent its wires from obstructing a public road. Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500.

52. Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829. And see Chicago, etc., R. Co. *v.* Smith, 54 Ill. App. 415, holding that there was no judicial knowledge as to the management of horses for the purpose of determining the question of negligence of driver. See also Negligence and other special titles.

53. Reg. *v.* Aspinall, 2 Q. B. D. 48, 46 L. J. M. C. 145, 36 L. T. Rep. N. S. 297, 25 Wkly. Rep. 283, holding that the court would take judicial notice that shares in limited companies are a vendible commodity, and that failure of such a company to comply with the rules and regulations of the stock exchange, so as to entitle the shares of the company to be quoted in the official list of the exchange, etc., will depreciate the price of the shares.

Reasonable time.— What length of time it is reasonable to allow for the performance of an act may be a matter of judicial knowledge. Upington *v.* Corrigan, 69 Hun (N. Y.) 320, 23 N. Y. Suppl. 451, where judicial notice was taken that twenty-nine years was an unreasonable time within which to commence to build a church.

Custom of insuring property.— The court will take judicial notice of the fact that an ordinarily prudent man, having in his possession a large manufacturing establishment, keeps the same insured against loss by fire to an amount well approaching its real value. Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

54. Hoare *v.* Silverlock, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624.

55. Spengler *v.* Williams, 67 Miss. 1, 4, 6 So. 613, where Cooper, J., said: "All persons are supposed to know the curiosity of children, and their disposition to play around and about objects of unusual appearance: no court could permit a verdict to stand which rested upon the denial of such instincts in children, or excused the negligence of the defendant because of the want of specific evidence that he possessed that common knowledge which all men are assumed to have."

56. Rex *v.* Luffe, 8 East 193, 9 Rev. Rep. 406.

such as the alternation of day and night, the return of the respective seasons with the concomitants of heat or cold, and the varying changes in animal and vegetable life.[57] The natural law which enables frost to arrest decay in animal or vegetable tissues will be noticed by the courts.[58] But variations of climate in particular places at particular times cannot be judicially known.[59]

9. Qualities and Properties of Matter. It is judicially known that natural gas is explosive,[60] and that dynamite is intrinsically dangerous,[61] but not that the same property under exceptional conditions characterizes substances normally harmless.[62] Unless controlled by statute,[63] courts will judicially notice the inflammable quality of substances like coal oil,[64] but not whether other substances not usually so regarded are inflammable within the meaning of a certain phrase.[65] A court knows that certain forms of matter are opaque;[66] the usual effect of time and use on asphalt

Rule qualified.— The court will decline to know judicially the operation of such laws of nature as may be neutralized or offset by others and consequently are variable in their action; and it will not take such notice where the existence of a minor law of nature or its operation in a particular instance is disputed. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; Chicago, etc., R. Co. *v.* Champion, (Ind. Sup. 1892) 32 N. E. 874.

57. *Alabama.*— Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Loeb *v.* Richardson, 74 Ala. 311.

Arkansas.— Person *v.* Wright, 35 Ark. 169; Tomlinson *v.* Greenfield, 31 Ark. 557; Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374.

California.— Mahoney *v.* Aurrecochea, 51 Cal. 429; People *v.* Smith, 1 Cal. 9.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1; Patterson *v.* McCausland, 3 Bland 69.

Missouri.— Garth *v.* Caldwell, 72 Mo. 622.

Texas.— Barr *v.* Cardiff, (Civ. App. 1903) 75 S. W. 341.

United States.— Lyon *v.* Marine, 55 Fed. 964, 5 C. C. A. 359.

See 20 Cent. Dig. tit. "Evidence," § 5.

Rising and setting of sun and moon see *infra*, II, B, 11.

Course of agriculture.— Courts take judicial notice within their territorial jurisdiction of the time for planting crops (Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Loeb *v.* Richardson, 74 Ala. 311; Person *v.* Wright, 35 Ark. 169; Tomlinson *v.* Greenfield, 31 Ark. 557; Abshire *v.* Mather, 27 Ind. 381), of the season at which particular crops mature (Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Mahoney *v.* Aurrecochea, 51 Cal. 429; People *v.* Smith, 1 Cal. 9; Garth *v.* Caldwell, 72 Mo. 622; Plano Mfg. Co. *v.* Cunningham, 73 Mo. App. 376), that rice cannot be grown to maturity without water (Barr *v.* Cardiff, (Tex. Civ. App. 1903) 75 S. W. 341), and that the use of a farm for six months during the cropping season is worth much more than during the six months including winter (Ross *v.* Boswell, 60 Ind. 235); but the court will not judicially notice the precise day a given crop reaches maturity, especially when it appears that the time of maturity varies (Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Culverhouse *v.* Worts, 32 Mo. App. 419. See also Gove *v.* Downer, 59 Vt. 139, 7 Atl. 463).

Phenomena of animal and vegetable life see *infra*, II, B, 16, b, c.

58. Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200, holding that notice will accordingly be taken of the usual appliances by which this natural law is utilized in common life.

59. Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197; Haines *v.* Gibson, 115 Mich. 131, 73 N. W. 126.

Vicissitudes of climate or season.— "Of facts of unvarying occurrence, courts must take judicial notice, but not of the vicissitudes of climate or of the seasons. These, like other facts, if relied on as important must be proved by the party seeking an advantage therefrom." Dixon *v.* Niccolls, 39 Ill. 372, 385, 89 Am. Dec. 312.

Weather.— The supreme court of Michigan declines to take judicial notice that the weather in northern Michigan on the 1st of April is always such that the water of lakes and streams is not open. Haines *v.* Gibson, 115 Mich. 131, 73 N. W. 126.

60. Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

61. Fitzsimons, etc., Co. *v.* Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421 [*affirming* 94 Ill. App. 533].

62. Cherokee, etc., Coal, etc., Co. *v.* Wilson, 47 Kan. 460, 28 Pac. 178, fine coal dust.

63. Where the legislature has declared that certain grades and qualities of kerosene are proper and safe to use, judicial notice cannot be invoked to establish that kerosene of that grade used in a particular case was in point of fact inflammable. Wood *v.* North Western Ins. Co., 46 N. Y. 421.

64. State *v.* Hayes, 78 Mo. 307; Bennett *v.* North British, etc., Ins. Co., 8 Daly (N. Y.) 471).

65. Gin and turpentine.— In an action on an insurance policy to recover for a loss the court will not take judicial notice that gin and turpentine are "inflammable liquids" within the meaning of that term as it is used in a clause providing that the policy shall be void, etc. Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142.

66. Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. 746, a brick wall.

on the streets of a populous city;[67] and that certain liquors are spirituous or intoxicating, etc.[68] The well known qualities of tobacco,[69] and the use commonly made of it[70] are judicially recognized. Courts do not assume to know the color of natural butter[71] or of oleomargarine.[72] Nor can a court know judicially that coal or wood, free in their constituent parts from poison, would not have a tendency to produce death if taken into the stomach of an animal.[73]

10. Scientific Facts.[74] The fact that there is a magnetic meridian,[75] that the compass varies therefrom in a particular direction,[76] that coal mines generate gas,[77] and other scientific facts universally conceded[78] are judicially noticed. The rule applies to facts of medical science which are matters of common knowledge, such as in what vaccination consists.[79]

11. Time, Days, and Dates. Most prominent perhaps among the facts of science judicially known to the court are those so to speak of the almanac.[80] Courts take judicial notice of the computation of time,[81] as for example the coin-

67. Wordin's Appeal, 71 Conn. 531, 42 Atl. 659, 71 Am. St. Rep. 219.

68. That whisky is a spirituous liquor (Hodge *v.* State, 116 Ga. 852, 43 S. E. 255), that bock beer and common beer are a malt liquor (Pedigo *v.* Com., 70 S. W. 659, 24 Ky. L. Rep. 1029), and that beer is an intoxicant (Sothman *v.* State, (Nebr. 1902) 92 N. W. 303), etc., will be judicially noticed. See, generally, Intoxicating Liquors.

69. State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

70. Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228 (that cigars and tobacco sold by a tobacconist are not "drugs and medicines"); *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636 (its manufacture into cigars); Austin *v.* Tennessee, 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224 [*affirming* 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478] (where the supreme court of the United States held that it could not judicially know that the use of tobacco in the form of cigarettes is particularly injurious, while the supreme court of Tennessee held that the character of cigarettes is so generally known that courts may take judicial notice of the fact that their use is harmful and deleterious for all purposes).

71. People *v.* Hillman, 58 N. Y. App. Div. 571, 69 N. Y. Suppl. 66, 15 N. Y. Cr. 394, its color not uniform.

72. People *v.* Meyer, 44 N. Y. App. Div. 1, 60 N. Y. Suppl. 415.

73. Sprankle *v.* Bart, 25 Ind. App. 681, 58 N. E. 862.

74. **Nature and use of mechanical devices,** etc., see *infra*, II, B, 16, a, (II).

75. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

76. Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

77. Poor *v.* Watson, 92 Mo. App. 89.

78. Luke *v.* Calhoun County, 52 Ala. 115 (process and scientific principles in relation to photography); Poor *v.* Watson, 92 Mo. App. 89; St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348 (where, however, the court said that it would be folly to hold that courts can take judicial notice of scientific facts concerning which men eminent in that particular branch of learning widely differ); Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176 (where judicial notice was taken that there is no device which will wholly prevent escape of sparks and cinders from railway locomotives).

Percolation of natural gas.— A court cannot judicially know that natural gas will not pass under the soil from a street main to a house in sufficient quantities to cause an explosion. Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203.

Salt wells.— The court will not take judicial notice of the proper method of boring or tubing salt wells, so as to make the tubing serve its purpose and shut out detrimental matters that would otherwise injure the work. Clark *v.* Babcock, 23 Mich. 164.

79. Com. *v.* Pear, 183 Mass. 242, 66 N. E. 719. See also *infra*, II, B, 16, a, (I).

80. Tutton *v.* Darke, 5 H. & N. 647, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. Rep. N. S. 361 (where Pollock, C. B., said: "The almanac is part of the law of England"); Brough *v.* Perkins, 6 Mod. 80, 81 (where Holt, C. J., said: "The almanac to go by is that which is annexed to the Common Prayer-Book"); Nixon *v.* Freeman, 5 H. & N. 652.

In England the calendar established by act of parliament and the feast days are judicially noticed. Harvey *v.* Broad, 6 Mod. 159; Brough *v.* Perkins, 6 Mod. 80.

81. *Alabama.*— Koch *v.* State, 115 Ala. 99, 22 So. 471; Sprowl *v.* Lawrence, 33 Ala. 674.

Indiana.— Williamson *v.* Brandenberg, 6 Ind. App. 97, 32 N. E. 1022.

Iowa.— McIntosh *v.* Lee, 57 Iowa 356, 10 N. W. 895.

Louisiana.— Whaley *v.* Houston, 12 La. Ann. 585.

Maine.— Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111, 24 Atl. 794.

Maryland.— Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415.

Minnesota.— Webb *v.* Kennedy, 20 Minn. 419; Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68; Finney *v.* Callendar, 8 Minn. 41.

cidence of days of the week with days of the month,[82] or of days of the month with days of a week in that month,[83] or the relation between a particular date and the terms of court,[84] provided always that such facts are relevant.[85] The time when the moon or the sun rises or sets on a particular day is judicially known.[86] The subdivision of the day into hours and their order of succession will likewise be judicially noticed.[87]

12. Weights, Measures, and Values. No proof is required of the legal standard of weights[88] or of measures legally established or in common use.[89] But the

New York.— Cohn *v.* Kahn, 14 Misc. 255, 35 N. Y. Suppl. 829.

Pennsylvania.— Hantsch *v.* Levan, 1 Woodw. 456.

See 20 Cent. Dig. tit. "Evidence," § 21.

The courts of England judicially notice the variation of time as related to the position of a particular place as east or west of Greenwich. Curtis *v.* March, 3 H. & N. 866, 4 Jur. N. S. 1112, 28 L. J. Exch. 36.

82. *Alabama.*— Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893.

Florida.— Dawkins *v.* Smithwick, 4 Fla. 158.

Georgia.—Dorough *v.* Equitable Mortg. Co., 118 Ga. 178, 45 S. E. 22.

Indiana.— Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. 877.

Iowa.— McIntosh *v.* Lee, 57 Iowa 356, 10 N. W. 895; Clough *v.* Goggins, 40 Iowa 325.

Maine.— Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111, 24 Atl. 794.

Maryland.— Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415.

Mississippi.— Morgan *v.* Burrow, (1894) 16 So. 432.

Missouri.— Jordan *v.* Chicago, etc., R. Co., 92 Mo. App. 84, holding that the court will take judicial notice that a certain day of a certain month and year fell on a particular day of the week.

New Jersey.— Reed *v.* Wilson, 41 N. J. L. 29.

New York.— Ryer *v.* Prudential Ins. Co., 85 N. Y. App. Div. 7, 82 N. Y. Suppl. 971.

Ohio.—Warren *v.* Fountain Square Theatre Co., 5 Ohio S. & C. Pl. Dec. 559, 7 Ohio N. P. 538.

Pennsylvania.—Wilson *v.* Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854.

England.— Hanson *v.* Shackelton, 4 Dowl. P. C. 48, 1 H. & W. 542.

See 20 Cent. Dig. tit. "Evidence," § 21.

83. Rice *v.* Mead, 22 How. Pr. (N. Y.) 445. See also Dime Deposit, etc., Bank *v.* Arnold, 6 Lack. Leg. N. (Pa.) 210, 7 North. Co. Rep. (Pa.) 281, 14 York Leg. Rec. (Pa.) 101.

84. Bethune *v.* Hale, 45 Ala. 522.

Legal days.— Courts are bound to take judicial cognizance of what are and what are not legal days. Schlingmann *v.* Fiedler, 3 Mo. App. 577.

85. Dawkins *v.* Smithwick, 4 Fla. 158.

86. Moon.— *Alabama.*— Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169.

California.— People *v.* Mayes, 113 Cal. 618, 45 Pac. 860.

Connecticut.— State *v.* Morris, 47 Conn. 179.

Maryland.— Munshower *v.* State, 55 Md. 11, 39 Am. Rep. 414; Sasscer *v.* Farmers' Bank, 4 Md. 409; Kilgour *v.* Miles, 6 Harr. & J. 268.

Michigan.— De Armond *v.* Neasmith, 32 Mich. 231.

New York.— Case *v.* Perew, 46 Hun 57.

England.— Page *v.* Faucet, Cro. Eliz. 227.

Sun.— *Alabama.*— Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892.

California.— People *v.* Chee Kee, 61 Cal. 404.

Connecticut.— State *v.* Morris, 47 Conn. 179.

New York.— Montenes *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 493, 78 N. Y. Suppl. 1059; Lendle *v.* Robinson, 53 N. Y. App. Div. 140, 65 N. Y. Suppl. 894.

Ohio.— Lake Erie, etc., R. Co. *v.* Hatch, 6 Ohio Cir. Ct. 230, 3 Ohio Cir. Dec. 430.

But in England it has been held that an almanac is not evidence of the time of sunrise on a particular day. Tutton *v.* Darke, 5 H. & N. 647, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. Rep. N. S. 361.

Time of daylight.— The courts will take judicial notice that about three-twenty A. M. on October 12 it is not daylight. Cincinnati, etc., R. Co. *v.* Worthington, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478.

The almanac need not be produced in evidence to prove such a fact. People *v.* Chee Kee, 61 Cal. 404; Wilson *v.* Van Leer, 127 Pa. St. 371, 379, 17 Atl. 1097, 14 Am. St. Rep. 854. But where an almanac is admitted, the objecting party is not aggrieved, as its only office can be to aid the court and jury to refresh their minds as to a fact which they already judicially know. State *v.* Morris, 47 Conn. 179; Lendle *v.* Robinson, 53 N. Y. App. Div. 140, 65 N. Y. Suppl. 894; Case *v.* Perew, 46 Hun (N. Y.) 57. And it is error to refuse to permit the use of facts appearing in the almanac as part of the closing argument of counsel. Wilson *v.* Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854.

87. Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768; Safford *v.* Douglas, 4 Edw. (N. Y.) 537, holding that courts will take judicial notice of the fractional parts of a day in determining the priority of liens created by the filing of different creditors' bills on the same day.

The courts of England refuse to know judicially the hours of the day on the calendar. Collier *v.* Nokes, 2 C. & K. 1012, 5 Exch. 275, 61 E. C. L. 1012.

88. 1 Greenleaf Ev. § 5.

89. Reid *v.* McWhinnie, 27 U. C. Q. B. 289, that a pint is less than five gallons. But see

capacity of measures not standard or commonly known is not judicially noticed.[90] Courts recognize the value of the circulating medium,[91] the premium on gold coin,[92] and the equivalents in currency of the United States of current gold coin of other countries.[93] Judicial knowledge of value extends, however, only to the standard, and does not cover the value of particular articles[94] or services.[95]

13. Geographical Facts — a. In General. A state court will take judicial notice of the boundaries of the United States, at least where they coincide with the state line.[96] Courts have judicial knowledge of the prominent geographical features of the territory over which or state in which they exercise jurisdiction[97] and of the country at large;[98] the location of cities outside the state, at least if they are well known commercial centers,[99] and their situation as related to tide-water.[1] Geographical facts of common knowledge relating to cities of commercial impor-

Tison *v.* Smith, 8 Tex. 147, area embraced in given metes and bounds not judicially noticed.

90. South Alabama, etc., R. Co. *v.* Wood, 74 Ala. 449, 49 Am. Rep. 819, notice not taken of the rule for measuring corn in the shock or the capacity of a railroad car of a certain size. But simple notorious facts, as that the three customary surveys of logs on the water of the Penobscot river widely differ from one another, may be noticed. Putnam *v.* White, 76 Me. 551.

91. Grant *v.* State, 89 Ga. 393, 15 S. E. 488; McCarty *v.* State, 127 Ind. 223, 26 N. E. 665; Daily *v.* State, 10 Ind. 536; Jones *v.* State, 39 Tex. Cr. 387, 46 S. W. 250.

The act of congress defining the nature and value of the United States currency is judicially noticed. State *v.* Moseley, 38 Mo. 380; U. S. *v.* Fuller, 4 N. M. 358, 20 Pac. 175; U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23. See also *infra*, II, C, 2, a.

Nature and history of circulating medium see *infra*, II, B, 14, d.

92. U. S. *v.* American Gold Coin, 24 Fed. Cas. No. 14,439, Woolw. 217.

The value of bank-note currency at different times is not judicially noticed. Letcher *v.* Kennedy, 3 J. J. Marsh. (Ky.) 701; Feemster *v.* Ringo, 5 T. B. Mon. (Ky.) 336. But the fact that there was some depreciation in value in a particular state the court may judicially notice as a historical fact. Perrit *v.* Crouch, 5 Bush (Ky.) 199. See *infra*, II, B, 14.

93. Johnston *v.* Hedden, 2 Johns. Cas. (N. Y.) 274, the English pound. But see Kermott *v.* Ayer, 11 Mich. 181, holding that the equivalent of Canadian currency in United States dollars must be proved.

94. Price *v.* Connecticut Mut. L. Ins. Co., 48 Mo. App. 281 (present value of a life-insurance policy, depending partly on extraneous facts, and partly on the accuracy of an intricate computation); Towne *v.* St. Anthony, etc., Elevator Co., 8 N. D. 200, 77 N. W. 608 (value of grain at a given date).

95. Pearson *v.* Darrington, 32 Ala. 227 (value of an attorney's services); Seymour *v.* Marvin, 11 Barb. (N. Y.) 80 (what would be fair commission on an acceptance paid without funds); Millener *v.* Driggs, 10 N. Y. St. 237 (what is a fair charge by a physician under certain circumstances). But *compare* Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; and Adams Express Co. *v.* Hoeing, 9 Ky. L. Rep. 814.

96. Ogden *v.* Lund, 11 Tex. 688.

97. Trenier *v.* Stewart, 55 Ala. 458; Bittle *v.* Stuart, 34 Ark. 224; Williams *v.* State, 64 Ind. 553, 31 Am. Rep. 135; Mossman *v.* Forrest, 27 Ind. 233; Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; Hart *v.* Bodley, Hard. (Ky.) 98.

98. U. S. *v.* La Vengeance, 3 Dall. (U. S.) 297, 1 L. ed. 610; Peyroux *v.* Howard, 7 Pet. (U. S.) 324, 8 L. ed. 700. See also The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111.

Wheat-growing regions. — In Gatling *v.* Newell, 9 Ind. 572, 583, it was said: "We know, as matter of general knowledge, that parts of Ohio, Minnesota and Michigan are wheat-growing regions, and as well adapted to the use of the drill, as is Illinois."

99. Dickinson *v.* Mobile Branch Bank, 12 Ala. 54; Parks *v.* Jacob Dold Packing Co., 6 Misc. (N. Y.) 570, 27 N. Y. Suppl. 289 (location of Kansas City and Wichita); Orr *v.* Lacy, 20 Fed. Cas. No. 10,589, 4 McLean 243 ("city of New York" is in New York state). See also The Sunswick, 23 Fed. Cas. No. 13,624, 6 Ben. 112, that Astoria is on Long Island. But a court cannot judicially know that a city named in a pleading and not otherwise identified is a particular city of the same name in another state (Riggin *v.* Collier, 6 Mo. 568; Yale *v.* Ward, 30 Tex. 17; Whitlock *v.* Castro, 22 Tex. 108; Andrews *v.* Hoxie, 5 Tex. 171; Cook *v.* Crawford, 4 Tex. 420), especially where there is a city of the same name within the state where the court is sitting (Woodward *v.* Chicago, etc., R. Co., 21 Wis. 309). The court of king's bench declined to judicially notice that "Dublin" on a bill of exchange meant Dublin in Ireland. Kearney *v.* King, 2 B. & Ald. 301. See also Brunt *v.* Thompson, 2 Q. B. 789, 42 E. C. L. 913, C. & M. 34, 41 E. C. L. 24, 2 G. & D. 34; Deybel's Case, 4 B. & Ald. 243, 6 E. C. L. 468; Humphreys *v.* Budd, 9 Dowl. P. C. 1000, 5 Jur. 630. But a ruling that "St. Louis, Mo.," would not be known judicially to mean the city of St. Louis in the state of Missouri (Ellis *v.* Park, 8 Tex. 205) seems entirely anomalous. See further as to judicial notice of location of cities *infra*, II, B, 13, c.

1. Irwin *v.* Phillips, 5 Cal. 140, 63 Am. Dec. 113; Price *v.* Page, 24 Mo. 65; Peyroux *v.* Howard, 7 Pet. (U. S.) 324, 8 L. ed. 700.

tance within the jurisdiction of the court need not be proved.[2] Location in respect of climate, soil, topography, or rainfall of limited areas, such as counties and towns, cannot be judicially noticed.[3]

b. Boundaries of States and Territories. Courts take judicial notice of the established boundaries of the state[4] or territory[5] where they are sitting and will know that a certain tract or region is[6] or is not[7] included therein.

c. Location of Political Divisions of State. Courts sitting in a particular state or territory have judicial knowledge of the geographical position of its political divisions,[8] such as counties,[9] cities or villages,[10] and towns or townships;[11] their boundaries, in so far as the same are prescribed by public statutes,[12] but no

2. Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698 (holding that in Illinois judicial notice would be taken of the fact that the city of Chicago is situated near the great bituminous coal fields of the state, and that much of the fuel used by the multitude of factories there is common soft coal); *Ex p.* Davidson, 57 Fed. 883, 887 (where the court said: "It is a matter of such general knowledge that the court will take judicial notice of it, that the lands surrounding this harbor have been for many years selected for and known as the site of a city. It is true that it has not all of it been covered and occupied by brick buildings or city improvements, but it is — all of it — the site of a city, and occupied for the purposes of trade and business."

3. Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197; McCorkle *v.* Driskell, (Tenn. Ch. App. 1900) 60 S. W. 172; McGhee Irr. Ditch Co. *v.* Hudson, 85 Tex. 587, 22 S. W. 398.

4. Thorson *v.* Peterson, 9 Fed. 517, 10 Biss. 530; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74.

Boundaries claimed by the political department of the state will be judicially recognized and the courts will exercise jurisdiction in conformity therewith. State *v.* Dunwell, 3 R. I. 127; Harrold *v.* Arrington, 64 Tex. 233.

5. Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.

6. Perry *v.* State, 113 Ga. 938, 39 S. E. 315; Carey *v.* Reeves, 46 Kan. 571, 26 Pac. 951.

7. Smitha *v.* Flournoy, 47 Ala. 345; Dickinson *v.* Mobile Branch Bank, 12 Ala. 54; Gilbert *v.* Moline Water-Power, etc., Co., 19 Iowa 319; Thomas *v.* Forest City Bank, 4 Ohio Dec. (Reprint) 32, 1 Clev. L. Rec. 37; Conner *v.* State, 23 Tex. App. 378, 5 S. W. 189.

8. State *v.* De Baillon, 37 La. Ann. 392; Harvey *v.* Wayne, 72 Me. 430; Hall *v.* Rushing, 21 Tex. Civ. App. 631, 54 S. W. 30.

Political divisions in other states are not usually judicially known. Yale *v.* Ward, 30 Tex. 17. See, however, for exceptions *supra*, II, B, 13, *a*.

Courts created by congress judicially notice the location of any town recognized in government departmental records. Maese *v.* Hermann, 17 App. Cas. (D. C.) 52 [*affirmed* in 183 U. S. 572, 22 S. Ct. 91, 46 L. ed. 335], where the court of appeals of the District of Columbia recognized the existence of the town of Los Vegas in New Mexico.

9. *Iowa.*— Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594; State *v.* Reader, 60 Iowa 527, 15 N. W. 423.

Missouri.— Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663.

Oklahoma.— Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

Tennessee.— Bond *v.* Perkins, 4 Heisk. 364.

Texas.— Hall *v.* Rushing, 21 Tex. Civ. App. 631, 54 S. W. 30.

See also *infra*, II, C, 3, c, (III), (B).

Names of the counties are judicially known (Higgins *v.* Bullock, 66 Ill. 37; Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594); as also the fact that there is only one town of the same name within the state (Smitha *v.* Flournoy, 47 Ala. 345).

10. Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123; Sullivan *v.* People, 122 Ill. 385, 13 N. E. 248; Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698; Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589; Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302. But see Anderson *v.* Com., 100 Va. 860, 42 S. E. 865, unincorporated village. See also *supra*, II, B, 13, a; *infra*, II, C, 3, c, (III), (C), (E).

11. *Illinois.*—Reading *v.* Wedder, 66 Ill. 80.

Iowa.— State *v.* Reader, 60 Iowa 527, 15 N. W. 423.

Missouri.— McGrew *v.* Missouri Pac. R. Co., 177 Mo. 533, 76 S. W. 995 (position of towns on line of railroad); City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123.

Nevada.— State *v.* Buralli, (1903) 71 Pac. 532.

United States.— Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1.

See also *infra*, II, C, 3, c, (III), (D).

12. *Alabama.*— Ward *v.* Janney, 104 Ala. 122, 16 So. 73; Smitha *v.* Flournoy, 47 Ala. 345.

Arkansas.— Bittle *v.* Stuart, 34 Ark. 224.

California.— De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237; Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; Brumagim *v.* Bradshaw, 39 Cal. 24.

Indiana.— Louisville, etc., R. Co. *v.* Hixon, 101 Ind. 337; Steinmetz *v.* Versailles, etc., R. Co., 57 Ind. 457.

Kansas.— Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589.

further;[13] and that a particular city or town,[14] especially if it be a post-office,[15]

Maine.— Ham *v.* Ham, 39 Me. 263.
Massachusetts.— Com. *v.* Springfield, 7 Mass. 9.
Missouri.— State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106.
New York.— Bang *v.* McAvoy, 52 N. Y. App. Div. 501, 65 N. Y. Suppl. 467.
Oklahoma.— Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.
Texas.— Wright *v.* Hawkins, 28 Tex. 452. But *compare* Com. *v.* State, (Cr. App. 1894) 25 S. W. 1119.
Wisconsin.— Houlton *v.* Chicago, etc., R. Co., 86 Wis. 59, 56 N. W. 336.
United States.— Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1.
See 20 Cent. Dig. tit. "Evidence," §§ 10, 12.

The areas of counties in the state will, it is said, be judicially noticed. Jasper County *v.* Spitler, 13 Ind. 235.

Distance within boundary line.—Courts will take judicial notice that a given distance from a place named in a county is within that county. Terre Haute, etc., R. Co. *v.* Pierce, 95 Ind. 496; Indianapolis, etc., R. Co. *v.* Lyon, 48 Ind. 119; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589; Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837. *Contra*, as to place at a particular distance from an unincorporated village. Anderson *v.* Com., 100 Va. 860, 42 S. E. 865.

Location of private ownership in respect of boundaries of political divisions is not judicially noticed. Goodwin *v.* Scheerer, 106 Cal. 690, 40 Pac. 18; Russell *v.* Hoyt, 4 Mont. 412, 2 Pac. 25; People *v.* Kelly, 20 Hun (N. Y.) 549; Edwards *v.* Davis, 3 Tex. 321.

13. Where the designation of a town is popular merely, without legal authority, the court may decline to know its location. Huston *v.* People, 53 Ill. App. 501. See also St. Louis, etc., R. Co. *v.* Cady, 67 Ark. 512, 55 S. W. 929.

Township lines not judicially noticed.— Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492; Mayes *v.* St. Louis, etc., R. Co., 71 Mo. App. 140.

14. *Alabama.*— Smith *v.* Flournoy, 47 Ala. 345.
Arkansas.— St. Louis, etc., R. Co. *v.* Magness, 68 Ark. 289, 57 S. W. 933; Forehand *v.* State, 53 Ark. 46, 13 S. W. 728.
California.— Cole *v.* Segraves, 88 Cal. 103, 25 Pac. 1109.
Connecticut.— State *v.* Powers, 25 Conn. 48.
Delaware.— State *v.* Tootle, 2 Harr. 541.
Georgia.— Central R. Co. *v.* De Bray, 71 Ga. 406; Clayton *v.* May, 67 Ga. 769. See also Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.
Illinois.— Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22; Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123; Sullivan *v.* People, 122 Ill. 385, 13 N. E. 248; People *v.* Suppiger, 103 Ill. 434; Harding *v.* Strong, 42 Ill. 148, 89 Am. Dec. 415; Cornshock *v.* People, 56 Ill. App. 467.
Indiana.— Steinmetz *v.* Versailles, etc., Turnpike Co., 57 Ind. 457; Indianapolis, etc., R. Co. *v.* Stephens, 28 Ind. 429; Louisville, etc., R. Co. *v.* McAfee, 15 Ind. App. 442, 43 N. E. 36. See also Lenck *v.* State, 96 Ind. 16.
Iowa.— Equitable L. Ins. Co. *v.* Gleason, 56 Iowa 47, 8 N. W. 790. See also State *v.* Reader, 60 Iowa 527, 15 N. W. 423.
Kansas.— State *v.* Brooks, 8 Kan. App. 344, 56 Pac. 1127.
Maine.— State *v.* Simpson, 91 Me. 83, 39 Atl. 287; Martin *v.* Martin, 51 Me. 366; Ham *v.* Ham, 39 Me. 263.
Massachusetts.— Com. *v.* Springfield, 7 Mass. 9 [*distinguished* in Com. *v.* Wheeler, 162 Mass. 429, 38 N. E. 1115].
Michigan.— People *v.* Curley, 99 Mich. 238, 58 N. W. 68.
Minnesota.— Kretzschmar *v.* Meehan, 74 Minn. 211, 77 N. W. 41; Baumann *v.* Granite Sav. Bank, etc., Co., 66 Minn. 227, 68 N. W. 1074.
Missouri.— State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106; Johnson *v.* Hutchinson, 81 Mo. App. 299.
Nebraska.— Green *v.* Paul, 60 Nebr. 7, 82 N. W. 98.
New York.— People *v.* Wood, 131 N. Y. 617, 30 N. E. 243; Chapman *v.* Wilber, 6 Hill 475; People *v.* Breese, 7 Cow. 429. See also Vandewerker *v.* People, 5 Wend. 530.
Oregon.— Marx *v.* Croisan, 17 Oreg. 393, 21 Pac. 310.
Pennsylvania.— Com. *v.* Kaiser, 184 Pa. St. 493, 39 Atl. 299.
Texas.— Traylor *v.* Blum, (Sup. 1888) 7 S. W. 829; Terrell *v.* State, 41 Tex. 463; Monford *v.* State, 35 Tex. Cr. 237, 33 S. W. 351. See also Solyer *v.* Romanet, 52 Tex. 562. *Compare* Latham *v.* State, 19 Tex. App. 305; Boston *v.* State, 5 Tex. App. 383, 32 Am. Rep. 575.
Vermont.— Bellows *v.* Elliot, 12 Vt. 569.
Washington.— See Schilling *v.* Washington Territory, 2 Wash. Terr. 283, 5 Pac. 926.
West Virginia.— Beasley *v.* Beckley, 28 W. Va. 81.
Wisconsin.— Huey *v.* Van Wie, 23 Wis. 613.
United States.— Gager *v.* Henry, 9 Fed. Cas. No. 5,172, 5 Sawy. 237.
See 20 Cent. Dig. tit. "Evidence," § 10 *et seq.*

In England the limits of the several counties and townships or parishes are not ascertained by public acts of parliament, the records of which are remaining; but they are determined by ancient usage, and the courts cannot take judicial notice that a particular township or parish is in a particular county. Com. *v.* Springfield, 7 Mass. 9 [*citing* Rex *v.* Burridge, 3 P. Wms 439].

15. Smitha *v.* Flournoy, 47 Ala. 345; Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

or a particular township,[16] village,[17] borough,[18] range or section[19] established by law, is or is not in a particular county, unless a statute requires allegation and proof.[20]

d. Location and Operation of Railroads. As a fundamental fact of general knowledge a court knows of the existence and location of railroads, whether they are wholly within its jurisdiction[21] or only partly so,[22] and knows to what system, if any, they belong.[23] Courts will also to a not very well defined extent notice the minor facts connected with railroad locations in their jurisdiction.[24] Thus it has been held that the courts may know that railroads are in operation between two places,[25] the distance between them,[26] that these points are within a certain county,[27] the geographical positions of towns on the line of a railroad,[28] and that a railroad cannot be located in a given direction from one place to another without passing through a third.[29] In like manner courts will notice that a town contains a station on a certain railroad[30] or that it is a railroad terminus[31] or center.[32] But they cannot notice more minute facts.[33]

16. Cornshock *v.* People, 56 Ill. App. 467; Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663; City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123 (notice that a particular township is not in a given county); State *v.* Buralli, (Nev. 1903) 71 Pac. 532; Com. *v.* Kaiser, 184 Pa. St. 493, 39 Atl. 299.

17. Louisville, etc., R. Co. *v.* Hixon, 101 Ind. 337; Moon *v.* Missouri Pac R. Co., 83 Mo. App. 458. *Compare*, however, Anderson *v.* Com., 100 Va. 860, 42 S. E. 865, apparently holding to the contrary where a village was unincorporated.

18. Stroudsburg *v.* Brown, 11 Pa. Co. Ct. 272.

19. Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663; Moon *v.* Missouri Pac. R. Co., 83 Mo. App. 458.

20. St. Louis, etc., R. Co. *v.* Cady, 67 Ark. 512, 55 S. W. 929. See also Com. *v.* Clauss, 5 Pa. Dist. 658, 18 Pa. Co. Ct. 381.

21. Galveston, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1895) 29 S. W. 428, the court knows the termini.

Historical facts as to railroads see *infra*, II, B, 14, j.

22. Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 873; Miller *v.* Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954.

Reason of the rule.—"Railways are public highways; and it is a matter of history that important lines of railways once established have remained as fixed and permanent in their course as the rivers themselves. Their locality becomes so notorious and indisputable that the courts will take notice thereof. Gulf, etc., R. Co. *v.* State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815. So the court would take notice of the locality of defendant's line of railways, for it is a physical and geographical fact of undisputed notoriety." Miller *v.* Texas, etc., R. Co., 83 Tex. 518, 520, 18 S. W. 954, per Garrett, P. J.

The route of a prospective railroad not definitely fixed by the performance of an act of which the court can take judicial notice will not be judicially known. McKeoin *v.* Northern Pac. R. Co., 45 Fed. 464.

23. Missouri Pac. R. Co. *v.* Graves, 2 Tex. App. Civ. Cas. § 676.

24. Indianapolis, etc., R. Co. *v.* Case, 15 Ind. 42, and other cases in the following notes.

25. Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302.

26. Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530, holding that a court may take judicial notice of the map of a city in order to determine the distance between certain points on a railroad track within its limits. *Compare infra*, II, B, 13, g.

27. Indianapolis, etc., R. Co. *v.* Case, 15 Ind. 42.

28. McGrew *v.* Missouri Pac. R. Co., 177 Mo. 533, 76 S. W. 995.

29. Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131.

30. St. Louis, etc., R. Co. *v.* Magness, 68 Ark. 289, 57 S. W. 933; Indianapolis, etc., R. Co. *v.* Stephens, 28 Ind. 429; Louisville, etc., R. Co. *v.* McAfee, 15 Ind. App. 442, 43 N. E. 36.

31. Smitha *v.* Flournoy, 47 Ala. 345; Galveston, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1895) 29 S. W. 428.

32. Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; Gulf, etc., R. Co. *v.* State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849. The courts of Texas notice the fact that several railroads run into Texarkana (Texas, etc., R. Co. *v.* Black, *supra*), and that certain lines of railroads touch the same points and are practically parallel and necessarily competing lines (Gulf, etc., R. Co. *v.* State, *supra*).

33. Georgia, etc., R. Co. *v.* Gaines, 88 Ala. 377, 7 So. 382 (holding that the court could not assume that the lines of the constituent members of a consolidated railroad company, when completed according to their charters, would be so located as to admit the passage of trains from one to the other continuously, without break or interruption); Miller *v.* Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954 (holding that a contractual relation into which a railway might enter with other railways to form a continuous line for the transportation of freight would not be of such historical

e. Lakes, Streams, and Mountains, and Navigability of Waters. Courts take judicial notice of the existence and location within the states in which they exercise jurisdiction of great lakes and rivers,[34] and their relation to county[35] or city[36] lines, and to the distribution of population;[37] of the navigability of streams constituting great national highways of commerce,[38] as well as of smaller streams within the jurisdiction,[39] and other notorious facts concerning the latter.[40] The existence and location of prominent mountains in the jurisdiction[41] and of great mountain ranges[42] will also be judicially known.

f. Location of Streets, Blocks, Lots, Etc. It has been held that courts will take notice of the blocks and lots in towns and cities.[43] The particularity, how-

or commercial notoriety as to render it so indisputable that the courts ought to take judicial knowledge that such was the fact); Texas Cent. R. Co. *v.* Childress, 64 Tex. 346 (holding that courts do not take notice whether a railroad was fenced at a particular point).

34. People *v.* Brooks, 101 Mich. 98, 59 N. W. 444 (Lake St. Clair); Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420. See also De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

35. Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550, 29 So. 584; Walker *v.* Allen, 72 Ala. 456.

36. Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76.

37. Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698 (taking judicial notice of the fact that the Chicago river is situated in the midst of a city where a dense population exists); State *v.* Wabash Paper Co., 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949 (taking judicial notice that Wabash and Miami counties are less than four hundred miles from the mouth of the Wabash river, and that certain cities and towns in those counties are situated on the banks of the river). See also State *v.* Jones, 11 Ohio Cir. Dec. 496.

38. Neaderhouser *v.* State, 28 Ind. 257; Wood *v.* Fowler, 26 Kan. 682, 40 Am. Rep. 330 (where the court said: "To attempt to prove that the Mississippi or the Missouri is a navigable stream, would seem an insult to the intelligence of the court"); Bennett *v.* Bryan, 1 Ky. L. Rep. 274.

Federal courts know judicially "what streams are public navigable waters of the United States." U. S. *v.* The Monello, 11 Wall. (U. S.) 411, 20 L. ed. 191. To the same point see Lands *v.* A Cargo of Two Hundred and Twenty-seven Tons of Coal, 4 Fed. 478; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1. In U. S. *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 698, 19 S. Ct. 770, 43 L. ed. 1136, Brewer, J., said: "It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact."

In England judicial notice has been taken of geographical facts and navigability with respect to the St. Lawrence river and the Gulf of St. Lawrence. Birrell *v.* Dryer, 9 App. Cas. 345, 5 Aspin. 267, 51 L. T. Rep. N. S. 130.

39. People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581 (where the court took notice of the rise, direction, and navigability of a river partly in California and partly in Nevada); Wood *v.* Fowler, 26 Kan. 682, 687, 40 Am. Rep. 330 (where the court said: "The presumption of general knowledge weakens as we pass to smaller and less-known streams; and yet, within the limits of any state the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge, and take judicial notice thereof"); Browne *v.* Scofield, 8 Barb. (N. Y.) 239; Lockwood *v.* Charleston Bridge Co., 60 S. C. 492, 38 S. E. 112, 629.

Their non-navigability will be judicially known. Ross *v.* Faust, 54 Ind. 471, 23 Am. Rep. 655; Com. *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; Clark *v.* Cambridge, etc., Irr., etc., Co., 45 Nebr. 798, 64 N. W. 239.

Inland rivers of no public importance are not widely enough known to have their navigability judicially noticed. Sanders *v.* Brooks, 6 Ky. L. Rep. 671; De Camp *v.* Thomson, 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107. See also People *v.* Faust, 113 Cal. 172, 45 Pac. 261; Louisville, etc., R. Co. *v.* McAfee, 15 Ind. App. 442, 43 N. E. 36.

40. Cash *v.* Clark County, 7 Ind. 227 (location of falls of the Ohio river in Indiana); Thurman *v.* Morrison, 14 B. Mon. (Ky.) 296 (rise and fall of the waters at certain seasons, to which point see also Kerns *v.* Perry, (Tenn. Ch. App. 1898) 48 S. W. 729); Talbot *v.* Hudson, 16 Gray (Mass.) 417 (course, etc., of the Concord and Sudbury rivers).

41. Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.

42. Price *v.* Page, 24 Mo. 65, taking judicial notice that Missouri is east of the Rocky mountains.

43. Gardner *v.* Eberhart, 82 Ill. 316. And see People *v.* Kelly, 20 Hun (N. Y.) 549. But the court cannot take judicial notice of the precise location of a mere city lot or sub-

ever, of the knowledge called for in order that the court may judicially know the location of streets, their direction, numbering, etc., is so great that much diversity of decision exists on the point. What would be eminently proper to expect on the part of a local court of limited jurisdiction would be unreasonable in case of an appellate court or one of general jurisdiction.[44]

g. Distance and Time of Travel Between Places. It follows from their knowledge of the locality of counties, cities, towns, etc., that courts judicially know the distance between places within their jurisdiction,[45] particularly where such dis-

division of city lands with reference to township or other political subdivision lines. Gunning *v.* People, 189 Ill. 165, 59 N. E. 494 [*reversing* 86 Ill. App. 676].

44. *California.*— The courts of California judicially know the location of streets as platted on a plan approved by statute (Whiting *v.* Quackenbush, 54 Cal. 306), the relation of such streets to one another, and the directions in which they run (Brady *v.* Page, 59 Cal. 52); but not the correct location on the ground of the streets therein platted (Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283).

Illinois.— The court cannot take judicial notice of the place of intersection of a street in a city with a railroad track (Pennsylvania Co. *v.* Frana, 13 Ill. App. 91), nor of the distance between the streets of a city like Chicago (West Chicago St. R. Co. *v.* Vandehouten, 58 Ill. App. 318).

Iowa.— The court will not take judicial notice of the names of streets and public places in the towns and cities of the state (Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594), nor of the width of the streets of a city where they are not established by special charter (Coe College *v.* Cedar Rapids, 120 Iowa 541, 95 N. W. 267).

Louisiana.— Courts in Louisiana take notice of the streets and of the names and location of the suburbs from time to time brought within the limits of New Orleans. Poland *v.* Dreyfous, 48 La. Ann. 83, 18 So. 906.

Michigan.— The courts of Michigan do not take judicial notice of the relative situation of lots and blocks on a map or plat not introduced in evidence, nor as to how they apply on the surface of the ground. Shepard *v.* Shepard, 36 Mich. 173.

Missouri.— Courts will take judicial notice of old established and well known streets of the city in which they sit, as their existence must be a matter of common knowledge throughout the city (State *v.* Ruth, 14 Mo. App. 226); but not of less well known streets or their direction (Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62). *Compare* Allen *v.* Scharringhausen, 8 Mo. App. 229, holding that judicial notice will be taken of the locality of a particular number on a certain street in a given ward or district of a city.

New York.— New York courts will take judicial notice of the fact that the streets of New York city are numbered east and west from Fifth avenue, and that the odd numbers are on the north side of the street. Canavan *v.* Stuyvesant, 7 Misc. 113, 27 N. Y. Suppl. 413. They also notice the general direction of the streets, and where they begin and end (Skelly *v.* New York El. R. Co., 7 Misc. 88, 27 N. Y. Suppl. 304); and that premises described by a street are within a particular judicial district (People *v.* Kelly, 20 Hun 549). The doctrine, however, seems a flexible one. In landlord and tenant proceedings, in the district courts, although the boundaries of the several judicial districts are within the supposed judicial knowledge of the courts, the locality of the streets and avenues, their termini, and the numbers of houses situated thereon are not matters of judicial notice. People *v.* Callahan, 23 Hun 581, 60 How. Pr. 372.

Wisconsin.— In this state, where certain lots were sold by designation in a town subsequently incorporated into a city, the supreme court, while taking notice of the facts of incorporation, declined to take judicial notice that the numbering would designate the same lots in the new municipality. Ritchie *v.* Catlin, 86 Wis. 109, 56 N. W. 473.

England.— An English court will not take judicial notice that a particular street is not in a certain county, although it may be generally known to be situate in another. Humphreys *v.* Budd, 9 Dowl. P. C. 1000, 5 Jur. 630. See Reg. *v.* Holborn Union, 6 E. & B. 715, 2 Jur. N. S. 571, 25 L. J. M. C. 110, 4 Wkly. Rep. 606, 88 E. C. L. 715. But such courts will take judicial cognizance that a place lies east or west of Greenwich, and consequently has a time different from that of Greenwich. Curtis *v.* March, 3 H. & N. 866, 4 Jur. N. S. 1112, 28 L. J. Exch. 36.

See 20 Cent. Dig. tit. "Evidence," § 11.

45. *Illinois.*— Bruson *v.* Clark, 151 Ill. 495, 38 N. E. 252.

New York.— Williams *v.* Brown, 53 N. Y. App. Div. 486, 65 N. Y. Suppl. 1049.

Pennsylvania.— Pearce *v.* Langfit, 101 Pa. St. 507, 47 Am. Rep. 737.

Tennessee.— Coover *v.* Davenport, 1 Heisk. 368, 2 Am. Rep. 706.

Washington.— Blumenthal *v.* Pacific Meat Co., 12 Wash. 331, 41 Pac. 47.

Wisconsin.— Siegbert *v.* Stiles, 39 Wis. 533 (holding that the court will take judicial notice that Prairie du Chien and McGregor are separated only by the Mississippi river, that they are readily and easily reached from each other when the river is frozen in the winter, and therefore that there will not be any considerable difference in the market price of hogs at the two towns); Hinckley *v.* Beckwith, 23 Wis. 328.

United States.— Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 22

tances are established by law,[46] and will take cognizance of the length of time consumed in travel between places by present modes of conveyance.[47]

14. Facts of History — a. In General. The main facts of history known to the community at large are known to judges and jurors. Facts of world history, sacred and secular, and of local history, national, state, county, or town, which are generally known, judges or jurors will know. The minuteness of the knowledge will be found to vary with the size of the community for which a court is sitting. A fact of distinctly local history may properly be known to the judge of a local court. Under certain circumstances the judge of a court of general jurisdiction sitting within and for that locality may take notice of it. Such knowledge would not be required in a judge sitting at a distance. Subject to these considerations, courts may take judicial notice of matters of public history.[48] Thus courts judicially know the historical facts concerning the political action of their own country in foreign affairs,[49] and the history of prominent religious organiza-

L. R. A. 325, where it was held that a United States circuit court in Iowa may take judicial notice that Asheville, N. C., is distant more than one hundred miles from Dubuque, Iowa.

See 20 Cent. Dig. tit. "Evidence," § 14.

Contra.— In Maine, however, the court declines to take judicial notice of the local situation and distances of places in counties from each other (Goodwin *v.* Appleton, 22 Me. 453); and in Virginia it was held that the court would not take judicial notice of the fact that a point at a given distance from a certain unincorporated village was in a particular county (Anderson *v.* Com., 100 Va. 860, 42 S. E. 865).

Distance between places on railroad.— Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530. See *supra*, II, B, 13, d.

46. Courts in California will take judicial notice of the legal distances from place to place in the state of California, as established by the political code in sections 150–202, for the purpose of computing the time within which notice of intention to move for a new trial must be served. Hegard *v.* California Ins. Co., (Cal. 1886) 11 Pac. 594.

47. *Illinois.*—National Masonic Acc. Assoc. *v.* Seed, 95 Ill. App. 43.

Indiana.— Hipes *v.* Cochran, 13 Ind. 175.

Iowa.— State *v.* Seery, 95 Iowa 652, 64 N. W. 631.

New York.— Williams *v.* Brown, 53 N. Y. App. Div. 486, 65 N. Y. Suppl. 1049.

Pennsylvania.— Pearce *v.* Langfit, 101 Pa. St. 507, 47 Am. Rep. 737.

Time of travel see also *infra*, II, B, 16, a, (IV).

48. *California.*— Payne *v.* Treadwell, 16 Cal. 220.

Indiana.— Williams *v.* State, 64 Ind. 553, 31 Am. Rep. 135.

Kentucky.— Bell *v.* Barnet, 2 J. J. Marsh. 516; Hart *v.* Bodley, Hard. 98.

Maine.— Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325.

Texas.— Magee *v.* Chadoin, 30 Tex. 644; Blethen *v.* Bonner, (Civ. App. 1899) 52 S. W. 571.

United States.— Underhill *v.* Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456; Sears *v.* The Scotia, 14 Wall. 170, 20 L. ed. 822; U. S. *v.* One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958.

See 20 Cent. Dig. tit. "Evidence," § 15.

Contra.— Woods *v.* Banks, 14 N. H. 101; McKinnon *v.* Bliss, 21 N. Y. 206; Gregory *v.* Baugh, 4 Rand. (Va.) 611.

Foreign history.— Courts will notice salient events of foreign history, such as the existence of civil war in a foreign state at a certain time and its result. Underhill *v.* Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456, in Venezuela.

Treaties, proclamations, foreign acts, etc.— In U. S. *v.* Reynes, 9 How. (U. S.) 127, 147, 13 L. ed. 74, the court said: "We come now to the inquiry, whether the grant in question was protected either by the treaty of retrocession from Spain to the French Republic, or by the treaty of Paris, by which the Territory of Louisiana was ceded to the United States. The treaties above mentioned, the public acts and proclamations of the Spanish and French governments, and those of their publicly recognized agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial notice; and reference to which is implied in the investigation before us."

Rules of navigation.— Courts will take judicial notice of the historical fact that by common consent of mankind there has been a general acquiescence in the rules of navigation established in the British orders in council, Jan. 9, 1863, prescribing the kinds of lights to be used on British vessels, and subsequently reënacted by the act of congress of April 29, 1864. Sears *v.* The Scotia, 14 Wall. (U. S.) 170, 20 L. ed. 822.

Basis of foreign laws known as a matter of history.— Banco de Sonora *v.* Bankers' Mut. Casualty Co., (Iowa 1903) 95 N. W. 232. See *infra*, II, C, 1, c.

49. Neely *v.* Henkel, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448 [*affirming* 103 Fed. 631]; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74.

Occupation of Cuba.— Judicial notice may be taken that the island of Cuba was, at the date of the act of congress of June 6, 1900,

tions.[50] It will be noticed that slavery existed in certain of the American states prior to the Civil war,[51] that it was abolished as a result of the war,[52] that methods of instruction have changed in the last twenty-five years, and that one who was competent to teach twenty-five years ago would not necessarily be qualified now,[53] and that steamboats, first used in 1807, were in 1824 freely employed in transporting merchandise, and were not confined to carrying passengers.[54] Courts cannot assume knowledge of the secondary and more minute circumstances connected with historical events, although of general interest.[55] Minor matters of questionable general interest or knowledge constitute a debatable border land between judicial knowledge and its absence, and involve cases where the personal equation of the individual judge has greater weight in determining cognizance than any very definite rule.[56]

b. Facts of Civil War. Among the more prominent facts of modern American history is the Civil war between the states of the Union. The courts know judicially the fact of such war, the period covered by it, and the other main facts concerning it,[57] as the historical causes which led up to it,[58] the proclamations of the executive connected with its outbreak,[59] the relative position of the several states on the issue,[60] and its leading battles and other incidents.[61] The courts cannot take judicial notice of the more minute circumstances connected with the

and for some time thereafter, occupied by and under the control of the United States. Neely *v.* Henkel, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448 [*affirming* 103 Fed. 631].

Matters in relation to Philippines.— In La Rue *v.* Kansas Mut. L. Ins. Co., (Kan. Sup. 1904) 75 Pac. 494, it was held that courts will take judicial notice that under the treaty of Paris the Philippine Islands became a part of the territory of the United States, and after that time were in a state of insurrection against the government, which insurrection had not ended in the island of Mindanao in 1902.

50. Humphrey *v.* Burnside, 4 Bush (Ky.) 215.

The separation of the methodist episcopal church, in 1844, into two methodist episcopal churches, the one north and the other south of a common boundary line, was an event that connected itself with and formed a part of the history of the country, and from its notoriety courts will take judicial notice of it without proof. Humphrey *v.* Burnside, 4 Bush (Ky.) 215.

Matters of religion generally see *supra*, II, B, 7, b.

51. Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469, holding that the judges of the supreme court of the United States whose jurisdiction is coextensive with the country were bound to take judicial notice of the existence of slavery in those states where it prevailed.

52. See *infra*, note 61.

53. People *v.* Maxwell, 87 N. Y. App. Div. 391, 84 N. Y. Suppl. 947.

54. Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

55. Kelley *v.* Story, 6 Heisk. (Tenn.) 202; Simmons *v.* Trumbo, 9 W. Va. 358 (that a person entertaining certain political views was not safe in his person or property in a particular county at some particular time); Cross *v.* Sabin, 13 Fed. 308.

Facts of civil war which are not noticed see *infra*, II, B, 14, b.

56. Values.— In Dayton *v.* Multnomah County, 34 Oreg. 239, 55 Pac. 23, it was held that the court would not take judicial notice that values had been unreasonably increased or diminished under the system adopted in the state for ultimate equalization of assessments by a state board. But in Ludlow *v.* Brewster, 3 Ohio Cir. Ct. 82, 2 Ohio Cir. Dec. 47, it was held to be part of the history of the country "of which courts must take judicial notice" that lands leased some time ago at much less than their present value. *Compare infra*, II, B, 14, e.

57. *Alabama.*— Lyon *v.* Foscue, 60 Ala. 469; Foscue *v.* Lyon, 55 Ala. 440; Ashley *v.* Martin, 50 Ala. 537. As to these cases see *infra*, note 95.

Arkansas.— Williams *v.* State, 37 Ark. 463; Hanks *v.* Harris, 29 Ark. 323.

Indiana.— Brooke *v.* Filer, 35 Ind. 402.

New York.— Woods *v.* Wilder, 43 N. Y. 164, 3 Am. Rep. 684; Swinnerton *v.* Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560.

Tennessee.— Smart *v.* Mason, 2 Heisk. 223.

United States.— Cuyler *v.* Ferrill, 6 Fed. Cas. No. 3.523, 1 Abb. 169.

See 20 Cent. Dig. tit. "Evidence," § 15.

Blockade and effect on course of trade.—The Mersey, 17 Fed. Cas. No. 9,489, Blatchf. Pr. Cas. 187 [*reversed* on other grounds in 17 Fed. Cas. No. 9,490, Blatchf. Pr. Cas. 658].

58. Cuyler *v.* Ferrill, 6 Fed. Cas. No. 3,523, 1 Abb. 169.

59. Woods *v.* Wilder, 43 N. Y. 164, 3 Am. Rep. 684. See *infra*, II, C, 3, b, (v).

60. Douthitt *v.* Stinson, 63 Mo. 268.

61. Thus it has been held that the courts of particular states would notice the time of termination of the war and of the reëstablishment of the United States mails (Turner *v.* Patton, 49 Ala. 406); the suspension of the mail service in the Confederate states

Civil war,[62] but secondary facts of more general importance connected with the war may be noticed.[63]

c. National Expositions and Institutions. Notice will be taken of the holding of great national expositions, such as the Columbian or "World's Fair," so called,[64] and of the existence, location, and objects of great national institutions, such as universities.[65]

d. Nature and History of Circulating Medium. Courts will notice as a historical fact of great notoriety and importance the nature of the circulating medium at a particular time,[66] the popular language in reference to it,[67] and its value.[68]

(Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275); Sherman's march to the sea and its date (Williams *v.* State, 67 Ga. 260); the elimination of gold and silver from circulation and the issue, use, and depreciation of Confederate currency (see *infra*, II, B, 14, d); the abolition of slavery (Morgan *v.* Nelson, 43 Ala. 586; Rose *v.* Pearson, 41 Ala. 687; Glover *v.* Taylor, 41 Ala. 124; Ferdinand *v.* State, 39 Ala. 706) and its effect on the colored race (Hunt *v.* Wing, 10 Heisk. (Tenn.) 139); the date of the war's termination (Turner *v.* Patton, 49 Ala. 406); although on this last point it has been held that what should constitute the conditions of war and peace are purely for political determination, and that courts would not take judicial notice that hostilities ceased and peace was restored by the surrender of any particular army (U. S. *v.* Fifteen Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958 [*reversing* 27 Fed. Cas. No. 15,957]).

62. Kelley *v.* Story, 6 Heisk. (Tenn.) 202. See also *supra*, II, B, 14, a. Thus it has been held that the courts will not take judicial notice of the position of the lines of armies in the field at any particular period of the Civil war (Kelley *v.* Story, 6 Heisk. (Tenn.) 202; McDonald *v.* Kirby, 3 Heisk. (Tenn.) 607; Wood *v.* Cooper, 2 Heisk. (Tenn.) 441); of the fact that civil law was suspended in a certain county at a particular time, or that at such time clerks could not issue process and sheriffs could not levy executions and sell lands (Smart *v.* Mason, 2 Heisk. (Tenn.) 223); that civil law was suspended and the courts of a particular county were closed (Gross *v.* Sabin, 13 Fed. 308. *Contra*, Killebrew *v.* Murphy, 3 Heisk. (Tenn.) 546); or that a Union or Confederate sympathizer was not safe in his person or property in some particular county at a particular time (Simmons *v.* Trumbo, 9 W. Va. 358).

63. Turner *v.* Patton, 49 Ala. 406; Rice *v.* Shook, 27 Ark. 137, 11 Am. Rep. 783; Wood *v.* Cooper, 2 Heisk. (Tenn.) 441. Thus it has been held that a court will judicially notice that certain localities or portions of a Confederate state were in the possession and under the control of the forces of the United States, although they will not infer therefrom that individuals resided there, or in the territory over which the government had re-established its authority, as against the averments of a plea that they were public enemies. Rice *v.* Shook, 27 Ark. 137, 11 Am. Rep. 783. Courts will take judicial notice that the state of Missouri had representatives in the provisional congress of the Confederate states prior to 1861, and was represented there until the end of the war. Wood *v.* Cooper, 2 Heisk. (Tenn.) 441. And see other cases cited *supra*, note 61.

64. McCoy *v.* World's Columbian Exposition, 186 Ill. 356, 57 N. E. 543, 78 Am. St. Rep. 288.

65. *In re* Oxford Poor-Rate, 8 E. & B. 184, 92 E. C. L. 184, holding that the fact that the University of Oxford is a national institution, the purposes of which are the advancement of religion and learning, will be noticed.

66. *Alabama.*— Gady *v.* State, 83 Ala. 51, 3 So. 429; Morris *v.* Morris, 58 Ala. 443; Riddle *v.* Hill, 51 Ala. 224.

Arkansas.— Dillard *v.* Evans, 4 Ark. 175.

Indiana.— Hart *v.* State, 55 Ind. 599.

Kentucky.— Lampton *v.* Haggard, 3 T. B. Mon. 149.

Maryland.— Chesapeake Bank *v.* Swain, 29 Md. 483, 502, where it is said: "What is lawful money of the United States, other than gold and silver coin, is a question of law, which should have been referred to the Court to decide, and not to the jury."

Missouri.— State *v.* Moseley, 38 Mo. 380; Farwell *v.* Kennett, 7 Mo. 595.

North Carolina.— Grant *v.* Reese, 94 N. C. 720.

Tennessee.— Wood *v.* Cooper, 2 Heisk. 441. *Compare*, however, Laird *v.* Folwell, 10 Heisk. 92; State *v.* Shelton, 7 Humphr. 31.

Texas.— Lumpkin *v.* Murrell, 46 Tex. 51.

West Virginia.— Hix *v.* Hix, 25 W. Va. 481; Simmons *v.* Trumbo, 9 W. Va. 358.

United States.— Judicial notice should be taken by the court of the fact that gold coin at a certain date was no longer used as money in the business of the country, but had become an article of merchandise and traffic. U. S. *v.* American Gold Coin, 24 Fed. Cas. No. 14,439, 1 Woolw. 217.

See 20 Cent. Dig. tit. "Evidence," § 16.

67. Lampton *v.* Haggard, 3 T. B. Mon. (Ky.) 149.

68. *Alabama.*— Gady *v.* State, 83 Ala. 51, 3 So. 429 (holding that on an indictment for embezzlement the property "being averted to be 'currency of the United States of America,' the court judicially knows that the bills, as matter of law, were *prima facie* of a commercial value equal to that imported by their face"); Duvall *v.* State, 63 Ala. 12; Grant *v.* State, 55 Ala. 201.

Georgia.— Mallory *v.* State, 62 Ga. 164,

The reason for the court's knowledge of standards of value is in part at least that they are established by law.[69] The courts, it has been held, will also take judicial notice of the change from a gold basis to a paper standard and the consequent rise in prices,[70] of the different classes of notes and bills in circulation as money at any particular time,[71] and of the elimination of gold and silver and United States paper currency from circulation in the Confederate states and the general facts connected with the issuing, use, and depreciation of the Confederate currency.[72]

e. General History of State. The courts of a state, including federal courts, will judicially know the general history of the state.[73] This principle has been applied to the history of land ownership in the state,[74] the cession to the national

holding that it will be known that "nickels" are of value.

Illinois.— Collins *v.* People, 39 Ill. 233.

Indiana.— McCarty *v.* State, 127 Ind. 223, 26 N. E. 665; Daily *v.* State, 10 Ind. 536.

Missouri.— State *v.* Moseley, 38 Mo. 380.

South Carolina.— State *v.* Evans, 15 Rich. 31.

Tennessee.— Shaw *v.* State, 3 Sneed 86.

Texas.— Jones *v.* State, 39 Tex. Cr. 387, 46 S. W. 250.

United States.— U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23, 30, holding that "the court and jury will take notice, without proof, that a fifty cent piece, or a twenty-five cent piece, is identical in its meaning and import with the half dollar, and the quarter dollar, respectively." And see U. S. *v.* American Gold Coin, 24 Fed. Cas. No. 14,439, 1 Woolw. 217.

England.— Bryant *v.* Foot, L. R. 3 Q. B. 497, 9 B. & S. 444, 37 L. J. Q. B. 217, 18 L. T. Rep. N. S. 587, 16 Wkly. Rep. 808, holding that the court will take judicial notice of the difference in the value of money in the reign of Richard I and the present day.

See 14 Cent. Dig. tit. "Criminal Law," § 714; 20 Cent. Dig. tit. "Evidence," § 16; 32 Cent. Dig. tit. "Larceny," § 155.

Contra, as to the value of the notes of the bank of the commonwealth. Feemster *v.* Ringo, 5 T. B. Mon. (Ky.) 336.

69. U. S. *v.* Fuller, 4 N. M. 358, 20 Pac. 175; U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23. See *infra*, II, C.

70. *Alabama.*— Morris *v.* Morris, 58 Ala. 443; Riddle *v.* Hill, 51 Ala. 224.

Arkansas.— Dillard *v.* Evans, 4 Ark. 175.

Missouri.— Farwell *v.* Kennett, 7 Mo. 595.

North Carolina.— Grant *v.* Reese, 94 N. C. 720.

Tennessee.— Henly *v.* Franklin, 3 Coldw. 472, 91 Am. Dec. 296; Wood *v.* Cooper, 2 Heisk. 441.

West Virginia.— Hix *v.* Hix, 25 W. Va. 481.

United States.— U. S. *v.* American Gold Coin, 24 Fed. Cas. No. 14,439, 1 Woolw. 217.

See 20 Cent. Dig. tit. "Evidence," §§ 15, 16.

71. Hart *v.* State, 55 Ind. 599; Lumpkin *v.* Murrell, 46 Tex. 51.

72. *Alabama.*— Morris *v.* Morris, 58 Ala. 443; Riddle *v.* Hill, 51 Ala. 224; Buford *v.* Tucker, 44 Ala. 89.

North Carolina.— Grant *v.* Reese, 94 N. C. 720.

Tennessee.— Wood *v.* Cooper, 2 Heisk. 441; Henly *v.* Franklin, 3 Coldw. 472, 91 Am. Dec. 296.

Texas.— Lumpkin *v.* Murrell, 46 Tex. 51.

West Virginia.— Hix *v.* Hix, 25 W. Va. 481; Simmons *v.* Trumbo, 9 W. Va. 358.

Contra, as to the extent of the depreciation of Confederate paper currency at a particular time. Modawell *v.* Holmes, 40 Ala. 391.

See 20 Cent. Dig. tit. "Evidence," § 16.

73. *Alabama.*— Bonner *v.* Phillips, 77 Ala. 427; Ashley *v.* Martin, 50 Ala. 537.

Indiana.— Carr *v.* McCampbell, 61 Ind. 97.

Kentucky.— Wood *v.* Lee, 5 T. B. Mon. 50.

Louisiana.— Lake *v.* Caddo Parish, 37 La. Ann. 788; Walden *v.* Canfield, 2 Rob. 466.

Missouri.— Douthitt *v.* Stinson, 63 Mo. 268.

Nebraska.— Porter *v.* Flick, 60 Nebr. 773, 84 N. W. 262.

New York.— Howard *v.* Moot, 64 N. Y. 262 [*affirming* 2 Hun 475].

Texas.— Kilpatrick *v.* Sisneros, 23 Tex. 113; Wheeler *v.* Moody, 9 Tex. 372; Robertson *v.* Teal, 9 Tex. 344.

Vermont.— State *v.* Franklin County Sav. Bank, etc., Co., 74 Vt. 246, 52 Atl. 1069.

Washington.— Yelm Jim *v.* Territory, 1 Wash. Terr. 63.

West Virginia.— Dryden *v.* Stephens, 19 W. Va. 1; Kent *v.* Chapman, 18 W. Va. 485.

United States.— Lamb *v.* Davenport, 14 Fed. Cas. No. 8,015, 1 Sawy. 609; De Celis *v.* U. S., 13 Ct. Cl. 117.

See 20 Cent. Dig. tit. "Evidence," § 15.

Commercial importance of large cities noticed.— Wight *v.* Wolff, 112 Ga. 169, 37 S. E. 395, Atlanta and Savannah.

Facts in relation to banks and other private corporations and associations see *infra*, II, B, 20.

74. *Alabama.*— Bonner *v.* Phillips, 77 Ala. 427; Lewis *v.* Harris, 31 Ala. 689. See also Mathis *v.* Tennessee, etc., R. Co., 83 Ala. 411, 3 So. 793, notice that the United States has taken no steps to forfeit a state land grant.

Illinois.— Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088 (that the title to lands in Illinois was originally acquired from the United States); Smith *v.* Stevens, 82 Ill. 554 (to the same effect, and also that notice will be taken of the location of the land granted to the state by the United States); Dickenson *v.* Breeden, 30 Ill. 279 (dedication of land as bounties to soldiers).

Indiana.— Carr *v.* McCampbell, 61 Ind. 97; Henthorn *v.* Shepherd, 1 Blackf. 157.

government of places within the state,[75] the conditions under which the original settlement of the state took place,[76] the existence of ancient surveys, the method of running them[77] and their inaccuracy,[78] the names and localities of ancient places in the state,[79] facts in relation to taxation,[80] prices of land,[81] Indian wars,[82] the public careers of famous men,[83] etc.

f. Facts Relating to Counties.[84] Judicial notice will be taken as a general rule of the date when a particular county in the state was organized,[85] of the fact that two counties were on opposite sides during the Civil war,[86] of the fact that a certain county was within the lines of the Federal[87] or Confederate[88] army at a particular time,[89] and of the time and place at which courts are held in a given county.[90]

g. Matters of Local History. The courts will take judicial notice of salient facts in the history of important cities within their jurisdiction;[91] but facts of recent occurrence relating to a limited section of country cannot be considered as covered by judicial knowledge as matter of history.[92]

New York.— Howard *v.* Moot, 64 N. Y. 262 [*affirming* 2 Hun 475]; People *v.* Snyder, 51 Barb. 589 [*affirmed* in 41 N. Y. 397].

United States.— Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402; Lamb *v.* Davenport, 14 Fed. Cas. No. 8,015, 1 Sawy. 609.

Public domain.— It has been held that while courts will take judicial notice of acts of congress granting the right to lay out public highways over lands of the United States, and of state statutes declaring all roads in use in a particular county public highways, and accepting them as such (see *infra*, II, C, 2), they cannot take judicial notice that any particular land at a specified date was a part of the public domain. Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448.

75. People *v.* Snyder, 41 N. Y. 397 [*affirming* 51 Barb. 589]; Wills *v.* State, 3 Heisk. (Tenn.) 141; Lasher *v.* State, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

76. Holmes *v.* Mallett, Morr. (Iowa) 82; Kilpatrick *v.* Sisneros, 23 Tex. 113; Wheeler *v.* Moody, 9 Tex. 372; Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075.

77. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

78. Hellman *v.* Los Angeles, 125 Cal. 383, 58 Pac. 10.

79. Trenier *v.* Stewart, 55 Ala. 458, holding that judicial notice would be taken of the historical fact stated by Bancroft and Pickett that Dauphin island was anciently called "Massacre island."

Geographical facts see *supra*, II, B, 13.

80. Mullen *v.* Sackett, 14 Wash. 100, 44 Pac. 136, holding that judicial notice will be taken that some assessed taxes are not collected until years after they are assessed.

81. Wood *v.* Lee, 5 T. B. Mon. (Ky.) 50; Walker *v.* Walker, 3 Abb. N. Cas. (N. Y.) 12. *Compare supra*, II, B, 14, a.

82. Yelm Jim *v.* Territory, 1 Wash. Terr. 63.

Civil war see *supra*, II, B, 14, b.

83. Walden *v.* Canfield, 2 Rob. (La.) 466 (portions of the career of Edward Livingston); Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075 (that in the war between Texas and Mexico, Sam Houston held a high military office, and was actively engaged as a leader in the Texas army); De Celis *v.* U. S., 13 Ct. Cl. 117 (Fremont's public career in 1846 and 1847).

84. Geographical facts as to counties see *supra*, II, B, 13, c.

85. Buckinghouse *v.* Gregg, 19 Ind. 401; Ellsworth *v.* Nelson, 81 Iowa 57, 46 N. W. 740; Pitts *v.* Lewis, 81 Iowa 51, 46 N. W. 739. *Contra*, Trimble *v.* Edwards, 84 Tex. 497, 19 S. W. 772.

Creation of new counties by division of old ones.— It has been held, however, that while the court takes judicial notice of a county created by public statute, it will not notice the time of the division of counties and the erection of new ones by county commissioners under general law, but in the latter case such time if material must be proved. Buckinghouse *v.* Gregg, 19 Ind. 401.

86. Kent *v.* Chapman, 18 W. Va. 485.

87. Dryden *v.* Stephens, 19 W. Va. 1.

88. Hix *v.* Hix, 25 W. Va. 481.

89. Facts of Civil war see *supra*, II, B, 14, b.

90. Ross *v.* Austill, 2 Cal. 183.

91. Sun Printing, etc., Assoc. *v.* New York, 8 N. Y. App. Div. 230, 40 N. Y. Suppl. 607 (holding that it would be noticed that the efforts to build elevated railroads in the city of New York failed at one time by reason of inability to procure capital for the work); Guckenberger *v.* Dexter, 8 Ohio S. & C. Pl. Dec. 530, 5 Ohio N. P. 429 (holding that in determining whether a contract for the sale of refunding bonds is in the interest of a municipality the court will take judicial notice of the fact that other municipal departments or agencies sold bonds at a premium and the amount of such premium). The rule has also been applied to such facts as the local feeling against a street railway (Geist *v.* Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112); and to the effect of elevated roads in increasing traffic (Bookman *v.* New York El. R. Co., 137 N. Y. 302, 33 N. E. 333 [*reversing* 60 N. Y. Super. Ct. 493, 17 N. Y. Suppl. 951]; Streets *v.* New York El. R. Co., 79 Hun (N. Y.) 288, 29 N. Y. Suppl. 356. See also Sloane *v.* New York El. R. Co., 137 N. Y. 595, 33 N. E. 335 [*reversing* 63 Hun 300, 17 N. Y. Suppl. 769]).

92. McKinnon *v.* Bliss, 21 N. Y. 206; Bogardus *v.* Trinity Church, 4 Sandf. Ch.

h. Facts Aiding in the Construction of Statutes, Contracts, and Other Documents. In construing statutory provisions judges make constant use of their knowledge of state history in ascertaining the mischief for which the legislature has sought to provide relief.[93] The construction of contracts is aided in the same way by judicial knowledge as to what shall be considered, in view of historical facts, to have been the intention of the parties.[94]

i. Facts Bearing on Conduct of Parties. Historical facts are also judicially noticed as bearing on the conduct of the parties.[95]

j. Facts Bearing on Railroad and Telegraph Matters.[96] In like manner facts of state history have been judicially noticed as bearing on the opening of railroads,[97] the relative priority in construction among railroads,[98] the permanence of railroad locations,[99] the increase of traffic and business,[1] the change in motive power on street railways,[2] and that a telegraph line is necessary to the operation of a railway, and usually consists of wires strung on posts set alongside the railroad,[3] but not of the space required for the repair of such a line.[4]

k. Rates of Interest. The current rate of interest at a given date on moneyed securities is part of the history of a state of which the courts will take judicial notice.[5]

l. Tenures of Office. As part of the general history of the state, courts know of the tenure of office of the chief executive and prominent facts connected with the same,[6] and even of that of local officials.[7]

m. Facts Relating to Elections. The court will not require proof but will take judicial notice of the date of a general state election,[8] or of an election to

(N. Y.) 633, 724 (where it is said that evidence derived from public records, statutes, legislative journals, historical works, etc., is restricted to historical evidence concerning facts of a public and general nature); Morris *v.* Edwards, 1 Ohio 189; Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781; Stainer *v.* Droitwich, 1 Salk. 281.

Private ownership.— Among facts which are not of sufficient general interest to warrant the assumption of judicial knowledge are those relating to the history of private titles. The court in New York for example declines to admit evidence from local histories on a claim of private ownership to a tract of land said to have been granted to Sir William Johnson prior to his decease in 1774. McKinnon *v.* Bliss, 21 N. Y. 206.

93. Smith *v.* Speed, 50 Ala. 276; Tompkins County *v.* Taylor, 21 N. Y. 173. See, generally, STATUTES.

94. Buford *v.* Tucker, 44 Ala. 89, holding that the courts of Alabama would take notice without proof that as a general thing contracts made in January, 1865, were made with reference to Confederate currency.

95. Thus it was held that the courts of Alabama would take judicial notice of the increased responsibility of a trustee by the condition of affairs during the Civil war (Lyon *v.* Foscue, 60 Ala. 468); the disturbed condition of business during that period, and the difficulty of making safe and productive investments (Foscue *v.* Lyon, 55 Ala. 440); and the fact that the people of the state were in 1867 in a condition of very great pecuniary embarrassment and insolvency, and that in consequence of this state of affairs it may have been impracticable for a guardian at that time to make a safe loan of a large sum of money without delay after its receipt (Ashley *v.* Martin, 50 Ala. 537).

Facts in relation to civil war see *supra*, II, B, 14, b.

96. Facts as to street railways see *supra*, II, B, 14, g.

97. Knowlton *v.* New York, etc., R. Co., 72 Conn. 188, 44 Atl. 8.

98. Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

99. Miller *v.* Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954.

Location and operation of railroads see *supra*, II, B, 13, d.

1. Chinn *v.* Chicago, etc., R. Co., 100 Mo. App. 576, 75 S. W. 375, holding that in an action against a carrier for delay in the carriage of cattle the court may take judicial notice of the fact that the live-stock traffic increases yearly.

2. Meyer *v.* Krauter, 56 N. J. L. 696, 29 Atl. 426, 24 L. R. A. 575, holding that judicial notice will be taken that at a particular time trolleys had not long taken the place of horse-cars.

3. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; Youree *v.* Vicksburg, etc., R. Co., 110 La. 791, 34 So. 779.

4. Youree *v.* Vicksburg, etc., R. Co., 110 La. 791, 34 So. 779.

5. New Haven Trust Co. *v.* Doherty, 74 Conn. 468, 51 Atl. 130; Collins *v.* Wardell, 63 N. J. Eq. 371, 52 Atl. 708.

6. State *v.* Boyd, 34 Nebr. 435, 51 N. W. 964. See also Henry *v.* Cole, 2 Ld. Raym. 811, 7 Mod. 103, holding that English courts will notice on what day the king died. See *infra*, II, C, 3, b, (I).

7. McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098. See also *infra*, II, C, 3, b, (I).

8. Lewis *v.* Bruton, 74 Ala. 317, 49 Am. Rep. 816.

congress,[9] and it will take judicial notice of a contest in such an election.[10] It has also been held that the courts will take judicial notice of the result of a general election,[11] and of other facts in relation thereto,[12] and of the powers of state conventions as the highest party organization.[13]

n. Facts of Incorporation. The rule that courts will take judicial notice of historical facts applies to matters of history with respect to corporations.[14]

15. Facts Established by Statistics — a. Census. Courts know the facts generally known to have been established by statistics in much the same way and for much the same reason that they know the facts set forth in the almanac. The court cannot verify the facts; but where statistics are official, prepared by public officers acting under provision of law, the duty of the court to know the law and recognize the existence of acts done under it stimulates and indorses the court's knowledge of the facts established by such statistics, in which the community shares. Courts therefore will take judicial knowledge of the results of a census taken under federal,[15] state,[16] or municipal[17] authority. The court will take judicial notice of the population of counties,[18] cities,[19] and towns,[20] and of the approximate rate at which the population of such places increases.[21] Other facts

9. Lewis *v.* Bruton, 74 Ala. 317, 49 Am. Rep. 816.

10. Lewis *v.* Bruton, 74 Ala. 317, 49 Am. Rep. 816.

11. State *v.* Swift, 69 Ind. 505, holding that the supreme court takes judicial notice of the number of votes cast at a general state election upon all questions of public affairs affecting the state, and therefore must know all the facts necessary to the decision of the question whether or not a constitutional amendment was ratified. See also *In re* Denny, 156 Ind. 104, 59 N. E. 359, 52 L. R. A. 722, holding that the court will take judicial notice of the vote cast at an election as shown by the returns made to the secretary of state.

12. State *v.* Downs, 148 Ind. 324, 47 N. E. 670, holding that the supreme court would take judicial notice that at the last general election one of the great political parties of the state and nation, known as the "Republican Party," submitted to the voters of this state a ticket known by the people and recognized in the election laws as the "Republican ticket."

13. State *v.* Liudahl, 11 N. D. 320, 91 N. W. 950.

14. See *infra*, II, B, 20, c.

15. *California.*— People *v.* Williams, 64 Cal. 87, 27 Pac. 939.

Illinois.— Chicago, etc., R. Co. *v.* Baldridge, 177 Ill. 229, 52 N. E. 263; Worcester Nat. Bank *v.* Cheney, 94 Ill. 430.

Indiana.— Whitley County *v.* Garty, 161 Ind. 464, 68 N. E. 1012; Huntington *v.* Cast, 149 Ind. 255, 48 N. E. 1025; Stultz *v.* State, 65 Ind. 492; Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157.

Iowa.— State *v.* Braskamp, 87 Iowa 588, 54 N. W. 532.

Missouri.— State *v.* Jackson County Ct., 89 Mo. 237, 1 S. W. 307; State *v.* Herrmann, 75 Mo. 340.

Oregon.— Stratton *v.* Oregon City, 35 Oreg. 409, 60 Pac. 905.

West Virginia.— Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

See 20 Cent. Dig. tit. "Evidence," § 17; and other cases in the following notes.

16. Huntington *v.* Cast, 149 Ind. 255, 48 N. E. 1025; Stratton *v.* Oregon City, 35 Oreg. 409, 60 Pac. 905.

17. Kokes *v.* State, 55 Nebr. 691, 76 N. W. 467, holding that courts will take judicial notice of a school census and its results.

18. *Illinois.*— Worcester Nat. Bank *v.* Cheney, 94 Ill. 430.

Indiana.— Whitley County *v.* Garty, 161 Ind. 464, 68 N. E. 1012.

Iowa.— State *v.* Braskamp, 87 Iowa 588, 54 N. W. 532.

Missouri.— Crow *v.* Evans, 166 Mo. 347, 66 S. W. 355; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23.

New York.— Farley *v.* McConnell, 7 Lans. 428. And see Adams *v.* Elwood, 176 N. Y. 106, 68 N. E. 126.

United States.— Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200.

19. *California.*— People *v.* Wong Wang, 92 Cal. 277, 28 Pac. 270.

Colorado.— *In re* Senate Bill No. 293, 21 Colo. 38, 39 Pac. 522.

Iowa.— Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844.

Nebraska.— Union Pac. R. Co. *v.* Montgomery, 49 Nebr. 429, 68 N. W. 619.

New York.— Denair *v.* Brooklyn, 5 N. Y. Suppl. 835.

Oregon.— Stratton *v.* Oregon City, 35 Oreg. 409, 60 Pac. 905.

20. Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157.

21. *In re* Senate Bill No. 293, 21 Colo. 38, 39 Pac. 522; Union College *v.* New York, 65 N. Y. App. Div. 553, 73 N. Y. Suppl. 51. It has been held, however, that the court cannot take judicial notice of the fact that a county contains more than one hundred and twenty thousand inhabitants, where the last public record shows the population to be less than that in number, although in point of fact it may have been more at the time of the trial, as the court must be governed by the facts

of general interest obtained from the official census will be noticed, such as the amount of capital in the jurisdiction, the form in which it is held,[22] etc.

b. Law of Averages. The law of averages as established by statistics will be recognized by the judge, so that for example he will take notice of the average duration of life as indicated by mortality tables showing the natural expectancy of life at a given age.[23] But the average must be one which is definitely fixed and not subject to violent fluctuations,[24] and the facts to be known to the court must be such as are generally known.[25]

16. Phenomena of Life — a. Human Life — (I) *In General.* Well known facts concerning the phenomena of human life in its various forms need not be proved. Thus courts take judicial notice of the ordinary period of gestation,[26] the ordinary length and limitation of human life,[27] the ordinary proportions of the human body and its consequent height in different positions,[28] the diseases to which men are subject,[29] and in a general way the causes of such diseases so far as they are generally known;[30] the nature and effect of injuries and diseases so far as they are matters of common knowledge;[31] the increased power of certain

shown by the public records. Adams v. Elwood, 176 N. Y. 106, 68 N. E. 126.

22. Wasson *v.* Indianapolis First Nat. Bank, 107 Ind. 206, 8 N. E. 97, holding that courts will take judicial notice of the fact that national bank stock constitutes a material portion of the moneyed capital of the state.

Newspapers.— But courts will not take judicial notice of the number of newspapers printed in a county or that any newspaper is published therein. Atkeson *v.* Lay, 115 Mo. 538, 22 S. W. 481.

23. *Alabama.*— Kansas City, etc., R. Co. *v.* Phillips, 98 Ala. 159, 13 So. 65; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; McDonald *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

Arkansas.— Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550.

Connecticut.— Nelson *v.* Branford Lighting, etc., Co., 75 Conn. 548, 54 Atl. 303.

Georgia.— Western, etc., R. Co. *v.* Hyer, 113 Ga. 776, 39 S. E. 447.

Indiana.— Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512.

Kentucky.— Alexander *v.* Bradley, 3 Bush 667.

Missouri.— Boettger *v.* Scherpe, etc., Architectural Iron Co., 136 Mo. 531, 38 S. W. 298, "American experience table."

New York.— Davis *v.* Standish, 26 Hun 608.

West Virginia.— Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

See 20 Cent. Dig. tit. "Evidence," § 17.

24. Kokes *v.* State, 55 Nebr. 691, 76 N. W. 467, holding that the ratio which the number of voters at an annual election bears to the whole population in a county or state is not so definitely fixed that courts can take judicial notice of it.

25. Price *v.* Connecticut Mut. L. Ins. Co., 48 Mo. App. 281, holding that the rule that courts will take judicial notice of ordinary mathematical propositions, as well as of scientific facts which universal experience has rendered axiomatic, is not applicable to the ascertainment of the present net value of a life-insurance policy, depending partly on extraneous facts and partly on the accuracy of an intricate computation.

26. Eddy *v.* Gray, 4 Allen (Mass.) 435; Erickson *v.* Schmill, 62 Nebr. 368, 87 N. W. 166; Rex *v.* Luffe, 8 East 193, 9 Rev. Rep. 406. But they do not take judicial notice of the fact that the possible period of gestation exceeds ten calendar months. Erickson *v.* Schmill, 62 Nebr. 368, 87 N. W. 166.

27. Floyd *v.* Johnson, 2 Litt. (Ky.) 109, 13 Am. Dec. 255; Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, 21 N. W. 711; Johnson *v.* Hudson River R. Co., 6 Duer (N. Y.) 633; Allen *v.* Lyons, 1 Fed. Cas. No. 227, 2 Wash. 475.

Averages from mortality tables see *supra*, II, B, 15, b.

28. Hunter *v.* New York, etc., R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246, action for personal injuries.

29. Kiernan *v.* Metropolitan L. Ins. Co., 13 Misc. (N. Y.) 39, 34 N. Y. Suppl. 95, pneumonia. And see Lidwinofsky's Petition, 7 Pa. Dist. 188, referred to *infra*, note 31.

30. Birmingham Southern R. Co. *v.* Cuzzart, 133 Ala. 262, 31 So. 979; Leovy *v.* U. S., 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914 [*reversing* 92 Fed. 344, 34 C. C. A. 392]. Certainty of knowledge and the importance of the fact known are factors in determining judicial knowledge. Thus that a certain disease is hereditary will not be noticed (Birmingham Southern R. Co. *v.* Cuzzart, *supra*), while judicial notice will be taken that the public health is deeply concerned in the reclamation of swamp and overflowed lands because of their tendency to cause malarial and malignant fevers (Leovy *v.* U. S., *supra*).

Labor in unsanitary places.— The supreme court will take judicial notice that the manufacture of wearing apparel in improperly ventilated, unsanitary, and overcrowded apartments is likely to promote the spread of disease. State *v.* Hyman, (Md. 1904) 57 Atl. 6.

31. McDaniel *v.* State, 76 Ala. 1 (holding that the fact that a fracture of the skull

senses caused by additional demands made upon them;[32] the ordinary sentiments, feelings, and sensibilities of the people of the community;[33] the habits and curiosity of children;[34] the physical ability or inability of an individual to perform certain acts at a given age;[35] the fact that certain services can only be performed by skilled adults, and are consequently expensive.[36] It has also been held that the price of labor in general will be noticed.[37] Courts do not know that negroes are always liars,[38] but the California court seems to have taken judicial notice of the mendacity of Chinese witnesses.[39] Hypnotism is not a subject of judicial cognizance.[40]

(II) *Articles in Common Use.*[41] The courts judicially notice articles in common use and the facts in relation to them which are commonly known, such as the use of tobacco in its various forms,[42] the fact that oleomargarine is an article of commerce,[43] etc. Courts also know judicially the nature and use of common mechanical devices,[44] such as the telephone,[45] the bicycle,[46] hoppers and

pressing upon the brain is a dangerous wound which may cause death, but which does not necessarily and in all cases produce it, is a matter of common knowledge of which the court will take notice); Lidwinofsky's Petition, 7 Pa. Dist. 188 (holding that the court will take judicial notice of the location and functions of the scrotum in the male human body, and find as a fact, against all the evidence, that varicose veins in that region do not as a matter of law entail such disability for manual labor as would justify granting a license to peddle under a statute authorizing the granting of such a license to persons who by disease or otherwise have become disabled, and who by reason of such disability are unable to procure a livelihood by manual labor).

32. Matter of Cross, 85 Hun (N. Y.) 343, 32 N. Y. Suppl. 933, holding that the court will take judicial notice of the fact that persons engaged in business who cannot read and write have their faculties of memory more acutely educated because they are compelled to depend on their memory and cannot rely on written memoranda.

33. Rowland *v.* Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182, for the purpose of determining the offensive nature of a particular business, such as the undertaking business. See also *infra*, II, B, 18.

34. Spengler *v.* Williams, 67 Miss. 1, 6 So. 613, holding that the court would notice the fact that a lumber pile in a street is calculated to attract children.

35. Southern R. Co. *v.* Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253, holding that the courts will take judicial cognizance of the fact that an infant of under two years of age is incapable of rendering valuable services.

Capacity to commit rape see Rape.

36. Beck, etc., Lithographing Co. *v.* Evansville Brewing Co., 25 Ind. App. 662, 58 N. E. 859 (holding that judicial notice will be taken that lithographing is an art which requires a high degree of skill, and is expensive); Adams Express Co. *v.* Hoeing, 9 Ky. L. Rep. 814 (holding that the court will take judicial notice that preparing maps for a geological survey can only be performed by skilled labor, and that one hundred and twenty dollars a month is a fair compensation for such labor).

37. Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516.

38. Fonville *v.* State, 91 Ala. 39, 8 So. 688.

39. People *v.* Lon Yeck, 123 Cal. 246, 55 Pac. 984.

40. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

41. **Qualities and properties of matter** see *supra*, II, B, 9.

Scientific facts see *supra*, II, B, 10.

42. Austin *v.* State, 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478 [*affirmed* in 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224]. See *supra*, II, B, 9.

43. Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49.

44. Wolfe *v.* Missouri Pac. R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539.

Novelty of invention.— Such notice may be taken in determining the novelty of an alleged invention in a patent suit. King *v.* Gallun, 109 U. S. 99, 101, 3 S. Ct. 85, 27 L. ed. 870, where Woods, J., said: "In deciding whether the patent covers an article the making of which requires invention, we are not required to shut our eyes to matters of common knowledge or things in common use." See also Black Diamond Coal-Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553; Terhune *v.* Phillips, 99 U. S. 592, 25 L. ed. 293; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Farmers' Mfg. Co. *v.* Spruks Mfg. Co., 119 Fed. 594; Lamson Consol. Service Co. *v.* Seigel-Cooper Co., 106 Fed. 734. And see, generally, Patents.

45. Wolfe *v.* Missouri Pac., etc., R. Co., 97 Mo. 473, 481, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539, where it is said: "The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history." See also Globe Printing Co. *v.* Stahl, 23 Mo. App. 451.

46. Rochester, etc., Turnpike Road Co. *v.* Joel, 41 N. Y. App. Div. 43, 58 N. Y. Suppl.

chutes,[47] corner sockets for show-cases,[48] the mode of suspending lamps in railroad cars and in hand lanterns,[49] methods of packing goods,[50] etc., the demonstrated accuracy of their operation,[51] and the general state of development in mechanical arts.[52] The courts, however, will not take judicial notice of particular facts of limited general importance in relation to articles or mechanical devices.[53]

(III) *Social Customs.*[54] The general social customs in vogue through the community are known to the court,[55] but local, provincial, or foreign customs cannot be noticed.[56]

(IV) *Facts of Travel.* The usual route and approximate duration for journeys are judicially noticed.[57]

(V) *Facts of Business.*[58] The usual methods of doing business prevailing in the community will be judicially known and therefore require no proof,[59] and

346, holding that the court may take judicial notice of the fact that bicycles are extensively used as a means of locomotion.

47. Black Diamond Coal-Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553, holding that a court will notice that hoppers with chutes below them are used for various purposes.

48. Terhune *v.* Phillips, 99 U. S. 592, 25 L. ed. 293.

49. Lamson Consol. Service Co. *v.* Seigel-Cooper Co., 106 Fed. 734.

50. King *v.* Gallun, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870, where the court takes judicial notice of the method of packing tobacco and other articles by using several parcels or packages and compressing or inclosing them in a larger package, in deciding that a patent for compressing several parcels of plasterers' hair, each in a separate paper, so as to be convenient for sale, etc., was void for want of novelty.

51. Luke *v.* Calhoun County, 52 Ala. 115; Globe Printing Co. *v.* Stahl, 23 Mo. App. 451; Cozzens *v.* Higgins, 1 Abb. Dec. (N. Y.) 451, 3 Keyes. (N. Y.) 206; Udderzook *v.* Com., 76 Pa. St. 340.

Photographs.— Where photographs are offered in evidence, courts will judicially notice the art of photography, the mechanical and chemical process employed, the scientific principles on which they are based, and their results. Luke *v.* Calhoun County, 52 Ala. 115; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464; Udderzook *v.* Com., 76 Pa. St. 340.

52. Phillips *v.* Detroit, 111 U. S. 604, 4 S. Ct. 580, 28 L. ed. 532; Parsons *v.* Seelye, 100 Fed. 452, 40 C. C. A. 484; Heaton-Peninsular Button-Fastener Co. *v.* Schlochtmeyer, 69 Fed. 592.

53. The state of the art, of which a court may take judicial notice in a suit relating to a patent, and as to which it can be assisted by the statements of the parties or their counsel, without proofs furnished in accordance with the rules of law, is confined to matter of general knowledge; and such judicial notice cannot extend to a single patent relating to a particular fact in a limited art. Parsons *v.* Seelye, 100 Fed. 452, 40 C. C. A. 484.

The weight of artificial legs will not be judicially known. Garrow *v.* Barre R. Co., (Vt. 1902) 52 Atl. 537.

54. Customs and usages generally see *infra*, II, B, 19.

55. Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Com. *v.* Whitney, 11 Cush. (Mass.) 477.

Illustrations.—Thus it has been held that a court will notice that "habitual drunkenness" is a distinct habit from common excess in the use of morphine or chloroform (Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Com. *v.* Whitney, 11 Cush. (Mass.) 477); that liquor saloons are resorted to for sale of liquor as a beverage (Zapf *v.* State, 11 Ind. App. 360, 39 N. E. 171); that the yachting season in northern waters closes before November 1 (The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 14 L. ed. 937); and that a postal card or telegram is likely to be read by others than the one to whom it is addressed (Williamson *v.* Freer, L. R. 9 C. P. 393, 43 L. J. C. P. 161, 30 L. T. Rep. N. S. 332, 22 Wkly. Rep. 878; Robinson *v.* Jones, L. R. 4 Ir. 391).

56. De Tolna *v.* De Tolna, 135 Cal. 575, 67 Pac. 1045 (holding that the court would not take judicial notice that a defendant was a resident of Austria because he affixed to his name a title of nobility); State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138 (holding that because the names of parties show them to belong to the English-speaking race judicial notice will not be taken that they are citizens of the United States).

57. Oppenheim *v.* Leo Wolf, 3 Sandf. Ch. (N. Y.) 571, the usual time for passage by steam or sailing vessels across the Atlantic from New York.

Distances and time of travel between places see *supra*, II, B, 13, g.

58. Customs and usages see *infra*, II, B, 19.

Management and conduct of occupations see *infra*, II, B, 18.

59. Indiana Bond Co. *v.* Bruce, 13 Ind. App. 550, 41 N. E. 958 (that taxes are frequently paid by check); Bowman *v.* Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870 (that a bank, when it makes a collection for a foreign correspondent, never, unless specially directed to do so, remits the specie collected, but takes

the court knows, as every one does, what business it is necessary to do on Sunday.[60]

(VI) *Gaming Enterprises.* It has been held that courts judicially know the peculiar nature of gaming enterprises and the mode in which they are generally carried on,[61] but in some instances courts have declined to take such judicial knowledge.[62]

b. Animal Life. The courts take judicial notice of prominent facts concerning animal life[63] and its progress,[64] the diseases with which animals are commonly afflicted,[65] and ordinary psychological characteristics of animals.[66]

c. Vegetable Life. Courts will also take judicial notice of the prominent facts of vegetable life,[67] as for example that crops require cultivation,[68] that a particular crop such as rice cannot be grown to maturity without water,[69] that crops mature at a particular time,[70] and that they are attacked by certain diseases.[71] But facts

the specie to its own use and sends its draft or certificate of deposit); Bowman *v.* Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; Gibson *v.* Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123 (that, in collecting the price of goods sold, a bill of sale may be remitted to an agent of the vendors in the vendee's neighborhood).

Blockade.— A prize-court will take judicial notice of the notorious course of trade between a certain neutral port and blockaded ports of the enemy. The Mersey, 17 Fed. Cas. No. 9,489, Blatchf. Pr. Cas. 187 [*reversed* on other grounds in 17 Fed. Cas. No. 9,490, Blatchf. Pr. Cas. 658].

60. State *v.* Frederick, 45 Ark. 347, 55 Am. Rep. 555, holding that the court would take judicial notice that carrying on the business of a barber on Sunday is not necessary.

61. Boullemet *v.* State, 28 Ala. 83 (lottery); Lohman *v.* State, 81 Ind. 15 (gift enterprise); State *v.* Burton, 25 Tex. 420 (faro bank).

62. State *v.* Bruner, 17 Mo. App. 274; State *v.* Sellner, 17 Mo. App. 39; State *v.* Russell, 17 Mo. App. 16. See, generally, GAMING.

63. State *v.* Gould, 26 W. Va. 258, that a mule is a domestic animal and that there are no wild mules in the state.

64. Thus in customs duties cases the court will take judicial notice of the general facts of natural history, including the fact that the unimproved native sheep of all countries produce fleeces whose value is depreciated more or less by the undue quantity of hair growing on the belly, flanks, and parts of the thighs and arms of the animals. Lyon *v.* Marine, 55 Fed. 964, 5 C. C. A. 359. See, generally, CUSTOMS DUTIES, 12 Cyc. 1117, 1165.

65. As for example the disease of cattle known as "Texas fever." Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638; Kimmish *v.* Ball, 129 U. S. 217, 9 S. Ct. 277, 32 L. ed. 695. Such notice, however, cannot properly be taken when the matter is one on which competent authorities differ in opinion (Bradford *v.* Floyd, 80 Mo. 207); and minor facts attending a disease will not be judicially noticed until they are well established in general knowledge (Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638; Bradford *v.* Floyd, 80 Mo. 207; Minnesota *v.* Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 [*affirming* 39 Fed. 64]). In Minnesota *v.* Barber, *supra*, the theory upon which a certain statute was alleged to be based, viz., that inspection of an animal on the hoof within a short time before it is slaughtered is necessary to ascertain whether it is diseased, was held not to be a fact which the court could judicially notice.

66. Judicial notice has been taken that a mule is a domestic animal of a treacherous and vicious nature (Borden *v.* Falk Co., 97 Mo. App. 566, 71 S. W. 478); that a trolley-car will frighten an otherwise well broken horse (Meyer *v.* Krauter, 56 N. J. L. 696, 29 Atl. 426, 24 L. R. A. 575); that a box-car standing at a crossing will not frighten horses of ordinary gentleness (Gilbert *v.* Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592); and that cattle on a highway, approaching a railroad crossing, will sometimes be arrested or frightened back by the sight and sound of a coming train, and sometimes will not be by the whistling and ringing in addition (St. Louis, etc., R. Co. *v.* Hurst, 25 Ill. App. 181, 182).

67. Rex *v.* Woodward, 1 Moody C. C. 323, that beans are a species of pulse.

68. Meyers *v.* Menter, 63 Nebr. 427, 88 N. W. 662, that potatoes, sugar beets, and turnips are not the spontaneous products of the soil.

69. Barr *v.* Cardiff, (Tex. Civ. App. 1903) 75 S. W. 341.

70. Wetzler *v.* Kelly, 83 Ala. 440, 442, 3 So. 747 (where it is said: "It is common knowledge that crops of cotton are not planted in this State until after" January); Person *v.* Wright, 35 Ark. 169; Tomlinson *v.* Greenfield, 31 Ark. 557; Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Garth *v.* Caldwell, 72 Mo. 622. See also, as to notice of the course and laws of nature, *supra*, II, B, 8.

71. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623, holding that the court would take judicial notice of the prevalence and serious character of the disease termed "peach yellows," ordinarily resulting in the premature death of the tree affected.

ot vegetable life which are of minor importance and not generally known will not be noticed.[72]

17. LANGUAGE — a. Meaning of Words. A judge judicially knows the ordinary meaning of English words[73] at any given time.[74] He may even decline to hear the evidence of experts on the subject,[75] and dictionaries are used, not as evidence, but at his option to refresh his memory.[76]

b. Meaning of Phrases. The judge will also judicially know the meaning of phrases used in ordinary speech[77] and of legal phrases and expressions in common use,[78] but he cannot notice the meaning of phrases without well established significance.[79]

c. Meaning of Abbreviations. The meaning of customary abbreviations and diminutives of christian names,[80] of other abbreviations in common use,[81] of initials

72. That the age of certain trees can be determined by the number of concentric rings shown on a transverse section is not judicially known. Patterson *v.* McCausland, 3 Bland (Md.) 69.

73. *California.*— Sinnott *v.* Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594; Edwards *v.* San Jose Printing, etc., Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Illinois.— Hill *v.* Bacon, 43 Ill. 477.

Kentucky.— Locke *v.* Com., 74 S. W. 654, 25 Ky. L. Rep. 76, that "beer" without a prefix means either common, lager, or bock beer.

Massachusetts.— Com. *v.* Kneeland, 20 Pick. 206.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389, "malpractice."

New York.— Simpson *v.* Press Pub. Co., 33 Misc. 228, 67 N. Y. Suppl. 401, "leprosy."

Oregon.— Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

United States.— Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570.

England.— Clementi *v.* Golding, 2 Campb. 25.

See 20 Cent. Dig. tit. "Evidence," § 20. And see LIBEL AND SLANDER.

The pronunciation of foreign names must be proved. State *v.* Johnson, 26 Minn. 316, 3 N. W. 982; Galveston, etc., R. Co. *v.* Sanchez, (Tex. Civ. App. 1901) 65 S. W. 893.

Names of liquors judicially known to be or not to be intoxicating see INTOXICATING LIQUORS.

74. Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Lampton *v.* Haggard, 3 T. B. Mon. (Ky.) 149, holding that the court notices "any change which in popular acceptation the meaning of words undergoes."

75. Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228.

76. Nix *v.* Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745.

77. Reed *v.* State, 16 Ark. 499 (knowledge that a "Wyandott Indian" is a human being and not a river); Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70 (the word "sack" as used in newspaper literature in connection with alleged election corruption funds); Baker *v.* Hope, 49 Cal. 598 ("fence pole"); Clarke *v.* Fitch, 41 Cal. 472 ("squatter riot"); Greenfield First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444 (holding that the question to a witness: "What did you understand by the word 'deal'? was rightly excluded," because the word was judicially known); Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251 ("Beecher business"); Hoare *v.* Silverlock, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624 (allusion to "fable of the frozen snake").

78. *Alabama.*— Ward *v.* State, 22 Ala. 16; Sterne *v.* State, 20 Ala. 43.

Massachusetts.— Com. *v.* Kneeland, 20 Pick. 206.

Missouri.— South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360; Schlingmann *v.* Fiedler, 3 Mo. App. 577.

New York.— Lenahan *v.* People, 5 Thomps. & C. 265.

United States.— Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570.

See 20 Cent. Dig. tit. "Evidence," § 20.

79. Grennan *v.* McGregor, 78 Cal. 258, 20 Pac. 559 ("branch railroad"); Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572 ("Black Republican," or "Supporters of the Helper Book"); The Mary, 123 Fed. 609 (holding that a federal court in Alabama cannot take judicial notice of what constitutes a "sack raft," and that a particular raft is such a raft and unlawful, where the testimony shows that there is no such thing as a sack raft commonly known within its jurisdiction, there being no law of the United States or of the state describing such a raft).

80. See NAMES.

81. Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328, holding that courts must judicially notice the vernacular language, and decide what abbreviations and symbols of ideas have been adopted by the people generally and have become a part of the language.

"Acct."— Heaton *v.* Ainley, 108 Iowa 112, 78 N. W. 798.

"Admr."— Moseley *v.* Mastin, 37 Ala. 216.

"Ind."— Burroughs *v.* Wilson, 59 Ind. 536.

"Sec. 23, 38, 14."— McChesney *v.* Chicago, 173 Ill. 75, 50 N. E. 191.

"Supt."— South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360.

commonly employed in the community,[82] and of initials and abbreviations of printers[83] and surveyors,[84] will be within the knowledge of judges and jurors. Judges may properly decline to hear evidence to establish a meaning of an ordinary word, abbreviation, or other symbol which is contrary to the judicial knowledge of the judge.[85] In Texas it has been held that courts do not know that "La." is an abbreviation for "Louisiana,"[86] nor that "Mo." represents the state of Missouri.[87] These rulings, however, apparently rest upon a misapprehension of the point decided in an earlier case in the same state.[88]

18. Management and Conduct of Occupations. On the ground of common knowledge courts take judicial notice of the general course of business in the mutitudinous occupations of men.[89] This doctrine has been applied with respect to the general practice of persons conducting the business of agriculture;[90] banking;[91]

82. "A. M."— Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

"C., B. & Q. R. R. Co." are initials judicially known to Iowa courts as meaning the Chicago, Burlington & Quincy Railroad Company. Accola *v.* Chicago, etc., R. Co., 70 Iowa 185, 30 N. W. 503.

"C. O. D."— U. S. Express Co. *v.* Keefer, 59 Ind. 263; State *v.* Intoxicating Liquors, 73 Me. 278.

"F. O. B."— Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672.

"N. P." for "notary public." Rowley *v.* Berrian, 12 Ill. 198.

"P. M." for "afternoon." Hedderick *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

Description of land in tax receipts as "W. ½" for "west half," "N. W. ¼" for "northwest quarter," and "T. 37 N" for "township thirty-seven north" were judicially recognized in Paris *v.* Lewis, 85 Ill. 597.

83. Johnson *v.* Robertson, 31 Md. 476.

84. Paris *v.* Lewis, 85 Ill. 597; Kile *v.* Yellowhead, 80 Ill. 208. But not where they have a merely local meaning. Keith *v.* Hayden, 26 Minn. 212, 2 N. W. 495.

85. Greenfield First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

86. Russell *v.* Martin, 15 Tex. 238.

87. Ellis *v.* Park, 8 Tex. 205.

88. Andrews *v.* Hoxie, 5 Tex. 171, where the court declined not, as is apparently assumed in the later decision, to know that there was a New Orleans in Louisiana but to know judicially that there was not one somewhere else.

89. "We apprehend that it is the duty of courts judicially to know what is the general course of the transactions of human life." Duncan *v.* Littell, 2 Bibb (Ky.) 424, 426, per Boyle, C. J. "We cannot close our eyes to the well-known course of business in the country." Kentucky Bank *v.* Adams Express Co., 93 U. S. 174, 185, 23 L. ed. 872, per Strong, J. See also Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 431, 26 How. Pr. (N. Y.) 1.

Mutations in methods of conducting business.— "*Quicquid agant homines*," said Lord Mansfield, "is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind." Barwell *v.* Brooks, 3 Dougl. 371, 373, 26 E. C. L. 245 [*quoted* in Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 5 Mo. App. 347, 375, where the court took judicial notice of the effect of the car-ferry for conveying freight across rivers without breaking bulk].

90. Judicial notice will be taken of the time for planting cotton (Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747); and the necessity for irrigation of arid lands and the methods adopted for securing it (Crawford Co. *v.* Hathaway, (Nebr. 1903) 93 N. W. 781 [*citing* Ramelli *v.* Irish, 96 Cal. 214, 31 Pac. 41; Judkins *v.* Elliott, (Cal. 1886) 12 Pac. 116; Low *v.* Schaffer, 24 Oreg. 239, 33 Pac. 678; Speake *v.* Hamilton, 21 Oreg. 3, 26 Pac. 855; Kaler *v.* Campbell, 13 Oreg. 596, 11 Pac. 301]). See also, as to notice of the course and laws of nature, *supra*, II, B, 8.

91. Agawam Bank *v.* Strever, 18 N. Y. 502; Citizens' State Bank *v.* Cowles, 39 Misc. (N. Y.) 571, 80 N. Y. Suppl. 598, holding that where the question as to whether the delayed presentment of a check is justified by the fact that it was first sent from New York to another state the court will take notice of the fact that exchange is in favor of the city of New York, and that checks and drafts on banks there or in its vicinity are in demand throughout the rest of the country generally and at a premium. Judicial notice will be taken that banks in their ordinary course of business receive paper for collection, and collaterals accompanying it (Birmingham First Nat. Bank *v.* Newport First Nat. Bank, 116 Ala. 520, 22 So. 976) and allow depositors to check out their funds in parcels (Munn *v.* Burch, 25 Ill. 35); that employees of a bank other than the cashier must have access to the funds (La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805); that banks have a right to expect their depositors to know the usages of business, and to conform to them (American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725). They notice the practice of renewing obligations for favored customers on payment of a new discount (Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338, 38 Am. Rep. 434 [*affirming* 18 Hun 176]); and receiving deposits, signing circulating notes, certificates of deposit, and certificates on the face of

brokerage;[92] and building or paving,[93] commercial,[94] or legal[95] pursuits; the lottery business;[96] mercantile agencies;[97] mining;[98] and to the constructing[99] and operating[1] of railroads. The doctrine has also been applied to the real estate

checks (Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425).

92. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 41 Pac. 308, relations between a broker and his customers.

93. Judicial notice will be taken of the general nature and use of materials employed (Duby *v.* Jackson, 69 Minn. 342, 72 N. W. 568; Doyle *v.* New York, 58 N. Y. App. Div. 588, 69 N. Y. Suppl. 120; Conde *v.* Schenectady, 29 N. Y. App. Div. 604, 51 N. Y. Suppl. 854); that crushed stone is used merely for pavements, and is not an article ordinarily kept in stock for sale to the general public (Duby *v.* Jackson, 69 Minn. 342, 72 N. W. 568); that there is a lake on the island of Trinidad known as "Asphaltum lake," and that a requirement in specifications for "the best quality of refined lake asphaltum" means asphalt from that lake (Conde *v.* Schenectady, 29 N. Y. App. Div. 604, 51 N. Y. Suppl. 854); but not that "waterstone" is the same as "cobblestone" (Doyle *v.* New York, 58 N. Y. App. Div. 588, 69 N. Y. Suppl. 120).

94. Judicial notice will be taken of the distinction between a wholesale dealer and a manufacturer (Kansas City *v.* Butt, 88 Mo. App. 237); of changes in methods of doing business (Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390. See also Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 5 Mo. App. 347 [*reversed* in 73 Mo. 389, 39 Am. Rep. 519]); of the custom of mutual credits under which business houses furnish each other's clerks or customers with goods, and charge them to each other (Cameron *v.* Blackman, 39 Mich. 108); "that exchange is in favor of the city of New York, and that checks and drafts on banks there or in its vicinity are in demand throughout the rest of the country generally and at a premium" (Citizens' State Bank *v.* Cowles, 39 Misc. (N. Y.) 571, 577, 80 N. Y. Suppl. 598, per Gaynor, J.); and of the practice of charging interest after a certain date (Watt *v.* Hoch, 25 Pa. St. 411); but not how long it ought to take an express company to carry a sum of money from one designated city to another (Rice *v.* Montgomery, 20 Fed. Cas. No. 11,753, 4 Biss. 75).

95. Judicial notice will be taken that an attorney must render legal services in order to collect a note (Stephenson *v.* Allison, 123 Ala. 439, 26 So. 290); and of what is the usual course of conveyancing (Doe *v.* Hilder, 2 B. & Ald. 782, 21 Rev. Rep. 488; Rowe *v.* Grenfel, R. & M. 386, 27 Rev. Rep. 761, 21 E. C. L. 778; Willoughby *v.* Willoughby, 1 T. R. 763, 1 Rev. Rep. 397); but not what "the cost book principle" in mining is (Matter of Pennant, etc., Consol. Lead Min. Co., 4 De G. M. & G. 285, 2 Eq. Rep. 944, 22 L. J. Ch. 692, 2 Wkly. Rep. 282, 43 Eng. Reprint 517).

96. Salomon *v.* State, 28 Ala. 83.

97. Holmes *v.* Harrington, 20 Mo. App. 661; Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394; Ernst *v.* Cohn, (Tenn. Ch. App. 1900) 62 S. W. 186.

98. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 41 Pac. 308; Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217; Helm *v.* Chapman, 66 Cal. 291, 5 Pac. 352. See also Irwin *v.* Phillips, 5 Cal. 140, 53 Am. Dec. 113.

Meaning of terms.— Courts notice that the "true meaning of such expressions as shaft, tunnels, levels, chutes, slopes, uprises, crosscuts, inclines, et cetera, when applied to mines, signifies instrumentalities whereby and through which such mines are opened, developed, prospected, improved, and worked." Hines *v.* Miller, 122 Cal. 517, 519, 55 Pac. 401.

99. Judicial notice taken that the lines of a railroad are marked out and the grades fixed by the company's engineer. Alabama, etc., R. Co. *v.* Coskry, 92 Ala. 254, 9 So. 202.

1. "In such a case the general course of business may be judicially noticed on the principle quoted in Fisher *v.* Jansen, 30 Ill. App. 91, that 'courts will not pretend to be more ignorant than the rest of mankind.'" Pittsburg, etc., R. Co. *v.* Callaghan, 50 Ill. App. 676, 681, per Gary, J. Judicial notice will be taken of the general speed of trains (Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884) and the necessity for it (Lake Shore, etc., R. Co. *v.* Miller, *supra*); the practice of connecting lines to make through joint rates (Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477), to carry drummers' samples as baggage (McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052), and to check baggage through over connecting lines (Isaacson *v.* New York Cent., etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142); the general duties of railroad agents, such as conductors and ticket agents and the relation they sustain to passengers (Dye *v.* Virginia Midland R. Co., 20 D. C. 63); that trains running upon a railroad are usually run, directed, and controlled by the owners of the road (South, etc., R. Co. *v.* Pilgreen, 62 Ala. 305; Evansville, etc., R. Co. *v.* Smith, 65 Ind. 92; Slater *v.* Jewett, 85 N. Y. 61, 29 Am. Rep. 627. See also Pittsburg, etc., R. Co. *v.* Callaghan, 50 Ill. App. 676); that a "clearance" or "clearance card," given an employee on quitting the service of the company is not necessarily a letter of recommendation such as would tend to secure him further employment (McDonald *v.* Illinois Cent. R. Co., 187 Ill. 529, 58 N. E. 463; Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, 62 L. R. A. 922); that section men at certain

business;[2] the retail wine business;[3] stock raising;[4] operating street railways[5] or omnibus lines;[6] the undertaking business;[7] and selling patent medicines.[8] But a court does not judicially know the proper management of horses.[9]

19. Customs and Usages.[10] Judges and jurors recognize the existence of reasonable[11] and legal[12] customs and usages generally known throughout a community[13]

times of the year, during the ordinary hours of labor, burn rubbish on the railroad right of way (Baxter *v.* Great Northern R. Co., 73 Minn. 189, 75 N. W. 1114); that it is within the agency of a section foreman to keep both track and right of way in proper condition (Mobile, etc., R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 14, 522); that the maintenance of gates and a flagman at a crossing of the tracks of a railroad and a street railway on a city street diminishes the danger of accidents (Richmond Union Pass. R. Co. *v.* Richmond, etc., R. Co., 96 Va. 670, 32 S. E. 787); that there is no device which will wholly prevent escape of sparks and cinders from locomotives (Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176); and that the practice is to separate freight and passenger trains (Atchison, etc., R. Co. *v.* Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822. But judicial notice is not taken of the time which railroad trains require to run between different places (Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884), the time of the arrival or departure of trains (Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302); nor of the details of internal management and regulation not immediately in contact with the public, such as the duties of the superintendent (Southern R. Co. *v.* Hagan, 103 Ga. 564, 29 S. E. 760; Brown *v.* Missouri, etc., R. Co., 67 Mo. 122), or a passenger brakeman (Cleveland, etc., R. Co. *v.* McLean, 1 Ohio Cir. Ct. 112, 1 Ohio Cir. Dec. 67); that the footboard in front of a switch engine is the post of duty of the yard-master (Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357); that freight trains of diverse length upon roads of varying grade can (Moore *v.* Saginaw, etc., R. Co., 115 Mich. 103, 72 N. W. 1112) or cannot (Jonas *v.* Long Island R. Co., 21 Misc. (N. Y.) 306, 47 N. Y. Suppl. 149) be stopped without a "jerk."

2. Judicial notice is taken that contracts to buy real estate are often made with the expectation on the part of the purchaser of reselling at a profit before he is compelled to complete his contract. Anderson *v.* Blood, 86 Hun (N. Y.) 244, 33 N. Y. Suppl. 233.

3. "The court takes judicial notice of the fact that champagne, as ordinarily served from an ice chest or in coolers, is liable to lose its labels before the bottle is shown to the customer." Von Mumm *v.* Wittemann, 85 Fed. 966, 967, per Townsend, D. J.

4. Judicial notice is taken that the owners of cattle are accustomed to depasture unsurveyed public lands (Mathews *v.* Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085), and that mere pasturage upon uninclosed western plains is very slight evidence of possession (Whitney *v.* U. S., 167 U. S. 529, 17 S. Ct. 857, 42 L. ed. 263); but not whether a partition fence sufficient to restrain and inclose sheep will also restrain and inclose hogs (Enders *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056).

5. Judicial notice is taken that passengers ride on the platforms (Metropolitan R. Co. *v.* Snashall, 3 App. Cas. (D. C.) 420, 433), and that a cable car on an up grade through a reverse curve cannot cross another track without a sudden start, that the cable cannot be kept taut, and that jerks are common and unavoidable (Pryor *v.* Metropolitan St. R. Co., 85 Mo. App. 367); but not whether an electric car can be stopped or its speed so checked within one hundred and fifty feet as to avoid injury to persons or animals on the track (Kotila *v.* Houghton County St. R. Co., (Mich. 1903) 96 N. W. 437).

6. The owner of an omnibus line is known to be a common carrier of passengers and their baggage. Parmelee *v.* McNulty, 19 Ill. 556.

7. The court takes judicial notice that a particular undertaking establishment as described in the evidence would be offensive to the sensibilities of persons dwelling in its vicinity. Rowland *v.* Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182.

8. The fact that the sale of proprietary medicines and nostrums depends less upon the merits of the medicines themselves than upon the expedients used to recommend them to the public is so notorious that the court will take judicial notice thereof. Fowle *v.* Park, 48 Fed. 789.

9. About managing horses, refractory or otherwise, a court knows no more judicially than it does of navigating a steamship in a storm upon the Atlantic. Chicago City R. Co. *v.* Smith, 54 Ill. App. 415, 417, per Gray, J.

10. Social customs see *supra*, II, B, 16, a, (III).

11. An unreasonable custom, such as a custom that an employee must accept goods from a particular store in payment of wages, will not be judicially noticed. Cady *v.* Case, 11 Wash. 124, 39 Pac. 375.

12. Columbia Bank *v.* Fitzhugh, 1 Harr. & G. (Md.) 239; Murphy *v.* Calley, 1 Allen (Mass.) 107; Rowland *v.* Miln, 2 Hilt. (N. Y.) 150.

13. *Arkansas.*— City Electric St. R. Co. *v.* First Nat. Exch. Bank, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535; Davis *v.* Hanly, 12 Ark. 645.

Illinois.— Munn *v.* Burch, 25 Ill. 35.

Maryland.— Sasscer *v.* Farmers' Bank, 4 Md. 409; Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217.

Massachusetts.— Murphy *v.* Calley, 1 Allen

in mining,[14] commercial,[15] official,[16] or religious[17] matters, although the community

107; Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. 282; Sawyer *v.* Baldwin, 11 Pick. 492.

Michigan.— Pfeiffer *v.* Detroit Bd. of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536; Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390.

New York.— Rowland *v.* Miln, 2 Hilt. 150.

Pennsylvania.— Watt *v.* Hoch, 25 Pa. St. 411.

South Carolina.— Union Bank *v.* Union Ins. Co., Dudley 171.

Texas.— Chadoin v. Magee, 20 Tex. 476.

Vermont.— Wood *v.* Smith, 23 Vt. 706.

Washington.— Cady *v.* Case, 11 Wash. 124, 39 Pac. 375.

United States.— U. S. *v.* Arredondo, 6 Pet. 691, 8 L. ed. 547.

England.— Bruin *v.* Knott, 9 Jur. 979, 12 Sim. 453; Piper *v.* Chappell, 9 Jur. 601, 14 M. & W. 624.

See 20 Cent. Dig. tit. "Evidence," § 25.

Assessment and payment of taxes.— That taxpayers do not fix the value of their own property for assessment purposes, but that this duty usually devolves upon municipal or state officers (Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241), and that they do not always pay in the year of assessment (Mullen *v.* Sackett, 14 Wash. 100, 44 Pac. 136), are facts of which judicial notice is taken.

Public usage to fish in private ponds unless the owner has given public notice that it will not be allowed is judicially noticed. Marsh *v.* Colby, 39 Mich. 626, 33 Am. Rep. 439.

Usage once judicially known.— Where a usage has been proved in a previous case, so as to leave no doubt as to its existence, the court will take judicial notice of it. Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225. See *supra*, II, B, 2.

14. Courts will take judicial notice of those general methods, which are common to all districts, of locating and designating mines by serial number above and below a common base, known as "discovery" or "No. 1." Butler *v.* Good Enough Min. Co., 1 Alaska 246. *Compare*, as to purely local usages, *infra*, this section, note 23.

15. Jones *v.* Peppercorne, 5 Jur. N. S. 140, Johns. 430, 28 L. J. Ch. 158, 7 Wkly. Rep. 103.

Custom of brokers, as part of the general custom of merchants, is judicially noticed. Jones *v.* Peppercorne, 5 Jur. N. S. 140, Johns. 430, 28 L. J. Ch. 158, 7 Wkly. Rep. 103.

Negotiability of bonds payable to bearer.— It is no longer necessary to tender evidence as to the negotiability of bearer bonds, foreign or English. The existence of the usage has been so often proved that it must now be taken to be part of the law of which the courts ought to take judicial notice. Edelstein *v.* Schuler, [1902] 2 K. B. 144, 71 L. J. K. B. 572, 87 L. T. Rep. N. S. 204, 50 Wkly. Rep. 493.

Sundays and festivals.— A general usage to observe Sundays and great festivals like Christmas in the protest of commercial paper is judicially known. Sasscer *v.* Farmers' Bank, 4 Md. 409.

Banking hours are judicially noticed. Salt Springs Nat. Bank *v.* Burton, 58 N. Y. 430, 17 Am. Rep. 265; Calisher *v.* Forbes, L. R. 7 Ch. 109, 41 L. J. Ch. 56, 25 L. T. Rep. N. S. 772, 20 Wkly. Rep. 160; Jameson *v.* Swinton, 2 Campb. 373, 2 Taunt. 224; Hare *v.* Henty, 10 C. B. N. S. 65, 7 Jur. N. S. 523, 30 L. J. C. P. 302, 4 L. T. Rep. N. S. 363, 9 Wkly. Rep. 738, 100 E. C. L. 65; Parker *v.* Gordon, 7 East 385, 6 Esp. 41, 3 Smith K. B. 358, 8 Rev. Rep. 646.

Time of presentment of commercial paper.— The practice of all banks and merchants in a county to present negotiable paper for payment on the day following the third day of grace is judicially noticed. Columbia Bank *v.* Fitzhugh, 1 Harr. & G. (Md.) 239.

The custom of the vendors of property to ask more for it than it is worth has been judicially noticed. State *v.* Chingren, 105 Iowa 169, 74 N. W. 946.

Otherwise of usages of limited adoption such as local customs as to days of grace upon instruments not entitled to grace by general mercantile law (Tranter *v.* Hibbard, 108 Ky. 265, 56 S. W. 169, 21 Ky. L. Rep. 1710), especially when payable in another state (Goddin v. Shipley, 7 B. Mon. (Ky.) 575), the regulations of a brokers' board (Goldsmith *v.* Sawyer, 46 Cal. 209), or the allowance of commissions on bills of exchange received in payment of a judgment (Ward *v.* Everett, 1 Dana (Ky.) 429).

16. Judicial notice is taken of the custom of assessors to assess real estate for taxation at a percentage below its real value. Bureau County *v.* Chicago, etc., R. Co., 44 Ill. 229; Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Railroad, etc., Co. *v.* Tennessee, 85 Fed. 302; Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. 395.

17. That it is a general custom among churches to keep a record of their official acts (Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492), that seventh-day baptists do not work on Saturday (State *v.* South Kingstown, 18 R. I. 258, 273, 27 Atl. 599, 22 L. R. A. 65), and that religious exercises and bible readings are customarily employed in the daily exercises of the public schools and other state institutions of learning (Pfeiffer *v.* Detroit Bd. of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536) may be judicially noticed; but customs of particular religious denominations, of limited application, such as the practice of the episcopal church as to the tenure of a parish minister (Youngs *v.* Ransom, 31 Barb. (N. Y.) 49), the authority of vestrymen over the affairs of their parish (Hill Estate Co. *v.* Whittlesey, 21 Wash. 142, 57 Pac. 345), the general organization and administration of the methodist episcopal church (Sarahass *v.* Armstrong, 16 Kan. 192), the

through which the custom is general be of limited extent.[18] Judicial notice is not taken, however, of purely local usages,[19] such as those relating to local municipal improvement of streets,[20] the use of private premises[21] or the preëmption of lands,[22] and local customs relating to mining,[23] or the appropriation of water-rights,[24] and the local laws of Indian tribes.[25] Judicial knowledge of customs and usages may enable the court to declare that there is no such custom or usage as is claimed;[26] but such knowledge may not extend to the details which attend a custom itself known to exist,[27] except it seems to the extent of limitations forming part of the custom.[28]

20. Matters Relating to Private Corporations and Associations[29]— a. State Courts. Since as we shall presently see the courts judicially know the public laws

laws (Katzer *v.* Milwaukee, (Wis. 1899) 79 N. W. 745) and powers of the Roman catholic church (Baxter *v.* McDonnell, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670), require proof.

Historical facts.— Judicial notice will be taken of the creeds and general doctrine of the mormon church, and of the principles of celestial marriage peculiar to that church, as being matters of general history, which may be presumed to be subjects of common knowledge. Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

Judicial notice of historical facts see *supra*, II, B, 14.

18. Thus the custom as to demurrage charges in a particular port (Union Bank *v.* Union Ins. Co., Dudley (S. C.) 171), the custom of the merchants of Philadelphia (Koons *v.* Miller, 3 Watts & S. (Pa.) 271) or Pittsburgh (Watt *v.* Hoch, 25 Pa. St. 411) to charge interest on open accounts after a certain date, and the usage that permits those admitted to certain colonies to make selections of lands already surveyed (Chadoin *v.* Magee, 20 Tex. 476) have been judicially noticed.

19. *California.*— Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534.

Indiana.— Rapp *v.* Grayson, 2 Blackf. 130.

Kentucky.—Longes *v.* Kennedy, 2 Bibb 607.

Maryland.— Columbia Bank *v.* Fitzhugh, 1 Harr. & G. 239.

Mississippi.— Turner *v.* Fish, 28 Miss. 306.

New York.— *In re* Walter, 75 N. Y. 354; Youngs *v.* Ransom, 31 Barb. 49.

Oregon.— Lewis *v.* McClure, 8 Oreg. 273.

Tennessee.—McCorkle *v.* Driskell, (Ch. App. 1900) 60 S. W. 172.

Vermont.— Wood *v.* Smith, 23 Vt. 706.

See 20 Cent. Dig. tit. "Evidence," § 25.

20. *In re* Walter, 75 N. Y. 354.

21. Judicial notice will not be taken that there is a growing custom in the city of Chattanooga to discard fences between lots, or that there is a custom to erect high fences thereon. McCorkle *v.* Driskell, (Tenn. Ch. App. 1900) 60 S. W. 172.

22. The court will not take notice judicially of a custom for a locator to take one third of the land for his services (Longes *v.* Kennedy, 2 Bibb (Ky.) 607), nor "of rules and customs governing the manner of locating and holding claims in each district" (Poujade *v.* Ryan, 21 Nev. 449, 33 Pac. 659).

23. *California.*— Harvey *v.* Ryan, 42 Cal. 626.

Colorado.— Sullivan *v.* Hense, 2 Colo. 424.

Montana.— King *v.* Edwards, 1 Mont. 235.

Nevada.— Poujade *v.* Ryan, 21 Nev. 449, 33 Pac. 659; Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

United States.—Meydenbauer *v.* Stevens, 78 Fed. 787.

See 20 Cent. Dig. tit. "Evidence," § 25.

24. Lewis *v.* McClure, 8 Oreg. 273.

Contra.— The courts of Arizona, however, take judicial notice of the "local customs, laws, and decisions of courts" as to water-rights, as these terms are used in the act of congress of March 26, 1866, providing for the protection of such vested rights. Clough *v.* Wing, (Ariz. 1888) 17 Pac. 453. In Nebraska the supreme court will take judicial notice of the fact that since the early settlement of the western portion of the state, where irrigation has been found necessary to successful agriculture, the custom has existed of appropriating and diverting waters from the natural channels into irrigation canals, and the application of such waters to the soil for agricultural purposes. Crawford Co. *v.* Hathaway, (Nebr. 1903) 93 N. W. 781.

25. Sass *v.* Thomas, (Indian Terr. 1902) 69 S. W. 893; Kelly *v.* Churchill, (Indian Terr. 1902) 69 S. W. 817; Hockett *v.* Alston, 110 Fed. 910, 49 C. C. A. 180; Wilson *v.* Owens, 86 Fed. 571, 30 C. C. A. 257.

26. A court will take judicial notice that it is not customary to require from a vendor an affidavit as to the condition of his title on making a contract of sale or to deposit earnest money in a trust company pending the execution of a deed. Livingston *v.* Spero, 18 Misc. (N. Y.) 243, 41 N. Y. St. 606.

27. While a court knows that railroads are in the habit of carrying "drummers' samples" as baggage, it will not know the conditions and limitations under which it is done. McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052.

28. McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052.

29. Judicial notice as to: Location and operation of railroads see *supra*, II, B, 13, d. Historical facts bearing on railroads and telegraph lines see *supra*, II, B, 14, j. Facts in relation to conduct and management of occupations see *supra*, II, B, 7, 19. Matters in

of the legislature of their own state, but not, in the absence of statutory requirement, the private acts of the legislature or the acts either public or private of another state or foreign country,[30] they will judicially notice the existence, name, and powers of a private domestic corporation created by a public act and the authority to incorporate under and powers conferred by a general incorporation law;[31] but in the absence of a statute they do not notice the existence or powers of a domestic corporation created by a private act,[32] or of a corporation created by or under an act, public or private, of a sister state or foreign country.[33] As a rule, however, courts do not notice without proof the fact of acceptance of a charter or organization of a domestic corporation under a general law,[34] unless a

relation to religious societies see *supra*, II, B, 7, b.

30. See *infra*, II, C, 2.

31. *Alabama.*— Burdine *v.* Grand Lodge, 37 Ala. 478; Douglass *v.* Mobile Branch Bank, 19 Ala. 659.

Arkansas.— Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204; Washington *v.* Finley, 10 Ark. 423, 52 Am. Dec. 244; State Bank *v.* Watkins, 6 Ark. 123; McKiel *v.* Real Estate Bank, 4 Ark. 592.

Georgia.— Jackson *v.* State, 72 Ga. 28.

Indiana.— Gordon *v.* Montgomery, 19 Ind. 110, that a certain bank is a bank of discount and deposit.

Kentucky.— Lexington Mfg. Co. *v.* Door, 2 Litt. 256; Simpkinson *v.* Irwin, 13 Ky. L. Rep. 976.

Maine.— State *v.* Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495.

Maryland.— Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176.

Massachusetts.— Portmouth Livery Co. *v.* Watson, 10 Mass. 91; Jones *v.* Fales, 4 Mass. 245.

Michigan.— Chapman *v.* Colby, 47 Mich. 46, 10 N. W. 74; People *v.* De Mill, 15 Mich. 164, 93 Am. Dec. 179; Hurlbut *v.* Britain, 2 Dougl. 191, judicial notice that a bank not created by a special act must have been incorporated under the general banking laws.

South Carolina.— Simpson *v.* South Carolina Mut. Ins. Co., 59 S. C. 195, 37 S. E. 18, 225; Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

Tennessee.— Owens *v.* State, 5 Sneed 493; Shaw *v.* State, 3 Sneed 86; Trice *v.* State, 2 Head 591.

Texas.— Alabama Bank *v.* Simonton, 2 Tex. 531.

Vermont.— Buell *v.* Warner, 33 Vt. 570.

West Virginia.— State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803; Farmers' Bank *v.* Willis, 7 W. Va. 31.

See 20 Cent. Dig. tit. "Evidence," §§ 26, 27; and cases cited *infra*, II, C, 2. a.

Name.— Jackson *v.* State, 72 Ga. 28; Georgetown, etc., Cent. Bank *v.* Tayloe, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427.

Free masons.— The courts will judicially notice that the society of free masons is purely a charitable corporation. Burdine *v.* Grand Lodge, 37 Ala. 478.

That railroads are common carriers will be judicially noticed. Boyle *v.* Great Northern R. Co., 13 Wash. 383, 43 Pac. 344. And see Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678.

Expiration of charter noticed.— Terry *v.* Merchants', etc., Bank, 66 Ga. 177.

32. Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740; Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76; Kirby *v.* Wabash R. Co., 85 Mo. App. 345; State *v.* Haddonfield, etc., Turnpike Co., 65 N. J. L. 97, 46 Atl. 700; Conley *v.* Columbus Tap R. Co., 44 Tex. 579. See also *infra*, II, C, 2, d.

33. *Alabama.*— Savage *v.* Russell, 84 Ala. 103, 4 So. 235.

Maine.— Savage Mfg. Co. *v.* Armstrong, 17 Me. 34, 35 Am. Dec. 227.

Maryland.— Agnew *v.* Gettysburg Bank, 2 Harr. & G. 478.

Massachusetts.— Portsmouth Livery Co. *v.* Watson, 10 Mass. 91.

Michigan.— Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453; Rohan Bros. Boiler-Mfg. Co. *v.* Richmond, 14 Mo. App. 594.

Ohio.— Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469.

Oregon.— Law Trust Soc. *v.* Hogue, 37 Oreg. 544, 62 Pac. 380, 63 Pac. 690.

Tennessee.— Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 50 S. W. 763; Owens *v.* State, 5 Sneed 493.

England.— St. Charles Nat. Bank *v.* De Bernales, 1 C. & P. 569, R. & M. 193, 12 E. C. L. 325.

See also CORPORATIONS, 10 Cyc. 243; and cases cited *infra*, II, C, 2, b, c.

34. Danville, etc., Plank-Road Co. *v.* State, 16 Ind. 456; People *v.* De Mill, 15 Mich. 164, 93 Am. Dec. 179; Trice *v.* State, 2 Head (Tenn.) 591. See also Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204; Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386; Dutton Ministerial, etc., Fund *v.* Kendrick, 12 Me. 381; Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Purdy *v.* Erie R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669 [*affirming* 33 N. Y. App. Div. 643, 54 N. Y. Suppl. 1114]; Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876; Goodale Lumber Co. *v.* Shaw, 41 Oreg. 544, 69 Pac. 546. And

statute requires them to do so,[35] or under which one of several laws it was organized,[36] whether it has adopted the provisions of some other act,[37] that corporations have consolidated under a statute authorizing them to do so,[38] that the existence of a corporation whose charter has not expired by limitation has ceased,[39] or that a corporation has taken certain action with respect to property or otherwise.[40] Nor will the courts notice the by-laws of a private corporation,[41] or the existence, powers, or duties of officers of a corporation,[42] unless such facts are matters of public law,[43] or other facts of like character.[44]

b. Federal Courts. The federal courts, including the supreme court of the United States, judicially know the existence, name, and powers of a corporation created by an act of congress,[45] the existence and powers of corporations created by a public act of a state,[46] and the powers or privileges conferred by act of congress on a state corporation.[47] It has also been held that federal courts take

see CORPORATIONS, 10 Cyc. 236 *et seq.* *Compare* U. S. *v.* Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302, referred to *infra*, II, B, 20, b.

35. Statutes sometimes require the existence of corporations formed under a general law to be judicially noticed by the courts of the county or counties in which their articles or certificates are recorded. Cicero Hygiene Draining Co. *v.* Craighead, 28 Ind. 274 (such a statute does not require this notice by the supreme court); Delawter *r.* Sand Creek Ditching Co., 26 Ind. 407 (supreme court on appeal presumes action of lower court in this respect was correct).

36. Danville, etc., Plank-Road Co. *v.* State, 16 Ind. 456.

37. Danville, etc., Plank-Road Co. *r.* State, 16 Ind. 456.

38. Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89. And see Columbus, etc., R. Co. *v.* Skidmore, 69 Ill. 566.

Foreign law authorizing consolidation is not judicially noticed. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656.

39. Shea *v.* Knoxville, etc., R. Co., 6 Baxt. (Tenn.) 277.

40. Dunlap *v.* Wilson, 32 Ill. 517; Topp *v.* Watson, 12 Heisk. (Tenn.) 411.

Illustrations.— Thus it has been held that the court will not take judicial notice that a railroad company under its charter condemned or acquired title to any particular land (Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184); that an assignment has been made by a banking corporation, a trustee appointed, etc., as authorized or required by statute (Topp *v.* Watson, 12 Heisk. (Tenn.) 411); of the existence or operation of telegraph lines of a corporation outside of the state, or that a telegraph company under authority of an act of congress has entered into certain business relations with the United States (People *v.* Tierney, 57 Hun (N. Y.) 357, 589, 10 N. Y. Suppl. 940, 948); or of the insolvent condition of a bank in another state (Market Nat. Bank *v.* Pacific Nat. Bank, 27 Hun (N. Y.) 465).

Seal.— The court cannot know judicially that a corporation (a railroad company) has a seal other than a scrawl, purporting to be a seal, which appears upon an appeal-bond. Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35. Courts do not judicially notice the seals of private corporations, but they must be proved. See CORPORATIONS, 10 Cyc. 1076.

The action of the board of directors of a corporation cannot be judicially noticed. Crawford *v.* Mobile Branch State Bank, 7 Ala. 205; Dunlap *v.* Wilson, 32 Ill. 517; Topp *v.* Watson, 12 Heisk. (Tenn.) 411.

41. Bushnell *r.* Hall, 9 Ky. L. Rep. 684; Portage Lake Miners', etc., Benev. Soc. *v.* Phillips, 36 Mich. 22; Haven *r.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512; Simpson *r.* South Carolina Mut. Ins. Co., 59 S. C. 195, 37 S. E. 18, 225.

42. Crawford *v.* Mobile Branch State Bank, 7 Ala. 205 (holding that a person appointed by the legislature to be a director of the state bank could not be judicially recognized as president, when chosen *pro tempore* by the board, and that his authority to perform an act belonging to that office must be established by proof); Brown *v.* Missouri, etc., R. Co., 67 Mo. 122 (holding that courts will not know judicially the powers of officers of a corporation whose office is not created by the charter).

43. Douglass *r.* Mobile Branch Bank, 19 Ala. 659, holding that the courts of Alabama were bound to take judicial notice that the assets of the state bank and branches were placed by law in the hands of commissioners, who were authorized to sell or lease its real estate and to appoint assistant commissioners to aid in the adjustment and settlement of its affairs.

44. The courts do not know judicially that the members of a corporation are all citizens, although they may all be residents of the state (Lexington Mfg. Co. *v.* Dorr, 2 Litt. (Ky.) 256); or the general organization of churches, their administration and control over local churches of the denomination, and their property, etc. (Sarahass *v.* Armstrong, 16 Kan. 192, methodist episcopal church). See also *supra*, II, B, 7, b.

45. Central Bank *v.* Tayloe, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427.

46. Beaty *v.* Knowler, 4 Pet. (U. S.) 152, 7 L. ed. 813. And see Covington Drawbridge Co. *v.* Shepherd, 20 How. (U. S.) 227, 15 L. ed. 896. See also *infra*, II, C, 2, a.

47. Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129. authority conferred

judicial notice of the existence of all national banks without proof of organization under the National Banking Act.[48]

e. Historical Facts. Judicial notice will be taken by state and federal courts of facts in relation to corporations which come within the rule that courts take notice of matters of history, as elsewhere explained.[49]

C. Of Matters of Law — 1. Unwritten Law — a. In General. The rules of the common law are judicially known to the courts in England[50] and in the United States;[51] and the same is true of the doctrines of equity jurisprudence.[52] In England the common law of Ireland and of Scotland is known to the house of lords, without proof,[53] but not to lower courts.[54]

b. Of the Forum. Courts judicially know as of course the unwritten law of the forum, which it is their function to administer,[55] and on appellate review of a judgment of a state court the United States supreme court takes judicial notice of course of the law of that state.[56] A common-law court as well as courts of equity will judicially notice the doctrines of equity jurisprudence and practice;[57] and conversely a court sitting in equity judicially knows the doctrines of the common law and the general rules for their administration.[58] A common-law court, however, does not judicially know the ecclesiastical law, even when dealing with matters affected by ecclesiastical law referred to in public acts of

upon a railroad company to construct a bridge over a navigable river.

48. U. S. *v.* Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302. *Compare*, however, *supra*, note 34.

49. Thus judicial notice will be taken that the incorporation of companies of a certain class has frequently taken place under certain conditions. Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416, 435, 14 L. ed. 997, where it is said: "It is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the Legislature in the last days of its session, when from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act." See also State *v.* Franklin County Sav. Bank, etc., Co., 74 Vt. 246, 52 Atl. 1069, where judicial notice was taken of the facts, as matters of history, in relation to state banks of circulation, discount, and deposit, and in relation to savings banks.

50. Cooper *v.* Cooper, 13 App. Cas. 88, 59 L. T. Rep. N. S. 1; Reg. *v.* Nesbitt, 2 D. & L. 529.

51. Eureka Springs R. Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690; Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353; Copley *v.* Sanford, 2 La. Ann. 335, 46 Am. Dec. 548; Stokes *v.* Macken, 62 Barb. (N. Y.) 145; Wallace *v.* Burden, 17 Tex. 468; Nimmo *v.* Davis, 7 Tex. 26. See also Common Law, 8 Cyc. 386.

Doctrines lately established in England — that is since the Declaration of Independence — are not judicially noticed where their existence as constituting the law of England is in question. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788.

The unwritten law of France is judicially known not to be identical with the English common law. Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406.

52. Nimmo *v.* Davis, 7 Tex. 26. See *infra*, II, C, 1, b.

53. Cooper *v.* Cooper, 13 App. Cas. 88, 59 L. T. Rep. N. S. 1.

54. So stated by Lord Macnaghten in Cooper *v.* Cooper, 13 App. Cas. 88, 107, 59 L. T. Rep. N. S. 1. See also Reg. *v.* Povey, 6 Cox C. C. 83, Dears. C. C. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40, 14 Eng. L. & Eq. 549. But in Reg. *v.* Nesbitt, 2 D. & L. 529, 533, in the court of queen's bench, Patterson, J., said: "I rather think I am bound to take judicial notice, that the common law of England prevails in Ireland."

55. Gaylor's Appeal, 43 Conn. 82 (where the court excluded the testimony of a Connecticut lawyer which was offered in order to prove the existing law of the state); St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176.

56. Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535.

57. Nimmo *v.* State, 7 Tex. 26; Sims *v.* Marryat, 17 Q. B. 281, 79 E. C. L. 281; Neeves *v.* Burrage, 14 Q. B. 504, 19 L. J. Q. B. 68, 68 E. C. L. 504; Elliot *v.* Edwards, 3 B. & P. 181; Westboy *v.* Day, 2 E. & B. 605, 18 Jur. 10, 22 L. J. Q. B. 418, 1 Wkly. Rep. 431, 75 E. C. L. 605. See also Maberley *v.* Robins, 1 Marsh. 258, 5 Taunt. 625. And see, generally, Equity.

58. Civil.— Southgate *v.* Montgomery, 1 Paige (N. Y.) 41.

Criminal.— Scott *v.* Brown, [1892] 2 Q. B. 724, 57 J. P. 213, 61 L. J. Q. B. 738, 67 L. T. Rep. N. S. 782, 4 Reports 42, 41 Wkly. Rep. 116.

the legislature.[59] The general unwritten law of any nation,[60] state,[61] or territory,[62] in force at the time when either of them exercised political sovereignty over the territory in which the court is sitting[63] is judicially noticed as the law of the forum.

c. **Of Sister State or Foreign Country** — (i) *In General.* In the absence of statutory requirement[64] courts of one of the United States do not take judicial notice of the unwritten or "judge-made" law prevailing in a sister state;[65] and in this respect the judicial knowledge of the United States supreme court in the

59. De Grandmont *v.* La. Société des Artisans, etc., 16 Quebec Super. Ct. 532.

60. **Law of England.**— Cox *v.* Morrow, 14 Ark. 603; Davis *v.* Curry, 2 Bibb (Ky.) 238; Stokes *v.* Macken, 62 Barb. (N. Y.) 145.

Law of France.— Chouteau *v.* Pierre, 9 Mo. 3. See also Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406.

Law of Spain.— Doe *v.* Eslava, 11 Ala. 1028; Berluchaux *v.* Berluchaux, 7 La. 539; Malpica *v.* McKown, 1 La. 248, 20 Am. Dec. 279; Ott *v.* Soulard, 9 Mo. 581; Chouteau *v.* Pierre, 9 Mo. 3.

Law of Mexico.— Wells *v.* Stout, 9 Cal. 479.

61. Cox *v.* Morrow, 14 Ark. 603; Henthorn *v.* Doe, 1 Blackf. (Ind.) 157; Delano *v.* Jopling, 1 Litt. (Ky.) 417; Holley *v.* Holley, Litt. Sel. Cas. (Ky.) 505, 12 Am. Dec. 342; Northwestern Bank *v.* Machir, 18 W. Va. 271. See also State *v.* Sais, 47 Tex. 307.

62. Crandall *v.* Sterling Gold-Min. Co., 1 Colo. 106.

63. "Where one government succeeds another over the same territory, in which rights of real property have been acquired, the preceding government is not a foreign government, whose laws must be proved in the courts of the succeeding government." State *v.* Sais, 47 Tex. 307, 318, per Roberts, C. J. See also the cases cited in the three preceding notes.

64. **Pursuant to statutory requirement** decisions of courts in other states were judicially noticed in Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Anderson *v.* May, 10 Heisk. (Tenn.) 84; Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 873. See also Lockwood *v.* Crawford, 18 Conn. 361.

65. *Alabama.*—Cubbedge *v.* Napier, 62 Ala. 518; Sidney *v.* White, 12 Ala. 728.

Arkansas.— Cox *v.* Morrow, 14 Ark. 603.

Connecticut.— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Dyer *v.* Smith, 12 Conn. 384; Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179.

Florida.— Tuten *v.* Gazan, 18 Fla. 751.

Indiana.— Robord *v.* Marley, 80 Ind. 185; Billingsley *v.* Dean, 11 Ind. 331.

Iowa.— Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853.

Kansas.— Ferd. Heim Brewing Co. *v.* Gimber, 67 Kan. 834, 72 Pac. 859; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Hunter *v.* Ferguson, 13 Kan. 462.

Kentucky.— Muhling *v.* Sattler, 3 Metc. 285, 77 Am. Dec. 172; McDaniel *v.* Wright, 7 J. J. Marsh. 475.

Maryland.—Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688.

Massachusetts.—Hazelton *v.* Valentine, 113 Mass. 472, 478; Kline *v.* Baker, 99 Mass. 253. See also Mowry *v.* Chase, 100 Mass. 79.

Michigan.— Kermott *v.* Ayer, 11 Mich. 181.

Minnesota.— Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458; Brimhall *v.* Van Campen, 8 Minn. 1, 82 Am. Dec. 118.

Nebraska.— Barber *v.* Hildebrand, 42 Nebr. 400, 60 N. W. 594.

New Jersey.— Condit *v.* Blackwell, 19 N. J. Eq. 193.

New York.— Phenix Ins. Co. *v.* Church, 59 How. Pr. 293; Leavenworth *v.* Brockway, 2 Hill 201.

North Carolina.—Hooper *v.* Moore, 50 N. C. 130; Moore *v.* Gwynn, 27 N. C. 187.

Ohio.— Smith *v.* Bartram, 11 Ohio St. 690; Ingraham *v.* Hart, 11 Ohio 255; McCann *v.* Pennsylvania Co., 10 Ohio Cir. Ct. 139, 6 Ohio Cir. Dec. 610; Barr *v.* Closterman, 2 Ohio Cir. Ct. 387, 1 Ohio Cir. Dec. 546.

Pennsylvania.— Bollinger *v.* Gallagher, 170 Pa. St. 84, 32 Atl. 569; Ripple *v.* Ripple, 1 Rawle 386; Whiting Mfg. Co. *v.* Fourth St. Nat. Bank, 15 Pa. Super. Ct. 419.

Rhode Island.— Horton *v.* Reed, 13 R. I. 366.

South Dakota.— Meuer *v.* Chicago, etc., R. Co., 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L. R. A. 81.

Tennessee.— Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. 873.

Texas.— Tryon *v.* Rankin, 9 Tex. 595.

Vermont.— Ward *v.* Morrison, 25 Vt. 593; Woodbridge *v.* Austin, 2 Tyler 364, 4 Am. Dec. 740.

See 20 Cent. Dig. tit. "Evidence," § 51; and cases cited *infra*, II, C, 1, c, (II).

Louisiana courts have, however, taken notice that the common law prevails in divers sister states, or is the basis of jurisprudence therein (Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353; Sandidge *v.* Hunt, 40 La. Ann. 766, 5 So. 55; Kling *v.* Sejour, 4 La. Ann. 128; Copley *v.* Sanford, 2 La. Ann. 335, 46 Am. Dec. 548); for example that slaves were personal property in other states (Farwell *v.* Harris, 12 La. Ann. 50), and that a vendor's privilege upon movables is not there recognized (McIlvaine *v.* Legare, 34 La. Ann. 923).

It is assumed in many cases, if there is no evidence to the contrary, that the common law of a sister state is the same as the common law of the forum. See *infra*, V, C, 3, g; and COMMON LAW, 8 Cyc. 387.

exercise of its appellate jurisdiction to review judgments of state courts is subject to the same limitation.[66] The unwritten law[67] of each of the United States, of the territories, and of the District of Columbia is judicially noticed by every federal court in the exercise of original jurisdiction[68] or jurisdiction by removal;[69] and by necessary consequence it is known to the supreme court when the latter is exercising appellate jurisdiction to review judgments of inferior federal courts.[70] No court, however, takes judicial notice of the unwritten law of a foreign country.[71]

Personal knowledge of the judge see *supra*, II, B, 3.

Judicial notice of written law of sister states or foreign countries see *infra*, II, C, 2, b, c.

Reference may be had to the opinions of the highest court of another state. Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853.

66. In such cases the supreme court cannot know what are the doctrines established by judicial decision in another state, these not being judicially noticed in the court below (Lloyd *v.* Matthews, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 7 S. Ct. 398, 30 L. ed. 519; Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535), unless by statute of the state where the judgment under review was rendered the state courts are bound to take judicial notice of the jurisprudence of other states (Hanley *v.* Donoghue, *supra*).

67. Public statutes are noticed by federal courts of original jurisdiction to the same extent as unwritten law. Lamar *v.* Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. ed. 94. See also *infra*, II, C, 2.

68. Laws of states.— Lamar *v.* Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. ed. 94; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469. Laws of foreign governments in force in territory afterward acquired by the United States are deemed, for the purposes of judicial notice, to be the laws of the states or territories into which the acquisition has been carved. U. S. *v.* Chaves, 159 U. S. 452, 16 S. Ct. 57, 40 L. ed. 215; U. S. *v.* Perot, 98 U. S. 428, 25 L. ed. 251; Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241; U. S. *v.* Turner, 11 How. (U. S.) 663, 13 L. ed. 857.

Laws of territories or District of Columbia see Breed *v.* Northern Pac. R. Co., 35 Fed. 642.

Judicial notice of written laws of the several states see *infra*, II, C, 2.

69. Removed cases same as original.— See 18 U. S. St. at L. 472; § 6 [U. S. Comp. St. (1901) p. 512], which provides that circuit courts in cases removed from state courts shall "proceed therein as if the suit had been originally commenced in said circuit court."

70. Lamar *v.* Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. ed. 94; Owings *v.* Hull, 9 Pet. (U. S.) 607, 9 L. ed. 246. See also *infra*, II, C, 2.

Judicial notice of written laws of the several states see *infra*, II, C, 2.

71. *California.*— Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118 (England); McFadden *v.* Mitchell, 61 Cal. 148 (Mexico).

Iowa.— Banco de Sonora *v.* Bankers' Mut. Casualty Co., (1903) 95 N. W. 232, holding that while judicial notice would be taken of the fact that the civil law is the basis of the Mexican jurisprudence as a matter of history, whether a male infant became an adult at the age of fourteen years under the Mexican laws, as he did under the civil law, could not be judicially noticed.

Louisiana.— Isabella *v.* Pecot, 2 La. Ann. 387, Mexico.

Massachusetts.— Bowditch *v.* Soltyk, 99 Mass. 136, Geneva, France, and Austria.

Missouri.— Charlotte *v.* Chouteau, 25 Mo. 465, Canada.

New Hampshire.—Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207, and Pickard *v.* Bailey, 26 N. H. 152 (Canada); Watson *v.* Walker, 23 N. H. 471 (England).

New York.— Roberts' Will, 8 Paige 446, Spain.

North Carolina.— State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449, Russia.

Oregon.— State *v.* Moy Looke, 7 Oreg. 54, China.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507, Grand Duchy of Baden.

United States.— Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788, and Untermeyer *v.* Freund, 50 Fed. 77 (law of England as established by decisions since the Declaration of Independence not judicially noticed); Pierce v. Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254 (Norway); Wilcocks *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47.

England.— Godard *v.* Gray, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62, 24 L. T. Rep. N. S. 89, 19 Wkly. Rep. 348; Nelson *v.* Bridport, 8 Beav. 527, 10 Jur. 871; Millar *v.* Heinrick, 4 Campb. 155; Vander Donckt *v.* Thellusson, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812; *In re* Sussex Peerage, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Reg. *v.* Povey, 6 Cox C. C. 83, Dears. C. C. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40, 14 Eng. L. & Eq. 549; Mostyn *v.* Fabrigas, 1 Cowp. 161; Bristow *v.* Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289; Di Sora *v.* Phillipps, 10 H. L. Cas. 624, 33 L. J. Ch. 129, 2 New Rep. 553, 11 Eng. Reprint 1168; Bremer *v.* Freeman, 10 Moore P. C. 306, 14 Eng. Reprint 508; Cartwright *v.* Cartwright,

(11) *Mode of Proving the Law.* In a few cases it has been held that the unwritten law[72] of a sister state or foreign country may be proved by the production of reports of decisions accredited therein;[73] but according to most of the authorities proof should be made by the testimony of witnesses speaking from their own knowledge,[74] who may, however, refer to printed reports or to text-books in order to refresh their memory,[75] and only for that purpose.[76] In this manner unwritten law consisting of mere practice and usage[77] may be proved as well as that which has received formal judicial sanction. The witnesses testify as experts,[78] and the court decides upon their qualifications.[79] Lawyers who are practising in the foreign jurisdiction[80] or other lawyers who are specially informed in the

26 Wkly. Rep. 684, law of Canada not judicially noticed in England.

See 20 Cent. Dig. tit. "Evidence," § 52.

Judicial notice of written laws of a foreign country see *infra*, II, C, 2, c.

72. Foreign law is assumed to be unwritten until the contrary is shown. Booraem *v.* Merrifield, 17 La. 594; Wetmore *v.* Merrifield, 17 La. 513; Newsom *v.* Adams, 2 La. 153, 22 Am. Dec. 126; Charlotte *v.* Chonteau, 25 Mo. 465. *Compare* Isabella *v.* Pecot, 2 La. Ann. 387. See *infra*, V, C, 3, g.

73. Cubbedge *v.* Napier, 62 Ala. 518; Sidney *v.* White, 12 Ala. 728; Inge *v.* Murphy, 10 Ala. 885; Franklin *v.* Twogood, 25 Iowa 520, 96 Am. Dec. 73; Dundee Mortg., etc., Co. *v.* Cooper, 26 Fed. 665; The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142, a well considered case. See also Horton *v.* Reed, 13 R. I. 366.

By stipulation of counsel the court resorted to the reports of decisions in Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688, but whether the court could have done so without the stipulation was expressly left undecided.

In Illinois it seems that when a foreign statute has been properly introduced in evidence the court may look to the reports of the decisions construing it and judicially notice them without resorting to the testimony of witnesses. McDeed *v.* McDeed, 67 Ill. 545; Hoes *v.* Van Alstyne, 20 Ill. 201. See also *infra*, II, C, 2, b, note 19.

By statute in some of the states reports of decisions in other states or foreign countries are admissible in evidence. See Billingsley *v.* Dean, 11 Ind. 331; Robinson *v.* Boston, etc., R. Co., 7 Allen (Mass.) 393; Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.) 244, 71 Am. Dec. 753; Rice *v.* Rankans, 101 Mich. 378, 59 N. W. 660; People *v.* McQuaid, 85 Mich. 123, 48 N. W. 161; State *v.* Moy Looke, 7 Oreg. 54.

74. Tyler *v.* Trabue, 8 B. Mon. (Ky.) 306; Pierce *v.* Indseth, 106 U. S. 551, 1 S. Ct. 418, 27 L. ed. 254; Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472. See also French *v.* Lowell, 18 Pick. (Mass.) 34; Raynham *v.* Canton, 3 Pick. (Mass.) 293; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222; Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225; Millar *v.* Heinrick, 4 Campb. 155; Mostyn *v.* Fabrigas, 1 Cowp. 161.

A history of China containing a description of its institutions has been held inadmissible to prove the unwritten law and customs of that country. State *v.* Moy Looke, 7 Oreg. 54.

75. Nelson *v.* Bridport, 8 Beav. 527, 10 Jur. 871; *In re* Sussex Peerage, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Bremer *v.* Freeman, 10 Moore P. C. 306, 14 Eng. Reprint 508.

76. Nelson *v.* Bridport, 8 Beav. 527, 539, 10 Jur. 871, where the court said: "In general, it is the testimony of the witness, and not the authority . . . of the text writer, detached from the testimony of the witness, which is to influence the Judge." *Compare*, however, Di Sora *v.* Phillipps, 10 H. L. Cas. 624, 33 L. J. Ch. 129, 2 New Rep. 553, 11 Eng. Reprint 1168, where it was said that the books thus referred to became part of the evidence in the case.

77. Dyer *v.* Smith, 12 Conn. 384; Crafts *v.* Clark, 38 Iowa 237; Mowry *v.* Chase, 100 Mass. 79.

78. People *v.* Lambert, 5 Mich. 349, 362, 72 Am. Dec. 49 (where it was said to be "well settled that the witness must be an expert"); Watson *v.* Walker, 23 N. H. 471 (where it was said that "witnesses [in order] to be competent to prove unwritten laws must be instructed in them").

In North Carolina, however, a statute providing that unwritten foreign law "may be proven by oral evidence" was construed to authorize any layman to testify thereto, the jury to judge of his skill and intelligence. State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

79. People *v.* McQuaid, 85 Mich. 123, 48 N. W. 161; Kline *v.* Baker, 99 Mass. 253; Pickard *v.* Bailey, 26 N. H. 152.

80. *Alabama.*—Walker *v.* Forbes, 31 Ala. 9.

Arkansas.—Barkman *v.* Hopkins, 11 Ark. 157.

Connecticut.—Dyer *v.* Smith, 12 Conn. 384.

Illinois.—McDeed *v.* McDeed, 67 Ill. 545.

Iowa.—Greasons *v.* Davis, 9 Iowa 219.

Kentucky.—Tyler *v.* Trabue, 8 B. Mon. 306.

Louisiana.—Layton *v.* Chalon, 4 La. Ann. 318.

Maryland.—Baltimore Consol. Real Estate, etc., Co. *v.* Cashow, 41 Md. 59; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688; Wilson *v.* Corson, 12 Md. 54.

Massachusetts.—Mowry *v.* Chase, 100 Mass. 79; Bowditch *v.* Soltyk, 99 Mass. 136; Holman *v.* King, 7 Metc. 384; McRae *v.* Mattoon, 13 Pick. 53.

matter,[81] clerks,[82] or judges[83] of the foreign courts, and persons who are not lawyers but from their situation and circumstances may be presumed to understand the foreign law or that part of it which is the subject of inquiry,[84] are competent witnesses to prove it. Where the testimony is uncontradicted,[85] is based on a document[86] or harmonious judicial opinions,[87] or is adduced in connection with

Michigan.— People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49.

Nebraska.— Snyder *v.* Critchfield, 44 Nebr. 66, 62 N. W. 306; Barber *v.* Hildebrand, 42 Nebr. 400, 60 N. W. 594.

New Hampshire.— Kennard *v.* Kennard, 63 N. H. 303.

New Jersey.— Title Guarantee, etc., Co. *v.* Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422; Condit *v.* Blackwell, 19 N. J. Eq. 193.

New York.— Roberts' Will, 8 Paige 446.

North Carolina.— Hooper *v.* Moore, 50 N. C. 130; Moore *v.* Gwynn, 27 N. C. 187.

Pennsylvania.— Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520.

United States.— Pierce *v.* Indseth, 106 U. S. 55, 1 S. Ct. 418, 27 L. ed. 254.

See also *infra*, XI.

81. Hall *v.* Costello, 48 N. H. 176, 179, 2 Am. Rep. 207, where the unwritten law of Canada was proved by New Hampshire lawyers "who had a direct interest to investigate this precise question in Canada, and who had their information from authentic and well informed sources." See also Temple *v.* Pasquotank County, 111 N. C. 36, 15 S. E. 886; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379. See also, as to skilled witnesses testifying with respect to foreign laws, *infra*, XI.

82. Crafts *v.* Clark, 38 Iowa 237; Greasons *v.* Davis, 9 Iowa 219.

83. Greasons *v.* Davis, 9 Iowa 219; Mowry *v.* Chase, 100 Mass. 79; Charlotte *v.* Chouteau, 25 Mo. 465; Pickard *v.* Bailey, 26 N. H. 152, magistrate held competent, although he was not a lawyer.

84. French *v.* Lowell, 18 Pick. (Mass.) 34, 35, where Shaw, C. J., said: "It would be difficult to lay down any rules *a priori*, in a matter depending so exclusively upon circumstances. In regard to a question of mercantile or maritime law of a neighboring State, it would be reasonable to expect testimony from well known and distinguished professional men. Upon a subject of maritime law, especially of some country with which our own has little intercourse, perhaps the testimony of ship-masters and supercargoes would be considered competent. Perhaps, in a case like the present, the testimony of a president or secretary of an insurance company, as to a point of customary law, affecting mercantile rights, might be deemed competent, if given under a profession of being acquainted with it, and with the intent of stating his own knowledge of the law, with his means of knowledge." See also Vander Donckt *v.* Thellusson, 8 C. B. 812, 825, 19 L. J. C. P. 12, 65 E. C. L. 812, where Maule, J., said: "All persons . . . who practise a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required." And see McFadden *v.* Mitchell, 61 Cal. 148; Pickard *v.* Bailey, 26 N. H. 152; Kenny *v.* Clarkson, 1 Johns. (N. Y.) 395, 3 Am. Dec. 336; Dundee Mortg., etc., Co. *v.* Cooper, 26 Fed. 665.

A priest or minister may testify to the law of marriage in his state or country (Bird *v.* Com., 21 Gratt. (Va.) 800), or to the admissibility as evidence therein of records of births, etc., of which he is custodian (American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507).

A merchant and stock-broker at Brussels was held competent to testify to the law of Belgium with regard to commercial paper. Vander Donckt *v.* Thellusson, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812.

Knowledge based on hearsay.— A layman whose knowledge of English law was derived only by inquiry of English lawyers was held incompetent to prove that law. Watson *v.* Walker, 23 N. H. 471.

Indefinite qualification.— An Englishman describing himself as a "certified special pleader" and "familiar with Italian law" was held incompetent to prove it. *In re* Bonelli, 1 P. D. 69, 45 L. J. P. & Adm. 42, 24 Wkly. Rep. 255. A member of the English bar "practicing before the Privy Council is not [as of course] an expert to give evidence concerning the law of those countries for which the Privy Council is the ultimate Court of Appeal." Cartwright *v.* Cartwright, 26 Wkly. Rep. 684.

Knowledge gained by study alone.— It was intimated in Cartwright *v.* Cartwright, 26 Wkly. Rep. 684, that one who has acquired his knowledge by mere study is incompetent; and in Bristow *v.* Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289, a witness whose knowledge of the law of a foreign country was derived solely from his having studied it at a university in another country was not permitted to prove the foreign law.

85. *Maryland.*— Wilson *v.* Carson, 12 Md. 54; Frasher *v.* Everhart, 3 Gill & J. 234.

Michigan.—Rice *v.* Rankans, 101 Mich. 378, 59 N. W. 660.

North Carolina.—Hooper *v.* Moore, 50 N. C. 130.

Pennsylvania.— Bock *v.* Lauman, 24 Pa. St. 435.

United States.— Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225.

86. Rice *v.* Rankans, 101 Mich. 378, 59 N. W. 660; Kline *v.* Baker, 99 Mass. 253.

87. Ely *v.* James, 123 Mass. 36; Kline *v.* Baker, 99 Mass. 253; Thomson-Houston Electric Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536. See also Lockwood *v.* Crawford, 18 Conn. 371.

an offer of a written instrument as evidence[88] the effect of the evidence is to be determined by the court. But if the evidence is conflicting the jury must ascertain under proper instructions what is the foreign law.[89]

d. Law Merchant. Courts take judicial notice of the law merchant as part of the common law.[90] Thus they are cognizant of the status of a partnership and the character of the liability of its members,[91] the negotiability of bills of exchange,[92] days of grace, and *dies non* in connection with the presentment of negotiable paper for payment,[93] the general lien of bankers upon the deposits of their customers,[94] and the seal of a notary public,[95] together with the functions of that officer.[96] A judge need not hear evidence controverting what he judicially knows to be the law merchant.[97]

e. International Law. All courts have judicial knowledge of the rules established by the law of nations.[98]

f. Maritime Law. Courts take judicial notice of the general maritime law,[99]

88. Frasher *v.* Everhart, 3 Gill & J. (Md.) 234; Pickard *v.* Bailey, 26 N. H. 152.

89. Ames *v.* McCamber, 124 Mass. 85; Kline *v.* Baker, 99 Mass. 253; Holman *v.* King, 7 Metc. (Mass.) 384; Charlotte *v.* Chouteau, 25 Mo. 465; Hooper *v.* Moore, 50 N. C. 130; Moore *v.* Gwynn, 27 N. C. 187. See also Ingraham *v.* Hart, 11 Ohio 255; State *v.* Moy Looke, 7 Oreg. 54.

In Connecticut it seems that the judge expresses his opinion upon the evidence, but in no case gives a binding instruction to the jury. Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Kilgore *v.* Bulkley, 14 Conn. 362; Dyer *v.* Smith, 12 Conn. 384; Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179. *Compare* Lockwood *v.* Crawford, 18 Conn. 361, a case apparently influenced by a Connecticut statute.

90. Jewell *v.* Center, 25 Ala. 498; Davis *v.* Hanly, 12 Ark. 645; Reed *v.* Wilson, 41 N. J. L. 29; Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295.

91. Cameron *v.* Orleans, etc., R. Co., 108 La. 83, 32 So. 208.

92. Brandao *v.* Barnett, 3 C. B. 519, 54 E. C. L. 519, 12 Cl. & F. 787, 8 Eng. Reprint 1622.

93. Huie *v.* Brazeale, 19 La. 457; Sasscer *v.* Farmers' Bank, 4 Md. 409; Reed *v.* Wilson, 41 N. J. L. 29.

94. Brandao *v.* Barnett, 3 C. B. 519, 54 E. C. L. 519, 12 Cl. & F. 787, 8 Eng. Reprint 1622.

95. Judicial notice is taken of his seal, whether he is acting within the jurisdiction of the court (Porter *v.* Judson, 1 Gray (Mass.) 175; Browne *v.* Philadelphia Bank, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463; Anon., 12 Mod. 345), in a colony (Brooke *v.* Brooke, 17 Ch. D. 833, 50 L. J. Ch. 528, 44 L. T. Rep. N. S. 512, 30 Wkly. Rep. 45; Hutcheon *v.* Mannington, 6 Ves. Jr. 823, 2 Rev. Rep. 115, 31 Eng. Reprint 1327), in a sister state (Denmead *v.* Maack, 2 MacArthur (D. C.) 475; Carter *v.* Burley, 9 N. H. 558; Halliday *v.* McDougall, 20 Wend. (N. Y.) 81; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243), or in a foreign country (Pierce *v.* Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254; Yeaton *v.* Fry, 5 Cranch 335, 3 L. ed. 117; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243; Cole *v.* Sherard, 11 Exch. 482, 25 L. J. Exch. 59). A notary's seal stamped in the paper itself with a die using ink has been judicially noticed. Pierce *v.* Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254. See, generally, NOTARIES.

Act valid where done.— It must affirmatively appear that the attestation of the notary is conformable to the law of the place where it was made. Neese *v.* Farmers' Ins. Co., 55 Iowa 604, 8 N. W. 450; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243. See, generally, NOTARIES.

96. Brooke *v.* Brooke, 50 L. J. Ch. 528, 17 Ch. D. 833, 44 L. T. Rep. N. S. 512, 30 Wkly. Rep. 45. See, generally, NOTARIES.

Other officers excluded.— Notice will not be taken of a "hussier" or bailiff, an officer exercising, under the local law of France, functions somewhat similar to those of a notary. Chanoine *v.* Fowler, 3 Wend. (N. Y.) 173.

Notary of another state.— It has been held, however, that the courts of Indiana will not take judicial notice of whether a notary public in Ohio has power to take affidavits, as such power is conferred by statute only. Tetonia Loan, etc., Co. *v.* Turrill, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

97. Jewell *v.* Center, 25 Ala. 498.

98. Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 436, 9 L. ed. 1137; U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604. See also U. S. *v.* Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627; Soulard *v.* U. S., 4 Pet. (U. S.) 511, 7 L. ed. 938.

Notice as to foreign governments, flags, and seals see *infra*, II, C, 4.

Prize-courts administering the law of nations are bound to take judicial notice of and give effect to a rule of international law exempting fishing vessels from capture as prize, when there is no treaty or other public act of their own government in relation to the matter. The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320.

99. The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320; The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126; Place *v.* Potts, 8 Exch. 705, 17 Jur. 1168, 22 L. J.

including maritime regulations established in a particular country and accepted as obligatory by the principal commercial states of the world.[1]

2. WRITTEN LAW — a. Domestic Constitutions and Public Statutes. All courts in the United States take judicial notice of the United States constitution and amendments thereto,[2] and of the public statutes enacted by congress.[3] The constitution and public statutes of a state are judicially recognized by all courts of that state[4] and by the United States supreme court when reviewing on appeal or

Exch. 269; Chandler *v.* Grieves, 2 H. Bl. 606 note, 3 Rev. Rep. 525.

Jurisdiction and practice of admiralty courts.— The courts of common law in England will take judicial notice of the jurisdiction of the court of admiralty (Chandler *v.* Grieves, 2 H. Bl. 606 note, 3 Rev. Rep. 525), but not of its practice (Place *v.* Potts, 8 Exch. 705, 17 Jur. 1168, 22 L. J. Exch. 269).

1. The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126 [*reversing* 86 Fed. 814, 30 C. C. A. 628, 82 Fed. 819, 27 C. C. A. 154, and *distinguishing* Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788]; Sears *v.* The Scotia, 14 Wall. (U. S.) 170, 20 L. ed. 822.

2. St. Louis, etc., R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865; Graves *v.* Keaton, 3 Coldw. (Tenn.) 8; State *v.* Bates, 22 Utah 65, 61 Pac. 905, 83 Am. St. Rep. 768; Furman *v.* Nichol, 8 Wall. (U. S.) 44, 19 L. ed. 370; U. S. *v.* Johnson County, 6 Wall. (U. S.) 166, 181, 199, 18 L. ed. 768; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; Central Bank *v.* Tayloe, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427; Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

3. *Alabama.*— Kansas City, etc., R. Co. *v.* Flippo, 138 Ala. 487, 35 So. 457.

Arkansas.—St. Louis, etc., R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865; St. Louis, etc., R. Co. *v.* Maddry, 57 Ark. 306, 21 S. W. 472.

California.— Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448; Semple *v.* Hagar, 27 Cal. 163.

Georgia.— Morris *v.* Davidson, 49 Ga. 361.

Iowa.— Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005.

Kentucky.— Laidley *v.* Cummings, 83 Ky. 606.

Louisiana.— Pollard *v.* Cook, 4 Rob. 199.

Maryland.— Eastwood *v.* Kennedy, 44 Md. 563.

New Mexico.— U. S. *v.* Fuller, 4 N. M. 358, 20 Pac. 175.

New York.— Wheelock *v.* Lee, 15 Abb. Pr. N. S. 24.

Oklahoma.—Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

Pennsylvania.— Flanigen *v.* Washington Ins. Co., 7 Pa. St. 306.

South Dakota.— *In re* Kirby, 10 S. D. 338, 73 N. W. 95.

Texas.— Mims *v.* Swartz, 37 Tex. 13.

Vermont.— Metropolitan Stock Exch. *v.* Lyndonville Nat. Bank, (1904) 57 Atl. 101.

Virginia.— Bird *v.* Com., 21 Gratt. 800; Bayly *v.* Chubb, 16 Gratt. 284.

United States.—Gardner *v.* Barney, 6 Wall. 499, 18 L. ed. 890; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129; Central Bank *v.* Tayloe, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427; U. S. *v.* Johnson, 15 Fed. Cas. No. 15,488, 2 Sawy. 482; *In re* Muller, 17 Fed. Cas. No. 9,912, Deady 513; U. S. *v.* Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302.

See 20 Cent. Dig. tit. "Evidence," §§ 49, 50.

State statutes specifically referred to or incorporated in an act of congress are judicially noticed. Flanigen *v.* Washington Ins. Co., 7 Pa. St. 306; Belt *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 231, 22 S. W. 1062; Apollos *v.* Staniforth, 3 Tex. Civ. App. 502, 22 S. W. 1060.

Where congress puts in force a code of laws in a territory by reference to such laws, they not being embraced in the act or by express provision made a part thereof, the courts of the other states and territories from which such code of laws is not taken will take judicial notice of every fact that can be obtained from the act of congress, but will not take judicial notice of the provisions of the laws it puts in force; and in order to be availed of they must be pleaded and proven. Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

4. *Alabama.*— Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

Arkansas.— Pritchard *v.* Woodruff, 36 Ark. 196.

California.— Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448.

Connecticut.— Willimantic School Soc. *v.* Windham First School Soc., 14 Conn. 457.

Georgia.— Mayson *v.* Atlanta, 77 Ga. 662.

Illinois.— Vance *v.* Rankin, 194 Ill. 625, 62 N. E. 807 [*reversing* 95 Ill. App. 562]; Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149.

Indiana.— Moss *v.* Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45; Madison County *v.* Burford, 93 Ind. 383; Evans *v.* Browne, 30 Ind. 514, 95 Am. Dec. 710; Parent *v.* Walmsly, 20 Ind. 82.

Iowa.— State *v.* Olinger, (1897) 72 N. W. 441; Stier *v.* Oskaloosa, 41 Iowa 353.

Kansas.— *In re* Howard County, 15 Kan. 194; Topeka *v.* Tuttle, 5 Kan. 311.

Kentucky.— Lackey *v.* Richmond, etc., Turnpike Road Co., 17 B. Mon. 43.

Maine.— State *v.* Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495.

Maryland.— Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176.

Massachusetts.— Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042.

error a judgment or decree rendered by a court in that state.[5] All federal courts when exercising original jurisdiction take judicial notice of the constitutions and public statutes not only of the state where they are sitting[6] but of every other state,[7] and of every territory;[8] and the judicial knowledge of the United States supreme court upon appellate review of a judgment or decree of an inferior federal court is equally extensive.[9] The rules above stated as to judicial notice of

Michigan.— Holdridge *v.* Farmers', etc., Bank, 16 Mich. 66.

Minnesota.— Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615.

Mississippi.— Green *v.* Miller, 32 Miss. 650, 685.

Missouri.— Bowen *v.* Missouri Pac. R. Co., 118 Mo. 541, 24 S. W. 436; Woods *v.* Henry, 55 Mo. 560; State *v.* Case, 53 Mo. 246; Rolla State Bank *v.* Borgfeld, 93 Mo. App. 62.

Nebraska.— North Platte Water-Works Co. *v.* North Platte, 50 Nebr. 853, 70 N. W. 393.

New Hampshire.— Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.

New Jersey.— Rader *v.* Union Tp. Committee, 43 N. J. L. 518.

New York.— Warner *v.* Beers, 23 Wend. 103.

North Carolina.—Wikel *v.* Jackson County, 120 N. C. 451, 27 S. E. 117.

Oregon.— State *v.* Banfield, 4 Oreg. 287, 72 Pac. 1093.

South Carolina.— State *v.* Sartor, 2 Strobh. 60.

Tennessee.— State *v.* Murfreesboro, 11 Humphr. 217.

Texas.— Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; Southern Cotton-Press, etc., Co. *v.* Bradley, 52 Tex. 587; Taylor *v.* Hoya, 9 Tex. Civ. App. 312, 29 S. W. 540.

Vermont.— Briggs *v.* Whipple, 7 Vt. 15.

West Virginia.— Hart *v.* Baltimore, etc., Co., 6 W. Va. 336.

Wisconsin.— Smith *v.* Janesville, 52 Wis. 680, 9 N. W. 789.

Canada.— Darling *v.* Hitchcock, 25 U. C. Q. B. 463; Girdlestone *v.* O'Reilly, 21 U. C. Q. B. 409.

See 20 Cent. Dig. tit. "Evidence," § 37.

Existence of a fact necessary to the original or continued application of a statute is not judicially noticed. Miller *v.* Com., 13 Bush (Ky.) 731; People *v.* State Land Office, 23 Mich. 270.

5. Pennie *v.* Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. ed. 426; Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535; Beaty *v.* Knowler, 4 Pet. (U. S.) 152, 7 L. ed. 813.

6. Gerling *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Smith *v.* Tallapoosa County, 22 Fed. Cas. No. 13,113, 2 Woods 574.

7. Barry *v.* Snowden, 106 Fed. 571; Hathaway *v.* New York Mut. L. Ins. Co., 99 Fed. 534; New York Mut. L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127; Andruss *v.* People Bldg., etc., Assoc., 94 Fed. 575, 36 C. C. A. 336; L'Engle *v.* Gates, 74 Fed. 513; Noonan *v.* Delaware, etc., R. Co., 68 Fed. 1; Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646; Merchants' Exch. Bank *v.* McGraw, 59 Fed. 972, 8 C. C. A. 420; Loree *v.* Abner, 57 Fed. 159, 6 C. C. A. 302; Newberry *v.* Robinson, 36 Fed. 841; Knower *v.* Haines, 31 Fed. 513, 24 Blatchf. 488; Swann *v.* Swann, 21 Fed. 299; Taylor *v.* Holmes, 14 Fed. 498; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,609, 2 Sumn. 401; Jaffray *v.* Dennis, 13 Fed. Cas. No. 7,171, 2 Wash. 253; Jasper *v.* Porter, 13 Fed. Cas. No. 7,229, 2 McLean 579; Jones *v.* Hays, 13 Fed. Cas. No. 7,467, 4 McLean 521; Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469; Nelson *v.* Foster, 17 Fed. Cas. No. 10,105, 5 Biss. 44; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74; Woodworth *v.* Spafford, 30 Fed. Cas. No. 18,020, 2 McLean 168.

See 20 Cent. Dig. tit. "Evidence," § 48.

State laws not foreign laws.— In Owings *v.* Hull, 9 Pet. (U. S.) 607, 625, 9 L. ed. 246, the court said: "The circuit courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the general government by the Constitution, extends to many cases arising under the laws of the different States. . . . That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.

Date of elections judicially noticed.— Mills *v.* Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. ed. 293; Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691; Hoyt *v.* Russell, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed. 914; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200; Gardner *v.* Barney, 6 Wall. (U. S.) 499, 18 L. ed. 890.

8. Breed *v.* Northern Pac. R. Co., 35 Fed. 642.

9. Mills *v.* Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. ed. 293; Gerling *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086; New York Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825; Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535; Lamar *v.* Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. ed. 94; Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751; Elwood *v.* Flannigan, 104 U. S. 562, 26 L. ed. 842; Mitchell *v.* Overman, 103 U. S. 62, 26 L. ed. 369; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154; Junction

public statutes apply of course to public acts creating, authorizing, or conferring powers upon private corporations, and to general corporation laws;[10] and to public acts creating, chartering, or conferring powers upon or otherwise relating to municipal corporations, and to general municipal incorporation laws.[11] What

R. Co. *v.* Ashland Bank, 12 Wall. (U. S.) 226, 20 L. ed. 385; Cheever *v.* Wilson, 9 Wall. (U. S.) 108, 19 L. ed. 604; Griffing *v.* Gibb, 2 Black (U. S.) 519, 17 L. ed. 353; Pennington *v.* Gibson, 16 How. (U. S.) 65, 14 L. ed. 847; Harpending *v.* New York Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Owings *v.* Hull, 9 Pet. (U. S.) 607, 9 L. ed. 246; Beaty *v.* Knowler, 4 Pet. (U. S.) 152, 7 L. ed. 813; Course *v.* Stead, 4 Dall. (U. S.) 22, 1 L. ed. 724.

10. *Alabama.*— Burdine *v.* Grand Lodge, 37 Ala. 478; Douglass *v.* Mobile Branch Bank, 19 Ala. 659; Jemison *v.* Planters', etc., Bank, 17 Ala. 754; Crawford *v.* Planters', etc., Bank, 6 Ala. 289.

Arkansas.— Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204; Washington *v.* Finley, 10 Ark. 423, 52 Am. Dec. 244; State Bank *v.* Watkins, 6 Ark. 123; McKiel *v.* Real Estate Bank, 4 Ark. 592.

Connecticut.— Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.

Delaware.— Wilmington, etc., Bank *v.* Wollaston, 3 Harr. 90.

Georgia.— Jackson *v.* State, 72 Ga. 28; Terry *v.* Merchants', etc., Bank, 66 Ga. 177; Davis *v.* Fulton Bank, 31 Ga. 69.

Illinois.— Nimmo *v.* Jackman, 21 Ill. App. 607.

Indiana.— Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407; Gordon *v.* Montgomery, 19 Ind. 110; Eel River Draining Assoc. *v.* Topp, 16 Ind. 242; Ewing *v.* Robeson, 15 Ind. 26; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63; State *v.* Vincennes University, 5 Ind. 77; Russell *v.* Branham, 8 Blackf. 277; White Water Valley Canal Co. *v.* Boden, 8 Blackf. 130; Brookville Ins. Co. *v.* Records, 5 Blackf. 170; Vance *v.* Farmers', etc., Bank, 1 Blackf. 80.

Iowa.— Durham *v.* Daniels, 2 Greene 518.

Kentucky.— Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171; Lexington Mfg. Co. *v.* Dorr, 2 Litt. 256; Simpkinson *v.* Irwin, 13 Ky. L. Rep. 976.

Maine.— State *v.* Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495; State *v.* McAllister, 24 Me. 139; Rogers' Case, 2 Me. 303.

Maryland.— Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176; Agnew *v.* Gettysburg Bank, 2 Harr. & G. 478; Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. 47, 14 Am. Dec. 254.

Massachusetts.— Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Jones *v.* Fales, 4 Mass. 245.

Michigan.— Chapman *v.* Colby, 47 Mich. 46, 10 N. W. 74; People *v.* De Mill, 15 Mich. 164, 93 Am. Dec. 179; People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; Hurlbut *v.* Britain, 2 Dougl. 191.

New Hampshire.— Hall *v.* Brown, 58 N. H. 93; Haven *v.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512.

New Jersey.— Stephens, etc., Transp. Co. *v.* New Jersey Cent. R. Co., 33 N. J. L. 229.

New York.— Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

South Carolina.— Simpson *v.* South Carolina Mut. Ins. Co., 59 S. C. 195, 37 S. E. 18, 225; Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888; Newberry Bank *v.* Greenville, etc., R. Co., 9 Rich. 495.

Tennessee.— Owen *v.* State, 5 Sneed 493; Shaw *v.* State, 3 Sneed 86; Williams *v.* Union Bank, 2 Humphr. 339.

Texas.— Alabama Bank *v.* Simonton, 2 Tex. 531.

Vermont.— Buell *v.* Warner, 33 Vt. 570. And see State *v.* Franklin County Sav. Bank, etc., Co., 74 Vt. 246, 52 Atl. 1069.

Virginia.— Hays *v.* Northwestern Bank, 9 Gratt. 127; Stribbling *v.* Valley Bank, 5 Rand. 132.

West Virginia.— State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803; Farmers' Bank *v.* Willis, 7 W. Va. 31.

United States.— Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513; Covington Drawbridge Co. *v.* Shepherd, 20 How. 227, 15 L. ed. 896; Beaty *v.* Knowler, 4 Pet. 152, 7 L. ed. 813; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129; Georgetown, etc., Cent. Bank *v.* Tayloe, 5 Fed. Cas. No. 2.548, 2 Cranch C. C. 427; U. S. *v.* Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302.

See 20 Cent. Dig. tit. "Evidence," §§ 26, 27, 40; and *supra*, II, B, 20.

Private acts see *infra*, II, C, 2, d.

11. *Alabama.*— Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922; Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422; Selma *v.* Perkins, 68 Ala. 145; Montgomery *v.* Hughes, 65 Ala. 201; Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; Albrittin *v.* Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Perryman *v.* Greenville, 51 Ala. 507; Smitha *v.* Flournoy, 47 Ala. 345; Case *v.* Mobile, 30 Ala. 538; Smoot *v.* Wetumpka, 24 Ala. 112.

California.— Bituminous Lime Rock Paving, etc., Co. *v.* Fulton, (1893) 33 Pac. 1117; Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

Delaware.— Downs *v.* Smyrna, 2 Pennew. 132, 45 Atl. 717.

Illinois.— Vance *v.* Rankin, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173 [*reversing* 95 Ill. App. 562]; People *v.* Wilson, 3 Ill. App. 368.

Indiana.— Moss *v.* Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Stultz *v.* State, 65 Ind. 492.

Iowa.— State *v.* Olinger, (1897) 72 N. W.

statutes are public is a subject discussed elsewhere in this work.[12] Judicial knowledge of a statute includes the date when it went into effect,[13] when it was suspended[14] or repealed,[15] and facts recited or recognized in the statute.[16] But it has been held that courts cannot, unless required by statute, take judicial notice of the local adoption of a general law by the voters of cities, counties, towns, or

441; Hard *v.* Decorah, 43 Iowa 313; Stier *v.* Oskaloosa, 41 Iowa 353.

Kansas.—Solomon *v.* Hughes, 24 Kan. 211; Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423.

Kentucky.— Gifford *v.* Falmouth, 4 Ky. L. Rep. 902.

Maine.— Belmont *v.* Morrill, 69 Me. 314.

Massachusetts.— Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042, notice of statute establishing valuation of a city for the purpose of applying a statute limiting liability of cities in suits for damages for personal injuries.

Minnesota.— Peterson *v.* Cokato, 84 Minn. 205, 87 N. W. 615; Burlington Mfg. Co. *v.* Board of Court-house, etc., Com'rs, 67 Minn. 327, 69 N. W. 1091 (notice of acts providing for erection of a court-house and city hall); Burfenning *v.* Chicago, etc., R. Co., 46 Minn. 20, 48 N. W. 444; State *v.* Tosney, 26 Minn. 262, 3 N. W. 345; State *v.* Lake City, 25 Minn. 404.

Missouri.— Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835 (township organization law); Bowie *v.* Kansas City, 51 Mo. 454; State *v.* Sherman, 42 Mo. 210; State *v.* Nolle, 96 Mo. App. 524, 70 S. W. 504; Stone *v.* Halstead, 62 Mo. App. 136; Savannah *v.* Dickey, 33 Mo. App. 522; O'Brien *v.* Wabash, etc., R. Co., 21 Mo. App. 12; Kirkwood *v.* Heege, 9 Mo. App. 576.

Nebraska.— North Platte Water-Works Co. *v.* North Platte, 50 Nebr. 853, 70 N. W. 393 (statute conferring power upon cities for erection and maintenance of waterworks); Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23.

New Hampshire.— Gross *v.* Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586.

New Jersey.— Hawthorne *v.* Hoboken, 32 N. J. L. 172.

New York.— Shaw *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 137, 83 N. Y. Suppl. 91 (statute relating to villages); Armstrong *v.* Cummings, 20 Hun 313.

Oregon.— State *v.* Banfield, 43 Oreg. 287, 72 Pac. 1093, act relating to the port of Portland.

Tennessee.— State *v.* Murfreesboro, 11 Humphr. 217; East Tennessee, etc., R. Co. *v.* Morristown, (Ch. App. 1895) 35 S. W. 771.

Texas.— Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; Dwyer *r.* Brenham, 65 Tex. 526; Taylor *r.* Hoya, 9 Tex. Civ. App. 312, 29 S. W. 540.

Vermont.— Winooski *v.* Gokey, 49 Vt. 282.

Washington.— Seattle *v.* Turner, 29 Wash. 515, 69 Pac. 1083.

West Virginia.— Beasley *v.* Beckley, 28 W. Va. 81.

Wisconsin.— Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813; Durch *v.* Chippewa County, 60 Wis. 227, 19 N. W. 79; Smith *v.* Janesville, 52 Wis. 680, 9 N. W. 789; Swain *v.* Comstock, 18 Wis. 463; Alexander *v.* Alexander, 16 Wis. 247; Terry *r.* Milwaukee, 15 Wis. 490; Janesville *r.* Milwaukee, etc., R. Co., 7 Wis. 484.

See 20 Cent. Dig. tit. "Evidence," §§ 32, 41. And see *infra*, II, C, 3, c, (III), (C).

Private acts see *infra*, II, C, 2, d.

12. See, generally, STATUTES.

13. *California.*— Fowler *v.* Pierce, 2 Cal. 165.

Illinois.— Young *v.* Thompson, 14 Ill. 380; Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Indiana.— Moss *r.* Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

Iowa.— Pierson *r.* Baird, 2 Greene 235; Allen *v.* Dunham, 1 Greene 89.

Minnesota.— State *v.* Stearns, 72 Minn. 200, 75 N. W. 210; Ramsey County *v.* Heenan, 2 Minn. 330.

New York.— Ottman *r.* Hoffman, 7 Misc. 714, 28 N. Y. Suppl. 28; De Bow *r.* People, 1 Den. 9; Purdy *r.* People, 4 Hill 384; People *v.* Herkimer, 4 Cow. 345, 15 Am. Dec. 379.

Pennsylvania.— Speer *r.* Allegheny, etc., Plank Road Co., 22 Pa. St. 376.

Utah.— People *r.* Hopt, 3 Utah 396, 4 Pac. 250.

Wisconsin.— Berliner *v.* Waterloo, 14 Wis. 378; Atty.-Gen. *r.* Foote, 11 Wis. 14, 78 Am. Dec. 689.

United States.— Walnut *r.* Wade, 103 U. S. 683, 26 L. ed. 526; South Ottawa *r.* Perkins, 96 U. S. 260, 24 L. ed. 154; Gardner *r.* Barney, 6 Wall. 499, 572, 18 L. ed. 890; Matter of Welman, 29 Fed. Cas. No. 17,407, 20 Vt. 653.

See 20 Cent. Dig. tit. "Evidence," § 44.

In Louisiana the date of the promulgation of laws in the different parishes will be noticed. L'Eglise *r.* Brenton, 3 La. 435.

14. Bernstein *r.* Humes, 60 Ala. 582, 31 Am. Rep. 52; Buckingham *r.* Walker, 48 Miss. 609; East Tennessee Iron Mfg. Co. *r.* Gaskell, 2 Lea (Tenn.) 742.

15. State *r.* O'Conner, 13 La. Ann. 486; Springfield *v.* Worcester, 2 Cush. (Mass.) 52.

16. *Georgia.*— Lane *v.* Harris, 16 Ga. 217.

Michigan.— Boyd *v.* Conklin, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831.

Texas.— Grant *v.* State, 33 Tex. Cr. 527, 27 S. W. 127.

Wisconsin.— Swain *v.* Comstock, 18 Wis. 463.

United States.— Watkins *r.* Holman, 16 Pet. 25, 55, 56, 10 L. ed. 873.

England.— Alcinous *v.* Nigreu, 4 E. & B. 217, 1 Jur. N. S. 16, 24 L. J. Q. B. 19, 3 Wkly. Rep. 25, 82 E. C. L. 217; Rex *v.* Sutton, 4 M. & S. 532; Rex *v.* De Berenger, 3

villages, unless, according to some of the cases, the statute relates to the functions of government.[17]

b. Constitutions and Public Statutes of Sister States. In the absence of statutory direction to the contrary [18] a state or territorial court does not judicially notice the constitution or statutes of another state or territory;[19] and this rule

M. & S. 67, 15 Rev. Rep. 415; Withers *v.* Warner, 1 Str. 309.

Sec 20 Cent. Dig. tit. "Evidence," § 37.

17. It has been so held with respect to the local adoption of a general law providing for the working of public roads (State *v.* Burkett, 31 Miss. 301, 35 So. 689); of a general law restraining hogs from running at large (Foster *v.* Swope, 41 Mo. App. 137); of a general law authorizing cities, towns, and villages to become incorporated (Hard *v.* Decorah, 43 Iowa 313; Hopkins *v.* Kansas City, etc., R. Co., 79 Mo. 98; Temple *v.* State, 15 Tex. App. 304, 49 Am. Rep. 200; Patterson *v.* State, 12 Tex. App. 222. See also Sipe *v.* Holliday, 62 Ind. 4; Johnson *v.* Indianapolis, 16 Ind. 227. But see House *v.* Greensburg, 93 Ind. 533; Stultz *v.* State, 65 Ind. 492; Shaw *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 137, 83 N. Y. Suppl. 91. *Contra*, as to amendment of municipal charter. Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813. See also *supra*, II, C, 2, a, note 10); unless required by statute to do so (Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688; Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698; Potwin *v.* Johnson, 108 Ill. 70; Brush *v.* Lemma, 77 Ill. 496; Rock Island *v.* Cuinely. 26 Ill. App. 173); of a general township organization law (Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835; Spurlock *v.* Dougherty, 81 Mo. 171; State *v.* Cleveland, 80 Mo. 108; State *v.* Hays, 78 Mo. 600; State *v.* Bench, 68 Mo. 78; Rousey *v.* Wood, 47 Mo. App. 465. And see Bragg *v.* Rush County, 34 Ind. 405. *Compare* Harvey *v.* Wayne, 72 Me. 430; Ives *v.* Kimball, 1 Mich. 308), unless required by statute to do so (Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688; Bruner *v.* Madison County, 111 Ill. 11; People *v.* Suppiger, 103 Ill. 434; Rock Island County *v.* Steile, 31 Ill. 543); and of a local option law (*Ex p.* Reynolds, 87 Ala. 138, 6 So. 335; Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; Com. *v.* Throckmorton, 32 S. W. 130, 17 Ky. L. Rep. 550, 1124; Gifford *v.* Falmouth, 4 Ky. L. Rep. 902; Whitman *v.* State, 80 Md. 410, 31 Atl. 325; State *v.* Mackin, 41 Mo. App. 99. *Contra*, Woodard *v.* State, 103 Ga. 496, 30 S. E. 522. See, generally, INTOXICATING LIQUORS).

18. Statutes in some of the states require courts to take judicial notice of the public statutes of other states. See Miller *v.* Johnston, 71 Ark. 174, 72 S. W. 371 (holding that a statute requiring courts to take judicial notice of the laws of other states does not apply to private statutes); Bates *v.* McCully, 27 Miss. 584; Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 873.

19. *Alabama.*— Johnson *v.* State, 88 Ala. 176, 7 So. 253; Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870; Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718; Bradley *v.* Harden, 73 Ala. 70; Mobile, etc., R. Co. *v.* Whitney, 39 Ala. 468; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Clarke *v.* Pratt, 20 Ala. 470; Hinson *v.* Wall, 20 Ala. 298.

Arkansas.—McNeill *v.* Arnold, 17 Ark. 154; Cox *v.* Morrow, 14 Ark. 603; Newton *v.* Cocke, 10 Ark. 169.

California.— Norman *v.* Norman, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343; Hartman *v.* Williams, 4 Cal. 254.

Colorado.— Polk *v.* Butterfield, 9 Colo. 325, 12 Pac. 216.

Connecticut.— Hempstead *v.* Reed, 6 Conn. 480.

Delaware.— Kinney *v.* Hosea, 3 Harr. 77.

Florida.— Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; Tuten *v.* Gazan, 18 Fla. 751.

Illinois.— Bonnell *v.* Holt, 89 Ill. 71; Hyman *v.* Bayne, 83 Ill. 256; Tinkler *v.* Cox, 68 Ill. 119; Chumasero *v.* Gilbert, 24 Ill. 293; Buckmaster *v.* Job, 15 Ill. 328; McCurdy *v.* Alaska, etc., Commercial Co., 102 Ill. App. 120; Rand *v.* Continental Mut. F. Ins. Co., 58 Ill. App. 665.

Indiana.— Robards *v.* Marley, 80 Ind. 185; Patterson *v.* Carrell, 60 Ind. 128; Kenyon *v.* Smith, 24 Ind. 11; Coplinger *v.* The David Gibson, 14 Ind. 480; Comparet *v.* Jernegan, 5 Blackf. 375; Baltimore, etc., R. Co. *v.* Ryan, 31 Ind. App. 597, 68 N. E. 923; Old Wayne Mut. L. Assoc. *v.* Flynn, 31 Ind. App. 473, 68 N. E. 327; Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

Iowa.— Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853; Kreuger *v.* Walker, 80 Iowa 733, 45 N. W. 871; Neese *v.* Farmers' Ins. Co., 53 Iowa 604, 8 N. W. 450; David *v.* Porter, 51 Iowa 254, 1 N. W. 528; Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357; Bean *v.* Briggs, 4 Iowa 464.

Kansas.— Ferd. Heim Brewing Co. *v.* Gimber, 67 Kan. 834, 72 Pac. 859; Shed *v.* Augustine, 14 Kan. 282.

Kentucky.— McDaniel *v.* Wright, 7 J. J. Marsh. 475; Dorsey *v.* Dorsey, 5 J. J. Marsh. 280, 22 Am. Dec. 33; Cook *v.* Wilson, Litt. Sel. Cas. 437; Louisville, etc., R. Co. *v.* Sullivan, 76 S. W. 525, 25 Ky. L. Rep. 854. See also Greenwade *v.* Greenwade, 3 Dana 495.

Louisiana.— Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353.

Maine.— Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 608.

Maryland.—Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688; Gardner *v.* Lewis, 7 Gill 377.

applies to laws of another state creating or authorizing the formation of corporations.[20] Some of the state courts have held that they will take judicial notice of

Massachusetts.— Washburn Crosby Co. *v.* Boston, etc., R. Co., 180 Mass. 252, 62 N. E. 590; Witters *v.* Globe Sav. Bank, 171 Mass. 425, 50 N. E. 932; Hancock Nat. Bank *v.* Ellis, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414; Chipman *v.* Peabody, 159 Mass. 420, 34 N. E. 563, 38 Am. St. Rep. 437; Haines *v.* Hanrahan, 105 Mass. 480; Eastman *v.* Crosby, 8 Allen 206; Palfrey *v.* Portland, etc., R. Co., 4 Allen 55; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105.

Michigan.— Phelps *v.* American Sav., etc., Assoc., 121 Mich. 343, 80 N. W. 120; Millard *v.* Truax, 73 Mich. 381, 41 N. W. 328; Chapman *v.* Colby, 47 Mich. 46, 10 N. W. 74; People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49; Jones *v.* Palmer, 1 Dougl. 379.

Minnesota.— Myers *v.* Chicago, etc., R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 572; Hoyt *v.* McNeil, 13 Minn. 390; Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118.

Mississippi.— Hemphill *v.* Alabama Bank, 6 Sm. & M. 44.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; Witascheck *v.* Glass, 46 Mo. App. 209; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

Nebraska.— People's Bldg., etc., Assoc. *v.* Backus, (1902) 89 N. W. 315; Scroggin *v.* McClelland, 37 Nebr. 644, 56 N. W. 208, 40 Am. St. Rep. 520, 22 L. R. A. 110; Moses *v.* Comstock, 4 Nebr. 516.

New Hampshire.— Pickard *v.* Bailey, 26 N. H. 152.

New Jersey.— Uhler *v.* Semple, 20 N. J. Eq. 288; Condit *v.* Blackwell, 19 N. J. Eq. 193; Campion *v.* Kille, 14 N. J. Eq. 229.

New York.— Harris *v.* White, 81 N. Y. 532; Cutler *v.* Wright, 22 N. Y. 472; Stearns *v.* St. Louis, etc., R. Co., 4 N. Y. St. 715; Hill *v.* Packard, 7 Wend. 375; Kenny *v.* Clarkson, 1 Johns. 385, 3 Am. Dec. 336; Miller *v.* Avery, 2 Barb. Ch. 582.

North Carolina.— Hilliard *v.* Outlaw, 92 N. C. 266.

Ohio.—Smith *v.* Bartram, 11 Ohio St. 690; Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197; Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469; Ingraham *v.* Hart, 11 Ohio 255; Barr *v.* Closterman, 2 Ohio Cir. Ct. 387, 1 Ohio Cir. Dec. 546.

Oregon.— Cressey *v.* Tatom, 9 Oreg. 541.

Pennsylvania.— Spellier Electric Time Co. *v.* Geiger, 147 Pa. St. 399, 23 Atl. 547; Ripple *v.* Ripple, 1 Rawle 386; Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520.

Rhode Island.— Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001.

South Carolina.— Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24; Whitesides *v.* Poole, 9 Rich. 68.

Tennessee.— Templeton *v.* Brown, 86 Tenn. 50, 5 S. W. 441; Bagwell *v.* McTighe, 85 Tenn. 616, 4 S. W. 46; Anderson *v.* May, 10 Heisk. 84; Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. 873; Owen *v.* State, 5 Sneed 493; Stevens *v.* Bomar, 9 Humphr. 546.

Texas.— Trigg *v.* Moore, 10 Tex. 197; Ramsay *v.* McCanley, 2 Tex. 189; Pacific Express Co. *v.* Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312; Missouri, etc., R. Co. *v.* Cocreham, 10 Tex. Civ. App. 166, 30 S. W. 1118.

Vermont.— Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779; Taylor *v.* Boardman, 25 Vt. 581; Adams *v.* Gay, 19 Vt. 358.

Virginia.—Union Central L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271; Bayly *v.* Chubb, 16 Gratt. 284.

Washington.— McDaniel *v.* Pressler, 3 Wash. 636, 29 Pac. 209.

West Virginia.— Klinck *v.* Price, 4 W. Va. 4, 6 Am. Rep. 268.

Wisconsin.— Osborn *v.* Blackburn, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 400, 10 L. R. A. 367; Continental Nat. Bank *v.* McGeoch, 73 Wis. 332, 41 N. W. 409.

See 20 Cent. Dig. tit. "Evidence," § 51; and *supra*, II, C, 1, c.

Written laws of Indian tribes in the Indian Territory are not judicially noticed elsewhere than in the tribal courts, and in other courts they must be pleaded. Sass *v.* Thomas, (Indian Terr. 1902) 69 S. W. 893; Kelly *v.* Churchill, (Indian Terr. 1902) 69 S. W. 817; Campbell *v.* Scott, (Indian Terr. 1900) 58 S. W. 719; Hockett *v.* Alston, 110 Fed. 910, 49 C. C. A. 180; Wilson *v.* Owens, 86 Fed. 571, 30 C. C. A. 257.

Decisions construing statutes.— It has been held that while the courts of one state will not take judicial notice of the laws of another, written or unwritten, the opinions of the court of last resort of another state in construing its statutes may properly be referred to. Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853. *Compare*, however, Pacific Express Co. *v.* Pitman, 36 Tex. Civ. App. 626, 71 S. W. 312. See also *supra*, II, C, 1, c, (II).

Statute once judicially known.— A judge, where the fact has been ascertained in previous cases, will take judicial notice of a foreign statute. Graham *v.* Williams, 21 La. Ann. 594; U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353. See *supra*, II, B, 2.

Personal knowledge of judge see *supra*, II, B, 3.

20. *Alabama.*— Savage *v.* Russell, 84 Ala. 103, 4 So. 235.

Maryland.— Agnew *v.* Gettysburg Bank, 2 Harr. & G. 478.

Massachusetts.— Portsmouth Livery Co. *v.* Watson, 10 Mass. 91.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301.

Ohio.— Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469.

the written law of another state for the purpose of giving full faith and credit, as required by the constitution of the United States, to a judgment of the other state;[21] but this view has been repudiated by the supreme court of the United States and by many of the state courts;[22] and the supreme court of the United States when reviewing on appeal or error a judgment of a state court does not take judicial notice of laws not thus noticed in the court below.[23]

c. Written Laws of Foreign Countries. It is also well settled as a general rule that courts do not take judicial cognizance of the written laws of a foreign country.[24] This is true of foreign laws creating corporations as well as of other

Oregon.— Law Trust Soc. *v.* Hogue, 37 Oreg. 544, 62 Pac. 380, 63 Pac. 690.

Tennessee.—Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 50 S. W. 763; Owen *v.* State, 5 Sneed 493.

See also CORPORATIONS, 10 Cyc. 243; and, generally, FOREIGN CORPORATIONS.

21. In State *v.* Hinchman, 27 Pa. St. 479, it was held that when an action is brought in a state court upon a judgment rendered by a court of another state, the written law of the latter must be judicially noticed so far as to determine whether or not the judgment is valid under that law; for the reason that the court cannot otherwise comply with the "full faith and credit" clause of the federal constitution (U. S. Const. art. 4, § 1), and furthermore because, the validity of the judgment being involved, a federal question is presented so that a decision declaring the judgment invalid may be reviewed on appeal or error by the United States supreme court, in which event the latter court would take judicial notice of the written law of the state where the judgment was rendered. This ruling and the reasons therefor were approved or the same conclusion reached independently in the following cases:

Illinois.— Rae *v.* Hulbert, 17 Ill. 572; Hull *v.* Webb, 78 Ill. App. 617; Kopperl *v.* Nagy, 37 Ill. App. 23.

Indiana.— See Draggoo *v.* Graham, 9 Ind. 212.

Kansas.— Dodge *v.* Coffin, 15 Kan. 277. But see Hunter *v.* Ferguson, 13 Kan. 462; Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

Missouri.— Wilson *v.* Jackson, 10 Mo. 329.

New Jersey.— See Curtis *v.* Martin, 2 N. J. L. 399.

Pennsylvania.— Jones *v.* Quaker City Mut. F. Ins. Co., 9 Pa. Dist. 213.

Rhode Island.— Paine *v.* Schenectady Ins. Co., 11 R. I. 411.

Tennessee.— Coffee *v.* Neely, 2 Heisk. 304.

Washington.— Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

22. The ruling in State *v.* Hinchman, 27 Pa. St. 479, cited in the preceding note, was expressly repudiated in Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535, where it was held that the supreme court will not in such a case depart from the general rule in that court forbidding judicial notice of laws that cannot properly be judicially noticed in the court below. To the same effect see the following cases:

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Iowa.— Taylor *v.* Runyan, 9 Iowa 522.

Massachusetts.— Knapp *v.* Abell, 10 Allen 485. See also Wright *v.* Andrews, 130 Mass. 149; Mowry *v.* Chase, 100 Mass. 79.

Texas.— Gill *v.* Everman, 94 Tex. 209, 59 S. W. 531; Porcheler *v.* Bronson, 50 Tex. 555.

Wisconsin.— Osborn *v.* Blackburn, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 460, 10 L. R. A. 367; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

United States.—See Lloyd *v.* Matthews, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 7 S. Ct. 398, 30 L. ed. 519. *Compare dictum* in Carpenter *v.* Dexter, 8 Wall. 531.

See 20 Cent. Dig. tit. "Evidence," § 51.

23. Lloyd *v.* Matthews, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 7 S. Ct. 398, 30 L. ed. 519; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629; Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535, as to which case see the note preceding.

24. *Alabama.*—Doe *v.* Eslava, 11 Ala. 1028.

Arkansas.— Cox *v.* Morrow, 14 Ark. 603.

California.— Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

Connecticut.— Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179.

Delaware.— Thomas *v.* Grand Trunk R. Co., 1 Pennew. 593, 42 Atl. 987.

Illinois.— McCurdy *v.* Alaska, etc., Commercial Co., 102 Ill. App. 120; Dempster *v.* Stephen, 63 Ill. App. 126; Rand *v.* Continental Mut. F. Ins. Co., 58 Ill. App. 665.

Indiana.— Coplinger *v.* The David Gibson, 14 Ind. 480.

Iowa.— Banco de Sonora *v.* Bankers' Mut. Casualty Co., (1903) 95 N. W. 232; Bean *v.* Briggs, 4 Iowa 464.

Louisiana.— Kohn *v.* The Renaisance, 5 La. Ann. 25, 52 Am. Dec. 577.

Maryland.— Baptiste *v.* De Volunbrun, 5 Harr. & J. 86.

Massachusetts.— Aslanian *v.* Dostumian, 174 Mass. 328, 54 N. E. 845, 75 Am. St. Rep. 348, 47 L. R. A. 495; Eastman *v.* Crosby, 8 Allen 206; Palfrey *v.* Portland, etc., R. Co., 4 Allen 55.

Michigan.—Chapman *v.* Colby, 47 Mich. 46, 10 N. W. 74.

Minnesota.— Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118.

foreign laws.[25] It has been held, however, that the rule does not apply to statutes which may be regarded as part of the general international and maritime law.[26]

d. Private Statutes. The general rule is that private statutes of a state, as distinguished from public statutes, are not judicially noticed either by its own courts[27] or by any other courts,[28] in the absence of constitutional or statutory

Mississippi.— Sessions *v.* Doe, 7 Sm. & M. 130.

Missouri.— Charlotte *v.* Chouteau, 25 Mo. 465; Chouteau *v.* Pierre, 9 Mo. 3.

Nebraska.—Moses *v.* Comstock, 4 Nebr. 516.

New Jersey.— Campion *v.* Kille, 14 N. J. Eq. 229 [*affirmed* in 15 N. J. Eq. 476].

New York.— Monroe *v.* Douglass, 5 N. Y. 447; Munroe *v.* Guilleaume, 3 Abb. Dec. 334, 3 Keyes 30; Bates *v.* Virolet, 33 N. Y. App. Div. 436, 53 N. Y. Suppl. 893; Ocean Ins. Co. *v.* Francis, 2 Wend. 64, 19 Am. Dec. 549; Thompson *v.* Ketcham, 4 Johns. 285; Hosford *v.* Nichols, 1 Paige 220.

Oregon.— State *v.* Moy Looke, 7 Oreg. 54.

South Carolina.— McFee *v.* South Carolina Ins. Co., 2 McCord 503, 13 Am. Dec. 757.

Texas.— Trigg *v.* Moore, 10 Tex. 197; Bryant *v.* Kelton, 1 Tex. 434; Crosby *v.* Huston, 1 Tex. 203; Burton *v.* Anderson, 1 Tex. 93; Huff *v.* Folger, Dall. 530.

Vermont.— McLeod *v.* Connecticut, etc., R. Co., 58 Vt. 727, 6 Atl. 648; Woodrow *v.* O'Conner, 28 Vt. 776; Peck *v.* Hibbard, 26 Vt. 698, 62 Am. Dec. 605.

United States.— Coghlan *v.* South Carolina R. Co., 142 U. S. 101, 12 S. Ct. 150, 35 L. ed. 951 [*affirming* 32 Fed. 316]; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Dainese *v.* Hale, 91 U. S. 13, 23 L. ed. 190; Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472; Strother *v.* Lucas, 6 Pet. 763, 8 L. ed. 573; Church *v.* Hubbart, 2 Cranch 187, 2 L. ed. 249; Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225; Robinson *v.* Clifford, 20 Fed. Cas. No. 11,948, 2 Wash. 1; U. S. *v.* Ortega, 27 Fed. Cas. No. 15,971, 4 Wash. 531; Wilcocks *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47.

England.— De Bode's Case, 8 Q. B. 208, 55 E. C. L. 208; Nelson *v.* Bridport, 8 Beav. 527, 10 Jur. 871; Millar *v.* Heinrick, 4 Campb. 155; Gyles *v.* Hill, 1 Campb. 471; Fyson *v.* Kemp, 6 C. & P. 71, 25 E. C. L. 326; Lacon *v.* Higgins, D. & R. N. P. 38, 3 Stark. 178, 25 Rev. Rep. 779, 16 E. C. L. 425; McNeil *v.* Perchard, 1 Esp. 263; Bristow *v.* Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289; Fremoult *v.* Dedire, 1 P. Wms. 429, 24 Eng. Reprint 458; Rolf *v.* Dart, 2 Taunt. 52.

Canada.— Giles *v.* Gariepy, 29 L. C. Jur. 207.

See 20 Cent. Dig. tit. "Evidence," § 52; and *supra*, II, C, 1, c.

25. Portmouth Livery Co. *v.* Watson, 10 Mass. 91; Law Trust Soc. *v.* Hogue, 37 Oreg. 544, 62 Pac. 380, 63 Pac. 690; St. Charles Nat. Bank *v.* De Bernales, 1 C. & P. 569, R. & M. 193, 12 E. C. L. 325. And see, generally, FOREIGN CORPORATIONS.

26. The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126 [*reversing* 82 Fed. 819, 27 C. C. A. 154, 86 Fed. 814, 30 C. C. A. 628], holding that judicial notice may be taken of the Canadian act of 1886 for the regulation of navigation, which is in all material respects like the act of congress of 1885.

27. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Broad St. Hotel Co. *v.* Weaver, 57 Ala. 26; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740; Drake *v.* Flewellen, 33 Ala. 106; Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76; Moore *v.* State, 26 Ala. 88.

California.— Ellis *v.* Eastman, 32 Cal. 447.

Illinois.— Minck *v.* People, 6 Ill. App. 127.

Indiana.— Toledo, etc., R. Co. *v.* Nordyke, 27 Ind. 95; Danville, etc., Plank-Road Co. *v.* State, 16 Ind. 456.

Kansas.— Atchison, etc., R. Co. *v.* Blackshire, 10 Kan. 477.

Kentucky.— Rudd *v.* Owensboro Deposit Bank, 105 Ky. 443, 49 S. W. 207, 971, 20 Ky. L. Rep. 1276, 1497.

Louisiana.— Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830; Workingmen's Bank *v.* Converse, 33 La. Ann. 963.

Missouri.— Bailey *v.* Lincoln Academy, 12 Mo. 174; Kirby *v.* Wabash R. Co., 85 Mo. App. 345.

New Hampshire.— See Hall *v.* Brown, 58 N. H. 93.

New Jersey.— State *v.* Haddenfield, etc., Turnpike Co., 65 N. J. L. 97, 46 Atl. 700.

North Carolina.— Carrow *v.* Washington Toll-Bridge Co., 61 N. C. 118.

Ohio.— Pittsburgh, etc., R. Co. *v.* Moore, 33 Ohio St. 384, 31 Am. Rep. 543.

Pennsylvania.— Timlow *v.* Philadelphia, etc., R. Co., 99 Pa. St. 284; Allegheny *v.* Nelson, 25 Pa. St. 332; Hestonville, etc., R. Co. *v.* Schuylkill River Pass. R. Co., 6 Phila. 141; Handy *v.* Philadelphia, etc., R. Co., 1 Phila. 31; Com. *v.* Commissioners, 1 Pittsb. 249.

Texas.— Holmes *v.* Anderson, 59 Tex. 481; Conley *v.* Columbus Tap R. Co., 44 Tex. 579; Hailes *v.* State, 9 Tex. App. 170.

Vermont.— Pearl *v.* Allen, 2 Tyler 311.

Virginia.— Legrand *v.* Hampden Sidney College, 5 Munf. 324.

West Virginia.— Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

Wisconsin.— Horn *v.* Chicago, etc., R. Co., 38 Wis. 463.

See 20 Cent. Dig. tit. "Evidence," § 38.

28. Miller *v.* Johnston, 71 Ark. 174, 72 S. W. 371; Leland *v.* Wilkinson, 6 Pet. (U. S.) 317, 8 L. ed. 412. See also South Carolina *v.* Coosaw Min. Co., 45 Fed. 804.

Previous knowledge of the court.— Where a court has once been properly informed of the terms of a private act and recognized it in a written opinion, the same court in subsequent cases will take judicial cogni-

requirement to the contrary;[29] and the same is true of private acts of congress.[30] The rule applies of course in the absence of a statute to the contrary to private acts creating or relating to private corporations,[31] and to private acts creating or conferring powers upon municipal corporations.[32] If a statute of a private nature contains a clause declaring it to be a public act, or if there is such a provision in a general law, it will be noticed by the courts as a public act.[33] Courts will also take judicial notice of a private statute which is recognized by a public act,[34] or by the constitution,[35] or which is recognized and amended by a public act.[36] The characteristics which distinguish private from public statutes are considered in another part of this work.[37]

e. **Legislative Resolutions.** Courts take judicial notice of legislative resolutions of a public character,[38] but not of private resolutions.[39]

zance of the act. Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830. See *supra*, II, B, 2.

29. In Junction R. Co. *v.* Ashland Bank, 12 Wall. (U. S.) 226, 230, 20 L. ed. 385, it was observed that "the courts in Indiana are authorized by the Constitution of that State to take judicial notice of all its laws;" consequently the federal court takes judicial notice of a private Indiana statute in accordance with the rule governing federal courts in respect of public state statutes. See *supra*, II, C, 2, b. In Miller *v.* Johnston, 71 Ark. 174, 72 S. W. 371, it was held that a statute requiring courts to take judicial notice of the laws of other states does not apply to private statutes of those states.

Contract with state.— In Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262, it was held that where a complaint alleged that plaintiff, at the special instance and request of defendant state, rendered certain services as its agent, and sought to recover the agreed compensation therefor, the objection that the alleged employment was illegal might be raised by demurrer, since the court would take cognizance of the fact that there could be no valid contract without legislative authority, and by Code Civ. Proc. § 1875, subds. 2, 3, was charged with knowledge of all public and private acts.

30. Denver, etc., R. Co. *v.* U. S., 9 N. M. 389, 54 Pac. 336; Wright *v.* Paton, 10 Johns. (N. Y.) 300.

31. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740; Drake *v.* Flewellen, 33 Ala. 106; Montgomery *v.* Montgomery, etc., Plank-Road Co., 31 Ala. 76.

Louisiana.— Mandere *v.* Bonsignore, 28 La. Ann. 415.

Maine.— Fryeburg Canal *v.* Frye, 5 Me. 38.

Missouri.— Butler *v.* Robinson, 75 Mo. 192; Kirby *v.* Wabash R. Co., 85 Mo. App. 345.

New Hampshire.— Haven *v.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512.

New Jersey.— State *v.* Haddenfield, etc., Turnpike Co., 65 N. J. L. 97, 46 Atl. 700; Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367.

New York.— Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482.

North Carolina.— Carrow *v.* Washington Toll-Bridge Co., 61 N. C. 118.

Pennsylvania.— Timlow *v.* Philadelphia, etc., R. Co., 99 Pa. St. 284; Clarion First Nat. Bank *v.* Gruber, 87 Pa. St. 468, 30 Am. Rep. 378.

Texas.— Conley *v.* Columbus Tap R. Co., 44 Tex. 579.

See 20 Cent. Dig. tit. "Evidence," § 40.

Public acts see *supra*, II, C, 2, a.

32. Loper *v.* St. Louis, 1 Mo. 681; Apitz *v.* Missouri Pac. R. Co., 17 Mo. App. 419.

Public acts see *supra*, II, C, 2, a.

33. *Illinois.*— Nimmo *v.* Jackman, 21 Ill. App. 607.

Indiana.— White Water Valley Canal Co. *v.* Boden, 8 Blackf. 130; Brookville Ins. Co. *v.* Records, 5 Blackf. 170.

Iowa.— State *v.* Olinger, (1897) 72 N. W. 441.

Maine.— State *v.* McAllister, 24 Me. 139.

Michigan.— People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64.

Missouri.— Bowie *v.* Kansas, 51 Mo. 454.

Nebraska.— Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23.

New Jersey.— Stephens, etc., Transp. Co. *v.* New Jersey Cent. R. Co., 33 N. J. L. 229 (holding that where a charter of a corporation contains a provision declaring it to be a public act a supplement to the charter will also be regarded as a public act of which judicial notice must be taken); Hawthorne *v.* Hoboken, 32 N. J. L. 172.

Texas.— Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

United States.— Case *v.* Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513 (where a charter of incorporation "hereby declared to be a public act" in the charter itself, was judicially noticed); Beaty *v.* Knowler, 4 Pet. 152, 7 L. ed. 813.

See 20 Cent. Dig. tit. "Evidence," § 38 *et seq.*; and, generally, STATUTES.

34. Webb *v.* Bidwell, 15 Minn. 479.

35. Vance *v.* Farmers', etc., Bank, 1 Blackf. (Ind.) 80.

36. Lavalle *v.* People, 6 Ill. App. 157.

37. See, generally, STATUTES.

38. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3; State *v.* Delesdenier, 7 Tex. 76.

Distinction between public and private acts see, generally, STATUTES.

39. Simmons *v.* Jacobs, 52 Me. 147.

f. Municipal Ordinances or By-Laws. While the power of municipalities to pass ordinances or by-laws is judicially noticed by the courts within the state,[40] the ordinances or by-laws themselves are not judicially known to courts having no special function to enforce them,[41] unless a statute requires all courts to take judicial notice thereof.[42] A municipal court on the other hand takes judicial cognizance of the ordinances in force in the particular municipality.[43] Upon the

40. Case *v.* Mobile, 30 Ala. 538; Green *v.* Indianapolis, 22 Ind. 192; Akerman *v.* Lima, 8 Ohio S. & C. Pl. Dec. 430, 7 Ohio N. P. 92.

Where municipal charters are not judicially noticed, the power to pass by-laws and ordinances must be proved. Butler *v.* Robinson, 75 Mo. 192. See *supra*, II, C, 2, d.

41. *Alabama.*— Furhman *v.* Huntsville, 54 Ala. 263; Case *v.* Mobile, 30 Ala. 538.

Arkansas.— Strickland *v.* Little Rock, 68 Ark. 483, 60 S. W. 26.

Colorado.— Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460.

Florida.— Freeman *v.* State, 19 Fla. 552.

Georgia.— Moore *v.* Jonesboro, 107 Ga. 704, 33 S. E. 435; Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; McDonald *v.* Lane, 80 Ga. 497, 5 S. E. 628; Mayson *v.* Atlanta, 77 Ga. 662.

Idaho.— People *v.* Buchanan, 1 Ida. 681.

Illinois.— Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Bloomington *v.* Illinois Cent. R. Co., 154 Ill. 539, 39 N. E. 478; Lasher *v.* Littell, 104 Ill. App. 211 [*affirmed* in 202 Ill. 551, 67 N. E. 372]; Munson *v.* Fenno, 87 Ill. App. 655; O'Hare *v.* Lieb, 66 Ill. App. 349.

Iowa.— Wolf *v.* Keokuk, 48 Iowa 129; Goodrich *v.* Brown, 30 Iowa 291; State *v.* Leiber, 11 Iowa 407; Garvin *v.* Wells, 8 Iowa 286.

Kansas.— Watt *v.* Jones, 60 Kan. 201, 56 Pac. 16; McPherson *v.* Nichols, 48 Kan. 430, 29 Pac. 679.

Kentucky.— Kucker *v.* Com., 4 Bush 440; Horne *v.* Mehler, 64 S. W. 918, 23 Ky. L. Rep. 1176.

Louisiana.— State *v.* Judge Criminal Dist. Ct., 105 La. 758, 30 So. 105; Chappuis *v.* Marmouget, 104 La. 1, 28 So. 920; New Orleans *v.* Labatt, 33 La. Ann. 107; Laviosa *v.* Chicago, etc., R. Co., McGloin 299.

Maryland.— Shanfelter *v.* Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648; Central Sav. Bank *v.* Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283.

Massachusetts.— O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350; Atty.-Gen. *v.* McCabe, 172 Mass. 417, 52 N. E. 717.

Minnesota.— Winona *v.* Burke, 23 Minn. 254.

Missouri.— Tarkio *v.* Loyd, 179 Mo. 600, 78 S. W. 797; St. Louis *v.* Roche, 128 Mo. 541, 31 S. W. 915; Cox *v.* St. Louis, 11 Mo. 431; Keane *v.* Klausman, 21 Mo. App. 485; St. Louis *v.* St. Louis R. Co., 12 Mo. App. 591.

New York.— Porter *v.* Waring, 69 N. Y. 250; Boston *v.* Abraham, 91 N. Y. App. Div. 417, 86 N. Y. Suppl. 863; People *v.* Caseganda, 15 Misc. 325, 37 N. Y. Suppl. 768; Barrett *v.* Smith, 76 N. Y. Suppl. 907; People *v.* New York, 7 How. Pr. 81; Harker *v.* New York, 17 Wend. 199.

Ohio.— Toledo *v.* Libbie, 19 Ohio Cir. Ct. 704, 8 Ohio Cir. Dec. 589.

Pennsylvania.— City *v.* Cohen, 13 Wkly. Notes Cas. 468; Lancaster *v.* Harsh, 1 Lanc. L. Rev. 209.

South Carolina.— Charleston *v.* Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845.

Tennessee.— Tilford *v.* Woodbury, 7 Humphr. 190.

Texas.— Austin *v.* Walton, 68 Tex. 507, 5 S. W. 70.

Vermont.— State *v.* Soragan, 40 Vt. 450.

Wisconsin.— Stittgen *v.* Rundle, 99 Wis. 78, 74 N. W. 536; Horn *v.* Chicago, etc., R. Co., 38 Wis. 463; Pettit *v.* May, 34 Wis. 666.

See 20 Cent. Dig. tit. "Evidence," § 42.

Repeal of ordinances not judicially noticed. Field *v.* Malster, 88 Md. 691, 41 Atl. 1087.

Regulations made by county commissioners imposing penalties for their violations are not judicially noticed. Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217.

A justice of the peace in and for a city and county does not judicially notice the city's ordinances. Winona *v.* Burke, 23 Minn. 254. See also Harker *v.* New York, 17 Wend. (N. Y.) 199.

42. **Judicial notice is required by statute** in some of the states. See Moore *v.* Jonesboro, 107 Ga. 704, 33 S. E. 435; Wooley *v.* Louisville, 71 S. W. 893, 24 Ky. L. Rep. 1357. But a statute providing that printed and officially published copies of ordinances may be received in evidence without further proof does not authorize judicial notice of the ordinances. Central Sav. Bank *v.* Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283; Winona *v.* Burke, 23 Minn. 254; Cox *v.* St. Louis, 11 Mo. 431; Harker *v.* New York, 17 Wend. (N. Y.) 199; Toledo *v.* Libbie, 19 Ohio Cir. Ct. 704, 8 Ohio Cir. Dec. 589. See also Porter *v.* Waring, 69 N. Y. 250.

43. *California.*— *Ex p.* Davis, 115 Cal. 445, 47 Pac. 258.

Georgia.— Taylor *v.* Sandersville, 118 Ga. 63, 44 S. E. 845.

Iowa.— Scranton *v.* Danenbaum, 109 Iowa 95, 80 N. W. 221; Laporte City *v.* Goodfellow, 47 Iowa 572; State *v.* Leiber, 11 Iowa 407; Conboy *v.* Iowa City, 2 Iowa 90.

Kansas.— West *v.* Columbus, 20 Kan. 633.

Louisiana.— State *v.* Judge Criminal Dist. Ct., 105 La. 758, 30 So. 105.

Ohio.— Keck *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 324, 3 Ohio N. P. 253; Strauss *v.* Conneaut, 23 Ohio Cir. Ct. 320.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632; *In re* Oliver, 21 S. C. 318, 323, 53 Am. Rep. 681, where Mc-

question whether on appeal from a municipal court and trial *de novo*[44] or review on the record[45] the appellate court will judicially notice municipal ordinances of which the court below was at liberty to take such notice the decisions are in conflict.[46]

3. Government as Established by Law — a. In General. In some of the states courts are expressly required by statute to take judicial notice of whatever is established by law, and of public and private official acts of the legislative, executive, and judicial departments of the state and of the United States.[47] Excepting the provision for judicial notice of private official acts, these statutes seem to be merely declaratory of the preëxisting rule upon the subject.[48]

b. Executive Department — (i) *Official Positions*[49] — (a) *State Officers.* Courts of a state judicially know who is[50] or was at any time[51] the chief executive

Gowan, J., said: "Municipal ordinances are private laws when brought before the superior judiciary of the state, but not when brought before a city court."

West Virginia.— Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373; Wheeling *v.* Black, 25 W. Va. 266.

See 20 Cent. Dig. tit. "Evidence," § 42.

Contra, it seems, in Missouri. St. Louis *v.* Roche, 128 Mo. 541, 31 S. W. 915.

Ordinances of subdepartments of the city government are not judicially noticed. Wright *v.* Trenton, 51 N. J. L. 497, 17 Atl. 1103.

44. Judicial notice taken.— Solomon *v.* Hughes, 24 Kan. 211; Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706; Moundsville *v.* Velton, 35 W. Va. 217, 13 S. E. 373. See also Clapp *v.* Hartford, 35 Conn. 66. In Kansas on appeal from city courts to district courts in misdemeanor cases the latter court will judicially notice ordinances under which defendant was prosecuted. Watt *v.* Jones, 60 Kan. 201, 56 Pac. 16; Downing *v.* Miltonvale, 36 Kan. 740, 14 Pac. 281; Smith *v.* Emporia, 27 Kan. 528; Solomon *v.* Hughes, 24 Kan. 211. But it is otherwise in civil cases between individuals. McPherson *v.* Nichols, 48 Kan. 430, 29 Pac. 679.

Judicial notice not taken.— Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1; Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460; McIntosh *v.* Pueblo, 9 Colo. App. 460, 48 Pac. 969.

45. Judicial notice taken.— March *v.* Com., 12 B. Mon. (Ky.) 25; Strauss *v.* Conneaut, 23 Ohio Cir. Ct. 320.

Judicial notice not taken.— Green *v.* Indianapolis, 22 Ind. 192; Shanfelter *v.* Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648; Central Sav. Bank *v.* Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283. The foregoing cases hold that the judgment must be reversed so far as its correctness depends upon a municipal ordinance, unless the ordinance appears in the record. On the other hand in Louisiana on appeal from a judgment of conviction in a city court for violation of a municipal ordinance the latter must appear in the record or else the judgment will be affirmed for the reason that no error affirmatively appears. State *v.* Judge Criminal Dist. Ct., 105 La. 758, 30 So. 105. See also State *v.* Callac, 45 La. Ann. 27, 12 So. 119; State *v.* Clesi, 44 La. Ann. 85, 10 So. 409; State *v.* Tsni Ho, 37 La. Ann. 50; New Orleans *v.* Labatt, 33 La. Ann. 107; New Orleans *v.* Boudro, 14 La. Ann. 303; Hassard *v.* Municipality No. 2, 7 La. Ann. 495.

On certiorari to review a judgment of conviction for violation of a city ordinance it will be presumed that the conviction was based upon a legal ordinance, if no ordinance appears in the record. Benson *v.* Carrollton, 96 Ga. 761, 22 S. E. 303; Chambers *v.* Barnesville, 89 Ga. 739, 15 S. E. 634; Davis *v.* Rome, 89 Ga. 724, 15 S. E. 632.

46. See the cases cited in the two preceding notes.

47. See for example Cal. Code Civ. Proc. § 1875, subs. 2 & 3; Mont. Rev. St. § 625, div. 1. Construing the Montana statute last cited, McLeary, J., said: "Doubtless our courts will take judicial notice of the fact that the powers of the national government are divided among the three great departments, the legislative, the executive and the judicial; and, again, of the subdivision of the business of the executive department among the various subdepartments." U. S. *v.* Williams, 6 Mont. 379, 387, 12 Pac. 851.

48. See U. S. *v.* Williams, 6 Mont. 379, 12 Pac. 851. In Prince *v.* Skillin, 71 Me. 361, 367, 36 Am. Rep. 325, Appleton, C. J., said: "We are bound to take judicial notice of the doings of the executive and legislative departments of the government, when called upon by proper authorities to pass upon their validity. We are bound to take judicial notice of historical facts, matters of public notoriety and interest passing in our midst."

49. Tenures of office as historical facts see *supra*, II, B, 14, l.

50. *Indiana.*— Hizer *v.* State, 12 Ind. 330.

Iowa.— State *v.* Minnick, 15 Iowa 123.

Kentucky.— Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 23 Ky. L. Rep. 146, 53 L. R. A. 245.

Mississippi.— Lindsey *v.* Atty.-Gen., 33 Miss. 508.

Nebraska.— State *v.* Boyd, 34 Nebr. 435, 51 N. W. 964.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Texas.— Dewees *v.* Colorado County, 32 Tex. 570.

Wisconsin.— State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

See 20 Cent. Dig. tit. "Evidence," § 66.

51. Dewees *v.* Colorado County, 32 Tex.

thereof, or of any government formerly exercising sovereignty therein.[52] Other officials,[53] including *de facto* officers,[54] whether appointed by the executive[55] or elected by the legislature,[56] have been judicially recognized; such as state agents,[57] attorneys-general,[58] auditors-general and their deputies,[59] tax officials,[60] bank commissioners,[61] commissioners of deeds,[62] notaries,[63] and paymasters.[64] The date of accession to office[65] and the term of office[66] are likewise noticed. But a court cannot judicially know whether a particular official act was properly done.[67]

(B) *County Officers.* Judicial notice is taken of county administrative officers within the jurisdiction of the court,[68] such as auditors,[69] commissioners,[70] registers,[71] sheriffs and their deputies,[72] supervisors,[73] tax-collectors and other tax officials,[74] and treasurers.[75] But the court will not judicially know that there are more coroners than one in a certain district if the statute does not require more than one.[76]

(C) *City and Town Officers.* The courts will also know judicially the principal executive officers of a city or town,[77] such as aldermen,[78] marshals,[79] street

570. See also Holman *v.* Burrow, 2 Ld. Raym. 794; Whaley *v.* Carlisle, 17 Ir. C. L. 792.

52. Jones *v.* Gale, 4 Mart. (La.) 635; Hayes *v.* Berwick, 2 Mart. (La.) 138, 5 Am. Dec. 727.

53. Cary *v.* State, 76 Ala. 78; Coleman *v.* State, 63 Ala. 93; Wetherbee *v.* Dunn, 32 Cal. 106; Follain *v.* Lefevre, 3 Rob. (La.) 13, 14 (where it was said that judicial cognizance has been extended to "the official capacity of all functionaries commissioned in this State"); State *v.* Cooper, (Tenn. Ch. App. 1899) 53 S. W. 391.

54. New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659; Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585; State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

55. Colgin *v.* State Bank, 11 Ala. 222.

56. Colgin *v.* State Bank, 11 Ala. 222; Bennett *v.* State, Mart. & Y. (Tenn.) 133.

57. Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585.

58. Simms *v.* Quebec, etc., R. Co., 22 L. C. Jur. 20.

Deputy attorney-general not judicially known. Crawford *v.* State, 155 Ind. 692, 57 N. E. 931.

59. People *v.* Johr, 22 Mich. 461.

60. New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

61. Colgin *v.* State Bank, 11 Ala. 222.

62. Fisk *v.* Hopping, 169 Ill. 105, 48 N. E. 323.

63. Russell *v.* Huntsville R., etc., Co., 137 Ala. 627, 34 So. 855; Cary *v.* State, 76 Ala. 78; Hertig *v.* People, 159 Ill. 237, 42 N. E. 879, 50 Am. St. Rep. 162; Eichenbaum *v.* Levee, 78 Ill. App. 610; Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984; Rowland *v.* Brown, 75 Iowa 679, 37 N. W. 403; Wiley *v.* Carson, 15 S. D. 298, 89 N. W. 475. See also Denmead *v.* Maack, 2 MacArthur (D. C.) 475, holding that the supreme court of the District of Columbia will take notice of the authority of a notary public in the state of Maryland to administer an oath to an affidavit to be used in an action pending in the district, the oath being certified by his signature and notarial seal.

64. See Rex *v.* Bembridge, 22 How. St. Tr. 29.

65. Lindsey *v.* Atty.-Gen., 33 Miss. 508, 528.

66. Cary *v.* State, 76 Ala. 78; Coleman *v.* State, 63 Ala. 93; Romero *v.* U. S., 1 Wall. (U. S.) 721, 17 L. ed. 627.

67. Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585.

68. *Arkansas.*— Webb *v.* Kelsey, 66 Ark. 180, 49 S. W. 819.

California.— Wetherbee *v.* Dunn, 32 Cal. 106.

Illinois.— Thielmann *v.* Burg, 73 Ill. 293; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73.

New York.— Farley *v.* McConnell, 7 Lans. 428.

South Carolina.— Whaley *v.* Lawton, 57 S. C. 256, 35 S. E. 558.

See 20 Cent. Dig. tit. "Evidence," § 66.

69. State *v.* Gut, 13 Minn. 341.

70. State *v.* Gates, 67 Mo. 139.

71. Fancher *v.* De Montegre, 1 Head (Tenn.) 40.

72. Burrow *v.* Brown, 59 Tex. 457; Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749.

Term of office of sheriffs judicially noticed. Ragland *v.* Wynn, 37 Ala. 32.

73. Greenbrier County *v.* Livesay, 6 W. Va. 44.

74. Ellis *v.* Reddin, 12 Kan. 306; Templeton *v.* Morgan, 16 La. Ann. 438; New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

Constables serving as tax-collectors judicially noticed. Campbell *v.* Dewick, 20 N. J. Eq. 186.

75. Rauch *v.* Com., 78 Pa. St. 490.

76. Johnson *v.* Parke, 12 U. C. C. P. 179.

77. A town constable holding office by appointment was not judicially noticed, since "it was not of public notoriety who were chosen constables in the several towns from year to year." Doe *v.* Blackman, 1 D. Chipm. (Vt.) 109.

The Missouri court of appeals "can not take judicial notice of the officers of a municipal corporation." State *v.* Brown, 72 Mo. App. 651, 656, per Bland, P. J.

78. Fox *v.* Com., 81 Pa. St. 511.

79. Fleugel *v.* Lards, 108 Mich. 682, 66 N. W. 585 (holding that failure of a city

commissioners,[80] superintendents of streets and their deputies,[81] and trustees,[82] and the legal powers of municipal officers.[83]

(D) *Federal Officers.* Courts judicially know who is or was the executive head of the United States;[84] the principal officers of state in the national government;[85] the heads of departments and of bureaus therein;[86] the permanent[87] or *pro tempore*[88] commissioner of patents; the commissioner of the general land-office,[89] his *pro tempore* substitute,[90] and principal subordinate officials;[91] the comptroller of the currency or a deputy acting as comptroller.[92] It has been held, however, that the state courts at least do not judicially notice a deputy United States marshal.[93]

(II) *Elections and Appointments.*[94] Since judicial knowledge of official position[95] implies knowledge of the methods by which it is legally obtained, state courts judicially know the date of holding a general election,[96] or a special election provided for by a general law,[97] and what officers are then to be elected, such as governor,[98] secretary of state,[99] county superintendent,[1] prosecuting attorney,[2] sheriff,[3] township trustee,[4] or president of the United States;[5] what party "tickets" were before the voters at a general election;[6] and the result of the election as shown by official returns.[7] A state court also judicially notices the gov-

marshal to append his official title to his signature to the return on a writ of replevin issued by a justice of the peace does not invalidate the return); Alford *v.* State, 8 Tex. App. 545.

Deputy marshals not judicially known. Alford *v.* State, 8 Tex. App. 545.

80. St. Louis *v.* Greely, 14 Mo. App. 578.

81. Himmelmann *v.* Hoadley, 44 Cal. 213.

82. Inglis *v.* State, 61 Ind. 212.

83. Lynn *v.* People, 170 Ill. 527, 48 N. E. 964; Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688 (assessors); Alford *v.* State, 8 Tex. App. 545.

84. "We take judicial notice of the fact that Andrew Jackson was President of the United States on November 1st, 1830, the date of the patents in question." Liddon *v.* Hodnett, 22 Fla. 442, 450, per Raney, J.

85. Backus Portable Steam Heater Co. *v.* Simonds, 2 App. Cas. (D. C.) 290; Herriot *v.* Broussard, 4 Mart. N. S. (La.) 260, 262, where the court said: "It is believed that it may be assumed as an axiom, that officers of the United States ought not to be held, in the exercise of authority or performance of the duties of their offices, as foreign, in relation to the citizens or public officers of the states individually. Officers appointed by the power, and in conformity with the principles of the general government, are officers for the whole United States collectively, and for each state separately, so far as their functions relate to the interest of the states separately, or that of the citizens of each state, and *quoad hæc*, they are officers of the state, and as such are presumed to be generally known and recognized; for the government ought to know their governors and the authority by which they act."

86. Backus Portable Steam Heater Co. *v.* Simonds, 2 App. Cas. (D. C.) 290.

87. Backus Portable Steam Heater Co. *v.* Simonds, 2 App. Cas. (D. C.) 290.

88. York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27.

89. Liddon *v.* Hodnett, 22 Fla. 442.

90. Barton *v.* Hempkin, 19 La. 510.

91. Bullock *v.* Wilson, 5 Port. (Ala.) 338; Herriot *v.* Broussard, 4 Mart. N. S. (La.) 260 (receivers of public money); Barton *v.* Hempkin, 19 La. 510 (chief clerk).

92. Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531.

93. Ward *v.* Henry, 19 Wis. 76, 88 Am. Dec. 672.

94. Facts relating to elections see also *supra*, II, B, 14, m.

95. See *supra*, II, C, 3, b, (I).

96. State *v.* Minnick, 15 Iowa 123; Davis *v.* Best, 2 Iowa 96; Ellis *v.* Reddin, 12 Kan. 306; Jackson County *v.* Arnold, 135 Mo. 207, 36 S. W. 662; Taylor *v.* Rennie, 35 Barb. (N. Y.) 272.

97. Wampler *v.* State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829.

Date of elections in other states is not judicially known. Taylor *v.* Rennie, 35 Barb. (N. Y.) 272.

98. Hizer *v.* State, 12 Ind. 330.

99. State *v.* Minnick, 15 Iowa 123.

1. Wampler *v.* State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829.

2. State *v.* Seibert, 130 Mo. 202, 32 S. W. 670.

3. Martin *v.* Aultman, 80 Wis. 159, 49 N. W. 749. See also Urmston *v.* State, 73 Ind. 175.

4. State *v.* Minnick, 15 Iowa 123.

5. Jackson County *v.* Arnold, 135 Mo. 207, 36 S. W. 662.

6. State *v.* Downs, 148 Ind. 324, 328, 47 N. E. 670, where the court said: "The court judicially knows that at the last general election one of the great political parties of the State, and nation, known as the 'Republican party,' submitted to the voters of the various precincts of that State a ticket, known by the people, and recognized in the election laws of the State as the 'Republican ticket.'"

7. *In re* Denny, 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722; Hizer *v.* State, 12 Ind. 330;

ernor's appointments to prominent offices, such as attorney-general,[8] commissioner of deeds,[9] election commissioner,[10] or sheriff;[11] and appointments by the president, such as cabinet officers,[12] foreign ministers,[13] and United States marshals.[14] Federal courts take judicial notice of the date prescribed by law for the general election of state officers, and the legal requirements under which such election is held.[15]

(III) *Official Signatures and Seals*—(A) *State Officers.* State courts judicially know the great seal of their own state,[16] the signature and official seal of any governor of the state,[17] the signatures and official seals of other prominent state officers and agents,[18] such as the auditor-general or his deputy on his behalf,[19] commissioners of deeds,[20] attorney-general,[21] and registers of the state land-office.[22] English courts take judicial notice of the signature and seal of officers appointed by the general government, such as commissioners to administer oaths.[23]

(B) *County Officers.* State courts take judicial notice of the signatures and seals of county executive officers,[24] and the signatures of their deputies appointed by statutory authority and acting for them.[25]

(C) *Federal Officers.* State and federal courts judicially notice the official signatures and seals of the president of the United States,[26] and of other important federal officers, such as commissioners of patents,[27] or consuls and their deputies.[28]

Kokes *v.* State, 55 Nebr. 691, 76 N. W. 467; Thomas *v.* Com., 90 Va. 92, 17 S. E. 788; Savage's Case, 84 Va. 582, 5 S. E. 563.

8. State *v.* Evans, 8 Humphr. (Tenn.) 110.

9. Kaufman *v.* Stone, 25 Ark. 336.

10. Louisville *v.* Board of Park Com'rs, 112 Ky. 409, 65 S. W. 860, 24 Ky. L. Rep. 38.

11. Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749; Alexander *v.* Burnham, 18 Wis. 199.

12. Walden *v.* Canfield, 2 Rob. (La.) 466.

13. Wetherbee *v.* Dunn, 32 Cal. 106; Walden *v.* Canfield, 2 Rob. (La.) 466.

14. Wetherbee *v.* Dunn, 32 Cal. 106.

15. U. S. *v.* Morrissey, 32 Fed. 147.

16. Chicago, etc., R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33.

17. Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245; Jones *v.* Gale, 4 Mart. (La.) 635; Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Private seal of governor of province not judicially recognized. Beach *v.* Workman, 20 N. H. 379.

18. Cary *v.* State, 76 Ala. 78; Coleman *v.* State, 63 Ala. 93; Wetherbee *v.* Dunn, 32 Cal. 106, 108 (where the court said: "There is some conflict as to how far Courts should go in the exercise of judicial knowledge in respect to who are occupants of inferior offices and tribunals. It is settled that they will take notice of who are the principal officers of the State, heads of Departments, foreign Ministers, United States Senators, Marshals, Sheriffs, and the like, and the genuineness of their signatures"); Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585 (agent of the provisional government of the republic of Texas).

19. People *v.* Johr, 22 Mich. 461.

20. Kaufman *v.* Stone, 25 Ark. 336; Dwight *v.* Splane, 11 Rob. (La.) 487.

21. State *v.* Evans, 8 Humphr. (Tenn.) 110; Bennett *v.* State, Mart. & Y. (Tenn.) 133.

22. State *v.* Cooper, (Tenn. Ch. App. 1899) 53 S. W. 391.

23. Ferguson *v.* Benyon, 16 Wkly. Rep. 71; Anonymous, 1 Wkly. Rep. 186.

24. Himmelmann *v.* Hoadley, 44 Cal. 213; Wetherbee *v.* Dunn, 32 Cal. 106; State *v.* Evans, 8 Humphr. (Tenn.) 110.

Recorder of deeds.—Scott *v.* Jackson, 12 La. Ann. 640.

Sheriff and his deputies.—Ingram *v.* State, 27 Ala. 17; Thielmann *v.* Burg, 73 Ill. 293; Wood *v.* Fitz, 10 Mart. (La.) 196; Major *v.* State, 2 Sneed (Tenn.) 11; Alford *v.* State, 8 Tex. App. 545; Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749; Ward *v.* Henry, 19 Wis. 76, 88 Am. Dec. 672; Alcock *v.* Whatmore, 8 Dowl. P. C. 615.

Tax-collector.—Wetherbee *v.* Dunn, 32 Cal. 106; Walcott *v.* Gibbs, 97 Ill. 118; Templeton *v.* Morgan, 16 La. Ann. 438.

25. Himmelmann *v.* Hoadley, 44 Cal. 213, 226; Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749; and other cases cited in the note preceding.

26. Yount *v.* Howell, 14 Cal. 465; Gardner *v.* Barney, 6 Wall. (U. S.) 499, 18 L. ed. 890.

Initials judicially noticed. Liddon *v.* Hodnet, 22 Fla. 442.

27. York, etc., Line R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27, 30, where the court said: "The objection to the patent, that it is signed by 'an acting Commissioner of Patents,' and that the records contain no averment nor proof of his title to the office, is not tenable. The court will take notice judicially of the persons who from time to time preside over the Patent Office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts."

28. Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758.

(IV) *ADMINISTRATIVE REGULATIONS* — (A) *State Courts.* State courts take judicial notice of administrative regulations of considerable notoriety established by important state boards, such as supervisors,[29] the regular course of business in the departments of state government,[30] and the rules of federal executive departments.[31] But judicial notice will not be taken of subordinate regulations concerning the internal management of an office,[32] or the regulations of inferior boards, such as canal,[33] civil service,[34] or fish commissioners.[35] And it has been held that the courts cannot take judicial notice of the existing provisions of the health department.[36]

(B) *Federal Courts.* Federal courts take judicial notice of rules and regulations of executive departments of the government promulgated by authority of acts of congress,[37] but not of regulations of inferior executive boards slightly affecting the general public.[38]

(V) *TREATIES, OFFICIAL PROCLAMATIONS, MESSAGES, AND ORDERS.* All courts in the United States take judicial notice of treaties made between the United States and foreign governments,[39] or Indian tribes,[40] and of their

29. People *v.* Kent County, 40 Mich. 481.

Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the court will take judicial notice of them. Larson *v.* Pender First Nat. Bank, (Nebr. 1902) 92 N. W. 729.

30. That the public officer who is charged with the duty of caring for public books and records has not the manual custody of them, but acts through clerks and other subordinates, is judicially known. People *v.* Palmer, 6 N. Y. App. Div. 19, 39 N. Y. Suppl. 631.

31. **The interior.**— Prather *v.* U. S., 9 App. Cas. (D. C.) 82; Campbell *v.* Wood, 116 Mo. 196, 202, 22 S. W. 796 (public land-office); U. S. *v.* Williams, 6 Mont. 379, 12 Pac. 851; Larson *v.* Pender First Nat. Bank, (Nebr. 1902) 92 N. W. 729; U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398 (rules and regulations adopted by the secretary of the interior in regard to cutting timber on public lands); Whitney *v.* Spratt, 25 Wash. 62, 64 Pac. 919, 87 Am. St. Rep. 738 (public land-office).

The treasury.— Prather *v.* U. S., 9 App. Cas. (D. C.) 82; Low *v.* Hanson, 72 Me. 104; Sears *v.* Dewing, 14 Allen (Mass.) 413, 424. *Contra*, Moore *v.* Worthington, 2 Duv. (Ky.) 307.

Internal revenue regulations not judicially noticed. Com. *v.* Crane, 158 Mass. 218, 33 S. W. 388.

32. Hensley *v.* Tarpey, 7 Cal. 288, rule as to permitting removal of original papers.

33. Palmer *v.* Aldridge, 16 Barb. (N. Y.) 131.

34. Judicial notice will not be taken of rules and regulations of civil service commissioners of the city of New York, prescribed in accordance with the civil service law. People *v.* Dalton, 46 N. Y. App. Div. 264, 61 N. Y. Suppl. 263.

35. Rules and regulations of fish commissioners prescribing conditions on which nets may be set are not noticed by the New York state courts. Josh *v.* Marshall, 33 N. Y. App. Div. 77, 53 N. Y. Suppl. 419.

36. New York City Health Dept. *v.* City Real Property Invest. Co., 86 N. Y. Suppl. 18.

37. Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415, and cases there cited. See also U. S. *v.* Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. ed. 591; Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588.

Regulations of treasury department and decisions thereon judicially noticed. Dominici *v.* U. S., 72 Fed. 46.

Regulations of interior department including public land-office judicially noticed. Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415; Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402. *Compare* U. S. *v.* Bedgood, 49 Fed. 54.

Letters patent are not judicially noticed. Bottle Seal Co. *v.* De la Vergne Bottle, etc., Co., 47 Fed. 59.

38. Regulations of supervising inspectors of steam vessels not judicially noticed. The E. A. Packer, 140 U. S. 360, 11 S. Ct. 794, 35 L. ed. 453; The Clara, 55 Fed. 1021, 5 C. C. A. 390.

Regulations of the lighthouse board, made upon the authority of an act of congress, and prescribing the number and kinds of lights to be placed on the drawbridges across navigable streams, are judicially noticed by courts of admiralty. Smith *v.* Shakopee, 103 Fed. 240, 44 C. C. A. 1.

39. Montgomery *v.* Deeley, 3 Wis. 709; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74; U. S. *v.* The Peggy, 1 Cranch (U. S.) 103, 2 L. ed. 49; Callsen *v.* Hope, 75 Fed. 758 (including protocol of transfer of property and contents of papers attached thereto); Lacroix *v.* Sarrazin, 15 Fed. 489, 4 Woods 174; Fisher *v.* Harnden, 9 Fed. Cas. No. 4,819, 1 Paine (U. S.) 55. Courts take judicial notice that under the treaty of Paris the Philippine islands became a part of the territory of the United States. La Rue *v.* Kansas Mut. L. Ins. Co., (Kan. Sup. 1904) 75 Pac. 494.

40. U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505; Myers *v.* Mathis, 2 Indian Terr. 3, 46 S. W. 178; Dole *v.* Wilson, 16 Minn. 525; Kreuger *v.* Schultz, 6 N. D. 310, 70 N. W. 269. See also Gay *v.* Thomas, 5 Okla. 1, 46 Pac. 578; U. S. *v.* De Coursey, 1 Pinn. (Wis.)

dates[41] and ratification;[42] but notice is not taken of superseded treaties,[43] or of foreign laws and usages referred to in treaties.[44] Judicial notice is taken of the public national acts of the executive head of the nation[45] in recognizing the political status of certain territory;[46] the existence of a state of war[47] or its termination;[48] the existence of martial law in a particular locality;[49] or establishing or regulating Indian reservations.[50] Courts take judicial cognizance of proclamations,[51] messages,[52] or orders[53] issued by the chief executive or by his authority.[54]

(VI) *Official Proceedings*—(A) *Prominent Officials.* To require courts to notice not only the regulations of prominent executive officers, state or national, but also what they do in discharge of their legal powers, would impose a burden of multitudinous details, often of slight importance, and more familiar to litigants than to the court. Despatch of business is usually served by requiring such facts to be proved. But where an act is that of a high executive officer of the United States, such as the president, or the secretary of the interior, etc.,[55]

508. But no notice is taken of acts done under such treaty affecting only a small portion of a tribe. Dole *v.* Wilson, 16 Minn. 525.

41. Courts take judicial notice that certain lands were within the "Indian country" and of the date when the Indian right of occupancy was terminated by treaty. Kreuger *v.* Schultz, 6 N. D. 310, 70 N. W. 269.

42. Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

43. Ryan *v.* Knorr, 19 Hun (N. Y.) 540.

44. Dainese *v.* Hale, 91 U. S. 13, 23 L. ed. 190.

45. Woods *v.* Wilder, 43 N. Y. 164, 3 Am. Rep. 684, and other cases cited in the notes following.

English and Canadian courts take judicial cognizance of the public official acts of the British executive. Rex *v.* Holt, 2 Leach C. C. 676, 5 T. R. 436; Taylor *v.* Barclay, 7 L. J. Ch. O. S. 65, 2 Sim. 213, 29 Rev. Rep. 82, 2 Eng. Ch. 213; Rex *v.* De Berenger, 3 M. & S. 67, 15 Rev. Rep. 415; Dolder *v.* Huntingfield, 11 Ves. Jr. 283, 8 Rev. Rep. 139, 32 Eng. Reprint 1097.

British orders in council, passed pursuant to authority conferred by parliament, are judicially noticed in Canadian courts. Reg. *v.* The Ship Minnie, 4 Can. Exch. 151.

46. Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691; U. S. *v.* Lynde, 11 Wall. (U. S.) 632, 20 L. ed. 230; U. S. *v.* Yorba, 1 Wall. (U. S.) 412, 17 L. ed. 635; Williams *v.* Suffolk Ins. Co., 13 Pet. (U. S.) 415, 10 L. ed. 226; Garcia *v.* Lee, 12 Pet. (U. S.) 511, 9 L. ed. 1176; Keene *v.* McDonough, 8 Pet. (U. S.) 308, 8 L. ed. 955; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415; The Divina Pastora, 4 Wheat. (U. S.) 52, 4 L. ed. 512; U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471.

Guano island.— In determining whether or not the executive has declared that a guano island is within the jurisdiction of the United States the court is not confined to the averments in the pleadings and the documents set out in the record, but it will take judicial notice of the acts of the executive relative to such island. Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691.

47. Sutton *v.* Tiller, 6 Coldw. (Tenn.) 593, 98 Am. Dec. 471; Ogden *v.* Lund, 11 Tex. 688; Philips *v.* Hatch, 19 Fed. Cas. No. 11,094, 1 Dill. 571.

48. U. S. *v.* Anderson, 9 Wall. (U. S.) 56, 19 L. ed. 615; U. S. *v.* One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958.

49. Jeffries *v.* State, 39 Ala. 655.

50. U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

51. Moss *v.* Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; Dunning *v.* New Albany, etc., R. Co., 2 Ind. 437; Wells *v.* Missouri Pac. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; Priest *v.* Lawrence, 16 Mo. App. 409; Woods *v.* Wilder, 43 N. Y. 164, 3 Am. Rep. 684 (proclamations of the executive connected with the outbreak of the Civil war); U. S. *v.* Johnson, 26 Fed. Cas. No. 15,488, 2 Sawy. 482; Theberge *v.* Danjou, 12 Quebec 1.

Proclamations of pardon and amnesty.— State *v.* Keith, 63 N. C. 140; Jenkins *v.* Collard, 145 U. S. 546, 12 S. Ct. 868, 36 L. ed. 812; Armstrong *v.* U. S., 13 Wall. (U. S.) 154, 20 L. ed. 614; *In re* Greathouse, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Sawy. 487.

52. Wells *v.* Missouri Pac. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847.

Federal courts do not take judicial notice of facts stated in reports or messages of a governor to the state legislature. Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 272. But see Cœur d'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

53. *Re* Stanbro, 2 Manitoba 1.

54. **General orders of commanding officers** acting as military governors judicially noticed. New Orleans Canal, etc., Co. *v.* Templeton, 20 La. Ann. 141, 96 Am. Dec. 385; Taylor *v.* Graham, 18 La. Ann. 656, 89 Am. Dec. 699; Lanfear *v.* Mestier, 18 La. Ann. 497, 89 Am. Dec. 658; Gates *v.* Johnson County, 36 Tex. 144. See also Johnston *v.* Wilson, 29 Gratt. (Va.) 379. But *compare* Burke *v.* Tregre, 19 Wall. (U. S.) 519, 22 L. ed. 158.

55. Dole *v.* Wilson, 16 Minn. 525 (president); Lerch *v.* Snyder, 112 Pa. St. 161, 4 Atl. 336 (collector of customs); Southern Pac. R. Co. *v.* Groeck, 68 Fed. 609 (secretary of the interior).

or of a state,[56] and is one of general public interest, such as the selection of a tract of land to be donated by the federal government for the benefit of a state university,[57] sale of land scrip certificates,[58] or withdrawal of public lands from sale,[59] judicial notice thereof will be taken by state and federal courts. But executive acts of the same officials, if of slight general importance,[60] as for instance issuing land scrip under an Indian treaty by authority of the president,[61] filing a map of a railroad location in the interior department,[62] changing the name of a railroad corporation,[63] or regulating freight rates on a particular railroad[64] must be proved. While courts do not take judicial notice of the modes by which executive officers carry into effect a public statute,[65] the practice of the great executive departments or bureaus of the national government has much the force of unwritten law and may become so notorious as to be judicially known to the courts;[66] and where the fact is one that the court may judicially recognize its existence may be ascertained from the official records.[67]

(B) *Inferior Officials.* While a court of general jurisdiction will as a rule take judicial notice of an act of a local or inferior officer or board which nearly concerns the general public, such as the issuance of paper currency,[68] the assessment of taxes,[69] and other acts of general public interest,[70] it will decline to notice judicially the acts of inferior officers of purely local interest.[71]

(VII) *PUBLIC SURVEYS.* All courts in the United States take judicial notice of the original surveys of public lands under acts of congress;[72] the area,[73] location,[74]

56. State *v.* Gramelspacher, 126 Ind. 398, 26 N. E. 81 (governor); Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585 (agent); Martin *v.* State, 51 Wis. 407, 8 N. W. 248 (secretary of state).

57. State *v.* Gramelspacher, 126 Ind. 398, 26 N. E. 81.

58. Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585.

59. Southern Pac. R. Co. *v.* Groeck, 68 Fed. 609.

60. Dole *v.* Wilson, 16 Minn. 525.

61. Dole *v.* Wilson, 16 Minn. 525.

62. McKevin *v.* Northern Pac. R. Co., 45 Fed. 464.

63. Cincinnati, etc., R. Co. *v.* Hoffhines, 46 Ohio St. 643, 22 N. E. 871.

64. Thompson *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427.

65. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

66. The court will take judicial notice of the business of the patent office, and that patent No. 543,659 is an issue of later date than No. 186,374 (A. Smith, etc., Carpet Co. *v.* Skinner, 91 Hun (N. Y.) 641, 36 N. Y. Suppl. 1000) and that patents for public lands are frequently dated several years after the payment of the purchase-money and the issuance of the certificate of entry (Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402).

67. Smitha *v.* Flournoy, 47 Ala. 345; Pleasant Valley Coal Co. *v.* Salt Lake County, 15 Utah 97, 48 Pac. 1032; Martin *v.* State, 51 Wis. 407, 8 N. W. 248.

Official printed reports are as a rule incompetent. Gordon *v.* Bucknell, 38 Iowa 438 (state land-office); Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669.

68. D'Invilliers *v.* New Orleans Second Municipality, 5 Rob. (La.) 123.

69. State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; Railroad, etc., Co. *v.* Tennessee, 85 Fed. 302. *Compare* New York *v.* Barker, 179 U. S. 279, 21 S. Ct. 121, 45 L. ed. 190.

70. Guckenberger *v.* Dexter, 8 Ohio S. & C. Pl. Dec. 530, holding that in determining whether a contract for the sale of refunding bonds is in the interest of the municipality, the court will take judicial notice of the fact that other of the municipal departments or agencies sold bonds at a premium and the amount of such premium.

71. Porter *v.* Waring, 2 Abb. N. Cas. (N. Y.) 230 (opinion of local officials as to what constitutes a sidewalk); State *v.* Wise, 7 Ind. 645 (establishment of ferries); Bledsoe *v.* Little, 4 How. (Miss.) 13 (holding that courts cannot judicially know that registers and receivers of land-offices have not offered lands for sale pursuant to a statute authorizing such action); Archer *v.* State, 9 Tex. App. 78 (fixing amount of license fees).

72. *Alabama.*— Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579.

Arkansas.— Bittle *v.* Stuart, 34 Ark. 224.

California.— Faekler *v.* Wright, 86 Cal. 210, 24 Pac. 996.

Illinois.— Gardner *v.* Eberhart, 82 Ill. 316; Gooding *v.* Morgan, 70 Ill. 275.

Indiana.— Burton *v.* Ferguson, 69 Ind. 486; Murphy *v.* Hendricks, 57 Ind. 593.

Iowa.— Hypfner *v.* Walsh, 3 Greene 509.

Minnesota.— Quinn *v.* Champagne, 38 Minn. 322, 37 N. W. 451.

Wisconsin.— Atwater *v.* Schenck, 9 Wis. 160; Prieger *v.* Exchange Mut. Ins. Co., 6 Wis. 89.

See 20 Cent. Dig. tit. "Evidence," § 30.

73. Quinn *v.* Windmiller, 67 Cal. 461, 8 Pac. 14; Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503.

74. Muse *v.* Richards, 70 Miss. 581, 12 So. 821.

as being within a state,[75] county,[76] or township,[77] of the lands surveyed; their numbering,[78] and the relative position[79] of counties[80] or townships[81] to meridian lines[82] or points of the compass;[83] the nomenclature[84] and relative size[85] of the territorial divisions thus established; how the divisions are constituted in particular instances,[86] including the position of the range lines;[87] their relation to the principal meridian;[88] and the location of fractional townships,[89] or, on the other hand, that a particular legal subdivision of a section of land is not fractional,[90] or that the township lines coincide with the sectional.[91] Judicial notice cannot be taken of the topography of the land surveyed,[92] or of its minor subdivisions,[93] nor probably of the position, on the ground, of a particular lot.[94] English courts take judicial notice of the geographical position of and general names applied to districts as shown on the admiralty chart made by public officials under requirement of law.[95]

c. Legislative Department — (1) *Existence, Composition, and Proceedings.* State and federal courts judicially recognize the existence of a state legislature,[96] and the time when a particular session thereof terminated;[97] and they know in a general way who constitute its members,[98] as well as the number composing the different branches;[99] but judicial notice is not taken that a particular person is privileged from arrest because he is a member of the legislature.[1] Subsidiary matters relating to the internal working of the legislature rather than to its law-making function will not be judicially noticed. Thus it has been held that reports of committees[2] and the proper methods of influencing legislation[3]

75. King *v.* Kent, 29 Ala. 542.

76. *Alabama.*— Webb *v.* Mullins, 78 Ala. 111; Money *v.* Turnipseed, 50 Ala. 499; Smitha *v.* Flournoy, 47 Ala. 345.

California.— Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.

Illinois.— Dickerson *v.* Hendryx, 88 Ill. 66.

Indiana.— Richardson *v.* Hedges, 150 Ind. 53, 49 N. E. 822; Adams *v.* Harrington, 114 Ind. 66, 14 N. E. 603; Smith *v.* Clifford, 99 Ind. 113.

Iowa.— Wright *v.* Phillips, 2 Greene 191.

Texas.— Wright *v.* Hawkins, 28 Tex. 452.

See 20 Cent. Dig. tit. "Evidence," § 30.

77. Wright *v.* Phillips, 2 Greene (Iowa) 191 (judicial notice properly taken by justice of the peace); Dexter *v.* Cranston, 41 Mich. 448, 2 N. W. 674.

78. Smitha *v.* Flournoy, 47 Ala. 345; Kile *v.* Yellowhead, 80 Ill. 208; Mossman *v.* Forrest, 27 Ind. 233; Albert *v.* Salem, 39 Oreg. 466, 65 Pac. 1068, 66 Pac. 233.

79. King *v.* Kent, 29 Ala. 542; Mossman *v.* Forrest, 27 Ind. 233.

80. O'Brien *v.* Krockinski, 50 Ill. App. 456; Buchanan *v.* Whitham, 36 Ind. 257.

81. Kile *v.* Yellowhead, 80 Ill. 208; O'Brien *v.* Krockinski, 50 Ill. App. 456.

82. O'Brien *v.* Krockinski, 50 Ill. App. 456.

83. Kile *v.* Yellowhead, 80 Ill. 208; Buchanan *v.* Whitham, 36 Ind. 257.

84. Quinn *v.* Windmiller, 67 Cal. 461, 8 Pac. 14.

85. Hill *v.* Bacon, 43 Ill. 477; Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503.

86. Hill *v.* Bacon, 43 Ill. 477; Meacham *v.* Sunderland, 10 Ill. App. 123 (that the west half of the quarter section according to government survey is made up of two forty-acre tracts); Muse *v.* Richards, 70 Miss. 581, 12 So. 821.

87. Muse *v.* Richards, 70 Miss. 581, 12 So. 821.

88. Muse *v.* Richards, 70 Miss. 581, 12 So. 821.

89. Webb *v.* Mullins, 78 Ala. 111.

90. Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313.

91. Kile *v.* Yellowhead, 80 Ill. 208.

92. Wilcox *v.* Jackson, 109 Ill. 261.

93. Stanberry *v.* Nelson, Wright (Ohio) 766.

94. Goodwin *v.* Scheerer, 106 Cal. 690, 694, 40 Pac. 18, where the court said: "It would be carrying the rule of judicial notice farther than it has ever been carried to hold that the knowledge of the court includes the precise lines upon the surface of the earth which define the boundaries of a patent, or that any particular parcel of land is within or without those boundaries."

95. Birrell *v.* Dryer, 9 App. Cas. 345, 5 Aspin. 267, 51 L. T. Rep. N. S. 130.

96. People *v.* Burt, 43 Cal. 560.

97. Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120.

98. Although the court has not the power to decide who are the members of the general assembly, yet the judges thereof are bound to know what assemblage of men constitute the state legislature; for they are bound to know what the laws of the state are, in order to adjudicate upon the rights of the litigants under the law. State *v.* Kennard, 25 La. Ann. 238.

99. State *v.* Mason, 155 Mo. 486, 55 S. W. 636.

1. Prentis *v.* Com., 5 Rand. (Va.) 697, 16 Am. Dec. 782; State *v.* Polacheck, 101 Wis. 427, 77 N. W. 708.

2. State *v.* Dow, 53 Me. 305.

3. The court has no judicial knowledge whether or not there are proper and legiti-

are matters which must be established by evidence. Nor can the court, in determining the validity of appropriations, know the amount of revenue raised.[4]

(II) *Legislative Journals.* Journals of the legislature being not only the official records of a coördinate branch of government kept under requirement of law, but also important as bearing on the validity and meaning of statute law which it is the function of courts to know and enforce, are according to the weight of authority judicially noticed by the courts.[5]

(III) *Political Divisions*[6] — (A) *In General.* Courts judicially know the boundaries claimed by[7] and the political divisions[8] of the government within which they exercise jurisdiction, whether these divisions exist for election pur-

mate modes of expending money in procuring the passage of an act of the legislature, and therefore it cannot say that an averment in an answer of such expenditure, with such purpose and result, is either immaterial or vicious. Judah *v.* Vincennes University, 16 Ind. 56.

4. Validity of appropriations.— Although the court must take judicial notice of the constitutional methods provided for raising revenue, it cannot take notice of the amount so raised and received until it is shown that the income for the two years for which the legislative appropriations are made is not sufficient to meet such appropriations, but will assume that the legislature kept within the constitutional limits. Stein *v.* Morrison, (Ida. 1904) 75 Pac. 246.

5. *Alabama.*— Stein *v.* Leeper, 78 Ala. 517; Moog *v.* Randolph, 77 Ala. 597; Moody *v.* State, 48 Ala. 115, 17 Am. Rep. 28; Jones *v.* Hutchinson, 43 Ala. 721.

Arkansas.— Worthen *v.* Badgett, 32 Ark. 496; Burr *v.* Ross, 19 Ark. 250.

Florida.— State *v.* Hocker, 36 Fla. 358, 18 So. 767.

Iowa.— Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609.

Kansas.— *In re* Vanderberg, 28 Kan. 243; State *v.* Francis, 26 Kan. 724; *In re* Howard County, 15 Kan. 194.

Louisiana.— Barnard *v.* Gall, 43 La. Ann. 959, 10 So. 5.

Maryland.— Legg *v.* Annapolis, 42 Md. 203; Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69.

Michigan.— Hart *v.* McElroy, 72 Mich. 446, 40 N. W. 750; Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203; People *v.* Mahaney, 13 Mich. 481.

Missouri.— McCaffery *v.* Mason, 155 Mo. 486, 55 S. W. 636; State *v.* Wray, 109 Mo. 594, 19 S. W. 86; State *v.* Mead, 71 Mo. 266.

Nebraska.— State *v.* Frank, 61 Nebr. 679, 85 N. W. 956; Webster *v.* Hastings, 56 Nebr. 669, 77 N. W. 127; State *v.* McLelland, 18 Nebr. 236, 25 N. W. 77, 53 Am. Rep. 814.

New Hampshire.— Opinion of Justices, 52 N. H. 622; Opinion of Justices, 35 N. H. 579.

New York.— People *v.* Chenango, 8 N. Y. 317; Commercial Bank *v.* Sparrow, 2 Den. 97; De Bow *v.* People, 1 Den. 9; Purdy *v.* People, 4 Hill 384.

Ohio.— Miller *v.* State, 3 Ohio St. 475.

Pennsylvania.— Southwark Bank *v.* Com., 26 Pa. St. 446.

South Carolina.— State *v.* Platt, 2 S. C. 150, 16 Am. Rep. 647.

South Dakota.— Somers *v.* State, 5 S. D. 321, 58 N. W. 804.

Tennessee.— Williams *v.* State, 6 Lea 549.

Utah.— Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

Vermont.— *In re* Welman, 20 Vt. 653, 29 Fed. Cas. No. 17,407.

West Virginia.— Osburn *v.* Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin.— Dane County *v.* Reindahl, 104 Wis. 302, 80 N. W. 438; *In re* Ryan, 80 Wis. 414, 50 N. W. 187; McDonald *v.* State, 80 Wis. 407, 50 N. W. 185.

United States.— Blake *v.* New York Nat. City Bank, 23 Wall. 307, 23 L. ed. 119; Gardner *v.* Barney, 6 Wall. 499, 18 L. ed. 890.

See 20 Cent. Dig. tit. "Evidence," § 47.

Contra.— Grob *v.* Cushman, 45 Ill. 119; Coleman *v.* Dobbins, 8 Ind. 156; Auditor *v.* Haycraft, 14 Bush (Ky.) 284; Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289; Green *v.* Weller, 32 Miss. 650, 686.

Journals as public documents.— In some jurisdictions legislative journals are treated merely as public documents (Grob *v.* Cushman, 45 Ill. 119; Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77; Evans *v.* Browne, 30 Ind. 514, 95 Am. Dec. 710), and the legal status of records has occasionally been denied to them (Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 85; Pangborn *v.* Young, 32 N. J. L. 29. See also Rex *v.* Arundel, Hob. K. B. 109).

Correction of journals.— The same legislature which passed an act may at a subsequent extra session correct the record of the journals regarding its passage. Turley *v.* Logan, 17 Ill. 151.

6. Geographical facts see *supra*, II, B, 13, c.

7. Cummings *v.* Stone, 13 Mich. 70; Baumann *v.* Granite Sav. Bank, 66 Minn. 227, 68 N. W. 1074; State *v.* Dunwell, 3 R. I. 127; Hoyt *v.* Russell, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed. 914; Thorson *v.* Peterson, 9 Fed. 517, 10 Biss. 530. See also U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

8. Payne *v.* Treadwell, 16 Cal. 220; Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423; State *v.* Nolle, 96 Mo. App. 524, 70 S. W. 504; U. S. *v.* Jackson, 104 U. S. 41, 26 L. ed. 651; U. S. *v.* Johnson, 26 Fed. Cas. No. 15,488, 2 Sawy. 482.

poses[9] or for the direct administration of governmental functions,[10] such as collection of revenue.[11] Judicial cognizance does not cover the public ownership of land,[12] even of land under navigable water;[13] but notorious historical facts, as that the title to state lands was originally in the United States,[14] or that a congressional grant to a railroad of land within the state has or has not been declared forfeited,[15] will be judicially noticed by courts of the state within whose limits the land lies.

(B) *Counties and County-Seats.*[16] Courts judicially notice counties,[17] their area,[18] boundaries,[19] location,[20] names,[21] and date of organization;[22] but notice cannot be taken that a particular piece of land is within a certain county.[23] In

9. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,488, 2 Sawy. 482.

10. U. S. *v.* Jackson, 104 U. S. 41, 26 L. ed. 651; Eastern Judicial Dist. Bd. *v.* Winnipeg, 3 Manitoba 537.

11. U. S. *v.* Jackson, 104 U. S. 41, 26 L. ed. 651, collection districts.

12. Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448.

13. New York, etc., Bridge Co. *v.* Skelly, 90 Hun (N. Y.) 312, 35 N. Y. Suppl. 920.

14. Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088; Smith *v.* Stevens, 82 Ill. 554.

15. Mathis *v.* Tennessee, etc., R. Co., 83 Ala. 411, 3 So. 793.

16. See also *supra*, II, B, 13, c.

17. *Alabama.*— Scheuer *v.* Kelly, 121 Ala. 323, 26 So. 4; Trammell *v.* Chambers County, 93 Ala. 388, 9 So. 815; Camp *v.* Marion County, 91 Ala. 240, 8 So. 786.

Arkansas.— Bittle *v.* Stuart, 34 Ark. 224.

Connecticut.— State *v.* Powers, 25 Conn. 48.

Illinois.— Gooding *v.* Morgan, 70 Ill. 275; Dickenson *v.* Breeden, 30 Ill. 279.

Indiana.— Dawson *v.* James, 64 Ind. 162.

Iowa.— Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594; Pitts *v.* Lewis, 81 Iowa 51, 46 N. W. 739.

Maine.— State *v.* Simpson, 91 Me. 83, 39 Atl. 287; Harvey *v.* Wayne, 72 Me. 430; Martin *v.* Martin, 51 Me. 366; Goodwin *v.* Appleton, 22 Me. 453.

Missouri.— Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663.

New Hampshire.— Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.

Pennsylvania.— Com. *v.* McMichael, 8 Pa. Dist. 157, 22 Pa. Co. Ct. 182.

Tennessee.— Coover *v.* Davenport, 1 Heisk. 368, 2 Am. Rep. 706.

Texas.— Boston *v.* State, 5 Tex. App. 383, 32 Am. Rep. 575.

Utah.— McMaster *v.* Morse, 18 Utah 71, 55 Pac. 70.

West Virginia.— Beasley *v.* Beckley, 28 W. Va. 81.

Wisconsin.— Woodward *v.* Chicago, etc., R. Co., 21 Wis. 309.

United States.— Gager *v.* Henry, 9 Fed. Cas. No. 5,172, 5 Sawy. 237; Lyell *v.* Lapeer County, 15 Fed. Cas. No. 8,618, 6 McLean 446.

England.— Reg. *v.* St. Maurice, 16 Q. B. 908, 15 Jur. 559, 20 L. J. M. C. 221, 71 E. C. L. 908; Deybel's Case, 4 B. & Ald. 243, 6 E. C. L. 468.

See 20 Cent. Dig. tit. "Evidence," § 31.

Courts in England judicially know that a particular county is also a city. Reg. *v.* St. Maurice, 16 Q. B. 908, 15 Jur. 559, 20 L. J. M. C. 221, 71 E. C. L. 908.

18. Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908; State *v.* Gramelspacher, 126 Ind. 398, 26 N. E. 81; Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313; State *v.* Glasgow, 1 N. C. 176, 2 Am. Dec. 629; Wright *v.* Hawkins, 28 Tex. 452; State *v.* Jordan, 12 Tex. 205.

19. *Alabama.*—Smitha *v.* Flournoy, 47 Ala. 345.

Indiana.— Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908; State *v.* Gramelspacher, 126 Ind. 398, 26 N. E. 81; Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313; Steinmetz *v.* Versailles, etc., Turnpike Co., 57 Ind. 457.

Maine.— Ham *v.* Ham, 39 Me. 263.

Missouri.— Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663.

Texas.— Wright *v.* Hawkins, 28 Tex. 452; State *v.* Jordan, 12 Tex. 205; McGill *v.* State, 25 Tex. App. 499, 8 S. W. 661.

United States.— Ross *v.* Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288; Bluefield Waterworks, etc., Co. *v.* Sanders, 63 Fed. 333, 11 C. C. A. 232.

See 20 Cent. Dig. tit. "Evidence," § 31.

An English court will not notice the precise boundary of a county. Brunt *v.* Thompson, 2 Q. B. 789, 42 E. C. L. 913, C. & M. 34, 41 E. C. L. 34, 2 G. & D. 110.

20. State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106.

21. *Alabama.*— Overton *v.* State, 60 Ala. 73.

Illinois.— Doyle *v.* Bradford, 90 Ill. 416; Higgins *v.* Bullock, 66 Ill. 37.

Iowa.— Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594.

Kentucky.— Holley *v.* Holley, Litt. Sel. Cas. 505, 12 Am. Dec. 342.

Massachusetts.— Com. *v.* Desmond, 103 Mass. 445.

North Carolina.— State *v.* Snow, 117 N. C. 774, 23 S. E. 322.

Tennessee.— Brown *v.* Elms, 10 Humphr. 135.

See 20 Cent. Dig. tit. "Evidence," § 31.

22. People *v.* Wallace, 101 Cal. 281, 35 Pac. 862; Moseley *v.* Stucken, 26 Tex. Civ. App. 290, 62 S. W. 1103.

23. Kretzschmar *v.* Meehan, 74 Minn. 211, 77 N. W. 41, "at least when not described according to the government survey."

like manner, the identity of particular county-seats and their location are judicially known to the courts.[24]

(c) *Cities and Their Subdivisions.*[25] Courts of states and territories take judicial notice of the cities therein,[26] although incorporated under a preceding government;[27] their boundaries,[28] and by consequence what lands they include;[29] their location, as within the state or territory,[30] or within a particular county,[31] although not as within a given township where that fact is jurisdictional.[32] Wards,[33] or lots and blocks shown on a survey,[34] are not judicially noticed by courts of general jurisdiction unless such subdivisions are directly established by a public law;[35] and in much the same way courts notice the location and direction

24. *Arizona.*— Maricopa County *v.* Burnett, (1903) 71 Pac. 908, holding that the supreme court will take judicial notice that not all of the county-seats in the territory are situated in the largest towns and centers of population.

Arkansas.— St. Louis, etc., R. Co. *v.* State, 68 Ark. 561, 60 S. W. 654; Cox *v.* State, 68 Ark. 462, 60 S. W. 27.

California.— People *v.* Faust, 113 Cal. 172, 45 Pac. 261; People *v.* Etting, 99 Cal. 577, 34 Pac. 237.

Illinois.— Andrews *v.* Knox County, 70 Ill. 65.

Indiana.— Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727.

Iowa.— Adair *v.* Egland, 58 Iowa 314, 12 N. W. 277; State *v.* Laffer, 38 Iowa 422.

Missouri.— State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106.

Nevada.— State *v.* Buralli, (1903) 71 Pac. 532.

Texas.— Whitener *v.* Belknap, 89 Tex. 273, 34 S. W. 594; Hambel *v.* Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46; Carson *v.* Dalton, 59 Tex. 500; Flynt *v.* Eagle Pass Coal, etc., Co., (Civ. App. 1903) 77 S. W. 831.

United States.— Gager *v.* Henry, 9 Fed. Cas. No. 5,172, 5 Sawy. 237.

See 20 Cent. Dig. tit. "Evidence," § 31.

The result of an election to determine the location of a county-seat is judicially known. Andrews *v.* Knox County, 70 Ill. 65; Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727.

25. See also *supra*, II, B, 13, c, f.

26. *Alabama.*— Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Iowa.— Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594.

Maine.— Goodwin *v.* Appleton, 22 Me. 453.

Missouri.— State *v.* Nolle, 97 Mo. App. 524, 70 S. W. 504.

Pennsylvania.— Com. *v.* McMichael, 8 Pa. Dist. 157, 22 Pa. Co. Ct. 182.

Vermont.— French *v.* Barre, 58 Vt. 367, 5 Atl. 568.

Wisconsin.— Woodward *v.* Chicago, etc., R. Co., 21 Wis. 309; Swain *v.* Comstock, 18 Wis. 463.

Class of city.— The court will take judicial notice that a city of the state is of a particular class. Ft. Scott *v.* Elliott, (Kan. Sup. 1903) 74 Pac. 609.

Judicial cognizance of statutes incorporating municipal corporations and prescribing their powers see *supra*, II, C, 2, a, d.

27. Payne *v.* Treadwell, 16 Cal. 220.

28. De Baker *v.* Southern Cal. R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237; *In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; Houlton *v.* Chicago, etc., R. Co., 86 Wis. 59, 56 N. W. 336. It has been held, however, that the precise boundaries cannot be noticed unless established by statute. Boston *v.* State, 5 Tex. App. 383, 32 Am. Rep. 575.

29. Brown *v.* Ogg, 85 Ind. 234; Bannister *v.* Grassy Fork Ditching Assoc., 52 Ind. 178; Houlton *v.* Chicago, etc., R. Co., 86 Wis. 59, 56 N. W. 336.

30. U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505; Baumann *v.* Granite Sav. Bank, etc., Co., 66 Minn. 227, 68 N. W. 1074.

31. *Alabama.*— Smitha *v.* Flournoy, 47 Ala. 345.

California.— People *v.* Etting, 99 Cal. 577, 34 Pac. 237.

Illinois.— Huston *v.* People, 53 Ill. App. 501.

Iowa.— Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594.

Kansas.— Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 736, 21 Pac. 589.

Michigan.— People *v.* Curley, 99 Mich. 238, 58 N. W. 68.

Minnesota.— Baumann *v.* Granite Sav. Bank, etc., Co., 66 Minn. 227, 68 N. W. 1074.

Utah.— McMaster *v.* Morse, 18 Utah 21, 55 Pac. 70.

See 20 Cent. Dig. tit. "Evidence," § 32.

In Texas judicial cognizance will be taken that a city is in a given county where that fact has been recognized in a public statute. Solyer *v.* Romanet, 52 Tex. 562; Lewis *v.* State, (Cr. App. 1894) 24 S. W. 903.

32. Mayes *v.* St. Louis, etc., R. Co., 71 Mo. App. 140; Porter *v.* St. Louis, etc., R. Co., 66 Mo. App. 623.

33. Moberry *v.* Jeffersonville, 38 Ind. 198; Armstrong *v.* Cummings, 20 Hun (N. Y.) 313.

34. Brumagim *v.* Bradshaw, 39 Cal. 24; Sever *v.* Lyons, 170 Ill. 395, 48 N. E. 926; McMaster *v.* Morse, 18 Utah 21, 55 Pac. 70; Pleasant Valley Coal Co. *v.* Salt Lake County, 15 Utah 97, 48 Pac. 1032; Ritchie *v.* Catlin, 86 Wis. 109, 56 N. W. 473.

35. Sever *v.* Lyons, 170 Ill. 395, 48 N. E. 926; Armstrong *v.* Cummings, 20 Hun (N. Y.) 313.

Subdivisions resulting from acts in pais, of which no evidence is furnished, are not judicially noticed. Moberry *v.* Jeffersonville, 38

of streets established in a city by law and their relations to each other,[36] but not their incidence on the ground,[37] nor streets established by dedication or municipal by-law.[38]

(D) *Towns or Townships.*[39] Courts take judicial notice of the statutory division of a state into towns;[40] their boundaries, where the precise boundaries are declared by law;[41] their location as within the state,[42] or as related to a particular county;[43] and their numbering.[44] But it has been held that judicial notice cannot be taken of the distances between different places in counties.[45]

(E) *Villages.* Courts take judicial notice of the incorporated villages of a state,[46] and judicially know in what county they are situated.[47]

Ind. 198; Ritchie *v.* Catlin, 86 Wis. 109, 56 N. W. 473. See also *supra*, II, B, 13, f.

36. Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283.

37. Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283.

38. Diggins *v.* Hartshorne, 108 Cal. 154, 41 Pac. 283.

39. See also *supra*, II, B, 13, c.

40. *Connecticut.*— State *v.* Powers, 25 Conn. 48.

Maine.— State *v.* Simpson, 91 Me. 83, 39 Atl. 287; Harvey *v.* Wayne, 72 Me. 430; Martin *v.* Martin, 51 Me. 366; Goodwin *v.* Appleton, 22 Me. 453.

Missouri.— Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663.

New York.— People *v.* Breese, 7 Cow. 429.

North Carolina.— State *v.* Glasgow, 1 N. C. 176, 2 Am. Dec. 629.

Texas.— Boston *v.* State, 5 Tex. App. 383, 32 Am. Rep. 575.

Vermont.— French *v.* Barre, 58 Vt. 567, 5 Atl. 568; Briggs *v.* Whipple, 7 Vt. 15.

Wisconsin.— Woodward *v.* Chicago, etc., R. Co., 21 Wis. 309.

See 20 Cent. Dig. tit. "Evidence," § 32; and *supra*, II, C, 2, a.

41. Hite *v.* State, 9 Yerg. (Tenn.) 357; Boston *v.* State, 5 Tex. App. 383, 32 Am. Rep. 575. *Compare*, however, Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492; Mayes *v.* St. Louis, etc., R. Co., 71 Mo. App. 140.

42. King *v.* Kent, 29 Ala. 542.

43. *Arkansas.*— St. Louis, etc., R. Co. *v.* Magness, 68 Ark. 289, 57 S. W. 933; Forehand *v.* State, 53 Ark. 46, 13 S. W. 728.

Delaware.— State *v.* Tootle, 2 Harr. 541.

Georgia.— Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

Illinois.— Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22; Sullivan *v.* People, 122 Ill. 385, 13 N. E. 248; People *v.* Suppiger, 103 Ill. 434.

Indiana.— Turbeville *v.* State, 42 Ind. 490.

Iowa.— State *v.* Reader, 60 Iowa 527, 15 N. W. 423.

Maine.— State *v.* Simpson, 91 Me. 83, 39 Atl. 287; Martin *v.* Martin, 51 Me. 366; Ham *v.* Ham, 39 Me. 263.

Michigan.— People *v.* Curley, 99 Mich. 238, 58 N. W. 68; People *v.* Telford, 56 Mich. 541, 23 N. W. 213.

Missouri.— Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663; City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123.

New Hampshire.— Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.

New York.— Vanderwerker *v.* People, 5 Wend. 530; People *v.* Breese, 7 Cow. 429.

Oregon.— Marx *v.* Croisan, 17 Oreg. 393, 21 Pac. 310.

Vermont.— State *v.* Soragan, 40 Vt. 450.

See 20 Cent. Dig. tit. "Evidence," § 32.

Conflicting view.— In criminal cases the courts in Missouri (State *v.* Burgess, 75 Mo. 541; State *v.* Hartnett, 75 Mo. 251; State *v.* Quaite, 20 Mo. App. 405), South Dakota (State *v.* Clark First Nat. Bank, 3 S. D. 52, 51 N. W. 780), and Texas (Boston *v.* State, 5 Tex. App. 383, 32 Am. Rep. 575. See also Hutto *v.* State, (Cr. App. 1895) 33 S. W. 223; Cain *v.* State, (Cr. App. 1894) 25 S. W. 1119; Fields *v.* State, (Cr. App. 1893) 24 S. W. 407; Latham *v.* State, 19 Tex. App. 305) decline to take notice whether a particular locality is or is not in a particular county; except that where the location of a municipality is recognized or established by a public law (Fields *v.* State, (Cr. App. 1893) 24 S. W. 407; Hoffman *v.* State, 12 Tex. App. 406. See also Taylor *v.* Blum, (App. 1888) 7 S. W. 829), as by being selected for the capital of the state (Lewis *v.* State, (Cr. App. 1904) 24 S. W. 903), in which case it has been held that the courts of Texas will take judicial notice of it.

A township may judicially be noticed not to be in a certain county. City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123.

In England courts do not take judicial notice that particular places are or are not within particular counties (Brunt *v.* Thompson, 2 Q. B. 789, 42 E. C. L. 913, C. & M. 34, 41 E. C. L. 34, 2 G. & D. 110), but they notice the names and location of parishes (Reg. *v.* Sharpe, 8 C. & P. 436, 34 E. C. L. 823).

44. Kile *v.* Yellowhead, 80 Ill. 208.

45. Goodwin *v.* Appleton, 22 Me. 453. And see Anderson *v.* Com., 100 Va. 860, 42 S. E. 865. *Compare supra*, II, B, 13, g.

46. U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505; Chamberlain *v.* Litchfield, 56 Ill. App. 652; Shaw *v.* New York, etc., R. Co., 85 N. Y. App. Div. 137, 83 N. Y. Suppl. 91; French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

Incorporation of villages see *supra*, II, C, 2, a, d.

47. People *v.* Telford, 56 Mich. 541, 23 N. W. 213.

d. Judicial Department — (I) *Judicial Notice by State Courts* — (A) *In General.* Judges of state courts take judicial notice of the organization, jurisdiction, and powers of their own court,[48] and of other tribunals created by the constitution or established by statute,[49] and of the official seals of state and federal courts,[50] but not of the private seals of judges or their clerks,[51] nor the seals of foreign municipal courts.[52] Federal courts are regarded as domestic tribunals by the state courts, and judicial notice is taken of their jurisdiction,[53] including jurisdiction over places ceded by the state,[54] but not of their jurisdiction over land purchased or condemned by the United States.[55] State courts recognize in a general way the notorious jurisdiction of superior tribunals in other states[56] or in Canada,[57] and salient facts regarding them, as that the supreme courts are courts of record.[58]

(B) *Judicial Districts.* State courts judicially know the boundaries of the judicial districts in the state,[59] and consequently the location of counties,[60] cities,[61] and towns,[62] with respect to such districts.

(C) *Terms of Courts and Sessions of Other Bodies.* State courts also judi-

The location of an unincorporated village is not judicially known. Anderson *v.* Com., 100 Va. 860, 42 S. E. 865.

48. State *v.* Schlessinger, 38 La. Ann. 564.

49. *Alabama.*— *Ex p.* Peterson, 33 Ala. 74.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348.

Illinois.— Russell *v.* Sargent, 7 Ill. App. 98.

Iowa.— Upton *v.* Paxton, 72 Iowa 295, 33 N. W. 773; Ellsworth *v.* Moore, 5 Iowa 486.

Maryland.— Tucker *v.* State, 11 Md. 322.

New York.— *In re* Hackley, 21 How. Pr. 103.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198.

South Dakota.— Nelson *v.* Ladd, 4 S. D. 1, 54 N. W. 809.

Texas.— Long *v.* State, 1 Tex. App. 709.

Vermont.— State *v.* Marsh, 70 Vt. 288, 40 Atl. 836; Hancock *v.* Worcester, 62 Vt. 106, 18 Atl. 1041.

See 20 Cent. Dig. tit. "Evidence," § 54.

Probate courts.— La Salle *v.* Milligan, 143 Ill. 321, 32 N. E. 196; State *v.* Green, 52 S. C. 520, 30 S. E. 683.

County courts.— St. Louis, etc., R. Co. *v.* Magness, 68 Ark. 289, 57 S. W. 933; Nelson *v.* Ladd, 4 S. D. 1, 54 N. W. 809; Long *v.* State, 1 Tex. App. 709. See also Reg. *v.* Whittles, 13 Q. B. 248, 13 Jur. 403, 18 L. J. M. C. 96, 66 E. C. L. 248, holding that the quarter sessions ought to take judicial notice of the petty sessional divisions in their county.

Municipal courts.— Hearson *v.* Graudine, 87 Ill. 115; Heffernan *v.* Hervey, 41 W. Va. 766, 24 S. E. 592.

Courts of inquest.— State *v.* Marsh, 70 Vt. 288, 40 Atl. 836.

Justices of the peace.— Olmstead *v.* Thompson, 91 Ala. 130, 8 So. 755; Goodsell *v.* Leonard, 23 Mich. 374.

Commissioners' courts.— See *Ex p.* Dubois, 7 Rev. Lég. 430.

That no court of a particular name exists in the state will be judicially known. Tucker *v.* State, 11 Md. 322.

In England courts of general jurisdiction take judicial notice of other superior courts of the kingdom, such as the exchequer in Wales. Tregany *v.* Fletcher, 1 Ld. Raym. 154.

50. Womack *v.* Dearman, 7 Port. (Ala.) 513; Dwight *v.* Splane, 11 Rob. (La.) 487; Delafield *v.* Hand, 3 Johns. (N. Y.) 310, 313.

51. See Barrett Nav. Co. *v.* Shower, 8 Dowl. P. C. 173.

52. Delafield *v.* Hand, 3 Johns. (N. Y.) 310. See also Collins *v.* Mathew, 5 East 473; Henry *v.* Adey, 3 East 221, 4 Esp. 228.

53. Womack *v.* Dearman, 7 Port. (Ala.) 513; Headman *v.* Rose, 63 Ga. 458. The counties in which the court sits are judicially known. State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017.

54. Lasher *v.* State, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

55. People *v.* Collins, 105 Cal. 504, 39 Pac. 16.

56. Dozier *v.* Joyce, 8 Port. (Ala.) 303, 312 (where the court said: "All courts of the United States take judicial notice, that tribunals are established in the several States, for the adjustment of controversies and the ascertainment of rights"); Jarvis *v.* Robinson, 21 Wis. 523, 94 Am. Dec. 560.

57. Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

58. Morse *v.* Hewett, 28 Mich. 481; Shotwell *v.* Harrison, 22 Mich. 410. *Contra*, as to inferior courts. Holly *v.* Bass, 68 Ala. 206; Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366.

59. Chicago, etc., R. Co. *v.* Hyatt, 48 Nebr. 161, 67 N. W. 8.

60. People *v.* Robinson, 17 Cal. 363; Chicago, etc., R. Co. *v.* Hyatt, 48 Nebr. 161, 67 N. W. 8; State *v.* Ray, 97 N. C. 510, 1 S. E. 876; Barnwell *v.* Marion, 58 S. C. 459, 36 S. E. 818.

61. Alabama Gold L. Ins. Co. *v.* Cobb, 57 Ala. 547.

62. St. Louis, etc., R. Co. *v.* State, 68 Ark. 561, 60 S. W. 654.

cially know the legally appointed times for holding the sessions of their own courts,[63] and of courts whose proceedings they are called upon to review;[64] the legally appointed beginning and duration of terms of other inferior courts in the state;[65] and the legally established sittings of important administrative boards exercising semijudicial functions, such as county commissioners;[66] but not of the sessions of legally constituted bodies meeting at irregular intervals, such as a grand jury.[67] Inferior courts take judicial notice of the terms of other courts of the same state in so far as they are established by law.[68] Knowledge of the beginning and duration of terms implies recognition of the coincidence in the month and week of a designated day of the term,[69] and conversely in what term of the court a particular month[70] or day of the month[71] falls; and therefore whether an act done on a particular day was done in term-time or in vacation.[72] While the possible legal length of a term may be judicially noticed,[73] the actual time when a session ends, being a matter not fixed by law, must be proved whenever it is relevant;[74] and although the legal power to adjourn will be judicially noticed,[75] and a court will take cognizance of its own adjournments,[76] the actual

63. Anderson *v.* Dickson, 8 Ala. 733; Harwood *v.* Toms, 130 Mo. 225, 32 S. W. 666; Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451; Foster *v.* Frost, 15 N. C. 424. See also *Ex p.* Dubois, 7 Rev. Lég. 430.

64. *Alabama.*— Rodgers *v.* State, 50 Ala. 102; Harrison *v.* Meadors, 41 Ala. 274; Lindsay *v.* Williams, 17 Ala. 229.

Arkansas.— State *v.* Hammett, 7 Ark. 492.

California.— Talbert *v.* Hopper, 42 Cal. 397; Boggs *v.* Clark, 37 Cal. 236; Ross *v.* Austill, 2 Cal. 183.

Colorado.— Cooper *v.* American Cent. Ins. Co., 3 Colo. 318.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348.

Indiana.— Anderson *v.* Anderson, 141 Ind. 567, 40 N. E. 131, 1082; Wallace *v.* Ransdell, 90 Ind. 173; Spencer *v.* Curtis, 57 Ind. 221; McGinnis *v.* State, 24 Ind. 500; Buckinghouse *v.* Greeg, 19 Ind. 401; Morgan *v.* State, 12 Ind. 448; Indiana Mut. Bldg., etc., Assoc. *v.* Paxton, 18 Ind. App. 304, 47 N. E. 1082. See also Moss *v.* Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896.

Kansas.— Scruton *v.* Hall, 6 Kan. App. 714, 50 Pac. 964.

Maine.— Kidder *v.* Blaisdell, 45 Me. 461.

Massachusetts.—Com. *v.* Stevens, 142 Mass. 457, 8 N. E. 344.

Michigan.— Tromble *v.* Hoffman, 130 Mich. 676, 90 N. W. 694.

Missouri.— State *v.* Broderick, 70 Mo. 622; Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451.

New Hampshire.— Fobyan *v.* Russell, 38 N. H. 84.

New York.— Matter of Hackley, 21 How. Pr. 103.

South Carolina.— State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

Tennessee.— Pugh *v.* State, 2 Head 227.

Texas.— Davidson *v.* Peticolas, 34 Tex. 27; Emery *v.* League, 31 Tex. Civ. App. 474, 72 S. W. 603.

Virginia.— Thomas *v.* Com., 90 Va. 92, 17 S. E. 788.

Wyoming.— Natrona County *v.* Shaffner, 10 Wyo. 181, 68 Pac. 14.

See 20 Cent. Dig. tit. "Evidence," § 56.

65. *Alabama.*— Rodgers *v.* State, 50 Ala. 102; Bethune *v.* Hale, 45 Ala. 522.

Colorado.— Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13.

Indiana.— Moss *v.* Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896; Anderson *v.* Anderson, 141 Ind. 567, 40 N. E. 131, 1082; Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841; Spencer *v.* Curtis, 57 Ind. 221.

Missouri.— State *v.* Broderick, 70 Mo. 622.

Tennessee.— Pugh *v.* State, 2 Head 227.

Texas.— Davidson *v.* Peticolas, 34 Tex. 27.

Wyoming.— Donovan *v.* Territory, 3 Wyo. 91, 2 Pac. 532.

See 20 Cent. Dig. tit. "Evidence," § 56.

66. Kane County *v.* Young, 31 Ill. 194; Collins *v.* State, 58 Ind. 5.

67. Matter of Hackley, 21 How. Pr. (N. Y.) 103.

68. *Ex p.* Vincent, 43 Ala. 402. See also *Ex p.* Dubois, 7 Rev. Lég. 430.

69. The court will take judicial notice of what is "the twentieth judicial day" of the term of the court below next succeeding a designated other day. Lewis *v.* Wintrode, 76 Ind. 13.

70. Durre *v.* Brown, 7 Ind. App. 127, 34 N. E. 577.

71. Rodgers *v.* State, 50 Ala. 102; Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20; Barnwell *v.* Marion, 58 S. C. 459, 36 S. E. 818.

72. Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13; Buckles *v.* Kentucky Northern Bank, 63 Ill. 268; Williams *v.* Hubbard, 1 Mich. 446; Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451.

73. State *v.* Maier, 36 W. Va. 757, 15 S. E. 991.

74. Harrison *v.* Meadors, 41 Ala. 274; Dudley *v.* Barney, 4 Kan. App. 122, 46 Pac. 178; Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451; Gilliland *v.* Sellers, 2 Ohio St. 223.

75. Harrison *v.* Meadors, 41 Ala. 274.

76. Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451.

adjournments of another court will not be judicially noticed, but must be proved like any other fact.[77]

(D) *Judges and Justices.* State courts judicially know who are the judges,[78] permanent or temporary,[79] present or past,[80] of their own or other courts of record within the state, as well as judges of inferior courts[81] and justices of the peace;[82] the date of their appointment or election;[83] under what law they are commissioned,[84] and whether a proper commission has issued;[85] their terms of office;[86] their salaries;[87] their official signatures;[88] and the date when a particular judge

77. Baker *v.* Knott, 3 Ida. 700, 35 Pac. 172.

78. *Colorado.*— Means *v.* Stow, 29 Colo. 80, 66 Pac. 881.

Florida.— Perry *v.* Bush, (1903) 35 So. 225.

Illinois.— Vahle *v.* Brackenseik, 145 Ill. 231, 34 N. E. 524; Russell *v.* Sargent, 7 Ill. App. 98.

Indiana.— Indianapolis St. R. Co. *v.* Lawn, 30 Ind. App. 515, 66 N. E. 508; Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

Iowa.— Upton *v.* Paxton, 72 Iowa 295, 33 N. E. 773; Ellsworth *v.* Moore, 5 Iowa 486.

Louisiana.—Dwight *v.* Splane, 11 Rob. 487.

Maryland.— Tucker *v.* State, 11 Md. 322.

North Carolina.— State *v.* Ray, 97 N. C. 510, 1 S. E. 876.

Texas.— De la Rosa *v.* State, (Cr. App. 1893) 21 S. W. 192; Watson *v.* State, 5 Tex. App. 11.

Vermont.— State *v.* Marsh, 70 Vt. 288, 40 Atl. 836; Hancock *v.* Worcester, 62 Vt. 106, 18 Atl. 1041.

See 20 Cent. Dig. tit. "Evidence," § 57.

In Canada the same rule obtains. Watson *v.* Hay, 5 N. Brunsw. 559; Fay *v.* Miville, 2 Rev. Lég. 333; Tremaine *v.* Tonnancour, 2 Rev. Lég. 471.

Identity in name.— But a court will not take judicial notice that the judge and a person appearing in another capacity with an identical name are one and the same person. Shropshire *v.* State, 12 Ark. 190; San Joaquin County *v.* Budd, 96 Cal. 47, 30 Pac. 967; Ellsworth *v.* Moore, 5 Iowa 486.

79. Bell *v.* State, 115 Ala. 25, 22 So. 526.

80. Indianapolis St. R. Co. *v.* Lawn, 30 Ind. App. 515, 66 N. E. 508 (at time of signing bill of exceptions); Barnwell *v.* Marion, 58 S. C. 459, 36 S. E. 818; Watson *v.* Hay, 5 N. Brunsw. 559.

81. *Alabama.*— *Ex p.* Peterson, 33 Ala. 74.

California.— People *v.* Ebanks, 120 Cal. 626, 52 Pac. 1078; San Joaquin County *v.* Budd, 96 Cal. 47, 30 Pac. 967.

Florida.— Perry *v.* Bush, (1903) 35 So. 225.

Illinois.— People *v.* McConnell, 155 Ill. 192, 40 N. E. 608; Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89.

Indiana.— Indianapolis St. R. Co. *v.* Lawn, 30 Ind. App. 515, 66 N. E. 508.

Kentucky.— Kennedy *v.* Com., 78 Ky. 447.

Louisiana.— Despau *v.* Swindler, 3 Mart. N. S. 705; Wood *v.* Fitz, 10 Mart. 196; Jones *v.* Gale, 4 Mart. 635.

Massachusetts.— Com. *v.* Jeffts, 14 Gray 19; Hawkes *v.* Kennebeck County, 7 Mass. 461. *Compare* Ripley *v.* Warren, 2 Pick. 592, where the court doubted whether it could "know who are the justices or the chief justices of inferior tribunals."

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198.

South Carolina.— Barnwell *v.* Marion, 58 S. C. 459, 36 S. E. 818, that a certain circuit judge was regularly assigned to a certain circuit at a particular time.

South Dakota.— Nelson *v.* Ladd, 4 S. D. 1, 54 N. W. 809.

See 20 Cent. Dig. tit. "Evidence," § 57.

In England it has been suggested that a superior court will not notice who are the justices of an inferior court. Skipp *v.* Hooke, 2 Str. 1080. See also Van Sandau *v.* Turner, 6 Q. B. 773, 9 Jur. 296, 14 L. J. Q. B. 154, 51 E. C. L. 773.

82. *Arkansas.*— Webb *v.* Kelsey, 66 Ark. 180, 49 S. W. 819.

California.— Ede *v.* Johnson, 15 Cal. 53.

Illinois.—Gilbert *v.* National Cash-Register Co., 176 Ill. 288, 52 N. E. 22; Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89; Livingston *v.* Kettelle, 6 Ill. 116, 41 Am. Dec. 166; Shattuck *v.* People, 5 Ill. 477. See also Chambers *v.* People, 5 Ill. 351.

Louisiana.—Dwight *v.* Splane, 11 Rob. 487; Despau *v.* Swindler, 3 Mart. N. S. 705.

Mississippi.— Coleman *v.* Gordon, (1894) 16 So. 340.

Pennsylvania.— Hibbs *v.* Blair, 14 Pa. St. 413; *In re* Ross Poor Dist., 3 Kulp 198.

See 20 Cent. Dig. tit. "Evidence," § 58.

83. Fay *v.* Miville, 2 Rev. Lég. 333; Tremaine *v.* Tonnacour, 2 Rev. Lég. 471.

84. Clark *v.* Com., 29 Pa. St. 129.

85. Follain *v.* Lefevre, 3 Rob. (La.) 13.

86. *Alabama.*— *Ex p.* Peterson, 33 Ala. 74.

California.— People *v.* Ebanks, 120 Cal. 626, 52 Pac. 1078.

Illinois.— Vahle *v.* Brackenseik, 145 Ill. 231, 34 N. E. 524; Russell *v.* Sargent, 7 Ill. App. 98.

Indiana.—Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

Iowa.— Upton *v.* Paxton, 72 Iowa 295, 33 N. W. 773; Ellsworth *v.* Moore, 5 Iowa 486.

Maryland.— Tucker *v.* State, 11 Md. 322.

Mississippi.—Stubbs *v.* State, 53 Miss. 437; Coopwood *v.* Prewett, 30 Miss. 206.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198.

See 20 Cent. Dig. tit. "Evidence," § 57.

87. McKinney *v.* O'Connor, 26 Tex. 5.

88. Dwight *v.* Splane, 11 Rob. (La.) 487; Follain *v.* Lefevre, 3 Rob. (La.) 13; Despau *v.* Swindler, 3 Mart. N. S. (La.) 705 (sig-

resigned,[89] or at which for any other reason he ceased to be a judge.[90] But a court cannot know who are the judges of courts of record in another state.[91]

(E) *Court Officials* — (1) In General. It is a general rule that state courts judicially notice their own officials,[92] the officials of other courts of the state,[93] and their signatures.[94]

(2) Clerks. State courts also notice judicially the clerks of the respective courts in the state;[95] their names;[96] and their signatures,[97] even where the official designation is absent,[98] or indicated only by initials or other abbreviation,[99] provided that the signature is made in the clerk's official capacity. Notice will also be taken of a clerk's legally appointed deputies,[1] and of their names and signatures,[2] whether the official designation be given as "clerk,"[3] or "deputy,"[4] or is represented merely by initials.[5]

(3) Sheriffs and Constables. State courts judicially know who are the officers appointed by law for the service of process, such as the sheriffs of the several counties,[6] tax-collectors acting as sheriffs under statutory authority,[7] and constables acting as court officers;[8] their terms of office;[9] and their names and signatures,[10] even where the official title is indicated by initials.[11] It has been

nature of justice of the peace); People *v.* Bloedel, 16 N. Y. Suppl. 837; Matter of Hackley, 21 How. Pr. (N. Y.) 103.

89. *Ex p.* Peterson, 33 Ala. 74; People *v.* McConnell, 155 Ill. 192, 40 N. E. 608.

90. People *v.* Ebanks, 120 Cal. 626, 52 N. W. 1078.

91. Fellows *v.* Menasha, 11 Wis. 558.

92. Cary *v.* State, 76 Ala. 78; Thielmann *v.* Burg, 73 Ill. 293; Hammann *v.* Mink, 99 Ind. 279; Hipes *v.* State, 73 Ind. 39; State *v.* Postlewait, 14 Iowa 446; Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176. But in Frost *v.* Hayward, 2 Dowl. P. C. N. S. 566, 6 Jur. 1045, 12 L. J. Exch. 84, 10 M. & W. 673, the court declined to know that a person signing a jurat to an affidavit as "master extraordinary in the high court of chancery" was also one of its own commissioners for taking affidavits.

93. Despau *v.* Swindler, 3 Mart. N. S. (La.) 705. See also Buford *v.* Hickman, 4 Fed. Cas. No. 2,114*a*, Hempst. 232, holding that a territorial court judicially knows officers of United States courts. But *compare* Norvell *v.* McHenry, 1 Mich. 227.

94. Alderson *v.* Bell, 9 Cal. 315; Hipes *v.* State, 73 Ind. 39; State *v.* Postlewait, 14 Iowa 446; Wood *v.* Fitz, 10 Mart. (La.) 196.

95. *Alabama.*— White *v.* Rankin, 90 Ala. 541, 8 So. 118.

California.— Campbell *v.* West, 86 Cal. 197, 24 Pac. 1000.

New York.— Mackinnon *v.* Barnes, 66 Barb. 91.

Texas.— Goodwin *v.* Harrison, 28 Tex. Civ. App. 7, 66 S. W. 308.

West Virginia.— Central Land Co. *v.* Calhoun, 16 W. Va. 361.

See 20 Cent. Dig. tit. "Evidence," § 59.

The clerk of a federal court sitting within the state may be judicially noticed, but not the clerk of a federal court in another state. U. S. *v.* U. S. Bank, 11 Rob. (La.) 418.

Clerks of courts of record in other states are judicially noticed in Michigan, at least for some purposes. Munroe *v.* Eastman, 31 Mich. 283; Morse *v.* Hewett, 28 Mich. 481.

96. Mountjoy *v.* State, 78 Ind. 172. But a court is not bound to notice that a person acting in another capacity is clerk of a district court because he has the same name. Com. *v.* Fay, 126 Mass. 235.

97. *Illinois.*— Dyer *v.* Last, 51 Ill. 179.

Indiana.— Mountjoy *v.* State, 78 Ind. 172; Buell *v.* State, 72 Ind. 523.

Minnesota.— Sherrerd *v.* Frazer, 6 Minn. 572.

Texas.— Goodwin *v.* Harrison, 28 Tex. Civ. App. 7, 66 S. W. 308.

West Virginia.— Central Land Co. *v.* Calhoun, 16 W. Va. 361.

See 20 Cent. Dig. tit. "Evidence," § 71.

98. Dyer *v.* Last, 51 Ill. 179; Marsee *v.* Middlesborough Town, etc., Co., 65 S. W. 118, 23 Ky. L. Rep. 1258; Central Land Co. *v.* Calhoun, 16 W. Va. 361.

99. Buell *v.* State, 72 Ind. 523.

1. Himmelmann *v.* Hoadley, 44 Cal. 213; State Bank *v.* Watson, 15 La. 38; State *v.* Barrett, 40 Minn. 65, 41 N. W. 459; Drumheller *v.* Mumaw, 9 Pa. St. 19.

2. Himmelmann *v.* Hoadley, 44 Cal. 213; State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

3. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

4. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

5. Marsee *v.* Middlesborough Town, etc., Co., 65 S. W. 118, 23 Ky. L. Rep. 1258.

6. Ingram *v.* State, 27 Ala. 17; Miller *v.* McMillan, 4 Ala. 527; Land *v.* Patterson, Minor (Ala.) 14; Thompson *v.* Haskell, 21 Ill. 215, 74 Am. Dec. 98. See also *supra*, II, C, 3, b, (III), (B).

7. Burnett *v.* Henderson, 21 Tex. 588.

8. Harris *v.* Buehler, 1 Pennew. (Del.) 346, 40 Atl. 733; Graham *v.* Gibson, 14 La. 146.

9. Ragland *v.* Wynn, 37 Ala. 32.

10. Miller *v.* McMillan, 4 Ala. 527; Graham *v.* Gibson, 14 La. 146; Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749.

11. Miller *v.* McMillan, 4 Ala. 527.

held that officers such as deputy sheriffs, not commissioned in the name of the state, are not judicially recognized ;[12] but other cases are to the contrary.[13]

(4) Prosecuting and Other Attorneys. Courts judicially recognize prosecuting attorneys[14] and their assistants[15] within the jurisdiction, and also their signatures,[16] although the official designation be erroneously given ;[17] and the commencement and duration of their terms of office.[18] An attorney at law is judicially recognized by the court in which he is admitted to practice.[19] His signature in his professional capacity when attached to pleadings, etc., is likewise known ;[20] but not his signature in a personal capacity,[21] as for example when he is acting as his own attorney.[22] A court cannot judicially know particular facts concerning an attorney of its bar, as that he is in actual practice[23] or has removed from the state ;[24] and a superior court will not take judicial notice of attorneys admitted to practice in lower courts but not members of its own bar.[25]

(F) *Practice and Procedure.* While courts take judicial cognizance of the practice prevailing in their own tribunal,[26] and assume a general similarity in the procedure of other courts,[27] including those of equity,[28] in the same jurisdiction, they do not, in the absence of statutory requirement,[29] take judicial notice of the rules of practice in other courts of equal or inferior authority,[30] or of the practice or procedure of courts in another state.[31]

(G) *Records, Court Papers, Etc.*— (1) Court's Own Records — (a) In General. Courts take judicial notice of their own records,[32] including records in cases tried

12. Land *v.* Patterson, Minor (Ala.) 14; State Bank *v.* Curran, 10 Ark. 142.

13. Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749. And see *supra*, II, C, 3, b, (III), (B).

14. State *v.* Kinney, 81 Mo. 101; Simms *v.* Quebec, etc., R. Co., 22 L. C. Jur. 20.

15. People *v.* Lyman, 2 Utah 30.

16. State *v.* Kinney, 81 Mo. 101.

17. State *v.* Kinney, 81 Mo. 101.

18. State *v.* Seibert, 130 Mo. 202, 32 S. W. 670.

19. *Illinois.*— Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118.

Louisiana.— Dixey *v.* Irwin, 23 La. Ann. 426; Hall *v.* Laurence, 21 La. Ann. 692.

Missouri.— State *v.* Sanders, 62 Mo. App. 33; Fry *v.* Estes, 52 Mo. App. 1.

Pennsylvania.— Philadelphia *v.* Jacobs, 22 Wkly. Notes Cas. 348.

Wisconsin.— Cothren *v.* Connaughton, 24 Wis. 134.

England.— *Ex p.* Hore, 3 Dowl. P. C. 600; *Ex p.* King, 3 Dowl. P. C. 41.

See 20 Cent. Dig. tit. "Evidence," § 59.

20. Markes *v.* Epstein, 13 N. Y. Civ. Proc. 293; Strippelmann *v.* Clark, 11 Tex. 296.

21. Masterson *v.* Le Claire, 4 Minn. 163.

22. Alderson *v.* Bell, 9 Cal. 315; Masterson *v.* Le Claire, 4 Minn. 163.

23. Cothren *v.* Connaughton, 24 Wis. 134, 138.

24. Sutton *v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993.

25. Clark *v.* Morrison, (Ariz. 1898) 52 Pac. 985. See also Sutton *v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993.

26. Pugh *v.* Robinson, 1 T. R. 116.

27. Newell *v.* Newton, 10 Pick. (Mass.) 470.

28. Contee *v.* Pratt, 9 Md. 67; Oliver *v.* Palmer, 11 Gill & J. (Md.) 426.

29. Kindel *v.* Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.

30. *California.*— Sweeney *v.* Stanford, 60 Cal. 362; Cutter *v.* Caruthers, 48 Cal. 178.

Colorado.— Kindel *v.* Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.

Illinois.— Gudgeon *v.* Casey, 62 Ill. App. 599; Kessel *v.* O'Sullivan, 60 Ill. App. 548.

Indiana.— Rout *v.* Ninde, 118 Ind. 123, 20 N. E. 704.

Kansas.— McIntosh *v.* Crawford County Com'rs, 13 Kan. 171.

Kentucky.— Cornelison *v.* Foushee, 101 Ky. 257, 40 S. W. 680, 19 Ky. L. Rep. 417.

Louisiana.— Bowman *v.* Flowers, 2 Mart. N. S. 267; Dours *v.* Cazentre, McGloin 251.

Maryland.— Cherry *v.* Baker, 17 Md. 75.

Nebraska.— Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811.

England.— Van Sandau *v.* Turner, 6 Q. B. 773, 9 Jur. 296, 14 L. J. Q. B. 154, 51 E. C. L. 773; Sargent *v.* Wedlake, 11 C. B. 732, 73 E. C. L. 732; *Re* Ramsden, 10 Jur. 879, 15 L. J. Q. B. 234, 1 Saund. & C. 133.

See 20 Cent. Dig. tit. "Evidence," § 61.

Double pleading.— It has been held, however, that a court of error will judicially notice the lack of power in an inferior tribunal to allow double pleading. Chitty *v.* Dendy, 3 A. & E. 319, 1 H. & W. 169, 4 L. J. K. B. 195, 4 N. & M. 842, 30 E. C. L. 161.

31. An allegation that a suit is "pending" in another state does not to the judicial knowledge of the court of the forum imply proper service on defendant, as would be the case in the court of the forum. Newell *v.* Newton, 10 Pick. (Mass.) 470.

32. *California.*— Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57.

Illinois.— Hangsleben *v.* People, 89 Ill. 164; Robinson *v.* Brown, 82 Ill. 279; Evans *v.* People, 27 Ill. App. 616.

in and removed from another court;[33] that is to say such records[34] need not if relevant be introduced in evidence,[35] but will, when produced and identified[36] on the inspection of the judge[37] or by evidence,[38] be accepted by the court as establishing their own existence,[39] indorsements on them,[40] and other facts which such records purport to state;[41] as that a certain case is pending,[42] that a claim is barred by the statute of limitations,[43] that there is a want of proper parties,[44] that one joint debtor has been discharged by discharging the other,[45] or that a person has been appointed receiver.[46] Acts done in the clerk's office *dehors* the record will not be judicially noticed,[47] although the rule is otherwise when a fact of this nature, such as payment of money into court, is entered as of record.[48] The court may examine records[49] or docket entries,[50] either of its own motion,[51] or at the suggestion of counsel,[52] to ascertain the relevant facts set forth in them; but

Iowa.— State *v.* Schilling, 14 Iowa 455; Harrison *v.* Kramer, 3 Iowa 543.

Louisiana.— Minor *v.* Stone, 1 La. Ann. 283.

Nebraska.— Stewart *v.* Rosengren, (1902) 92 N. W. 586; Zug *v.* Forgan, 3 Nebr. (Unoff.) 149, 90 N. W. 1129.

Texas.— Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454.

England.— Craven *v.* Smith, L. R. 4 Exch. 146, 38 L. J. Exch. 90, 20 L. T. Rep. N. S. 400, 17 Wkly. Rep. 710.

See 20 Cent. Dig. tit. "Evidence," § 62.

33. Boteler *v.* State, 8 Gill & J. (Md.) 359.

34. **What constitutes the record.**— The original papers, docket entries, etc., of a case constitute the record prior to its being spread upon the record, and have been held to be equally competent on a plea of *nul tiel record* as a fully extended record. Maguire *v.* State, 47 Md. 485; State *v.* Logan, 33 Md. 1; Boteler *v.* State, 8 Gill & J. (Md.) 359; Burch *v.* Scott, 1 Gill & J. (Md.) 393; Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. (U. S.) 333, 16 L. ed. 650.

35. *California.*— Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57. But see People *v.* De la Guerra, 24 Cal. 73, where it was held that on the trial of one case, the court could not take judicial notice of the record in another case in the same court without its formal introduction in evidence.

Illinois.— Robinson *v.* Brown, 82 Ill. 279.

Iowa.— Conlee Lumber Co. *v.* Meyer, 74 Iowa 403, 38 N. W. 117.

Mississippi.— McGuire *v.* State, 76 Miss. 504, 25 So. 495.

Missouri.— State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; State *v.* Daugherty, 106 Mo. 182, 17 S. W. 303.

See 20 Cent. Dig. tit. "Evidence," § 62.

36. Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; Boteler *v.* State, 8 Gill & J. (Md.) 359; McGuire *v.* State, 76 Miss. 504, 25 So. 495. Unless the record of the fact actually on the files is produced to the court the party loses the benefit of it. Watkins *v.* Martin, 69 Ark. 311, 65 S. W. 103, 425.

37. Boteler *v.* State, 8 Gill & J. (Md.) 359; Farrar *v.* Bates, 55 Tex. 193.

38. Farrar *v.* Bates, 55 Tex. 193.

39. Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Robinson *v.* Brown, 82 Ill. 279; State *v.* Postlewait, 14 Iowa 446; Harrison *v.* Kramer, 3 Iowa 543; Boteler *v.* State, 8 Gill & J. (Md.) 359; Stewart *v.* Rosengren, (Nebr. 1902) 92 N. W. 586.

40. Such as the date of filing (Yell *v.* Lane, 41 Ark. 53; Altoona Quicksilver Min. Co. *v.* Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Chapman *v.* Currie, 51 Mo. App. 40; Fellers *v.* Lee, 2 Barb. (N. Y.) 488; Van Hook *v.* Whitlock, 7 Paige (N. Y.) 373; Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10), or the amount of claim indorsed on a summons (Chicago, etc., R. Co. *v.* Minard, 20 Ill. 9).

41. Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57.

42. McClain *v.* Williams, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289.

43. Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; Searls *v.* Knapp, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873.

44. Baron *v.* Baum, 44 La. Ann. 295, 10 So. 766.

45. Doremus *v.* Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649.

46. McNulta *v.* Lockridge, 32 Ill. App. 86 [*affirmed* in 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362].

47. The court on the trial of an appeal from the award of the commissioner in condemnation proceedings is not bound to take judicial notice that the company deposited the amount of the award with the clerk. Foster *v.* Chicago, etc., R. Co., 10 Tex. Civ. App. 476, 31 S. W. 529.

48. Blum *v.* Stein, 68 Tex. 608.

49. Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84.

50. Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84; Armstrong *v.* Colby, 47 Vt. 359.

51. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Cluggish *v.* Koons, 15 Ind. App. 599, 43 N. E. 158; Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84.

52. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Cluggish *v.* Koons, 15 Ind. App. 599, 43 N. E. 158.

its judicial knowledge does not have greater force and effect than would be accorded the evidence of which it supplies the place.[53]

(b) IN SAME CASE. In a case on trial in any court its records are actually or constructively before the judge. He will therefore take judicial notice of them and the facts which they establish,[54] as in dealing with pleas in abatement, motions to dismiss, or for a new trial based upon defects in the record,[55] or on a plea of former jeopardy;[56] including facts as to the action of the court,[57] or of the judge[58] on a former hearing, and what such records show regarding the action of any court,[59] magistrate,[60] or administrative board,[61] whose proceedings are under review.

53. Neville *v.* Kenney, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230.

54. *California.*— Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57.

Illinois.— World's Columbian Exposition Co. *v.* Lehigh, 94 Ill. App. 433; Montreal Bank *v.* Taylor, 86 Ill. App. 388.

Iowa.— Conlee Lumber Co. *v.* Meyer, 74 Iowa 403, 38 N. W. 117; Poole *v.* Seney, 70 Iowa 275, 24 N. W. 520, 30 N. W. 634; Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548; State *v.* Postlewait, 14 Iowa 446.

Kansas.— State *v.* Stevens, 56 Kan. 720, 44 Pac. 992; State *v.* Bowen, 16 Kan. 475.

Kentucky.— Monticello Nat. Bank *v.* Bryant, 13 Bush 419; Louisville, etc., R. Co. *v.* Com., 4 Ky. L. Rep. 627.

Louisiana.— Pagett *v.* Curtis, 15 La. Ann. 451.

Minnesota.— Rees *v.* Lowenstein, 39 Minn. 401, 40 N. W. 370.

Mississippi.— McGuire *v.* State, 76 Miss. 504, 25 So. 495.

Missouri.— State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; Dawson *v.* Dawson, 29 Mo. App. 521.

Nebraska.— George *v.* State, 59 Nebr. 163, 80 N. W. 486.

New York.— Farmers' L. & T. Co. *v.* Hotel Brunswick Co., 12 N. Y. App. Div. 628, 42 N. Y. Suppl. 693; People *v.* Rice, 80 Hun 437, 30 N. Y. Suppl. 457; Matter of Nesmith, 14 N. Y. St. 375.

Oregon.— Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107.

South Dakota.— Searls *v.* Knapp, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873.

Texas.— Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454; Wood *v.* Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071.

Utah.— State *v.* Bates, 22 Utah, 65, 61 Pac. 905, 83 Am. St. Rep. 768; Warren *v.* Robinson, 21 Utah 429, 61 Pac. 28.

Washington.— State *v.* Jones, 20 Wash. 576, 56 Pac. 369.

Wisconsin.— Brucker *v.* State, 19 Wis. 539.

United States.— *In re* Bennett, 84 Fed. 324.

England.— Craven *v.* Smith, L. R. 4 Exch. 146, 38 L. J. Exch. 90, 20 L. T. Rep. U. S. 400, 17 Wkly. Rep. 710.

See 20 Cent. Dig. tit. "Evidence," § 63.

Time of filing appeal.— The question being whether, as a result of a suspensive appeal taken to the supreme court, the effect of a certain judgment is stayed, the supreme court will take notice of the fact that the appeal in question was filed too late. Wegmann's Succession, 110 La. 930, 34 So. 878.

55. State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; Searls *v.* Knapp, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873.

56. George *v.* State, 59 Nebr. 163, 80 N. W. 486.

57. *California.*— Hollenbach *v.* Schnabel, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57.

Kansas.— State *v.* Bowen, 16 Kan. 475.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 4 Ky. L. Rep. 627.

Missouri.— State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; State *v.* Daugherty, 106 Mo. 182, 17 S. W. 303.

Nebraska.— George *v.* State, 59 Nebr. 163, 80 N. W. 486.

New York.— Farmers' L. & T. Co. *v.* Hotel Brunswick Co., 12 N. Y. App. Div. 628, 42 N. Y. Suppl. 693; People *v.* Rice, 80 Hun 437, 30 N. Y. Suppl. 457.

Utah.— State *v.* Bates, 22 Utah 65, 61 Pac. 905, 83 Am. St. Rep. 768; Warren *v.* Robinson, 21 Utah 429, 61 Pac. 28.

Washington.— State *v.* Jones, 20 Wash. 576, 56 Pac. 369.

See 20 Cent. Dig. tit. "Evidence," § 63.

58. Bailey *v.* Kerr, 180 Ill. 412, 54 N. E. 165; Secrist *v.* Petty, 109 Ill. 188; State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; *In re* Bennett, 84 Fed. 324, 327, where the court said: "The court itself was bound to take judicial notice of every step shown by its own record to have been taken in the prosecution of the case before it,— notice not only of the petitioner's arraignment, and of his plea upon such arraignment, but also of the verdict rendered upon the former trial of the same case, and entered upon the record of the court as a perpetual memorial of its rendition; and, having judicial knowledge of such facts, the court was bound to know that, under the constitution, it no longer had jurisdiction to retry the petitioner for the offense of which he had been acquitted by such former verdict." But see State *v.* Bennett, 114 Cal. 56, 45 Pac. 1013.

59. The court takes judicial notice of prior proceedings in a criminal case including those before the examining magistrate, State *v.* Stevens, 56 Kan. 720, 44 Pac. 992.

60. Bristol *v.* Fischel, 81 Mo. App. 367.

61. St. Louis, etc., R. Co. *v.* Martin, 29 Kan. 750, county commissioners.

(c) In Supplementary Proceedings. Where proceedings supplementary to an original action are practically part of it, such as garnishment proceedings,[62] or proceedings against a stock-holder on a judgment against a corporation of which he is a member,[63] the court takes judicial cognizance of the record in the original suit and of the facts shown by it;[64] and it is not prejudicial error to reject the record altogether when offered as evidence.[65] Where, however, garnishment[66] or other supplementary proceedings[67] are independent, a judgment recovered in the main action must be duly proved in the new proceeding.[68]

(d) In Other Suits in Same Court. A judge is not at liberty to give one of the parties the benefit of a fact known to himself, simply because it is a matter of record in his own court.[69] Courts, including those of probate,[70] cannot in one case take judicial notice of their records in another and different case,[71] even though the cases are connected.[72] But where a fact, such as the pendency of an indictment against a juryman,[73] concerns the proper administration of justice; or where the interests of the public in ascertaining the truth are of paramount importance, the court may properly resort to an inspection of its record in other cases.[74]

62. *Iowa.*— Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933.

Minnesota.— S. E. Olson Co. *v.* Brady, 76 Minn. 8, 78 N. W. 864.

Missouri.— Dinkins *v.* Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246.

Texas.— Kelly *v.* Gibbs, 84 Tex. 143, 19 S. W. 380, 563; Farrar *v.* Bates, 55 Tex. 193; Jeffries *v.* Smith, 31 Tex. Civ. App. 582, 73 S. W. 48; Plowman *v.* Eastman, 15 Tex. Civ. App. 304, 39 S. W. 171.

Wisconsin.— Mace *v.* Roberts, 97 Wis. 199, 72 N. W. 866.

63. Pease *v.* Underwriters' Union, 1 Ill. App. 287; Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App. 172.

64. See the cases cited in the last two notes.

65. Spengler *v.* Kaufman, 43 Mo. App. 5.

66. Pease *v.* Underwriters' Union, 1 Ill. App. 287; O. L. Packard Mach. Co. *v.* Laev, 100 Wis. 644, 76 N. W. 596.

67. State *v.* Hudson County Electric Co., 61 N. J. L. 144, 38 Atl. 818, contempt proceeding.

68. See the cases cited in last two notes.

69. Lake Merced Water Co. *v.* Cowles, 31 Cal. 214. In an action by the payee of a promissory note against the maker, where defendant pleaded that she was the wife of the maker when the note was executed, it was held that the judge could not take judicial notice of the fact that the parties had been divorced by a decree pronounced by himself as a judge in the same court. Streeter *v.* Streeter, 43 Ill. 155.

70. Daniel *v.* Bellamy, 91 N. C. 78.

71. *Arkansas.*— Gibson *v.* Buckner, 65 Ark. 84, 44 S. W. 1034.

California.— Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243; Stanley *v.* McElrath, (1889) 22 Pac. 673; Lake Merced Water Co. *v.* Cowles, 31 Cal. 214; People *v.* De la Guerra, 24 Cal. 73.

Colorado.— Downing *v.* Howlett, 6 Colo. App. 291, 40 Pac. 505.

Illinois.— Streeter *v.* Streeter, 43 Ill. 155; Montreal Bank *v.* Taylor, 86 Ill. App. 388.

Iowa.— Granger *v.* Griffin, 78 Iowa 759, 43 N. W. 297; Enix *v.* Miller, 54 Iowa 551, 6 N. W. 722; Baker *v.* Mygatt, 14 Iowa 131.

Kansas.— State *v.* Bowen, 16 Kan. 475; Thayer *v.* Honeywell, 7 Kan. App. 548, 51 Pac. 929.

Maryland.— Anderson *v.* Cecil, 86 Md. 490, 38 Atl. 1074.

Missouri.— Spurlock *v.* Missouri Pac. R. Co., 76 Mo. 67; Banks *v.* Burnam, 61 Mo. 76; Adler *v.* Lang, 26 Mo. App. 226.

North Carolina.— Daniel *v.* Bellamy, 91 N. C. 78.

South Dakota.— Grace *v.* Ballou, 4 S. D. 333, 56 N. W. 1075.

Texas.— Goodwin *v.* Harrison, 28 Tex. Civ. App. 7, 66 S. W. 308.

Wisconsin.— McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303.

See 20 Cent. Dig. tit. "Evidence," § 64.

72. Com. *v.* Hill, 11 Cush. (Mass.) 137; *In re* Bennett, 84 Fed. 324.

73. State *v.* Jackson, 35 La. Ann. 769.

74. Story *v.* Ulman, 88 Md. 244, 41 Atl. 120.

Citizenship.— The court of appeals of the Indian Territory took judicial notice of its own records, showing that it had passed adversely on a claim of a person to citizenship in the Cherokee nation, on the validity of which claim defendant relied to establish his own citizenship, which was essential to his defense, and that its judgment in passing thereon was still unreversed on appeal to the federal supreme court. Crawford *v.* Duckworth, 3 Indian Terr. 10, 53 S. W. 465.

Dedication of street.— Where the facts in previous cases before the court showed a certain street to have been dedicated, the court took notice of that fact in a subsequent case involving the same question. Story *v.* Ulman, 88 Md. 244, 41 Atl. 120.

An administrative board with judicial functions will notice the legal status created by its former action; as where the board of ex-

(2) RECORDS OF OTHER COURTS. In the absence of statutory requirement,[75] state courts do not take judicial notice of the records of other courts in the state[76] or of federal courts.[77]

(II) *JUDICIAL NOTICE BY FEDERAL COURTS.* The rules established in the federal courts as to judicial cognizance of matters established by law in the judicial departments of government follow the rules of the courts of the state within which the federal court is sitting.[78] They notice the existence, organization, and jurisdiction of other federal courts of every grade,[79] including those of bankruptcy,[80] who are or were in particular districts federal judges,[81] or clerks of court;[82] the judicial districts into which the United States is divided for exercising the judicial functions of federal justice;[83] the legally appointed times of holding court sessions,[84] the jurisdiction of their own subordinate officers, such as commissioners;[85] their own rules of procedure and practice, but not those of a state court, except as established by law;[86] and of their own records in the same or other cases,[87] but not of the records of other federal courts, including those of

cise takes judicial notice of premises which it has licensed. People *v.* Board of Excise, 17 Misc. (N. Y.) 98, 40 N. Y. St. 741.

75. Under Cal. Code Civ. Proc. § 1875, subd. 3, which permits courts to take judicial notice of the acts of the judicial department of the state, the supreme court will judicially notice the vacation by a federal court of a decree confirming a Mexican grant. Ohm *v.* San Francisco, (1890) 25 Pac. 155.

76. Hall *v.* Cole, 71 Ark. 601, 76 S. W. 1076; People *v.* De la Guera, 24 Cal. 73; Jones *v.* Jones, 45 Md. 144; Boteler *v.* State, 8 Gill & J. (Md.) 359; State *v.* District Court, 18 Nev. 286, 3 Pac. 417. A judge sitting in one county cannot take judicial notice of a conviction or *nolle prosequi* previously had before him in another. State *v.* Edwards, 19 Mo. 674.

77. Vassault *v.* Seitz, 31 Cal. 225.

Bankruptcy proceedings in the federal courts are not judicially noticed in the state courts.

Georgia.— Kent *v.* Downing, 44 Ga. 116.

Kentucky.— Davis *v.* Smallgood, 3 Ky. L. Rep. 539.

Massachusetts.— Cutter *v.* Evans, 115 Mass. 27.

Missouri.— Haber *v.* Klauberg, 3 Mo. App. 342. See also McCready *v.* Harris, 54 Mo. 137.

United States.— Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403; Valliant *v.* Childress, 21 Wall. 642, 22 L. ed. 549; *In re* Irving, 13 Fed. Cas. No. 7,073, 8 Ben. 463, 14 Nat. Bankr. Reg. 289; Johnson *v.* Bishop, 13 Fed. Cas. No. 7,373, 1 Woolw. 324, 8 Nat. Bankr. Reg. 533. See also Hewett *v.* Norton, 12 Fed. Cas. No. 6,441, 1 Woods 68, 13 Nat. Bankr. Reg. 276.

See 20 Cent. Dig. tit. "Evidence," § 65.

78. See, generally, COURTS.

79. Ledbetter *v.* U. S., 108 Fed. 52, 47 C. C. A. 191; Lathrop *v.* Stuart, 14 Fed. Cas. No. 8,113, 5 McLean 167. And see U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

80. Lathrop *v.* Stuart, 14 Fed. Cas. No. 8,113, 5 McLean 167.

81. Ledbetter *v.* U. S., 108 Fed. 52, 47 C. C. A. 191.

82. Ledbetter *v.* U. S., 108 Fed. 52, 47 C. C. A. 191.

83. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,488, 2 Sawy. 482. And see U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

84. Ledbetter *v.* U. S., 108 Fed. 52, 47 C. C. A. 191, holding that the circuit court of appeals will take judicial notice as to whether, at the time a grand jury was impaneled and returned bills of indictment, as specified in the transcript on a writ of error, both the district and circuit courts were in session.

85. *Ex p.* Lane, 6 Fed. 34, holding that on application for a writ of habeas corpus for one held under a warrant in extradition proceedings issued by a commissioner, the court would take judicial notice that the commissioner was duly empowered to act in cases of that description.

86. Randall *v.* New England O. of P., 118 Fed. 782; Yarnell *v.* Felton, 104 Fed. 161, holding that on consideration of a motion to remand a cause to the state court because the petition for removal was not filed in time, the federal court cannot take judicial notice of a rule of the state court by which the time in which pleadings may be filed is extended beyond the date fixed by the general statute of the state.

87. *In re* Osborne, 115 Fed. 1, 52 C. C. A. 595 (on petition for revision of bankruptcy proceedings); Cushman Paper-Box Mach. Co. *v.* Goddard, 95 Fed. 664, 37 C. C. A. 221 (holding that in a patent case, for the purpose of ascertaining the state of the art, the court might take judicial notice of what was disclosed by its own records in a previous case involving machines appertaining to the same art); Pitkin *v.* Cowen, 91 Fed. 599; Pittel *v.* Fidelity, etc., Ins. Co., 86 Fed. 255, 30 C. C. A. 21 (on plea of *res adjudicata*); *In re* Durrant, 84 Fed. 314 (affirmance of judgment by supreme court); Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 318, 22 C. C. A. 334 (where there was said to be "no difficulty in the circuit court taking judicial notice of the pendency of another suit in the same court under which it had taken possession of the subject-matter of this suit");

bankruptcy,[88] nor of those of the courts of the state in which they exercise jurisdiction.[89] Notice cannot be taken of justices of the peace in another state.[90] The circuit court of appeals will take judicial notice of proceedings had in the court below in the case under review,[91] but will not take notice of independent proceedings in the trial court or other courts of the circuit.[92] It cannot take knowledge, actual or judicial, of what may appear upon the records of the district and circuit courts within the boundaries of its judicial circuit, and to support the right of appeal cannot assume the existence of necessary facts which do not appear of record in the lower court.[93]

4. Foreign Governments, Etc.— a. In General. The existence of a foreign government,[94] its proper title,[95] and the identity of its colonies[96] are judicially known in all courts of a country which has recognized the existence of that government.[97] But courts have no judicial knowledge of subordinate departments existing under foreign governments.[98]

b. Flags and Seals. In conformity to the law of nations all courts in a government, where that government has recognized the existence of a foreign nation, but not in the absence of such recognition,[99] will take cognizance of the flag[1]

The Minna, 17 Fed. Cas. No. 9,634 (where the court took judicial notice of the fact that the shipper at Nassau, a neutral port, of a cargo captured as prize, for an alleged attempt to violate the blockade was a person shown by the records of the court to have been actively engaged in trading to and from blockaded ports). And see Bohart *v.* Hull, 2 Indian Terr. 45, 47 S. W. 306.

Knowledge of appointment of receiver.— Pitkin *v.* Cowen, 91 Fed. 599; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

Not always required to take judicial notice. —*In re* Osborne, 115 Fed. 1, 52 C. C. A. 595.

Supreme court.— *In re* Boardman, 169 U. S. 39, 18 S. Ct. 291, 42 L. ed. 653; Craemer *v.* Washington, 168 U. S. 124, 18 S. Ct. 1, 42 L. ed. 407; Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986.

Same court at different places in district.— U. S. Rev. St. (1878) §§ 905, 906 [U. S. Comp. St. (1901) p. 677], providing for the authentication of records of "other courts," do not apply to the records of the same court in different places in the same district. Such court will take judicial cognizance of its proceedings throughout the district. Bohart *v.* Hull, 2 Indian Terr. 45, 47 S. W. 306.

88. Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403.

89. Stewart *v.* Masterson, 131 U. S. 151, 9 S. Ct. 682, 33 L. ed. 114, holding that on a demurrer to a bill alleging that defendant had obtained possession of land belonging to complainant by representing it to be unappropriated, and thus procuring a patent from the state, the court could not judicially notice actions between the remote vendor of complainant and others, in which the supreme court of the state held the land claimed by complainant to be unappropriated.

90. *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

91. Ledbetter *v.* U. S., 108 Fed. 52, 47 C. C. A. 191.

92. *In re* Manderson, 51 Fed. 501, 2 C. C. A. 490, holding that the circuit court of appeals in reviewing a judgment dismissing condemnation proceedings cannot take judicial notice of independent proceedings in the trial court and other courts of the circuit for the condemnation of other lands, such proceedings not being a part of the record.

93. Fitzgerald *v.* Evans, 49 Fed. 426, 1 C. C. A. 307.

94. Calhoun *v.* Ross, 60 Ill. App. 309; Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Underhill *v.* Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456; U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. *v.* Wagner, L. R. 2 Ch. 582; Yrisarri *v.* Clement, 3 Bing. 432, 11 E. C. L. 213, 2 C. & P. 223, 12 E. C. L. 538, 11 Moore C. P. 308; Taylor *v.* Barclay, 2 Sim. 213, 7 L. J. Ch. O. S. 65, 29 Rev. Rep. 82, 2 Eng. Ch. 213.

95. U. S. *v.* Wagner, L. R. 2 Ch. 582.

96. Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Lumley *v.* Wabash R. Co., 71 Fed. 21; *Ex p.* Lane, 6 Fed. 34, judicial notice taken that the Dominion of Canada is a British possession. See also Calhoun *v.* Ross, 60 Ill. App. 309.

97. Recognition of foreign government see *infra*, note 99.

98. Schoerken *v.* Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

99. National recognition binding on courts. — In the case of a foreign government, "who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government." Jones *v.* U. S., 137 U. S. 202, 212, 11 S. Ct. 80, 34 L. ed. 691, per Gray, J. See also International Law.

The seal of an unacknowledged government is not judicially noticed; but it may be proved by such testimony as the nature of the case admits. U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471.

1. Watson *v.* Walker, 23 N. H. 471.

and great seal[2] of that nation or its provinces.[3] For a like reason,[4] reinforced by the construction of a federal statute,[5] all courts in the United States take judicial notice of the seals of the several states and territories,[6] but these seals are not judicially known in the courts of a foreign nation.[7] The seal of the United States is judicially noticed by state courts.[8] Seals of foreign municipalities[9] or of executive departments in other states or countries[10] will not be judicially noticed in the absence of statutory requirement.[11] The seal of a court of admiralty[12] or vice-admiralty[13] will be judicially noticed, as those courts are recognized by the law of nations. The seal of a notary public is in the same legal position.[14]

D. How Acquired — 1. By the Judge — a. Matters of Fact. Judicial knowledge is distinctive and technical; that which a judge has *qua* judge, part of the mental equipment which the ideal judge would have in order to discharge perfectly the duties of his position. In matters of fact the knowledge of a particular judge may vary from that of the ideal judge by being either greater or less. Except as to quasi-matters of law, such as the existence of a foreign law[15] or facts directly established by the law of the forum; or in order to prevent loss of time in proving a fact on which the parties are already agreed by an announcement from the judge that he already knows it, a judge is not at liberty to treat as judicial knowledge any personal knowledge of a fact not generally known.[16] Where, on the other hand, as frequently happens,[17] the actual knowledge of the judge is less than the knowledge of the ideal judge, or where he regards the fact as not sufficiently notorious to be made a subject of judicial cognizance,[18] a judge may decline to know it. This he may do, either absolutely,[19] in which case the party to whose cause the fact is relevant must establish its existence by evidence,[20] or conditionally, that is, until he may become satisfied that the fact is as it is.

2. *Connecticut.*— Griswold *v.* Pitcairn, 2 Conn. 85.
New Hampshire.— Watson *v.* Walker, 23 N. H. 471.
New York.— Lincoln *v.* Bartelle, 6 Wend. 475.
Texas.— Phillips *v.* Lyons, 1 Tex. 392.
United States.— The Santissima Trinidad, 7 Wheat. 283, 5 L. ed. 454; U. S. *v.* Palmer, 3 Wheat. 610, 4 L. ed. 471.
England.— Anonymous, 9 Mod. 66.
See 20 Cent. Dig. tit. "Evidence," § 71.

3. Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404, great seal of Canada.

4. Phillips *v.* Lyons, 1 Tex. 392, where the rule of judicial notice as between states of the Union is assimilated to the law of nations.

5. 1 U. S. St. at L. 122 [U. S. Comp. St. (1901) p. 677], construed in U. S. *v.* Johns, 4 Dall. (U. S.) 412, 1 L. ed. 888, 26 Fed. Cas. No. 15,481.

6. Robinson *v.* Gilman, 20 Me. 299; State *v.* Carr, 5 N. H. 367; Coit *v.* Millikin, 1 Den. (N. Y.) 376; Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475; Patterson *v.* Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108; U. S. *v.* Amedy, 11 Wheat. (U. S.) 392, 6 L. ed. 502; U. S. *v.* Johns, 4 Dall. (U. S.) 412, 1 L. ed. 888, 26 Fed. Cas. No. 15,481.

7. See Phillips *v.* Lyons, 1 Tex. 392.

8. Yount *v.* Howell, 14 Cal. 465.

9. Chew *v.* Keck, 4 Rawle (Pa.) 163, corporate seal of London.

10. Church *v.* Hubbard, 2 Cranch (U. S.) 187, 2 L. ed. 249; Schoerken *v.* Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

11. See Duffey *v.* Bellefonte Presb. Cong., 48 Pa. St. 51, where the seal of the mayor of Wilmington, Del., was recognized in obedience to a statute.

12. Thompson *v.* Stewart, 3 Conn. 171, 181, 8 Am. Dec. 168 (where it is said: "The seal is deemed to be evidence of itself, because such courts are considered as courts of the whole civilized world, and every person interested as a party"); Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475; Croudson *v.* Leonard, 4 Cranch (U. S.) 434, 2 L. ed. 670; Rose *v.* Himely, 4 Cranch (U. S.) 41, 2 L. ed. 608; Church *v.* Hubbard, 2 Cranch (U. S.) 187, 2 L. ed. 249; Green *v.* Waller, 2 Ld. Raym. 891; The Maria, 1 Rob. Adm. 340.

13. Yeaton *v.* Fry, 5 Cranch (U. S.) 335, 3 L. ed. 117, vice-admiralty in Jamaica.

14. See *supra*, II, C, 1, d.

15. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; Herschfield *v.* Dexel, 12 Ga. 582. See also Farmers' Mfg. Co. *v.* Spruks Mfg. Co., 119 Fed. 594.

16. See *supra*, II, B, 3.

17. Cary *v.* State, 76 Ala. 78; Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

18. Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444.

19. Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444. But see Gilbert *v.* Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592, where it is held that the refusal of a judge to rule in accordance with the judicial cognizance of the appellate court is error.

20. Kaolatype Engraving Co. *v.* Hoke, 30 Fed. 444.

claimed to be. To attain mental certainty, he may require the assistance of the party who invokes his judicial knowledge; he may investigate the matter for himself, or he may pursue both courses.[21] The scope, direction, and details of such investigation are entirely within the discretion and under the direction of the judge, uncontrolled by the rules of evidence or the wishes or suggestions of the parties,[22] who have no right to produce evidence on the subject.[23] This is especially true as to the significance of words of ordinary meaning, such as "drugs and medicines"[24] or "peach yellows."[25] Although, in discharge of the court's function of construction, the evidence may properly be received and such reception is not erroneous because unnecessary,[26] it is just as much an error for the court to mistake a fact of which it has taken cognizance as to mistake a principle of law.[27] This power of the court is not only valuable in shortening trials of fact, but it is useful to an appellate court by preventing reversals where the evidence on the record fails to establish a result which is in accordance with substantial justice.[28] The judge may resort to or obtain information from any source of knowledge which he feels would be helpful to him,[29] including public official documents of all kinds, whether of the state[30] or national government; such as those in the state[31] or navy[32] departments, census bureau,[33] or land-office.[34] Indeed he may resort to any public document[35] properly authenticated;[36] to dictionaries,[37] books, periodicals, and public addresses.[38] He may even inquire of others.[39] On matters of public history he may examine public documents,[40] histories,[41] or other writings or historical data. He may inform himself as to

21. Atty.-Gen. *v.* Dublin, 38 N. H. 459; Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 1 Dr. & Wal. 353.

22. Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

23. White *v.* Rankin, 90 Ala. 541, 8 So. 118; People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; White *v.* Phœnix Ins. Co., 83 Me. 279, 22 Atl. 167; Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389; Page *v.* Faucet, Cro. Eliz. 227.

24. Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228.

25. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

26. People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; People *v.* Chee Kee, 61 Cal. 404; State *v.* Main, 68 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623; State *v.* Morris, 47 Conn. 179; Rowland *v.* Milton, 139 N. Y. 93, 34 N. E. 765, 22 L. P A. 182.

27. U. S. *v.* One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958. See also Gilbert *v.* Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592, where it was held that failure to rule according to the judicial knowledge of the court was error.

28. Campbell *v.* Wood, 116 Mo. 196, 22 S. W. 796; Hunter *v.* New York, etc., R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246.

29. Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688; Hunter *v.* New York, etc., R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246; Underhill *v.* Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456.

30. Cary *v.* State, 76 Ala. 78; Kirby *v.* Lewis, 39 Fed. 66.

31. Underhill *v.* Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456; Foster *v.* Globe Venture Syndicate, [1900] 1 Ch. 811, 69 L. J. Ch. 375, 82 L. T. Rep. N. S. 253; Taylor *v.* Barclay, 2 Sim. 213, 7 L. J. Ch. O. S. 65, 29 Rev. Rep. 82, 2 Eng. Ch. 213. In determining the fact that the executive has declared a guano island to be within the jurisdiction of the United States, the court is not confined to the pleadings and documents in the case, but will inspect the records of the department of state. Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691.

32. The records of the navy department may be consulted by the supreme court of the United States upon the question of the recognition of the exemption of coast-fishing boats from capture. The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320.

33. People *v.* Williams, 64 Cal. 87, 27 Pac. 939; State *v.* Wagner, 61 Me. 178, 186; Whiton *v.* Albany City Ins. Co., 109 Mass. 24.

34. Kirby *v.* Lewis, 39 Fed. 66.

35. McMillen *v.* Blattner, 67 Iowa 287, 25 N. W. 245; Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609.

36. McMillen *v.* Blattner, 67 Iowa 287, 25 N. W. 245; Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609.

37. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

38. Burdine *v.* Alabama Grand Lodge, 37 Ala. 478; People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.

39. People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.

40. Keyser *v.* Coe, 37 Conn. 597; Com. *v.* Alburger, 1 Whart. (Pa.) 469; U. S. *v.* One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958.

41. Keyser *v.* Coe, 37 Conn. 597; Com. *v.* Alburger, 1 Whart. (Pa.) 469; U. S. *v.* One

the facts of geography, such as the navigable character of a river,[42] the distance between two points,[43] the location of a given place within the jurisdiction,[44] by resort to histories,[45] geographies,[46] public documents,[47] maps, etc.[48] Where the court is authorized to construe,[49] or to charge the jury[50] concerning the ordinary meaning of words in the vernacular, the judge may resort to dictionaries,[51] works of history,[52] or other writings;[53] which, while not strictly evidence,[54] but merely serving to bring actual up to judicial knowledge, or aiding, as the supreme court of the United States say, "the memory and understanding of the court"[55] — evidence, as such, being properly rejected by the court[56] as "irregular"[57] — may still be introduced in evidence, without error.[58] The judge in determining chrono-

Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958; Neale *v.* Fry [*cited* in Stainer *v.* Droitwich, 1 Salk. 281], where to prove a forgery of a deed chronicles were produced and admitted in evidence to show the time when the council of Spain received the abdication of Charles V, and his son Philip took his titles upon himself.

42. U. S. *v.* The Montello, 11 Wall. (U. S.) 411, 20 L. ed. 191.

43. Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

44. Keyser *v.* Coe, 37 Conn. 597; State *v.* Wagner, 61 Me. 178.

45. Keyser *v.* Coe, 37 Conn. 597; State *v.* Wagner, 61 Me. 178; U. S. *v.* The Montello, 11 Wall. (U. S.) 411, 20 L. ed. 191.

46. U. S. *v.* The Montello, 11 Wall. (U. S.) 411, 20 L. ed. 191.

47. Kelsey *v.* Coe, 37 Conn. 597; State *v.* Wagner, 61 Me. 178, 190.

48. Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

49. Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

50. Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

51. *Alabama.*— Cook *v.* State, 110 Ala. 40, 20 So. 360.

Connecticut.— State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

Massachusetts.— Nelson *v.* Cushing, 2 Cush. 519, 532; Com. *v.* Kneeland, 20 Pick. 206.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

United States.— Nix *v.* Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745; Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691; Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200.

England.— Page's Case, 1 Leon. 242.

Province of jury.— Where a word has two or more meanings, one of which is libelous, it is the province of the jury to determine in what sense the word was used under instructions from the court as to what those meanings are. Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389. See, generally, LIBEL AND SLANDER.

52. Atty.-Gen. *v.* Dublin, 38 N. H. 459, 516; Kniskern *v.* St. John's, etc., Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 1 Dr. & Wal. 353; Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 8 Eng. Reprint 450.

53. Com. *v.* Kneeland, 20 Pick. (Mass.) 206; Atty.-Gen. *v.* Dublin, 38 N. H. 459; Kniskern *v.* St. John's, etc., Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 1 Dr. & Wal. 353; Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 8 Eng. Reprint 450.

54. Brown *v.* Piper, 91 U. S. 37, 42, 23 L. ed. 200; Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 8 Eng. Reprint 450.

Production of histories in evidence.— The earlier practice in England was that facts of history, if ancient, were shown by the production in jury trials of the history itself in evidence. Brounker *v.* Atkyns, Skin. 14; *In re* St. Catherine's Hospital, 1 Vent. 149. Such also has been decided to be the proper course in several states of the United States. McKinnon *v.* Bliss, 21 N. Y. 206; Gregory *v.* Baugh, 4 Rand. (Va.) 611. The histories are only receivable where the historian was disinterested (Evans *v.* Getting, 6 C. & P. 586, 25 E. C. L. 587), and it has been suggested that he must be dead (Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781). The fact that the matter is one of judicial cognizance is shown in the rule that a history is only admissible in evidence to show a notorious fact of general public interest, that is, precisely the matters as to which judicial cognizance is taken. McKinnon *v.* Bliss, 21 N. Y. 206, 217; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633, 724; Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781; Stainer *v.* Droitwich, 1 Salk. 281, custom of Droitwich, as shown by Camden's Britannia.

55. Nix *v.* Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745.

56. Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228; Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

57. Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

58. "There was no error in the admission of Webster's International Dictionary. The courts are expected to know, and take knowledge of the meaning of any vernacular word which may be ascertained by reference to any standard authority. The admission in evidence of such standard authority may be superfluous, but is not erroneous." Cook *v.* State, 110 Ala. 40, 47, 20 So. 360. But see Atty.-Gen. *v.* Dublin, 38 N. H. 459, 516; Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 1 Dr. & Wal. 353.

logical facts may resort to an almanac [59] or calendar,[60] which is not evidence [61] any more than the date on a newspaper would be if used for the same purpose, but which may be admitted into the evidence in the case if so superfluous an act should be deemed advisable.[62] A recognized source of information as to certain matters to be judicially known may be established by law. Thus Canadian courts take judicial cognizance of appointments promulgated in the official gazette.[63]

b. Matters of Law. In the absence of statutory regulation [64] the only required judicial cognizance is that the judge should know the law. Such knowledge is of the essence of the judicial office. If a particular judge does not know what the law is on a given point, as where a statute is recent,[65] it is his duty to ascertain. In so doing he may, as in cases of optional cognizance, resort to any source of information which he thinks enlightening,[66] such as documents in the office of the secretary of state,[67] election returns and records,[68] etc.; "always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." [69] But a judge may require the assistance of the parties; as where it is prescribed by rule of court that all statutes relied on shall be set out in a party's brief.[70] He cannot be required to hear evidence to guide him in exercising his judicial function of knowing a matter of law.[71] No evidence is necessary, for while statutes, opinions, and text-books are frequently read to the court, it is "not because that is evidence, for no evidence is necessary, as the judges are presumed to know the law, but the book is read to refresh their memory." [72]

2. By the Jury. While, contrary to the early practice,[73] a jury in finding the existence of a controverted fact are to be confined as a rule to the evidence submitted to them during the trial, and will not be permitted to use as evidence facts within the merely individual knowledge of particular jurymen,[74] including

59. *Alabama.*— Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892; Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169.
California.— People *v.* Chee Kee, 61 Cal. 404.
Connecticut.— State *v.* Morris, 47 Conn. 179.
Nebraska.— Stewart *v.* Rosengren, (1902) 92 N. W. 586.
New York.— Montenes *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 493, 78 N. Y. Suppl. 1059.
England.— Page *v.* Faucet, Cro. Eliz. 227.

60. Cohn *v.* Kahn, 14 Misc. (N. Y.) 255, 35 N. Y. Suppl. 829.

61. Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169; People *v.* Chee Kee, 61 Cal. 404; State *v.* Morris, 47 Conn. 179.

62. Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892; Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169.

63. Simms *v.* Quebec, etc., R. Co., 22 L. C. Jur. 20; *Ex p.* Dubois, 7 Rev. Lég. 430.

64. Puckett *v.* State, 71 Miss. 192, 14 So. 452.

65. People *v.* Dowling, 84 N. Y. 478.

66. *Alabama.*— Cary *v.* State, 76 Ala. 78.
Iowa.— Clare *v.* State, 5 Iowa 509.
Maryland.— Strauss *v.* Heiss, 48 Md. 292; Legg *v.* Annapolis, 42 Md. 203.
Minnesota.— State *v.* Stearns, 72 Minn. 200, 75 N. W. 210.
Mississippi.— Puckett *v.* State, 71 Miss. 192, 14 So. 452.
Missouri.— Bowen *v.* Missouri Pac. R. Co., 118 Mo. 541, 24 S. W. 436.
United States.— Gardner *v.* Barney, 6 Wall. 499, 18 L. ed. 890.
See 20 Cent. Dig. tit. "Evidence," § 72.
"The existence of a public act is determined by the judges themselves, who, if there be any difficulty, are to make use of ancient copies, transcripts, books, pleadings, or any other memorial, to inform themselves." Sedgwick Constr. St. and Const. L. (2d ed.) p. 26 [*cited* with approval in Bowen *v.* Missouri Pac. R. Co., 118 Mo. 541, 547, 24 S. W. 436].

67. Clare *v.* State, 5 Iowa 509; Bowen *v.* Missouri Pac. R. Co., 118 Mo. 541, 24 S. W. 436.

68. State *v.* Stearns, 72 Minn. 200, 75 N. W. 210; Puckett *v.* State, 71 Miss. 192, 14 So. 452.

69. Gardner *v.* Barney, 6 Wall. (U. S.) 499, 18 L. ed. 890.

70. The court may continue the case for non-compliance with the rule. Richardson County School Dist. No. 56 *v.* St. Joseph F. & M. Ins. Co., 101 U. S. 472, 25 L. ed. 868.

71. *In re* Howard County, 15 Kan. 194.

72. Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475. To the same effect see Clegg *v.* Levy, 3 Campb. 166.

73. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529, 535.

74. *Georgia.*— Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853.
Kansas.— Craven *v.* Hornburg, 26 Kan. 94.
Massachusetts.— Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529; Murdoch *v.* Sumner, 22 Pick. 156; Patterson *v.* Boston, 20 Pick. 159.
Texas.— Wharton *v.* State, 45 Tex. 2.
Wisconsin.— Johnson *v.* Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753.

facts bearing on the character of witnesses[75] or facts of a historical nature[76] — the rule being that where a juror knows a fact material to the issue he must disclose and testify to it in court[77] — jurors are entitled to use the facts which are part of common knowledge,[78] experience,[79] and observation[80] in the community, and, indeed, must necessarily do so.[81] They may utilize such facts not only at the stage of inference[82] or judgment[83] in deciding what the facts in evidence establish,[84] but may also use such notorious facts in correlating,[85] supplementing,[86] and giving coherence to other facts in evidence,[87] or in determining the credit to be given to witnesses;[88] but these facts cannot be used to take the place of any essential evidentiary facts.[89] Among facts of such common notoriety that a jury may take cognizance of them are the attractiveness to children of an irregularly piled heap of lumber;[90] the ordinary motives influencing men,[91] such as the instinct of self-preservation,[92] the desire not to waste time, as in playing faro with no hope of gain[93] or searching for a horse which has no value;[94] the general price of land;[95] that certain beverages are intoxicating;[96] that sea-water damages dry-goods;[97] the effect of obstacles in deflecting currents of air;[98] or that a lighted pipe in the

United States.— Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028.

See also *supra*, II, B, 6.

75. Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853; Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529; Johnson *v.* Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753.

76. Gregory *v.* Baugh, 4 Rand. (Va.) 611.

77. Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529; Parks *v.* Boston, 15 Pick. (Mass.) 198; Hacker's Case, Kel. C. C. 12; Rex *v.* Stutton, 4 M. & S. 532; Partridge *v.* Strange, Plowd. 77; Anonymous, 1 Salk. 404.

78. Green *v.* Chicago, 97 Ill. 370.

79. Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; State *v.* Lingle, 128 Mo. 528, 31 S. W. 20; Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600; Willis *v.* Lance, 28 Oreg. 371, 43 Pac. 384, 487.

80. Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600.

81. Craver *v.* Hornburg, 26 Kan. 94.

82. McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 220, 50 N. E. 611, where it is said: "Jurors take with them their knowledge and experience of affairs, and are not only at liberty to use, but ought to use, that knowledge and experience in drawing conclusions from the evidence."

83. McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 611; Parks *v.* Boston, 15 Pick. (Mass.) 198.

84. McGarrahan *v.* New York, etc., R. Co., 171 Mass. 211, 50 N. E. 611; Murdoch *v.* Sumner, 22 Pick. (Mass.) 156; Patterson *v.* Boston, 20 Pick. (Mass.) 159; Parks *v.* Boston, 15 Pick. (Mass.) 198; Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028.

85. Green *v.* Chicago, 97 Ill. 370.

86. Stevens *v.* State, 3 Ark. 66; Green *v.* Chicago, 97 Ill. 370.

87. Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381.

88. Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

89. Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744; Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600; Reynolds *v.* New York Cent., etc., R. Co., 58 N. Y. 248; Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375.

90. Spengler *v.* Williams, 67 Miss. 1, 6 So. 613.

91. Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

92. *Iowa.*— Hopkinson *v.* Knapp, etc., Co., 92 Iowa 328, 60 N. W. 653; Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227; Way *v.* Illinois Cent. R. Co., 40 Iowa 341.

Maine.— Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

Massachusetts.— Lamoureux *v.* New York, etc., R. Co., 169 Mass. 338, 47 N. E. 1009; Mayo *v.* Boston, etc., R. Co., 104 Mass. 137.

New Hampshire.— Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600.

New York.— Reynolds *v.* New York Cent., etc., R. Co., 58 N. Y. 248; Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375.

Wisconsin.— Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425.

93. Stevens *v.* State, 3 Ark. 66.

94. Houston *v.* State, 13 Ark. 66.

95. Green *v.* Chicago, 97 Ill. 370; Parks *v.* Boston, 15 Pick. (Mass.) 198.

96. Freiberg *v.* State, 94 Ala. 91, 10 So. 703 (whisky); Com. *v.* Peckham, 2 Gray (Mass.) 514 (gin); State *v.* Packer, 80 N. C. 439 (port wine). See, generally, INTOXICATING LIQUORS.

Cider, having no intoxicating principle at all for some time after it comes from the press, the fact whether in a particular case it was intoxicating when sold is not one to be ascertained by jurors by applying their own knowledge only. Feldman *v.* Morrison, 1 Ill. App. 460.

97. Bradford *v.* Cunard Steamship Co., 147 Mass. 55, 16 N. E. 719.

98. Willis *v.* Lance, 28 Oreg. 371, 43 Pac. 384, 487.

mouth of a man sleeping on straw is dangerous as being likely to communicate fire.[99] Facts judicially noticed may be embodied in instructions to the jury.[1]

III. BURDEN OF PROOF.[2]*

A. Confusion of Terms. While the phrase "burden of proof" is one of double meaning and, although the attendant confusion has been so great as to suggest the propriety of adopting one less objectionable,[3] it has a firmly established place in legal phraseology and cannot well be superseded. The ambiguity lies in the word "proof," when used indifferently as representing either the effect of introducing sufficient evidence or the means employed or required to obtain this result.[4] "Burden of proof," as a phrase, means therefore either: (1) The necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent;[5] or (2) the necessity which rests on a party at any particular time during a trial to create a *prima facie* case in his own favor or to overthrow one when created against him. In this article the phrase "burden of evidence" will be applied to this second meaning, and the phrase "burden of proof" to the necessity of finally establishing a fact or facts in issue. "Burden of evidence" represents a very ordinary and, indeed, inevitable incident of any contest which is to be decided by the use of reason as influenced by facts and argument. Confusion can, to a certain extent, be avoided, and apparent contradictions reconciled, by bearing in mind the distinction between "burden of proof" and "burden of evidence," to be hereinafter stated, and also the fact that in the vast majority of cases any such distinction is entirely ignored by the courts.[6]

B. Burden of Proof Properly So-Called — 1. In General. The general rule is that w[illegible]r has the affirmative of the issue, as determined by the pleadings, or, where there are no pleadings, by the nature of the investigation, has the burden of proof.[7] It never shifts from that party either in civil[8] or in

99. Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381.

1. People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; State *v.* Laffer, 38 Iowa 422. See, generally, TRIAL.

2. Right to open and close as affected by burden of proof see TRIAL.

3. See remarks of Brett, M. R., in Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 453, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50; Thayer Prelim. Treat. 384. *Compare* State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, 41 L. R. A. 530.

4. See *supra*, I, C.

5. Measure of proof required see *infra*, XVII.

6. See *infra*, III, C.

7. See *infra*, III, B, 3–7.

8. *California.*— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871; People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549.

Connecticut.— Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; Miles' Appeal, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176; Pease *v.* Cole, 53 Conn. 53, 71, 22 Atl. 681, 55 Am. Rep. 53.

Illinois.— Supreme Tent K. of M. of W. *v.* Stensland, 105 Ill. App. 267.

Kentucky.— Royal Ins. Co. *v.* Schwing, 87 Ky. 410, 9 S. W. 242, 10 Ky. L. Rep. 380.

Maine.— Small *v.* Clewley, 62 Me. 155, 16 Am. Rep. 410.

Massachusetts.— Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684 [*explaining* Cass *v.* Boston, etc., R. Co., 14 Allen 448]; Wright *v.* Wright, 139 Mass. 177, 29 N. E. 380; Central Bridge Corp. *v.* Butler, 2 Gray 130.

Michigan.— Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140.

New Hampshire.— Eastman *v.* Gould, 63 N. H. 89.

New York.— Heineman *v.* Heard, 62 N. Y. 448; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282; Wiley *v.* Bondy, 23 Misc. 658, 52 N. Y. Suppl. 68.

Rhode Island.— Atlas Bank *v.* Doyle, 9 R. I. 78, 98 Am. Dec. 368, 11 Am. Rep. 219.

Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

England.—Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50, per Brett, M. R.

See 20 Cent. Dig. tit. "Evidence," § 113.

Shifting under statutory pleading.— When under statutory pleading a defendant sets up an affirmative defense in his evidence it is said that the burden of proof is shifted. Tarbox *v.* Eastern Steamboat Co., 50 Me. 339; Brown *v.* King, 5 Metc. (Mass.) 173 [*citing* Sperry *v.* Wilcox, 1 Metc. (Mass.) 267]; Powers *v.* Rus-

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

criminal[9] cases. Where a party erroneously assumes the burden of proof as to a particular allegation or the burden of evidence as to a particular fact, the mistake will not be corrected in the appellate court.[10]

2. Negative Allegations.[11] What allegations are necessary to constitute a sufficient case is a question of substantive law;[12] but whenever, under the rules of substantive law applicable to the rights or liabilities in dispute between the parties, an affirmative case requires proof of a material negative allegation, the party, whether plaintiff[13] or defendant,[14] has the burden of proving it,[15] so far as

sell, 13 Pick. (Mass.) 69, 77. In like manner when plaintiff in his evidence makes an affirmative reply, in confession and avoidance, to defendant's affirmative defense, it is said that the burden of proof is again shifted. But the burden of proof is not shifting. The parties are merely trying to find where it really is. They are doing the work at the trial which it was the preliminary function of pleading to do. Practically they are pleading *ore tenus*. Thayer Prelim. Treat. Ev. 379. This explains the apparent necessity for a distinction which was early suggested and still may be traced in the decisions to the effect that where the party who does not have the burden of proof contents himself with introducing evidence directly negativing the existence of facts essential to the case against him, the burden of proof continues to be on the party having the affirmative of the issue; but that where the party having the negative of the issue undertakes to establish some independent fact inconsistent with those which his opponent claims the burden of proof shifts to him. Powers *v.* Russell, 13 Pick. (Mass.) 69. See also Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

9. See Criminal Law, 12 Cyc. 379.

10. See Appeal and Error, 2 Cyc. 675; and Stewart *v.* Outhwaite, 141 Mo. 562, 44 S. W. 326.

11. *Compare infra*, III, C, 3.

12. See *infra*, III, B, 3.

13. *Louisiana.*— Baird *v.* Brown, 28 La. Ann. 842; Hicks *v.* Martin, 9 Mart. 47, 13 Am. Dec. 304.

Maine.— Pennell *v.* Cummings, 75 Me. 163; Sawtelle *v.* Sawtelle, 34 Me. 228.

New Hampshire.— Eastman *v.* Gould, 63 N. H. 89.

Vermont.— Thayer *v.* Viles, 23 Vt. 494.

England.—Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50.

See 20 Cent. Dig. tit. "Evidence," § 114.

14. Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715; Morgan *v.* Mitchell, 3 Mart. N. S. (La.) 576; Atlantic Trust Co. *v.* Crystal Water Co., 72 N. Y. App. Div. 539, 76 N. Y. Suppl. 647; Western Union Tel. Co. *v.* Jackson, 19 Tex. Civ. App. 273, 46 S. W. 279; Elkin *v.* Jansen, 9 Jur. 353, 14 L. J. Exch. 201, 13 M. & W. 655; Field *v.* Sowle, 4 Russ. 112, 4 Eng. Ch. 112.

15. *Alabama.*— Bufford *v.* Raney, 122 Ala. 565, 26 So. 120, absence of indebtedness. But see Carroll *v.* Malone, 28 Ala. 521.

Arkansas.—St. Louis, etc., R. Co. *v.* Berger, 64 Ark. 613, 44 S. W. 809, 39 L. R. A. 784, force not necessary.

California.— Douglass *v.* Willard, 129 Cal. 38, 61 Pac. 572, no notice.

Connecticut.— Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521 (goods not salable); Brown *v.* Fitch, 43 Conn. 512 (no notice).

Georgia.— Davis *v.* Central R. Co., 60 Ga. 329, that prior to an accident a person was not deaf.

Illinois.— Ames *v.* Snider, 69 Ill. 376, want of probable cause.

Indiana.— Carmel Natural Gas, etc., Co. *v.* Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; New Albany *v.* Endres, 143 Ind. 192, 42 N. E. 683; Nash *v.* Hall, 4 Ind. 444 (want of probable cause); Mississinewa Min. Co. *v.* Andrews, 22 Ind. App. 523, 54 N. E. 146; O'Kane *v.* Miller, 3 Ind. App. 126, 29 N. E. 439.

Kentucky.— Lucas *v.* Hunt, 91 Ky. 279, 15 S. W. 781, 12 Ky. L. Rep. 871, want of probable cause.

Louisiana.—Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715 (land not salable); Baird *v.* Brown, 28 La. Ann. 842 (no proper service); Morgan *v.* Mitchell, 3 Mart. N. S. 576 (hond not furnished); Hicks *v.* Martin, 9 Mart. 47, 13 Am. Dec. 304 (non-consent).

Maine.— Pennell *v.* Cummings, 75 Me. 163 (that a person is not insane); Sawtelle *v.* Sawtelle, 34 Me. 228 (non-delivery).

Massachusetts.— Phipps *v.* Mahon, 141 Mass. 471, 5 N. E. 835; Lane *v.* Crombie, 12 Pick. 177, want of probable cause.

Missouri.— Dowell *v.* Guthrie, 116 Mo. 646, 22 S. W. 893.

New Hampshire.— Eastman *v.* Gould, 63 N. H. 89.

New York.—Schlesinger *v.* Hexter, 34 N. Y. Super. Ct. 499. But see Stokes *v.* Stokes, 155 N. Y. 581, 50 N. E. 342, property not pledged.

Pennsylvania.— Pusey *v.* Wright, 31 Pa. St. 387.

Rhode Island.— King *v.* Colvin, 11 R. I. 582, want of probable cause.

Texas.— Texas, etc., Co. *v.* Morin, 66 Tex. 133, 18 S. W. 345; Western Union Tel. Co. *v.* Jackson, 19 Tex. Civ. App. 273, 46 S. W. 279 (no notice); L. & H. Blum Land Co. *v.* Herbin, (Civ. App. 1895) 33 S. W. 153 (no notice).

Vermont.— Thayer *v.* Viles, 23 Vt. 494, absence of title.

England.— Brown *v.* Hawkes, [1891] 2 Q. B. 718, 55 J. P. 823, 61 L. J. Q. B. 151, 65 L. T. Rep. N. S. 108 (want of probable cause); Abrath *v.* North Eastern R. Co., 11

is reasonably possible,[16] even as to facts within the knowledge or control of the other side.[17] A party is not required to prove negative allegations which are merely necessary as pleadings but constitute no part of his case.[18]

3. Under Common-Law Pleading. Under the common-law system of pleading[19] the burden of proof is on the party holding the affirmative of the issue[20] to establish the substance of his contention by the required preponderance of evidence;[21]

Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50 (want of probable cause); Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589 (no notice); Elkin *v.* Jansen, 9 Jur. 353, 14 L. J. Exch. 201, 13 M. & W. 655 (no notice).

Canada.— Barter *v.* Smith, 2 Can. Exch. 455 (failure to comply with statute); McIntyre *v.* Atty.-Gen., 14 Grant Ch. (U. C.) 86 (non-compliance with law); Malcolm *v.* Perth Mut. F. Ins. Co., 29 Ont. 406 (want of probable cause).

See 20 Cent. Dig. tit. "Evidence," § 114; and *infra*, III, C, 3.

16. Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715; Phelps *v.* Hughes, 1 La. Ann. 320; Thayer *v.* Viles, 23 Vt. 494. See also *infra*, III, C, 3.

17. See cases cited in the preceding notes. The burden of evidence, however, stands in a different position. See *infra*, III, C, 4.

18. Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199.

19. **Statutory modifications** which follow the general analogy of common-law pleading are considered herein as part of the system. As to the operation of more radical statutory modifications see *infra*, III, B, 5.

20. *Alabama.*— Tillis *v.* McKinna, 114 Ala. 311, 21 So. 465; Garrett *v.* Garrett, 64 Ala. 263; Shulman *v.* Brantley, 50 Ala. 81.

Georgia.— Craig *v.* Adair, 22 Ga. 373.

Illinois.— English *v.* Porter, 109 Ill. 285; Sturman *v.* Streamer, 70 Ill. 188; Nash *v.* Cooney, 108 Ill. App. 211; Supreme Tent K. of M. of W. *v.* Stensland, 105 Ill. App. 267.

Indiana.— McClure *v.* Pursell, 6 Ind. 330. One who asserts the invalidity of an instrument for failure to record the same must allege and prove such failure. Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760.

Iowa.— McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447; Hanson *v.* Stephenson, 32 Iowa 129.

Kansas.— Montgomery *v.* Road, 34 Kan. 122, 8 Pac. 253; Amos *v.* Livingston, 26 Kan. 106.

Kentucky.—Com. *v.* Louisville, etc., R. Co., 31 S. W. 473, 17 Ky. L. Rep. 417.

Louisiana.— Young *v.* Talbot, 12 Rob. 518; Blanc *v.* Perilliat, 8 Rob. 100; Union Bank *v.* Hyde, 7 Rob. 418, 41 Am. Dec. 290.

Massachusetts.— Loring *v.* Steineman, 1 Metc. 204; Phillips *v.* Ford, 9 Pick. 39; Phelps *v.* Hartwell, 1 Mass. 71.

Michigan.— Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734; Stewart *v.* Ashley, 34 Mich. 183.

Mississippi.—Mask *v.* Allen, (1894) 17 So. 82.

New York.— Heinemann *v.* Heard, 62 N. Y. 448 [*reversing* 2 Hun 324, 4 Thomps. & C. 666]; Costigan *v.* Mohawk, etc., R. Co., 2 Den. 609, 43 Am. Dec. 758. See also Fleitmann *v.* Ashley, 60 N. Y. App. Div. 201, 69 N. Y. Suppl. 1099 [*affirmed* in 172 N. Y. 628, 65 N. E. 1116].

North Carolina.— Pollock *v.* Warwick, 104 N. C. 638, 10 S. E. 699; Neal *v.* Fesperman, 46 N. C. 446.

Ohio.— Titus *v.* Lewis, 33 Ohio St. 304.

Oregon.— Farley *v.* Parker, 4 Oreg. 269.

Pennsylvania.— Zerbe *v.* Miller, 16 Pa. St. 488.

South Carolina.— Connor *v.* Green Pond, etc., R. Co., 23 S. C. 427.

Texas.— Mills *v.* Johnston, 23 Tex. 308.

Washington.—Wright *v.* Stewart, 19 Wash. 179, 52 Pac. 1020.

West Virginia.— Pusey *v.* Gardner, 21 W. Va. 469. See also Clifton *v.* Weston, 54 W. Va. 250, 46 S. E. 360.

United States.—Simonton *v.* Winter, 5 Pet. 141, 8 L. ed. 75.

England.— *Ex p.* Palmer, 1 Deac. & C. 371.

See 20 Cent. Dig. tit. "Evidence," § 113 *et seq.*

Affirmative of issue, not of proposition.— The phrase "he who affirms must prove — *ei incumbit probatio qui dicit non qui negat*" (Marigny *v.* Union Bank, 12 Rob. (La.) 283; Sowell *v.* Cox, 10 Rob. (La.) 68; Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524), occasionally put in the form of a presumption, "*presumitur pro negante*" (Union Nat. Bank *v.* Baldenwick, 45 Ill. 375), has been held to mean that the burden of proof is invariably upon him who has the affirmative in point of form, i. e., that no pleader is required to prove a negative (Carroll *v.* Malone, 28 Ala. 521; State *v.* Melton, 8 Mo. 417; State *v.* Morrison, 14 N. C. 299; McKinnon *v.* Burrows, 3 U. C. Q. B. O. S. 114); or that the burden of proof is on the party who has the "affirmative of any proposition" (People *v.* Schryver, 42 N. Y. 1, 1 Am. Rep. 480). But this is not an adequate statement of the law. See *infra*, III, C, 3.

21. Chicago, etc., R. Co. *v.* Lambert, 119 Ill. 255, 10 N. E. 219; Nash *v.* Cooney, 108 Ill. App. 211; Parfitt *v.* Lawless, L. R. 2 P. & D. 462, 41 L. J. P. & Adm. 68, 27 L. T. Rep. N. S. 215, 21 Wkly. Rep. 200.

Negativing conditions.— On principle the burden of proof when the liability is denied includes proof that the liability is unconditional.

Alabama.— Bufford *v.* Raney, 122 Ala. 565, 26 So. 120.

New Hampshire.— Eastman *v.* Gould, 63 N. H. 89; Blodgett *v.* Cummings, 60 N. H. 115; Shepardson *v.* Perkins, 60 N. H. 76.

but not necessarily to explain or disprove the allegations of his opponent.[22] It follows that where a defendant denies an allegation material to the plaintiff's case, the burden is on the plaintiff to establish its truth,[23] whether the action be in contract[24] or in tort.[25] Should defendant not traverse, generally or specifically, the allegations of plaintiff's case, but on the contrary rely upon an affirmative defense in abatement,[26] or confession and avoidance,[27] which plaintiff denies, the

New York.— Atlantic Trust Co. *v.* Crystal Water Co., 72 N. Y. App. Div. 539, 76 N. Y. Suppl. 647.

Ohio.— Leisy *v.* Zuellig, 7 Ohio Cir. Ct. 423, 4 Ohio Cir. Dec. 662.

Texas.— Rash *v.* Dillon, (Civ. App. 1894) 27 S. W. 497.

But *compare* Rivers *v.* Obear, etc., Glass Co., 81 Mo. App. 374.

See 20 Cent. Dig. tit. "Evidence," § 113.

Performance of conditions.—And it includes proof that any condition originally existing has been performed. Sext *v.* Geise, 80 Ga. 698, 6 S. E. 174; Doe *v.* Roberts, 4 Dougl. 306, 26 E. C. L. 491. But see Thayer *v.* Connor, 5 Allen (Mass.) 25.

Under the Ontario Judicature Act the performance of conditions precedent to a right of action must be alleged and proved by plaintiff (Home L. Assoc. *v.* Randall, 30 Can. Supreme Ct. 97), or by defendant on a plea in confession and avoidance (Light *v.* Woodstock, etc., R., etc., Co., 13 U. C. Q. B. 216).

22. Schallman *v.* Royal Ins. Co., 94 Ill. App. 364.

23. *Alabama.*— Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827.

District of Columbia.— Tolson *v.* Inland, etc., Coasting Co., 6 Mackey 39.

Illinois.— Kitner *v.* Whitlock, 88 Ill. 513.

Massachusetts.— Starratt *v.* Mullen, 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697.

New Hampshire.— Eastman *v.* Gould, 63 N. H. 89; Buzzell *v.* Snell, 25 N. H. 474.

Texas.— Pares *v.* St. Louis, etc., R. Co., (Civ. App. 1900) 57 S. W. 301.

But *compare* Wright *v.* Stewart, 19 Wash. 179, 52 Pac. 1020.

See 20 Cent. Dig. tit. "Evidence," § 113.

Where a general issue is pleaded it is a denial of all plaintiff's case, and requires plaintiff to prove it by a preponderance of the evidence. Nash *v.* Cooney, 108 Ill. App. 211. See, generally, PLEADING.

24. *Illinois.*— Merchant *v.* Manion, 97 Ill. App. 43.

Kansas.— Piper *v.* Matkins, 8 Kan. App. 215, 55 Pac. 487.

Kentucky.— Kenton Ins. Co. *v.* Osborne, 51 S. W. 306, 21 Ky. L. Rep. 330; Andrews *v.* Haydon, 9 Ky. L. Rep. 440.

Maryland.— Laubheimer *v.* Naill, 88 Md. 174, 40 Atl. 888.

New Hampshire.— Eastman *v.* Gould, 63 N. H. 89.

New York.— Ford *v.* Standard Oil Co., 32 N. Y. App. Div. 596, 53 N. Y. Suppl. 48; Raines *v.* Totman, 64 How. Pr. 493.

See 20 Cent. Dig. tit. "Evidence," § 113; and CONTRACTS, 9 Cyc. 757 *et seq.*

25. *Alabama.*— Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827.

Illinois.— Hudson *v.* Miller, 97 Ill. App. 74.

Iowa.— Grimmell *v.* Warner, 21 Iowa 11.

Kentucky.— Louisville, etc., R. Co. *v.* McClain, 66 S. W. 391, 23 Ky. L. Rep. 1878.

Michigan.— Shelly *v.* Brooks, 114 Mich. 11, 72 N. W. 37.

New York.— Taylor *v.* Guest, 58 N. Y. 262.

Pennsylvania.—Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

Texas.— Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621.

Wisconsin.— Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516.

See 20 Cent. Dig. tit. "Evidence," § 113. And see, generally, NEGLIGENCE, and the cross-references under that title.

26. Jewett *v.* Davis, 6 N. H. 518 (on a plea of non-joinder where the rule was applied although plaintiff had filed an argumentative replication); Robertson *v.* Ephraim, 18 Tex. 118 (non-residence); Hopson *v.* Caswell, 13 Tex. Civ. App. 492, 36 S. W. 312 (want of jurisdiction); De Sobry *v.* Nicholson, 3 Wall. (U. S.) 420, 18 L. ed. 263 (want of jurisdiction); Gilmer *v.* Grand Rapids, 16 Fed. 708 (non-residence). See also ABATEMENT AND REVIVAL, 1 Cyc. 46, 134.

27. *Alabama.*— America Land Mort., etc., Co. *v.* Preston, 119 Ala. 290, 24 So. 707; Thweatt *v.* McCullough, 84 Ala. 517, 4 So. 399, 5 Am. St. Rep. 391; Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

California.— Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Finn *v.* Wharf Co., 7 Cal. 253.

Colorado.— Bliley *v.* Wheeler, 5 Colo. App. 287, 38 Pac. 603.

Florida.— Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Illinois.— Supreme Tent K. of M. of W. *v.* Stensland, 105 Ill. App. 267; Morrison First Nat. Bank *v.* Bressler, 38 Ill. App. 499.

Indiana.— Swift *v.* Ratliff, 74 Ind. 426; Peck *v.* Hunter, 7 Ind. 295.

Kentucky.— Kentucky L., etc., Ins. Co. *v.* Thompson, 35 S. W. 550, 18 Ky. L. Rep. 79; Thompson *v.* Wharton, 7 Bush 563, 3 Am. Rep. 306; Jenkins *v.* Jenkins, 3 T. B. Mon. 327.

Louisiana.— Scovel *v.* Gill, 30 La. Ann. 1207; Sullivan *v.* Goldman, 19 La. Ann. 12; Ford *v.* Simmons, 13 La. Ann. 397. See Durham *v.* Williams, 32 La. Ann. 962.

Maine.— Gile *v.* Sawtelle, 94 Me. 46, 46 Atl. 786; Windle *v.* Jordan, 75 Me. 149; Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540.

Massachusetts.— Jones *v.* Ames, 135 Mass. 431; St. John *v.* Eastern R. Co., 1 Allen 544.

Michigan.— Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939. And see Truax *v.* Heartt, (1903) 97 N. W. 394.

burden of proof is on defendant to prove every material allegation relied on by him,[28] although the replication itself be argumentative,[29] or the declaration negative the defense by anticipation.[30] Where a replication does not traverse or deny defendant's affirmative defense, but confesses and avoids it by setting up new facts which are themselves denied, the burden of proof is on plaintiff.[31]

4. Under Equity Pleading.[32] It is as true in equity as at law that he has the burden of proof who has the affirmative of the issue;[33] with the distinction, however, that while under the common-law system of pleading an issue of fact is

Minnesota.— Day *v.* Raguet, 14 Minn. 273.

Mississippi.— Cain *v.* Moyse, 71 Miss. 653, 15 So. 115; Lamar *v.* Williams, 39 Miss. 342.

Missouri.— Knoche *v.* Whiteman, 86 Mo. App. 568; Kent *v.* Miltenberger, 13 Mo. App. 503; Schutter *v.* Adams Express Co., 5 Mo. App. 316.

Nebraska.— Home F. Ins. Co. *v.* Johansen, 59 Nebr. 349, 80 N. W. 1047.

New Hampshire.— Benton *v.* Burbank, 54 N. H. 583; Buzzell *v.* Snell, 25 N. H. 474; Seavy *v.* Dearborn, 19 N. H. 351.

New York.— Coffin *v.* Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076 [*affirming* 61 N. Y. Super. Ct. 51, 18 N. Y. Suppl. 782]; Atlantic Trust Co. *v.* Crystal Water Co., 72 N. Y. App. Div. 539, 76 N. Y. Suppl. 647; Hemenway *v.* Keeler, 88 Hun 405, 34 N. Y. Suppl. 808. See also Fleitmann *v.* Ashley, 60 N. Y. App. Div. 201, 69 N. Y. Suppl. 1099 [*affirmed* in 172 N. Y. 628, 65 N. E. 1116].

North Carolina.—McQueen *v.* People's Nat. Bank, 111 N. C. 509, 16 S. E. 270; Hall *v.* Younts, 87 N. C. 285; Mayo *v.* Jones, 78 N. C. 402.

Pennsylvania.— Erb *v.* Erb, 50 Pa. St. 388; Pusey *v.* Wright, 31 Pa. St. 387.

Tennessee.— Gaugh *v.* Henderson, 2 Head 628.

Texas.— Skipwitch *v.* Hurt, (Civ. App. 1900) 58 S. W. 192.

Vermont.— Burton *v.* Blin, 23 Vt. 151.

Wisconsin.— Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995.

United States.— Home Ben. Assoc. *v.* Sargent, 142 U. S. 691, 12 S. Ct. 332, 35 L. ed. 1160 (suicide as defense in action on insurance policy); Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189.

England.— The Agra *v.* Elizabeth Jenkins, L. R. 1 P. C. 501, 36 L. J. P. & Adm. 16, 16 L. T. Rep. N. S. 755, 4 Moore P. C. N. S. 435, 16 Wkly. Rep. 735, 16 Eng. Reprint 382; Calder *v.* Rutherford, 3 B. & B. 302, 7 Moore C. P. 158, 7 E. C. L. 743; Elkin *v.* Jansen, 9 Jur. 353, 14 L. J. Exch. 201, 13 M. & W. 655.

Canada.— Hart *v.* Jones, K. B. 1834, 1 S. R. 589; Bury *v.* Forsyth, 32 L. C. Jur. 267; Manning *v.* Thompson, 17 U. C. C. P. 606.

See 20 Cent. Dig. tit. "Evidence," § 119.

28. What defenses are affirmative. In Starratt *v.* Mullen, 148 Mass. 570, 571, 20 N. E. 178, 2 L. R. A. 697, it was said: "Undoubtedly many matters which, if true, would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant; for instance, infancy, coverture, or, probably, illegality. Where the line should be drawn might differ, conceivably, in different jurisdictions." *Compare* Peudleton *v.* Cline, 85 Cal. 142, 24 Pac. 659.

Defendant's affirmative pleadings include abandonment (Hood *v.* Smiley, 5 Wyo. 70, 36 Pac. 856. See Abandonment, 1 Cyc. 7), accident (Atchison *v.* Dullam, 16 Ill. App. 42), conditional delivery (Coffin *v.* Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076), conditions subsequent (Thayer *v.* Connor, 5 Allen (Mass.) 25), estoppel (Neal *v.* Deming, (Ark. 1893) 21 S. W. 1066. See Estoppel), license (Chandler *v.* Smith, 70 Ill. App. 658; Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715. See also Durham *v.* Williams, 32 La. Ann. 962; and Licenses), modification of agreement (Gernert Bros. Lumber Co. *v.* Rapier, 37 S. W. 261, 18 Ky. L. Rep. 536; Warwick *v.* Stockton, (N. J. Ch. 1897) 37 Atl. 458), reconvention (Gann *v.* Shaw, 2 Tex. App. Civ. Cas. § 255), recoupment (Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798; Trnax *v.* Heartt, (Mich. 1903) 97 N. W. 394), release (Swift *v.* Ratliff, 74 Ind. 426; Scovel *v.* Gill, 30 La. Ann. 1207; Knoche *v.* Whiteman, 86 Mo. App. 568; Light *v.* Woodstock, etc., R., etc., Co., 13 U. C. Q. B. 216. See Release), *res adjudicata* (O'Neill *v.* Leight, 3 U. C. Q. B. 70. See Judgments), unconstitutionality (St. Louis Southwestern R. Co. *v.* Smith, 20 Tex. Civ. App. 451, 49 S. W. 627. See Constitutional Law, 8 Cyc. 695), and unseaworthiness (Pickup *v.* Thames, etc., Mar. Ins. Co., 3 Q. B. D. 594, 4 Aspin. 43, 47 L. J. Q. B. 749, 39 L. T. Rep. N. S., 341, 26 Wkly. Rep. 689). See also Contracts, 9 Cyc. 760, 762.

29. Fox *v.* Hilliard, 35 Miss. 160; Wilson *v.* Hodges, 2 East 312, 6 Rev. Rep. 427.

30. Henry *v.* Ward, 49 Nebr. 392, 68 N. W. 518; Hill *v.* Allison, 51 Tex. 390.

31. *Iowa.*— Clapp *v.* Cunningham, 50 Iowa 307.

Kansas.— Meeh *v.* Missouri Pac. R. Co., 61 Kan. 630, 60 Pac. 319.

Nebraska.— Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30.

New York.— Blunt *v.* Barrett, 54 N. Y. Super. Ct. 548.

England.— Ferguson *v.* Gilmour, 1 L. C. Jur. 131.

See 20 Cent. Dig. tit. "Evidence," § 121.

32. Burden of proof in equity see, generally, Equity.

33. Pusey *v.* Wright, 31 Pa. St. 387; Cochran *v.* Blout, 161 U. S. 350, 16 S. Ct. 454, 40

reached by the constructive admission, peculiar to that system, implied in not traversing a particular allegation, a plaintiff in equity has the burden of proving all allegations of his bill not expressly admitted by the answer.[34] Where a defendant pleads an affirmative defense or sets up in his answer facts in avoidance the burden of proof is upon him.[35]

5. Under Statutory Pleading — a. In General. A division, by no means exact, exists between jurisdictions where statutory modification of the common-law rules of pleading has been comparatively slight, and those in which divergence is more radical, and a result reached which has been denominated "statutory pleading." Under this system analogies in equity pleading are usually followed. The doctrine of constructive admission is rejected; each allegation in the statement of a plaintiff's claim not distinctly admitted being regarded as denied,[36] and the burden of proof is on plaintiff to establish such allegations,[37] even though the denial be argumentative,[38] as by setting up a new contract,[39] or a price differing from that claimed,[40] and although it is accompanied by a plea qualifying the denial, but not admitting the truth of the allegation.[41] A defendant may, instead of a distinct affirmative plea, state in his answer a sufficient number of express admissions to establish plaintiff's *prima facie* case and so transfer the burden of proof to himself.[42]

b. Set-Off or Counter-Claim. Where a defendant pleads a set-off or counter-claim which is denied the burden of proving it is upon him;[43] but if no fact essential to the counter-claim or set-off is denied, and an affirmative defense to it is relied on, the burden of proof as to such defense is on plaintiff.[44] In either case where the burden of proof on the issue is finally placed by the pleadings it remains throughout the trial.[45]

6. In Special Judicial Proceedings. The rule regulating the burden of proof in special judicial proceedings is the same that governs where an issue has been formulated by pleadings. He who asks affirmative relief — one for example who

L. ed. 729. See also Huston *v.* Harrison, 168 Pa. St. 136, 150, 31 Atl. 987.

34. Eyre *v.* Dolphin, 2 Ball & B. 303, 12 Rev. Rep. 94. And see Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760. Where a bill alleged that certain deeds of plaintiff covered land claimed by defendant town as part of a public street, and the allegation was denied by the answer, it was held that the burden of proof is on plaintiff to establish the allegation. Clifton *v.* Weston, 54 W. Va. 250, 46 S. E. 360.

35. Clements *v.* Nicholson, 6 Wall. (U. S.) 299, 315, 18 L. ed. 786. See also McGhee Irr. Ditch Co. *v.* Hudson, 85 Tex. 587, 22 S. W. 398.

36. Carver *v.* Eads, 65 Ala. 190; Woodson Mach. Co. *v.* Morse, 47 Kan. 429, 28 Pac. 152. And see, generally, EQUITY.

37. Chamberlain Banking House *v.* Woolsey, 60 Nebr. 516, 83 N. W. 729.

38. Homire *v.* Rodgers, 74 Iowa 395, 37 N. W. 572.

39. Mott *v.* Baxter, 29 Colo. 418, 68 Pac. 220; Phipps *v.* Mahon, 141 Mass. 471, 5 N. E. 835; Consumers' Brewing Co. *v.* Lipot, 21 Misc. (N. Y.) 532, 47 N. Y. Suppl. 718.

40. Connolly *v.* Clark, 20 Misc. (N. Y.) 415, 45 N. Y. Suppl. 1042.

41. Breeding *v.* Stoneman, 6 J. J. Marsh. (Ky.) 376; Balmford *v.* Grand Lodge A. O. U. W., 19 Misc. (N. Y.) 1, 42 N. Y. Suppl. 881.

42. Hunter *v.* Sanders, 113 Ga. 140, 38 S. E. 406.

43. *Alabama.*— O'Neal *v.* Curry, 134 Ala. 216, 32 So. 697; Alabama State Land Co. *v.* Reed, 99 Ala. 19, 10 So. 238; Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28.

Connecticut.— Wetherell *v.* Hollister, 73 Conn. 622, 48 Atl. 826.

Illinois.— East *v.* Crow, 70 Ill. 91.

Maine.— Gile *v.* Sawtelle, 94 Me. 46, 46 Atl. 786.

Massachusetts.— Broaders *v.* Toomey, 9 Allen 65.

Missouri.— Blum *v.* Versteeg Grant Shoe Co., 77 Mo. App. 567.

New York.— Belshaw *v.* Colie, 1 E. D. Smith 213; Plattner *v.* Weiler, 57 N. Y. Suppl. 98.

Pennsylvania.— Davis-Colby Ore Roaster Co. *v.* Rogers, 191 Pa. St. 229, 43 Atl. 567.

England.— Dickson *v.* Evans, 6 T. R. 57, 3 Rev. Rep. 119.

See 20 Cent. Dig. tit. "Evidence," § 120.

Aided by presumption.—Where a negotiable note was pleaded as a set-off, the onus was held to be on plaintiff to rebut the presumption that defendant was in possession of the paper at the time the action was commenced. Griffin *v.* Evans, 23 Ga. 438.

44. Rumbough *v.* Southern Imp. Co., 109 N. C. 703, 14 S. E. 314.

45. Gile *v.* Sawtelle, 94 Me. 46, 49, 46 Atl. 786.

appeals from an order,[46] who intervenes as claimant[47] or to enforce a lien;[48] who seeks to condemn land[49] or to recover damages caused by taking it;[50] who propounds a will for probate;[51] or who asks to be declared elected to an office[52] has the burden of convincing the court that action should be taken in his favor.

C. Burden of Evidence — 1. In General. As the burden of proof is invariably determined by the rules of pleading, so the position of the burden of evidence is controlled by the logical necessities of making proof which a party is under at the time the question of its position becomes important; the burden of evidence being always upon that party against whom the decision of the tribunal would be given if no further evidence were introduced,[53] or, to speak more accurately, if no evidence were introduced which the judge would permit the jury to consider as the basis of their verdict.[54] It results from this that at the beginning of every trial the burden of proof and the burden of evidence are on the same party as to the existence of every fact essential to the affirmative case,[55]

46. Lloyd *v.* Trimleston, 2 Molloy 81.

47. Baldree *v.* Davenport, 7 La. Ann. 587; Rex *v.* Nash, Taylor (U. C.) 197.

48. Houser *v.* Cooper, 102 Ga. 823, 30 S. E. 539.

The burden of proof in the principal action is not affected by the intervention. Eastmore *v.* Bunkley, 113 Ga. 637, 39 S. E. 105. See also Miller *v.* Pryse, 49 S. W. 776, 20 Ky. L. Rep. 1544.

49. Neff *v.* Rud, 98 Ind. 341. See, generally, Eminent Domain.

50. Montgomery Southern R. Co. *v.* Sayre, 72 Ala. 443; Williams *v.* Macon, etc., R. Co., 94 Ga. 709, 21 S. E. 997. See, generally, Eminent Domain.

51. Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524. See, generally, Wills.

52. *In re* Stanstead Election Case, 20 Can. Supreme Ct. 12 [*followed* in *In re* Bellechasse Election Case, 20 Can. Supreme Ct. 181].

53. *California.*— Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

Connecticut.— Pease *v.* Cole, 53 Conn. 53, 71, 22 Atl. 681, 55 Am. Rep. 53.

Indiana.— Kent *v.* White, 27 Ind. 390; Judah *v.* Vincennes University, 23 Ind. 272.

Iowa.— Veiths *v.* Hagge, 8 Iowa 163.

Mississippi.— Porter *v.* Still, 63 Miss. 357.

England.— Dublin, etc., R. Co. *v.* Slattery, 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191 (per Lord Blackburn); Barry *v.* Butlin, 2 Moore P. C. 480, 12 Eng. Reprint 1089 (per Parke, B.); Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S 618, 32 Wkly. Rep. 50 (per Bowen, L. J.).

Canada.— Hamilton *v.* Davis, 2 U. C. Q. B. 137.

See 20 Cent. Dig. tit. "Evidence," § 112.

In Kentucky, the civil code, section 926, provides that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." See Crabtree *v.* Atchison, 93 Ky. 338, 20 S. W. 260, 14 Ky. L. Rep. 313; Royal Ins. Co. *v.* Schwing, 87 Ky. 410, 9 S. W. 242, 10 Ky. L. Rep. 380; Walling *v.* Eggers, 78 S. W. 428, 25 Ky. L. Rep. 1563 (plaintiff alleging ownership of a strip of land and an easement in an alley, and defendant admitting plaintiff's paper title to strip but pleading adverse possession thereof and denying easement); Chaplin, etc., Turnpike Road Co. *v.* Nelson County, 77 S. W. 377, 25 Ky. L. Rep. 1154; Martin *v.* Macey, 4 Ky. L. Rep. 625.

54. *Illinois.*— Bartelott *v.* International Bank, 119 Ill. 259, 9 N. E. 898.

Iowa.— Fornes *v.* Wright, 91 Iowa 392, 59 N. W. 51.

Maine.— Market, etc., Nat. Bank *v.* Sargent, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376.

Massachusetts.— Denny *v.* Williams, 5 Allen 1.

Michigan.— Hyde *v.* Shank, 93 Mich. 535, 53 N. W. 787; Mynning *v.* Detroit, etc., R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804.

New Jersey.— Haines *v.* Merrill Trust Co., 56 N. J. L. 312, 28 Atl. 796.

New York.— Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325.

North Carolina.— Wittkowsky *v.* Wasson, 71 N. C. 451.

Pennsylvania.— Hyatt *v.* Johnston, 91 Pa. St. 196.

Texas.— Joske *v.* Irvine, 91 Tex. 574, 44 S. W. 1059; Lee *v.* International, etc., R. Co., 89 Tex. 583, 36 S. W. 63.

Wisconsin.— Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176.

United States.— Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434; Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, 14 S. Ct. 85, 37 L. ed. 1068; Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 11 S. Ct. 569, 35 L. ed. 213; Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Ewing *v.* Goode, 78 Fed. 442; Phœnix Assur. Co. *v.* Lucker, 77 Fed. 243, 23 C. C. A. 139.

England.— Dublin, etc., R. Co. *v.* Slattery, L. R. 3 App. Cas. 1155, 39 L. T. Rep. N. S. 365, 27 Wkly. Rep. 191; Ryder *v.* Wombwell, L. R. 4 Exch. 32, 38 L. J. Exch. 8, 19 L. T. Rep. N. S. 491, 17 Wkly. Rep. 167; Bridges *v.* North London R. Co., L. R. 7 H. L. 213, 43 L. J. Q. B. 151, 30 L. T. Rep. N. S. 844, 23 Wkly. Rep. 62.

See 20 Cent. Dig. tit. "Evidence," § 112.

55. *Alabama.*—Land Mortg. Invest. Agency Co. *v.* Preston, 119 Ala. 290, 24 So. 707.

including the credibility of the witnesses[56] and the legal validity[57] and genuineness of documents[58] adduced to support it. This burden of evidence so continues until the party with the burden of proof establishes a *prima facie* case,[59] for nothing less than the latter will shift the burden of evidence.[60] The party

Illinois.— Peck *v.* Scoville Mfg. Co., 43 Ill. App. 360.

Kentucky.— Sun L. Ins. Co. *v.* Seigler, 42 S. W. 1137, 19 Ky. L. Rep. 1227.

Massachusetts.— Starratt *v.* Mullen, 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697; Wilder *v.* Coles, 100 Mass. 487.

North Carolina.— McQueen *v.* People's Nat. Bank, 111 N. C. 509, 16 S. E. 270.

Tennessee.— East Tennessee, etc., R. Co. *v.* Stewart, 13 Lea 432.

Texas.— McGhee Irr. Ditch Co. *v.* Hudson, 85 Tex. 857, 22 S. W. 398; Williams *v.* Sapieha, (Tex. Civ. App. 1900) 59 S. W. 947.

See 20 Cent. Dig. tit. "Evidence," § 113.

The burden of evidence as to any particular fact rests generally speaking upon him to whose case the fact is material.

Alabama.— Brandon *v.* Cabiness, 10 Ala. 155.

Georgia.— Penitentiary Co. No. 2 *v.* Gordon, 85 Ga. 159, 11 S. E. 584.

Illinois.— Peck *v.* Scoville Mfg. Co., 43 Ill. App. 360.

Massachusetts.— Willett *v.* Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684; Burnham *v.* Noyes, 125 Mass. 85.

North Carolina.— McQueen *v.* People's Nat. Bank, 111 N. C. 509, 16 S. E. 270.

Wisconsin.— Whitney *v.* Morrow, 50 Wis. 197, 6 N. W. 494.

England.— Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666; Rex *v.* Butler, R. & R. 44.

Canada.— Paget *v.* Fauquier, 1 Ont. El. Cas. 197 [*following* Cunningham *v.* Hagar, 1 Ont. El. Cas. 88].

Foreign law as a fact.— Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118; Lyon *v.* Goldsmith, 1 Lehigh Val. L. Rep. (Pa.) 177; Ward *v.* Morrison, 25 Vt. 593.

Facts necessary to admissibility of material evidence.— *Connecticut.*— State *v.* Swift, 57 Conn. 496, 18 Atl. 664.

Illinois.— Grimes *v.* Hilliary, 150 Ill. 141, 36 N. E. 977.

Iowa.— Hansen *v.* American Ins. Co., 57 Iowa 741, 11 N. W. 670.

Massachusetts.— Com. *v.* Ratcliffe, 130 Mass. 36; Com. *v.* Waterman, 122 Mass. 43; Com. *v.* Brown, 14 Gray 419.

Vermont.— State *v.* Thibeau, 30 Vt. 100.

Facts essential to jurisdiction of court.— Shaw *v.* Cartier, 2 Montreal Super. Ct. 282.

Facts difficult to prove.—The necessity that a party who requires the benefit of a fact shall prove it assumes especial importance where evidence on the subject is difficult if not impossible of attainment; as where the death at a particular time of a person long absent and unheard from must be shown (Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480); or proof is required as to who survived longest in a series of deaths due to a common catastrophe (Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Ehle's Estate, 73 Wis. 445, 41 N. W. 627; Wing *v.* Angrave, 8 H. L. Cas. 183, 30 L. J. Ch. 65 [*affirming* 19 Beav. 459, 4 De G. M. & G. 633, 3 Eq. Rep. 794, 1 Jur. N. S. 159, 24 L. J. Ch. 293, 2 Wkly. Rep. 641]. See DEATH, 13 Cyc. 290).

56. Saunders *v.* Leslie, 2 Ball & B. 509, 12 Rev. Rep. 114; Higgins *v.* Robillard, 12 L. C. Rep. 3; Elliott *v.* Bussell, 19 Ont. 413.

57. *Connecticut.*—Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

Georgia.—Anderson *v.* Suggs, 42 Ga. 265.

Illinois.— Kitner *v.* Whitlock, 88 Ill. 513.

Indiana.— Swift *v.* Ratliff, 74 Ind. 426.

Massachusetts.— Burnham *v.* Allen, 1 Gray 496; Delano *v.* Bartlett, 6 Cush. 364.

New York.— Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358.

Wisconsin.— Eaton *v.* Woydt, 32 Wis. 277.

58. Ross *v.* Gould, 5 Me. 204; Watt *v.* Grove, 2 Sch. & Lef. 502.

This burden is discharged for the time being by production of a document apparently genuine and effective for the purpose for which it is offered, its formal execution being proved or admitted.

Alabama.— Bouldin *v.* Barclay, 121 Ala. 427, 25 So. 827. See also Glover *v.* Gentry, 104 Ala. 222, 16 So. 38 [*citing* Barclift *v.* Treece, 77 Ala. 528; Hill *v.* Nelms, 86 Ala. 442, 5 So. 796].

Louisiana.— Macarty *v.* Landreaux, 8 Rob. 130.

Maine.— Small *v.* Clewley, 62 Me. 155, 16 Am. Rep. 410.

Massachusetts.— Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Burnham *v.* Allen, 1 Gray 496; Blanchard *v.* Young, 11 Cush. 341.

Michigan.— Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140.

New York.— Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358.

Rhode Island.—Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.

West Virginia.— Newlin *v.* Beard, 6 W. Va. 110.

England.— Mills *v.* Barber, 5 Dowl. P. C. 77, 2 Gale 5, 5 L. J. Exch. 204, 1 M. & W. 425.

Canada.— See Marshall *v.* Shelburne, 14 Can. Supreme Ct. 737.

See 20 Cent. Dig. tit. "Evidence," § 117.

59. Jones *v.* Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679; Whitney *v.* Marrow, 50 Wis. 197, 6 N. W. 494.

60. *Alabama.*— Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

Illinois.— Kitner *v.* Whitlock, 88 Ill. 513.

Massachusetts.— Phipps *v.* Mahon, 141 Mass. 471, 5 N. E. 835.

having the burden of proof may establish a *prima facie* case in several ways. (1) He may prove facts which give rise to an inference of that probative weight;[61] or (2) he may establish the existence of some legal substitute for such an inference of fact;[62] or (3) he may proceed by a combination of these methods as to the whole or different parts of his case. When such a *prima facie* case is established, the burden of evidence is then shifted upon the party who does not have the affirmative of the issue,[63] the position of the burden of proof being in no way affected.[64] Since affirmative action of the tribunal demands that the party who has the burden of proof shall at the end of the trial stand possessed of a *prima facie* case in his favor, the party who has not the affirmative of the issue succeeds, for the time being, if he can impair the *prima facie* quality of the case against him, and the burden of evidence thereupon returns to the party having the burden of proof;[65] and this process continues until the stock of relevant facts is exhausted.[66]

2. Effect of Presumptions and Other Substitutes For Evidence. While the existence of a presumption of law does not affect the burden of proof,[67] yet, as an

New Jersey.— Turner *v.* Wells, 64 N. J. L. 269, 45 Atl. 641.

Utah.— McIntyre *v.* Ajax Min. Co., 20 Utah 323, 60 Pac. 552.

England.— *In re* Banbury Peerage Case, 1 Sim. & St. 153, 24 Rev. Rep. 159, 1 Eng. Ch. 153.

Canada.— Taylor *v.* Barker, 5 N. Brunsw. 614; Court *v.* Holland, 8 Ont. Pr. 213; McEwan *v.* Milne, 5 Ont. 100 [*following* Wallis *v.* Andrews, 16 Grant Ch. (U. C.) 634]; Larraway *v.* Harvey, 14 Quebec Super. Ct. 97.

See 20 Cent. Dig. tit. "Evidence," § 117.

"What is prima facie evidence of a fact? It is such as in judgment of law is sufficient to establish the fact; and if not rebutted remains sufficient for the purpose." Kelly *v.* Morris, 6 Pet. (U. S.) 622, 632, 8 L. ed. 523, per Story, J. A mere "tendency" of evidence to raise an inference (Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33), the improbability that a fact exists (Larraway *v.* Harvey, 14 Quebec Super. Ct. 97), the concession implied in a payment of money into court (Taylor *v.* Barker, 5 N. Brunsw. 614), or failure to comply with rules of practice (Turner *v.* Wells, 64 N. J. L. 269, 45 Atl. 641) does not shift the burden of evidence, for the reason that it does not establish a *prima facie* case.

Prima facie inference of fact.— The party who endeavors to overcome the *prima facie* effect of a transaction (Fleming *v.* People, 27 N. Y. 329; Muir *v.* Carter, 16 Can. Supreme Ct. 473; Bostwick *v.* Phillips, 6 Grant Ch. (U. C.) 427) or a situation (Lenig *v.* Eisenhart, 127 Pa. St. 59, 17 Atl. 684; North of Scotland Mortgage Co. *v.* Udell, 46 U. C. Q. B. 511), or to impeach the apparent validity (Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; Nicol *v.* Vaughan, 6 Bligh N. S. 104, 5 Eng. Reprint 537, 1 Cl. & F. 49, 6 Eng. Reprint 834; Larraway *v.* Harvey, 14 Quebec Super. Ct. 97) or establish the invalidity (Peel *v.* Kingsmill, 7 U. C. Q. B. 364) of a document has the burden of evidence.

61. Cook *v.* Cook, 53 Barb. (N. Y.) 180; Muir *v.* Carter, 16 Can. Supreme Ct. 473; Bostwick *v.* Phillips, 6 Grant Ch. (U. C.) 427; North of Scotland Mortgage Co. *v.* Udell, 46 U. C. Q. B. 511; Peel *v.* Kingsmill, 7 U. C. Q. B. 364.

62. See *infra*, III, C, 2.

63. *Alabama.*— Alabama Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827.

California.— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871 [*citing* People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549].

Illinois.— Federal L. Assoc. *v.* Smith, 86 Ill. App. 427 [*citing* Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, 36 N. E. 408; Continental L. Ins. Co. *v.* Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810]; Parry *v.* Squair, 79 Ill. App. 324.

Massachusetts.— Central Bridge Corp. *v.* Butler, 2 Gray 130; Davis *v.* Jenney, 1 Metc. 221; Powers *v.* Russell, 13 Pick. 69.

New York.— Heinemann *v.* Heard, 62 N. Y. 448; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282.

South Carolina.— Charleston *v.* Brandt, Cheves 72.

Texas.— Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794.

See 20 Cent. Dig. tit. "Evidence," § 117.

64. *Kentucky.*— Wall *v.* Hill, 1 B. Mon. 290, 36 Am. Dec. 578.

Massachusetts.— Phipps *v.* Mahon, 141 Mass. 471, 5 N. E. 835.

New York.— Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282.

Texas.— Clark *v.* Hills, 67 Tex. 141, 148, 2 S. W. 356.

Wisconsin.— Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 13, 31 N. W. 164.

See 20 Cent. Dig. tit. "Evidence," § 117.

65. Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 72, 51 N. W. 140; Long *v.* Long, 44 Mo. App. 141; Haines *v.* Merrill Trust Co., 56 N. J. L. 312, 28 Atl. 796.

66. Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; Barber's Appeals, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321.

67. Pickup *v.* Thames, etc., Mar. Ins. Co.,

inference of fact which the law assumes to be correct, establishes, in the absence of evidence to the contrary, a *prima facie* case and thereby sustains the burden of evidence on the point which it covers,[68] it is frequently said that presumptions of law shift the burden of proof,[69] meaning the burden of evidence; but no special function, however, in this regard attaches to a presumption of law. Any substitute for legal evidence which regulates the burden of evidence or establishes a *prima facie* case produces the same result. Among these substitutes for evidence are judicial admissions,[70] stipulations,[71] rules of substantive law,[72] and statutory regulations prescribing what shall constitute *prima facie* evidence of specified facts.[73] On the position of the burden of proof, properly so called, the existence of any particular inference of fact can have no effect, even should it constitute a *prima facie* case;[74] or should further proof be excused by a rule of law.[75]

3 Q. B. D. 594, 4 Aspin. 43, 47 L. J. Q. B. 749, 39 L. T. Rep. N. S. 341, 26 Wkly. Rep. 689; Hingeston *v.* Kelly, 18 L. J. Exch. 360; *In re* Banbury Peerage Case, 1 Sim. & St. 153, 24 Rev. Rep. 159, 1 Eng. Ch. 153.

68. See *supra*, III, A, B.

69. *Alabama.*— Haney *v.* Conoly, 57 Ala. 179; Tarvers *v.* Boykin, 6 Ala. 353.

California.— Ficken *v.* Jones, 28 Cal. 618; Thompson *v.* Lee, 8 Cal. 275.

Georgia.—Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624.

Illinois.— Kitner *v.* Whitlock, 88 Ill. 513; Hartford L., etc., Ins. Co. *v.* Gray, 80 Ill. 28; Myatt *v.* Walker, 44 Ill. 485.

Indiana.—Unthank *v.* Henry County Turnpike Co., 6 Ind. 125.

Iowa.— Nicodemus *v.* Young, 90 Iowa 423, 57 N. W. 906; McMullan *v.* Mackenzie, 2 Greene 368.

Kentucky.— See also Higdon *v.* Higdon, 6 J. J. Marsh. 48.

Louisiana.— Beard's Succession, 14 La. Ann. 121.

Maine.— Halley *v.* Webster, 21 Me. 461.

Maryland.— Rosenthal *v.* Maryland Brick Co., 61 Md. 590; Owens *v.* Collinson, 3 Gill & J. 25.

Michigan.— Hynes *v.* Hickey, 109 Mich. 188, 66 N. W. 1090; Walker *v.* Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187.

Minnesota.— Youn *v.* Lamont, 56 Minn. 216, 57 N. W. 478; Pratt *v.* Beaupre, 13 Minn. 187.

Missouri.— State *v.* Mastin, 103 Mo. 508, 15 S. W. 529; Paramoer *v.* Lindsey, 63 Mo. 63.

New Hampshire.— Nutting *v.* Herbert, 37 N. H. 346; Pettes *v.* Bingham, 10 N. H. 514.

New Jersey.— Hill *v.* Beach, 12 N. J. Eq. 31.

New York.— Bayliss *v.* Cockcroft, 81 N. Y. 363; Brown *v.* Klock, 1 Silv. Supreme 273, 5 N. Y. Suppl. 245; Sowarby *v.* Russell, 6 Rob. 322, 4 Abb. Pr. (N. S.) 238.

Tennessee.— Robertson *v.* Branch, 3 Sneed 506; Foster *v.* Jordan, 2 Swan 476.

Texas.— Wichita Land, etc., Co. *v.* Ward, 1 Tex. Civ. App. 307, 21 S. W. 128.

West Virginia.— Maurice *v.* Devol, 23 W. Va. 247.

Wisconsin.— Drummond *v.* Huyssen, 46 Wis. 188, 50 N. W. 590.

United States.— Lawrence *v.* Minturn, 17 How. 100, 58 L. ed. 58; Fowler *v.* Byrd, 9 Fed. Cas. No. 4,999*a*, Hempst. 213; Gilleland *v.* Martin, 10 Fed. Cas. No. 5,433, 3 McLean 490.

England.— See Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589.

See 20 Cent. Dig. tit. "Evidence," § 109.

Pseudo-presumptions.— The same effect in shifting the burden of evidence is produced by the rules of administration which establish a *prima facie* case or substantially determine who has the burden of evidence. See *infra*, V, C.

70. See *infra*, IV, C.

71. See, generally, STIPULATIONS.

72. For example the rule that a person who receives an advantage from one to whom he stands in a confidential relation and who has been guided by his advice has the burden of showing that there has been no abuse of confidence. See, generally, TRUSTS; and cross-references *supra*.

73. See cross-references *supra*, 834; and CONSTITUTIONAL LAW, 8 Cyc. 925.

74. *Connecticut.*— Pease *v.* Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.

Illinois.— Jackson Paper Mfg. Co. *v.* Commercial Nat. Bank, 99 Ill. App. 108.

Maine.— Tarbox *v.* Eastern Steamboat Co., 50 Me. 339; State *v.* Flye, 26 Me. 312.

Massachusetts.—Holmes *v.* Hunt, 122 Mass. 505, 514, 23 Am. Rep. 381; Nichols *v.* Munsel, 115 Mass. 567; Brown *v.* King, 5 Metc. 173.

Missouri.— J. D. Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240.

New Hampshire.— Blodgett *v.* Cummings, 60 N. H. 115.

New York.— Heinemann *v.* Heard, 62 N. Y. 448 [*reversing* 2 Hun 324, 4 Thomps. & C. 666].

Texas.— Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356.

England.— Pickup *v.* Thames, etc., Mar. Ins. Co., 3 Q. B. D. 594, 4 Aspin. 43, 47 L. J. Q. B. 749, 39 L. T. Rep. N. S. 341, 26 Wkly. Rep. 689.

See 20 Cent. Dig. tit. "Evidence," § 109.

As to references of fact see *infra*, V, A.

75. New York L. Ins. Co. *v.* La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 1.

3. PROOF OF NEGATIVE FACTS. The party whose contention requires proof of a negative fact has the burden of evidence to prove that fact.[76] In deciding, however, what *quantum* of evidence shall be deemed sufficient, the practical limitations on proof imposed by the nature of the subject-matter or the relative situation of the parties will be considered,[77] and the burden of evidence will be sustained by proof which renders probable the existence of the negative fact;[78] circumstantial evidence being sufficient[79] and nothing in the nature of a demonstration being required.[80]

4. PROOF OF FACTS KNOWN TO OTHER PARTY. Where the party who has not the general burden of proof possesses positive and complete knowledge concerning

76. *Arizona.*— Territory *v.* Turner, (1894) 37 Pac. 368.

California.— Kelley *v.* Owens, (1892) 30 Pac. 596, that a certain mechanical process would not produce steel.

District of Columbia.— Kilbourn *v.* Latta, 18 D. C. 80, non-receipt of profits.

Georgia.— Weaver *v.* State, 89 Ga. 639, 15 S. E. 840 (non-payment of a tax); Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624 (that one has not done his duty).

Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 [*reversing* 19 Ill. App. 241] (no notice); Beardstown *v.* Virginia, 76 Ill. 34 (unqualified voter).

Indiana.— Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453 (no divorce); Goodwin *v.* Smith, 72 Ind. 113, 37 Am. Rep. 144 (that one is not in the habit of becoming intoxicated).

Iowa.— State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Louisiana.— Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164 (that a person made no additional deposits in a bank); Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715 (no alluvium deposited).

Maine.— Little *v.* Thompson, 2 Me. 228, lack of consent.

Massachusetts.— Com. *v.* Locke, 114 Mass. 288 (no legal authority to sell spirituous liquors); Com. *v.* Samuel, 2 Pick. 103.

Mississippi.— Kerr *v.* Freeman, 33 Miss. 292, non-execution of deed.

Missouri.— State *v.* Hirsch, 45 Mo. 429, that goods sold were not the growth, produce, or manufacture of the state. See also State *v.* Melton, 8 Mo. 417.

New York.—Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430, 32 N. E. 239 (no indebtedness); People *v.* Pease, 27 N. Y. 45, 63, 84 Am. Dec. 242 (voter not naturalized); People *v.* Meyer, 26 Misc. 117, 56 N. Y. Suppl. 1097 (absence of authority).

Pennsylvania.— Lenig *v.* Eisenhart, 127 Pa. St. 59, 17 Atl. 684, defendant not a relative or creditor.

Rhode Island.— State *v.* Read, 12 R. I. 135.

Vermont.— Thayer *v.* Viles, 23 Vt. 494, lack of title.

United States.— Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 317, 8 S. Ct. 131, 31 L. ed. 182, fictitious grantees.

England.— Doe *v.* Whitehead, 8 A. & E. 571, 2 Jur. 493, 7 L. J. Q. B. 250, 3 N. & P. 557, W. W. & H. 521, 35 E. C. L. 736 [*followed* in Toleman *v.* Portbury, L. R. 5 Q. B. 288, 39 L. J. Q. B. 136, 22 L. T. Rep. N. S. 33, 18 Wkly. Rep. 579; Wedgwood *v.* Hart, 2 Jur. N. S. 288; Price *v.* Worwood, 4 H. & N. 512, 5 Jur. N. S. 472, 28 L. J. Exch. 329, 7 Wkly. Rep. 506] (failure to insure); Calder *v.* Rutherford, 3 B. & B. 302, 7 Moore C. P. 158, 7 E. C. L. 743; Rex *v.* Rogers, 2 Campb. 654; Rex *v.* Hazy, 2 C. & P. 458, 12 E. C. L. 673; Rex *v.* Jarvis, 1 East 643 note.

Canada.— Reg. *v.* Howarth, 1 Can. Cr. Cas. 243; Mimandre *v.* Allard, 14 L. C. Rep. 154.

See 20 Cent. Dig. tit. "Evidence," § 114.

77. In Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 317, 8 S. Ct. 131, 31 L. ed. 182, Justice Matthews, after remarking that it is "sometimes said that a negative is incapable of proof," but that "this is not a maxim of law," quotes with approval Chamberlayne Best Ev. § 270, as follows: "When the negative ceases to be a simple one — when it is qualified by time, place, or circumstance — much of this objection is removed: and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative."

78. *California.*— Kelley *v.* Owens, (1892) 30 Pac. 596.

Georgia.—Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624.

Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 [*reversing* 19 Ill. App. 241]; Beardstown *v.* Virginia, 76 Ill. 34.

Indiana.— Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453.

Louisiana.— Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164; Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715.

Missouri.— State *v.* Hirsch, 45 Mo. 429.

Vermont.— Thayer *v.* Viles, 23 Vt. 494.

United States.—U. S. *v.* Southern Colorado Coal, etc., Co., 18 Fed. 273, 5 McCrary 563.

England.— Calder *v.* Rutherford, 3 B. & B. 302, 7 Moore C. P. 158, 7 E. C. L. 743.

See 20 Cent. Dig. tit. "Evidence," § 116.

79. Com. *v.* Locke, 114 Mass. 288.

80. Kelley *v.* Owens, (Cal. 1892) 30 Pac. 596; Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164; Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715; Thayer *v.* Viles, 23 Vt. 494.

the existence of facts which the party having that burden is called upon to negative,[81] or where for any reason the evidence to prove a fact is chiefly if not entirely within the control of the adverse party,[82] it has been held that the burden of proof, meaning the burden of evidence, is on the party who knows or has special opportunity for knowing the fact,[83] even in criminal cases,[84] although he is obliged to go no further than necessity requires.[85] It is, however, entirely anomalous that mere difficulty in discharging a burden of making proof should under all circumstances and to any extent displace it.[86] As a matter of principle the difficulty only relieves the party having the burden of evidence from the necessity of creating positive conviction entirely by his own testimony. Should he produce the evidence in his power its probative effect is enhanced by the silence of his opponent.[87] Conversely, where the party on whom rests the burden of evidence as to a particular fact has the essential documents or evidence within his control, a peculiar clearness of proof is demanded,[88] although the fact be negative.[89] Ambiguity, concealment, or evasion react with peculiar force on a pleader who asserts a fact and fails to produce the evidence which if his assertion were true would be in his possession.[90]

That defendant had no title to certain lands is sustained *prima facie* by unsuccessful search for title in the public records. Thayer *v.* Viles, 23 Vt. 494.

81. Facts of this nature are a license to practice medicine (People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; Williams *v.* People, 121 Ill. 84, 11 N. E. 881; People *v.* Nyce, 34 Hun (N. Y.) 298), to peddle merchandise (Rex *v.* Smith, 3 Burr. 1475), and to sell intoxicating liquor (see, generally, INTOXICATING LIQUORS).

82. State *v.* Arnold, 35 N. C. 184, age.

83. *Alabama.*— Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 2 So. 81, plaintiff's age. See also Carroll *v.* Malone, 28 Ala. 521.

Arkansas.— Flower *v.* State, 39 Ark. 209; Williams *v.* State, 35 Ark. 430; Hopper *v.* State, 19 Ark. 143.

California.— See Dirks *v.* California Safe Deposit, etc., Co., 136 Cal. 84, 68 Pac. 487 (construing Cal. Code Civ. Proc. § 1869); Kelley *v.* Owens, (1892) 30 Pac. 596.

Illinois.— Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199; Robinson *v.* Robinson, 51 Ill. App. 317; People *v.* Nedrow, 16 Ill. App. 192.

Louisiana.— Lovell *v.* Payne, 30 La. Ann. 511; Bowman *v.* McElroy, 15 La. Ann. 663; Rugely *v.* Gill, 15 La. Ann. 509.

Massachusetts.— See Thayer *v.* Connor, 5 Allen 25.

United States.— U. S. *v.* Southern Colorado Coal, etc., Co., 18 Fed. 273, 5 McCrary 563.

England.— Borthwick *v.* Carruthers, 1 T. R. 648, non-age.

Canada.— Simpson *v.* Raymond, 3 Rev. de Jur. 511; McKinnon *v.* Burrows, 3 U. C. Q. B. O. S. 114.

See 20 Cent. Dig. tit. "Evidence," § 115.

84. See CRIMINAL LAW, 12 Cyc. 381.

Historically the rule arose under the practical construction given in early English cases to the game laws, relieving the prosecution from the necessity of negativing in evidence the numerous exceptions to the operation of the statute; the expedient being adopted of ruling that the burden of proof, meaning burden of evidence, was on defendant to show a justification if he had one. Thayer Prelim. Treat. Ev. 359. See Rex *v.* Turner, 5 M. & S. 206.

85. Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199; People *v.* Nyce, 34 Hun (N. Y.) 298.

The trial judge has a liberal discretion in determining when a party may rest for the time being, and when the other may be called on to explain. Thayer Prelim. Treat. Ev. 370.

86. Anderson *v.* Suggs, 42 Ga. 265; Laing *v.* Sherley, (Tex. Civ. App. 1901) 61 S. W. 532; Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182; Doe *v.* Whitehead, 8 A. & E. 571, 2 Jur. 493, 7 L. J. Q. B. 250, 3 N. & P. 557, W. W. & H. 521, 35 E. C. L. 736; 1 Bonnier Traite des Preuves (5th ed.) 37.

87. *Alabama.*— McWilliams *v.* Phillips, 71 Ala. 80.

District of Columbia.— Kilbourn *v.* Latta, 18 D. C. 80.

Illinois.— Great Western R. Co. *v.* Bacon, 30 Ill. 347, 83 Am. Dec. 199.

Massachusetts.— Com. *v.* Locke, 114 Mass. 288.

North Carolina.— State *v.* Morrison, 14 N. C. 299.

West Virginia.— Wells-Stone Mercantile Co. *v.* Truax, 44 W. Va. 531, 29 S. E. 1006.

England.— Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50; Elkin *v.* Jansen, 9 Jur. 353, 14 L. J. Exch. 201, 13 M. & W. 655.

See also *infra*, V, A, 6, f, g.

88. Brown *v.* Raisin Fertilizer Co., 124 Ala. 221, 26 So. 891; Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715.

89. Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182.

90. Brown *v.* Raisin Fertilizer Co., 124 Ala. 221, 26 So. 891; Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715. See *infra*, V, A, 6.

IV. ADMISSIONS.*

A. Definitions. "Admissions," in the law of evidence, have been defined as being concessions or voluntary acknowledgments made by a party [91] of the existence of certain facts,[92] and have been said to be direct or express,[93] implied or indirect,[94] or incidental,[95] and either judicial or extrajudicial, the former being such admissions as appear of record in the proceedings of a court.[96] More accurately regarded, they are statements by a party or someone identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary. "Admissions" have been distinguished from "confessions" in that the latter term is applied only in criminal cases, and by the fact that even in criminal cases it is properly applied only to acknowledgments of guilt.[97] The

91. Or by a person by whose statement or conduct he is legally bound. See *infra*, IV, ——.

92. Bouvier L. Dict.

Other definitions are: "A voluntary acknowledgment, confession, or concession of the existence of a fact or the truth of an allegation made by a party to the suit." Black L. Dict.

"An admission may be defined as a statement or act which amounts to the affirmance of some fact material to the issue, where such affirmance would be against the interest of the party making it." McKelvey Ev. 90.

"An admission is a statement oral or written, suggesting any inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding." Stephen Dig. Ev. art. 15.

93. "Direct, called also express, admissions are those which are made in direct terms." Bouvier L. Dict.

"An admission made openly and in direct terms." Anderson L. Dict.

94. "Implied admissions are those which result from some act or failure to act of the party." Bouvier L. Dict.

An implied admission "results from an act done or undone; as, from character assumed, from conduct or silence." Anderson L. Dict.

"Admissions may be expressed in language or in conduct. The former may be called 'direct,' the latter 'indirect,' admissions." McKelvey Ev. 91.

95. "Incidental admissions are those made in some other connection, or involved in the admission of some other fact." Bouvier L. Dict.

96. Black L. Dict.; Bouvier L. Dict.

Other definitions.— A "judicial or solemn admission" is one "so plainly made in pleadings filed, or in the progress of a trial, as to dispense with the stringency of some rule of practice." Anderson L. Dict.

"As to the different kinds of self-harming statements. In the first place, they are either 'judicial' or 'extra judicial,' — *in judicio* or *extra judicium* — according as they are made in the course of a judicial proceeding, or under any other circumstances." Best Ev. (Chamberlayne ed.) § 522.

"In the law of pleading and evidence, an admission is an acknowledgment that an allegation is true. It may be made extra-judicially, as where a person admits his indebtedness. An admission *in judicio* may be made by a party to an action either expressly by a notice or pleading, or impliedly by failure to deliver a pleading or to traverse an allegation made by his opponent; sometimes the parties agree to make admissions of facts or documents in order to save the expense of proving them." Rapalje & L. L. Dict.

"In addition to estoppels by deed, there are two classes of admissions which fall under this head of conclusive presumptions of law; namely, solemn admissions, or admissions *in judicio*, which have been solemnly made in the course of judicial proceedings, either expressly, and as a substitute for proof of the fact, or tacitly, by pleading; and unsolemn admissions, *extra judicium*, which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith. Of the former class are all agreements of counsel, dispensing with legal proof of facts." 1 Greenleaf Ev. § 27.

"Judicial admissions, or those made in court by the party's attorney, generally appear either of record, as in pleading, or in the solemn admission of the attorney, made for the purpose of being used as a substitute for the regular legal evidence of the fact at the trial, or in a case stated for the opinion of the Court." 1 Greenleaf Ev. § 205.

As to judicial admissions see *infra*, IV, C.

97. See CRIMINAL LAW, 12 Cyc. 418, 459. And see State *v.* Crowder, 41 Kan. 101, 21 Pac. 208; State *v.* Picton, 51 La. Ann. 624, 25 So. 375; Musgrave *v.* State, 28 Tex. App. 57, 11 S. W. 927; State *v.* Carr, 53 Vt. 37; 1 Greenleaf Ev. § 170 (where it is said: "In our law, the term 'admission' is usually applied to civil transactions, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term 'confession' being generally restricted to acknowledgments of guilt"); Stephen Dig. Ev. art. 21 (where a confession is defined as "an admission made at any time by a person charged with a crime, stating or suggesting the inference, that he committed that crime"). "The

* By Charles F. Chamberlayne (except E, *infra*). Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

weight and sufficiency of admissions as evidence is considered in another part of this title.[98]

B. Extrajudicial Admissions — 1. IN GENERAL. A voluntary,[99] and certain [1] statement, oral or written,[2] of the existence of any relevant [3] matter of fact [4] is competent evidence against the party by whom or by whose authority it is made, as a fact tending to show the truth of the statement.[5] Admissions made in civil may be used in criminal cases [6] and admissions made in criminal may be used in civil cases.[7] So also those made in equity may be used at law and *vice versa*.[8] Admissions are equally competent whether offered in real [9] or personal [10]

term 'admission' is usually applied to civil actions, and 'confession' to acknowledgments of guilt in criminal prosecutions. Where statements made by a defendant to an officer involve him civilly, they may be received as an admission against interest, even though they might be rejected as a confession in a criminal court." Notara *v.* De Kamalaris, 22 Misc. (N. Y.) 337, 340, 49 N. Y. Suppl. 216.

98. See *infra*, XVII. And see *infra*, IV, E.

99. See *infra*, IV, B, 3, c.

1. See *infra*, IV, B, 3, b.

2. See *infra*, IV, B, 4.

3. See *infra*, IV, B, 3, a.

4. **Existence of a particular fact must be** the subject of an admission in order to render the latter competent. Morgan *v.* Patrick, 7 Ala. 185. Admissions of matter of law, unless law and fact are inextricably mingled (Lewis *v.* Harris, 31 Ala. 689), are excluded as evidence (Morgan *v.* Patrick, 7 Ala. 185; Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Crump *v.* Gerock, 40 Miss. 765; Crokett *v.* Morrison, 11 Mo. 3; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; Colt *v.* Selden, 5 Watts (Pa.) 525; Powell *v.* Tarry, 77 Va. 250). See 20 Cent. Dig. tit. "Evidence," § 685.

Opinion.— Unless the fact that a party had a certain opinion at a particular time is competent upon other grounds (Hobart *v.* Plymouth County, 100 Mass. 159; Fowler *v.* Middlesex County Com'rs, 6 Allen (Mass.) 92), his expression of opinion is not admissible as evidence of a fact (Colt *v.* Selden, 5 Watts (Pa.) 525).

Admission of a relevant mental state is competent as evidence of the latter. Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287; Ford *v.* Savage, 111 Mich. 144, 69 N. W. 240; Dever *v.* Myshrall, 8 N. Brunsw. 354.

5. "If a party has chosen to talk about a particular matter, his statement is evidence against himself." Darby *v.* Ouseley, 1 H. & N. 1, 6, 2 Jur. N. S. 497, 25 L. J. Exch. 227, 4 Wkly. Rep. 463, per Pollock, C. B. See also Roche *v.* Llewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147; Geraghty *v.* Randall, 18 Colo. App. 194, 70 Pac. 767; Leyner *v.* Leyner, (Iowa 1904) 98 N. W. 628; Powers *v.* Powers, 78 S. W. 152, 25 Ky. L. Rep. 1468; Anderson *v.* Adams, 43 Oreg. 621, 74 Pac. 215; Wilson *v.* Wilson, 137 Pa. St. 269, 20 Atl. 644.

6. Reg. *v.* McLean, 17 N. Brunsw. 317. See CRIMINAL LAW, 12 Cyc. 418 *et seq.*

7. *Delaware.*— Hendle *v.* Geiler, (1895) 50 Atl. 632.

Maine.— Dunbar *v.* Dunbar, 80 Me. 152, 13 Atl. 578, 6 Am. St. Rep. 166.

New Jersey.— Patton *v.* Freeman, 1 N. J. L. 113.

New York.— Notara *v.* De Kamalaris, 22 Misc. 337, 49 N. Y. Suppl. 216.

Oregon.— Meyers *v.* Dillon, 39 Oreg. 581, 65 Pac. 867, 66 Pac. 814, holding, however, that the plea of guilty made in a criminal case does not have in a civil case the effect of a conclusive admission of essential facts which it had in a criminal proceeding.

Pennsylvania.— Shumaker *v.* Reed, 3 Pa. Dist. 45, 13 Pa. Co. Ct. 547.

United States.— Garman *v.* U. S., 34 Ct. Cl. 237.

Canada.— Fortier *v.* Sauvé, 4 Montreal Super. Ct. 30.

8. *Alabama.*— Spann *v.* Torbert, 130 Ala. 541, 30 So. 389; McLemore *v.* Nuckolls, 37 Ala. 662; McGowen *v.* Young, 2 Stew. 276.

District of Columbia.— Beale *v.* Brown, 6 Mackey 574.

Georgia.— Gordon *v.* Green, 10 Ga. 534.

Indiana.— Holland *v.* Spell, 144 Ind. 561, 42 N. E. 1014; McNutt *v.* Dare, 8 Blackf. 35.

Kentucky.— Ring *v.* Gray, 6 B. Mon. 368; Eldridge *v.* Duncan, 1 B. Mon. 101; Roberts *v.* Tennell, 3 T. B. Mon. 247; Rees *v.* Lawless, 4 Litt. 218.

Ohio.— Earl *v.* Shoulder, 6 Ohio 409.

Virginia.— Hunter *v.* Jones, 6 Rand. 541.

Canada.— Doe *v.* Ross, 5 N. Brunsw. 346.

See 20 Cent. Dig. tit. "Evidence," § 714.

9. *Alabama.*— Allred *v.* Kennedy, 74 Ala. 326.

Massachusetts.— Graves *v.* Graves, 3 Metc. 167; Barnard *v.* Pope, 14 Mass. 434, 7 Am. Dec. 225.

New Hampshire.— Perkins *v.* Towle, 59 N. H. 583.

New York.— McCoon *v.* Smith, 3 Hill 147, 38 Am. Dec. 623.

North Carolina.— Curlee *v.* Smith, 91 N. C. 172.

Tennessee.— Spears *v.* Walker, 1 Head 166; Frazier *v.* Basset, 1 Overt. 297.

Texas.— Flores *v.* Maverick, (Civ. App. 1894) 26 S. W. 316.

10. *Georgia.*— Munnerlyn *v.* Augusta Sav. Bank, 94 Ga. 356, 21 S. E. 575; Roberts *v.* Neal, 62 Ga. 163.

Kansas.— Pope *v.* Bowzer, 1 Kan. App. 727, 41 Pac. 1048.

actions or in probate[11] or divorce[12] proceedings. Testimony of a party on a trial may be used against him on a subsequent trial of the same case.[13] A party cannot ordinarily put his own declarations in evidence,[14] nor are they made admissions of the other party merely by being communicated to him,[15] unless his conduct in connection with such a communication should itself be a relevant fact.[16] An oral admission may be proved by any one who heard it,[17] unless it was a legally privileged communication to the witness,[18] and the fact that a statement is intended for private or confidential use[19] does not exclude it. The weight and sufficiency of extrajudicial admissions is considered in a subsequent section.[20]

2. By and to Whom Made. An admission may be made either by a party himself or by a person for whose statements he is legally responsible.[21] It need not be made by one who is in every respect *sui juris*.[22] An admission may be made to any person.[23]

Minnesota.— Olson *v.* Swensen, 53 Minn. 516, 55 N. W. 596.

Missouri.— Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39; State *v.* Henderson, 86 Mo. App. 482.

New Jersey.— Glenn *v.* Garrison, 17 N. J. L. 1.

New York.— Kimball *v.* Huntington, 10 Wend. 675, 25 Am. Dec. 590.

Tennessee.— Miller *v.* Denman, 8 Yerg. 233.

Texas.— Bruce *v.* Laing, (Civ. App. 1901) 64 S. W. 1019; Extence *v.* Stewart, (Civ. App. 1894) 26 S. W. 896; Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405.

Vermont.— Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569.

11. *In re* Bramberry, 156 Pa. St. 628, 27 Atl. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594.

12. Gardner *v.* Gardner, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. Rep. 924.

13. White *v.* Collins, 90 Minn. 165, 95 N. W. 765; Sternbach *v.* Friedman, 75 N. Y. App. Div. 418, 78 N. Y. Suppl. 318; Egyptian Flag Cigarette Co. *v.* Comisky, 40 Misc. (N. Y.) 236, 81 N. Y. Suppl. 673.

14. Shively *v.* Eureka Tellurium Gold-Min. Co., 129 Cal. 293, 61 Pac. 939; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Ganton *v.* Size, 22 U. C. Q. B. 473.

15. St. John *v.* O'Connel, 7 Port. (Ala.) 466; Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235.

16. See *infra*, IV, B, 7.

17. Calvert *v.* Friebus, 48 Md. 44; Allen *v.* Hall, 64 Nebr. 256, 89 N. W. 803; Egyptian Flag Cigarette Co. *v.* Comisky, 40 Misc. (N. Y.) 236, 81 N. Y. Suppl. 673; Miller *v.* Wood, 44 Vt. 378.

18. Privileged communications to attorneys, physicians, etc., see Witnesses.

19. Crain *v.* Jacksonville First Nat. Bank, 114 Ill. 516, 2 N. E. 486.

20. See *infra*, XVII.

21. *Arkansas.*— Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425.

Connecticut.— White *v.* Reed, 15 Conn. 457; Dwight *v.* Brown, 9 Conn. 83.

Florida.— Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847.

Georgia.— Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898; Churchman *v.* Robinson, 93 Ga. 731, 20 S. E. 215; Reeves *v.* Matthews, 17 Ga. 449.

Indiana.— Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577.

Iowa.— Butterfield *v.* Kirtley, 115 Iowa 207, 88 N. W. 371.

Kentucky.— Marysville, etc., R. Co. *v.* Sparks, 14 Ky. L. Rep. 671.

Massachusetts.— Green *v.* Gould, 3 Allen 465; Davis *v.* Spooner, 3 Pick. 284.

Michigan.— Ford *v.* Savage, 111 Mich. 144, 69 N. W. 240; Hunt *v.* Strew, 33 Mich. 85.

Missouri.— Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715; Hitchcock *v.* Baughan, 36 Mo. App. 216.

New Hampshire.— Carr *v.* Griffin, 44 N. H. 510.

New York.— Laidlaw *v.* Sage, 2 N. Y. App. Div. 374, 37 N. Y. Suppl. 770.

Texas.— Keesey *v.* Old, 82 Tex. 22, 17 S. W. 928; Buzzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138; Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669.

Utah.— Boyle *v.* Ogden City, 24 Utah 443, 68 Pac. 153.

See also *infra*, IV, D.

22. **Infants.**— Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 (child six years old, but admission to be weighed with great caution); Hamblett *v.* Hamblett, 6 N. H. 333; Haile *v.* Lillie, 3 Hill (N. Y.) 149.

Insane persons.— In Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239, 245, although the court said that "it could scarcely be contended that in any case the ravings of a maniac should be received as his admissions of a fact against his interest," it was held that the admissions of a person of unsound mind who is under guardianship as incapable of managing his estate are not necessarily incompetent evidence without reference to his actual mental state.

Married woman.— McCafferty *v.* Heritage, 5 Houst. (Del.) 220; Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898; Lasselle *v.* Brown, 8 Blackf. (Ind.) 221; Morrell *v.* Cawley, 17 Abb. Pr. (N. Y.) 76.

Spendthrift under guardianship.— Hoit *v.* Underhill, 10 N. H. 220, 34 Am. Dec. 148; McNight *v.* McNight, 20 Wis. 446.

23. Adams *v.* Eartherly Hardware Co., 78 Ga. 485, 3 S. E. 430; Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270; Secor *v.* Pestana, 37 Ill. 525; Burke *v.*

3. Relevancy, Certainty, and Voluntary Character — a. Relevancy. It is essential to admissibility that the statement offered should supply the place of a relevant fact in a party's burden of evidence,[24] at the time when the evidence is offered.[25] The statement may be excluded for remoteness in point of time,[26] or because it relates to a fact not included in the issue or relevant to it.[27]

b. Certainty. An admission should possess the same degree of certainty as would be required in the evidence which it represents, and mere conjectures,[28] suggestions as to what might have happened if certain circumstances had not occurred,[29] what was the understanding, and the like,[30] are not competent.[31] But it is not essential that the statement should be absolutely precise.[32] Nor is it

Hindman, 70 Ill. App. 496; Douglass *v.* Leonard, 17 N. Y. Suppl. 591: Abbott *v.* Pratt, 16 Vt. 626. In Reed *v.* McCord, 160 N. Y. 330, 341, 54 N. E. 737, 740, the rule was stated to be: "In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever or to whomsoever made."

24. *Georgia.*— Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

Illinois.— Jameson *v.* Conway, 10 Ill. 227; Mason *v.* Park, 4 Ill. 532.

Louisiana.— Hackenburg *v.* Gartskamp, 30 La. Ann. 898.

Missouri.— Mulliken *v.* Greer, 5 Mo. 489.

Nebraska.— Hooper *v.* Browning, 19 Nebr. 420, 27 N. W. 419.

Pennsylvania.— Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661.

See 20 Cent. Dig. tit. "Evidence," § 687.

Statements by way of impeachment.— A somewhat looser test of relevancy is adopted where a party's statement is not offered as independent proof but to discredit his testimony by showing that he has made prior statements on a material point inconsistent therewith. Proof of these statements is very frequently allowed a wide range. Skillman *v.* Leverich, 11 La. 517; Lord *v.* Bigelow, 124 Mass. 185; Glenn *v.* Lehnen, 54 Mo. 45; Wiseman *v.* St. Louis, etc., R. Co., 30 Mo. App. 516; Galveston, etc., R. Co. *v.* Eckles, (Tex. Civ. App. 1899) 54 S. W. 651; Arnold *v.* Caldwell, 1 Manitoba 81, 155. But the range is not so extended as to cover clearly irrelevant facts. Zonker *v.* Cowan, 84 Ind. 395. And see, generally, Witnesses. Admissible inconsistent statements of a party are not as in case of an ordinary witness simply destructive of the effect of the testimony of the witness; but they may be used as admissions whenever they cover a fact which is included in the burden of evidence of his opponent. Copeland *v.* Taylor, 99 Mass. 613; Fowler *v.* Middlesex County Com'rs, 6 Allen (Mass.) 92. Hence it is not necessary to lay the foundation usually required in case of an ordinary witness when an inconsistent statement of a party is to be introduced in evidence. Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110; Simpson *v.* Edens, 14 Tex. Civ. App. 235, 38 S. W. 474.

25. Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126; Willard *v.* Horsey, 22 Md. 89.

26. Printup *v.* Patton, 91 Ga. 422, 18 S. E. 311; Bryant *v.* Crosby, 40 Me. 9; Smith *v.* Emerson, 43 Pa. St. 456; Byam *v.* Eddy, 4 Fed. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666.

27. Ditch *v.* Wilkinson, 10 La. 201; Reed *v.* McCourt, 41 N. Y. 435. Such as weakness of defendant's title in ejectment. McMaster *v.* Stewart, 11 La. Ann. 546. But the rule of exclusion does not apply where plaintiff's record title is conceded and defendant in ejectment sets up an independent title acquired by acts *in pais*, in which case defendant's statements in disparagement of his title are competent (Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854, 23 Ky. L. Rep. 238); and no good reason is perceived why defendant's admission of the validity of plaintiff's title should not be received *quantum valebit*, or why the statements of plaintiff as to the weakness of his own title should not be competent (Clarke *v.* Vankirk, 14 Serg. & R. (Pa.) 354. But see Paull *v.* Mackey, 3 Watts (Pa.) 110).

28. Fred Oppermann, Jr., Brewing Co. *v.* Pearson, 68 N. Y. App. Div. 637, 74 N. Y. Suppl. 187.

Fact of damage.— A statement by a party that he will claim no damages is not an admission that he has suffered none. Driscoll *v.* Taunton, 160 Mass. 486, 36 N. E. 495.

Admission of indebtedness.— The statements of a partner, when informed that a balance sheet taken from the firm's books showed him to be indebted in a certain sum, that if they were in the handwriting of the bookkeeper who as a matter of fact made them they must be correct could not of itself amount to an admission of a specific indebtedness appearing thereon, the sheets not being present at the time. Safe Deposit, etc., Co. *v.* Turner, (Md. 1903) 55 Atl. 1023.

29. Heinkin *v.* Barbrey, 40 Ga. 249; McHugh *v.* Fitzgerald, 103 Mich. 21, 61 N. W. 354; Cook *v.* Davis, Dudley (S. C.) 67.

30. Mittnacht *v.* Bache, 16 N. Y. App. Div. 426, 45 N. Y. Suppl. 81. But see Smith *v.* Eckford, (Tex. Sup. 1891) 18 S. W. 210.

31. See also Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973.

32. In an action on a promissory note, where the signature was denied, defendant's admission, made in answer to an interrogatory filed by plaintiff, that he made a note "something of the purport" of the one declared on, was held sufficient for the consideration of the jury. Nichols *v.* Allen, 112 Mass. 23.

necessary that it should be a direct admission; it may be an indirect admission, as where it bears on the issue incidentally or circumstantially.[33]

c. Voluntary Character. An admission is not of sufficient probative weight to be competent unless it is voluntary.[34] But an admission is none the less voluntary because it was made by a witness testifying on a trial in court in obedience to compulsory process,[35] or during any other legal proceeding,[36] or because the declarant was in the custody of an officer.[37] A statement is admissible, although made in response to a false suggestion of fact.[38]

4. Oral or Written — a. Oral Admissions. Oral admissions of a party are competent evidence against him,[39] even if there is an admission in writing to the same effect,[40] such as a bill of exchange,[41] a promissory note,[42] a book entry,[43] or a written agreement;[44] and although a writing might be required to achieve the same result in another way.[45] Whether the competency of oral evidence is con-

33. Beattyville Coal Co. *v.* Haskins, 44 S. W. 363, 19 Ky. L. Rep. 1759; Cummin *v.* Smith, 2 Serg. & R. (Pa.) 440; Marshall *v.* Cliff, 4 Campb. 133; Rankin *v.* Horner, 16 East 191; Maltby *v.* Christie, 1 Esp. 340; Holt *v.* Squire, R. & M. 282, 21 E. C. L. 752; Berryman *v.* Wise, 4 T. R. 366.

Incidental admissions competent.—There is no difference between direct admissions and those which are incidental, as made in some other connection or involved in statements as to some other fact (Harrington *v.* Gable, 81 Pa. St. 406), between admissions as to facts which bear on the issue directly and those which bear, as it is said, circumstantially (Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748), or between statements relating to an entire transaction and those covering a single fact (Stansell *v.* Leavitt, 51 Mich. 536, 16 N. W. 892).

34. Truby *v.* Seybert, 12 Pa. St. 101.

Statements obtained by duress are not admissible, it is said. New Orleans City Bank *v.* Foucher, 9 La. 405; Scott *v.* Home Ins. Co., 21 Fed. Cas. No. 12,533, 1 Dill. 105; Tucker *v.* Barrow, 7 B. & C. 623, 14 E. C. L. 281, 3 C. & P. 85, 14 E. C. L. 463, 6 L. J. K. B. O. S. 121, M. & M. 139; Robson *v.* Alexander, 1 M. & P. 448, 17 E. C. L. 614. See also Carr *v.* Griffin, 44 N. H. 510. *Compare* Fidler *v.* McKinley, 21 Ill. 308, where admissions made under threat of personal injury were not excluded, but it was said that the jury should have been cautioned as to the weight to be given to them.

35. Newhall *v.* Jenkins, 2 Gray (Mass.) 562; McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123; Collett *v.* Keith, 4 Esp. 212. See also Collins *v.* Wilson, 39 S. W. 33, 18 Ky. L. Rep. 1049.

36. Before arbitrator.— Calvert *v.* Friebus, 48 Md. 44; Doe *v.* Evans, 3 C. & P. 219, 14 E. C. L. 536; Murray *v.* Gregory, 5 Exch. 468, 14 Jur. 555, 19 L. J. Exch. 355.

Before commissioner in bankruptcy.—Stockfleth *v.* De Tastet, 4 Campb. 10, 2 Rose 282, 15 Rev. Rep. 720, even though the proceeding be entirely irregular. See also Lilley *v.* Mutual Ben. L. Ins. Co., 92 Mich. 153, 52 N. W. 631; Congleton *v.* Schreifhofer, (N. J. Ch. 1903) 54 Atl. 144.

Before magistrate taking deposition.— McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123. Admission in a deposition will not be excluded, although the deposition was taken on insufficient notice. Carr *v.* Griffin, 44 N. H. 510.

37. Notara *v.* De Kamalaris, 22 Misc. (N. Y.) 337, 49 N. Y. Suppl. 216. To the contrary it has been held in England that any admission of a demand made by a person when he is arrested, and is ignorant whether he is bound by law to the payment of the demand or not, is inadmissible to charge him. Rouse *v.* Redwood, 1 Esp. 155.

38. Higgins *v.* Dellinger, 22 Mo. 397.

39. *Alabama.*— Lehman *v.* McQueen, 65 Ala. 570.

Iowa.— Leyner *v.* Leyner, 123 Iowa 185, 98 N. W. 628.

Kentucky.— Powers *v.* Powers, 78 S. W. 152, 25 Ky. L. Rep. 1468.

Mississippi.— Myer, etc., Hardware Co. *v.* Spann, (1903) 35 So. 177.

Oregon.— Anderson *v.* Adams, 43 Oreg. 621, 74 Pac. 215.

Pennsylvania.— Stewart *v.* Gleason, 23 Pa. Super. Ct. 325; Rindt's Estate, 2 Lehigh Val. L. Rep. 246.

United States.— Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453.

Oral admissions "are at best but secondary evidence of the facts admitted — a species of hearsay . . . and from their nature can only afford a presumption, more or less strong, according to the circumstances of the particular case, of the truth of the matters stated." Husbrook *v.* Strawser, 14 Wis. 403, 404, per Dixon, C. J.

40. Blackington *v.* Rockland, 66 Me. 332; Bayliss *v.* Cockcroft, 81 N. Y. 363; Singleton *v.* Barrett, 2 Cromp. & J. 368, 1 L. J. Exch. 134, 2 Tyrw. 409. See also Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.

41. Fryer *v.* Brown, R. & M. 145, 21 E. C. L. 720.

42. Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273; Dimon *v.* Keery, 54 N. Y. App. Div. 318, 66 N. Y. Suppl. 817.

43. Singleton *v.* Barrett, 2 Cromp. & J. 368, 1 L. J. Exch. 134, 2 Tyrw. 409; Jacob *v.* Lindsay, 1 East 460.

44. Newhall *v.* Holt, 4 Jur. 610, 9 L. J. Exch. 293, 6 M. & W. 662.

45. Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155.

fined to admissions of facts which may properly be proved or includes the contents of written instruments is a question upon which authorities are in conflict.[46] The existence of any facts which are legally competent at law or in equity to affect the operation of a written instrument may be established by oral admissions.[47] A competent oral admission may be made through an interpreter,[48] through a telephone operator,[49] or by means of the telephone itself.[50]

b. Written Admissions — (i) *In General.* Admissions may be written as well as oral. They may be contained in any writings,[51] including those which are customarily employed in mercantile affairs,[52] in proceedings in probate courts,[53]

The evidence is primary.— The written admission is of no higher grade than the oral, although under most circumstances of greater probative force; and therefore it is not necessary to produce or account for the writing itself. Fryer *v.* Brown, R. & M. 145, 21 E. C. L. 720.

46. See *infra*, IV, C, 3, f.

47. Harris *v.* Harris, 2 Harr. (Del.) 354 (non-payment of the consideration); Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513; Saunders *v.* Dunn, 175 Mass. 164, 55 N. E. 893; Schwartz *v.* Hersker, 140 Pa. St. 550, 21 Atl. 401; Fetrow *v.* Kochenour, 3 Brewst. (Pa.) 138.

48. Wright *v.* Maseras, 56 Barb. (N. Y.) 521.

49. The telephone conversation is competent, notwithstanding the fact that it was necessary to use the services of an intermediary (Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Oskamp *v.* Gadsden, 35 Nebr. 7, 52 N. W. 718, 37 Am. St. Rep. 428, 17 L. R. A. 440), and even though he has forgotten what was said (Sullivan *v.* Kuydendall, *supra*).

50. Miles *v.* Andrews, 153 Ill. 262, 38 N. E. 644; Wolfe *v.* Missouri, etc., R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; Globe Printing Co. *v.* Stahl, 23 Mo. App. 451; Stepp *v.* State, 31 Tex. Cr. 349, 20 S. W. 753. It is not necessary to prove affirmatively, certainly not in the first instance, that an answer over a telephone purporting to come from a party was actually sent by him (Globe Printing Co. *v.* Stahl, 23 Mo. App. 451), even though the party receiving the message cannot identify the voice (Wolfe *v.* Missouri, etc., R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539. See also Merrill *v.* Southwestern Tel., etc., Co., 31 Tex. Civ. App. 614, 73 S. W. 422), or the reporting witness heard but one side of the conversation and knew only by inference with whom it was being held (Miles *v.* Andrew, 153 Ill. 262, 38 N. E. 644).

51. *Alabama.*— Lewis *v.* Robertson, 100 Ala. 246, 14 So. 166, contract between defendant and a third person.

California.— Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147 (holding that the report of an accident to an employee, made by the employer to an insurance company insuring the employer against accidents to its employees, was admissible in an action against the employer for the injuries sustained, so far as it contained admissions of the employer as to matters material and relevant to the controversy); Gradwohl *v.* Harris, 29 Cal. 150.

Georgia.— Huntington *v.* Chisholm, 61 Ga. 270, exemption papers.

Kansas.— Home-Riverside Coal Min. Co. *v.* Fores, 64 Kan. 39, 67 Pac. 445, statements as to amount of coal mined.

Massachusetts.— Putnam *v.* Gunning, 162 Mass. 552, 39 N. E. 347.

Missouri.— Griggs *v.* Deal, 30 Mo. App. 152.

New York.— Bayliss *v.* Cockcroft, 81 N. Y. 363; Foster *v.* Beals, 21 N. Y. 247; Edwards *v.* Watertown, 59 Hun 620, 13 N. Y. Suppl. 309, newspaper article.

Oklahoma.— Miller *v.* Campbell Commission Co., 13 Okla. 75, 74 Pac. 507, statement in settlement of items of account.

Pennsylvania.— Lynch *v.* Troxell, 207 Pa. St. 162, 56 Atl. 413 (agreement between riparian owners admitting construction of a dam); Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

Texas.— Robertson *v.* Ephraim, 18 Tex. 118 (application for membership in beneficiary order); San Antonio, etc., R. Co. *v.* Stone, (Civ. App. 1901) 60 S. W. 461.

See 20 Cent. Dig. tit. "Evidence," § 754 *et seq.*

Custom-house entry.— Sworn entries in the custom-house of the quantity and value of goods imported by a party claiming the damages occasioned by fire under a policy of insurance, in a much larger amount than appears to have been imported during the period claimed for, are evidence to go to the jury on the measure of damages. Lazare *v.* Phœnix Ins. Co., 8 U. C. C. P. 136.

52. *Colorado.*— Denver, etc., R. Co. *v.* Wilson, 4 Colo. App. 355, 36 Pac. 67.

Illinois.— Webster Mfg. Co. *v.* Schmidt, 77 Ill. App. 49 (claim for injuries); Springer *v.* Chicago, 37 Ill. App. 206 (option contract).

Nebraska.— German Nat. Bank *v.* Leonard, 40 Nebr. 676, 684, 59 N. W. 107, book entries.

Pennsylvania.— Ege *v.* Medlar, 82 Pa. St. 86 (abstract of title); Siebelist *v.* Metropolitan L. Ins. Co., 19 Pa. Super. Ct. 221.

Wisconsin.— Merrill Nat. Bank *v.* Illinois, etc., Lumber Co., 101 Wis. 247, 77 N. W. 185, mercantile agency reports.

See 20 Cent. Dig. tit. "Evidence," § 754 *et seq.*

Book entries constituting admissions see *infra*, XIV.

53. *Indiana.*— Beal *v.* State, 77 Ind. 231, administrators' reports.

or in bankruptcy,[54] which the party has made or adopted[55] by some unequivocal act, such as revising them.[56] Some doubt exists as to the competency of written statements made not necessarily because of knowledge of their truth but for certain special purposes, such for example as returns made to municipal officers for purposes of taxation[57] or obituary notices.[58] The written statement is none the less competent because it is contained in a document which is not itself effective for the purpose for which it was made, either by reason of illegality,[59] or by reason of non-compliance with requirements of substantive law.[60] But where a document containing a statement has not been delivered, it may fairly be contended that the statement in effect never was made.[61] When it is sought to use a

Missouri.— Emmons *v.* Gordon, (Sup. 1893) 24 S. W. 146, (Sup. 1894) 25 S. W. 938; State *v.* Richardson, 29 Mo. App. 595, guardian's statements.

New Hampshire.— Morrill *v.* Foster, 33 N. H. 379, administrator's inventory.

Pennsylvania.— Miller *v.* Garrecht, 17 Lanc. L. Rev. 133, administrator's inventory.

Texas.— Hendricks *v.* Huffmeyer, (Civ. App. 1894) 27 S. W. 777, administrator's inventory.

See 20 Cent. Dig. tit. "Evidence," § 754 *et seq.*

54. Dupuy *v.* Harris, 6 B. Mon. (Ky.) 534 (inventory); Lyon *v.* Phillips, 106 Pa. St. 57 (bankruptcy records); Rankin *v.* Busby, (Tex. Civ. App. 1894) 25 S. W. 678 (bankruptcy schedule).

55. Rich *v.* Flanders, 39 N. H. 304; Klatt *v.* N. C. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791; Reg. *v.* Geering, 18 L. J. M. C. 215.

56. Henkle *v.* Smith, 21 Ill. 238. See also Downs *v.* New York Cent. R. Co., 47 N. Y. 83.

57. Returns for taxation are indeed statements of the party, and good faith requires, it is said, that they be regarded as true. Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Wright *v.* Merriwether, 51 Ala. 183; Beckwith *v.* Talbot, 2 Colo. 639; Vernon Shell Road Co. *v.* Savannah, 95 Ga. 387, 22 S. E. 625; Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494; Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811; Sherman *v.* Hogland, 73 Ind. 472; Mifflin Bridge Co. *v.* Juniata County, 144 Pa. St. 365, 22 Atl. 896, 13 L. R. A. 431; Jones *v.* Cummins, 17 Tex. Civ. App. 661, 43 S. W. 854; Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465; Richardson *v.* Hitchcock, 28 Vt. 757. On the other hand it has not escaped judicial attention that tax lists are not, at least in all instances, compiled with the object of giving an exact list of property at its full value, that the declarant is often not a competent judge of value, and that consequently a liberal range of estimate may be consistent with entire good faith. These considerations have led many courts to reject these lists as evidence on the question of value. Swaim *v.* Swaim, 134 Ind. 596, 33 N. E. 792; Cincinnati, etc., R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571; German Mut. Ins. Co. *v.* Niewedde, 11 Ind. App. 624, 39 N. E. 534; Randidge *v.* Lyman, 124 Mass. 361; Com. *v.* Heffron, 102 Mass. 148; Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165; Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518; Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279; Railroad Co. *v.* Kell, (Tex. App. 1890) 16 S. W. 936; Gulf, etc., R. Co. *v.* Abney, 3 Tex. App. Civ. Cas. § 413. The foregoing is clearly a correct ruling where the valuation is made by a person other than the owner. San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522. And returns have been held incompetent as admissions for any purpose. Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705.

See 20 Cent. Dig. tit. "Evidence," § 759.

Independent relevancy.— It may be observed that tax lists are frequently said to contain a party's admissions when the real point is that the entries or admissions from such a list are circumstantial evidence that the party at a particular time claimed (Washburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Lefever *v.* Johnson, 79 Ind. 554; Painter *v.* Hall, 75 Ind. 208) or did not claim (Lefever *v.* Johnson, 79 Ind. 554; Whitfield *v.* Whitfield, 40 Miss. 352) to own certain property.

58. *In re* Hull, 117 Iowa 738, 746, 89 N. W. 979, where the court said: "Objection was made to the introduction in evidence of an obituary notice, published with the sanction of one of the contestants, reciting the intelligence and remarkable memory of testatrix during the latter part of her life. It is argued that this was an admission by the contestant that when this will was executed testatrix was of sound mind. It seems to us that this evidence was objectionable. . . . Such a notice does not purport to be, and is not understood as, a statement of facts from which any one is justified in drawing legal conclusions."

59. Iron Mountain, etc., R. Co. *v.* Stansell, 43 Ark. 275 (change tickets given in violation of statute); Indianapolis Chair Mfg. Co. *v.* Wilcox, 59 Ind. 429 (promissory note avoided by an infant); Bear *v.* Trexler, 3 Wkly. Notes Cas. (Pa.) 214 (note made on Sunday, covering an indebtedness due on account, admissible in an action on the account, as admission of the indebtedness).

60. Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666 (unsigned note); Lusk *v.* Throop, 89 Ill. App. 509 [*affirmed* in 189 Ill. 127, 59 N. E. 529] (not executed); Snyder *v.* Reno, 38 Iowa 329 (not executed).

61. Robinson *v.* Cushman, 2 Den. (N. Y.) 149. See also United Press *v.* A. S. Abell Co., 79 N. Y. App. Div. 550, 80 N. Y. Suppl.

written statement as an admission the "best evidence rule," so called, does not apply; and a copy of a letter for example is competent when identified without accounting for the original.[62]

(II) *Specialties.* A competent admission may be made in a sealed instrument, such as a bond,[63] a deed,[64] a release,[65] or an assignment of judgment.[66]

(III) *Promissory Notes.* A promissory note or an indorsement thereon may embody an admission of the amount lent[67] or paid[68] on the note.

(IV) *Letters.* Letters may constitute written admissions,[69] and to render them admissible in evidence it is not necessary that they shall have been sent to the party offering them,[70] nor that a letter to which they are replies shall be produced or accounted for;[71] and they are admissible even if, the sender being dead, the party receiving them cannot testify against his estate.[72] But the letters must be affirmatively shown otherwise than by regularity of business dealings[73] to have been written by the party against whom they are offered,[74] or by someone for whose act he is proved to be responsible,[75] either originally or by ratification.[76] A party is entitled to select such relevant statements in his adversary's letter as he chooses to rely upon, and other statements therein are not competent when self-serving,[77] except so far as reasonably necessary to explain the admissions.[78] Letters addressed to a party are not competent evidence against him,[79] unless they are shown to have been received by him,[80] and in connection with his reply,[81]

454. But *compare* Medway *v.* U. S., 6 Ct. Cl. 421.

62. Kelly *v.* McKenna, 18 Mich. 381. See *infra*, VIII.

63. Hunt *v.* Card, 94 Me. 386, 47 Atl. 921; Byam *v.* Eddy, 4 Fed. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666.

64. Boulter *v.* Peplow, 9 C. B. 493, 14 Jur. 248, 19 L. J. C. P. 190, 67 E. C. L. 493.

65. Travis *v.* Barger, 24 Barb. (N. Y.) 614.

66. Hennessy's Estate, 4 L. T. N. S. (Pa.) 9.

67. Colgin *v.* State Bank, 11 Ala. 222, amount for which it was discounted by the plaintiff bank.

68. Lloyd *v.* McClure, 2 Greene (Iowa) 139; Jobe *v.* Weaver, 77 Mo. App. 665; Mills *v.* Davis, 41 Hun (N. Y.) 415.

69. *Colorado.*— Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.

Indiana.— Huston *v.* Stewart, 64 Ind. 388; Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

Iowa.— Winebrenner *v.* Brunswick-Balke-Collender Co., 82 Iowa 741, 47 N. W. 1089; Williams *v.* Soutter, 7 Iowa 435.

Missouri.— Higgins *v.* Dellinger, 22 Mo. 397.

New Hampshire.— Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295.

New York.— Lewis Pub. Co. *v.* Lenz, 86 N. Y. App. Div. 451, 83 N. Y. Suppl. 841.

Pennsylvania.— Martin *v.* Kline, 157 Pa. St. 473, 27 Atl. 753.

Texas.— Bates *v.* Evans, 2 Tex. App. Civ. Cas. § 211.

United States.— Kirk *v.* Williams, 24 Fed. 437.

England.— Fairlie *v.* Denton, 8 B. & C. 395, 15 E. C. L. 198, 3 C. & P. 103, 14 E. C. L. 472, 2 M. & R. 353; Steuart *v.* Gladstone, 47 L. J. Ch. 423, 38 L. T. Rep. N. S. 557, 26 Wkly. Rep. 657.

Canada.— Wilmott *v.* Boulton, 1 Grant Ch. (U. C.) 479; Macdonald *v.* Wood, 8 U. C. C. P. 426.

See 20 Cent. Dig. tit. "Evidence," §§ 756, 757.

70. Downey *v.* Taylor, (Tex. Civ. App. 1898) 48 S. W. 541; Little *v.* Keyes, 24 Vt. 118; Mulhall *v.* Keenan, 18 Wall. (U. S.) 342, 21 L. ed. 808; Medway *v.* U. S., 6 Ct. Cl. 421.

71. Wiggin *v.* Boston, etc., Co., 120 Mass. 201; Barrymore *v.* Taylor, 1 Esp. 326; Mortimer *v.* Wright, 4 Jur. 465, 9 L. J. Exch. 158, 6 M. & W. 482.

72. Harriman *v.* Jones, 58 N. H. 328.

73. Stevens *v.* Equitable Mfg. Co., (Tex. Civ. App. 1902) 67 S. W. 1041; Barton *v.* Hutchinson, 2 C. & K. 712, 61 E. C. L. 712.

74. Reg. *v.* Attwood, 20 Ont. 574.

75. Reyner *v.* Pearson, 4 Taunt. 662, 13 Rev. Rep. 723; Fairlie *v.* Hastings, 10 Ves. Jr. 123, 32 Eng. Reprint 791.

76. Neely *v.* Naglee, 23 Cal. 152.

By delivering the letter to a third person the original recipient does not impliedly adopt the statements contained in it. Cottle *v.* Champion, 2 Peake 45.

77. Leslie *v.* Morrison, 16 U. C. Q. B. 130.

78. "The doctrine in such cases is that the admission, with the accompanying declaration, which serves as an answer to the admission, is to be received in evidence, and the answer is conclusive." Bailey *v.* Pardridge, 35 Ill. App. 121, 123, per Garnett, J. But see Lewis Pub. Co. *v.* Lenz, 86 N. Y. App. Div. 451, 83 N. Y. Suppl. 841.

79. People *v.* Colburn, 105 Cal. 648, 38 Pac. 1105; Kahl *v.* Jansen, 4 Taunt. 565; Langhorn *v.* Allnutt, 4 Taunt. 511, 13 Rev. Rep. 663.

80. Rex *v.* Huet, 2 Leach C. C. 956; Rex *v.* Hevey, 1 Leach C. C. 268.

81. Trischet *v.* Hamilton Mut. Ins. Co., 14 Gray (Mass.) 456; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Coates *v.*

his silence,[82] his indorsement,[83] or other conduct;[84] provided always that his conduct in connection with the statements of the letter presents a relevant fact.[85]

(v) *Memoranda.* Memoranda, even of an informal character,[86] and although intended only for private inspection,[87] may if sufficiently definite[88] constitute competent admissions, and even have a *prima facie* force.[89]

5. Offers or Agreements For Compromise — a. Offers in General. An offer to do something by way of compromise cannot be called an admission,[90] as it is made tentatively and hypothetically[91] to avoid controversy and save the expense of litigation.[92] Therefore the fact of an unaccepted offer of compromise is irrelevant on the issue of liability,[93] whether the offer be made by the party against

Bainbridge, 5 Bing. 58, 2 M. & P. 142, 6 L. J. C. P. O. S. 220, 15 E. C. L. 470.

82. Gaskill *v.* Skene, 14 Q. B. 664, 14 Jur. 597, 19 L. J. Q. B. 275, 68 E. C. L. 664.

83. Reg. *v.* Bernard, 1 F. & F. 240.

84. Keith [redacted] Electrical Engineering Co., 136 Cal. 178, 6[redacted] (construing Cal. Code Civ. Proc. [redacted]); Mulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384; McCallon *v.* Cohen, (Tex. Civ. App. 1897) 39 S. W. 973; Gaskill *v.* Skene, 14 Q. B. 664, 14 Jur. 597, 19 L. J. Q. B. 275, 68 E. C. L. 664; Reg. *v.* Barratt, 9 C. & P. 387, 38 E. C. L. 231.

Admissions by conduct see *infra*, IV, B, 6.

85. Reg. *v.* Hare, 3 Cox C. C. 247. See *supra*, IV, B, 3, a.

86. Conner *v.* Mt. Vernon Co., 25 Md. 55 (computation of horse-power attached to a contract); Harris *v.* Burley, 10 N. H. 171 (computation of interest on a note); Pendexter *v.* Carleton, 16 N. H. 482 (figures on a loose sheet of paper); Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767 (footings of an account).

87. Stannard *v.* Smith, 40 Vt. 513.

88. See supra, IV, B, 3, b.

89. Park *v.* Berczy, 8 U. C. C. P. 173.

90. West *v.* Smith, 101 U. S. 263, 25 L. ed. 809.

91. White *v.* Old Dominion Steamship Co., 102 N. Y. 661, 6 N. E. 289.

92. West *v.* Smith, 101 U. S. 263, 25 L. ed. 809.

A reason frequently assigned for rejecting offers of compromise is that public policy requires that a party shall be able to "buy his peace," without danger of being prejudiced should the effort fail. Perkins *v.* Concord R. Co., 44 N. H. 223; Pirie *v.* Wyld, 11 Ont. 422, 430; York County Corp. *v.* Toronto Gravel Road, etc., Co., 3 Ont. 584. Whatever may have been the influence of such a doctrine in establishing the rule it is not a satisfactory basis for it in the present state of the law; for the reasoning, if valid, would exclude evidence of statements as to independent facts made in connection with compromise negotiations.

To impeach witness.— An offer made by a father to compromise a claim for personal injuries on behalf of his infant child was held inadmissible to discredit the testimony of the former as to the circumstances attending the injury. Neal *v.* Thornton, 67 Vt. 221, 31 Atl. 296.

93. *Alabama.*— Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540; North Alabama Home Protection *v.* Whidden, 103 Ala. 203, 15 So. 567; Alexander *v.* Wheeler, 69 Ala. 332 (offer to compromise the pending suit, and agreement to abide by proposed survey of disputed boundary line); Kelly *v.* Brooks, 25 Ala. 523.

Arizona.— Davis *v.* Simmons, 1 Ariz. 25, 25 Pac. 535.

California.— Dennis *v.* Belt, 30 Cal. 247.

Colorado.— Holy Cross Gold Min., etc., Co. *v.* O'Sullivan, 27 Colo. 237, 60 Pac. 570; Chicago, etc., R. Co. *v.* Roberts, 26 Colo. 329, 57 Pac. 1076; Rankin *v.* Underwood, 9 Colo. App. 158, 47 Pac. 972.

Connecticut.— Fowles *v.* Allen, 64 Conn. 350, 30 Atl. 144; Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593; Stranahan *v.* East Haddam, 11 Conn. 507.

Georgia.— Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Thornton *v.* Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99; New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892; Emery *v.* Atlanta Real Estate Exch., 88 Ga. 321, 14 S. E. 556 (construing Code, § 3789); Montezuma *v.* Minor, 73 Ga. 484.

Idaho.—Kroetch *v.* Empire Mill Co., (1903) 74 Pac. 868; Sebree *v.* Smith, 2 Ida. (Hasb.) 359, 16 Pac. 915.

Illinois.— Chicago, etc., R. Co. *v.* Catholic Bishop, 119 Ill. 525, 10 N. E. 372; Matthiessen, etc., Zinc Co. *v.* Ferris, 72 Ill. App. 684; Harrison *v.* Trickett, 57 Ill. App. 515.

Indiana.—Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; Dailey *v.* Coons, 64 Ind. 545; Jennings County *v.* Verbarg, 63 Ind. 107; Halstead *v.* Coen, 31 Ind. App. 302, 67 N. E. 957.

Iowa.— Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973; Kassing *v.* Walter, (1896) 65 N. W. 832; Edward *v.* Turner, 9 Iowa 443.

Kansas.— Myers *v.* Goggerty, 10 Kan. App. 190, 63 Pac. 296.

Maryland.— Groff *v.* Hansel, 33 Md. 161; Willard *v.* Horsey, 22 Md. 89.

Massachusetts.— Hutchinson *v.* Nay, 183 Mass. 355, 67 N. E. 601; Higgins *v.* Shepard, 182 Mass. 364, 65 N. E. 805; Draper *v.* Hatfield, 124 Mass. 53; Gay *v.* Bates, 99 Mass. 263; Johnson *v.* Trinity Church Soc., 11 Allen 123; Harrington *v.* Lincoln, 4 Gray 563, 64 Am. Dec. 95.

Michigan.— Ward *v.* Munson, 105 Mich.

whom or by the party in favor of whom the claim of liability is made,[94] and although a party admits that he made the offer.[95] *A fortiori* a mere expression of willingness to consider a compromise offer is inadmissible.[96] Implied conces-

647, 63 N. W. 498; Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Montgomery *v.* Allen, 84 Mich. 656, 48 N. W. 153; Campau *v.* Dubois, 39 Mich. 274; Chandler *v.* Allison, 10 Mich. 460.

Minnesota.— Melby *v.* Osborne, 35 Minn. 387, 29 N. W. 58.

Missouri.— Smith *v.* Shell, 82 Mo. 215, 52 Am. Rep. 365; Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673; Gorham *v.* Auerswald, 59 Mo. App. 77.

Nebraska.— Boice *v.* Palmer, 55 Nebr. 389, 75 N. W. 849; Wright *v.* Morse, 53 Nebr. 3, 73 N. W. 211; Callen *v.* Rose, 47 Nebr. 638, 66 N. W. 639; Eldridge *v.* Hargreaves, 30 Nebr. 638, 46 N. W. 923.

New Hampshire.— Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233 [*citing* Plummer *v.* Currier, 52 N. H. 287; Rollins *v.* Chester, 46 N. H. 411; Sanborn *v.* Neilson, 4 N. H. 501].

New Jersey.— Scheurle *v.* Husbands, 65 N. J. L. 681, 48 Atl. 1118; Wrege *v.* Westcott, 30 N. J. L. 212; Lehigh Valley Terminal R. Co. *v.* Currie, 54 N. J. Eq. 84, 33 Atl. 824.

New York.— Tennant *v.* Dudley, 144 N. Y. 504, 39 N. E. 644; Smith *v.* Satterlee, 130 N. Y. 677, 29 N. E. 225; White *v.* Old Dominion Steamship Co., 102 N. Y. 661, 6 N. E. 289; Doyle *v.* Levy, 89 Hun 350, 35 N. Y. Suppl. 434; Payne *v.* Forty-Second St., etc., R. Co., 40 N. Y. Super. Ct. 8; Davey *v.* Lohrmann, 14 N. Y. Suppl. 922; Edwards *v.* Watertown, 13 N. Y. Suppl. 309; Gommersall *v.* Crew, 10 N. Y. Suppl. 231; Beebee *v.* Robert, 12 Wend. 413, 27 Am. Dec. 132. See also York *v.* Conde, 66 Hun, 316, 20 N. Y. Suppl. 961.

North Carolina.— Ely *v.* Norfolk Southern R. Co., 102 N. C. 42, 8 S. E. 779.

Ohio.— Sherer *v.* Piper, 26 Ohio St. 476, mere fact of offer as well as its terms is inadmissible.

Pennsylvania.— Fisher *v.* Fidelity Mut. L. Assoc., 188 Pa. St. 1, 41 Atl. 467; Sailor *v.* Hertzogg, 2 Pa. St. 182; Spence *v.* Spence, 4 Watts 165; Slocum *v.* Perkins, 3 Serg. & R. 295; Green *v.* Bauer, 15 Pa. Super. Ct. 372.

South Carolina.— Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572; Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543; Gibbes *v.* McCraw, 45 S. C. 184, 22 S. E. 790; Frick *v.* Wilson, 36 S. C. 65, 15 S. E. 331; Chandler *v.* Geraty, 10 S. C. 304.

South Dakota.— Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943.

Tennessee.— Strong *v.* Stewart, 9 Heisk. 137.

Texas.— International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515; Galveston, etc., R. Co. *v.* Green, (Civ. App. 1896) 35 S. W. 819; Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529; Hand *v.* Swann, 1 Tex. Civ. App. 241, 21 S. W. 282.

Virginia.— Brown *v.* Shields, 6 Leigh 440; Williams *v.* Price, 5 Munf. 507; Baird *v.* Rice, 1 Call 18, 1 Am. Dec. 497.

Wisconsin.— Richards *v.* Noyes, 44 Wis. 609; State Bank *v.* Dutton, 11 Wis. 371.

United States.— West *v.* Smith, 101 U. S. 263, 25 L. ed. 809; New York Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868; Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351.

Canada.— Pirie *v.* Wyld, 11 Ont. 422; York County Corp. *v.* Toronto Gravel Road, etc., Co., 3 Ont. 584.

See 20 Cent. Dig. tit. "Evidence," § 745.

Contra in England unless offer is made "without prejudice." v. Small, M. & M. 446. See *infra*, IV, B, 5, d.

Offer of judgment.— Where by statute an offer of judgment may be made by a party, it is usually provided that the offer if not accepted shall not be evidence of liability. Greve *v.* Wood-Harmon Co., 173 Mass. 45, 52 N. E. 1070. The same result attends a suggestion of willingness to make such an offer. Kelley *v.* Combs, 57 S. W. 476, 22 Ky. L. Rep. 365. And the offer cannot even be introduced to contradict the party's present evidence. Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973.

Tendency of judicial opinion.— It was said by Clayton, J., in Grubbs *v.* Nye, 13 Sm. & M. (Miss.) 443, 444 [*citing* 1 Greenleaf Ev. § 192, and notes] that "the courts of late, and especially in this country, have leaned against the exclusion of offers of compromise as testimony." Whether this is a correct statement may well be doubted in view of such cases as Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593, and West *v.* Smith, 101 U. S. 263, 25 L. ed. 809.

94. *Alabama.*— Collier *v.* Coggins, 103 Ala. 281, 15 So. 578.

Connecticut.— Fowles *v.* Allen, 64 Conn. 350, 30 Atl. 144.

Illinois.— Peru *v.* French, 55 Ill. 317.

Michigan.— Fox *v.* Barrett, 117 Mich. 162, 75 N. W. 440.

New York.— Tennant *v.* Dudley, 144 N. Y. 504, 39 N. E. 644.

United States.— Collins *v.* U. S., 35 Ct. Cl. 122.

See 20 Cent. Dig. tit. "Evidence," § 745.

Offer made on basis of truth.— Where the amount named in an offer to accept a certain sum in settlement appears to have been arrived at as a fair estimate of value it is relevant. Springfield *v.* Schmook, 68 Mo. 394; Daniels *v.* Woonsocket, 11 R. I. 4.

95. Gehm *v.* People, 87 Ill. App. 158.

96. Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407. See also Warren *v.* Wright, 5 Ill. App. 429; Pentz *v.* Pennsylvania F. Ins. Co., 92 Md. 444, 48 Atl. 139; Edwards *v.* Watertown, 13 N. Y. Suppl. 309, evidence that agent was authorized to offer compromise excluded.

sions made to facilitate a settlement are likewise destitute of probative quality.[97] On the other hand statements made by reason of their supposed truth are competent[98] and not to be excluded merely because the party subsequently asserts that he intended to effect a compromise.[99] A statement may be regarded as a competent admission when made before a controversy arose,[1] or as an inducement to consent to open negotiations for compromise,[2] or after a treaty for compromise has been abandoned,[3] or by a person not seeking a compromise,[4] or by a person who cannot settle the dispute,[5] or when the declarant was discussing the liability of another.[6] Nor does the rule of exclusion apply where compromise negotiations proceed upon the tacit assumption that the entire amount claimed is actually due,[7] or where there is no denial, express or implied, of liability and the amount to be paid[8] or of terms of payment,[9] or whether the declarant shall be given some incidental advantage in consideration of payment,[10] or the like, are the

97. Jewett *v.* Fink, 47 Wis. 446, 2 N. W. 1124, failure to mention a particular claim in negotiations ostensibly covering all claims.

98. *Georgia.*— Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366; Hatcher *v.* Bowen, 74 Ga. 840.

Illinois.— McKinzie *v.* Stretch, 53 Ill. App. 184.

Iowa.— Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837.

Michigan.— Taylor *v.* Bay City St. R. Co., 101 Mich. 140, 59 N. W. 447.

Minnesota.— Stariha *v.* Greenwood, 28 Minn. 521, 11 N. W. 76.

New York.— Hurd *v.* Pendrigh, 2 Hill 502; Hyde *v.* Stone, 7 Wend. 354, 22 Am. Dec. 582.

See 20 Cent. Dig. tit. "Evidence," § 745 *et seq.*

99. Steeg *v.* Walls, 4 Ind. App. 18, 30 N. E. 312; Hood *v.* Tyner, 3 Ind. App. 51, 28 N. E. 1033. See also St. Louis Southwestern R. Co. *v.* Smith, (Tex. Civ. App. 1903) 77 S. W. 28, where a claim purporting to be the entire amount of damages was made by plaintiff against a carrier for negligent injury to live stock at a time when there had been no negotiations for a settlement, and plaintiff denominated the transaction at the time, and also at the trial, as an offer to compromise. It was held that the claim was not an offer to compromise, but was in the nature of an admission of fact, and competent against plaintiff on the question of damages.

1. Cates *v.* Kellogg, 9 Ind. 506; Richardson *v.* International Pottery Co., 63 N. J. L. 248, 43 Atl. 692. See also Blake *v.* Austin, (Tex. Civ. App. 1903) 75 S. W. 571; Ft. Worth, etc., R. Co. *v.* Lock, 30 Tex. Civ. App. 426, 70 S. W. 456.

2. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503, where the court said that "confessions, made not under promise of secrecy and before it could be known whether any negotiations would be allowed, are not admissions or propositions within the rule concerning privileged communications."

3. Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

4. Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366; Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529, where one defendant is talking to another.

5. Ashlock *v.* Linder, 50 Ill. 169; Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975; Kansas City, etc., R. Co. *v.* Farrell, 76 Mo. 183; Daniel *v.* Wilkerson, 35 N. C. 329.

6. Freeman *v.* Bigham, 65 Ga. 580.

7. Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152; Armour *v.* Gaffey, 165 N. Y. 630, 59 N. E. 1118 [*affirming* 30 N. Y. App. Div. 121, 51 N. Y. Suppl. 846]; McElwee Mfg. Co. *v.* Trowbridge, 68 Hun (N. Y.) 28, 22 N. Y. Suppl. 674.

8. Perkins *v.* Concord R. Co., 44 N. H. 223; Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; Rotan Grocery Co. *v.* Martin, (Tex. Civ. App. 1900) 57 S. W. 706; Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. See also Hunter *v.* Helsley, (Mo. 1903) 73 S. W. 719.

9. *Georgia.*— Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113.

Indiana.— Hood *v.* Tyner, 3 Ind. App. 51, 28 N. E. 1033.

Massachusetts.— Snow *v.* Batchelder, 8 Cush. 513.

Minnesota.— Person *v.* Bowe, 79 Minn. 238, 82 N. W. 480.

Mississippi.— Grubbs *v.* Nye, 13 Sm. & M. 443.

Missouri.— Ferguson *v.* Davidson, 147 Mo. 664, 49 S. W. 859; Ferry *v.* Taylor, 33 Mo. 323.

Nevada.— Quinn *v.* White, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818.

New Hampshire.—Field *v.* Tenney, 47 N. H. 513.

New York.— Bartlett *v.* Tarbox, 1 Abb. Dec. 120, 1 Keyes 495; Jones *v.* Sparks, 2 N. Y. St. 139.

Pennsylvania.— Swan *v.* Scott, 11 Serg. & R. 155.

Rhode Island.— Draper *v.* Horton, 22 R. I. 592, 48 Atl. 945.

Vermont.— Clapp *v.* Foster, 34 Vt. 580.

United States.— McNiel *v.* Holbrook, 12 Pet. 84, 9 L. ed. 1009.

See 20 Cent. Dig. tit. "Evidence," §§ 745, 746.

10. Wallace *v.* Hussey, 63 Pa. St. 24.

Condition attached.— But a proposal to compromise a matter in controversy does not cease to be such merely because it is coupled

only questions discussed. A promise to do "the fair thing," [11] or a suggestion of submitting the matter to arbitration,[12] is a competent fact, failure to deny liability being the significant circumstance.[13] Suggestions of suppressing incriminating evidence,[14] of compounding a crime,[15] of marrying the complainant in bastardy proceedings,[16] or of the party's ability to use indirect influences "to divide the jury," [17] are admissible as facts independent of an offer to adjust a controversy.[18] In order to secure exclusion of a statement as an offer of compromise it is not essential that it shall have been made expressly on the faith of compromise negotiations.[19] It is sufficient if this fact can be satisfactorily inferred from the circumstances under which the statement was made;[20] for example the existence of negotiations for a settlement,[21] the pendency of litigation,[22] a distinct denial of liability,[23] or the fact that the claim is for a stipulated amount, so that the entire sum is due, if anything.[24]

b. Independent Relevancy of Offer. An offer of compromise may be admissible as relevant circumstantial evidence to prove a fact other than that of liability,[25] such as due diligence,[26] waiver,[27] good faith in making a claim, validity of claim,[28] reliance upon an alleged promise,[29] or interest in the event of the suit.[30] Evidence of a compromise offered by plaintiffs is properly rejected, where it does not appear that defendant himself made the offer or authorized it or knew that an offer was made.[31]

with a condition which is rejected. It is not an admission that anything is due, and has no effect on the legal rights of the parties. Jackson *v.* Clopton, 66 Ala. 29.

11. Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421.

12. Plummer *v.* Currier, 52 N. H. 287; Thompson *v.* Austen, 2 D. & R. 358, 1 L. J. K. B. O. S. 99, 16 E. C. L. 94. See also Maclay *v.* Work, 10 Serg. & R. (Pa.) 194. But *compare* Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656. Consent to an appointment in course of litigation of one as an officer of the court, usual in such proceedings, is not a concession of liability. Hughes *v.* Christy, 26 Tex. 230, auditor.

13. Plummer *v.* Currier, 52 N. H. 287.

14. Robb *v.* Hewitt, 39 Nebr. 217, 58 N. W. 88 [*followed* in Gatzmeyer *v.* Peterson, (Nebr. 1903) 94 N. W. 974], "sending away" the mother of a bastard child.

15. State *v.* Wright, 48 La. Ann. 1525, 21 So. 160; State *v.* Jefferson, 28 N. C. 305.

16. Laney *v.* State, 109 Ala. 34, 19 So. 531.

17. Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

18. See further as to independent fact *infra*, IV, B, 5, b.

19. See *infra*, IV, B, 5, c.

20. Chicago, etc., R. Co. *v.* Roberts, 26 Colo. 329, 57 Pac. 1076; Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113. But unless it can be made clearly to appear that the statement was made for the sake of a compromise it is competent as an admission. Townsend *v.* Merchants' Ins. Co., 36 N. Y. Super. Ct. 172, 45 How. Pr. (N. Y.) 501 [*affirmed* in 56 N. Y. 655]; Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641; Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142.

21. Gibbs *v.* Johnson, 10 Fed. Cas. No. 5,384; York County Corp. *v.* Toronto Gravel Road, etc., Co., 3 Ont. 584.

22. Reynolds *v.* Manning, 15 Md. 510.

23. Columbia Planing Mill Co. *v.* American F. Ins. Co., 59 Mo. App. 204.

24. Scheurle *v.* Husbands, 65 N. J. L. 40, 46 Atl. 759.

25. The fact of an offer of compromise is admissible to make intelligible a reply thereto, where such reply happens to contain a relevant statement of fact. Lucas *v.* Parsons, 27 Ga. 593.

26. Jones *v.* Foxall, 15 Beav. 388, 21 L. J. Ch. 725.

27. Gould *v.* Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Untbank *v.* Travelers' Ins. Co., 28 Fed. Cas. No. 16,795, 4 Biss. 357.

28. *Colorado.*— Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.

Georgia.—Anderson *v.* Robinson, 73 Ga. 644.

Iowa.— Bayliss *v.* Murray, 69 Iowa 290, 28 N. W. 604.

Michigan.—Passmore *v.* Passmore, 60 Mich. 463, 27 N. W. 601.

Montana.— Swenson *v.* Kleinschmidt, 10 Mont. 473, 26 Pac. 198.

North Carolina.— Sutton *v.* Robeson, 31 N. C. 380.

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

Canada.— Clark *v.* Grand Trunk R. Co., 29 U. C. Q. B. 136.

See 20 Cent. Dig. tit. "Evidence," § 745.

Contra.— York *v.* Conde, 66 Hun (N. Y.) 316, 20 N. Y. Suppl. 961, to the effect that the existence of an offer of compromise is an immaterial fact.

29. Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.

30. Watson *v.* Reed, 129 Ala. 388, 29 So. 837; Butler Ballast Co. *v.* Hoshaw, 94 Ill. App. 68; Matthiessen, etc., Zinc Co. *v.* Ferris, 72 Ill. App. 684.

31. Marks *v.* Hardy, 78 S. W. 864, 1105, 25 Ky. L. Rep. 1770, 1909. See *infra*, IV, D.

c. Statements of Independent Facts in Offer. Statements of facts independent of the concession involved in an offer of compromise are competent as admissions,[32] since they are supposed to have been made because of belief in their truth.[33] Although such statements directly relate to a compromise offer,[34] or were made pending compromise negotiations,[35] or at an interview during which the terms of a compromise were discussed,[36] or probably would not have been made at all except upon the assumption that they would facilitate a settlement,[37] they are nevertheless admissible. In other words, an admissible statement of fact need not be independent of the subject-matter of the controversy; it is sufficient if the statement is a distinct admission of a fact, as distinguished from an offer to buy peace or settle a controversy.[38] If a letter contains a statement of fact which cannot be separated from an offer of compromise associated with it, the objection-

32. *Alabama.*— Gibbs *v.* Wright, 14 Ala. 465.

California.— Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658.

Colorado.— Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152; Patrick *v.* Crowe, 15 Colo. 543, 25 Pac. 985.

Connecticut.— Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; Fuller *v.* Hampton, 5 Conn. 416.

Georgia.— Columbus *v.* Howard, 6 Ga. 213.

Illinois.— Thom *v.* Hess, 51 Ill. App. 274.

Indiana.—Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Cates *v.* Kellogg, 9 Ind. 506.

Kansas.—Central Branch Union Pac. R. Co. *v.* Butman, 22 Kan. 639.

Kentucky.— Illinois Cent. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40, 23 Ky. L. Rep. 2267; Church *v.* Steele, 1 A. K. Marsh. 328.

Louisiana.— Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369; Pike *v.* Doyle, 19 La. Ann. 362.

Maine.— Cole *v.* Cole, 33 Me. 542.

Massachusetts.— Durgin *v.* Somers, 117 Mass. 55; Akers *v.* Demond, 103 Mass. 318; Harrington *v.* Lincoln, 4 Gray 563, 64 Am. Dec. 95; Dickinson *v.* Dickinson, 9 Metc. 471.

Michigan.— Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140; Hickey *v.* Hinsdale, 12 Mich. 99.

New Hampshire.— Jenness *v.* Jones, 68 N. H. 475, 44 Atl. 607; Downer *v.* Button, 26 N. H. 338; Hamblett *v.* Hamblett, 6 N. H. 333; Sanborn *v.* Neilson, 4 N. H. 501.

New York.— Hess *v.* Van Auken, 11 Misc. 422, 32 N. Y. Suppl. 126; Marvin *v.* Richmond, 3 Den. 58; Mount *v.* Bogert, Anth. N. P. 259.

Pennsylvania.— Sailor *v.* Hertzogg, 2 Pa. St. 182.

Vermont.— Chickering *v.* Brooks, 61 Vt. 554, 18 Atl. 144; Stanford *v.* Bates, 22 Vt. 546.

England.— Waldridge *v.* Kennison, 1 Esp. 143.

See 20 Cent. Dig. tit. "Evidence," § 751. See also *supra*, IV, B, 5, a.

Admission of liability, express or necessarily implied, may be such an independent fact. Agricultural Bank *v.* The Jane, 19 La. 1; Delogny *v.* Rentoul, 2 Mart. (La.) 175; Bartlett *v.* Tarbox, 1 Abb. Dec. (N. Y.) 120, 1 Keyes (N. Y.) 495; Goodnow *v.* Parsons, 36 Vt. 46.

A declarant may testify as to the intent with which a statement was made. West *v.* Smith, 101 U. S. 263, 25 L. ed. 809.

Offer not containing admissions of independent facts.— The rule that statements in an offer of compromise constituting admissions of independent facts are admissible does not apply to a letter written by defendant in an action for alienation of affections of plaintiff's wife, which relates solely to a proposition to settle "our affair," as it contains no admissions of fact, although the letter states defendant's conclusion that plaintiff "should be paid," but without stating for what. Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973.

33. *Connecticut.*— Hartford Bridge Co. *v.* Granger, 4 Conn. 142.

Indiana.— Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Wilt *v.* Bird, 7 Blackf. 258.

Kentucky.— Evans *v.* Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74.

Maine.— Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23.

New York.— White *v.* Old Dominion Steamship Co., 102 N. Y. 661, 6 N. E. 289.

Vermont.— Doon *v.* Ravey, 49 Vt. 293, 296, where the court said: "If a party during such treaty admits a fact to be true because it is a fact, and not because he is willing to treat it as a fact for the purposes of the then pending compromise, it may properly be shown in evidence."

See 20 Cent. Dig. tit. "Evidence," § 751.

"Mere opinions and loose expressions indicating the opinion of the party as to liability or exemption therefrom, . . . seem to come within the reasons of the rule excluding such admissions." White *v.* Old Dominion Steamship Co., 102 N. Y. 660, 663, 6 N. E. 289.

34. Central Branch Union Pac. R. Co. *v.* Butman, 22 Kan. 639.

35. Watson *v.* Crowsore, 93 Ind. 220; Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23; Bartlett *v.* Tarbox, 1 Abb. Dec. (N. Y.) 120, 1 Keyes (N. Y.) 495.

36. Akers *v.* Demond, 103 Mass. 318.

37. Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658.

38. Perkins *v.* Concord R. Co., 44 N. H. 223; Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

able part will exclude the whole letter;[39] and the same result occurs where the parts are separable but the letter is offered in evidence as an entirety.[40]

d. Admissions Made in Offer "Without Prejudice." A party's admission of liability or of other facts in the course of negotiations for a compromise is not competent evidence against him when the admission is expressly stated to be made "without prejudice."[41] Nor can it be used even for a collateral purpose,[42] for example to avoid the statute of limitations,[43] or to prove knowledge on the part of the declarant.[44] The words "without prejudice" are not indispensable, an equivalent expression being equally efficacious,[45] and, indeed, an agreement not to make prejudicial use of an admission may be inferred from circumstances.[46] The rule of exclusion covers negotiations made in a letter,[47] and where correspondence is begun with a statement that the negotiations are "without prejudice," a letter in reply, although not so limited, is within the same privilege.[48] Conversely a reservation in one letter may protect the statements of a prior letter in the same correspondence.[49] A party may use his letter written "without prejudice" if he reserves the right to do so under stated conditions or for certain purposes;[50] but the other party will be at liberty to use it for a similar purpose.[51] So if the effect of a statement as an admission of a particular fact or set of facts is expressly restricted this limitation will be regarded as the only one and the statement will be competent for other purposes.[52]

e. Agreements of Compromise. A completed agreement for a compromise[53]

39. Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593; New York Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868.

40. Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593.

41. Molyneaux *v.* Collier, 13 Ga. 406; White *v.* Old Dominion Steamship Co., 102 N. Y. 660, 6 N. E. 289; *In re* River Steamer Co., L. R. 6 Ch. 822, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130; Jones *v.* Foxall, 15 Beav. 388, 21 L. J. Ch. 725; Paddock *v.* Forrester, 1 Dowl. P. C. N. S. 527, 11 L. J. C. P. 107, 3 M. & G. 903, 3 Scott N. R. 715, 42 E. C. L. 470; Pirie *v.* Wyld, 11 Ont. 422; York County Corp. *v.* Toronto Gravel Road, etc., Co., 3 Ont. 584; Ritchey *v.* Howard, 6 U. C. C. P. 437. The protection afforded by Canadian courts to a party in making statements in communications made "without prejudice" is liberal, provided such statements are made fairly and in good faith. All communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view or wrong motives, are not admissible in evidence. Where therefore a letter written without prejudice and coming within the above rule was admitted at the trial, and the court was not able to say that defendant was not prejudiced thereby, a new trial was directed. Pirie *v.* Wyld, 11 Ont. 422. The rule in England is more strict. An express statement that the offer is by way of compromise is required. An offer of a specific sum by way of compromise is admissible, unless accompanied with a caution that the offer is confidential. Wallace *v.* Small, M. & M. 446, 22 E. C. L. 562.

42. Burns *v.* Kerr, 13 U. C. Q. B. 468.

43. *In re* River Steamer Co., L. R. 6 Ch. 822, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130; Cory *v.* Bretton, 4 C. & P. 462, 19 E. C. L. 603.

44. Pirie *v.* Wyld, 11 Ont. 422.

45. Johnson *v.* Trinity Church Soc., 11 Allen (Mass.) 123, 127, proposition made "as a compromise." But an offer or statement expressly made as a "compromise" will not be excluded where it clearly appears that there was no controversy between the parties. Cooper *v.* Jones, 79 Ga. 379, 4 S. E. 916.

46. White *v.* Old Dominion Steamship Co., 102 N. Y. 660, 6 N. E. 289.

47. Hoghton *v.* Hoghton, 15 Beav. 278, 17 Jur. 99, 21 L. J. Ch. 482; Healey *v.* Thatcher, 8 C. & P. 388, 34 E. C. L. 796; Cory *v.* Bretton, 4 C. & P. 462, 19 E. C. L. 603; York County Corp. *v.* Toronto Gravel Road, etc., Co., 3 Ont. 584. A letter containing an offer written "without prejudice" means, "I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all." *In re* River Steamer Co., L. R. 6 Ch. 822, 832, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130, per Mellish, L. J. See also Omnium Securities Co. *v.* Richardson, 7 Ont. 182.

48. Paddock *v.* Forrester, 1 Dowl. P. C. N. S. 527, 11 L. J. C. P. 107, 3 M. & G. 903, 3 Scott N. R. 715, 42 E. C. L. 470.

49. Peacock *v.* Harper, 26 Wkly. Rep. 109.

50. Williams *v.* Thomas, 2 Dr. & Sm. 29, 8 Jur. N. S. 250, 31 L. J. Ch. 674, 7 L. T. Rep. N. S. 184, 10 Wkly. Rep. 417.

51. Clark *v.* Grand Trunk R. Co., 29 U. C. Q. B. 136.

52. Hartney *v.* North British F. Ins. Co., 13 Ont. 581.

53. Conditional acceptance.—A compromise offer accepted by an agent subject to approval of his principal is inadmissible if not so

is not within the rule hereinbefore stated [54] which excludes offers of compromise as evidence.[55] Letters, although written "without prejudice," may be used to prove the terms and binding force of a completed agreement for settlement of the differences involved.[56]

f. Functions of Court and Jury. Where it appears that a jury may reasonably find on the evidence that a statement claimed to have been made as an offer of compromise was in fact an independent admission, the statement may be received in evidence and the jury instructed not to consider it if found to be a mere offer.[57] So if a letter or an entire correspondence introduced in evidence includes negotiations for compromise and independent admissions of fact connected therewith, the irrelevant portion should be pointed out to the jury with instructions to disregard it.[58]

6. Admissions by Conduct — a. In General. A party's conduct, including statements, so far as definitely connected with a fact in issue,[59] is often relevant [60] as circumstantial evidence of an admission.[61] The range of this class of evidence is limited by no more definite tests than (1) that the fact is relevant, and (2) that it was done by the opposite party or by someone for whose act he is responsible. It may be shown for example on an issue as to whether a definite relation exists that a party has recognized its existence.[62] Title to an office may be shown as against the incumbent by evidence that he has discharged its duties.[63] Conversely where the question is whether a third person is entitled to an office [64] or to sustain a certain character [65] or relation,[66] the fact that a party has recognized such a right is as to him a competent fact. Prior facts relevant to either civil [67]

approved. International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515.

54. See *supra*, IV, B, 5, a.

55. Smith *v.* Atwood, 14 Ga. 402; Stuht *v.* Sweesy, 48 Nebr. 767, 67 N. W. 748; Pym *v.* Pym, 118 Wis. 662, 96 N. W. 429; Froysell *v.* Lewelyn, 9 Price 122; Omnium Securities Co. *v.* Richardson, 7 Ont. 182. See also Newcombe *v.* Hyman, 16 Misc. (N. Y.) 25, 37 N. Y. Suppl. 649. On the other hand it has been said that an offer of compromise, although accepted, does not cease to be part of a compromise negotiation until the relations of the parties have been changed by an accord and satisfaction or otherwise, and in the meanwhile no evidence can be given of its terms. Rideout *v.* Newton, 17 N. H. 71. See also Tennant *v.* Dudley, 144 N. Y. 504, 39 N. E. 644 [*reversing* 68 Hun 225, 22 N. Y. Suppl. 876].

Payment of money in pursuance of such an agreement is evidence that the party paying owed something at the time of the payment. Needham *v.* Sanger, 17 Pick. (Mass.) 500.

Statement in settlement of account.— It is not error to admit in evidence a statement, signed by the parties, in settlement of the items of their account, where the amount claimed to be due by one of them is subsequently disputed by the other. Miller *v.* Campbell Commission Co., 13 Okla. 75, 74 Pac. 507.

56. Vardon *v.* Vardon, 6 Ont. 719.

57. Webber *v.* Dunn, 71 Me. 331; Prussel *v.* Knowles, 4 How. (Miss.) 90; Hall *v.* Brown, 58 N. H. 93.

58. Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23; Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Garner *v.* Myrick, 30 Miss. 448; Arthur *v.* James, 28 Pa. St. 236.

59. Walters *v.* Munroe, 17 Md. 150; Whiteford *v.* Munroe, 17 Md. 135; Hills *v.* Hoitt, 18 N. H. 603.

60. See *supra*, IV, B, 3, a.

61. Pym *v.* Pym, 118 Wis. 662, 96 N. W. 429.

Acceptance of sick benefits by a member of a benefit association amounts to an admission that he was sick at the time. Sidenspinner *v.* Metropolitan L. Ins. Co., 175 N. Y. 95, 67 N. E. 123.

62. Dickinson *v.* Coward, 1 B. & Ald. 677; Lipscombe *v.* Holmes, 2 Campb. 441; Radford *v.* McIntosh, 3 T. R. 632.

63. Trowbridge *v.* Baker, 1 Cow. (N. Y.) 251 (toll-gatherer); Rex *v.* Gardner, 2 Campb. 513; Rex *v.* Borrett, 6 C. & P. 124, 25 E. C. L. 353 (mail carrier); Cross *v.* Kaye, 6 T. R. 543 (attorney); Bevan *v.* Williams, 3 T. R. 635 note; Lister *v.* Priestley, Wightw. 67 (collector).

64. Cummin *v.* Smith, 2 Serg. & R. (Pa.) 440 (clergyman); Berryman *v.* Wise, 4 T. R. 366 (attorney).

65. Dickinson *v.* Coward, 1 B. & Ald. 677 (assignee of a bankrupt); Peacock *v.* Harris, 10 East 104, 10 Rev. Rep. 231 (renter of tolls); Radford *v.* McIntosh, 3 T. R. 632 (farmer-general of post duties).

66. Pritchard *v.* Walker, 3 C. & P. 212, 14 E. C. L. 532, clerk.

67. *California.*— Arnold *v.* Skaggs, 35 Cal. 684.

Connecticut.— Connecticut Insane Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017.

Illinois.— Chicago, etc., R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161, establishing a rule for safe conduct of business.

Massachusetts.— Manning *v.* Lowell, 173 Mass. 100, 53 N. E. 160.

or criminal[68] liability may be shown by subsequent conduct. Evidence of this character is admissible to prove ownership of property,[69] or to establish the existence of a relevant mental state, such as assent,[70] claim,[71] intent,[72] knowledge,[73] motive,[74] notice,[75] existence of reasonable cause,[76] recklessness,[77] and the like; although it is by no means always easy to distinguish between the use of such evidence in this connection and its use to establish on the one hand facts effecting legal results in which intention enters as an element, as authority,[78] disclaimer,[79]

Missouri.— North St. Louis Christian Church *v.* McGowan, 62 Mo. 279.

New Hampshire.—Martin *v.* Towle, 59 N. H. 31, discharge of servant causing accident.

North Carolina.— Virginia-Carolina Chemical Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1, silence.

United States.— Atchison, etc., R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220, failure to discharge.

England.—Lucy *v.* Walrond, 3 Bing. N. Cas. 841, 6 L. J. C. P. 290, 5 Scott 49, 32 E. C. L. 386, payment of money into court.

Canada.— Pheeny *v.* Aiken, 22 N. Brunsw. 635; Edgar *v.* Canadian Oil Co., 23 U. C. Q. B. 333.

See 20 Cent. Dig. tit. "Evidence," § 762.

68. Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; Reg. *v.* Chute, 46 U. C. Q. B. 555. See also CRIMINAL LAW, 12 Cyc. 70.

69. Anderson *v.* Robinson, 73 Ga. 644; Duncan *v.* Duncan, 26 La. Ann. 532; Hathaway *v.* Spooner, 9 Pick. (Mass.) 23.

70. Churchman *v.* Robinson, 93 Ga. 731, 20 S. E. 215; Western *v.* Pollard, 16 B. Mon. (Ky.) 315; Sheldon *v.* Sheldon, 84 Hun (N. Y.) 422, 32 N. Y. Suppl. 419; Bell *v.* Gund, 110 Wis. 271, 85 N. W. 1031; Thomas *v.* Thomas, 2 Camph. 647; Doe *v.* Woombwell, 2 Campb. 559; Stanley *v.* White, 14 East 332, 12 Rev. Rep. 544; Doe *v.* Forster, 13 East 405, 12 Rev. Rep. 383; Doe *v.* Pye, 1 Esp. 364; Doe *v.* Allen, 3 Taunt. 78, 12 Rev. Rep. 579; Doe *v.* Biggs, 2 Taunt. 109, 11 Rev. Rep. 533; Oakapple *v.* Copous, 4 T. R. 361.

Lack of assent may be shown in the same way. Donahue *v.* Case, 61 N. Y. 631.

71. Beattyville Coal Co. *v.* Haskins, 44 S. W. 363, 19 Ky. L. Rep. 1759.

72. *Alabama.*— Troy *v.* Rogers, 113 Ala. 131, 20 So. 999.

Georgia.— Bailey *v.* State, 104 Ga. 530, 30 S. E. 817.

Iowa.— Shafer *v.* Dean, 29 Iowa 144.

Massachusetts.— Starks *v.* Sikes, 8 Gray 609, 69 Am. Dec. 270.

Minnesota.— Baldwin *v.* Blanchard, 15 Minn. 489.

North Carolina.— Hughes *v.* Boone, 102 N. C. 137, 9 S. E. 286.

Ohio.— Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

Pennsylvania.— Fuller *v.* Kelsey, 4 Brewst. 104.

Texas.— Keesey *v.* Old, 82 Tex. 22, 17 S. W. 028.

Vermont.— Hill *v.* Powers, 16 Vt. 516.

Wisconsin.— Northern Electrical Mfg. Co. *v.* J. G. Wagner Co., 108 Wis. 584, 84 N. W. 894.

England.—Reg. *v.* Heesom, 14 Cox C. C. 40; Reg. *v.* Cotton, 12 Cox C. C. 400; Reg. *v.* Garner, 3 F. & F. 681, 4 F. & F. 346.

Canada.— Reg. *v.* Chute, 46 U. C. Q. B. 555; Robinson *v.* Rapelje, 4 U. C. Q. B. 289. See, however, Reg. *v.* Winslow, 8 Cox C. C. 397; Rex *v.* Lloyd, 7 C. & P. 318, 32 E. C. L. 633.

73. *Connecticut.*— White *v.* Reed, 15 Conn. 457; Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79.

Florida.— Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847.

Georgia.— Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898.

Indiana.— Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577.

Iowa.— High *v.* Kistner, 44 Iowa 79; Jones *v.* Hopkins, 32 Iowa 503.

Louisiana.— Lewis *v.* Gibson, 9 Rob. 146.

Massachusetts.— Smith *v.* Duncan, 181 Mass. 435, 63 N. E. 938; Hackett *v.* King, 8 Allen 144, 85 Am. Dec. 695; Green *v.* Gould, 3 Allen 465; Dole *v.* Young, 24 Pick. 250; Davis *v.* Spooner, 3 Pick. 284.

Michigan.— Hunt *v.* Strew, 33 Mich. 85.

Minnesota.— Potter *v.* Mellen, 41 Minn. 487, 43 N. W. 375.

Missouri.— Hitchcock *v.* Baughan, 36 Mo. App. 216.

South Carolina.— Coleman *v.* Frazier, 4 Rich. 146, 53 Am. Dec. 727.

Texas.— Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669.

England.— Reg. *v.* Mallory, 13 Q. B. D. 33, 15 Cox C. C. 456, 48 J. P. 487, 50 L. T. Rep. N. S. 429, 32 Wkly. Rep. 721; Rex *v.* Forbes, 7 C. & P. 224, 32 E. C. L. 583; Cotton *v.* James, 3 C. & P. 505, M. & M. 277, 14 E. C. L. 686.

74. McUin *v.* U. S., 17 App. Cas. (D. C.) 323; Hunter *v.* State, 43 Ga. 483; Sanscrainte *v.* Torongo, 87 Mich. 69, 49 N. W. 497; Miller *v.* State, 68 Miss. 221, 8 So. 273; Fulmer *v.* Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L. R. A. 603; McCue *v.* Com., 78 Pa. St. 185, 21 Am. Rep. 7.

75. Richards *v.* Frankum, 9 C. & P. 221, 38 E. C. L. 138; Carne *v.* Steer, 5 H. & N. 628, 29 L. J. Exch. 281, 2 L. T. Rep. N. S. 198.

76. Hackett *v.* King, 8 Allen (Mass.) 144, 85 Am. Dec. 695.

77. Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79.

78. Revocation of authority may be thus shown. Zachry *v.* Nolan, 66 Fed. 467, 14 C. C. A. 253.

79. Moody *v.* Nichols, 16 Me. 23; Fowler *v.* Lee, 4 Munf. (Va.) 373; Smith *v.* Towne, 4 Munf. (Va.) 191.

fraud,[80] ratification,[81] or waiver;[82] and on the other hand admissions directly establishing the truth of the facts asserted.[83] While these several functions of the same act or statement may blend, the act or statement which is circumstantially relevant presents and may usually be distinguished by two persistent characteristics: (1) The act or statement is equally competent, whether it is in accordance with the truth of the matter or is not. (2) If not rendered irrelevant by the existence of a controversy or in some cases by the absence of adequate means of knowledge, the act or statement is equally competent on behalf of the declarant, although self-serving.[84]

b. Inconsistent Conduct. Conduct of a party inconsistent with his present contention may tend to show that the latter is an afterthought, and proof of such conduct is therefore competent as an admission.[85] Thus where a defendant denies liability it may be shown that he made no denial on a particular occasion when a denial would have been natural,[86] but that he rested his defense on some other

80. Wray *v.* Warner, 111 Iowa 64, 82 N. W. 455; Wohlfarth *v.* Chamberlain, 14 Daly (N. Y.) 178, 6 N. Y. St. 207; Horn *v.* Brooks, 61 Pa. St. 407.

81. *Alabama.*— Sheppard *v.* Buford, 7 Ala. 90.

Indiana.— Scranton *v.* Stewart, 52 Ind. 68.

Massachusetts.— Parker *v.* Hill, 8 Metc. 447.

New York.— Bronson *v.* Wiman, 8 N. Y. 182; Lobach *v.* Hotchkiss, 17 Abb. Pr. 88.

Pennsylvania.— Phillips *v.* Phillips, 8 Watts 195.

Vermont.— McCann *v.* Hallock, 30 Vt. 233.

Wisconsin.— Gillett *v.* Phelps, 5 Wis. 429.

82. Gery *v.* Redman, 1 Q. B. D. 161, 45 L. J. Q. B. 267, 24 Wkly. Rep. 270.

83. Clerk *v.* McGraw, 14 Mich. 139; Gregory *v.* Frothingham, 1 Nev. 253; Burnham *v.* Jenness, 54 Vt. 272, motive.

84. Hayes *v.* Hill, 105 Ga. 299, 31 S. E. 166; St. Martin *v.* His Creditors, 8 Rob. (La.) 1. See *infra*, XII.

85. *Colorado.*— Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.

Georgia.— Anderson *v.* Robinson, 73 Ga. 644.

Indiana.— Peffley *v.* Noland, 80 Ind. 164.

Massachusetts.— Tripp *v.* Metallic Packing Co., 137 Mass. 499; Hale *v.* Silloway, 1 Allen 21.

New York.— Terwilliger *v.* Industrial Ben. Assoc., 83 Hun 320, 31 N. Y. Suppl. 938.

North Carolina.— Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

Pennsylvania.— Riegel *v.* Wilson, 60 Pa. St. 388.

South Carolina.— Costelo *v.* Cave, 2 Hill (S. C.) 528, 27 Am. Dec. 404, note given in payment for work done under a contract.

South Dakota.— St. Paul White Lead, etc., Co. *v.* Tibbetts, 13 S. D. 446, 83 N. W. 564.

Wisconsin.— Pym *v.* Pym, 118 Wis. 662, 96 N. W. 429, holding that in an action by testator's son against testator's widow to recover money alleged to have been advanced to his father in his lifetime, the fact that prior to testator's death plaintiff was sued by him to recover money alleged to have been converted by plaintiff, and that he settled the suit, was competent as an admission.

See 20 Cent. Dig. tit. "Evidence," § 762.

86. *Georgia.*— Whitney *v.* Butts, 91 Ga. 124, 16 S. E. 649.

Illinois.— Hansen *v.* Wayer, 101 Ill. App. 212.

Indiana.— Benson *v.* McFadden, 50 Ind. 431.

Maryland.— Pierce *v.* Negro John, 6 Md. 28.

Massachusetts.— Parsons *v.* Martin, 11 Gray 111.

Michigan.—Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362.

Minnesota.— Griswold *v.* Edson, 32 Minn. 436, 21 N. W. 475.

New York.— Moore *v.* Hamilton, 48 Barb. 120; Schulz *v.* Vogel, 25 Misc. 760, 54 N. Y. Suppl. 125.

Pennsylvania.— Tams *v.* Bullitt, 35 Pa. St. 308.

See 20 Cent. Dig. tit. "Evidence," § 762.

Merely declining to discuss matter of defense has no evidentiary effect (Mabley *v.* Kittleberger, 37 Mich. 360. But see Hayes *v.* Kelley, 116 Mass. 300; St. John *v.* Lockhart, 23 N. Brunsw. 430) for a party is not compelled to make instant decision as to a claim under penalty of having waived legitimate defenses (Tait *v.* Frow, 8 Ala. 543; Woolner *v.* Hill, 47 N. Y. Super. Ct. 470).

Settlements with others.— Unless objectionable as being in the nature of a compromise (Slingerland *v.* Norton, 58 Hun (N. Y.) 578, 12 N. Y. Suppl. 647. See *supra*, IV, B, 5), it may be shown that the party claimed to be liable has settled with others in the same position as plaintiff (Howland *v.* Bartlett, 86 Ga. 669, 12 S. E. 1068; Campbell *v.* Missouri Pac. R. Co., 86 Mo. App. 67; Grimes *v.* Keene, 52 N. H. 330; Galveston, etc., R. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013. But the mere fact of payment does not in itself establish liability. *Non constat* that it was not a gratuity or by way of compromise. Indeed circumstances may rob the fact of all probative force. Missouri, etc., R. Co. *v.* Fulmore, (Tex. Civ. App. 1895) 29 S. W. 688. It is not a relevant fact that the party who is claimed to be liable, upon settling with one of several similarly situated parties, desired him to keep silent on the matter. Gault *v.* Concord R. Co., 63 N. H. 356.

ground,[87] or endeavored to gain time by promises of settlement,[88] or tried to arrange favorable terms of payment.[89] In case of a plaintiff or other claimant it may be shown that he has failed under suitable circumstances to advance the demand upon which he now relies.[90] And generally it may be shown as to either party that he has not acted in accordance with a present position,[91] but has recognized as valid a claim which he now resists.[92] Precautions taken to avoid loss by threatened litigation, as by demanding a bond of indemnity,[93] efforts to buy off a conflicting claim,[94] offers to purchase property which is perishable before it

87. *Alabama.*—May *v.* Hewitt, 33 Ala. 161.
Connecticut.—Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.
Illinois.— Day *v.* Gregory, 60 Ill. App. 34.
Oregon.— Nichols *v.* Southern Pac. R. Co., 23 Oreg. 123, 31 Pac. 296, 37 Am. St. Rep. 664, 18 L. R. A. 55.
Vermont.— Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445.

88. Wharton *v.* Thomason, 78 Ala. 45; Peck *v.* Richmond, 2 E. D. Smith (N. Y.) 380.

89. Wise *v.* Adair, 50 Iowa 104.

90. *California.*— Williams *v.* Harter, 121 Cal. 47, 53 Pac. 405; Robinson *v.* Dugan, (1894) 35 Pac. 902; Moore *v.* Campbell, 72 Cal. 251, 13 Pac. 689.
Indiana.— Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.
Iowa.— Smay *v.* Etnire, 99 Iowa 149, 68 N. W. 597.
Maine.— Judkins *v.* Woodman, 81 Me. 351, 17 Atl. 298, 3 L. R. A. 607.
Massachusetts.— Sears *v.* Kings County El. R. Co., 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 117.
New Hampshire.— Moore *v.* Dunn, 42 N. H. 471.
New York.— Lloyd *v.* Lloyd, 1 Redf. Surr. 399.
Pennsylvania.—Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916; Fullam *v.* Rose, 160 Pa. St. 47, 28 Atl. 497.
Vermont.— McCann *v.* Hallock, 30 Vt. 233; Brigg *v.* Georgia, 15 Vt. 61.
England.— Hart *v.* Newman, 3 Campb. 13; Nicholls *v.* Downes, 1 M. & Rob. 13.

The evidence is relevant only when conditions are such as naturally to call forth the statement. Thomas *v.* Brady, 10 Pa. St. 164.

Demanding less than the amount subsequently claimed is not relevant as to the amount really due. It bears only upon the question of good faith in advancing the subsequent claim and as such is to be weighed in connection with the circumstances under which it was made, especially the knowledge of the demandant and the purpose of the demand. Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291; State *v.* Berning, 74 Mo. 87; Shiland *v.* Loeb, 58 N. Y. App. Div. 565, 69 N. Y. Suppl. 11.

Evidence of the prices at which a party has offered property for sale is relevant in connection with his present contention as to its value. Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; Yeager *v.* Weaver, 1 Leg. Gaz. (Pa.) 156.

91. Atchison, etc., R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220. The bringing of a suit (Gwinn *v.* Hamilton, 29 Ala. 233; Hunt *v.* Stewart, 7 Ala. 525) or statements contained in the pleadings therein (Georgia Cent. R. Co. *v.* Moseley, 112 Ga. 914, 38 S. E. 350; Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356; Limbert *v.* Jones, 136 Pa. St. 31, 19 Atl. 956; Wheeler *v.* Styles, 28 Tex. 240) may be significant and relevant.

92. *Alabama.*— King *v.* Franklin, 132 Ala. 559, 31 So. 467; Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.
Connecticut.— Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675; Sharon *v.* Salisbury, 29 Conn. 113.
Iowa.— Floyd County *v.* Morrison, 40 Iowa 188.
Louisiana.— Gordon *v.* Parker, 10 La. 56.
Maine.— Harpswell *v.* Phipsburg, 29 Me. 313.
Massachusetts.— Readman *v.* Conway, 126 Mass. 374; Elliott *v.* Hayden, 104 Mass. 180.
Michigan.— Baxter *v.* Reynolds, 112 Mich. 471, 70 N. W. 1039.
Mississippi.— Southern Express Co. *v.* Thornton, 41 Miss. 216.
New York.— Miller *v.* Savannah Ocean Steamship Co., 118 N. Y. 199, 23 N. E. 462; Staples *v.* Hager, 42 N. Y. Suppl. 458.
Pennsylvania.— Lobb *v.* Lobb, 26 Pa. St. 327.

Relevant conduct.— Such recognition may take the form of seeking release from liability (Lusk *v.* Throop, 89 Ill. App. 509 [*affirmed* in 189 Ill. 127, 59 N. E. 529]; Colgan *v.* Philips, 7 Rich. (S. C.) 359), withdrawal from contesting (F. O. Sawyer Paper Co. *v.* Mangan, 68 Mo. App. 1); doing something which indicates fear of an unsuccessful issue of litigation, for example alienating property prior to suit (Heneky *v.* Smith, 10 Oreg. 349, 45 Am. Rep. 143); or refusing to give one's name without sufficient reason (Jones *v.* Shattuck, 175 Mass. 415, 56 N. E. 736).

Irrelevant conduct.— Mere failure to pay a bill (Pleasanton *v.* Simmons, 2 Pennew. (Del.) 477, 47 Atl. 697), or to vacate an arrest by furnishing bail (Talcott *v.* Harris, 93 N. Y. 567), or payment on a claim while denying liability or not conceding it (Camp *v.* U. S., 113 U. S. 648, 5 S. Ct. 687, 28 L. ed. 1081), has no probative effect. Providing an injured servant with a nurse does not tend to prove liability for the injury. Sias *v.* Consolidated Lighting Co., 73 Vt. 35, 50 Atl. 554.

93. Lucas *v.* Nichols, 52 N. C. 32.

94. Wallen *v.* Rossman, 45 Mich. 333, 7 N. W. 901; Chapin *v.* Hunt, 40 Mich. 595.

spoils,[95] insuring one's self against liability for accidents,[96] or paying a mechanic in order to avoid the enforcement of a lien[97] are irrelevant for much the same reason that excludes an offer of compromise,[98] namely, no concession of liability is implied. Likewise the receipt of money implies no concession by the receiver that the payer is the party primarily liable.[99] Admissibility of evidence of repairs or similar conduct subsequent to an accident as tending to prove negligence is considered elsewhere.[1] The party charged with inconsistent conduct may explain it.[2]

7. Admissions by Silence or Acquiescence — a. In General. A statement made in the presence of a party, but not connected with his conduct at the time when it was made, is mere hearsay and not evidence against him of any fact narrated in such statement.[3] But where a definite[4] statement of a matter of fact[5] is made in the presence or hearing[6] of a party so that he understands it,[7] in regard to facts affecting him or his rights,[8] and the statement is of such a nature as to call for a

95. Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787.

96. Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333; Anderson *v.* Duckworth, 162 Mass. 251, 38 N. E. 510.

97. Kelley *v.* Schupp, 60 Wis. 76, 18 N. W. 725.

98. See *supra*, IV, B, 5, a.

99. James *v.* Biou, 2 Sim. & St. 600, 1 Eng. Ch. 600.

1. See, generally, Highways; Master and Servant; Negligence; Railroads; and other special titles.

2. Moore *v.* Dunn, 42 N. H. 471.

3. People *v.* Mallon, 103 Cal. 513, 37 Pac. 512; Carter *v.* Buchannon, 3 Ga. 513; Gihney *v.* Marchay, 34 N. Y. 301. See also Jones *v.* Morrell, 1 C. & K. 266, 47 E. C. L. 266.

4. Chapman *v.* State, 109 Ga. 157, 159, 34 S. E. 369.

5. Inference is excluded. State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

6. *Alabama.*— Downing *v.* Woodstock Iron Co., 93 Ala. 262, 9 So. 177.

California.— Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31.

Indiana.— Pierce *v.* Goldsberry, 35 Ind. 317.

Iowa.— Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534.

Massachusetts.— Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783; Simonds *v.* Patridge, 154 Mass. 500, 28 N. E. 901; Mallen *v.* Boynton, 132 Mass. 443.

Michigan.— Sanscrainte *v.* Torongo, 87 Mich. 69, 49 N. W. 497; Barry *v.* Davis, 33 Mich. 515.

New York.— Garnsey *v.* Rhodes, 18 N. Y. Suppl. 484.

North Carolina.— State *v.* Burton, 94 N. C. 947.

Oregon.— Josephi *v.* Furnish, 27 Oreg. 260, 41 Pac. 424.

Pennsylvania.— Cain *v.* Cain, 140 Pa. St. 144, 21 Atl. 309.

Texas.— Taliaferro *v.* Goudelock, 82 Tex. 521, 17 S. W. 792.

See 20 Cent. Dig. tit. "Evidence," § 773.

A statement made in the party's hearing, although not in his presence, is admissible if otherwise within the rule. Neile *v.* Jakle, 2 C. & K. 709, 61 E. C. L. 709.

That the statement was actually heard by the party must affirmatively appear. Josephi *v.* Furnish, 27 Oreg. 260, 41 Pac. 424; Allison *v.* Barrow, 3 Coldw. (Tenn.) 414, 91 Am. Dec. 291; Qucener *v.* Morrow, 1 Coldw. (Tenn.) 123; Cabiness *v.* Holland, (Tex. Civ. App. 1895) 30 S. W. 63. Intervention of partitions (Yale *v.* Dart, 17 N. Y. Suppl. 179), loudness of tone (Vincent *v.* Huff, 8 Serg. & R. (Pa.) 381), whether a party was listening (Steer *v.* Little, 44 N. H. 613), or was employed about other matters (Drury *v.* Hervey, 126 Mass. 519; Moore *v.* Smith, 14 Serg. & R. (Pa.) 388) may be material considerations.

That the party understood the purport of the statement is also essential to its admissibility (Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Leach *v.* Dickerson, 14 Ind. App. 375, 42 N. E. 1031; Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534. See also cases cited in the next note); the mere fact of being within hearing distance is not sufficient (Jackson *v.* Builders' Wood Working Co., 91 Hun (N. Y.) 435, 36 N. Y. Suppl. 227), unless the party must of necessity have heard (Josephi *v.* Furnish, 27 Oreg. 260, 41 Pac. 424; Moore *v.* Smith, 14 Serg. & R. (Pa.) 388; Neile *v.* Jakle, 2 C. & K. 709, 61 E. C. L. 709).

7. Com. *v.* Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; State *v.* Burton, 94 N. C. 947. See also cases cited in the preceding note.

If a party is unable to hear by reason of deafness (Tufts *v.* Charlestown, 4 Gray (Mass.) 537), or inattention caused by present suffering (Schilling *v.* Union R. Co., 77 N. Y. App. Div. 74, 78 N. Y. Suppl. 1015; Tinker *v.* New York, etc., R. Co., 92 Hun (N. Y.) 269, 36 N. Y. Suppl. 672), or because he is unconscious (Dean *v.* State, 105 Ala. 21, 17 So. 28; People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; Gowen *v.* Bush, 76 Fed. 349, 22 C. C. A. 196), or ignorant of the language in which the statement is made (Riley *v.* Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33. See also Wright *v.* Maseras, 56 Barb. (N. Y.) 521), or for any other reason, the statement is not relevant.

8. Pierce *v.* Goldsberry, 35 Ind. 317.

reply;[9] and the party addressed is possessed of knowledge concerning the matter referred to,[10] enabling him to reply if inclined to do so; and the nature of the statement,[11] the right to information of the person who makes it,[12] or other circumstances are such as to render a reply proper[13] and natural,[14] the statement, in connection with a total or partial failure to reply,[15] is admissible evidence tending to show a concession of the truth of the facts stated.[16] *A fortiori* statements in the presence of a party

9. Peck *v.* Ryan, 110 Ala. 336, 17 So. 733; Humes *v.* O'Bryan, 74 Ala. 64; Larry *v.* Sherburne, 2 Allen (Mass.) 34.

10. *Maine.*— Robinson *v.* Blen, 20 Me. 109.

Mississippi.—Edwards *v.* Williams, 2 How. 846.

New Hampshire.— Wallace *v.* Goodall, 18 N. H. 439.

Ohio.— Griffith *v.* Zipperwick, 28 Ohio St. 388.

United States.— Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553.

England.— Hayslep *v.* Gymer, 1 A. & E. 162, 3 L. J. K. B. 149, 3 N. & M. 479, 28 E. C. L. 96.

See 20 Cent. Dig. tit. "Evidence," § 775.

11. Whitney *v.* Houghton, 127 Mass. 527; Sira *v.* Wabash, etc., R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386.

12. *California.*— Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Indiana.— Pierce *v.* Goldsburg, 35 Ind. 317.

Iowa.— Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Iowa 4, 55 N. W. 67.

Massachusetts.— Drury *v.* Hervey, 126 Mass. 519; Hildreth *v.* Martin, 3 Allen 371.

New Hampshire.— Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

New York.— Blanchard *v.* Evans, 55 N. Y. Super. Ct. 543.

Pennsylvania.— McClenkan *v.* McMillan, 6 Pa. St. 366; Moore *v.* Smith, 14 Serg. & R. 388.

Vermont.— Hackett *v.* Collender, 32 Vt. 97; Brainard *v.* Buck, 25 Vt. 573, 60 Am. Dec. 291; Vail *v.* Strong, 10 Vt. 457.

See 20 Cent. Dig. tit. "Evidence," §§ 772, 774.

Duty to speak.— Where parties meet for settlement of their differences (Darlington *v.* Taylor, 3 Grant (Pa.) 195), or it otherwise sufficiently appears that the party must have known that his opponent would alter his position in the event of non-denial (Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Iowa 4, 55 N. W. 67; Hendrickson *v.* Miller, 1 Mill (S. C.) 296), or where the party to whom the statement is addressed owes the declarant a fiduciary or other moral or legal obligation to afford correct information regarding the subject-matter of the declaration (Reid *v.* Barnhart, 54 N. C. 142; Andres *v.* Lee, 21 N. C. 318), silence may be construed as an admission.

Statements by strangers.— A party is not, however, called upon to answer the statements of a third person who may see fit to project himself into a matter which in no way concerns him. No inference arises from what may be nothing more than a disinclination to discuss personal affairs with strangers. Thornton *v.* Savage, 120 Ala. 449, 25 So. 27; Perry *v.* Johnston, 59 Ala. 648; Carter *v.* Buchannon, 3 Ga. 513, 522, where the court said: "What a stranger says to a party . . . may be impertinent, and best rebuked by silence."

13. Hildreth *v.* Martin, 3 Allen (Mass.) 371; Larry *v.* Sherburne, 2 Allen (Mass.) 34; Fenno *v.* Weston, 31 Vt. 345; Fairlie *v.* Denton, 8 B. & C. 395, 15 E. C. L. 198, 3 C. & P. 103, 14 E. C. L. 472, 2 M. & R. 353.

14. See *infra*, IV, B, 7, b.

15. *Georgia.*— Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.

Indiana.— Pierce *v.* Goldsberry, 35 Ind. 317.

New York.— Gibney *v.* Marchay, 34 N. Y. 301.

North Carolina.— Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737; Radford *v.* Rice, 19 N. C. 39.

South Carolina.— Hendrickson *v.* Miller, 1 Mill 296.

See 20 Cent. Dig. tit. "Evidence," § 772.

16. *Alabama.*— Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Peck *v.* Ryan, 110 Ala. 336, 17 So. 733; B. H. Claflin Co. *v.* Rodenburg, 101 Ala. 213, 13 So. 272; Bob *v.* State, 32 Ala. 560; Abercrombie *v.* Allen, 29 Ala. 281.

California.— Tibbet *v.* Sue, 125 Cal. 544, 58 Pac. 160; People *v.* McCrea, 32 Cal. 98.

Florida.— Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

Georgia.— Holston *v.* Southern R. Co., 116 Ga. 656, 43 S. E. 29; Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115; Bray *v.* Latham, 81 Ga. 640, 8 S. E. 64; Rolfe *v.* Rolfe, 10 Ga. 143; Carter *v.* Buchannon, 3 Ga. 513.

Illinois.— Mix *v.* Osby, 62 Ill. 193.

Indiana.— Springer *v.* Bryam, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; Blessing *v.* Dodds, 53 Ind. 95; Pierce *v.* Goldsberry, 35 Ind. 317; Masons' Union L. Ins. Assoc. *v.* Brockman, 26 Ind. App. 182, 59 N. E. 401.

Iowa.— Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Iowa 4, 55 N. W. 67; State *v.* Nash, 10 Iowa 81.

Kentucky.—Thompson *v.* Thompson, 93 Ky. 435, 20 S. W. 373, 14 Ky. L. Rep. 513; Givens *v.* Louisville, etc., R. Co., 72 S. W. 320, 24 Ky. L. Rep. 1796.

Louisiana.— Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431; Barry *v.* Louisiana Ins. Co., 12 Mart. 493.

Maine.— Johnson *v.* Day, 78 Me. 224, 3 Atl. 647.

Maryland.— Brooke *v.* Berry, 1 Gill 153. And see Safe Deposit, etc., Co. *v.* Turner, (Md. 1903) 55 Atl. 1023.

are relevant where he expresses acquiescence therein.[17] Even where a party is justified in keeping silence, so that his failure to reply is without probative force,[18] still, if he ventures a statement upon the subject-matter the entire conversation becomes admissible.[19] The fact of non-denial or other conduct being the essential element, it is comparatively immaterial by whom the statement itself is made.[20] Silence of an agent,[21] especially in the presence of his principal who also remains silent,[22] is imputable to the principal. Inferences may be drawn against a husband or wife from silence or acquiescence where statements are made by either in the other's presence under the conditions stated above.[23]

b. Significance of Failure to Reply. A party's failure to reply to a statement made in his presence is significant in proportion to the extent to which a reply would be natural.[24] Where the facts stated would expose him to the consequences

Massachusetts.— Proctor *v.* Old Colony R. Co., 154 Mass. 251, 28 N. E. 13; Drury *v.* Hervey, 126 Mass. 519; Boston, etc., R. Corp. *v.* Dana, 1 Gray 83.

Michigan.—Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362.

Minnesota.— Bathke *v.* Krassin, 82 Minn. 226, 84 N. W. 796; Greene *v.* Dockendorf, 13 Minn. 70.

New Hampshire.— Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753. And see Green *v.* Bedell, 48 N. H. 546.

New York.— Lathrop *v.* Bramhall, 3 Hun 394; Smith *v.* Hill, 22 Barb. 656.

North Carolina.— Blackwell Durham Tobacco Co. *v.* McElwee, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404.

Pennsylvania.— Connolly *v.* Shannon, 3 Lack. Leg. N. 247.

Texas.— Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535.

Vermont.— State *v.* Magoon, 68 Vt. 289, 35 Atl. 310; Pierce *v.* Pierce, 66 Vt. 369, 29 Atl. 364; Hackett *v.* Callender, 32 Vt. 97; Brainard *v.* Buck, 25 Vt. 573, 60 Am. Dec. 291; Mattocks *v.* Lyman, 16 Vt. 113; Gale *v.* Lincoln, 11 Vt. 152; Vail *v.* Strong, 10 Vt. 457.

Virginia.— Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500.

United States.— Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553. See also U. S. *v.* Craig, 25 Fed. Cas. No. 14,883, 4 Wash. 729.

See 20 Cent. Dig. tit. "Evidence," §§ 771, 772.

Application of the rule in criminal cases see CRIMINAL LAW, 12 Cyc. 70.

17. Crosland *v.* Mutual Sav. Fund, 121 Pa. St. 65, 15 Atl. 504; Kay *v.* Shaw, 8 Bing. 320, 21 E. C. L. 560.

18. See *infra*, IV, B, 7, b.

19. Morris *v.* Stokes, 21 Ga. 552; Com. *v.* Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; McCann *v.* Hallock, 30 Vt. 233; Mattocks *v.* Lyman, 16 Vt. 113.

20. Morton *v.* Rils, 5 La. 413; Boyles *v.* McCowen, 3 N. J. L. 677, 678 (where the court said: "It is every day's practice to admit in evidence anything said in the presence of the party, and uncontradicted by him, and whether this is said by a stranger, by the wife of the party, or even by the opposite party himself, it makes no difference"); Selig *v.* Rehfuss, 195 Pa. St. 200, 45 Atl. 919.

Self-serving declarations.— While it is competent to introduce declarations of a party against his interest, his declarations in his own favor may not be introduced, unless they were made in conversations previously testified to in behalf of the other side, and constituted a part thereof. Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505. See *infra*, IX, A, 2, b, (II), (B), (2).

21. Gault *v.* Sickles, 85 Iowa 266, 52 N. E. 206; State *v.* Farish, 23 Miss. 483; Stecher Lithographic Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213.

22. Linder *v.* Sahler, 51 Barb. (N. Y.) 322.

23. Gillespie *v.* Burleson, 28 Ala. 551; Owen *v.* Christensen, 106 Iowa 394, 76 N. W. 1003; Clark *v.* Evarts, 46 Iowa 248; Carrel *v.* Early, 4 Bibb (Ky.) 270; Boyles *v.* McCowen, 3 N. J. L. 677. See also Linder *v.* Sahler, 51 Barb. (N. Y.) 322. It is otherwise if the circumstances do not demand a reply. Pierce *v.* Pierce, 66 Vt. 369, 29 Atl. 364.

In Missouri statements by a husband or wife made in the presence of the other and against the interest of the latter are not deemed debatable, and therefore silence is not admissible as a prejudicial circumstance. Hoffmann *v.* Hoffmann, 126 Mo. 486, 29 S. W. 603; St. Louis Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385.

24. *Alabama.*— Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425; Wheeler *v.* State, 109 Ala. 56, 19 So. 993; Jelks *v.* McRae, 25 Ala. 440.

California.— Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658.

Georgia.— Chapman *v.* State, 109 Ga. 157, 34 S. E. 369; Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115; Dixon *v.* Edwards, 48 Ga. 142; Block *v.* Hicks, 27 Ga. 522.

Indiana.— Ewing *v.* Bass, 149 Ind. 1, 48 N. E. 241; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Pruett *v.* Beard, 86 Ind. 104; Johnson *v.* Holliday, 79 Ind. 151; Pierce *v.* Goldsberry, 35 Ind. 317.

Massachusetts.— O'Neil *v.* Glover, 5 Gray 144.

Michigan.— St. Johns' State Bank *v.* McCabe, (1904) 98 N. W. 20; Barry *v.* Davis, 33 Mich. 515.

Missouri.— Phillips *v.* Towler, 23 Mo. 401; Ball *v.* Independence, 41 Mo. App. 469.

North Carolina.— State *v.* Burton, 94 N. C.

of a criminal act,[25] or would inflict a civil injury,[26] or injuriously affect his title to real[27] or personal[28] property, or limit his right to recover damages for a serious injury,[29] it would be reasonable to expect a denial of the statement if it were not true. On the other hand where failure to answer was caused by constraint of others,[30] or the party was not aware at the time that he had an interest,[31] or was aware that he had no interest,[32] or was only indirectly affected;[33] or where, as the matter was presented, he had no interest to object,[34] for example, where the statement was not addressed to him[35] or was in his favor,[36] no unfavorable inference can be drawn from his silence. The same absence of relevancy occurs where an answer would be an unseemly interruption of orderly proceedings then in progress; such as the delivery of a sermon,[37] the taking of a deposition[38] or of testimony in open court,[39] or the discharge by a judge,[40] magistrate,[41] counsel,[42] or other person[43] of his proper functions in court proceedings. Where, as in case of a pleading, no opportunity is afforded later for a denial,[44] no probative force

947, 948; Guy *v.* Manuel, 89 N. C. 83; State *v.* Crockett, 82 N. C. 599.

Ohio.— Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526.

Pennsylvania.— McClenkan *v.* McMillan, 6 Pa. St. 366.

Vermont.— Hersey *v.* Barton, 23 Vt. 685.

United States.— Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553.

See 20 Cent. Dig. tit. "Evidence," § 774.

25. Hicks *v.* Lawson, 39 Ala. 90.

26. Wheat *v.* Croom, 7 Ala. 349; Waldridge *v.* Arnold, 21 Conn. 424; Puett *v.* Beard, 86 Ind. 104; Kimball *v.* Post, 44 Wis. 471.

27. Wheeler *v.* State, 109 Ala. 56, 19 So. 993; Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726; Adams *v.* Morgan, 150 Mass. 143, 22 N. E. 708; Roberts *v.* Rice, 69 N. H. 472, 45 Atl. 237 [*citing* Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753; Spence *v.* Smith, 18 N. H. 587].

28. *Arkansas.*— Humphries *v.* McCraw, 9 Ark. 91.

Michigan.— Matthews *v.* Forslund, 112 Mich. 591, 70 N. W. 1105.

Missouri.—State *v.* Henderson, 86 Mo. App. 482.

North Dakota.— Paulson Mercantile Co. *v.* Seaver, 8 N. D. 215, 77 N. W. 1001.

Pennsylvania.—Orner *v.* Hollman, 4 Whart. 45.

Texas.— Simonds *v.* Firemen's Fund Ins. Co., (Civ. App. 1896) 35 S. W. 300.

See 20 Cent. Dig. tit. "Evidence," § 774.

29. Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431.

30. Sindall *v.* Jones, 57 Ga. 85.

31. Ware *v.* Ware, 8 Me. 42.

32. Collier *v.* Dick, 111 Ala. 263, 18 So. 522; State *v.* Hamilton, 55 Mo. 520; Gerding *v.* Funk, 48 N. Y. App. Div. 603, 64 N. Y. Suppl. 423.

33. *In re* Huston, 167 Pa. St. 217, 31 Atl. 553; Brainard *v.* Buck, 25 Vt. 573, 60 Am. Dec. 291.

34. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

35. Gale *v.* Lincoln, 11 Vt. 152.

36. People *v.* Foo, 112 Cal. 17, 44 Pac. 453.

37. Johnson *v.* Trinity Church Soc., 11 Allen (Mass.) 123.

38. Melen *v.* Andrews, M. & M. 336, 31 Rev. Rep. 736, 22 E. C. L. 540.

39. *Alabama.*— Collier *v.* Dick, 111 Ala. 263, 18 So. 522.

California.—Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Georgia.— McElmurray *v.* Turner, 86 Ga. 215, 12 S. E. 359.

Indiana.— Broyles *v.* State, 47 Ind. 251.

New Hampshire.—Horan *v.* Byrnes, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602.

North Carolina.— Blackwell Durham Tobacco Co. *v.* McElwee, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404.

Oregon.— Caseday *v.* Lindstrom, 44 Oreg. 309, 75 Pac. 222, holding that in a suit against one for money paid to him, he was not prevented from denying the payment, on the ground of an admission by silence when he ought to have spoken, because, when he was in court in another action to which he was not a party, he said nothing when a person testified that such payment was made to him, as defendant was under no duty to speak in refutation of what was then given in evidence.

South Dakota.— Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

England.—Sutherland *v.* McLaughlin, C. & M. 429, 41 E. C. L. 236; Thomas *v.* Shirley, 11 Wkly. Rep. 21. But see Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; Cole *v.* Lake Shore, etc., R. Co., 81 Mich. 156, 45 N. W. 983, 95 Mich. 77, 54 N. W. 638; Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; McDermott v. Hoffman, 70 Pa. St. 31.

See 20 Cent. Dig. tit. "Evidence," § 778.

40. Keith *v.* Marcus, 181 Mass. 377, 63 N. E. 924.

41. Child *v.* Grace, 2 C. & P. 193, 12 E. C. L. 522.

42. Carr *v.* Hilton, 4 Fed. Cas. No. 2,437, 1 Curt. 390.

43. Abercrombie *v.* Allen, 29 Ala. 281; Johnson *v.* Holliday, 79 Ind. 151; Varnum *v.* Hart, 47 Hun (N. Y.) 18; Child *v.* Grace, 2 C. & P. 193, 12 E. C. L. 522.

44. Persons *v.* Jones, 12 Ga. 371, 58 Am. Dec. 476.

attaches to a failure to deny. But if a party testifying or being able to testify has an adequate opportunity to controvert testimony previously heard by him, the fact of non-denial is relevant,[45] although the statements not denied are not therefore necessarily established as facts.[46] A party's failure to deny a statement is not relevant where he has bound himself not to make any reply,[47] or is acting under advice[48] or orders[49] to the same effect.

c. Proof and Effect. Proof of a statement made in the presence of a party should be stricken out if it is not followed by proof of the party's conduct on the occasion.[50] Whether the situation was one from which the jury may reasonably find his conduct relevant to a fact in issue is a preliminary question for the court,[51] to be determined in view of all the evidence in the case, direct or circumstantial;[52] for a person is not at liberty to make evidence for himself by the simple expedient of saying something to his opponent and then supporting the truth of his statement by proof that it was not denied.[53] Silence or acquiescence is a species of evidence to be received with caution,[54] and the weight to be given to it is a question for the jury.[55] In the absence of estoppel[56] it is not conclusive upon the rights involved,[57] but is open to explanation.[58]

d. In Respect of Written Statements — (1) *Letters.* The general rule is that omission to answer a written communication is not evidence of the truth of the facts therein stated, and that under ordinary circumstances a party is not required to reply to a letter containing false statements of fact.[59] There are circum-

45. Blanchard *v.* Hodgkins, 62 Me. 119; Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; Simpson *v.* Robinson, 12 Q. B. 511, 13 Jur. 187, 18 L. J. Q. B. 73, 64 E. C. L. 511.

46. Jones *v.* Morrell, 1 C. & K. 266, 47 E. C. L. 266.

47. Slattery *v.* People, 76 Ill. 217.

48. Killian *v.* Georgia, etc., R. Co., 97 Ga. 728, 25 S. E. 384.

49. People *v.* Kessler, 13 Utah 69, 44 Pac. 97.

50. Thornton *v.* Savage, 120 Ala. 449, 25 So. 27; People *v.* Mallon, 103 Cal. 513, 37 Pac. 512; People *v.* Ah Yute, 54 Cal. 89.

Failure to deny is an essential element of relevancy and must be established. Senn *v.* Southern R. Co., 108 Mo. 142, 18 S. W. 1007. It is not conclusive against implied admission that a charge has been previously denied. Jewett *v.* Banning, 21 N. Y. 27. But the denial may be in general terms, denial in detail not being essential. Ware *v.* State, 96 Ga. 349, 23 S. E. 410.

51. Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272; Conway *v.* State, 118 Ind. 482, 21 N. E. 285; State *v.* Burton, 94 N. C. 947; Pierce *v.* Pierce, 66 Vt. 369, 29 Atl. 364.

52. Conway *v.* State, 118 Ind. 482, 21 N. E. 285.

53. Hill *v.* Bishop, 2 Ala. 320; Fearing *v.* Kimball, 4 Allen (Mass.) 125, 81 Am. Dec. 690; St. Louis Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385; Davis *v.* Gallagher, 124 N. Y. 487, 26 N. E. 1045; Learned *v.* Tillotson, 97 N. Y. 1, 49 Am. Rep. 508.

54. People *v.* Mallon, 103 Cal. 513, 37 Pac. 512; Chapman *v.* State, 109 Ga. 157, 34 S. E. 369; Rolfe *v.* Rolfe, 10 Ga. 143; Carter *v.* Buchannon, 3 Ga. 513; May *v.* Coffin, 4 Mass. 341; Wallace *v.* Goodall, 18 N. H. 439. See also *infra*, XVII.

55. Perry *v.* Johnston, 59 Ala. 648; Morrill *v.* Richey, 18 N. H. 295; Jewett *v.* Banning, 21 N. Y. 27; McCann *v.* Hallock, 30 Vt. 233.

56. Estoppel by silence see ESTOPPEL.

57. Hagenbaugh *v.* Crabtree, 33 Ill. 225.

58. Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526.

59. *Colorado.*— Lee-Clark-Andreesen Hardware Co. *v.* Yankee, 9 Colo. App. 443, 48 Pac. 1050.

Illinois.— Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963.

Maryland.— Biggs *v.* Stueler, 93 Md. 100, 48 Atl. 727.

Massachusetts.— Fearing *v.* Kimball, 4 Allen 125, 81 Am. Dec. 690; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Michigan.— St. Johns' State Bank *v.* McCabe, (1904) 98 N. W. 20, holding that statements contained in unanswered letters written to an indorser by an indorsee relative to promises to pay the note are not evidence of acquiescence by the indorser in the truth of such statements.

New Jersey.— Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098].

New York.—Thomas *v.* Gage, 141 N. Y. 506, 36 N. E. 385; Bank of British North America *v.* Delafield, 126 N. Y. 410, 27 N. E. 797; Learned *v.* Tillotson, 97 N. Y. 1, 49 Am. Rep. 508; Levison *v.* Seybold Mach. Co., 22 Misc. 327, 49 N. Y. Suppl. 148; Waring *v.* New York Tel. Co., 44 How. Pr. 69. See also Talcott *v.* Harris, 93 N. Y. 567.

Vermont.— Hill *v.* Pratt, 29 Vt. 119.

United States.— Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553.

England.— Gaskill *v.* Skene, 14 Q. B. 664, 14 Jur. 597, 19 L. J. Q. B. 275, 68 E. C. L. 664; Wiedemann *v.* Walpole, [1891] 2 Q. B. 534, 60 L. J. Q. B. 762, 40 Wkly. Rep. 114; Richards *v.* Frankum, 9 C. & P. 221, 38

stances, however, under which unanswered letters are competent evidence of admission by acquiescence in the statements therein contained;[60] as when the

E. C. L. 138; Draper *v.* Crofts, 15 L. J. Exch. 92, 15 M. & W. 166.

See 20 Cent. Dig. tit. "Evidence," § 781.

Oral declarations distinguished.— "It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them." Learned *v.* Tillotson, 97 N. Y. 112, 49 Am. Rep. 508, per Miller, J. The same distinction is also noticed in nearly all of the cases above cited in this note.

Where a party has taken his final position or for some other reason the correspondence is ended, because no advantage can be deemed likely to accrue from further correspondence, mere failure to reply to the statements of a letter will afford no inference of acquiescence.

Alabama.— Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41.

Colorado.— Patrick *v.* Crowe, 15 Colo. 543, 25 Pac. 985.

Florida.— Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

Louisiana.— Porter *v.* Ledoux, 6 La. Ann. 377.

Michigan.— Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

New York.— Learned *v.* Tillotson, 97 N. Y. 1, 49 Am. Rep. 508; Wait *v.* Borne, 7 N. Y. St. 113.

Pennsylvania.—Dempsey *v.* Dobson, 174 Pa. St. 122, 34 Atl. 459, 52 Am. St. Rep. 816, 32 L. R. A. 761.

See 20 Cent. Dig. tit. "Evidence," § 781.

60. St. Joseph Hydraulic Co. *v.* Globe Tissue-Paper Co., 156 Ind. 665, 59 N. E. 995; Keen *v.* Priest, 1 F. & F. 314, concerning which case Miller, J., in Learned *v.* Tillotson, 97 N. Y. 10, 49 Am. Rep. 508, said: "The letter then in question was from the plaintiff's attorney to the defendant, demanding redress for 'an illegal seizure of sheep,' and it was admitted on the ground that it was evidence of the conduct of the defendant, of which silence was sometimes evidence. It will be seen that the case was one of a tortious nature, and in this respect differs from an action upon a contract, where the letter is offered to show the plaintiff's version of the contract and its admission by the mere silence of the defendant."

"Ordinary practice of mankind" the test. —"There are cases — business and mercantile cases — in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, 'but you promised me that you would do this or that,' if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement. But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness. Is it the ordinary habit of mankind, of which the Courts will take notice, to answer such letters; and must it be taken, according to the ordinary practice of mankind, that if a man does not answer he admits the truth of the charge made against him? If it were so, life would be unbearable. A man might day by day write such letters, which, if they were not answered, would be brought forward as evidence of the truth of the charges made in them. The ordinary and wise practice is not to answer them — to take no notice of them. Unless it is made out to be the ordinary practice of mankind to answer, I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them." Wiedemann *v.* Walpole, [1891] 2 Q. B. 534, 537, 60 L. J. Q. B. 762, 40 Wkly. Rep. 114, per Lord Esher, M. R.

A dunning letter written to a debtor and incidentally stating the terms of the contract under which the money was alleged to be due was held admissible in connection with a failure to reply. Murphey *v.* Gates, 81 Wis. 370, 51 N. W. 573. See Draper *v.* Crofts, 15 L. J. Exch. 92, 93, 15 M. & W. 166, where Parke, B., said: "My own opinion is, that no attention need be paid to a letter asking for money which is not due. It is a different case if a party is bound by circumstances or by his situation to return an answer.

Independent relevancy.—A letter, the statements of which are not competent in connection with non-denial or other conduct of the party, may still be relevant for other reasons; for example to prove demand (Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748; Hill *v.* Pratt, 29 Vt. 119), notice (Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Allen *v.* Peters, 4 Phila. (Pa.) 78; Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748), or the like (Dutton *v.* Woodman, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384).

Probative force.— "The omission of a party to reply to statements in a letter about which he has knowledge, and which if not true he would naturally deny, when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true. So where there has been a correspondence between parties in regard to some subject matter, and one of the parties writes a letter to the other making statements in regard to such subject matter, of

party receiving a letter has in any way invited the same,[61] or when there is any ground to infer that he has acted on the letter[62] by partly answering[63] or otherwise recognizing it;[64] or when with such letters goods or other articles are forwarded with bills and these are received without return or protest,[65] or where money is sent upon terms and conditions stated in the letters and is not returned and there is no objection to or denial of the statements contained in the inclosing writing.[66]

(II) *Documents Other Than Letters.* Where it is affirmatively shown, directly or circumstantially,[67] that statements in accounts or reports of sales,[68]

which the latter has knowledge, and which he would naturally deny if not true, and he wholly omits to answer such letter, such silence is admissible as evidence tending to show the statements to be true. Still all such evidence is of a lighter character than silence when the same facts are directly stated to the party. Men use the tongue much more readily than the pen. Almost all men will reply to and deny or correct a false statement verbally made to them. It is done on the spot and from the first impulse. But when a letter is received making the same statement, the feeling, which readily prompts the verbal denial, not unfrequently cools before the time and opportunity arrive for writing a letter. Other matters intervene. A want of facility in writing, or an aversion to correspondence, or habits of dilatoriness may be the real causes of the silence. As the omission to reply to letters may be explained by so many causes not applicable to silence when the parties are in personal conversation, we do not think the same weight should be attached to it as evidence." Fenno *v.* Weston, 31 Vt. 345, 352, per Aldis, J. In any event failure to object is merely a circumstance to be weighed in connection with other evidence bearing on the question of the correctness of the statement. Meguire *v.* Corwine, 3 MacArthur (D. C.) 81; Waring *v.* U. S. Telegraph Co., 4 Daly (N. Y.) 233, 44 How. Pr. (N. Y.) 69; Hill *v.* Pratt, 29 Vt. 119; Fairlie *v.* Denton, 8 B. & C. 395, 15 E. C. L. 198, 3 C. & P. 103, 14 E. C. L. 472, 2 M. & R. 353.

61. Murray *v.* East End Imp. Co., 60 S. W. 648, 22 Ky. L. Rep. 1477.

62. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

63. Letters which are part of a running correspondence may be submitted to the jury with a caution that failure to reply to a particular statement must not be regarded as an admission unless the jury are satisfied that the party was silent because he could not deny the statement. Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553.

A mere acknowledgment of receipt, the writer postponing further reply, is inadmissible. Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196. See also Waring *v.* U. S. Telegraph Co., 4 Daly (N. Y.) 233, 44 How. Pr. (N. Y.) 69.

64. Murray *v.* East End Imp. Co., 60 S. W. 648, 22 Ky. L. Rep. 1477; Dutton *v.* Woodman, 9 Cush. (Mass.) 255, 57 Am. Dec. 46.

65. St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995; Sturtevant *v.* Wallack, 141 Mass. 119, 4 N. E. 615.

66. St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995.

67. Prout *v.* Chisholm, 21 N. Y. App. Div. 54, 47 N. Y. Suppl. 376 (posting in office); Wilshusen *v.* Binns, 19 Misc. (N. Y.) 547, 45 N. Y. Suppl. 1085 (possession of the book); Ryder *v.* Jacobs, 196 Pa. St. 386, 46 Atl. 667 (making other entries on same page); George A. Fuller Co. *v.* Doyle, 87 Fed. 687 (possession of accounts).

68. *Alabama.*— Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425.

Illinois.— House *v.* Beak, 43 Ill. App. 615; Mackin *v.* O'Brien, 33 Ill. App. 474.

Missouri.— McCormack *v.* Sawyer, 104 Mo. 36, 15 S. W. 998.

New York.— Fisk Pavement, etc., Co. *v.* Evans, 60 N. Y. 640; Prout *v.* Chisolm, 21 N. Y. App. Div. 54, 47 N. Y. Suppl. 376.

Oregon.— Fleishner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

Pennsylvania.— Coe *v.* Hutton, 1 Serg. & R. 398.

See 20 Cent. Dig. tit. "Evidence," §§ 779, 780.

Caution.— A party is not called upon to dispute an account on every occasion on which it may be presented, and care should be exercised in determining whether the circumstances so far required the party to dispute the account as to cause his omission to do so to have weight against him. Churchill *v.* Fulliam, 8 Iowa 45.

Retaining an account stated without objecting to its correctness may be a relevant fact, if the length of time be sufficient to give rise to the inference of acquiescence.

Alabama.— Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425; Peck *v.* Ryan, 110 Ala. 336, 17 So. 733; McCulloch *v.* Judd, 20 Ala. 703.

Colorado.— Freas *v.* Truitt, 2 Colo. 489.

Illinois.—Weigle *v.* Brantigam, 74 Ill. App. 285.

Michigan.— Pabst Beer Co. *v.* Lueders, 107 Mich. 41, 64 N. W. 872.

Missouri.— Shepard *v.* State Bank, 15 Mo. 143.

New Hampshire.— Rich *v.* Eldredge, 42 N. H. 153.

New York.— Murray *v.* Toland, 3 Johns. Ch. 569.

Pennsylvania.— Darlington *v.* Taylor, 3 Grant 195.

South Carolina.— McBride *v.* Watts, 1 McCord 384.

bills of sale,[69] book entries,[70] notices to quit,[71] reports of agents[72] or lessees,[73] sailing lists,[74] and the like[75] have been brought to a party's attention, his failure to deny their accuracy may be relevant if dissent would naturally have been manifested by objection. The effect of failure to deny the truth of written statements is much increased if other statements in the same document are disputed.[76] But where all liability is denied no inference of acquiescence in the correctness of amounts charged can be drawn from failure to object to them specifically.[77] In order that failure to correct a written statement should be a relevant fact it must appear that some duty exists to make corrections and some power to do so. Mere

Washington.— Smith *v.* Kennedy, 1 Wash. Terr. 55.

United States.— Wiggins *v.* Burkham, 10 Wall. 129, 19 L. ed. 884; Freeland *v.* Heron, 7 Cranch 147, 3 L. ed. 297; George A. Fuller Co. *v.* Doyle, 87 Fed. 687; Corps *v.* Robinson, 6 Fed. Cas. No. 3,252, 2 Wash. 388.

England.— Willis *v.* Jernegan, 2 Atk. 251; Sherman *v.* Sherman, 2 Vern. Ch. 276, 23 Eng. Reprint 778.

See 20 Cent. Dig. tit. "Evidence," § 780; and ACCOUNTS AND ACCOUNTING, 1 Cyc. 400.

69. Fisk Pavement, etc., Co. *v.* Evans, 60 N. Y. 640.

70. *Iowa.*— Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186.

Louisiana.—Didier *v.* Augé, 15 La. Ann. 398.

Maine.— Snow *v.* Thomaston Bank, 19 Me. 269.

Maryland.— Safe Deposit, etc., Co. *v.* Turner, (1903) 55 Atl. 1023, holding that the failure of a partner to inspect the firm books and object to any charges against him amounts to such an acquiescence in the entries therein relating to himself or his relation to his partners as to bind him by them in an action for an accounting.

Massachusetts.— Cheney *v.* Cheney, 162 Mass. 591, 39 N. E. 187.

Minnesota.— Snyder *v.* Wolford, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22.

New Hampshire.— Northumberland *v.* Cobleigh, 59 N. H. 250.

New Jersey.— Oram *v.* Bishop, 12 N. J. L. 153; Bird *v.* Magowan, (Ch. 1898) 43 Atl. 278.

New York.— Tanner *v.* Parshall, 4 Abb. Dec. 356, 3 Keyes 431, 2 Transcr. App. 204, 5 Abb. Pr. N. S. 373, 35 How. Pr. 472; Terry *v.* McNiel, 58 Barb. 241; Wilshusen *v.* Binns, 19 Misc. 547, 43 N. Y. Suppl. 1085.

Pennsylvania.— Ryder *v.* Jacobs, 196 Pa. St. 386, 46 Atl. 667.

United States.— George A. Fuller Co. *v.* Doyle, 87 Fed. 687; Corps *v.* Robinson, 6 Fed. Cas. No. 3,252, 2 Wash. 388.

See 20 Cent. Dig. tit. "Evidence," § 780.

Corporations stand in the same position as individuals in this connection. San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410; Anderson *v.* Mutual Reserve Fund L. Assoc., 171 Ill. 40, 49 N. E. 205; Allen *v.* Coit, 6 Hill (N. Y.) 318.

Special book entries.— The rule under consideration is not limited to ordinary books of account, but applies to any book which is an object of personal interest to and constant reference by the persons to be affected by its contents. It will be inferred for example that members of a club are aware of entries in club books kept by the proper persons and accessible to the members. Raggett *v.* Musgrave, 2 C. & P. 556, 12 E. C. L. 730; Wiltzie *v.* Adamson, 1 Phil. Ev. 253; Alderson *v.* Clay, 1 Stark. 405, 18 Rev. Rep. 788, 2 E. C. L. 157.

71. St. Louis Consol. Coal Co. *v.* Schaefer, 31 Ill. App. 364.

72. Bailey *v.* Bensley, 87 Ill. 556; McCord *v.* Manson, 17 Ill. App. 118.

73. Givens *v.* Providence Coal Co., 60 S. W. 304, 22 Ky. L. Rep. 1217.

74. Mackintosh *v.* Marshall, 12 L. J. Exch. 337, 11 M. & W. 116.

75. *Delaware.*— Grier *v.* Deputy, 1 Marv. 19, 40 Atl. 716, newspaper.

Massachusetts.— Traders' Nat. Bank *v.* Rogers, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, 36 L. R. A. 539, failure to deny genuineness of signature to note, but evidence not conclusive.

New Hampshire.— Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753, promissory note.

New York.— Del Piano *v.* Caponigri, 20 Misc. 541, 46 N. Y. Suppl. 452 (list of rents); Schrowang *v.* Sahler, 2 N. Y. Suppl. 140 (affidavit).

West Virginia.— Lee *v.* Virginia, etc., Bridge Co., 18 W. Va. 299, record.

See 20 Cent. Dig. tit. "Evidence," §§ 779, 780.

Retaining an invoice without objection is relevant as to receipt of the goods thereon stated. Field *v.* Moulson, 9 Fed. Cas. No. 4,770, 2 Wash. 155.

76. Burns *v.* Campbell, 71 Ala. 271; Tams *v.* Lewis, 42 Pa. St. 402; Kratzer *v.* Lyon, 5 Pa. St. 274; Lever *v.* Lever, 2 Hill Eq. (S. C.) 158; Fenno *v.* Weston, 31 Vt. 345.

Prima facie case.— It has been held that failure to object to other items than those disputed constitutes as to such other items a *prima facie* case (Prout *v.* Chisolm, 24 N. Y. App. Div. 54, 47 N. Y. Suppl. 376; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884); and even that retaining an account without objection may after a considerable interval have the same evidentiary force (Brown *v.* Brown, 16 Ark. 202; Bailey *v.* Bensley, 87 Ill. 556; McCord *v.* Manson, 17 Ill. App. 118; Shepard *v.* State Bank, 15 Mo. 143; Preston *v.* Killam, 1 Am. L. J. (Pa.) 168; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884).

See 20 Cent. Dig. tit. "Evidence," § 780.

77. Hinton *v.* Coleman, 45 Wis. 165.

access to the books is not sufficient,[78] and simply disregarding a claim leaves the positions of the parties entirely unaffected.[79]

C. Judicial Admissions — 1. In General. Procedure attaches to judicial admissions[80] the effect of a *levamen probationis*, establishing either, (1) in lieu of evidence, the point covered, or (2) a waiver of evidence in regard to it; somewhat different statements of the same result. Unlike extrajudicial admissions, which have no definite probative value, judicial admissions in either aspect sustain the burden of evidence, and until the court permits them to be withdrawn, because shown to have been made under a mistake or improvidently,[81] are binding on parties[82] and counsel,[83] and even on the court itself.[84] Since judicial admissions relate to procedure, all matters pertaining to their receipt,[85] withdrawal,[86] enforcement,[87] or effect are largely within the administrative control of the court. The opposing party in a civil[88] or the government in a criminal[89] case is not required to accept a judicial admission but may insist upon proving the fact.[90] When the statement becomes *functus officio* as a judicial admission, it still retains any legitimate probative effect it may have as the statement of the party, that is, as an extrajudicial admission.[91] A judicial admission is a perfectly competent independent fact, being received, although the declarant is present in court as an available witness.[92]

78. Cheney *v.* Cheney, 162 Mass. 591, 39 N. E. 187.

79. Sullivan *v.* Louisville, etc., R. Co., 128 Ala. 77, 30 So. 528; Robinson *v.* Fitchburg, etc., R. Co., 7 Gray (Mass.) 92.

80. **Judicial admissions defined** see *supra*, IV, A; and *infra*, note 91.

81. Prestwood *v.* Watson, 111 Ala. 604, 608, 20 So. 600 (where the court said: "If they are made improvidently and by mistake, and the improvidence and mistake be clearly shown, the court has a discretion to relieve from their consequences; a discretion which should be exercised sparingly and cautiously"); Rosenbaum *v.* State, 33 Ala. 354; Holley *v.* Young, 68 Me. 215, 28 Am. Rep. 40.

82. Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600; Rosenbaum *v.* State, 33 Ala. 354; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Holley *v.* Young, 68 Me. 215, 28 Am. Rep. 40; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 57 L. T. Rep. N. S. 780, 36 Wkly. Rep. 376.

Favored as evidence.— In Holley *v.* Young, 68 Me. 215, 216, 28 Am. Rep. 40, the court said: "It would be wiser to adopt some rule by which more admissions could be obtained, than to allow parties, at their own will and pleasure, to withdraw the few now made." And in Prestwood *v.* Watson, 111 Ala. 604, 608, 20 So. 600, it was declared that when admissions "are made deliberately and intelligently, in the presence of the court and reduced to writing, they are of the best species of evidence, and parties cannot be permitted to retract them, as they are not permitted at pleasure to retract admissions of fact, made in any form." See also Campbell Lives Chief Justices, vol. 5, p. 201.

83. Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453.

84. Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 57 L. T. Rep. N. S. 780, 36 Wkly. Rep. 376.

85. Com. *v.* Miller, 3 Cush. (Mass.) 243.

86. Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600. See also East *v.* O'Connor, 19 Ont. Pr. 301.

87. Holley *v.* Young, 68 Me. 215, 28 Am. Rep. 40.

88. Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; Whiteside *v.* Lowney, 171 Mass. 431, 50 N. E. 931.

89. Com. *v.* Costello, 120 Mass. 358; People *v.* Thomson, 103 Mich. 80, 61 N. W. 345.

90. "Parties as a general rule are entitled to prove the essential facts, to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances." Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 97, 39 Atl. 352, 64 Am. St. Rep. 208. The party by whom the benefit of an admission is declined is as fully entitled to insist that the court shall receive relevant evidence as if it had not been open to him to accept the admission. Whiteside *v.* Lowney, 171 Mass. 431, 50 N. E. 931.

91. Perry *v.* Simpson Water Proof Mfg. Co., 40 Conn. 313.

An admission is not judicial merely because made in the course of legal proceedings. The effect of the judicial admission is limited to the purposes of the case in which it is made, although not necessarily to the particular trial of the cause. When contained in a party's testimony, affidavits, or pleadings in another case, statements in court may have merely the force of extrajudicial admissions, in the legal operation of which logic as well as procedure plays a part. McLemore *v.* Nuckolls, 37 Ala. 662; Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628; Rich *v.* Minneapolis, 40 Minn. 82, 41 N. W. 455; Tabb *v.* Cabell, 17 Gratt. (Va.) 160. See also *infra*, IV, E.

92. Stevenson *v.* Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818, 88 Am. St. Rep. 805.

2. By Whom Made — a. Parties. Relevant judicial statements made or adopted[93] by a party,[94] although made without the consent or knowledge of his attorney,[95] are, when received by the court,[96] admissible not only in the case in which they are made but in any subsequent trial[97] or proceedings connected with it,[98] and in other cases in which the facts covered thereby are relevant.[99] The statements may be made not only in the course of a trial as usually conducted but in bankruptcy,[1] probate,[2] or other special proceedings, and are competent, although made in a representative capacity,[3] provided they are offered against the party when acting in the same capacity in which he made them. When a party, however, is sued individually it is not material that the admissions were made by him in a different capacity.[4]

b. Counsel or Attorneys.[5] Judicial admissions are frequently those of counsel or attorneys of record.[6] When these are made in good faith,[7] in the counsel's professional capacity,[8] for the purpose of dispensing with evidence,[9] and to that end are distinct and formal, they bind the client,[10] whether made before,[11] on,[12] or

93. Winter *v.* Walter, 37 Pa. St. 155.

A declaration by a third person cannot be treated as an admission, unless adopted or at least acted upon by the party, O'Bannon *v.* Kirkland, 2 Strobh. (S. C.) 29. And see Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56. In this connection one who was a party to the suit in which the statement was made but is not a party to that in which it is offered is deemed to be a third person, Dean *v.* Davis, 12 Mo. 112; Owens *v.* Dawson, 1 Watts (Pa.) 149, 26 Am. Dec. 49.

94. **For consideration of admissions in general by a party** see *infra*, IV, D, 1.

95. Pence *v.* Sweeney, 3 Ida. 181, 28 Pac. 413.

96. Com. *v.* Miller, 3 Cush. (Mass.) 243, 250.

97. Home Ins. Co. *v.* Field, 53 Ill. App. 119; Elwood *v.* Lannon, 27 Md. 200; Farmers' Bank *v.* Sprigg, 11 Md. 389.

98. Shipman *v.* Haynes, 15 La. 363.

99. Phillips *v.* Middlesex County, 127 Mass. 262; Kellenberger *v.* Sturtevant, 7 Cush. (Mass.) 465; Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228.

1. Dupuy *v.* Harris, 6 B. Mon. (Ky.) 534; Lyon *v.* Phillips, 106 Pa. St. 57; Rankin *v.* Busby, (Tex. Civ. App. 1894) 25 S. W. 678. See *supra*, IV, B, 4, b, (I); *infra*, IV, C, 3, d, (I).

2. *Indiana.*— Beal *v.* State, 77 Ind. 231.

Missouri.— State *v.* Richardson, 29 Mo. App. 595.

New Hampshire.— Morrill *v.* Foster, 33 N. H. 379.

New York.— Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228.

Pennsylvania.—Miller *v.* Garrecht, 17 Lanc. L. Rev. 133.

Texas.— Hendricks *v.* Huffmeyer, (Civ. App. 1894) 27 S. W. 777.

See 20 Cent. Dig. tit. "Evidence," § 707.

3. Phillips *v.* Middlesex County, 127 Mass. 262, holding that admissions by an administrator were competent as against him.

4. **Admissions of a garnishee** are competent against him when sued as a defendant. Purcell *v.* St. Paul F. & M. Ins. Co., 5 N. D. 100, 64 N. W. 943.

5. **Extrajudicial admissions by counsel or attorneys** see *infra*, IV, D, 4, f, (I).

6. Wilson *v.* Spring, 64 Ill. 14; Adams *v.* Utley, 87 N. C. 356; The Harry, 12 Fed. Cas. No. 6,147, 9 Ben. 524. Where, however, an attorney states without objection in the presence of his client facts to which he says the latter will testify, the statement is that of the client. Lord *v.* Bigelow, 124 Mass. 185.

7. Williams *v.* Preston, 20 Ch. D. 672, 51 L. J. Ch. 927, 47 L. T. Rep. N. S. 265, 30 Wkly. Rep. 555.

8. Dillon *v.* State, 6 Tex. 55.

Retainer or other authority must be affirmatively shown. Wagstaff *v.* Wilson, 4 B. & Ad. 339, 1 N. & M. 1, 24 E. C. L. 154.

Agents of attorney.— After the relation of attorney and client is shown to exist those entitled to act for the lawyer in the business of his office may by their relevant admissions bind the client. Taylor *v.* Willans, 2 B. & Ad. 845, 22 E. C. L. 355; Standage *v.* Crighton, 5 C. & P. 406, 24 E. C. L. 628; Truslove *v.* Burton, 2 L. J. C. P. O. S. 105, 9 Moore C. P. 64, 17 E. C. L. 555.

9. Treadway *v.* Sioux City, etc., R. Co., 40 Iowa 526; Ferson *v.* Wilcox, 19 Minn. 449; Truby *v.* Seybert, 12 Pa. St. 101; Young *v.* Wright, 1 Campb. 139.

Statements in conversations made by the attorney are not evidence against his client. Parkins *v.* Hawkshaw, 2 Stark. 239, 10 Rev. Rep. 711, 3 E. C. L. 393; Wilson *v.* Turner, 1 Taunt. 398, 9 Rev. Rep. 797.

10. Starke *v.* Kenan, 11 Ala. 818; Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

11. Marshall *v.* Cliff, 4 Campb. 133.

12. In the trial of a cause the admissions of counsel as to matters to be proved are constantly received and acted upon. Wilson *v.* Spring, 64 Ill. 14; People *v.* Mole, 85 N. Y. App. Div. 33, 82 N. Y. Suppl. 747; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539.

An admission in the opening statement of counsel, if made distinctly and deliberately, may be treated as proof of the fact (Lindley *v.* Atchison, etc., R. Co., 47 Kan. 432, 28 Pac.

after[13] the trial, and in the exercise of a wide discretion with which the client has as a rule so little personal connection as to establish in many cases no real relation of agency.[14] It is within the appropriate function of counsel to make admissions dispensing with strict rules of law or practice as to matters incidental to the issue, such as the formal proof of a statute,[15] corporation record,[16] or other document;[17] or as to uncontroverted facts about which a client knows nothing, such as the existence of a foreign law;[18] or as to facts about which the client cannot exercise a trained judgment, for example what an absent[19] or deceased[20] witness would testify if present; or in general as to technical matters relating to the machinery of a trial.[21] The anomalous relations of agency existing between counsel and client impose an important limitation upon the use of judicial admissions made by counsel when these are offered in subsequent cases. It is considered that the original concession may well have been made for other reasons than because it states the fact truly, for example to save time[22] or to avoid a continuance[23] or that the truth of facts may have been admitted only provisionally to raise an issue of law, as on an agreed statement of facts,[24] a bill of exceptions,[25] demurrer,[26] or special verdict,[27] or in order to formulate a request for a charge to the jury.[28] The judicial admission as originally made is not therefore so necessarily connected with the party himself as to be deemed competent in another action as an extra-judicial admission;[29] unless it was formally made, without limitation to the pur-

201; Ferson *v.* Wilcox, 19 Minn. 449; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539. See also Colledge *v.* Horn, 3 Bing. 119, 3 L. J. C. P. O. S. 184, 28 Rev. Rep. 606, 11 E. C. L. 66; Wallace *v.* Vernon, 3 N. Brunsw. 5), and is admissible on a subsequent trial of the same cause (Missouri, etc., Telephone Co. *v.* Vandevort, 67 Kan. 269, 72 Pac. 771). But an incidental or casual remark cannot be regarded. Lake Erie, etc., R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470. See also Lowrie *v.* Verner, 3 Watts (Pa.) 317.

A casual remark in a closing argument was held incompetent as an admission in another case. Adee *v.* Howe, 15 Hun (N. Y.) 20.

Observations of counsel during a trial do not affect the rights of clients (McKeen *v.* Gammon, 33 Me. 187; Petch *v.* Lyon, 9 Q. B. 147, 15 L. J. Q. B. 393, 58 E. C. L. 147), the office of legal adviser being rather to try causes than to talk about them (Young *v.* Wright, 1 Campb. 139; Watson *v.* King, 3 C. B. 608, 54 E. C. L. 608; Doe *v.* Richards, 2 C. & K. 216, 61 E. C. L. 216; Elton *v.* Larkins, 5 C. & P. 385, 1 M. & Rob. 196, 24 E. C. L. 617; Parkins *v.* Hawkshaw, 2 Stark. 239, 10 Rev. Rep. 711, 3 E. C. L. 393).

13. A statement of fact made by the attorney with his client's authority, in open court after a hearing of the cause, for the purpose of being considered in deciding the issues, has been treated as a judicial admission. The Harry, 11 Fed. Cas. No. 6,147, 9 Ben. 524.

14. Anderson *v.* McAleenan, 15 Daly (N. Y.) 444, 8 N. Y. Suppl. 483.

15. Truslove *v.* Burton, 9 Moore C. P. 64, 2 L. J. C. P. O. S. 105, 17 E. C. L. 555, 10 Moore C. P. 96, 17 E. C. L. 567.

16. Perry *v.* Simpson Waterproof Mfg. Co., 40 Conn. 313.

17. Voisin *v.* Commercial Mut. Ins. Co., 67 Hun (N. Y.) 365, 22 N. Y. Suppl. 348; Cooke *v.* Pennington, 7 S. C. 385.

18. Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 57 L. T. Rep. N. S. 780, 36 Wkly. Rep. 376, law of Scotland.

19. Ryan *v.* Beard, 74 Ala. 306.

20. Ryan *v.* Beard, 74 Ala. 306; Virginia-Carolina Chemical Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1.

21. Chicago City R. Co. *v.* McMeen, 70 Ill. App. 220; Lacoste *v.* Robert, 11 La. Ann. 33, submission on written evidence.

22. Hays *v.* Hynds, 28 Ind. 531; Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163; Shipman *v.* Haynes, 15 La. 363.

23. Ryan *v.* Beard, 74 Ala. 306; Cutler *v.* Cutler, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209.

24. Page *v.* Brewster, 58 N. H. 126.

25. Beeler *v.* Young, 3 Bibb (Ky.) 520.

26. Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621; Belden *v.* Blackman, 124 Mich. 667, 83 N. W. 616; Auld *v.* Hepburn, 2 Fed. Cas. No. 650, 1 Cranch C. C. 122. See, generally, PLEADING.

27. Dorsey *v.* Gassaway, 2 Harr. & J. (Md.), 402, 3 Am. Dec. 557.

28. Keane *v.* Fisher, 7 La. Ann. 334.

29. *Alabama.*— Ryan *v.* Beard, 74 Ala. 306.

California.— Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31; Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Connecticut.— Perry *v.* Simpson Water Proof Mfg. Co., 40 Conn. 313.

New York.— Adee *v.* Howe, 15 Hun 20; Anderson *v.* McAleenan, 15 Daly 444, 8 N. Y. Suppl. 483.

Ohio.— State *v.* Buchanan, Wright 233.

Wisconsin.— Weisbrod *v.* Chicago, etc., R. Co., 20 Wis. 419.

poses of any particular action,[30] or was ratified by the client[31] or his immediate agents;[32] the general rule being that under other circumstances an admission of this nature is to be strictly construed and not extended by implication.[33]

c. Guardian Ad Litem. The judicial admission of a guardian *ad litem* does not bind his ward in a subsequent suit.[34] And an admission by the guardian *ad litem* in a pleading is not evidence against the ward after the pleading has been abandoned.[35]

3. Form of Judicial Admissions — a. In General. A judicial admission may be oral, as a verbal waiver of proof made in open court,[36] or a plea of guilty in a criminal case,[37] or it may be in writing, as in pleadings,[38] stipulations,[39] confessions of judgment,[40] or in a letter.[41]

b. Pleading[42] — (i) *In General.* A constructive admission by failure to deny a traversable allegation[43] or the like[44] has no probative value, although, as far

See 20 Cent. Dig. tit. "Evidence," § 708.

30. *Kansas.*— Central Branch Union, etc., R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Maine.— Woodcock *v.* Calais, 68 Me. 244; Holley *v.* Young, 68 Me. 215, 28 Am. Rep. 40.

New Hampshire.— Holderness *v.* Baker, 44 N. H. 414.

New York.— Voisin *v.* Commercial Mut. Ins. Co., 67 Hun 365, 22 N. Y. Suppl. 348.

North Carolina.—Virginia-Carolina Chemical Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1; Davidson *v.* Cifford, 100 N. C. 18, 6 S. E. 718.

England.— Elton *v.* Larkins, 5 C. & P. 385, 1 M. & Rob. 196, 24 E. C. L. 617.

See 20 Cent. Dig. tit. "Evidence," § 708.

In doubtful cases the question of subsequent admissibility, depending largely on the intention with which the statement was originally made, is one of fact for the determination of the jury. Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

The admission may be expressly withdrawn. Perry *v.* Simpson Water Proof Mfg. Co., 40 Conn. 313 (holding, however, that even where the admission is withdrawn as a judicial *levamen probationis* it may still retain its force as an extrajudicial admission); Hays *v.* Hynds, 28 Ind. 531; Cutler *v.* Cutler, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209; Elton *v.* Larkins, 5 C. & P. 385, 1 M. & Rob. 196, 24 E. C. L. 617. See also Voisin *v.* Commercial Mut. Ins. Co., 67 Hun (N. Y.) 365, 22 N. Y. Suppl. 348.

31. Nichols, etc., Co. *v.* Jones, 32 Mo. App. 657.

32. Haller *v.* Worman, 3 L. T. Rep. N. S. 741, 9 Wkly. Rep. 348; s. c. at *nisi prius*, 2 F. & F. 165.

33. Hardin *v.* Forsythe, 99 Ill. 312; McKinney *v.* Salem, 77 Ind. 213; Cutler *v.* Cutler, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209; Macleod *v.* Wakley, 3 C. & P. 311, 14 E. C. L. 584. See also Holman *v.* Norfolk Bank, 12 Ala. 369.

34. Finn *v.* Hempstead, 24 Ark. 111; Hiatt *v.* Brooks, 11 Ind. 508.

35. Geraty *v.* National Ice Co., 16 N. Y. App. Div. 174, 44 N. Y. Suppl. 659, where the pleading was superseded by an amended pleading.

Abandoned or superseded pleadings generally see *infra*, IV, C, 3, b, (IV).

36. Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453. See also cases cited *supra*, IV, C, 2, b.

37. Hendle *v.* Geiler, (Del. 1895) 50 Atl. 632; Patton *v.* Freeman, 1 N. J. L. 113; Meyers *v.* Dillon, 39 Oreg. 581, 65 Pac. 867, 66 Pac. 814; Shumaker *v.* Reed, 3 Pa. Dist. 45, 13 Pa. Co. Ct. 547. See also Dunbar *v.* Dunbar, 80 Me. 152, 13 Atl. 578, 6 Am. St. Rep. 166. It is not material that the criminal charge was tried in a court of probate. Dunbar *v.* Dunbar, 80 Me. 152, 13 Atl. 578, 6 Am. St. Rep. 166.

There must be an unequivocal statement.— An act indicating an unwillingness to contend is consistent with a belief that there is no liability and cannot be used as an admission. Harrison *v.* Baker, 5 Litt. (Ky.) 250. At common law if on a prosecution for assault and battery defendant pleaded guilty the record was competent in a civil action for the same assault and battery to prove it, but when the accused without pleading to a charge of assault and battery throws himself on the mercy of the court and submits to a fine the record is not evidence in a civil action for the same act to prove it or to enhance the damages. Honaker *v.* Howe, 19 Gratt. (Va.) 50.

38. See *infra*, IV, C, 3, b.

39. See *infra*, IV, C, 3, c.

40. Earnest *v.* Hoskins, 100 Pa. St. 551. See, generally, Judgments.

41. Holderness *v.* Baker, 44 N. H. 414, where a letter written by counsel to an auditor to whom the case had been referred, the letter containing an admission of fact, was held to have been properly used by the auditor in making his decision.

42. See also Pleading.

43. Lee *v.* Heath, 61 N. J. L. 250, 39 Atl. 729; Clinton *v.* Lyon, 3 N. J. L. 1036; Starkweather *v.* Kittle, 17 Wend. (N. Y.) 20. See, generally, Pleading.

44. In an action for slander, a plea alleging the truth of the words charged to have been spoken cannot be read in evidence as an

as necessary to effectuate its purpose, it is, even if not offered in evidence,[45] conclusive by way of estoppel as sometimes said,[46] until changed by amendment or otherwise,[47] on the specific issue to which it applies. Allegations material on one issue may be immaterial on another.[48] But a distinct statement of facts contained in a pleading, apparently relied on because actually existing, is admissible,[49] although voluntary and unnecessary,[50] or not bearing on the plea on which the issue is tried,[51] and although the pleading was filed by a party without the knowledge of his attorney.[52] One who desires to avail himself of admissions in a pleading must accept them as an entirety; he cannot select such portion as may suit him and reject the remainder[53] should the latter qualify and explain the admission offered.[54] Nor on the other hand can a party insist on the receipt of declarations in his own favor because contained in a pleading.[55] And it would be pushing the relations of attorney and client to an unwarranted extent to hold the client responsible for any inconsistency between statements made in the pleadings.[56]

(II) *In Same Case.* Except so far as prevented by statute,[57] statements which are satisfactorily shown to be those of a party[58] or to have been approved by him[59] are, when made in the pleadings of a case, admissible in lien of evidence, against the party making them or against his successor in interest.[60] They are received also on any subsequent trial of the case,[61] including a trial in an appellate court,[62] and are equally competent whether the pleader be plaintiff[63] or

admission that they were spoken. Craig *v.* Burris, (Del. 1902) 55 Atl. 353.

45. Colter *v.* Calloway, 68 Ind. 219; New Albany, etc., Plank Road Co. *v.* Stallcup, 62 Ind. 345; Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450; Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. 701; White *v.* Smith, 46 N. Y. 418.

46. Metropolis Bank *v.* Faber, 38 N. Y. App. Div. 159, 56 N. Y. Suppl. 542.

47. Brooks *v.* Brooks, 90 N. C. 142; Boileau *v.* Rutlin, 2 Exch. 665, 12 Jur. 899.

48. Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076; McDonald *v.* Southern California R. Co., 101 Cal. 206, 35 Pac. 643; Marshall Field Co. *v.* Ruffcorn, (Iowa 1902) 90 S. W. 618; Blackington *v.* Johnson, 126 Mass. 21; Kinnear *v.* Gallagher, 3 N. Brunsw. 424; Wilkinson *v.* Walker, 2 U. C. Q. B. 162.

49. Connecticut Insane Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017; Lee *v.* Heath, 61 N. J. L. 250, 252, 39 Atl. 729 (where the court said: "It would seem to be unreasonable that, while a statement casually made by a party is receivable as evidence against him, a statement deliberately made, in response to a demand for the exact truth, should be deemed incapable of probative force"); Rowland *v.* Blaksley, 1 Q. B. 403, 2 G. & D. 734, 6 Jur. 732, 11 L. J. Q. B. 279, 41 E. C. L. 599; Hart *v.* Middleton, 2 C. & K. 9, 61 E. C. L. 9; Kenyon *v.* Wakes, 6 Dowl. P. C. 105, 6 L. J. Exch. 180, 2 M. & W. 764.

50. Sims *v.* La Prairie Mut. F. Ins. Co., 101 Wis. 586, 77 N. W. 908.

51. Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

52. Pence *v.* Sweeney, 3 Ida. 914, 28 Pac. 413.

53. Shrady *v.* Shrady, 42 N. Y. App. Div. 9, 58 N. Y. Suppl. 546.

54. Granite Gold Min. Co. *v.* Maginness, 118 Cal. 131, 50 Pac. 269.

55. Texas, etc., R. Co. *v.* O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. 902.

56. Larry *v.* Herrick, 58 N. H. 40.

57. Phillips *v.* Smith, 110 Mass. 61; Walcott *v.* Kimball, 13 Allen (Mass.) 460; Brooks *v.* Wright, 13 Allen (Mass.) 72.

58. Aultman *v.* Martin, 49 Nebr. 103, 68 N. W. 340; International, etc., R. Co. *v.* Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152. See also as to statements in pleadings not necessarily made by the party himself *supra*, IV, C, 3, b, (I).

59. Warder, etc., Co. *v.* Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250.

60. Miller *v.* Nicodemus, 58 Nebr. 352, 78 N. W. 618.

61. Spurlock *v.* Missouri, etc., R. Co., 125 Mo. 404, 28 S. W. 634.

62. Warder, etc., Co. *v.* Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250.

63. *Alabama.*— Hartsell *v.* Masterson, 132 Ala. 275, 31 So. 616.

Illinois.— Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621.

Indiana.— Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5.

New Jersey.— Lee *v.* Heath, 61 N. J. L. 250, 39 Atl. 729.

North Carolina.— Smith *v.* Nimocks, 94 N. C. 243.

Pennsylvania.— Kline *v.* Huntington First Nat. Bank, (1888) 15 Atl. 433.

Texas.— Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284.

Wisconsin.— Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

See 20 Cent. Dig. tit. "Evidence," §§ 713, 714.

Facts stated in his writ as to defendant's existence, residence, etc., are deemed to be admitted by plaintiff. Southern R. Co. *v.* Mayes, 113 Fed. 84, 51 C. C. A. 70.

The probative force of a plaintiff's state-

defendant,[64] and whether the pleadings of the latter be in abatement [65] or in bar. Failure to deny an allegation may be used in some instances as a so-called "admission by conduct." [66]

(III) *In Other Cases.* Only as an extrajudicial admission can the statements of a party in his pleading in one case be used against him in another.[67] These statements may be used in that quality even by a stranger to the former litigation,[68] but are not competent against a co-defendant.[69] The statement must be precise and definite,[70] and not founded merely on information and belief.[71] It is

ment is increased by verification under oath. Hastings *v.* Speer, 15 Pa. Super. Ct. 115.

64. *Iowa.*— Farley *v.* O'Malley, 77 Iowa 531, 42 N. W. 435.

Kentucky.—Edwards *v.* Mattingly, 107 Ky. 332, 53 S. W. 1032, 21 Ky. L. Rep. 1045.

Missouri.— Bowman *v.* Globe Steam Heating Co., 80 Mo. App. 628.

New York.— Breese *v.* Graves, 67 N. Y. App. Div. 322, 73 N. Y. Suppl. 167; Lecour *v.* Importers', etc., Nat. Bank, 61 N. Y. App. Div. 163, 70 N. Y. Suppl. 419; Foster *v.* Henry, 5 Alb. L. J. 173.

Texas.— Cook *v.* Hughes, 37 Tex. 343; Hamilton *v.* Van Hook, 26 Tex. 302.

See 20 Cent. Dig. tit. "Evidence," §§ 713, 714.

65. Witmer *v.* Schatter, 2 Rawle (Pa.) 359.

66. Roscoe Lumber Co. *v.* Standard Silica Co., 62 N. Y. App. Div. 421, 70 N. Y. Suppl. 1130. As to admissions by conduct see *supra*, IV, B, 6.

67. *California.*— Greer *v.* Tripp, 56 Cal. 209; McDermott *v.* Mitchell, 47 Cal. 249.

Georgia.— Printup *v.* Patton, 91 Ga. 422, 18 S. E. 311; Lunday *v.* Thomas, 26 Ga. 537.

Illinois.— Robbins *v.* Butler, 24 Ill. 387. See also Seymour *v.* O. S. Richardson Fueling Co., 103 Ill. App. 625.

Kentucky.— Clarke *v.* Robinson, 5 B. Mon. 55.

Louisiana.— Vredenburgh *v.* Baton Rouge Sugar Co., 52 La. Ann. 1666, 28 So. 122; Michel *v.* Davis, 12 La. 152.

Maine.— Robison *v.* Swett, 3 Me. 316.

Maryland.— Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484; Western Maryland R. Co. *v.* Orendoroff, 37 Md. 328.

Massachusetts.— Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373.

Minnesota.— Rich *v.* Minneapolis, 40 Minn. 82, 41 N. W. 455.

Missouri.— Dowzelot *v.* Rawlings, 58 Mo. 75.

Nebraska.— Paxton *v.* State, 60 Nebr. 763, 84 N. W. 254.

North Carolina.— Guy *v.* Manuel, 89 N. C. 83.

Oregon.— Feldman *v.* McGuire, 34 Oreg. 309, 55 Pac. 872.

Pennsylvania.— Kline *v.* Huntingdon First Nat. Bank, (1888) 15 Atl. 433; McClelland *v.* Lindsay, 1 Watts & S. 360.

United States.— Hyman *v.* Wheeler, 29 Fed. 347; Church *v.* Shelton, 5 Fed. Cas. No. 2,714, 2 Curt. 271.

England.— Tiley *v.* Cowling, Buller N. P. 243, 1 Ld. Raym. 744; *Re* Walters, 61 L. T. Rep. N. S. 872, 63 L. T. Rep. N. S. 328.

See 20 Cent. Dig. tit. "Evidence," § 714.

A bill in equity signed and sworn to by complainant may be put in evidence against him in another suit as an admission of the facts therein stated. Callan *v.* McDaniel, 72 Ala. 96; McLemore *v.* Nuckolls, 37 Ala. 662; Cooper *v.* Day, 1 Rich. Eq. (S. C.) 26; Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138; and other cases above cited. *Compare*, however, cases cited *infra*, note 74.

68. *Alabama.*—Royall *v.* McKensie, 25 Ala. 363.

Florida.— Booth *v.* Lenox, (1903) 34 So. 566.

Georgia.— St. Paul F. & M. Ins. Co. *v.* Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483.

Maine.— Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628.

Minnesota.— O'Riley *v.* Clampet, 53 Minn. 539, 55 N. W. 740.

Missouri.— Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614.

North Carolina.— Kiddie *v.* Debrutz, 2 N. C. 420.

Texas.— Burleson *v.* Goodman, 32 Tex. 229.

Virginia.— Hunter *v.* Jones, 6 Rand. 541.

West Virginia.— Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

United States.— General Electric Co. *v.* Jonathan Clark, etc., Co., 108 Fed. 170.

See 20 Cent. Dig. tit. "Evidence," § 715.

69. McDermott *v.* Mitchell, 47 Cal. 249; Lunday *v.* Thomas, 26 Ga. 537. See also *infra*, IV, D, 1, e.

70. Martin *v.* Campbell, 11 Rich. Eq. (S. C.) 205. See *supra*, IV, B, 3, b.

71. New York *v.* Fay, 53 Hun (N. Y.) 553, 554, 6 N. Y. Suppl. 400, where it is said: "It is true that admissions in pleadings in an action between other and different parties have been received in evidence by the courts. The ground upon which these admissions have been received has been because they were admissions against the interest of the party making them, and because of the great probability that a party would not admit or state anything against himself or against his own interest unless it was true. And, furthermore, these admissions have been confined to these cases where the admissions contained the assertion of facts which, from the nature of the case, if true, must have been within the knowledge of the party making the admission and the pleading is verified by him. These rules are laid down in the case of Cook *v.* Burr, 44 N. Y. 156, and their application is apparent. Therefore, an admission contained in pleadings between other

said to be not essential that the party against whom the admission is offered should have had actual knowledge of the existence of the pleading,[72] for the act of his attorney will bind him.[73] In some jurisdictions, however, a distinction is taken between statements contained in pleadings in another case which are emanations of counsel and those fairly to be regarded as statements by the party.[74] To be admissible in those jurisdictions in which this distinction is taken, the statement must affirmatively be connected with the party as one which he has made because it was true, as shown by the fact that he has verified it under oath[75] or authenticated it by his signature;[76] or as indicated by the fact that the statement is of such a nature that information could have come to the legal adviser only from the client.[77] Statements made in a former pleading may be competent evidence apart from their character as extra judicial admissions.[78] For example they may be competent to show that a suit was brought[79] and its general nature,[80] or that the issues in two actions are the same,[81] provided that the record affirmatively shows relevancy in the statements offered.[82] In like manner these statements may show that a former position was inconsistent with the one now taken;[83]

parties simply founded upon information and belief, where there is no presumption that the facts alleged or denied must have been within the knowledge of the party making the allegation or denial, and where the allegation or denial is not against the interest of the party making the same, cannot be received in evidence as establishing any fact." *Compare* Pope *v.* Allis, 115 U. S. 363, 370, 6 S. Ct. 69, 29 L. ed. 393, holding, on the authority of Doe *v.* Steel, 3 Campb. 115, 13 Rev. Rep. 768, that "when the averment is made on information and belief, it is nevertheless admissible as evidence, although not conclusive. . . . That the fact that the averment is made on information and belief merely detracts from the weight of the testimony; it does not render it inadmissible."

72. Dowzelot *v.* Rawlings, 58 Mo. 75.

73. Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Dowzelot *v.* Rawlings, 58 Mo. 75.

74. *Alabama.*— Tennessee Coal, etc., R. Co. *v.* Linn, 123 Ala. 112, 26 So. 245, 82 Am. St. Rep. 108; Cooley *v.* State, 55 Ala. 162.

Massachusetts.— Dennie *v.* Williams, 135 Mass. 28; Melvin *v.* Whiting, 13 Pick. 184.

Mississippi.— Meyer *v.* Blakemore, 54 Miss. 570; Co-operative L. Assoc. *v.* Leflore, 53 Miss. 1; Crump *v.* Gerock, 40 Miss. 765.

Montana.— Tague *v.* John Caplice Co., 28 Mont. 51, 72 Pac. 297.

Pennsylvania.— Owens *v.* Dawson, 1 Watts 149, 151, 26 Am. Dec. 49.

United States.— Delaware County Com'rs *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674; Pope *v.* Allis, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 293; Combs *v.* Hodge, 21 How. (U. S.) 397, 16 L. ed. 115.

England.— See Reg. *v.* Simmonds, 4 Cox C. C. 277.

See 20 Cent. Dig. tit. "Evidence," §§ 714, 716.

Equity pleadings are subject to the same distinction (Miller *v.* Chrisman, 25 Ill. 269; Rankin *v.* Maxwell, 2 A. K. Marsh. (Ky.) 488, 12 Am. Dec. 431), being regarded as the work of counsel and the answer being deemed more fully a statement by the party of facts known to be true (Doe *v.* Steel, 3 Campb. 115, 13 Rev. Rep. 768; Grant *v.* Jackson, Peake 203). See also the following cases holding a bill in chancery is not evidence against the complainant in the bill in a trial at law. Adams *v.* MacMillan, 7 Port. (Ala.) 73; Rees *v.* Lawless, 4 Litt. (Ky.) 218; Slack *v.* Buchannan, Peake 5. *Compare,* however, cases cited *supra,* note 67.

75. Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657; Hobson *v.* Ogden, 16 Kan. 388; Stump *v.* Henry, 6 Md. 201, 61 Am. Dec. 300; Siebert *v.* Leonard, 21 Minn. 442; Utley *v.* Tolfree, 77 Mo. 307.

76. Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106; Cook *v.* Barr, 44 N. Y. 156.

Where he has not signed the pleading it is regarded as the work of counsel. Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. 443; Dennie *v.* Williams, 135 Mass. 28; Eigenbrun *v.* Smith, 98 N. C. 207, 4 S. E. 122; Delaware County Com'rs *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674; Combs *v.* Hodge, 21 How. (U. S.) 397, 16 L. ed. 115.

77. Johnson *v.* Russell, 144 Mass. 409, 11 N. E. 670; Bliss *v.* Nichols, 12 Allen (Mass.) 443.

78. Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145.

79. Ricketts *v.* Garrett, 11 Ala. 806; Byrne *v.* Byrne, 47 Ill. 507; King *v.* Mittalberger, 50 Mo. 182.

80. Kamm *v.* State Bank, 74 Cal. 191, 15 Pac. 765; Truby *v.* Seybert, 12 Pa. St. 101; Ray *v.* Clemens, 6 Leigh (Va.) 600; State *v.* McDonald, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 787.

81. Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373.

82. Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307; Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525; Robbins *v.* Butler, 24 Ill. 387; Eccles *v.* Shackleford, 1 Litt. (Ky.) 35.

83. Stone *v.* Cook, 79 Ill. 424; Sharts *v.* Awalt, 73 Ind. 304; Baum *v.* Fryrear, 85 Mo. 151; Meade *v.* Black, 22 Wis. 241. See

that the amount claimed in two suits is different;[84] that a party has failed to advance a present claim under suitable circumstances;[85] that a defense entirely obvious if true was not suggested at an earlier stage;[86] or that a party has suffered a default, when if certain facts were true he probably would not have done so.[87] The statements in an answer in equity may be used as admissions in an action at law,[88] and admissions made in the pleadings filed in a federal are competent in a state court and *vice versa*.[89]

(IV) *Abandoned, Superseded, or Inchoate Pleadings*.[90] Although a pleading which has been withdrawn or superseded by amendment is out of the case in its capacity as pleading and the pleader is no longer concluded by it,[91] relevant statements therein may still be competent as extrajudicial admissions.[92] To be so used, the superseded pleading must be introduced in evidence,[93] must be shown to have been originally made as a statement of fact, and connected directly with the party himself,[94] as having been made or authorized and inspired by him. It is not sufficient that the attorney signed and filed the original pleadings.[95]

also Younglove *v.* Knox, (Fla. 1902) 33 So. 427.

84. Calvert *v.* Friebus, 48 Md. 44; Boston *v.* Richardson, 13 Allen (Mass.) 146; Gordon *v.* Parmelee, 2 Allen (Mass.) 212; Tindall *v.* McIntyre, 24 N. J. L. 147.

85. Springer *v.* Drosch, 32 Ind. 486, 2 Am. Rep. 356.

86. Garey *v.* Sangston, 64 Md. 31, 20 Atl. 1034.

87. Cragin *v.* Carleton, 21 Me. 492; Millard *v.* Adams, 1 Misc. (N. Y.) 431, 21 N. Y. Suppl. 424.

88. Lowney *v.* Perham, 20 Me. 235.

89. Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621 [*affirming* 30 Ill. App. 552].

90. See, generally, PLEADING.

91. *Arkansas.*— Holland *v.* Rogers, 33 Ark. 251.

California.— Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625.

Indiana.— Boots *v.* Canine, 94 Ind. 408.

Minnesota.— Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443.

Mississippi.— Gilmore *v.* Borders, 2 How. 824.

Montana.— Mahoney *v.* Butte Hardware Co., 19 Mont. 377, 48 Pac. 545.

Nebraska.— Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 459.

New York.— Strong *v.* Dwight, 11 Abb. Pr. N. S. 319.

Utah.—Kirkpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

See 20 Cent. Dig. tit. "Evidence," §§ 718, 719. And see, generally, PLEADING.

92. *Iowa.*—Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

Kentucky.— Wyles *v.* Berry, 76 S. W. 126, 25 Ky. L. Rep. 606.

Maine.— State *v.* Bowe, 61 Me. 171.

Missouri.— Anderson *v.* McPike, 86 Mo. 293; Dowzelot *v.* Rawlings, 58 Mo. 75; Bailey *v.* O'Bannon, 28 Mo. App. 39.

New York.— Fogg *v.* Edwards, 20 Hun 90; Strong *v.* Dwight, 11 Abb. Pr. N. S. 319.

Texas.— Barrett *v.* Featherstone, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; Galloway *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 78 S. W. 32; Texas, etc., R. Co. *v.* Coggin, (Civ. App. 1903) 77 S. W. 1053; Orange Rice Mill Co. *v.* McIlhinney, (Civ. App. 1903) 77 S. W. 428, abandoned pleading referred to in a substituted pleading, although not bearing any file-mark.

Utah.— Kirkpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

Wisconsin.— Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125; Folger *v.* Boyington, 67 Wis. 447, 30 N. W. 715.

See 20 Cent. Dig. tit. "Evidence," §§ 718, 719.

Contra, as to admission by a guardian *ad litem*. See *supra*, IV, C, 2, c.

93. Boots *v.* Canine, 94 Ind. 408; Leach *v.* Hill, 97 Iowa 81, 66 N. W. 69; Shipley *v.* Reasoner, 87 Iowa 555, 57 N. W. 470; Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450; Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125. See also McGavock *v.* Omaha, 40 Nebr. 64, 58 N. W. 543; Bunz *v.* Cornelius, 19 Nebr. 107, 26 N. W. 621.

Reason for the rule.— "Being only evidence, and subject to explanation, it seems that it should be introduced as any other evidence, and unless so introduced, should not be considered. To hold otherwise is to permit a party to spring a surprise upon his adversary, by presenting the admissions when the opportunity to explain has passed. Surely the law does not contemplate such an unfair practice that would deprive a party of the privilege of explaining how and why the admission was made." Shipley *v.* Reasoner, 87 Iowa 555, 558, 54 N. W. 470.

94. Burns *v.* Maltby, 43 Minn. 161, 45 N. W. 3.

95. Starkweather *v.* Kittle, 17 Wend. (N. Y.) 20; Corbett *v.* Clough, 8 S. D. 176, 65 N. W. 1074. See also Wyles *v.* Berry, 76 S. W. 126, 25 Ky. L. Rep. 606. *Compare* Galloway *v.* Antonio, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. 32, holding that while a plaintiff may show that a statement in an abandoned pleading is not his, he must, to counteract its effect, show not only that he had not so informed his counsel, but that he did not know the petition contained the allegation when filed.

Indeed in many instances the very necessity for amendment arises because counsel has failed to apprehend the facts correctly.[96] Therefore in some of the states where an original has been superseded by an amended pleading,[97] or has been withdrawn,[98] the allegations of the former pleading, in the absence of special circumstances, such as payment of money into court[99] or verification by oath,[1] are not admissible as evidence even in the same action; and where a pleading is not abandoned voluntarily but because the party is required to elect,[2] or the pleading is stricken out by order of court,[3] the statements contained in it are not admissions.[4] Other courts, while conceding the truth of the considerations on which the foregoing rulings are based, regard them rather as affecting the weight than the competency of the statements and hold that after making all due allowances there may remain a residuum of probative force in statements in abandoned or superseded pleadings, to the benefit of which the opposite party is entitled,[5] in the

96. Taft *v.* Fiske, 140 Mass. 250, 5 N. E. 621, 54 Am. Rep. 459.

97. Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076; Stern *v.* Loewenthal, 77 Cal. 340, 19 Pac. 579; Wheeler *v.* West, 71 Cal. 126, 11 Pac. 871; Ponce *v.* McElvy, 51 Cal. 222; Corley *v.* McKeag, 9 Mo. App. 38; Kimball *v.* Bellows, 13 N. H. 58; McGregor *v.* Sima, (Tex. Civ. App. 1898) 44 S. W. 1021; Southern Pac. Co. *v.* Wellington, (Tex. Civ. App. 1896) 36 S. W. 1114.

For purpose of impeachment.— Averments in an original complaint cannot be used to disprove those of the amended one, but may be introduced on cross-examination to impeach plaintiff. Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625. See also *In re* O'Connor, 118 Cal. 69, 50 Pac. 4.

98. Little Rock, etc., R. Co. *v.* Clark, 58 Ark. 490, 25 S. W. 504; Ruddock Co. *v.* Johnson, (Cal. 1902) 67 Pac. 680.

99. Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369.

1. Barrett *v.* Featherstone, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245. *Aliter* where the original pleading is verified by defendant's attorney (Smith *v.* Davidson, 41 Fed. 172), unless so done with the knowledge or direction of the client (Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129).

2. Lane *v.* Bryant, 100 Ky. 138, 37 S. W. 584, 18 Ky. L. Rep. 857, 36 L. R. A. 709.

3. Watters *v.* Parker, (Tex. Sup. 1892) 19 S. W. 1022; Dunson *v.* Nacogdoches County, 19 Tex. Civ. App. 9, 37 S. W. 978.

4. Lane *v.* Bryant, 100 Ky. 138, 37 S. W. 584, 18 Ky. L. Rep. 857, 36 L. R. A. 709; Dunson *v.* Nacogdoches County, 15 Tex. Civ. App. 9, 37 S. W. 978.

5. *Alabama.*— Davidson *v.* Rothchilds, 49 Ala. 104.

California.— Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Dakota.— Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661.

District of Columbia.— Beale *v.* Brown, 6 Mackey 574.

Georgia.— Alabama Midland R. Co. *v.* Guilford, 114 Ga. 627, 40 S. E. 794.

Idaho.— Bloomingdale *v.* Du Rell, 1 Ida. 33.

Illinois.— Soaps *v.* Eichberg, 42 Ill. App. 375; McNail *v.* Welch, 26 Ill. App. 482.

Indiana.— Baltimore, etc., R. Co. *v.* Evarts, 112 Ind. 533, 14 N. E. 369; Boots *v.* Canine, 94 Ind. 408.

Kansas.— Juneau *v.* Stunkle, 40 Kan. 756, 20 Pac. 473.

Missouri.— Schad *v.* Sharp, 95 Mo. 573, 8 S. W. 549; Murphy *v.* St. Louis Type Foundry, 29 Mo. App. 541; Bailey *v.* O'Bannon, 28 Mo. App. 39.

New York.— Breese *v.* Graves, 67 N. Y. App. Div. 322, 73 N. Y. Suppl. 167; New York, etc., Transp. Co. *v.* Hurd, 44 Hun 17; Fogg *v.* Edwards, 20 Hun 90; Strong *v.* Dwight, 11 Abb. Pr. N. S. 319.

North Carolina.— Adams *v.* Utley, 87 N. C. 356.

Ohio.— Peckham Iron Co. *v.* Harper, 41 Ohio St. 100.

Oregon.— Sayre *v.* Mohney, 35 Oreg. 141, 56 Pac. 526.

South Carolina.— Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

Texas.— Houston, etc., R. Co. *v.* De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877; Watson *v.* Itasca First Nat. Bank, 95 Tex. 351, 67 S. W. 314; Barrett *v.* Featherstone, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; Texas, etc., R. Co. *v.* Coggin, (Civ. App. 1903) 77 S. W. 1053; Felton *v.* Talley, (Civ. App. 1903) 72 S. W. 614; Ft. Worth, etc., R. Co. *v.* Wright, 27 Tex. Civ. App. 198, 64 S. W. 1001; Prouty *v.* Musquiz, (Civ. App. 1900) 59 S. W. 568; Southern Pac. Co. *v.* Wellington, (Civ. App. 1900) 57 S. W. 856; Jordan *v.* Young, (Civ. App. 1900) 56 S. W. 762; Galveston, etc., R. Co. *v.* Eckles, (Civ. App. 1899) 54 S. W. 651; Wright *v.* U. S. Mortgage Co., (Civ. App. 1899) 54 S. W. 368; Goodbar Shoe Co. *v.* Sims, (Civ. App. 1897) 43 S. W. 1065.

Utah.— Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629; Brown *v.* Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

Washington.— Oregon R., etc., Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415.

Wisconsin.— Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125; Norris *v.* Cargill, 57 Wis. 251, 15 N. W. 148.

See 20 Cent. Dig. tit. "Evidence," § 718.

Amendment of an answer after its admission in evidence does not destroy the original answer as evidence. Herzfeld *v.* Reinach, 44 N. Y. App. Div. 326, 60 N. Y. Suppl. 658.

absence of evidence that the pleading was unauthorized.[6] The statement will thereupon be received, even though the suit has been discontinued,[7] the judgment in it annulled for want of jurisdiction,[8] or, in case of a suit in equity, the bill has been dismissed.[9] Nor is it material that the case is being heard on appeal from a lower court,[10] or whether the pleading has [11] or has not [12] been verified, or even that the pleading has been withdrawn absolutely from the files,[13] or has not been filed at all.[14] This probative force has even been given a *prima facie* value.[15] But if it affirmatively appears that the former pleading was filed without authority it is not admissible.[16] While as before stated there is some difference of opinion as to the probative force of extrajudicial admissions contained in superseded or abandoned pleadings, it is agreed that in the absence of statute [17] such statements may be admissible to impeach a witness,[18] or to raise unfavorable inferences as to good faith in a belated claim or defense.[19] In like manner the statement may be admissible to show that the party made a different claim at another time.[20] The fact to be proved must have some evidentiary weight, that is, it must be relevant.[21]

c. Stipulations. An agreed statement of facts [22] or other stipulations by counsel or attorneys [23] as to matters of fact within the scope of their professional function [24] bind the party as a judicial admission, although made before issue joined,[25] and is competent evidence against him even on a second trial.[26] Where these agreements are made to avoid continuances [27] or for some other specific purpose, and are by their terms limited to a particular occasion or temporary object,[28] they possess no force beyond the occasion or after the purpose has been accomplished.[29] But if the admissions are on their face unqualified no limitation to the pending trial is implied,[30] and they are receivable as judicial admissions, in

6. Anderson *v.* McPike, 86 Mo. 293.
7. Byrne *v.* Hibernia Nat. Bank, 31 La. Ann. 81; Hunter *v.* Smith, 5 Mart. N. S. (La.) 178; Barlow *v.* Dupuy, 1 Mart. N. S. (La.) 442; Gordon *v.* Parmelee, 2 Allen (Mass.) 212.
8. Starns *v.* Hadnot, 45 La. Ann. 318, 12 So. 561.
9. Mey *v.* Guilliman, 105 Ill. 272.
10. Mahan *v.* Brinnell, 94 Mo. App. 165, 67 S. W. 930. *Contra*, Folger *v.* Boyinton, 67 Wis. 447, 30 N. W. 715.
11. Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284.
12. Daub *v.* Englebach, 109 Ill. 267; Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 531, 67 N. W. 1125, where the court said: "The fact that the answer is not verified only renders the declaration less solemn and cogent, but it is still competent to show the claim of defense originally set up."
13. Daub *v.* Englebach, 109 Ill. 267.
14. Matson *v.* Melchor, 42 Mich. 477, 4 N. W. 200.
15. Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.
16. Anderson *v.* McPike, 86 Mo. 293.
17. Taft *v.* Fiske, 140 Mass. 250, 5 N. E. 621, 54 Am. Rep. 459; Phillips *v.* Smith, 110 Mass. 61.
18. *In re* O'Connor, 118 Cal. 69, 50 Pac. 4.
19. Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928; Hodges *v.* Torrey, 28 Mo. 99.
20. Ryan *v.* Dutton, (Tex. Civ. App. 1896) 38 S. W. 546.
21. San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1898) 46 S. W. 374.
22. Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95.
23. See, generally, STIPULATIONS.
24. *Alabama.*— Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600.
Georgia.— King *v.* Shepard, 105 Ga. 473, 30 S. E. 634.
Maryland.— Merchants' Bank *v.* Marine Bank, 3 Gill 96, 43 Am. Dec. 300.
New Hampshire.— Page *v.* Brewsters, 54 N. H. 184.
North Carolina.— Virginia-Carolina Chemical Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1.
See 20 Cent. Dig. tit. "Evidence," § 726.
25. Jones *v.* Clark, 37 Iowa 586.
26. Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600; Merchant's Nat. Bank *v.* Stanton, 62 Minn. 204, 64 N. W. 390; Virginia-Carolina Chemical Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1; Doe *v.* Bird, 7 C. & P. 6, 32 E. C. L. 472; Langley *v.* Oxford, 2 Gale 63, 5 L. J. Exch. 166, 1 M. & W. 508.
27. Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163. See also CONTINUANCES IN CIVIL CASES, 9 Cyc. 155.
28. King *v.* Shepard, 105 Ga. 473, 30 S. E. 634.
29. Perry *v.* Simpson Waterproof Mfg. Co., 40 Conn. 313; Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163; Doe *v.* Bird, 7 C. & P. 6, 32 E. C. L. 472.
30. Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 749; Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163; Doe *v.* Bird, 7 C. & P. 6, 32 E. C. L. 472; Langley *v.* Oxford, 2 Gale 63, 5 L. J. Exch. 166, 1 M. & W. 508. But see Pearl *v.* Allen, 1 Tyler 4. The question of the intent

any subsequent trial of the cause between the parties.[31] A statement, so far as connected with the party[32] as a definite statement of his own or made by counsel under his express direction or with his distinct approval,[33] is admissible in another suit,[34] even though the admission may have been withdrawn.[35] A party, however, is entitled to explain or qualify the effect of an extrajudicial admission made in this way,[36] and the statement may be deprived of probative force by the consideration that it was not made as a fact but as a concession to obtain the opinion of the court[37] or for a similar purpose, and that abandoning the stipulation by consent connotes a mutual waiver of any probative effect.[38] There is no theory on which an agreed statement of facts is admissible in a suit between other independent parties, merely because the subsequent suit relates to the same subject.[39]

d. Sworn Statements[40] — (i) *Affidavits.* A judicial admission may be contained in an affidavit used in the case[41] whether made or adopted by the party.[42] It is not material that the affiant has testified to the same effect,[43] that the author-

with which an admission was made may be left to the jury. Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

31. *Alabama.*— Prestwood *v.* Watson, 110 Ala. 604, 20 So. 600.

Georgia.— King *v.* Shepard, 105 Ga. 473, 30 S. E. 634; Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 36 L. R. A. 95.

Kansas.— Central Branch Union Pac. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Maine.— Holley *v.* Young, 68 Me. 215, 28 Am. Rep. 40.

New Jersey.— Gallagher *v.* McBride, 66 N. J. L. 360, 49 Atl. 582.

England.— Doe *v.* Bird, 7 C. & P. 6, 32 E. C. L. 472; Langley *v.* Oxford, 2 Gale 63, 5 L. J. Exch. 166, 1 M. & W. 507.

See 20 Cent. Dig. tit. "Evidence," § 727.

32. Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

33. A party may deny the authority of his counsel to bind him beyond the particular case.

Kentucky.— Baylor *v.* Smithers, 1 T. B. Mon. 6; Harrison *v.* Baker, 5 Litt. 250.

Michigan.— Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

Missouri.— Nichols *v.* Jones, 32 Mo. App. 657.

New York.— Elting *v.* Scott, 2 Johns. 157, 163; Brittingham *v.* Stevens, 1 Hall 379.

England.— Tompkins *v.* Ashby, M. & M. 32, 22 E. C. L. 464.

34. Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613; Nichols *v.* Jones, 32 Mo. App. 657.

35. King *v.* Shepard, 105 Ga. 473, 30 S. E. 634.

36. King *v.* Shepard, 105 Ga. 473, 30 S. E. 634; Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95.

37. Hart's Appeal, 8 Pa. St. 32.

38. McLughan *v.* Bovard, 4 Watts (Pa.) 308.

39. Elting *v.* Scott, 2 Johns. (N. Y.) 157.

40. Schedules and inventories in bankruptcy proceedings see *supra*, IV, B, 4, b, (I).

41. *Alabama.*— Orr *v.* Travelers' Ins. Co., 120 Ala. 647, 24 So. 997; Penn *v.* Edwards, 50 Ala. 63; Hallett *v.* O'Brien, 1 Ala. 585.

Delaware.— Hall *v.* Cannon, 4 Harr. 360.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 147 note.

Indian Territory.— New York Fidelity, etc., Co. *v.* Brown, (Ind. Terr. 1902) 69 S. W. 915.

Iowa.— Asbach *v.* Chicago, etc., R. Co., 86 Iowa 101, 53 N. W. 90.

Michigan.— Cornelissen *v.* Ort, (1903) 93 N. W. 617.

New York.— Stickney *v.* Ward, 20 Misc. 667, 46 N. Y. Suppl. 382; Forrest *v.* Forrest, 6 Duer 102.

Pennsylvania.— Kline *v.* Huntingdon First Nat. Bank, (1888) 15 Atl. 433; Bowen *v.* De Lattre, 6 Whart. 430.

Texas.— Wyser *v.* Calhoun, 11 Tex. 323.

United States.— Hyman *v.* Wheeler, 29 Fed. 347.

See 20 Cent. Dig. tit. "Evidence," § 730.

An affidavit made in a state court may be used as an admission in the cause after its removal to a federal court. National Steamship Co. *v.* Tugman, 143 U. S. 28, 12 S. Ct. 361, 27 L. ed. 87.

Affidavits on collateral matters as motions for change of venue are not admissible as evidence for other purposes. Ohio, etc., R. Co. *v.* Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20; Campbell *v.* Maher, 105 Ind. 383, 4 N. E. 911; Carter *v.* Carter, 101 Ind. 450; Rochester School Town *v.* Shaw, 100 Ind. 268; Worley *v.* Moore, 97 Ind. 15; Paulman *v.* Claycomb, 75 Ind. 64; Farman *v.* Lauman, 73 Ind. 568.

42. *Alabama.*— Hallett *v.* O'Brien, 1 Ala. 585.

Indiana.— Wabash, etc., Canal *v.* Bledsoe, 5 Ind. 133.

Massachusetts.— Knight *v.* Rothschild, 172 Mass. 546, 52 N. E. 1062.

Pennsylvania.— Reineman *v.* Blair, 96 Pa. St. 155.

England.— Brickell *v.* Hulse, 7 A. & E. 454, 7 L. J. Q. B. 18, 2 N. & P. 426, 34 E. C. L. 248; Johnson *v.* Ward, 6 Esp. 47.

See 20 Cent. Dig. tit. "Evidence," § 730.

Reading the affidavit of a third person as part of a record does not make the statements contained in the same available as admissions. Hargis *v.* Price, 4 Dana (Ky.) 79.

43. Orr *v.* Travelers' Ins. Co., 120 Ala. 647, 24 So. 997.

ity of the officer before whom the affidavit was sworn is not proved,[44] or that the affidavit was irregularly taken.[45] Statements of a party contained in his affidavit in another case have no force as judicial admissions and are merely admissions *in pais*.[46]

(II) *Depositions.* Statements made by a party in his deposition in the cause may contain relevant judicial admissions, although not based on his personal knowledge, but on belief in the accuracy of an accountant.[47] His deposition is competent, although taken in a personal capacity and offered against him in a representative capacity,[48] or taken *in perpetuam*[49] or *de bene esse*.[50] If the deposition was not taken with statutory formalities,[51] or the cause for taking it no longer exists,[52] and, even if the deposition be suppressed,[53] a statement contained therein is still competent as an admission *in pais*. The same effect attaches to a statement in a deposition taken in another suit, whether the deposition was used as such in that suit or not,[54] and whether made by the deponent as a party in the case or by an agent expressly instructed.[55] A statement made in a deposition taken in a suit where the deponent was only a witness is competent as an admission in a later action to which he is a party.[56]

(III) *Answers to Interrogatories.* Where interrogatories are filed for the purpose of obtaining discovery, the party's answers have the force of judicial admissions in the suit in which they are made,[57] although the answers are not made with the formality required by statute,[58] or the interrogatories themselves put in evidence.[59] In another action such statements are admissions *in pais*,[60] although the issues in the two cases be different;[61] and statements thus used have been accorded the weight of *prima facie* evidence.[62] A party cannot use answers

44. Morrell *v.* Cawley, 17 Abb. Pr. (N. Y.) 76, proof of affiant's signature suffices.

45. Davenport *v.* Cummins, 15 Iowa 219.

46. *California.*— Shafter *v.* Richards, 14 Cal. 125.

Iowa.— Davenport *v.* Cummings, 15 Iowa 219.

Massachusetts.— Knight *v.* Rothschild, 172 Mass. 546, 52 N. E. 1062.

Missouri.— Rosenfeld *v.* Siegfried, 91 Mo. App. 169.

New York.— Furniss *v.* Mutual L. Ins. Co., 46 N. Y. Super. Ct. 467.

North Carolina.—Albertson *v.* Williams, 97 N. C. 264, 1 S. E. 841; Mushat *v.* Moore, 20 N. C. 257.

Oregon.— Tippin *v.* Ward, 5 Oreg. 450.

See 20 Cent. Dig. tit. "Evidence," § 730.

47. Cambioso *v.* Maffet, 4 Fed. Cas. No. 2,330, 2 Wash. 98.

48. Kritzer *v.* Smith, 21 Mo. 296.

49. Faunce *v.* Gray, 21 Pick. (Mass.) 243; Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233. *Contra*, by statute, in Maine. Dwinel *v.* Godfrey, 44 Me. 65.

50. Meyer *v.* Campbell, 1 Misc. (N. Y.) 283, 20 N. Y. Suppl. 705; McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

51. Carr *v.* Griffin, 44 N. H. 510; Bilger *v.* Buchanan, (Tex. Sup. 1887) 6 S. W. 408.

52. Moore *v.* Brown, 23 Kan. 269; Hatch *v.* Brown, 63 Me. 410; Charleson *v.* Hunt, 27 Mo. 34.

53. Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157. See also Profile, etc., Hotels Co. *v.* Bickford, 72 N. H. 73, 54 Atl. 699.

54. *Alabama.*— Spann *v.* Torbert, 130 Ala. 541, 30 So. 389.

Missouri.— Padley *v.* Catterlin, 64 Mo. App. 629.

New Hampshire.— Brewer *v.* Hyndman, 18 N. H. 9.

Texas.— Bilger *v.* Buchanan, (Sup. 1887) 6 S. W. 408.

Vermont.— Commercial Bank *v.* Clark, 28 Vt. 325.

Virginia.— Hatcher *v.* Crews, 78 Va. 460.

United States.— Lastrapes *v.* Blanc, 14 Fed. Cas. No. 8,100, 3 Woods 134.

See 20 Cent. Dig. tit. "Evidence," § 733.

55. Gardner *v.* Moult, 10 A. & E. 464, 3 Jur. 1190, 8 L. J. Q. B. 270, 2 P. & D. 403, 37 E. C. L. 255.

56. Helm *v.* Handley, 1 Litt. (Ky.) 219; Padley *v.* Catterlin, 64 Mo. App. 629.

57. Jewett *v.* Rines, 39 Me. 9; Nichols *v.* Allen, 112 Mass. 23; Lynde *v.* McGregor, 13 Allen (Mass.) 182, 90 Am. Dec. 188.

58. Jewett *v.* Rines, 39 Me. 9; Lynde *v.* McGregor, 13 Allen (Mass.) 182, 90 Am. Dec. 188; Edwards *v.* Norton, 55 Tex. 405.

59. Cochran *v.* Chipman, 11 Nova Scotia 254.

60. *Alabama.*—Gay *v.* Rogers, 109 Ala. 624, 20 So. 37.

Georgia.— Whitlock *v.* Crew, 28 Ga. 289.

Louisiana.— Murison *v.* Butler, 18 La. Ann. 197; Alford *v.* Hughes, 14 La. Ann. 727.

Maine.— Jewett *v.* Rines, 39 Me. 9.

Massachusetts.—Williams *v.* Cheney, 3 Gray 215.

Pennsylvania.— Moloney *v.* Davis, 48 Pa. St. 512.

See 20 Cent. Dig. tit. "Evidence," § 736.

61. Hood *v.* Chambliss, 7 La. Ann. 106; Williams *v.* Cheney, 3 Gray (Mass.) 215.

62. Clairmont *v.* Dixon, 4 L. C. Jur. 6.

made by him in his own favor, except so far as they qualify the statements relied upon against him.[63]

(iv) *Petitions.* When a verified petition is abandoned[64] or offered in evidence in another suit,[65] a statement contained in it no longer possesses the quality of a judicial admission but is still competent as an admission *in pais*,[66] provided that when drawn by counsel there is evidence distinctly connecting the statement with the client.[67]

(v) *Testimony.* While even in the case in which it is originally given the testimony of a party is primarily evidence,[68] its probative effect is still that of a judicial admission in the case or on any subsequent trial of it,[69] including a trial on appeal.[70] In the absence of a contrary regulation by statute,[71] testimony given by a party on a former trial is competent as an ordinary admission,[72] even when given in another state,[73] and whether he was then testifying as a party[74] or merely as a witness.[75] The rule is subject to the qualification that the fact stated must be

63. Gregory *v.* Kershaw, 3 Rev. de Lég. 98.

64. Southern Pac. Co. *v.* Wellington, (Tex. Civ. App. 1900) 57 S. W. 856.

65. Insane Connecticut Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017.

66. Insane Connecticut Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017; Paducah First Nat. Bank *v.* Wisdom, 111 Ky. 135, 63 S. W. 461, 23 Ky. L. Rep. 461; Flower *v.* O'Connor, 8 Mart. N. S. (La.) 555; Southern Pac. Co. *v.* Wellington, (Tex. Civ. App. 1900) 57 S. W. 856.

67. Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570.

68. Matthews *v.* Story, 54 Ind. 417, 419.

69. Wiseman *v.* St. Louis, etc., R. Co., 30 Mo. App. 516; Sternbach *v.* Friedman, 75 N. Y. App. Div. 418, 78 N. Y. Suppl. 318; Egyptian Flag Cigarette Co. *v.* Comisky, 40 Misc. (N. Y.) 236, 81 N. Y. Suppl. 673.

Statements used to impeach by showing contradiction are competent. Wiseman *v.* St. Louis, etc., R. Co., 30 Mo. App. 516.

70. Chase *v.* Debolt, 7 Ill. 371.

71. Uhler *v.* Maulfair, 23 Pa. St. 481; Daly *v.* Brady, 69 Fed. 285; Johnson *v.* Donaldson, 3 Fed. 22, 18 Blatchf. 287; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39. Such limitation upon the competency of relevant declarations by a party will be strictly construed and not extended by implication. Dusenbury *v.* Dusenbury, 63 How. Pr. (N. Y.) 349. Admissibility is, however, determined as of the time when the testimony was given and not as of the time when it is offered in evidence as an admission. Lapham *v.* Marshall, 51 Hun (N. Y.) 36, 3 N. Y. Suppl. 601.

72. *Connecticut.*— Benedict *v.* Nichols, 1 Root 434.

Indiana.— McKinzie *v.* Reneau, 8 Blackf. 411; Ruble *v.* Bunting, 31 Ind. App. 654, 68 N. E. 1041, holding that in an action for slander in charging the forgery of a check it was not error to admit evidence of defendant's testimony in another action between the parties denying the giving of the check.

Kentucky.— Shinkle *v.* McCullough, 77 S. W. 196, 25 Ky. L. Rep. 1143 (holding that in an action for injuries sustained by plaintiff because of his horse having been frightened by defendant's automobile, which was running at an excessive speed, evidence of a statement alleged to have been made by defendant on the trial in the justice's court in an action for repairs to the buggy injured in the accident complained of, to the effect that he considered himself responsible for the accident, was admissible as tending to contradict defendant's testimony on the trial to the effect that he had not been guilty of negligence); Louisville, etc., R. Co. *v.* Miller, 44 S. W. 119, 19 Ky. L. Rep. 1665.

Michigan.— Lilley *v.* Mutual Ben. L. Ins. Co., 92 Mich. 153, 52 N. W. 631.

Nebraska.— Hastings German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107.

New Jersey.— Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

Pennsylvania.— Stevenson *v.* Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818, 88 Am. St. Rep. 805; Graham *v.* Spang, 1 Mona. 167.

Texas.— Warren *v.* Frederichs, 83 Tex. 380, 18 S. W. 750.

Vermont.— Sutton *v.* Tyrell, 12 Vt. 79, where in an action for breach of contract plaintiff's evidence in a former action brought against him for value of services rendered under the same contract was admitted.

Wisconsin.—Crowe *v.* Colbeth, 63 Wis. 643, 24 N. W. 478.

United States.— Cimiotti Unhairing Co. *v.* Bowsky, 113 Fed. 698.

See 20 Cent. Dig. tit. "Evidence," § 739.

73. Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17. See also Congleton *v.* Schreihofer, (N. J. Ch. 1903) 54 Atl. 144.

74. Jones *v.* Dipert, 123 Ind. 594, 23 N. E. 944; Mercer *v.* King, 13 Ky. L. Rep. 429.

75. *Georgia.*— Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

Illinois.— Wheat *v.* Summers, 13 Ill. App. 444.

Nebraska.— Hastings German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107.

New Jersey.— Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229; Congleton *v.* Schreihofer, (Ch. 1903) 54 Atl. 144.

New York.— Tooker *v.* Gormer, 2 Hilt. 71.

Rhode Island.— Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

See 20 Cent. Dig. tit. "Evidence," § 739.

It is not necessary that the answers should be responsive to questions (Kirk *v.* Garrett,

relevant.[76] Testimony of third persons as witnesses in another case are admissible against a party if the latter is bound thereby because of agency, or because of joint or common interest, but not otherwise.[77] What a party said in giving his testimony may be stated by any one who heard it, including the judge,[78] but the statement must be affirmatively connected with him.[79] The admission is absolutely primary evidence. It is immaterial therefore upon principle that the party who made it is present in court and can be called as a witness.[80] Statements in the testimony are not the less competent, because no legal warrant exists for taking it[81] or because the witness was refused an opportunity at the time to explain his statements,[82] although it is otherwise where the testimony is elicited contrary to law.[83] But the party may prove if he can in any competent way that he made explanations at the time which were not taken down.[84] There is a valid distinction between a completed statement, which merely requires qualification or explanation, and a statement which was never fully made.[85] Accordingly, where the evidence of a party as to certain facts has not been completed, statements in it cannot be introduced as admissions; it will not suffice that the party may for the first time complete his statement on the trial at which it is offered.[86] A party is entitled to show that his opponent is now concealing a fact to which he has previously testified[87] or has given testimony on another occasion inconsistent with his present evidence.[88] So the statement may be admissible because it shows knowledge[89] or is in some other way circumstantially relevant.[90]

D. By Whom Made — 1. Parties to the Record — a. In General. Every competent admission is normally the relevant statement of a party to the record. Such statements are admissible when offered against the party himself,[91] whether

84 Md. 383, 35 Atl. 1089), that the attention of the witness should be first called to what he testified on the former trial (Fisher *v.* Monroe, 2 Misc. (N. Y.) 326, 21 N. Y. Suppl. 995), that the testimony should have been given in court (Rex *v.* Merceron, 2 Stark. 366, 3 E. C. L. 447, evidence given before a committee of the house of commons held competent), nor that the testimony of the party claimed to be an admission should be all his testimony on that particular matter (Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498).

76. Claypool *v.* Miller, 4 Blackf. (Ind.) 163; Eaton *v.* New England Tel. Co., 68 Me. 63; Mulliken *v.* Greer, 5 Mo. 489.

Where the relevant cannot be readily separated from the irrelevant in a party's testimony the whole may be read. Eaton *v.* New England Tel. Co., 68 Me. 63.

77. Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56. See *infra*, IV, D.

78. Chase *v.* Debolt, 7 Ill. 371; Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681, the latter case holding that in testifying he may rely merely upon a present knowledge that his notes of the testimony were accurate when made.

79. Castleman *v.* Sherry, 46 Tex. 228.

80. Stevenson *v.* Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818, 88 Am. St. Rep. 805. *Contra*, in Indiana. Carter *v.* Edwards, 16 Ind. 238; Carter *v.* Buckner, 3 Blackf. 314.

81. Lilley *v.* Mutual Ben. L. Ins. Co., 92 Mich. 153, 52 N. W. 631.

82. Collett *v.* Keith, 4 Esp. 212.

83. Wilson *v.* Hill, 13 N. J. Eq. 143, wife's testimony against husband.

84. Boardman *v.* Wood, 3 Vt. 570.

85. Misner *v.* Darling, 44 Mich. 438, 7 N. W. 77.

86. Misner *v.* Darling, 44 Mich. 438, 7 N. W. 77. It has been said, however, that if the direct examination is complete in itself, it is competent evidence of the party's testimony, he being present in court and able to state what he said upon cross-examination. Johnson *v.* Powers, 40 Vt. 611.

87. Lowe *v.* Vaughan, 48 Nebr. 651, 67 N. W. 464.

88. White *v.* Collins, (Minn. 1903) 95 N. W. 765; McAndrews *v.* Santee, 57 Barb. (N. Y.) 193, 7 Abb. Pr. N. S. (N. Y.) 408; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Sutton *v.* Tyrell, 12 Vt. 79.

89. Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

90. It frequently happens that neither statement is any part of the case of the party who brings it out. It may be indifferent to him which, if either, of the statements is true. His only purpose may be to establish the fact of contradiction, with the merely negative object, in a probative sense, of destroying the reliability of the contentions of the party making such conflicting statements. The fact of self-contradiction may be salient, properly proved by statements, and the result greatly against the interest of the declarant, without such statements constituting admissions, properly so called.

91. *Alabama.*— Seale *v.* Chambliss, 35 Ala. 19.

Arkansas.— Shinn *v.* Tucker, 37 Ark. 580; Phelan *v.* Bonham, 9 Ark. 389.

Georgia.— Scott *v.* Maddox, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263.

they relate to the subject-matter of the controversy — the issue in the cause — or to the existence of a fact relevant to the issue.[92] They have been accorded a *prima facie* probative effect,[93] but are not conclusive[94] in the absence of facts constituting an estoppel. Admissibility is not conditioned upon showing that the conduct of the party offering the statement was affected by it,[95] or his ability to fix the time and place when it was made,[96] provided that the statement be satisfactorily traced to the party.[97] The statement is equally competent evidence whether it is made before[98] or after[99] suit brought; and it is equally competent whether made on the present or a former trial;[1] whether the issue be made by the pleadings or be specially framed;[2] or whether the issue be at law or in equity;[3] or if not too remote to be relevant whether made before,[4] at the time

Indiana.— Denman *v.* McMahin, 37 Ind. 241.

Iowa.— Leyner *v.* Leyner, (1904) 98 N. W. 628; Wright *v.* Reed, (1902) 92 N. W. 61; Lundy *v.* Lundy, (1902) 92 N. W. 39.

Louisiana.— Upton *v.* Adeline Sugar Factory Co., 109 La. 670, 33 So. 725.

Maine.— Call *v.* Pike, 68 Me. 217; Ware *v.* Ware, 8 Me. 42.

Massachusetts.— Proctor *v.* Old Colony R. Co., 154 Mass. 251, 28 N. E. 13; McIntyre *v.* Park, 11 Gray 102, 71 Am. Dec. 690.

Michigan.— Sherrard *v.* Cudney, (1903) 96 N. W. 15; Reiser *v.* Portere, 106 Mich. 102, 63 N. W. 1041; Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931.

Minnesota.— Davis *v.* Hamilton, (1902) 92 N. W. 512.

Missouri.— Cafferatta *v.* Cafferatta, 23 Mo. 235; Schlicker *v.* Gordon, 19 Mo. App. 479.

Nebraska.— Carlson *v.* Holm, (1901) 95 N. W. 1125.

New York.—Williams *v.* Sargeant, 46 N. Y. 481; Collins *v.* McGuire, 76 N. Y. App. Div. 443, 78 N. Y. Suppl. 527; Larrison *v.* Payne, 1 Silv. Supreme 232, 5 N. Y. Suppl. 221; Titus *v.* Perry, 13 N. Y. St. 237; Betts *v.* Betts, 1 Johns. Ch. 197.

North Carolina.— Tredwell *v.* Graham, 88 N. C. 208.

Pennsylvania.— Shirley *v.* Shirley, 59 Pa. St. 267; McGill *v.* Ash, 7 Pa. St. 397; Yohe *v.* Barnet, 3 Watts & S. 81.

South Carolina.— Durant *v.* Ashmore, 2 Rich. 184.

Texas.— Wells *v.* Fairbank, 5 Tex. 582; Joy *v.* Liverpool, etc., Ins. Co., (Civ. App. 1903) 74 S. W. 822.

Wisconsin.— Johnston *v.* Hamburger, 13 Wis. 175.

United States.— Robinson *v.* Wiley, 20 Fed. Cas. No. 11,968*a*, Hempst. 38; The Stranger, 23 Fed. Cas. No. 13,525, 1 Brown Adm. 281.

England.— Spargo *v.* Brown, 9 B. & C. 935, 8 L. J. K. B. O. S. 67, 4 M. & R. 638, 17 E. C. L. 412.

See 20 Cent. Dig. tit. "Evidence," § 786.

Estimates of value.— Declarations of an owner of land indicating his opinion of its value are admissible against him in his action to recover damages for taking the property. Houston *v.* Western Washington R. Co., 204 Pa. St. 321, 54 Atl. 166.

False arrangement of parties.— A party cannot, however, make his declarations competent in his own favor by the "bungling device" of placing himself on the side of the record to which he is in fact opposed. Enloe *v.* Sherrill, 28 N. C. 212.

92. Moore *v.* Crosthwait, 135 Ala. 272, 33 So. 28; McBlain *v.* Edgar, 65 N. J. L. 634, 48 Atl. 600; Hart *v.* Pratt, 19 Wash. 560, 53 Pac. 711.

93. Cox *v.* Buck, 3 Strobh. (S. C.) 367; Slead *v.* Brannon, 1 Rice (S. C.) 298; Voelkel *v.* Supreme Tent K. of M. of W., (Wis. 1903) 92 N. W. 1104, 1135. See also *infra*, IV, E.

94. Cafferatta *v.* Cafferatta, 23 Mo. 235. See also *infra*, IV, E.

95. Mason *v.* Lothrop, 7 Gray (Mass.) 354.

96. Teller *v.* Ferguson, 24 Colo. 432, 51 Pac. 429.

97. Laidlaw *v.* Sage, 2 N. Y. App. Div. 374, 37 N. Y. Suppl. 770.

98. Cloud *v.* Dupree, 28 Ga. 170; Barlett *v.* Falk, 110 Iowa 346, 81 N. W. 602.

99. *Illinois.*— Clark *v.* Smith, 87 Ill. App. 409; Gottschalk *v.* Jarmuth, 69 Ill. App. 623.

Massachusetts.— Dole *v.* Young, 24 Pick. 250; Lambert *v.* Craig, 12 Pick. 199; Strong *v.* Wheeler, 5 Pick. 410.

Missouri.— Scovill *v.* Glasner, 79 Mo. 449.

Pennsylvania.—Morris *v.* Vanderen, 1 Dall. 64, 1 L. ed. 38.

Vermont.— Campbell *v.* Day, 16 Vt. 558.

See 20 Cent. Dig. tit. "Evidence," § 794.

Declarations against interest are not subject to a rule of evidence making declarations *post litem motam* inadmissible. Turner *v.* Patterson, 5 Dana (Ky.) 292.

1. Lorenzana *v.* Camarillo, 45 Cal. 125; Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760.

2. McRainy *v.* Clark, 4 N. C. 698.

Devisavit vel non.— McRainy *v.* Clark, 4 N. C. 698; Brown *v.* Moore, 6 Yerg. (Tenn.) 272. It has, however, been held that the arrangement of parties on this issue is too arbitrary and fortuitous to warrant applying the ordinary rule as to statements by a party. Enloe *v.* Sherrill, 28 N. C. 212; St. John's Lodge *v.* Callender, 26 N. C. 335; Dotts *v.* Fetzer, 9 Pa. St. 88.

3. Brandon *v.* Cabiness, 10 Ala. 155; Smith *v.* Burnham, 22 Fed. Cas. No. 13,018, 2 Sumn. 612.

4. Hall *v.* Bishop, 78 Ind. 370; Passavant *v.* Cantor, 17 N. Y. Suppl. 37; Joy *v.* Liverpool,

of,[5] or after[6] the transaction to which the statement relates. A party is not bound to present an absolute unity of testimony between his witnesses; and he may introduce admissions of his opponent, although these be not entirely consistent with the testimony of his own witnesses.[7] But the declarant must at the time his admissions are offered be a party to the record,[8] and duly served with process.[9] In actions *in rem*, or to establish a status, where parties are of less importance than in cases of mere personal concern, admissions are received with greater restrictions.[10]

b. Declarations as to Title. Under some circumstances a statement may not possess sufficient probative weight to be relevant as an admission. Thus in an action involving title a party's statement in disparagement is irrelevant if made before he was possessed of the particular interest,[11] or after he had parted with it.[12]

c. Coparties — (i) *Admissibility Against Declarant.* As a general rule admissions of one of two or more coparties are competent against himself,[13] although he may have been defaulted;[14] and they are not to be excluded merely because in terms they also affect a coparty against whom they are incompetent.[15] Where the interests of coparties, although several, are all dependent upon the existence of a particular fact, such as the validity of a certain instrument, the

etc., Ins. Co., (Tex. Civ. App. 1903) 74 S. W. 822; Forney *v.* Ferrell, 4 W. Va. 729.

5. Crowley *v.* Pendleton, 46 Conn. 62.

6. Scranton *v.* Stewart, 52 Ind. 68; Rounds *v.* Alee, 116 Iowa 345, 89 N. W. 1098; Werner *v.* Flies, 91 Iowa 146, 59 N. W. 18; Cincinnati, etc., R. Co. *v.* Cook, 113 Ky. 161, 67 S. W. 383, 23 Ky. L. Rep. 2410; Gordon *v.* Stubbs, 36 La. Ann. 625.

7. Williams *v.* Sargeant, 46 N. Y. 481.

8. Himroad Coal Co. *v.* Adack, 94 Ill. App. 1; Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183; Wise *v.* Wheeler, 28 N. C. 196.

9. Blackwell *v.* Davis, 2 How. (Miss.) 812; Griswold *v.* Burroughs, 60 Hun (N. Y.) 558, 15 N. Y. Suppl. 314; Peck *v.* Yorks, 47 Barb. (N. Y.) 131.

10. Harvey *v.* Young, 4 Quebec Super. Ct. 446.

11. Wallace *v.* Miner, 7 Ohio 249; Bell *v.* Preston, 19 Tex. Civ. App. 375, 47 S. W. 375, 753; Burton *v.* Scott, 3 Rand. (Va.) 399; Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751. See also Polly *v.* McCall, 37 Ala. 20; McIntyre *v.* Union College, 6 Paige (N. Y.) 239; Barber *v.* Bennett, 60 Vt. 662, 15 Atl. 348, 6 Am. St. Rep. 141, 1 L. R. A. 224.

12. Boshear *v.* Lay, 6 Heisk. (Tenn.) 163. See also *infra*, IV, D, 3, b, (I), (C); IV, D, 3, c, (I), (C).

13. *Alabama.*— Brown *v.* Fowler, 133 Ala. 310, 32 So. 584; Palmer *v.* Severance, 9 Ala. 751.

Connecticut.— Townsend Sav. Bank *v.* Todd, 47 Conn. 190; Bostwick *v.* Lewis, 1 Day 33.

Georgia.— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535; Harvey *v.* Anderson, 12 Ga. 69.

Indiana.— Smith *v.* Meiser, 11 Ind. App. 468, 38 N. E. 1092; Roberts *v.* Kendall, 3 Ind. App. 339, 29 N. E. 487.

Iowa.—Connors *v.* Chingren, 111 Iowa 384, 82 N. W. 934.

Kansas.— Boynton *v.* Hardin, 9 Kan. App. 166, 58 Pac. 1007.

Kentucky.—Milton *v.* Hunter, 13 Bush 163.

Massachusetts.— Williams *v.* Taunton, 125 Mass. 34; Hubbell *v.* Bissell, 2 Allen 196; Atkins *v.* Sanger, 1 Pick. 192.

Michigan.— Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576.

New Hampshire.— Mathewson *v.* Eureka Powder Works, 44 N. H. 289.

New York.— Petrie *v.* Williams, 68 Hun 589, 23 N. Y. Suppl. 237; Lormore *v.* Campbell, 60 Barb. 62; Treadwell *v.* Stebbins, 6 Bosw. 538; Pringle *v.* Chambers, 1 Abb. Pr. 58.

North Carolina.— Peebles *v.* Peebles, 63 N. C. 656; McRainy *v.* Clark, 4 N. C. 698.

Pennsylvania.— Blackstock *v.* Long, 19 Pa. St. 340; Spencer *v.* Campbell, 9 Watts & S. 32; Schall *v.* Miller, 5 Whart. 156.

Tennessee.— Wells *v.* Stratton, 1 Tenn. Ch. 328.

Texas.— Bruce *v.* Laing, (Civ. App. 1901) 64 S. W. 1019; Shelburn *v.* McCrocklin, (Civ. App. 1897) 42 S. W. 329; St. Louis, etc., R. Co. *v.* Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764.

Wisconsin.— Johnston *v.* Hamburger, 13 Wis. 175.

United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 2 Sumn. 152.

See 20 Cent. Dig. tit. "Evidence," § 798.

14. Bostwick *v.* Lewis, 1 Day (Conn.) 33; Ensminger *v.* Marvin, 5 Blackf. (Ind.) 210.

Entry of a discontinuance as to the declarant renders his admissions incompetent. Bensley *v.* Brockway, 27 Ill. App. 410.

15. Rogers *v.* Suttle, 19 Ill. App. 163; Williams *v.* Taunton, 125 Mass. 34. See Jones *v.* Norris, 2 Ala. 526, 527.

As a matter of practice if a party desires that the jury should not consider the declarations of a coparty as affecting himself, it is his duty to ask for a ruling to that effect. Polly *v.* McCall, 37 Ala. 20; Falkner *v.* Leith,

admissions of one of them regarding it will have no binding force upon him or the others.[16]

(II) *Admissibility Against Coparty*—(A) *In General.* The mere fact that under the system of pleading adopted in a particular jurisdiction two persons may be joined as coparties in the same action or that the practice exists of consolidating actions for convenience of trial does not make the statement of one party competent as against the other.[17] Except in cases of identification in legal interest by agency, privity, conspiracy, common design, joint interest, etc.,[18] such statements are incompetent against his coparties.[19] A mere community of interest

15 Ala. 9; Williams *v.* Taunton, 125 Mass. 34.

16. *Connecticut.*— Carpenter's Appeal, 74 Conn. 431, 51 Atl. 126 (will); Livingston's Appeal, 63 Conn. 68, 26 Atl. 470; Dale's Appeal, 57 Conn. 127, 17 Atl. 757.

Indiana.— Hayes *v.* Burkam, 67 Ind. 359, will.

Iowa.— Hertrich *v.* Hertrich, 114 Iowa 632, 87 N. W. 689, 89 Am. St. Rep. 389 (will); Dye *v.* Young, 55 Iowa 433, 7 N. W. 678 (will); Matter of Ames, 51 Iowa 596, 2 N. W. 408.

Massachusetts.— Britton *v.* Worcester County, 123 Mass. 309, agreement to settle damages to joint property.

Michigan.— O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105, will.

Mississippi.— Prewett *v.* Coopwood, 30 Miss. 369, will.

Missouri.— Wood *v.* Carpenter, 166 Mo. 465, (1901) 66 S. W. 172, will.

Ohio.— Thompson *v.* Thompson, 13 Ohio St. 356, will.

Pennsylvania.— Boyd *v.* Eby, 8 Watts 66 (will); Dietrich *v.* Dietrich, 4 Watts 167 note (will).

See 20 Cent. Dig. tit. "Evidence," § 821.

17. Garr *v.* Shaffer, 139 Ind. 191, 38 N. E. 811.

18. Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056. See also Lambert *v.* Craig, 12 Pick. (Mass.) 199; Strong *v.* Wheeler, 5 Pick. (Mass.) 410.

Where identity in legal interest is disputed the statement is inadmissible. Blenkinsopp *v.* Blenkinsopp, 11 Beav. 134. But see Blenkinsopp *v.* Blenkinsopp, 17 L. J. Ch. 343, 2 Phillim. 607.

19. *Alabama.*— Mahone *v.* Williams, 39 Ala. 202.

California.— Dean *v.* Ross, 105 Cal. 227, 38 Pac. 912.

Connecticut.— Smith *v.* Vincent, 15 Conn. 1, 38 Am. Dec. 52; Lockwood *v.* Smith, 5 Day 309.

Georgia.— Kiser *v.* Dannenburg, 88 Ga. 541, 15 S. E. 17; Boswell *v.* Blackman, 12 Ga. 591.

Illinois.— Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551. And see Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56, holding that, in a suit to set aside a deed and trust agreement for mental incapacity of the grantor, testimony upon a hearing for the appointment of a conservator for her about a month subsequent to the execution of the deed, given by grantor's son, who was not jointly interested with the grantee and his co-defendants in the subject-matter of the suit, should be excluded.

Indiana.— Pierce *v.* Goldsberry, 35 Ind. 317; Hackleman *v.* Moat, 4 Blackf. 164.

Kentucky.— Shields *v.* Lewis, 70 S. W. 51, 24 Ky. L. Rep. 822; Turner *v.* Mitchell, 61 S. W. 468, 22 Ky. L. Rep. 1784; Long *v.* Kerrigan, 16 S. W. 708, 17 S. W. 441, 13 Ky. L. Rep. 433; Sodusky *v.* McGee, 7 J. J. Marsh. 266; Commonwealth Bank *v.* McWilliams, 2 J. J. Marsh. 256.

Louisiana.— Weber *v.* Coussy, 12 La. Ann. 534.

Maine.— Page *v.* Swanton, 39 Me. 400; McLellan *v.* Cox, 36 Me. 95, 58 Am. Dec. 736.

Maryland.— Eakle *v.* Clarke, 30 Md. 322.

Massachusetts.—Hodges *v.* Hodges, 2 Cush. 455; Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311.

Michigan.— Osborne *v.* Bell, 62 Mich. 214, 28 N. W. 841; Thompson *v.* Richards, 14 Mich. 172; Dawson *v.* Hall, 2 Mich. 390.

Minnesota.— Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056.

Missouri.— Coxe *v.* Whitney, 9 Mo. 531.

New York.— Finelite *v.* Sonberg, 75 N. Y. App. Div. 455, 78 N. Y. Suppl. 338; Matter of Van Dawalker, 63 N. Y. App. Div. 550, 71 N. Y. Suppl. 705; Randrup *v.* Schroeder, 21 Misc. 52, 46 N. Y. Suppl. 943; Highland Bank *v.* Wynkopp, Lalor 243; Warner *v.* Price, 3 Wend. 397; Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395; Stoddard *v.* Holmes, 1 Cow. 245; Brush *v.* Holland, 3 Bradf. Surr. 240.

North Carolina.— Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; Peebles *v.* Peebles, 63 N. C. 656.

Pennsylvania.—Dickinson College *v.* Church, 1 Watts & S. 462; Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Sunday *v.* Dietrich, 16 Pa. Super. Ct. 640.

South Carolina.— Martin *v.* Adams, 29 S. C. 597, 6 S. E. 860.

Tennessee.— Wells *v.* Stratton, 1 Tenn. Ch. 328.

Texas.— Thurman *v.* Blankenship, 79 Tex. 171, 15 S. W. 387; St. Louis, etc., R. Co. *v.* Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764.

Virginia.— Wytheville Crystal Ice, etc., Co. *v.* Frick Co., 96 Va. 141, 30 S. E. 491; Street *v.* Street, 11 Leigh 498.

West Virginia.—Forney *v.* Ferrell, 4 W. Va. 729.

Wisconsin.— Clark *v.* Johnson, 67 Wis. 238, 30 N. W. 228.

United States.— Hyman *v.* Wheeler, 29 Fed. 347; Buckingham *v.* Burgess, 4 Fed.

will not make them competent even where, as in an action for a joint tort,[20] or for divorce on the ground of adultery,[21] the act charged, if committed at all, must have been committed by both parties; or where a common interest exists in a given property[22] or claim[23] under a legal or equitable[24] title, or under a will,[25] or by descent.[26] The rule is the same in equity as at law,[27] and applies to judicial[28] as well as to extrajudicial admissions. The reason for inadmissibility of statements by one of two or more coparties, severally liable, as against the others is still clearer where they are parties in different capacities; for example where one is sued as principal defendant and another as garnishee.[29] The rule of exclusion has no application to a statement by one coparty made in the hearing of the others and not denied by them under circumstances rendering a reply appropriate if the facts were thought to have been incorrectly stated.[30] Nor can it be applied to any statement which can be fairly deemed to have been made, authorized, or adopted by all the coparties.[31]

(B) *Joint Ownership.* The admission of one of several coparties to the record who are joint owners of real or personal property[32] will bind the others

Cas. No. 2,089, 3 McLean 549; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 2 Sumn. 152.

England.— Hollingsworth *v.* Shakeshaft, 14 Beav. 492, 21 L. J. Ch. 722.

See 20 Cent. Dig. tit. "Evidence," § 797 *et seq.*

Declarations of a defaulted defendant are generally inadmissible against his co-defendant. Burnham *v.* Sweatt, 16 N. H. 418; Martin *v.* Adams, 29 S. C. 597, 6 S. E. 860.

20. Roberts *v.* Kendall, 3 Ind. App. 339, 29 N. E. 487; Edgerton *v.* Wolf, 6 Gray (Mass.) 453; Farmers', etc., Bank *v.* Harper, 3 Am. L. J. (Pa.) 236.

21. Robinson *v.* Robinson, 1 Sw. & Tr. 362.

22. *Georgia.*— Bryant *v.* Booze, 55 Ga. 438.

Maine.— McLellan *v.* Cox, 36 Me. 95, 58 Am. Dec. 736.

Maryland.— Eakle *v.* Clarke, 30 Md. 322.

Michigan.— Shaw *v.* Chambers, 48 Mich. 355, 12 N. W. 486.

New York.— Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395.

North Carolina.— Young *v.* Griffith, 79 N. C. 201.

See 20 Cent. Dig. tit. "Evidence," § 816.

23. Jackson *v.* Illinois Cent. R. Co., 46 La. Ann. 226, 14 So. 514.

24. Pope *v.* Devereux, 5 Gray (Mass.) 409.

25. *Alabama.*— Blakey *v.* Blakey, 33 Ala. 611.

Illinois.— McMillan *v.* McDill, 110 Ill. 47.

Iowa.— Matter of Ames, 51 Iowa 596, 2 N. W. 408 [*distinguished* in Lundy *v.* Lundy, (1902) 92 N. W. 39].

Kentucky.— Rogers *v.* Rogers, 2 B. Mon. 324; Beall *v.* Cunningham, 1 B. Mon. 399.

Massachusetts.— Shailer *v.* Bumstead, 99 Mass. 112.

Missouri.— Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604.

Nebraska.—Stull *v.* Stull, (1901) 96 N. W. 196.

New York.— Matter of Campbell, 67 N. Y. App. Div. 418, 73 N. Y. Suppl. 753; Matter of Van Dawalker, 63 N. Y. App. Div. 550, 71 N. Y. Suppl. 705; *In re* Kennedy, 53 N. Y. App. Div. 105, 65 N. Y. Suppl. 879 [*affirmed* in 167 N. Y. 163, 60 N. E. 442]; *In re* Baird, 47 Hun 77; Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395; Osgood *v.* Manhattan Co., 3 Cow. 612, 15 Am. Dec. 304.

Ohio.— Thompson *v.* Thompson, 13 Ohio St. 356.

Pennsylvania.— Irwin *v.* West, 81 Pa. St. 157; Titlow *v.* Titlow, 54 Pa. St. 216, 93 Am. Dec. 691; Clark *v.* Morrison, 25 Pa. St. 453; Hauberger *v.* Root, 6 Watts & S. 431.

Tennessee.— Brown *v.* Moore, 6 Yerg. 272.

West Virginia.—Forney *v.* Ferrell, 4 W. Va. 729.

See 20 Cent. Dig. tit. "Evidence," § 821.

Where the interest of the declarant is separable from that of others claiming under the will, the statement will be received. Fay *v.* Feeley, 18 R. I. 715, 30 Atl. 342. See also Wall *v.* Dimmitt, 72 S. W. 300, 24 Ky. L. Rep. 1749; Gibson *v.* Sutton, 70 S. W. 188, 24 Ky. L. Rep. 868.

26. Street *v.* Street, 11 Leigh (Va.) 498.

27. Reed *v.* Noxon, 48 Ill. 323; Hitt *v.* Ormsbee, 12 Ill. 166; Taylor *v.* Morton, 5 J. J. Marsh. (Ky.) 65; Bartlett *v.* Marshall, 2 Bibb (Ky.) 467. See also EQUITY, *ante*, p. 1.

28. Taylor *v.* Roberts, 3 Ala. 83; Cockerham *v.* Davis, 5 Port. (Ala.) 220; Jones *v.* Bullock, 3 Bibb (Ky.) 467; Briesch *v.* McCauley, 7 Gill (Md.) 189; Hayward *v.* Carroll, 4 Harr. & J. (Md.) 518; Phœnix *v.* Dey, 5 Johns. (N. Y.) 412.

29. Jones *v.* Norris, 2 Ala. 526; Enos *v.* Tuttle, 3 Conn. 247; O'Brien *v.* Flanders, 58 Ind. 22.

30. Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515; Lockhart *v.* Wills, 9 N. M. 263, 50 Pac. 318; Crippen *v.* Morse, 49 N. Y. 63; Tredwell *v.* Graham, 88 N. C. 208. See *supra*, IV, B, 7.

31. Bradley *v.* Briggs, 22 Vt. 95.

32. *California.*— Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

Connecticut.— Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275.

Delaware.— State *v.* Reading's Terre-Tenants, 1 Harr. 23.

Georgia.— Ozment *v.* Anglin, 60 Ga. 242.

Illinois.— Hollenback *v.* Todd, 119 Ill. 543,

jointly interested. There is, however, no relation of agency between a tenant for life and a remainder-man when joined in the same action.[33]

(c) *Joint Liability.* In an action against two or more on a joint contract the admissions of one, however small his interest,[34] are evidence against all.[35] The scope of agency is limited to matters concerning the joint interest,[36] and does not extend to creating a new contract,[37] reviving an obligation presumably paid,[38] waiving performance of a contract or condition,[39] or enlarging a preëxisting obligation or liability.[40] But the admission is competent to show that an obligation or liability has not been discharged or has been discharged in part only.[41] Where the admission is not made within the scope of the common purpose, it is merely hearsay as regards the other joint obligors;[42] and if the circumstances are such that no agency between joint obligors may be taken to exist the statements of one are not competent as against the others.[43] A mere obligation to contribution or indemnity does not take the place of joint liability.[44]

(d) *Conspiracy or Common Purpose.* Existence of a conspiracy, combina-

8 N. E. 829; McMillan *v.* McDill, 110 Ill. 47; Seymour *v.* O. S. Richardson Fueling Co., 103 Ill. App. 625.

Iowa.— Matter of Ames, 51 Iowa 496, 2 N. W. 408.

Missouri.— Hurst *v.* Robinson, 13 Mo. 82, 53 Am. Dec. 134; Armstrong *v.* Farrar, 8 Mo. 627.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— Jackson *v.* McVey, 18 Johns. 330; Brandt *v.* Klein, 17 Johns. 335; Brush *v.* Holland, 3 Bradf. Surr. 240.

North Carolina.— McDonald *v.* Carson, 95 N. C. 377; Knight *v.* Houghtalling, 85 N. C. 17; Pepper *v.* Harris, 78 N. C. 71.

Tennessee.— Irby *v.* Brigham, 9 Humphr. 750.

Texas.— Tuttle *v.* Turner, 28 Tex. 759; Hardy *v.* De Leon, 5 Tex. 211.

West Virginia.— Dickinson *v.* Clarke, 5 W. Va. 280.

See 20 Cent. Dig. tit. "Evidence," § 816.

Community of interest, such as the interest of tenants in common, not amounting to a joint interest, does not make the statements admissible. Naul *v.* Naul, 75 N. Y. App. Div. 292, 78 N. Y. Suppl. 101. See also *supra*, IV, D, 1, c, (II), (A).

Joint ownership at the time of the admission is essential to its competency as evidence. Bakeney *v.* Ferguson, 14 Ark. 640.

33. Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68; McGregor *v.* Wait, 10 Gray (Mass.) 72, 69 Am. Dec. 305; Gallagher *v.* Rogers, 1 Yeates (Pa.) 390.

34. Walling *v.* Rosevelt, 16 N. J. L. 41.

35. *Arkansas.*— Rotan *v.* Nichols, 22 Ark. 244.

Connecticut.— Bound *v.* Lathrop, 4 Conn. 336, 10 Am. Dec. 147.

Florida.— Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Georgia.— Tillinghast *v.* Nourse, 14 Ga. 641.

Maine.— Davis *v.* Keene, 23 Me. 69.

Maryland.— Lowe *v.* Boteler, 4 Harr. & M. 346, 1 Am. Dec. 410.

Massachusetts.— Martin *v.* Root, 17 Mass. 222.

Michigan.— Mathews *v.* Phelps, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581.

New York.— Shirk *v.* Brookfield, 77 N. Y. App. Div. 295, 79 N. Y. Suppl. 225; Barrick *v.* Austin, 21 Barb. 241, promissory note.

South Carolina.— Costelo *v.* Cave, 2 Hill 528, 27 Am. Dec. 404.

Virginia.— Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976.

West Virginia.— Dickinson *v.* Clarke, 5 W. Va. 280.

England.— Crosse *v.* Bedingfield, 5 Jur. 836, 10 L. J. Ch. 219, 12 Sim. 35, bond.

See 20 Cent. Dig. tit. "Evidence," § 818.

The declarant must be a party (Abel *v.* Forgue, 1 Root (Conn.) 502; Hamlin *v.* Fitch, Kirby (Conn.) 174; Dickinson *v.* Clarke, 5 W. Va. 280), and duly served with process (Derby *v.* Rounds, 53 Cal. 659); but where one joint debtor is discharged in bankruptcy proceedings his statements are competent against the party actually sued (Howard *v.* Cobb, 12 Fed. Cas. No. 6,755, Brunn. Col. Cas. 75, 3 Day (Conn.) 309).

Self-serving declarations.— The declarations of one joint obligor are not competent in favor of another, even after the decease of the declarant. Morgan *v.* Hubbard, 66 N. C. 394.

36. Fenn *v.* Dugdale, 40 Mo. 63; Lyman *v.* U. S. Bank, 12 How. (U. S.) 225, 13 L. ed. 965 [*affirming* 2 Fed. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666].

37. Thompson *v.* Richards, 14 Mich. 172; U. S. Bank *v.* Lyman, 2 Fed. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666.

38. Rogers *v.* Clements, 92 N. C. 81, bond.

39. Thompson *v.* Richards, 14 Mich. 172, 188.

40. U. S. Bank *v.* Lyman, 2 Fed. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666.

41. U. S. Bank *v.* Lyman, 2 Fed. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666.

42. Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Smith *v.* Wagaman, 58 Iowa 11, 11 N. W. 713.

43. Wallis *v.* Randall, 81 N. Y. 164.

44. Rapier *v.* Louisiana Equitable L. Ins. Co., 57 Ala. 100. See also Edwards *v.* Bricker, 66 Kan. 241, 71 Pac. 587.

tion, or common design may establish a relation of agency so as to make the statements of one party competent against the others concerned,[45] provided such statements are made within the scope of the common enterprise.[46]

(III) *Admissibility in Favor of Coparty.* As a general rule parties cannot avail themselves of the statements of their coparties.[47] But the admission of a defendant against his own interest and in favor of a co-defendant is competent for the latter.[48]

d. Nominal Parties — (I) *In General.* The general rule is that admissions of a nominal plaintiff cannot be given in evidence to affect rights of the person beneficially interested.[49] Nor can admissions of a nominal defendant be permitted to affect the party really entitled to defend.[50] But admissions of a nominal party made while he possessed a beneficial interest are competent.[51] The admission of a nominal defendant is received to establish against the real defendant a fact in which the latter has no interest.[52] And admissions of a sole plaintiff on the record that he has no interest are provable to defeat the action, where there is no proof that any one else has an interest.[53] That a party's interest is small does not make it nominal; if he owns a substantial, although not the sole or principal interest involved on his side, his admissions are competent.[54] Whether a party is formally or beneficially interested is a question for the jury.[55]

(II) *Guardian Ad Litem or "Next Friend."* The general rule excluding statements made by nominal parties applies to the admissions of a guardian

45. *Delaware.*— State *v.* Reading's Terre-Tenants, 1 Harr. 23.

Illinois.— McMillan *v.* McDill, 110 Ill. 47.

Indiana.— Riehl *v.* Evansville Foundry Assoc., 104 Ind. 70, 3 N. E. 633.

Iowa.— Matter of Ames, 51 Iowa 596, 2 N. W. 408.

Maine.— Davis *v.* Keene, 23 Me. 69.

Missouri.— Hurst *v.* Robinson, 13 Mo. 82, 53 Am. Dec. 134; Armstrong *v.* Farrar, 8 Mo. 627.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— La Bau *v.* Vanderbilt, 3 Redf. Surr. 384; Brush *v.* Holland, 3 Bradf. Surr. 240.

North Carolina.— McDonald *v.* Carson, 95 N. C. 377.

Tennessee.— Irby *v.* Brigham, 9 Humphr. 750.

Texas.— Tuttle *v.* Turner, 28 Tex. 759; Hardy *v.* De Leon, 5 Tex. 211.

See 20 Cent. Dig. tit. "Evidence," § 815. As to admissibility of declarations of co-conspirators in criminal prosecutions see Criminal Law, 8 Cyc. 679.

Preliminary proof of common purpose essential to admissibility see *infra*, IV, D, 4, f, (II), (B).

46. Davis *v.* Keene, 23 Me. 69.

47. Quinlan *v.* Davis, 6 Whart. (Pa.) 169; Slaymaker *v.* Gundacker, 10 Serg. & R. (Pa.) 75.

48. Cade *v.* Hatcher, 72 Ga. 359; Carithers *v.* Jarrell, 20 Ga. 842.

49. *Alabama.*— Sykes *v.* Lewis, 17 Ala. 261; Head *v.* Shaver, 9 Ala. 791; Brown *v.* Foster, 4 Ala. 282; Copeland *v.* Clark, 2 Ala. 388.

Arizona.— Miller *v.* Miller, (1901) 64 Pac. 415.

Illinois.— Dazey *v.* Mills, 10 Ill. 67.

Louisiana.— Bissell *v.* Erwin, 15 La. 94.

Maine.— Butler *v.* Millett, 47 Me. 492; Gilligan *v.* Tebbetts, 33 Me. 360.

Maryland.— Owings *v.* Low, 5 Gill & J. 134.

Massachusetts.— Wing *v.* Bishop, 3 Allen 456.

New York.— Eberhardt *v.* Schuster, 10 Abb. N. Cas. 374; Frear *v.* Evertson, 20 Johns. 142.

North Carolina.— Strother *v.* Aberdeen, etc., Co., 123 N. C. 197, 31 S. E. 386.

Tennessee.— Bosbear *v.* Lay, 6 Heisk. 163; Moyers *v.* Inman, 2 Swan 80.

Texas.— Hall *v.* Clountz, 26 Tex. Civ. App. 348, 63 S. W. 941; Thompson *v.* Johnson, (Civ. App. 1900) 56 S. W. 591.

United States.— Palmer *v.* Cassin, 18 Fed. Cas. No. 10,687, 2 Cranch C. C. 66.

See 20 Cent. Dig. tit. "Evidence," § 809.

50. Day *v.* Baldwin, 34 Iowa 380; Armstrong *v.* Normandy, 5 Exch. 409, 14 Jur. 579, 19 L. J. Exch. 343.

51. Sally *v.* Gooden, 5 Ala. 78, holding also that, if it does not appear when the nominal party transferred his interest, his declarations made before suit brought are admissible, citing to the latter point Brown *v.* Foster, 4 Ala. 282.

52. Nix *v.* Winter, 35 Ala. 309 [*following* McLane *v.* Riddle, 19 Ala. 180], holding that, in a suit by the real owner of a judgment, admissions in the answer of the nominal plaintiff in the judgment action are proof of the complainant's title to the judgment as against the judgment defendant, who is co-defendant.

53. Hogan *v.* Sherman, 5 Mich. 60.

54. Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394.

55. Campbell *v.* Day, 16 Vt. 558. See also Hogan *v.* Sherman, 5 Mich. 60.

ad litem[56] and also to the admissions of a *prochein ami*,[57] when they are subsequently offered in evidence as against the infant.

(III) *Trustees.* It has been held that statements of one who is a trustee on the record are not competent to prejudice the trust fund or the *cestui que trust*,[58] but the prevailing rule is otherwise;[59] and admissions of a party acting in a representative capacity, such as administrator,[60] executor,[61] or guardian,[62] are competent, provided he has duly qualified to discharge the duties of his trust.[63]

2. Persons Beneficially Interested and Real Parties in Interest. Declarations of a person beneficially interested in the result of litigation are admissible against the nominal party representing his interest,[64] unless it is impossible to admit them without prejudicing the interests of non-declarants.[65] A person who will be called upon to pay the judgment in case of an adverse issue,[66] or who will receive the whole or a portion of the proceeds in the case of a successful one,[67] is a real party in interest. The fact of interest in a third party should be established *prima facie* by evidence exclusive of his own declarations.[68] The interest must be financial; a sentimental interest due to relationship,[69] a moral obligation to indemnify,[70] or possession of an interest similar to the one involved in the suit[71] is not sufficient. Where a trustee on the record has a purely nominal position in relation to the action, declarations of the *cestui que trust* are competent.[72] So where an administrator or executor is a formal party statements of the person beneficially interested are admissible.[73] On the other hand, where the administrator or executor is actually representing the interests of the estate, declarations of an

56. Matthews *v.* Dowling, 54 Ala. 202; Cochran *v.* McDowell, 15 Ill. 10; Cooper *v.* Mayhew, 40 Mich. 528.

57. Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208; Mertz *v.* Detweiler, 8 Watts & S. (Pa.) 376; Nicholson *v.* Rea, 3 U. C. Q. B. O. S. 84.

58. Bragg *v.* Geddes, 93 Ill. 39; Thomas *v.* Bowman, 29 Ill. 426; Sargeant *v.* Sargeant, 18 Vt. 371, where it was conceded that the rule is otherwise at common law.

59. Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

60. Stead *v.* Brannan, 1 Rice (S. C.) 298.

61. Dennis *v.* Weekes, 46 Ga. 514; Williamson *v.* Nabers, 14 Ga. 285; McRainy *v.* Clark, 4 N. C. 698; Peeples *v.* Stevens, 8 Rich. (S. C.) 198, 64 Am. Dec. 750.

Real interest considered.—An executor who would profit by failure of the will is not competent to make admissions against it. Titlow *v.* Titlow, 54 Pa. St. 216, 93 Am. Dec. 691.

62. Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

63. "The rule is settled that the declaration of a trustee before he came into the trust, or of an executor before he became such, is not admissible against him in his representative capacity." Niskern *v.* Haydock, 23 N. Y. App. Div. 175, 176, 48 N. Y. Suppl. 895 [*citing* Church *v.* Howard, 79 N. Y. 415; Fitzmahony *v.* Caulfield, 87 Hun (N. Y.) 66, 33 N. Y. Suppl. 876], per Cullen, J. To the same effect see Plant *v.* McEwen, 4 Conn. 544; Coble *v.* Coble, 82 N. C. 339.

64. *Alabama.*—Bowen *v.* Snell, 11 Ala. 379.
Colorado.— Hughes *v.* Spruance, 15 Colo. 208, 25 Pac. 307.
Illinois.— Blattner *v.* Weis, 19 Ill. 246.
Kansas.— Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599.
Maine.— Bigelow *v.* Foss, 59 Me. 162.
Missouri.— Dillon *v.* Chouteau, 7 Mo. 386; St. Louis Nat. Bank *v.* Ross, 9 Mo. App. 399.
New Hampshire.— Rich *v.* Eldredge, 42 N. H. 153; Carlton *v.* Patterson, 29 N. H. 580; Pike *v.* Wiggin, 8 N. H. 356; Copp *v.* Upham, 3 N. H. 159.
North Carolina.— Shields *v.* Whitaker, 82 N. C. 516.
Rhode Island.— Fay *v.* Feeley, 18 R. I. 715, 30 Atl. 342.
Tennessee.— Brown *v.* Moore, 6 Yerg. 278.
Canada.— Coates *v.* Kelty, 27 U. C. Q. B. 284.
See 20 Cent. Dig. tit. "Evidence," §§ 813, 814.

65. Morris *v.* Stokes, 21 Ga. 552 (a will case); Brown *v.* Moore, 6 Yerg. (Tenn.) 278.

66. Bayley *v.* Bryant, 24 Pick. (Mass.) 198; Kerchner *v.* Reilly, 72 N. C. 171.

67. Hamblett *v.* Hamblett, 6 N. H. 333.
An attorney is not so interested in a claim given to him for collection as to make his personal statements competent as admissions. Underwood *v.* Hart, 23 Vt. 120.
The prosecutor in a criminal case is not regarded as interested in the outcome of the proceedings within the meaning of the rule. Bridges *v.* State, 110 Ga. 246, 34 S. E. 1037.

68. Bowen *v.* Snell, 11 Ala. 379; Smith *v.* Aldrich, 12 Allen (Mass.) 553; Mullins *v.* Lyles, 1 Swan (Tenn.) 337; Harnden *v.* Toronto Bank, 14 U. C. C. P. 496.

69. Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

70. Stratford *v.* Sanford, 9 Conn. 275.

71. Hamlin *v.* Fitch, Kirby (Conn.) 174.

72. McLemore *v.* Nuckolls, 37 Ala. 662.

73. Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603; Reagan *v.* Grim, 13 Pa. St. 508.

heir at law, next of kin, or devisee are inadmissible.[74] Statements of an interested person are not admissible after his interest has ceased.[75]

3. Privies — a. In General. Statements of relevant facts made by persons identified in legal interest with a party to the record by reason of privity[76] are competent evidence.[77] The modern rule is that admissions made by a person while he is the owner of property, real or personal, are competent against a party claiming under him.[78] As in case of other admissions, the declaration of the person in privity is according to the weight of authority primary evidence and admissible, although the declarant be available as a witness.[79] The *prima facie* existence of privity must be shown, as a preliminary to admitting statements of persons said to stand in that relation.[80]

74. Gray *v.* Cottrell, 1 Hill (S. C.) 38; Merchants' L. Assoc. *v.* Yoakum, 98 Fed. 251, 39 C. C. A. 56.

75. Shepherd *v.* Hayes, 16 Vt. 486.

76. Privity defined.— "The term privity means mutual or successive relationship to the same rights of property. The executor is in privity with the testator, the heir with the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor." McDonald *v.* Gregory, 41 Iowa 513, 516, per Day, J. "By persons privy to the former parties, is really meant persons claiming under them." Morgan *v.* Nicholl, L. R. 2 C. P. 117, 119, 12 Jur. N. S. 963, 36 L. J. C. P. 86, 15 L. T. Rep. N. S. 184, 15 Wkly. Rep. 110, per Willis, J. See also Black L. Dict. 940, specifying six classes of persons who are privies.

77. See *infra*, IV, D, 3, b, c, d.

78. *Alabama.*— Arthur *v.* Gayle, 38 Ala. 259; Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413.

Connecticut.—Norton *v.* Pettibone, 7 Conn. 319, 18 Am. Dec. 116.

Georgia.— Meek *v.* Holton, 22 Ga. 491; Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

Illinois.— Waggoner *v.* Cooley, 17 Ill. 239.

Louisiana.— Leefe *v.* Walker, 18 La. 1.

Maryland.—Robinett *v.* Wilson, 8 Gill 179; Richards *v.* Swan, 7 Gill 366, 375, where Spence, J., said: "It certainly cannot be questioned, that admissions made by [the grantor in a conveyance of real and personal property], of facts of which he was conusant, at a time when they were not in dispute, having no interest to make false admissions, and making them to charge himself, are evidence against him, and those claiming under him, by title, subsequent to such admissions."

Massachusetts.— Binney *v.* Hall, 5 Pick. 503; Davis *v.* Spooner, 3 Pick. 284; Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209.

Missouri.— Cavin *v.* Smith, 24 Mo. 221.

New York.— Jackson *v.* McChesney, 7 Cow. 360, 17 Am. Dec. 521; Jackson *v.* McCall, 10 Johns. 377, 6 Am. Dec. 343; Jackson *v.* Bard, 4 Johns. 230, 4 Am. Dec. 267.

United States.— Gaines *v.* Rolf, 12 How. 472, 13 L. ed. 1071.

England.— Harrison *v.* Vallance, 1 Bing. 45, 7 Moore C. P. 304, 8 E. C. L. 394.

See 20 Cent. Dig. tit. "Evidence," §§ 822–824.

79. *Connecticut.*— Deming *v.* Carrington, 12 Conn. 1, 30 Am. Dec. 591 [*distinguishing* Fitch *v.* Chapman, 10 Conn. 8].

Illinois.— Sandifer *v.* Hoard, 59 Ill. 246.

Kentucky.— Smith *v.* Leforce, 14 Ky. L. Rep. 399.

Maine.— Holt *v.* Walker, 26 Me. 107, 45 Am. Dec. 98; Hale *v.* Smith, 6 Me. 416.

Maryland.— Coale *v.* Harrington, 7 Harr. & J. 147.

North Carolina.— Johnson *v.* Patterson, 9 N. C. 183, 11 Am. Dec. 756; Guy *v.* Hall, 7 N. C. 150, 152, where the court said: "It is asked, why not swear him? The answer is, the party likes his declarations better. He may, from some motive, vary his statement; and the party offering his evidence is alone to judge."

Pennsylvania.— Gibblehouse *v.* Strong, 3 Rawle 437.

Vermont.— Alger *v.* Andrews, 47 Vt. 238 [*overruling* Hines *v.* Soule, 14 Vt. 99].

Virginia.— Walthol *v.* Johnston, 2 Call 275.

United States.— Gaines *v.* Relf, 12 How. 472, 13 L. ed. 1071.

England.— Woolway *v.* Rowe, 1 A. & E. 114, 3 L. J. K. B. 121, 3 N. & M. 849, 28 E. C. L. 76; Barough *v.* White, 4 B. & C. 325, 10 E. C. L. 600, 2 C. & P. 8, 12 E. C. L. 420, 6 D. & R. 379, 3 L. J. K. B. O. S. 227; Foot *v.* Finch, 1 Taunt. 141, 9 Rev. Rep. 716. *Compare* Hedger *v.* Horton, 3 C. & P. 179, 14 E. C. L. 514.

See 20 Cent. Dig. tit. "Evidence," §§ 822, 824.

In the case of personal property it has been held that declarations of a former owner are not admissible against one claiming under him if the declarant himself may be produced as a witness. Lynn *v.* Jeter, 7 Blackf. (Ind.) 300; Coit *v.* Howd, 1 Gray (Mass.) 547; Bristol *v.* Dann, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122; Whitaker *v.* Brown, 8 Wend. (N. Y.) 490; Hurd *v.* West, 7 Cow. (N. Y.) 752; Alexander *v.* Mahon, 11 Johns. (N. Y.) 185. The existence of a distinction between real and personal property in that behalf was not stated in any of the foregoing cases; but there is a hint of it in Bristol *v.* Dann, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122.

80. Aiken *v.* Cato, 23 Ga. 154; Houston *v.* McCluney, 8 W. Va. 135.

b. Real Estate — (I) *GRANTORS* — (A) *In General.* Subject to the effect of the land registry laws,[81] statements of a former owner of real estate are competent against the party who claims under him by an interest acquired since the declaration was made,[82] but not against a party who claims adversely to the former owner.[83] The grantor's statement is not admissible unless made on his own knowledge.[84] Declarations of a grantor before obtaining title are not admissible against a subsequent holder claiming under him,[85] even, it is said, in cases of alleged fraud.[86] The party offering the evidence has the burden of showing that the necessary conditions for admissibility exist; for example that the declaration was made while the declarant was owner of the property to be affected by his statement.[87]

(B) *Before Alienation.* Declarations of an owner of land prior to his conveyance are competent as against his grantee and other privies, in disparagement of his title.[88] They are also competent to show the existence of easements on the

81. Hines *v.* Soule, 14 Vt. 99; Carpenter *v.* Hollister, 13 Vt. 552, 37 Am. Dec. 612.

82. Brown *v.* Chambersburg Bank, 3 Pa. St. 187; Andrews *v.* Fleming, 2 Dall. (Pa.) 93, 1 L. ed. 303; Stein *v.* Railway Co., 10 Phila. (Pa.) 440; Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Snelgrove *v.* Martin, 2 McCord (S. C.) 241.

83. Duff *v.* Leary, 146 Mass. 533, 16 N. E. 417; Geoghegan *v.* Marshall, (Miss. 1888) 4 So. 63; Hamilton *v.* Holder, 15 N. Brunsw. 222.

84. Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744.

85. Noyes *v.* Morrill, 108 Mass. 396; Tyler *v.* Mather, 9 Gray (Mass.) 177; Campau *v.* Dubois, 39 Mich. 274; Renneker *v.* Warren, 17 S. C. 139.

86. Stockwell *v.* Blamey, 129 Mass. 312.

87. Harrell *v.* Culpepper, 47 Ga. 635.

88. *Alabama.*— Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Baucum *v.* George, 65 Ala. 259; Pearce *v.* Nix, 34 Ala. 183 (failure to pay purchase-money); Reed *v.* Smith, 14 Ala. 380.

Arkansas.— Allen *v.* McGaughey, 31 Ark. 252.

California.— Smith *v.* Glenn, (1900) 62 Pac. 180; Lord *v.* Thomas, (1894) 36 Pac. 372; McFadden *v.* Ellmaker, 52 Cal. 348; McFadden *v.* Wallace, 38 Cal. 51; Bollo *v.* Navarro, 33 Cal. 459.

Connecticut.— Smith *v.* Martin, 17 Conn. 399; Rogers *v.* Moore, 10 Conn. 13; Norton *v.* Pettibone, 7 Conn. 319, 18 Am. Dec. 116 [both cases *distinguished* in Robinson *v.* Clapp, 65 Conn. 365, 382, 32 Atl. 939, 29 L. R. A. 582, where certain declarations were held inadmissible for the reason that they were not under the circumstances in derogation of the declarant's title].

Georgia.— Roberts *v.* Neal, 62 Ga. 163; Wood *v.* McGuire, 15 Ga. 202.

Idaho.— Daly *v.* Josslyn, 7 Ida. 657, 65 Pac. 442.

Illinois.— Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493 [*affirming* 101 Ill. App. 380] (holding that letters written by a husband, prior to his joining with his wife in a deed of trust conveying the wife's real estate, in which he had an inchoate curtesy right and homestead right, tending to show that he had as trustee invested trust funds in the land, were admissible against the grantee; the latter being a privy in estate to the husband); Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558.

Iowa.— Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429.

Kentucky.— Baker *v.* Dobyns, 4 Dana 220; Forsyth *v.* Kreakbaum, 7 T. B. Mon. 97; Mann *v.* Cavanaugh, 62 S. W. 854, 23 Ky. L. Rep. 238.

Louisiana.— Savenet *v.* Le Briton, 8 Mart. N. S. 501.

Maryland.— Keener *v.* Kauffman, 16 Md. 296; Richards *v.* Swan, 7 Gill 366; Dorsey *v.* Dorsey, 3 Harr. & J. 410, 6 Am. Dec. 506.

Massachusetts.— Simpson *v.* Dix, 131 Mass. 179; Osgood *v.* Coates, 1 Allen 77; Hyde *v.* Middlesex County, 2 Gray 267.

Minnesota.— Taylor *v.* Hess, 57 Minn. 96, 58 N. W. 824.

Missouri.— Dickerson *v.* Chrisman, 28 Mo. 134.

Montana.— Phillips *v.* Coburn, 28 Mont. 45, 72 Pac. 291.

Nebraska.— Cunningham *v.* Fuller, 35 Nebr. 58, 52 N. W. 836.

New Hampshire.— Morrill *v.* Foster, 33 N. H. 379.

New Jersey.— Horner *v.* Stillwell, 35 N. J. L. 307; Edwards *v.* Derrickson, 28 N. J. L. 39; Van Blarcom *v.* Kip, 26 N. J. L. 351.

New York.— Hutchins *v.* Hutchins, 98 N. Y. 56; Bingham *v.* Hyland, 53 Hun 631, 6 N. Y. Suppl. 75; Chadwick *v.* Fonner, 6 Hun 543 [*reversed*, but not on this point, in 69 N. Y. 404]; Keator *v.* Dimmick, 46 Barb. 158; Padgett *v.* Lawrence, 10 Paige 170, 40 Am. Dec. 232; Varick *v.* Briggs, 6 Paige 323; Park *v.* Peck, 1 Paige 477. See also Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757.

North Carolina.— Magee *v.* Blankenship, 95 N. C. 563; Headen *v.* Womack, 88 N. C. 468; Guy *v.* Hall, 7 N. C. 150.

Ohio.— Edgar *v.* Richardson, 33 Ohio St. 581, 31 Am. Rep. 571.

Oregon.— Besser *v.* Joyce, 9 Oreg. 310.

Pennsylvania.— McIldowny *v.* Williams, 28 Pa. St. 492; Alden *v.* Grove, 18 Pa. St. 377;

premises.[89] The owner of a fractional interest is within the rule.[90] Declarations by a grantor are not competent in his own favor,[91] nor in favor of the vendee.[92]

(c) *After Alienation.* Declarations of a grantor made after his grant in disparagement of his title are not admissible against his grantee or other person claiming through or under him to impeach the deed;[93] nor are the grantor's dec-

Maus *v.* Maus, 5 Watts 315; Reed *v.* Dickey, 1 Watts 152; Union Canal Co. *v.* Loyd, 4 Watts & S. 393; Stuart *v.* Line, 11 Pa. Super. Ct. 345.

Texas.— Wilson *v.* Simpson, 80 Tex. 279, 16 S. W. 40; Snow *v.* Starr, 75 Tex. 411, 12 S. W. 673; Titus *v.* Johnson, 50 Tex. 224.

Utah.—Church of Jesus Christ, etc. *v.* Watson, 25 Utah 45, 69 Pac. 531.

Vermont.— Oakman *v.* Walker, 69 Vt. 344, 38 Atl. 63; Downs *v.* Belden, 46 Vt. 674.

Virginia.— Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

United States.— Henderson *v.* Wanamaker, 79 Fed. 736, 25 C. C. A. 181.

Canada.— Payson *v.* Good, 5 N. Brunsw. 272.

See 20 Cent. Dig. tit. "Evidence," §§ 841–844.

A mortgagor stands in the same position, so far at least as concerns a transfer of the equity of redemption. His statements prior to alienation are competent against the subsequent holder. Frear *v.* Drinker, 8 Pa. St. 520.

Res gestæ.— The evidence has been admitted, it is said, as part of the *res gestæ.* Spaulding *v.* Hallenbeck, 39 Barb. (N. Y.) 79.

Irrelevant declarations.— Declarations of a grantor are not admissible to prove a fact which if conceded cannot affect the party against whom it is offered; for example, where the latter is a purchaser for value and without notice of an adverse claim. White *v.* Moss, 92 Ga. 244, 18 S. E. 13; Farmers' Bank *v.* Douglass, 11 Sm. & M. (Miss.) 468; Root *v.* Wadhams, 35 Hun (N. Y.) 57; McElfatrick *v.* Hicks, 21 Pa. St. 402. See also Wilson *v.* Williams, 25 Tex. 54.

89. Blake *v.* Everett, 1 Allen (Mass.) 248.

90. Campbell *v.* Holland, 22 Nebr. 587, 35 N. W. 871.

91. Blake *v.* Everett, 1 Allen (Mass.) 248; Riddle *v.* Dixon, 2 Pa. St. 372, 44 Am. Dec. 207.

92. Edwards *v.* Morgan, 100 Pa. St. 330.

93. *Alabama.*— Adair *v.* Craig, 135 Ala. 332, 33 So. 902; Anniston City Land Co. *v.* Edmondson, 127 Ala. 445, 30 So. 61; Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303; Claflin *v.* Rodenberg, 101 Ala. 213, 13 So. 272; Anonymous, 34 Ala. 430, 73 Am. Dec. 461.

Arizona.—Miller *v.* Miller, (1901) 64 Pac. 415.

Arkansas.—Crow *v.* Watkins, 48 Ark. 169, 2 S. W. 659; Gullett *v.* Lamberton, 6 Ark. 109.

California.— Ord *v.* Ord, 99 Cal. 523, 34 Pac. 83; Frink *v.* Roe, (1885) 7 Pac. 481; Taylor *v.* Central Pac. R. Co., 67 Cal. 615, 8 Pac. 436; Packard *v.* Moss, (1884) 4 Pac. 638; Packard *v.* Johnson, (1884) 4 Pac. 632; Tompkins *v.* Crane, 50 Cal. 478.

Connecticut.— Redfield *v.* Buck, 35 Conn. 328, 95 Am. Dec. 241.

Georgia.— Georgia R., etc., Co. *v.* Fitzgerald, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Towner *v.* Thompson, 81 Ga. 171, 6 S. E. 184; Muller *v.* Rhuman, 62 Ga. 332; Monroe *v.* Napier, 52 Ga. 385; Adair *v.* Adair, 38 Ga. 46; Gill *v.* Strozier, 32 Ga. 688.

Illinois.— Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493 [*affirming* 101 Ill. App. 380]; Holton *v.* Dunker, 198 Ill. 407, 64 N. E. 1050; Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Bentley *v.* O'Bryan, 111 Ill. 53; Brower *v.* Callender, 105 Ill. 88.

Indiana.— McSweeney *v.* McMillen, 96 Ind. 298; Stribling *v.* Brougher, 79 Ind. 328; Harness *v.* Harness, 49 Ind. 384; Burkholder *v.* Casad, 47 Ind. 418; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Indian Territory.—Ikard *v.* Minter, (1902) 69 S. W. 852.

Iowa.—O'Neil *v.* Vanderburg, 25 Iowa 104; De France *v.* Howard, 4 Iowa 524.

Kansas.— Sumner *v.* Cook, 12 Kan. 162; Smith *v.* Wilson, 5 Kan. App. 379, 48 Pac. 436.

Kentucky.— Johnson *v.* Johnson, (1887) 2 S. W. 487, 8 Ky. L. Rep. 600; Beall *v.* Barclay, 10 B. Mon. 261; Rees *v.* Lawless, 4 Litt. 218; Starling *v.* Blair, 4 Bibb 288; Norfleet *v.* Logan, 54 S. W. 713, 21 Ky. L. Rep. 1200; Judah *v.* Fleming, 4 Ky. L. Rep. 888.

Louisiana.— Burg *v.* Rivera, 105 La. 144, 29 So. 482.

Maine.— Pierce *v.* Faunce, 37 Me. 63.

Maryland.— Dodge *v.* Stanhope, 55 Md. 113; Cecil *v.* Cecil, 20 Md. 153; Parks *v.* Parks, 19 Md. 323; Baltimore County Mutual F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

Massachusetts.— Chase *v.* Horton, 143 Mass. 118, 19 N. E. 31; Wilcox *v.* Waterman, 113 Mass. 296; Bartlet *v.* Delprat, 4 Mass. 702.

Minnesota.— Kurtz *v.* St. Paul, etc., R. Co., 61 Minn. 18, 63 N. W. 1; Beard *v.* Minneapolis First Nat. Bank, 41 Minn. 153, 43 N. W. 7; Groff *v.* Ramsey, 19 Minn. 44.

Missouri.— Enders *v.* Richards, 33 Mo. 598; Cavin *v.* Smith, 24 Mo. 221; J. I. Case Plow Works *v.* Ross, 74 Mo. App. 437; Current River Lumber Co. *v.* Cravens, 54 Mo. App. 216.

Nebraska.— Zobel *v.* Bauersachs, 55 Nebr. 20, 75 N. W. 43; Consolidated Tank Line Co. *v.* Pien, 44 Nebr. 887, 62 N. W. 1112.

larations admissible to impeach a conveyance as fraudulent;[94] unless such subsequent declarations are so intimately connected with those made prior to alienation as not to be readily separated from them,[95] or unless there is evidence of a conspiracy or common design between the grantor and grantee establishing *prima facie* a relationship of agency.[96] The rule is the same where the property has been removed from possession of the owner by operation of law.[97] Where persons claim under successive deeds of a common grantor his relevant declarations affect grantees taking under conveyances subsequent thereto, but are inadmissible against those who acquired interests prior to that time.[98] *A fortiori* declarations of a grantor in his own favor, made after he has parted with his interest in land,

New Jersey.— Price *v.* Plainfield, 40 N. J. L. 608; Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

New York.— Hutchins *v.* Hutchins, 98 N. Y. 56; Sanford *v.* Ellithorp, 95 N. Y. 48; Kalish *v.* Higgins, 70 N. Y. App. Div. 192, 75 N. Y. Suppl. 397 [*affirmed* in 175 N. Y. 495, 67 N. E. 1084]; Leary *v.* Corvin, 63 N. Y. App. Div. 151, 71 N. Y. Suppl. 335; Pfeffer *v.* Kling, 58 N. Y. App. Div. 179, 68 N. Y. Suppl. 641; Padgett *v.* Lawrence, 10 Paige 170, 40 Am. Dec. 232; Varick *v.* Briggs, 6 Paige 323.

North Carolina.— Headen *v.* Womack, 88 N. C. 468; Melvin *v.* Bullard, 82 N. C. 33; Burroughs *v.* Jenkins, 62 N. C. 33; Ward *v.* Saunders, 28 N. C. 382.

Ohio.— Voss *v.* Murray, 50 Ohio St. 19, 32 N. E. 1112; Hill *v.* Ludwig, 46 Ohio St. 373, 24 N. E. 596; Williams *v.* Mears, 2 Disney 604, 4 Wkly. L. Gaz. 293.

Oregon.— Krewson *v.* Purdom, 11 Oreg. 266, 3 Pac. 822.

Pennsylvania.— Baldwin *v.* Stier, 191 Pa. St. 432, 43 Atl. 326; Carr *v.* H. C. Frick Coke Co., 170 Pa. St. 52, 32 Atl. 656; McLaughlin *v.* McLaughlin, 91 Pa. St. 462; Hartman *v.* Diller, 62 Pa. St. 37.

South Carolina.— Agnew *v.* Adams, 26 S. C. 101, 1 S. E. 414; Renwick *v.* Renwick, 9 Rich. 50.

Tennessee.—Merriman *v.* Lacefield, 4 Heisk. 209; Caraway *v.* Caraway, 7 Coldw. 245.

Texas.— Wallace *v.* Berry, 83 Tex. 328, 18 S. W. 595; McKnight *v.* Reed, (Civ. App. 1902) 71 S. W. 318; Stephens *v.* Johnson, (Civ. App. 1898) 45 S. W. 328; Sanger *v.* Jesse French Piano, etc., Co., 21 Tex. Civ. App. 523, 52 S. W. 621; Hatcher *v.* Stipe, (Civ. App. 1898) 45 S. W. 329; Smith *v.* James, (Civ. App. 1897) 42 S. W. 792; Phillips *v.* Sherman, (Civ. App. 1897) 39 S. W. 187; Hilburn *v.* Harrell, (Civ. App. 1895) 29 S. W. 925.

Utah.— Snow *v.* Rich, 22 Utah 123, 61 Pac. 336.

Vermont.— Norton *v.* Perkins, 67 Vt. 203, 31 Atl. 148; Aiken *v.* Peck, 22 Vt. 255; Shepherd *v.* Hayes, 16 Vt. 486; Brackett *v.* Wait, 6 Vt. 411.

West Virginia.— Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253; Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799.

United States.— Steinbach *v.* Stewart, 11 Wall. 566, 20 L. ed. 56; Fowler *v.* Merrill, 11 How. 375, 13 L. ed. 736; Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563.

England.— Sidmouth *v.* Sidmouth, 2 Beav. 447, 9 L. J. Ch. 282, 17 Eng. Ch. 447.

Absolute deed a mortgage.—After the execution of a deed in form absolute the grantor's declarations are inadmissible to show that it was a mortgage. Hyde *v.* Buckner, 108 Cal. 522, 41 Pac. 416; Jones *v.* Jones, 17 N. Y. Suppl. 905; Gadsby *v.* Dyer, 91 N. C. 311.

Reservation of equitable estate.— The rule stated in the text applies, although the grantor reserves an equitable interest in the land conveyed. Warren *v.* Carey, 145 Mass. 78, 12 N. E. 999.

Grantor's declarations in favor of his title are admissible evidence to sustain it. Miller *v.* Meers, 155 Ill. 284, 40 N. E. 577; Kerby *v.* Kerby, 57 Md. 345; Perkins *v.* Towle, 59 N. H. 583; Fulton *v.* Gracey, 15 Gratt. (Va.) 314.

See 20 Cent. Dig. tit. "Evidence," § 846.

94. *California.*— Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402.

Illinois.— Durand *v.* Weightman, 108 Ill. 489.

Indiana.— Skelley *v.* Vail, 27 Ind. App. 87, 60 N. E. 961.

Iowa.— Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 575, 81 N. W. 775, 80 Am. St. Rep. 325.

Kansas.— Stickel *v.* Bender, 37 Kan. 457, 15 Pac. 580.

Kentucky.— Judah *v.* Fleming, 4 Ky. L. Rep. 888.

Missouri.— Mueller *v.* Weitz, 56 Mo. App. 36; Cash *v.* Penix, 11 Mo. App. 597.

New York.— Strauss *v.* Murray, 31 Misc. 69, 63 N. Y. Suppl. 201.

United States.— Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709 [*affirming* 16 Fed. Cas. No. 8,956, Baldw. 344].

See 20 Cent. Dig. tit. "Evidence," § 848; and, generally, FRAUDULENT CONVEYANCES.

95. Smith *v.* Leforce, 14 Ky. L. Rep. 399; Holbrook *v.* Holbrook, 113 Mass. 74.

96. Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864; Hedrick *v.* Gregg, 10 Ohio S. & C. Pl. Dec. 462, 8 Ohio N. P. 24.

97. Renshaw *v.* The Pawnee, 19 Mo. 532.

98. *Alabama.*— Alexander *v.* Caldwell, 55 Ala. 517.

California.— Colton *v.* Seavey, 22 Cal. 496.

Connecticut.— Lockwood *v.* Lockwood, 56 Conn. 106, 14 Atl. 293; Nichols *v.* Hotchkiss, 2 Day 121.

North Carolina.— Braswell *v.* Gay, 75 N. C. 515, 518.

are inadmissible to affect the title of the grantee,[99] except on some ground of independent relevancy, as for example in contradiction of other declarations of the same person already admitted in evidence.[1] Abandonment[2] or dedication[3] is under the rule regarded as equivalent to a conveyance. If the party has acquiesced by word or deed in the statement of the grantor, although made subsequent to the conveyance, it is competent against the party as his own statement.[4]

(D) *Form of Statement.* Competent declarations of a former owner may be oral or written, judicial[5] or extrajudicial.[6] If the declaration is contained in a written instrument it is not material that the latter is not effective for the purpose for which it is designed.[7] The statement may even be that of another person acquiesced in by silence under circumstances which give the silence a probative value.[8]

(II) *Mortgagors or Other Encumbrancers.* Declarations of a mortgagor, so far as they affect the estate conveyed but no farther,[9] are competent as against the mortgagee if made prior to the execution of the mortgage.[10] But his declarations made after execution of the mortgage are not admissible to affect the rights of the mortgagee,[11] except in cases where retention of possession by the mortgagor,[12] or other facts point *prima facie* to the existence of a conspiracy between

Wisconsin.— McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303.

See 20 Cent. Dig. tit. "Evidence," § 846.

99. *California.*— Ord *v.* Ord, 99 Cal. 523, 34 Pac. 83.

Georgia.— Bush *v.* Rogan, 65 Ga. 320, 38 Am. Rep. 785.

Illinois.— Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150.

Kentucky.— Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482.

Maryland.— Worthington *v.* Worthington, (1890) 20 Atl. 911; Stewart *v.* Redditt, 3 Md. 67.

Missouri.— McLaughlin *v.* McLaughlin, 16 Mo. 242.

New Hampshire.— Perkins *v.* Towle, 59 N. H. 583.

New York.— Burnham *v.* Brennan, 74 N. Y. 597.

Pennsylvania.— Kirkland *v.* Hepselgefser, 2 Grant 84.

Tennessee.— McCasland *v.* Carson, 1 Head 117.

Texas.— Johnson *v.* Richardson, 52 Tex. 481; Hale *v.* Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288.

Vermont.— Edgell *v.* Bennett, 7 Vt. 534.

Virginia.— Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753.

Wisconsin.—Matteson *v.* Hartmann, 91 Wis. 485, 65 N. W. 58.

See 20 Cent. Dig. tit. "Evidence," § 846.

1. Joyce *v.* Hamilton, 111 Ind. 163, 12 N. E. 294.

2. May *v.* Jones, 4 Litt. (Ky.) 21.

3. Hayden *v.* Stone, 121 Mass. 413.

4. Higgins *v.* White, 18 Ill. App. 480 [*affirmed* in 118 Ill. 619, 8 N. E. 808].

Unequivocal evidence of acquiescence or adoption is required. Evans *v.* Merthyr Tydfil Urban Dist. Council, [1899] 1 Ch. 241, 68 L. J. Ch. 175, 79 L. T. Rep. N. S. 578.

5. Ford *v.* Belmont, 7 Rob. (N. Y.) 97, holding competent admissions contained in an answer in chancery.

6. Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137 (recitals in a deed); Carter *v.* Saunders, 6 N. Brunsw. 147 (crown grant).

7. Steed *v.* Knowles, 97 Ala. 573, 580, 12 So. 75.

8. Lejeune *v.* Barrow, 11 La. Ann. 501. See also *supra*, IV, B, 7.

9. Foote *v.* Beecher, 78 N. Y. 155, 7 Abb. N. Cas. (N. Y.) 358. See also Conkling *v.* Weatherwax, 90 N. Y. App. Div. 585, 86 N. Y. Suppl. 139, holding that in an action to establish the lien of a legacy as against a devisee's mortgagee, declarations of the devisee are incompetent to prove non-payment of the legacy.

10. Sherman County Bank *v.* McDonald, 57 Kan. 358, 46 Pac. 703; Hunt *v.* Haven, 56 N. H. 87.

11. *California.*— Silva *v.* Serpa, 86 Cal. 241, 24 Pac. 1013.

Connecticut.— White *v.* Wheaton, 16 Conn. 530.

Illinois.— Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493 [*affirming* 101 Ill. App. 380]; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Bell *v.* Prewitt, 62 Ill. 361.

Kentucky.— Hayden *v.* McIlvain, 4 Bibb 57; Nelson *v.* Terry, 56 S. W. 672, 22 Ky. L. Rep. 111.

Maryland.— Carson *v.* White, 6 Gill 17.

Missouri.— Thompson *v.* Longan, 42 Mo. App. 146.

New York.— Newgass *v.* Auburn Loan Co., 81 N. Y. App. Div. 411, 80 N. Y. Suppl. 778; Duane *v.* Paige, 82 Hun 139, 31 N. Y. Suppl. 310.

North Carolina.— Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302.

Pennsylvania.— Hoffman *v.* Lee, 3 Watts 352.

South Carolina.— Taylor *v.* Heriot, 4 Desauss. 227.

See 20 Cent. Dig. tit. "Evidence," § 846.

12. Levy *v.* Hamilton, 68 N. Y. App. Div. 277, 74 N. Y. Suppl. 159.

the mortgagor and the mortgagee to defraud creditors of the former. In general declarations of a former landowner affecting his title, made after rights have attached under a lien or encumbrance on the land, are inadmissible as against a purchaser under such lien or encumbrance.[13]

(III) *Landlord and Tenant.* Declarations of a landlord in relation to the estate leased are competent against his tenant.[14]

(IV) *Donors.* The rule that declarations of a former owner of the premises are competent against those claiming under him who take subsequently to the declaration[15] extends to cases where the conveyance was a gift and without valuable consideration.[16] On the other hand a voluntary alienor cannot limit or defeat the estate of his alienee by declarations made after consummation of the gift.[17]

(V) *Testators and Intestates.* Relevant[18] declarations of an ancestor regarding his interest in real estate which has devolved by his death are competent against an heir at law who has inherited such property from him.[19] Statements of this nature by a testator are admissible to affect a devisee.[20] So far as relevant,[21] the

13. Howard *v.* McKenzie, 54 Tex. 171.

After grant of an easement the grantor's declarations are not admissible in limitation of the interest conveyed. McCullough *v.* Cumberland Valley R. Co., 186 Pa. St. 112, 40 Atl. 404, right of way.

14. Cox *v.* Winston, 3 Metc. (Ky.) 577; Jackson *v.* Myers, 11 Wend. (N. Y.) 533.

15. See *supra*, IV, D, 3, b, (I).

16. Ogden *v.* Dodge County, 97 Ga. 461, 25 S. E. 321; Burlingame *v.* Robbins, 21 Barb. (N. Y.) 327.

17. *Alabama.*— Gillespie *v.* Burleson, 28 Ala. 551; Walker *v.* Blassingame, 17 Ala. 810; Strong *v.* Brewer, 17 Ala. 706; Julian *v.* Reynolds, 8 Ala. 680.

Arkansas.— Rector *v.* Danley, 14 Ark. 304; Prater *v.* Frazier, 11 Ark. 249.

Georgia.— Ogden *v.* Dodge County, 97 Ga. 461, 25 S. E. 321.

Indiana.— Paine *v.* Griffin, 7 Blackf. 485.

Kentucky.— Strelow *v.* Vonderhide, 3 Ky. L. Rep. 472.

New York.— Sanford *v.* Sanford, 5 Lans. 486; Woodruff *v.* Cook, 25 Barb. 505.

North Carolina.— Eelbank *v.* Burt, 3 N. C. 330.

Ohio.— Hall *v.* Geyer, 14 Ohio Cir. Ct. 229, 7 Ohio Cir. Dec. 436.

South Carolina.—Sumner *v.* Murphy, 2 Hill 488, 32 Am. Dec. 397; Hunter *v.* Parsons, 2 Bailey 59.

Texas.— Grooms *v.* Rust, 27 Tex. 231.

Virginia.— Brock *v.* Brock, 92 Va. 173, 23 S. E. 224; Smith *v.* Betty, 11 Gratt. 752.

See 20 Cent. Dig. tit. "Evidence," §§ 866, 867.

18. Baker *v.* Haskell, 47 N. H. 472, 93 Am. Dec. 455; Lee *v.* Parker, 5 Whart. (Pa.) 342.

19. *Alabama.*— Pittman *v.* Pittman, 124 Ala. 306, 27 So. 242.

Georgia.— Studstill *v.* Willcox, 94 Ga. 690, 20 S. E. 120; Yonn *v.* Pittman, 82 Ga. 637, 9 S. E. 667; Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

Illinois.— Rust *v.* Mansfield, 25 Ill. 336.

Indiana.— Wallis *v.* Luhring, 134 Ind. 447, 34 N. E. 231; McSweeney *v.* McMillen, 96 Ind. 298.

Iowa.— Davis *v.* Melson, 66 Iowa 715, 24 N. W. 526.

Louisiana.— Boatner *v.* Scott, 1 Rob. 546.

Maine.— Wentworth *v.* Wentworth, 71 Me. 72.

Massachusetts.— Plimpton *v.* Chamberlain, 4 Gray 320; Hodges *v.* Hodges, 2 Cush. 455; White *v.* Loring, 24 Pick. 319.

Michigan.— Chipman *v.* Thompson, Walk. Ch. 405.

Minnesota.—Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018.

Mississippi.— Graham *v.* Busby, 34 Miss. 272.

Missouri.— Long *v.* McDow, 87 Mo. 197.

New Hampshire.— Baker *v.* Haskell, 47 N. H. 479, 93 Am. Dec. 455; Hurlbut *v.* Wheeler, 40 N. H. 73; Little *v.* Gibson, 39 N. H. 505; Tilton *v.* Emery, 17 N. H. 536.

New Jersey.— Midmer *v.* Midmer, 26 N. J. Eq. 299.

New York.— Gibney *v.* Marchay, 34 N. Y. 301; Enders *v.* Sternbergh, 2 Abb. Dec. 31, 1 Keyes 264, 33 How. Pr. 464; McClellan *v.* Grant, 83 N. Y. App. Div. 599, 82 N. Y. Suppl. 208; Parkhurst *v.* Higgins, 38 Hun 113; Rose *v.* Adams, 22 Hun 389; Spaulding *v.* Hallenbeck, 39 Barb. 79; Baird *v.* Slaight, 5 Silv. Supreme 214, 8 N. Y. Suppl. 603; Lucky *v.* Odell, 46 N. Y. Super. Ct. 547.

Ohio.— Tipton *v.* Ross, 10 Ohio 273.

Pennsylvania.— Hunt's Appeal, 100 Pa. St. 590; Williard *v.* Williard, 56 Pa. St. 119.

See 20 Cent. Dig. tit. "Evidence," §§ 876–880.

The statement must be one of fact; existence of an opinion in the mind of an ancestor which is unfavorable to his title is not a probative and therefore not a relevant fact. *Ex p.* Yown, 17 S. C. 532.

20. Rust *v.* Mansfield, 25 Ill. 336; Hale *v.* Monroe, 28 Md. 98; Enders *v.* Sternbergh, 2 Abb. Dec. (N. Y.) 31, 1 Keyes (N. Y.) 264, 33 How. Pr. (N. Y.) 464; Broadrup *v.* Woodman, 27 Ohio St. 553.

21. Stubbs *v.* Beene, 37 Ala. 627; Central Branch Union Pac. R. Co. *v.* Andrews 37 Kan. 162, 14 Pac. 509.

statements of a decedent impairing his interest in real property are available against his administrator[22] or executor.[23] A tenant in dower does not claim under her husband in such a sense that his declarations are competent against her by privity.[24]

c. **Personal Property** — (I) *Vendors* — (A) *In General.* In most jurisdictions statements of a former owner of a chattel or chose in action regarding the title thereto are competent against a subsequent owner who is a party to the suit, provided it is made affirmatively to appear[25] that the statement was made while the declarant was owner of the property,[26] and that the party to be affected actually claims under the declarant.[27] But such statements are not competent if made before the declarant owned the property.[28]

(B) *Before Transfer.* In most of the states a relevant[29] statement by the owner of chattels regarding his title, when made before transfer of the property[30]

22. *Alabama.*— Stubbs *v.* Beene, 37 Ala. 627.

Georgia.— Anderson *v.* Brown, 72 Ga. 713.

Iowa.— Robinson *v.* Robinson, 22 Iowa 427.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 37 Kan. 162, 14 Pac. 509.

New York.— Hurlburt *v.* Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482.

South Carolina.—Burckmyer *v.* Mairs, Riley 208.

Texas.— Schmidt *v.* Huff, (Sup. 1892) 19 S. W. 131; Bush *v.* Barron, 78 Tex. 5, 14 S. W. 238.

See 20 Cent. Dig. tit. "Evidence," §§ 876–880.

23. Machem *v.* Machem, 28 Ala. 374; Turner *v.* Berry, 74 Ga. 481.

Conclusions of law rejected.— The statement must be one of fact and made upon personal knowledge. Conclusions of law or statements of fact based on ignorance or mistake as to legal rights are irrelevant. Machem *v.* Machem, 28 Ala. 374.

24. Richardson *v.* Taylor, 45 Ark. 472; Davis *v.* Evans, 102 Mo. 164, 14 S. W. 875; Derush *v.* Brown, 8 Ohio 412. *Contra,* Van Duyne *v.* Thayre, 14 Wend. (N. Y.) 233.

25. Holly *v.* Flournoy, 54 Ala. 99; Gregory *v.* Walker, 38 Ala. 26; Roberts *v.* Medbery, 132 Mass. 100; Givens *v.* Manns, 6 Munf. (Va.) 191.

26. See *infra,* IV, D, 3, c, (I), (B), (C).

27. *Alabama.*— Elmore *v.* Fitzpatrick, 56 Ala. 400.

Arkansas.— Dorr *v.* School Dist. No. 26, 40 Ark. 237.

California.— Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159; Hyde *v.* Buckner, 108 Cal. 522, 41 Pac. 416.

Illinois.— Clark *v.* Wilson, 127 Ill. 449, 19 N. E. 860, 11 Am. St. Rep. 143; Fyffe *v.* Fyffe, 106 Ill. 646.

Mississippi.— Levy *v.* Holberg, 71 Miss. 66, 14 So. 537; Sharp *v.* Maxwell, 30 Miss. 589.

See 20 Cent. Dig. tit. "Evidence," §§ 852–854.

Contra.— Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757 [*reversing* 30 N. Y. App. Div. 14, 51 N. Y. Suppl. 916], holding also that the assignee of a mortgagee of real estate comes within the benefit of the New York rule which excludes as against vendees of chattels and assignees of choses in actions the admissions of their vendors or assignors. See also Conkling *v.* Weatherwax, 90 N. Y. App. Div. 585, 86 N. Y. Suppl. 139; Booth *v.* Swezey, Seld. Notes (N. Y.) 153.

Claimant under adverse or paramount title is not affected by declarations of former owner. Elmore *v.* Fitzpatrick, 56 Ala. 400; Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657. A party having two distinct titles to property may disclaim one and rely entirely on the other, and after such election admissions of his privies in the disclaimed title are not evidence against him. Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657.

28. Tuttle *v.* Cone, 108 Iowa 468, 79 N. W. 267.

29. O'Brien *v.* Hilburn, 22 Tex. 616, 625; Wustland *v.* Potterfield, 9 W. Va. 438.

30. *Alabama.*— Elmore *v.* Fitzpatrick, 56 Ala. 400; Jemison *v.* Smith, 37 Ala. 185; Jennings *v.* Blocker, 25 Ala. 415; Barnes *v.* Mobley, 21 Ala. 232; Inge *v.* Murphy, 10 Ala. 885; Horton *v.* Smith, 8 Ala. 73, 42 Am. Dec. 628.

Georgia.— Doughty *v.* McMillan, 92 Ga. 818, 19 S. E. 59; Saulsbury *v.* McKellar, 59 Ga. 301.

Illinois.— Monmouth First Nat. Bank *v.* Strang, 138 Ill. 347, 27 N. E. 903; Gill *v.* Crosby, 63 Ill. 190; Vennum *v.* Thompson, 38 Ill. 143.

Indiana.— Durham *v.* Shannon, 116 Ind. 403, 19 N. E. 190, 9 Am. St. Rep. 860; Kuhns *v.* Gates, 92 Ind. 66; Bunberry *v.* Brett, 18 Ind. 343.

Kentucky.— Gentry *v.* McMinnis, 3 Dana 382; Carrel *v.* Early, 4 Bibb 270.

Maine.— White *v.* Chadbourne, 41 Me. 149; McLanathan *v.* Patten, 39 Me. 142; Holt *v.* Walker, 26 Me. 107, 45 Am. Dec. 98; Hale *v.* Smith, 6 Me. 416.

Mississippi.— Walker *v.* Marseilles, 70 Miss. 283, 12 So. 211.

Missouri.—Burgess *v.* Quimby, 21 Mo. 508; Cavin *v.* Smith, 21 Mo. 444; Renshaw *v.* The Pawnee, 19 Mo. 532.

New Hampshire.— Baker *v.* Haskell, 47 N. H. 479, 93 Am. Dec. 455.

New York.— White *v.* Chouteau, 10 Barb. 202.

or seizure thereof on legal process,[31] is admissible against parties claiming under him.

(c) *After Transfer.* Statements of a former owner of personal property made after a sale are not admissible either against the immediate[32] or against a

North Carolina.— Johnson *v.* Patterson, 9 N. C. 183, 11 Am. Dec. 756.

Ohio.— Ritchy *v.* Martin, Wright 441.

Pennsylvania.— Caldwell *v.* Gamble, 4 Watts 292.

South Carolina.— Crawley *v.* Tucker, 4 Rich. 560; Land *v.* Lee, 2 Rich. 168.

Tennessee.— Drennon *v.* Smith, 3 Head 389.

Texas.— Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794.

Vermont.— Alger *v.* Andrews, 47 Vt. 238.

Virginia.— Givens *v.* Manns, 6 Munf. 191.

West Virginia.— Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927.

Wisconsin.— Fay *v.* Rankin, 47 Wis. 400, 2 N. W. 562.

See 20 Cent. Dig. tit. "Evidence," § 853.

Contra.— Deasey *v.* Thurman, 1 Ida. 775; Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757; Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. 393; Tousley *v.* Barry, 16 N. Y. 497; Squire *v.* Greene, 47 N. Y. App. Div. 636, 62 N. Y. Suppl. 48; Paige *v.* Cagwin, 7 Hill (N. Y.) 361 (the leading case in New York); Stark *v.* Boswell, 6 Hill (N. Y.) 405, 41 Am. Dec. 752. See also Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920.

31. Renshaw *v.* The Pawnee, 19 Mo. 532.

32. *Alabama.*— McCormick *v.* Joseph, 77 Ala. 236; Pulliam *v.* Newberry, 41 Ala. 168; McKenzie *v.* Hunt, 1 Port. 37; Martin *v.* Kelly, 1 Stew. 198.

Arkansas.— Smith *v.* Hamlet, 43 Ark. 320; Clinton *v.* Estes, 20 Ark. 216; Humphries *v.* McCraw, 9 Ark. 91.

California.— Henderson *v.* Hart, 122 Cal. 332, 54 Pac. 1110; Banning *v.* Marleau, 121 Cal. 240, 53 Pac. 692; Cohn *v.* Mulford, 15 Cal. 50; Visher *v.* Webster, 13 Cal. 58; Paige *v.* O'Neal, 12 Cal. 483.

Georgia.— Smith *v.* Hare, 58 Ga. 446; Flanders *v.* Maynard, 58 Ga. 56; Bass *v.* Bass, 52 Ga. 531; Monroe *v.* Napier, 52 Ga. 385; Gill *v.* Strozier, 32 Ga. 688; Howard *v.* Snelling, 32 Ga. 195; James *v.* Kerby, 29 Ga. 684.

Illinois.— Milling *v.* Hillenbrand, 156 Ill. 310, 40 N. E. 941; Randegger *v.* Ehrhardt, 51 Ill. 101; Miner *v.* Phillips, 42 Ill. 123; Hessing *v.* McCloskey, 37 Ill. 341; Myers *v.* Kinzie, 26 Ill. 36; Rust *v.* Mansfield, 25 Ill. 336; McCartney *v.* Kraper, 84 Ill. App. 266; Edwards *v.* Hamilton, 19 Ill. App. 340.

Indiana.— Campbell *v.* Coon, 51 Ind. 76.

Iowa.— Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317 (holding that after a sale of goods was fully consummated and the purchase-price paid a conversation between the manager of the vendor's store and one of the creditors could not bind the purchasers); Neuffer *v.* Moehn, 96 Iowa 731, 65 N. W. 334; Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626; McCormicks *v.* Fuller, 56 Iowa 43, 8 N. W. 800; Benson *v.* Lundy, 52 Iowa 265, 3 N. W. 149; Keystone Mfg. Co. *v.* Johnson, 50 Iowa 142; Gray *v.* Earl, 13 Iowa 188.

Kansas.— Scheble *v.* Jordan, 30 Kan. 353, 1 Pac. 121.

Kentucky.— Gatliff *v.* Rose, 8 B. Mon. 629; Meriweather *v.* Herran, 8 B. Mon. 162; Ring *v.* Gray, 6 B. Mon. 368; Brashear *v.* Burton, 3 Bibb 9, 6 Am. Dec. 634.

Louisiana.— Ford *v.* Mills, 46 La. Ann. 331, 14 So. 845.

Maine.— Dennison *v.* Benner, 41 Me. 332.

Maryland.— Cooke *v.* Cooke, 29 Md. 538; Lark *v.* Linstead, 2 Md. Ch. 162.

Massachusetts.— Kimball *v.* Leland, 110 Mass. 325; Taylor *v.* Robinson, 2 Allen 562; Sumner *v.* McNeil, 12 Metc. 519. See also Roberts *v.* Medbery, 132 Mass. 100.

Michigan.— Vyn *v.* Keppel, 108 Mich. 244, 65 N. W. 966; Carr *v.* McCarthy, 70 Mich. 258, 38 N. W. 241.

Minnesota.— Glaucke *v.* Gerlich, (1904) 98 N. W. 94 (holding that statements of a vendor of personalty after execution of a bill of sale are not admissible to attack the vendee's title); Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63; Howland *v.* Fuller, 8 Minn. 50; Zimmerman *v.* Lamb, 7 Minn. 421; Derby *v.* Gallup, 5 Minn. 119; Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507.

Mississippi.— Ferriday *v.* Selser, 4 How. 506.

Missouri.—Stewart *v.* Thomas, 35 Mo. 202; Renshaw *v.* The Pawnee, 19 Mo. 532; Farrar *v.* Snyder, 31 Mo. App. 93; Worley *v.* Watson, 22 Mo. App. 546, where the court said that after a seller has parted with his title he is related to the property only as any other stranger.

Nebraska.— Williams *v.* Eikenbury, 25 Nebr. 721, 41 N. W. 770, 13 Am. St. Rep. 517.

Nevada.— Perley *v.* Forman, 7 Nev. 309; Lewis *v.* Wilcox, 6 Nev. 215.

New York.— Tabor *v.* Van Tassell, 86 N. Y. 642; Tilson *v.* Terwilliger, 56 N. Y. 273; Moravee *v.* Grell, 78 N. Y. App. Div. 146, 79 N. Y. Suppl. 533, 12 N. Y. Annot. Cas. 294; Knight *v.* Forward, 63 Barb. 311; Peck *v.* Crouse, 46 Barb. 151; Sprague *v.* Kneeland, 12 Wend. 161.

North Carolina.— Williams *v.* Clayton, 29 N. C. 442.

Ohio.— Ohio Coal Co. *v.* Davenport, 37 Ohio St. 194.

Pennsylvania.— Pringle *v.* Pringle, 59 Pa. St. 281.

South Carolina.— Kittles *v.* Kittles, 4 Rich. 422.

South Dakota.—Aldons *v.* Olverson, (1903) 95 N. W. 917.

Tennessee.— Holmark *v.* Molin, 5 Coldw. 482.

Texas.— Bradford *v.* Taylor, 74 Tex. 175, 12 S. W. 20; Boaz *v.* Schneider, 69 Tex. 128,

subsequent[33] transferee. But a vendor's statements after a sale may be used to contradict his own testimony,[34] and when made in the presence of the transferee may be competent as an admission by the latter if he apparently acquiesces in the statement or in some relevant part of it.[35]

(II) *MORTGAGORS, MORTGAGEES, AND PLEDGORS.* Declarations of a mortgagor of chattels against his title, made before execution of the mortgage, are in most states admissible against the mortgagee;[36] but the latter is not affected by the mortgagor's declarations made after the mortgage.[37] Declarations of a mortgagee while holding his security are competent against those subsequently claiming under him.[38] Declarations of a pledgor made subsequently to the pledge are not admissible against the pledgee.[39]

(III) *ASSIGNORS*—(A) *In General*—(1) BEFORE TRANSFER. In most states declarations of the assignor of a chose in action affirmatively shown[40] to have been made while he was the owner thereof and before assignment and notice to the debtor[41] are competent evidence against the assignee and all claiming under him;[42]

6 S. W. 402; Schmick *v.* Noel, 64 Tex. 406; Garrahy *v.* Green, 32 Tex. 202; Wooley *v.* Bell, (Civ. App. 1903) 76 S. W. 797 (holding that what purported to be a bill of sale, executed long after the property in controversy had been actually sold, was inadmissible in evidence under the rule excluding unsworn *ex parte* declarations of a vendor after title has passed out of him); Boltz *v.* Engelke, (Civ. App. 1901) 63 S. W. 899; D'Arrigo *v.* Texas Produce Co., (Civ. App. 1895) 31 S. W. 713.

Vermont.— Murray *v.* Chadwick, 52 Vt. 293; Bullard *v.* Billings, 2 Vt. 309.

Virginia.— Givens *v.* Manns, 6 Munf. 191; Vaughan *v.* Winckler, 4 Munf. 136.

Wisconsin.— Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407.

Wyoming.— Toms *v.* Whitmore, 6 Wyo. 220, 44 Pac. 56.

United States.— Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786; Many *v.* Jagger, 17 Fed. Cas. No. 9,055, 1 Blatchf. 372.

See 20 Cent. Dig. tit. "Evidence," § 855.

33. Woodhouse *v.* Jones, 5 N. Y. Leg. Obs. 20.

34. Fiske *v.* Small, 25 Me. 453.

35. See Peck *v.* Crouse, 46 Barb. (N. Y.) 151; Garrahy *v.* Green, 32 Tex. 202. See *supra*, IV, B, 7.

36. Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394; Beedy *v.* Macomber, 47 Me. 451.

Contra, in New York. Dwelly *v.* Van Houghton, 4 N. Y. Leg. Obs. 101. And see Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757; Conkling *v.* Weatherwax, 90 N. Y. App. Div. 585, 86 N. Y. Suppl. 139.

37. *Arkansas.*— Gauss *v.* Doyle, 46 Ark. 122.

Idaho.— Meyer *v.* Munro, (1903) 71 Pac. 969.

Iowa.— Fowler Co. *v.* McDonnell, 100 Iowa 536, 69 N. W. 873.

Michigan.— Krementz *v.* Howard, 109 Mich. 466, 67 N. W. 526.

Vermont.— Davis *v.* Buchanan, 73 Vt. 67, 50 Atl. 545.

Wisconsin.— Donaldson *v.* Johnson, 2 Pinn. 482, 2 Chandl. 160.

United States.— W. B. Grimes Dry-Goods Co. *v.* Malcolm, 164 U. S. 483, 17 S. Ct. 158, 41 L. ed. 524 [*affirming* 58 Fed. 670, 7 C. C. A. 426]; Winchester, etc., Mfg. Co. *v.* Creary, 116 U. S. 161, 6 S. Ct. 369, 29 L. ed. 591.

See 20 Cent. Dig. tit. "Evidence," § 855.

38. Farmers' L. & T. Co. *v.* Montgomery, 30 Nebr. 33, 46 N. W. 214; Kinna *v.* Smith, 3 N. J. Eq. 14; Walthall *v.* Johnston, 2 Call (Va.) 275.

Contra, in New York. Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757.

39. Fuqua *v.* Bogard, 62 S. W. 480, 22 Ky. L. Rep. 1910.

40. See *infra*, IV, D, 3, c, (III), (A), (2).

41. Notice of assignment fixes the time before or after which the assignor's declarations are or are not admissible. Patrick *v.* McWilliams, 23 Ga. 348. See also Norton *v.* Woods, 5 Paige (N. Y.) 249; Halloran *v.* Whitcomb, 43 Vt. 306.

42. *Alabama.*— Grayson *v.* Glover, 33 Ala. 182.

Georgia.— Athens Nat. Bank *v.* Athens Exch. Bank, 110 Ga. 692, 36 S. E. 265.

Illinois.— Anderson *v.* South Chicago Brewing Co., 173 Ill. 213, 50 N. E. 655; Williams *v.* Judy, 8 Ill. 282, 44 Am. Dec. 699; Merrick *v.* Hulbert, 15 Ill. App. 606.

Indiana.— Shade *v.* Creviston, 93 Ind. 591; Abbott *v.* Muir, 5 Ind. 444.

Kentucky.— Scott *v.* Coleman, 5 Litt. 349, 15 Am. Dec. 71.

Maryland.— Clary *v.* Grimes, 12 Gill & J. 31.

Massachusetts.— Stevens *v.* Parker, 5 Allen 333.

Mississippi.— Brown *v.* McGraw, 12 Sm. & M. 267.

Missouri.— Murray *v.* Oliver, 18 Mo. 405.

Pennsylvania.— Magee *v.* Raiguel, 64 Pa. St. 110; Kellogg *v.* Krauser, 14 Serg. & R. 137, 16 Am. Dec. 480; Brindle *v.* McIlvaine, 10 Serg. & R. 282.

South Carolina.— Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764.

Utah.— McCornick *v.* Sadler, 14 Utah 463, 47 Pac. 667.

Virginia.— Wilcox *v.* Pearman, 9 Leigh 144.

Wisconsin.— Kelley *v.* Schupp, 60 Wis. 76, 18 N. W. 725.

but declarations of an assignor are not competent in favor of himself or his assignee.[43]

(2) After Transfer. Similar declarations made after the assignment and notice thereof[44] are not admissible against the assignee or those claiming under him,[45] provided that the assignment was made in good faith;[46] and a party who offers the declaration of an assignor as against an assignee or subsequent holder has the burden of showing affirmatively that the statement was made before the assignment.[47] The application of the rule is not affected by the fact that the assignor is a party to the record. Only declarations made by him while he possessed the substantial interest are competent as against an assignee for whose benefit the suit is brought.[48]

(B) *In Insolvency or Bankruptcy.* Declarations of an assignor for the benefit

Canada.— Court *v.* Holland, 8 Ont. 219.
See 20 Cent. Dig. tit. "Evidence," § 870.
Contra.— Merkle *v.* Beidleman, 165 N. Y. 21, 68 N. E. 757 [*reversing* 30 N. Y. App. Div. 14, 51 N. Y. Suppl. 916] (holding that declarations of the assignor of a mortgage made while he was the owner were inadmissible as against his assignee either to defeat his title or to establish equities in favor of the mortgagor); Truax *v.* Slater, 86 N. Y. 630; Tousley *v.* Barry, 16 N. Y. 497; Booth *v.* Swezey, 8 N. Y. 276; Mitchell *v.* Baldwin, 88 N. Y. App. Div. 265, 84 N. Y. Suppl. 1043; Tittle *v.* Van Valkenburg, 75 N. Y. App. Div. 69, 77 N. Y. Suppl. 786; Robinson *v.* Bishop, 39 Hun (N. Y.) 370; Edington *v.* Ætna L. Ins. Co., 13 Hun (N. Y.) 543; Smith *v.* Webb, 1 Barb. (N. Y.) 230. See also Shober *v.* Jack, 3 Mont. 351; Von Sachs *v.* Kretz, 72 N. Y. 548; Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920.

43. Heywood *v.* Reed, 4 Gray (Mass.) 574.

44. As to notice of assignment see *supra*, note 41.

45. *Alabama.*— Vickars *v.* Mooney, 6 Ala. 97; Smith *v.* Rogers, 1 Stew. & P. 317.
Arkansas.— State *v.* Jennings, 10 Ark. 428.
Colorado.— Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107; Brock *v.* Schradsky, 6 Colo. App. 402, 41 Pac. 512.
Connecticut.— Scripture *v.* Newcomb, 16 Conn. 588.
Georgia.— Shields *v.* Blanchard, 74 Ga. 805; Wright *v.* Zeigler, 70 Ga. 501; Lindrum *v.* Robson, 50 Ga. 44; Patrick *v.* McWilliams, 23 Ga. 348.
Illinois.— Oliver *v.* McDowell, 100 Ill. App. 45.
Indiana.— Wynne *v.* Glidewell, 17 Ind. 446.
Iowa.— Reinecke *v.* Gruner, 111 Iowa 731, 82 N. W. 900; Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300.
Kansas.— Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 215, 19 Pac. 851; Hairgrove *v.* Millington, 8 Kan. 480.
Kentucky.— Turpin *v.* Marksberry, 3 J. J. Marsh. 622.
Maine.— Gillighan *v.* Tebbetts, 33 Me. 360; Matthews *v.* Houghton, 10 Me. 420.
Maryland.— Owings *v.* Low, 5 Gill & J. 134.
Michigan.— Muncey *v.* Sun Ins. Office, 109 Mich. 542, 67 N. W. 562.
Minnesota.— Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507.
Missouri.— Hazell *v.* Tipton Bank, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22; Garland *v.* Harrison, 17 Mo. 282; Claflin *v.* Sommers, 39 Mo. App. 419.
New York.— Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Beste *v.* Burger, 110 N. Y. 644, 17 N. E. 734 [*affirming* 13 Daly 317, 17 Abb. N. Cas. 162]; Truax *v.* Slater, 86 N. Y. 630; Coyne *v.* Weaver, 84 N. Y. 386; Cuyler *v.* McCartney, 40 N. Y. 221; Barnett *v.* Prudential Ins. Co., 91 N. Y. App. Div. 435, 86 N. Y. Suppl. 842 (declaration of assignor of life-insurance policy as to his age); Gerding *v.* Funk, 48 N. Y. App. Div. 603, 64 N. Y. Suppl. 423 [*affirmed* in 169 N. Y. 572, 61 N. E. 1129]; Peck *v.* Crouse, 46 Barb. 151; Harlam *v.* Green, 31 Misc. 261, 64 N. Y. Suppl. 79; Burhans *v.* Kelly, 2 N. Y. Suppl. 175; Vidvard *v.* Powers, 34 Hun 221; Hanna *v.* Curtis, 1 Barb. Ch. 263; Christie *v.* Bishop, 1 Barb. Ch. 105; Norton *v.* Woods, 5 Paige 249.
Pennsylvania.— Work's Appeal, 59 Pa. St. 444; Bailey *v.* Clayton, 20 Pa. St. 295; Eby *v.* Eby, 5 Pa. St. 435; Smith *v.* Gibson, 1 Yeates 291.
Texas.— Reed *v.* Herring, 37 Tex. 160; Cundiff *v.* Herron, 33 Tex. 622; Carleton *v.* Baldwin, 27 Tex. 572.
Vermont.— Halloran *v.* Whitcomb, 43 Vt. 306.
Virginia.— Ginter *v.* Breeden, 90 Va. 565, 19 S. E. 656; Strother *v.* Mitchell, 80 Va. 149; Barbour *v.* Duncanson, 77 Va. 76.
Wisconsin.— Bates *v.* Ableman, 13 Wis. 644; Norton *v.* Kearney, 10 Wis. 443.
See 20 Cent. Dig. tit. "Evidence," §§ 862, 863, 871.

46. McKean *v.* Adams, 11 Misc. (N. Y.) 387, 32 N. Y. Suppl. 281.

47. Oliver *v.* McDowell, 100 Ill. App. 45; Wilcox *v.* Pearman, 9 Leigh (Va.) 144. See also *infra*, IV, D, 3, c, (III), (C), (3).

48. *Alabama.*— Head *v.* Shaver, 9 Ala. 791.
Illinois.— Dazey *v.* Mills, 10 Ill. 67.
Maine.— Butler *v.* Millett, 47 Me. 492.
Massachusetts.— Wing *v.* Bishop, 3 Allen 456.
New York.—Eberhardt *v.* Schuster, 10 Abb. N. Cas. 374; Frear *v.* Evertson, 20 Johns. 142.
Tennessee.— Moyers *v.* Inman, 2 Swan 80.
United States.— Palmer *v.* Cassin, 18 Fed. Cas. No. 10,687, 2 Cranch C. C. 66.
See 20 Cent. Dig. tit. "Evidence," § 871.

of creditors or of one who takes advantage of a state or national law for the relief of insolvent debtors are, when made before the assignment, competent evidence against the assignee;[49] but declarations made subsequent to the assignment are incompetent to affect the rights of those claiming under it.[50]

(c) *Of Negotiable Instruments*—(1) As to Transferees Before Maturity. In most states an admission by the holder of a negotiable instrument is or is not competent against a subsequent holder according as the latter may or may not by the rules of substantive law governing negotiable instruments[51] be affected by proof of the fact admitted. Thus declarations of a holder tending to show the existence of equitable defenses[52] are not admissible against a subsequent *bona fide* holder for value before maturity,[53] while his declarations that the instrument represented money lost at gaming[54] or other admissions of facts which would constitute a defense as against a *bona fide* purchaser might be admissible.[55] Admissions of a prior owner, made while he was owner, are competent against one who is a holder without consideration,[56] or who acquired title with notice of the fact

49. Armour *v.* Doig, (Fla. 1903) 34 So. 249; Compton *v.* Fleming, 8 Blackf. (Ind.) 153; Carnes *v.* White, 15 Gray (Mass.) 378; Pierce *v.* McKeehan, 3 Pa. St. 136, 45 Am. Dec. 635.

Contra.— In New York it is held that declarations of an assignor, although made prior to the assignment, are not admissible to prejudice the title of the assignee or trustee for the benefit of creditors. Truax *v.* Slater, 86 N. Y. 630; Bullis *v.* Montgomery, 50 N. Y. 352; Humphrey *v.* Smith, 7 N. Y. App. Div. 442, 39 N. Y. Suppl. 1055; Flagler *v.* Wheeler, 40 Hun 125; Vidvard *v.* Powers, 34 Hun 221; Morris *v.* Wells, 4 Silv. Supreme 34, 7 N. Y. Suppl. 61. But in Von Sachs *v.* Kretz, 72 N. Y. 548 [*citing* Smallcombe *v.* Bruges, 13 Price 136; Watts *v.* Thorpe, 1 Campb. 376; Brett *v.* Levett, 13 East 213; Dowton *v.* Cross, 1 Esp. 168; Bateman *v.* Bailey, 5 T. R. 512], it was held that such declarations are admissible to establish a demand against the estate.

50. Glenn *v.* Grover, 3 Md. 212; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,509, 3 Woodb. & M. 380. But an assignee for the benefit of creditors is not a purchaser for value; and where his assignor has obtained by fraud the title to certain goods he himself takes the same voidable title, and any declarations of his assignor tending to establish the fraud, whenever made, are relevant in an action to recover the goods. Koch *v.* Lyon, 82 Mich. 513, 46 N. W. 779.

51. See, generally, Commercial Paper, 8 Cyc. 25.

52. Validity of equitable defenses in actions on negotiable instruments see Commercial Paper, 8 Cyc. 26 *et seq.*

53. *Indiana.*— Stoner *v.* Ellis, 6 Ind. 152.

Kentucky.— Crane *v.* Gunn, 4 B. Mon. 10.

Massachusetts.— Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. 162; Butler *v.* Damon, 15 Mass. 223.

Missouri.— Blanejour *v.* Tutt, 32 Mo. 576.

New Hampshire.— Forsaith *v.* Stickney, 16 N. H. 575.

New York.— Phillips *v.* Hebberd, 61 N. Y. 614; Jermaine *v.* Denniston, 6 N. Y. 276 [*reversing* 5 Den. 342]; Osborn *v.* Robbins, 37 Barb. 481; Beach *v.* Wise, 1 Hill 612; Bristol *v.* Dann, 12 Wend. 142, 27 Am. Dec. 122; Whitaker *v.* Brown, 8 Wend. 490; Willson *v.* Law, 26 N. Y. Wkly. Dig. 509; Witter *v.* Blodget, 4 N. Y. Leg. Obs. 263.

South Carolina.—Martin *v.* Lightner, 2 McCord 214.

Tennessee.— Collger *v.* Francis, 2 Baxt. 422; Drennon *v.* Smith, 3 Head 389.

United States.— Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920.

England.— Barough *v.* White, 4 B. & C. 325, 10 E. C. L. 600, 2 C. & P. 8, 12 E. C. L. 420, 6 D. & R. 379, 3 L. J. K. B. O. S. 227; Shaw *v.* Broom, 4 D. & R. 730, 16 E. C. L. 220.

See 20 Cent. Dig. tit. "Evidence," § 873.

In Louisiana it has been held that declarations by the payee of a note, executed by a married woman, and transferred before maturity, that he had taken it for her husband's debt, are admissible against the indorsee. Pilcher *v.* Kerr, 7 La. Ann. 144.

54. See Commercial Paper, 8 Cyc. 48.

55. Williams *v.* Judy, 8 Ill. 282, 44 Am. Dec. 699; Brown *v.* McGraw, 12 Sm. & M. (Miss.) 267; Sharp *v.* Smith, 7 Rich. (S. C.) 3.

Contra.— In New York, as has been seen, declarations of a former owner of a chose in action are not admissible against his assignee to affect his title or right (see *supra*, IV, D, 3, c, (III), (A)), and this rule applies to the declarations of the former owner of negotiable paper as well as to the former owner of a non-negotiable chose in action. Mitchell *v.* Baldwin, 88 N. Y. App. Div. 265, 84 N. Y. Suppl. 1043 [*citing* Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757; German American Bank *v.* Slade, 15 Misc. (N. Y.) 287, 36 N. Y. Suppl. 983; Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920], holding that declarations of the person to whom a note was given that it was given as a mere memorandum and was not to be negotiated were not admissible against his transferee.

56. Dolan *v.* Kehr, 9 Mo. App. 351. But a pledgee may be a holder for value. Butler *v.* Damon, 15 Mass. 223.

to which the admission relates.[57] Declarations of a person before he owned the instrument are not competent.[58]

(2) As to Transferees After Maturity. Admissions made by the holder of a negotiable instrument before transfer thereof are competent evidence against one to whom it is transferred after maturity, for it is then a mere non-negotiable chose in action.[59]

(3) After Transfer. Declarations made by a former holder of a negotiable instrument after it has been transferred by him[60] are incompetent as against a subsequent holder;[61] and the burden of proving, although not necessarily by direct evidence,[62] that the declarations were made before transfer is on the party offering them as evidence.[63]

(iv) *Testators and Intestates.* Declarations of a deceased owner of per-

57. Glanton *v.* Griggs, 5 Ga. 424.

58. Bond *v.* Fitzpatrick, 4 Gray (Mass.) 89; Roberts *v.* Briscoe, 44 Ohio St. 596, 10 N. E. 61.

59. *Connecticut.*— Roe *v.* Jerome, 18 Conn. 138.

Illinois.— Hanchett *v.* Kimbark, 118 Ill. 121, 7 N. E. 491; Sandifer *v.* Hoard, 59 Ill. 246; Curtiss *v.* Martin, 20 Ill. 557; Kane *v.* Torbit, 23 Ill. App. 311.

Indiana.— Blount *v.* Riley, 3 Ind. 471.

Maine.— Eaton *v.* Corson, 59 Me. 510; Fullerton *v.* Rundlett, 27 Me. 31; Hatch *v.* Dennis, 10 Me. 244; Shirley *v.* Todd, 9 Me. 83.

Massachusetts.— Sears *v.* Moore, 171 Mass. 514, 50 N. E. 1027; Bond *v.* Fitzpatrick, 4 Gray 89; Sylvester *v.* Crapo, 15 Pick. 92.

Missouri.— Robb *v.* Schmidt, 35 Mo. 290.

New Hampshire.— Scammon *v.* Scammon, 33 N. H. 52.

New Jersey.— Reed *v.* Vancleve, 27 N. J. L. 352, 72 Am. Dec. 369.

Ohio.— Hollister *v.* Reznor, 9 Ohio St. 1; Hollister *v.* Hunt, 9 Ohio 8.

Tennessee.— Collger *v.* Francis, 2 Baxt. 422; Drennon *v.* Smith, 3 Head 389.

Canada.— Myers *v.* Cornell, 2 U. C. Q. B. 279.

See 20 Cent. Dig. tit. "Evidence," § 874. And see cases cited *supra*, IV, D, 3, c, (III), (A).

Contra.— Shober *v.* Jack, 3 Mont. 351; Clews *v.* Kehr, 90 N. Y. 633; Paige *v.* Cagwin, 7 Hill (N. Y.) 361, 42 Am. Dec. 68; Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920. Such admissions are competent against one who takes the instrument without consideration. Smith *v.* Schanck, 18 Barb. (N. Y.) 344. See also Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757.

60. The date of delivery, rather than the date at which the formal indorsement is made, is the time of transfer within the rule stated in the text. Whittier *v.* Vose, 16 Me. 403.

61. *Alabama.*— Carmichael *v.* Brooks, 9 Port. 330.

Arkansas.— Patton *v.* Gee, 36 Ark. 506.

California.— Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748.

Georgia.— Athens Nat. Bank *v.* Athens Exch. Bank, 110 Ga. 692, 36 S. E. 265.

Illinois.— Thorp *v.* Goewey, 85 Ill. 611.

Indiana.— Schmidt *v.* Packard, 132 Ind. 398, 31 N. E. 944; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Lister *v.* Boker, 6 Blackf. 439; Fleming *v.* Newman, 5 Blackf. 220.

Kentucky.— Scott *v.* Hall, 6 B. Mon. 285; Crane *v.* Gunn, 4 B. Mon. 10; Bartlett *v.* Marshall, 2 Bibb 467.

Louisiana.— Dowty *v.* Sullivan, 19 La. Ann. 448.

Maine.— Norton *v.* Heywood, 20 Me. 359; Russell *v.* Doyle, 15 Me. 112.

Massachusetts.—Noxon *v.* De Wolf, 10 Gray 343; Bond *v.* Fitzpatrick, 4 Gray 89; Wheeler *v.* Rice, 8 Cush. 205.

Missouri.— Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Porter *v.* Rea, 6 Mo. 48; Cleaveland *v.* Davis, 3 Mo. 331.

Nebraska.—Commercial Nat. Bank *v.* Brill, 37 Nebr. 626, 56 N. W. 382.

New Hampshire.— Forsaith *v.* Stickney, 16 N. H. 575.

New Mexico.— Pearce *v.* Strickler, 9 N. M. 467, 54 Pac. 748.

New York.— Wangner *v.* Grimm, 169 N. Y. 421, 62 N. E. 569; Van Gelder *v.* Van Gelder, 81 N. Y. 625; Thorne *v.* Woodhull, Anth. N. P. 141.

North Carolina.— Maddox *v.* Atlantic, etc., R. Co., 115 N. C. 624, 20 S. E. 190.

Ohio.— Andrews *v.* Campbell, 36 Ohio St. 361.

Pennsylvania.— Camp *v.* Walker, 5 Watts 482; Bickell *v.* Thomas, 3 Phila. 356.

South Carolina.—De Bruhl *v.* Patterson, 12 Rich. 363; Crayton *v.* Collins, 2 McCord 457.

Texas.— Goodson *v.* Johnson, 35 Tex. 622; Ricker Nat. Bank *v.* Brown, (Civ. App. 1897) 43 S. W. 909.

Vermont.—Leland *v.* Farnham, 25 Vt. 553; Hough *v.* Barton, 20 Vt. 455; Washburn *v.* Ramsdell, 17 Vt. 299.

Wisconsin.— Welch *v.* Sugar Creek, 28 Wis. 618.

See 20 Cent. Dig. tit. "Evidence," § 875.

Independent relevancy.— Declarations of this nature may, however, be independently relevant; for example to impeach the evidence of the assignor. Thorp *v.* Goewey, 85 Ill. 611.

62. Sally *v.* Gooden, 5 Ala. 78.

63. Baxter *v.* Ellis, 57 Me. 178; Wooten *v.* Outlaw, 113 N. C. 281, 18 S. E. 252; Ellis *v.* Watkins, 73 Vt. 371, 50 Atl. 1105. See also *supra*, IV, D, 3, c, (III), (A), (2).

sonal property in disparagement of his title, to whomsoever made,[64] are competent against his personal representatives and next of kin,[65] or legatees.[66] Declarations of a decedent are also admissible against his personal representatives to show the contractual or other surviving liabilities of the decedent to others,[67] or to affect his representatives in suits on claims due to the estate.[68]

(v) *DONORS.* Statements of a donor in derogation of his title, made after delivery to the donee, are inadmissible against the latter.[69]

d. Declarations in Case of Fraudulent Alienation — (i) *AS AFFECTING CREDITORS.* Statements of a debtor while he is in possession of real or personal property and in disparagement of his title thereto are competent against an attaching or execution creditor,[70] provided the statements were made prior to the time at which the rights of the creditor accrued, but not otherwise.[71] But when

64. Slade *v.* Leonard, 75 Ind. 171; Eckert *v.* Triplett, 48 Ind. 174, 17 Am. Rep. 735; Denman *v.* McMahin, 37 Ind. 214; Bevins *v.* Cline, 21 Ind. 37.

65. *California.*— Harp *v.* Harp, 136 Cal. 421, 69 Pac. 28.

District of Columbia.— Keifer *v.* Carusi, 7 D. C. 156.

Indiana.— Clouser *v.* Ruckman, 104 Ind. 588, 4 N. E. 202; Bevins *v.* Cline, 21 Ind. 37.

Maine.— Dale *v.* Gower, 24 Me. 563.

Michigan.— Chipman *v.* Kellogg, 60 Mich. 438, 27 N. W. 592.

Missouri.— Smith *v.* Witton, 69 Mo. 458; Hart *v.* Hess, 41 Mo. 441; Diel *v.* Stegner, 56 Mo. App. 535.

New York.— Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375; Wooster *v.* Booth, 2 Hun 426; Smith *v.* Maine, 25 Barb. 33; Hunter *v.* Hunter, 19 Barb. 631; Ackley *v.* Ackley, 21 N. Y. Suppl. 877; Ginochio *v.* Porcella, 3 Bradf. Surr. 277. See also Komitsch *v.* De Groot, 80 N. Y. App. Div. 376, 80 N. Y. Suppl. 970.

South Carolina.— Richards *v.* Munro, 30 S. C. 284, 9 S. E. 108; Blake *v.* Jones, Bailey Eq. 141, 21 Am. Dec. 530.

Texas.— Dooley *v.* McEwing, 8 Tex. 306.

See 20 Cent. Dig. tit. "Evidence," § 876.

An insolvent husband's declaration that a certain article of personal property belongs to his wife is not admissible evidence for the latter after his death as against creditors of his estate. Gamber *v.* Gamber, 18 Pa. St. 363, where the court said: "The relation of a husband and wife is so intimate and the identity of their interests so absolute, that even the oath of one is not and ought not to be taken in favor of the other. *A multo fortiori* the naked declaration should be rejected."

66. Mueller *v.* Rebhan, 94 Ill. 142.

67. *Indiana.*— Kettry *v.* Thumma, 9 Ind. App. 498, 36 N. E. 919; Knight *v.* Knight, 6 Ind. App. 268, 33 N. E. 456.

Iowa.— Jamison *v.* Jamison, 113 Iowa 720, 84 N. W. 705; Mahaska County *v.* Ingalls, 16 Iowa 81.

Kansas.— Bonebrake *v.* Tauer, 67 Kan. 827, 72 Pac. 521.

Kentucky.— Montgomery *v.* Miller, 4 B. Mon. 470.

Massachusetts.— Heywood *v.* Heywood, 10 Allen 105; Crosman *v.* Fuller, 17 Pick. 171.

New Jersey.— Cox *v.* Baird, 11 N. J. L. 105, 19 Am. Dec. 386.

New York.— Bardin *v.* Stevenson, 75 N. Y. 164; Jennings *v.* Osborne, 2 N. Y. City Ct. 195.

North Carolina.— Gidney *v.* Moore, 86 N. C. 484.

Pennsylvania.— Gordner *v.* Heffley, 49 Pa. St. 163; Albert *v.* Ziegler, 29 Pa. St. 50; Humbertson *v.* Detwiler, 7 Pa. Super. Ct. 587.

Vermont.— Wheeler *v.* Wheeler, 47 Vt. 637.

Virginia.— Brewis *v.* Lawson, 76 Va. 36.

United States.— Vuyton *v.* Brenell, 28 Fed. Cas. No. 17,026, 1 Wash. 467.

See 20 Cent. Dig. tit. "Evidence," § 877.

68. Byrne *v.* Reed, 75 Cal. 277, 17 Pac. 201; Allen *v.* Hartford L. Ins. Co., 72 Conn. 693, 45 Atl. 955; Liebig *v.* Steiner, 37 Leg. Int. (Pa.) 398.

69. *California.*— Walden *v.* Purvis, 73 Cal. 518, 15 Pac. 91.

Georgia.— Echols *v.* Barrett, 6 Ga. 443.

Kentucky.— Dixon *v.* Labry, (1895) 29 S. W. 21, 16 Ky. L. Rep. 522.

New York.— Graves *v.* King, 15 Hun 367.

North Carolina.— Hicks *v.* Forrest, 41 N. C. 528; Cowan *v.* Tucker, 30 N. C. 426.

South Carolina.—Snowden *v.* Pope, Rice Eq. 174; Newman *v.* Wilbourne, 1 Hill Eq. 10.

See 20 Cent. Dig. tit. "Evidence," § 867.

If the donor regain possession of the article in question his declarations while so in possession are not competent against the donee. Cornett *v.* Fain, 33 Ga. 219.

70. *Alabama.*— Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; Walker *v.* Elledge, 65 Ala. 51; Cole *v.* Varner, 31 Ala. 244.

Massachusetts.— Pickering *v.* Reynolds, 119 Mass. 111.

Missouri.— Kirkendall *v.* Hartsock, 58 Mo. App. 234.

New Hampshire.— Putnam *v.* Osgood, 52 N. H. 148; Adams *v.* French, 2 N. H. 387.

North Carolina.— McCanless *v.* Reynolds, 67 N. C. 268.

Pennsylvania.— Shell *v.* Haywood, 16 Pa. St. 523.

Vermont.— Hayward Rubber Co. *v.* Dunklee, 30 Vt. 29.

See 20 Cent. Dig. tit. "Evidence," §§ 828–834.

71. *Alabama.*— Bell *v.* Kendall, 93 Ala. 489, 8 So. 492; Goodgame *v.* Cole, 12 Ala. 77.

such a creditor seeks to set aside an alleged fraudulent conveyance declarations of the debtor are not admissible on behalf of the alleged fraudulent transferee, being regarded as made in the declarant's favor.[72]

(II) *As Affecting Grantors, Vendors, and Other Transferrers.* Fraudulent intent of the grantor or other alienor may be shown circumstantially by his declarations. While these are frequently classed as admissions by one standing in privity, they are relevant independently.[73] Intention with which the transfer was made being the essential fact, declarations probative as to its existence at the time of transfer may be made either before[74] or after[75] that time, provided the statement is not in the opinion of the court too remote to be relevant.[76]

(III) *As Affecting Grantees, Vendees, and Other Transferees* —(A) *In General.* Declarations of an owner of property in possession and before alienation are competent against his vendee to show fraud on the part of the declarant.[77] But such declarations alone are not sufficient to establish fraudulent intent on the part of the transferee,[78] and the court may properly reject them

Georgia.— James *v.* Taylor, 93 Ga. 275, 20 S. E. 309; Powell *v.* Brunner, 86 Ga. 531, 12 S. E. 744; Foster *v.* Rutherford, 20 Ga. 676.

Maine.— Tarr *v.* Smith, 68 Me. 97.

New Hampshire.— Walcott *v.* Keith, 22 N. H. 196.

New Jersey.— Vandyke *v.* Bastedo, 15 N. J. L. 224.

New York.— Wise *v.* Grant, 59 Hun 466, 13 N. Y. Suppl. 376.

Pennsylvania.— Wall *v.* Staley, 91 Pa. St. 27; Magee *v.* Raiguel, 64 Pa. St. 110; Morrison *v.* Funk, 23 Pa. St. 421; Kinzer *v.* Mitchell, 8 Pa. St. 64; Pond *v.* Cruse, 10 Wkly. Notes Cas. 223. But see in case of a declaration of trust by a judgment debtor after entry of judgment King *v.* Weible, 10 Pa. Co. Ct. 521.

Tennessee.— Mulholland *v.* Ellitson, 1 Coldw. 307, 78 Am. Dec. 495; Clark *v.* Wright, 8 Humphr. 528.

72. Hooper *v.* Edwards, 18 Ala. 280; Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022.

73. The statement must embody a relevant fact, and an offer to make a fraudulent transfer to another person on a different occasion is not admissible. Oden *v.* Rippetoe, 4 Ala. 68.

74. *Alabama.*— Murphy *v.* Butler, 75 Ala. 381; Moses *v.* Dunhane, 71 Ala. 173.

California.— Visher *v.* Webster, 8 Cal. 109.

Iowa.— Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572.

Louisiana.— Hoose *v.* Robbins, 18 La. Ann. 648; Erwin *v.* Kentucky Bank, 5 La. Ann. 1.

Maine.— Fisher *v.* True, 38 Me. 534.

Maryland.— McDowell *v.* Goldsmith, 6 Md. 319, 61 Am. Dec. 305.

Massachusetts.— Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400.

Michigan.— Baldwin *v.* Buckland, 11 Mich. 389.

Missouri.— Gage *v.* Trawick, 94 Mo. App. 307, 68 S. W. 85; Whitney Holmes Organ Co. *v.* Petitt, 34 Mo. App. 536.

New York.— Kennedy *v.* Wood, 52 Hun 46, 4 N. Y. Suppl. 758; Jellenik *v.* May, 41 Hun 386; Savage *v.* Murphy, 8 Bosw. 75.

North Carolina.— Satterwhite *v.* Hicks, 44 N. C. 105, 57 Am. Dec. 577.

South Carolina.— Head *v.* Halford, 5 Rich. Eq. 128.

United States.— Bowie *v.* Hunter, 3 Fed. Cas. No. 1,731, 4 Cranch C. C. 699.

See 20 Cent. Dig. tit. "Evidence," §§ 843, 854.

75. *Indiana.*— Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381; Hogan *v.* Robinson, 94 Ind. 138.

Louisiana.— Hoose *v.* Robbins, 18 La. Ann. 648.

Missouri.— Holmes *v.* Braidwood, 82 Mo. 610; Gamble *v.* Johnson, 9 Mo. 605.

Nebraska.— Armagost *v.* Rising, 54 Nebr. 763, 75 N. W. 534.

North Carolina.— Burbank *v.* Wiley, 79 N. C. 501.

Tennessee.— Carnahan *v.* Wood, 2 Swan 500.

Texas.— Schmitt *v.* Jacques, 26 Tex. Civ. App. 125, 62 S. W. 956; Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581; Mayo *v.* Savoni, 1 Tex. App. Civ. Cas. § 216.

Contra, Wells *v.* O'Connor, 27 Hun (N. Y.) 426.

See 20 Cent. Dig. tit. "Evidence," §§ 838, 857.

76. Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45; Littlefield *v.* Getchell, 32 Me. 390; Doe *v.* Fraser, 8 N. Brunsw. 417.

77. *Alabama.*— Moses *v.* Dunham, 71 Ala. 173.

Louisiana.— Hoose *v.* Robbins, 18 La. Ann. 648.

Maine.— Parker *v.* Marston, 34 Me. 386.

North Carolina.— Harshaw *v.* Moore, 34 N. C. 247.

Pennsylvania.— Hollinshead *v.* Allen, 17 Pa. St. 275.

Texas.— Martel *v.* Somers, 26 Tex. 551.

See 20 Cent. Dig. tit. "Evidence," §§ 843, 854.

78. Trezevant *v.* Courtney, 23 La. Ann. 628; Hoose *v.* Robbins, 18 La. Ann. 648; Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Beers *v.* Aylsworth, 41 Oreg. 251, 69 Pac. 1025.

altogether, if no further evidence is forthcoming to show that fact.[79] When declarations of an alleged fraudulent transferrer made subsequent to the transfer are offered against his transferee, the doctrine of admissions by privity is removed from the case,[80] and, unless ratified or acquiesced in by the transferee under circumstances which make them in effect his own admissions,[81] such statements are rejected under the ordinary rule that declarations of an alienor made after alienation[82] do not affect and are inadmissible as against the alienee.[83]

(B) *Declarant as an Agent.* Declarations of the character noticed in the preceding subsection[84] can affect the transferee only by virtue of some agency to speak for him existing at the time of the declaration by the transferrer.[85] The form of agency usually presented is that implied from the existence of a design, common to both, to defraud the creditors of the transferrer; and the declarations of either during the pendency of the common design and within its scope, whether made before or after the transfer, are competent against the other.[86] As a general

79. *Alabama.*— Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Hodge *v.* Thompson, 9 Ala. 131.

Colorado.— Jefferson County Bank *v.* Hammel, 11 Colo. App. 337, 53 Pac. 286.

Connecticut.— Partelo *v.* Harris, 26 Conn. 480; Beach *v.* Catlin, 4 Day 284, 4 Am. Dec. 221.

Illinois.— Hamilton *v.* Gilman, 12 Ill. 260.

Louisiana.— Whiting *v.* Prentice, 12 Rob. 141; Guidry *v.* Grivot, 2 Mart. N. S. 13, 14 Am. Dec. 193.

Missouri.— Peters-Miller Shoe Co. *v.* Casebeer, 53 Mo. App. 640; Williams *v.* Williams, 53 Mo. App. 617.

New York.—Bullis *v.* Montgomery, 50 N. Y. 352; Flagler *v.* Wheeler, 40 Hun 125.

Tennessee.—Collger *v.* Francis, 2 Baxt. 422.

See 20 Cent. Dig. tit. "Evidence," §§ 843, 854.

The rights of a grantee date from the execution of the deed, not from the date of its record. Thompson *v.* Cody, 100 Ga. 771, 28 S. E. 669.

80. Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381; Boli *v.* Irwin, 51 S. W. 444, 21 Ky. L. Rep. 366.

81. Bender *v.* Kingman, 62 Nebr. 469, 87 N. W. 142.

82. See *supra*, IV, D, 3, b, (I), (C); IV, D, 3, c, (I), (C); IV, D, 3, c, (III), (A), (2); IV, D, 3, c, (III), (C), (3).

83. *Alabama.*— McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 552; Weaver *v.* Yeatmans, 15 Ala. 539.

California.— Walden *v.* Purvis, 73 Cal. 518, 15 Pac. 91; Hutchings *v.* Castle, 48 Cal. 152; Jones *v.* Morse, 36 Cal. 205; Paige *v.* O'Neal, 12 Cal. 483.

Illinois.— Myers *v.* Kinzie, 26 Ill. 36.

Iowa.— Neuffer *v.* Moehn, 96 Iowa 731, 65 N. W. 334; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626.

Maine.— White *v.* Chadbourne, 41 Me. 149.

Maryland.— Hall *v.* Hinks, 21 Md. 406.

Massachusetts.— Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124; Roberts *v.* Medbery, 132 Mass. 100; Lincoln *v.* Wilbur, 125 Mass. 249; Holbrook *v.* Holbrook, 113 Mass. 74; Winchester *v.* Charter, 97 Mass. 140; Tapley *v.* Forbes, 2 Allen 20; Aldrich *v.* Earle, 13 Gray 578; Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209; Clarke *v.* Waite, 12 Mass. 439.

Michigan.— Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868.

Minnesota.— Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63; Shaw *v.* Robertson, 12 Minn. 445; Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507.

Mississippi.— Taylor *v.* Webb, 54 Miss. 36.

Missouri.— Albert *v.* Besel, 88 Mo. 150; Missouri Exch. Bank *v.* Russell, 50 Mo. 531; Weinrich *v.* Porter, 47 Mo. 293; Gamble *v.* Johnson, 9 Mo. 605; Blasland-Parcels-Jordan Shoe Co. *v.* Hicks, 70 Mo. App. 301; Sammons *v.* O'Neill, 60 Mo. App. 530.

Nevada.— Hirschfeld *v.* Williamson, 18 Nev. 66, 1 Pac. 201.

New York.— Noyes *v.* Morris, 56 Hun 501, 10 N. Y. Suppl. 561; Scofield *v.* Spaulding, 54 Hun 523, 7 N. Y. Suppl. 927; Wells *v.* O'Connor, 27 Hun 426.

North Carolina.— Burbank *v.* Wiley, 79 N. C. 501; Harshaw *v.* Moore, 34 N. C. 247.

Pennsylvania.— Scott *v.* Heilager, 14 Pa. St. 238.

Tennessee.—McClellan *v.* Cornwell, 2 Coldw. 298; Perry *v.* Smith, 4 Yerg. 323, 26 Am. Dec. 236; Green *v.* Huggins, (Ch. App. 1898) 52 S. W. 675.

Virginia.— Smith *v.* Betty, 11 Gratt. 752.

Wisconsin.— Bates *v.* Albeman, 13 Wis. 644.

United States.— Winchester, etc., Mfg. Co. *v.* Creary, 116 U. S. 161, 6 S. Ct. 369, 29 L. ed. 591; Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786; Orr, etc., Shoe Co. *v.* Needles, 67 Fed. 990, 15 C. C. A. 142.

See 20 Cent. Dig. tit. "Evidence," §§ 838, 848, 850, 857.

84. See *supra*, IV, D, 3, d, (III), (A).

85. Boyd *v.* Jones, 60 Mo. 454.

86. *Alabama.*— Borland *v.* Mayo, 8 Ala. 104.

Illinois.— Philpot *v.* Taylor, 75 Ill. 309, 20 Am. Rep. 241.

Indiana.— Daniels *v.* McGinnis, 97 Ind. 549; Barkley *v.* Tapp, 87 Ind. 25; Kennedy *v.* Divine, 77 Ind. 490; Hogue *v.* McClintock, 76 Ind. 205; Ewing *v.* Gray, 12 Ind. 64; Caldwell *v.* Williams, 1 Ind. 405.

rule the existence of a common design must be shown by evidence satisfactory to the court[87] *dehors* the declaration itself, as preliminary to admission against one party of statements made by the other party after the transfer.[88] Where, however, the transferee under circumstances which would naturally lead him if acting in good faith to take possession of the property, suffers it to remain in the transferrer's possession beyond the time reasonably necessary to perfect a change of possession, the situation itself establishes *prima facie* the existence of a mutual design to defraud the creditors of the transferrer; and relevant declarations of the latter made subsequent to the conveyance and while in possession of the property are competent against the transferee[89] and those claiming under him.[90] Where the fact of possession by the transferrer at the time of the declaration is

Kentucky.— Oldham *v.* Bentley, 6 B. Mon. 428.

Louisiana.— Gaidry *v.* Lyons, 29 La. Ann. 4; Bushnell *v.* New Orleans City Nat. Bank, 20 La. Ann. 464; Cannon *v.* White, 16 La. Ann. 85.

Maryland.— Powell *v.* Young, 45 Md. 494.

Massachusetts.— Alexander *v.* Gould, 1 Mass. 165.

Missouri.— Boyd *v.* Jones, 60 Mo. 454; Williams *v.* Williams, 53 Mo. App. 644; Peters-Miller Shoe Co. *v.* Casebeer, 53 Mo. App. 640.

Montana.— Pincus *v.* Reynolds, 19 Mont. 564, 49 Pac. 145; Kleinschmidt *v.* Dunphy, 1 Mont. 118.

New Hampshire.— Coburn *v.* Storer, 67 N. H. 86, 36 Atl. 607.

New York.— Galle *v.* Tode, 74 Hun 542, 26 N. Y. Suppl. 633; Cuyler *v.* McCartney, 33 Barb. 165; Lee *v.* Huntoon, Hoffm. 447.

North Carolina.— Hauser *v.* Tate, 85 N. C. 81, 39 Am. Rep. 689.

Oregon.— Walker *v.* Harold, 44 Oreg. 205, 74 Pac. 705.

Pennsylvania.— Boyer *v.* Weimer, 204 Pa. St. 295, 54 Atl. 21; Souder *v.* Schechterly, 91 Pa. St. 83; Pier *v.* Duff, 63 Pa. St. 59; Hartman *v.* Diller, 62 Pa. St. 37; Brown *v.* Parkinson, 56 Pa. St. 336; Deakers *v.* Temple, 41 Pa. St. 234; Peterson *v.* Speer, 29 Pa. St. 478; Jackson *v.* Summerville, 13 Pa. St. 359; Irwin *v.* Keen, 3 Whart. 347; McKee *v.* Gilchrist, 3 Watts 230.

Texas.—Thompson *v.* Rosenstein, (Civ. App. 1902) 67 S. W. 439.

Vermont.— Quinn *v.* Halbert, 57 Vt. 178.

United States.—Jones *v.* Simpson, 116 U. S. 609, 6 S. Ct. 538, 29 L. ed. 742; Moyer *v.* Dewey, 103 U. S. 301, 26 L. ed. 394; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106.

See 20 Cent. Dig. tit. "Evidence," §§ 999–1001.

Res gestæ.— It is said that the declarations are admissible or not admissible according as they do or do not "have such relation to the execution of that purpose [to defraud] that they fairly constitute a part of the *res gestæ*." Winchester, etc., Mfg. Co. *v.* Creary, 116 U. S. 161, 166, 6 S. Ct. 369, 29 L. ed. 591. To the same effect see Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63; Williamson *v.* Williams, 11 Lea (Tenn.) 355; Neal *v.* Peden, 1 Head (Tenn.) 546; Jones *v.* Simpson, 116 U. S. 609, 6 S. Ct. 538, 29 L. ed. 742. This is equivalent to saying that the declaration is relevant only when made within the scope of the agency.

87. Bilberry *v.* Mobley, 21 Ala. 277; Weaver *v.* Yeatmans, 15 Ala. 539; Jones *v.* Hurlburt, 39 Barb. (N. Y.) 403; Neal *v.* Peden, 1 Head (Tenn.) 546; Klein *v.* Hoffheimer, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373.

88. Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864; Hudson *v.* Willis, 73 Tex. 256, 11 S. W. 273; Moore *v.* Robinson, (Tex. Civ. App. 1903) 75 S. W. 890.

89. *Alabama.*— Mobile Sav. Bank *v.* McDonnell, 89 Ala. 434, 8 So. 137, 18 Am. St. Rep. 137, 9 L. R. A. 645; Borland *v.* Mayo, 8 Ala. 104.

Arkansas.— Bowden *v.* Spellman, 59 Ark. 251, 27 S. W. 602.

California.— Bush *v.* Helbing, 134 Cal. 676, 66 Pac. 967; Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114. But see under Code Civ. Proc. § 1849, Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303.

Connecticut.— Redfield *v.* Buck, 35 Conn. 328, 95 Am. Dec. 241.

Georgia.— Williams *v.* Hart, 65 Ga. 201; Oatis *v.* Brown, 59 Ga. 711.

Illinois.— Jones *v.* King, 86 Ill. 225.

Indiana.— Creighton *v.* Hoppis, 99 Ind. 369.

Minnesota.— Lehmann *v.* Chapel, 70 Minn. 496, 73 N. W. 402, 68 Am. St. Rep. 550.

Nevada.— Gregory *v.* Frothingham, 1 Nev. 253.

New Hampshire.—Osgood *v.* Eaton, 63 N. H. 355.

New York.— Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

North Carolina.— Woodley *v.* Hassell, 94 N. C. 157; Hilliard *v.* Phillips, 81 N. C. 99; Gidney *v.* Logan, 79 N. C. 214; Marsh *v.* Hampton, 50 N. C. 382.

South Carolina.— Richardson *v.* Mounce, 19 S. C. 477; McCord *v.* McCord, 3 S. C. 577.

Tennessee.— Harton *v.* Lyons, 97 Tenn. 180, 36 S. W. 851; Carney *v.* Carney, 7 Baxt. 284.

Texas.— Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895.

Vermont.— Spaulding *v.* Albin, 63 Vt. 148, 21 Atl. 530. But see Ellis *v.* Howard, 17 Vt. 330.

See 20 Cent. Dig. tit. "Evidence," §§ 839, 850, 859.

90. Poundstone *v.* Jones, 182 Pa. St. 574, 38 Atl. 714.

not affirmatively shown,[91] or where this fact fails under the circumstances of the case to give rise to the usual inference of conspiracy to defraud creditors,[92] the declaration falls within the general rule and is incompetent. Inference of conspiracy is particularly strong in cases involving the transfer of personal property.[93] The declarations are competent only when the fact of fraud is relevant.[94]

e. Independent Relevancy.[95] Declarations of a person who stands in some relation of privity to a party may be competent, not as admissions, but as relevant facts in themselves. For example the claim under which real[96] or personal[97]

91. Visher *v.* Webster, 13 Cal. 58; Selsby *v.* Redlon, 19 Wis. 17.

92. *Indiana.*— Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263.

Kentucky.— Carpenter *v.* Carpenter, 8 Bush 283.

Massachusetts.— Sweetser *v.* Bates, 117 Mass. 466; Gates *v.* Mowry, 15 Gray 564.

Missouri.— Gordon *v.* Ritenour, 87 Mo. 54.

New York.— Vrooman *v.* King, 36 N. Y. 477.

West Virginia.— Robinson *v.* Pitzer, 3 W. Va. 335.

See 20 Cent. Dig. tit. "Evidence," §§ 839, 849, 858.

93. *Alabama.*— Goodgame *v.* Cole, 12 Ala. 77.

Arkansas.— Eaton *v.* Sims, 59 Ark. 611, 28 S. W. 429.

Indiana.— Caldwell *v.* Rose, Smith 190.

Iowa.— Blake *v.* Graves, 18 Iowa 312.

Kansas.— Turner *v.* Tootle, 9 Kan. App. 765, 58 Pac. 562.

Kentucky.— Kendall *v.* Hughes, 7 B. Mon. 368.

Michigan.— Frankel *v.* Coots, 41 Mich. 75, 1 N. W. 940; Wyckoff *v.* Carr, 8 Mich. 44.

Montana.— Gallick *v.* Bordeaux, 22 Mont. 470, 56 Pac. 961.

New York.— Adams *v.* Davidson, 10 N. Y. 309; Jellenik *v.* May, 41 Hun 386; Persse, etc., Paper Works *v.* Willett, 1 Rob. 131.

North Carolina.— Foster *v.* Woodfin, 33 N. C. 339.

Pennsylvania.— Helfrich *v.* Stem, 17 Pa. St. 143; Reeper *v.* Greevy, 5 Pa. Super. Ct. 316, 40 Wkly. Notes Cas. 494.

Rhode Island.— Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236.

See 20 Cent. Dig. tit. "Evidence," § 859.

A return of personal property to the possession of the vendor may be an entirely irrelevant fact as related to the competency of his declarations against the vendee. Sutton *v.* Shearer, 1 Grant (Pa.) 207.

Where a mortgage of chattels contemplates possession by the mortgagee, declarations of the mortgagor in possession after the mortgage are competent. Rochester City Bank *v.* Westbury, 16 Hun (N. Y.) 458. But a reasonable time must be afforded for transfer of possession in the usual course of business before the inference of a common purpose arises. Donaldson *v.* Johnson, 2 Pinn. (Wis.) 482, 2 Chandl. 160.

Res gestæ.— These statements, being received as relevant facts, qualifying possession (Grant *v.* Lewis, 14 Wis. 487, 80 Am. Dec. 785), are frequently said to be "part of the *res gestæ*" (Mobley *v.* Bilberry, 17 Ala. 428; Vermillion *v.* Le Clare, 89 Mo. App. 55; Newlin *v.* Lyon, 49 N. Y. 661; Adams *v.* Davidson, 10 N. Y. 309).

94. Williams *v.* Williams, 142 N. Y. 156, 36 N. E. 1053. But see Gadsby *v.* Dyer, 91 N. C. 311.

95. See also *infra*, VIII.

96. *Alabama.*— Savery *v.* State, 71 Ala. 236.

Connecticut.— Peck, etc., Co. *v.* Atwater Mfg. Co., 61 Conn. 31, 23 Atl. 699; Linahan *v.* Barr, 41 Conn. 471.

Illinois.— Herscher *v.* Brazier, 38 Ill. App. 654.

Indiana.— Steeple *v.* Downing, 60 Ind. 478.

Iowa.— Griffin *v.* Turner, 75 Iowa 250, 39 N. W. 294.

Maryland.— Keener *v.* Kauffman, 16 Md. 296.

Massachusetts.— Tyler *v.* Mather, 9 Gray 177.

Michigan.— Bower *v.* Earl, 18 Mich. 367.

New Hampshire.— South Hampton *v.* Fowler, 54 N. H. 197; Bell *v.* Woodward, 46 N. H. 315; Fellows *v.* Fellows, 37 N. H. 75; Hobbs *v.* Cram, 22 N. H. 130; Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371.

New Jersey.— Outcalt *v.* Ludlow, 32 N. J. L. 239.

New York.— Hurlburt *v.* Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482; Abeel *v.* Van Gelder, 36 N. Y. 513, 2 Transcr. App. 99; Pitts *v.* Wilder, 1 N. Y. 525; Jackson *v.* Cole, 4 Cow. 587.

Pennsylvania.— Bennett *v.* Biddle, 150 Pa. St. 420, 24 Atl. 738; Gratz *v.* Beates, 45 Pa. St. 495; St. Clair *v.* Shale, 20 Pa. St. 105; Weidman *v.* Kohr, 4 Serg. & R. 174.

Texas.— Wilson *v.* Simpson, 80 Tex. 279, 16 S. W. 40; Snow *v.* Starr, 75 Tex. 411, 12 S. W. 673; Hancock *v.* Tram Lumber Co., 65 Tex. 225.

Vermont.— Bennett *v.* Camp, 54 Vt. 36; Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633.

United States.— Ward *v.* Cochran, 71 Fed. 127, 18 C. C. A. 1.

See 20 Cent. Dig. tit. "Evidence," §§ 825, 842.

97. *Alabama.*— Guy *v.* Lee, 81 Ala. 163, 2 So. 273. See also Mobly *v.* Barnes, 26 Ala. 718.

Iowa.— Taylor *v.* Lusk, 9 Iowa 444.

Missouri.— Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209; Vermillion *v.* Le Clare, 89 Mo. App. 55.

Tennessee.— Sharp *v.* Miller, 3 Sneed 42.

Virginia.— Smith *v.* Towne, 4 Munf. 191.

property is being held, its nature[93] and extent,[99] may be relevant facts[1] properly established by declarations of a predecessor in title. So far as they are circumstantially relevant facts rather than admissions in derogation of title, these declarations are competent, no matter who may be the parties to the litigation.[2] A claim as to domicile,[3] disclaimer as to real[4] or personal[5] property, notice,[6] fraud,[7] or other relevant[8] mental state, such as intent,[9] assent,[10] knowledge,[11] incapacity,[12]

See 20 Cent. Dig. tit. "Evidence," § 852 *et seq.*

Declarations subsequent to alienation have been held incompetent. Tierney *v.* Corbett, 2 Mackey (D. C.) 264.

98. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; McCurtain *v.* Grady, 1 Indian Terr. 107, 38 S. W. 65.

99. *California.*— Austin *v.* Andrews, 71 Cal. 98, 16 Pac. 546.

Florida.— Daggett *v.* Willey, 6 Fla. 482.

North Carolina.— Ellis *v.* Harris, 106 N. C. 395, 11 S. E. 248; Magee *v.* Blankenship, 95 N. C. 563.

Pennsylvania.— Gratz *v.* Beates, 45 Pa. St. 495.

Vermont.— Hale *v.* Rich, 48 Vt. 217.

Canada.— Sartell *v.* Scott, 11 N. Brunsw. 166.

See 20 Cent. Dig. tit. "Evidence," §§ 825, 842.

Declarations as to boundaries.— Where a statement of a predecessor in title concerning boundaries does not characterize the possession under which the land is held but is in disparagement of title by a record owner, it is competent as an admission by privity under the general rule. Deming *v.* Carrington, 12 Conn. 1, 30 Am. Dec. 591; Towner *v.* Thompson, 82 Ga. 740, 9 S. E. 672; Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558; Stumpf *v.* Osterhage, 111 Ill. 82; Treat *v.* Strickland, 23 Me. 234; Jones *v.* Pashby, 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589; Smith *v.* Powers, 15 N. H. 546; Pike *v.* Hayes, 14 N. H. 19, 40 Am. Dec. 171; Cox *v.* Tomlin, 19 N. J. L. 76; Townsend *v.* Johnson, 3 N. J. L. 706; Bush *v.* Hicks, 2 Thomps. & C. (N. Y.) 356; Jackson *v.* McCall, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343; Cansler *v.* Fite, 50 N. C. 424; Benner *v.* Hauser, 11 Serg. & R. (Pa.) 352; Bird *v.* Pace, 26 Tex. 487; Niles *v.* Burke, 14 N. Brunsw. 237. Declarations of a deceased owner as to boundaries in his own favor have been rejected. Newell *v.* Horn, 47 N. H. 379 [*citing* Morrill *v.* Titcomb, 8 Allen (Mass.) 100; Smith *v.* Powers, 15 N. H. 546]; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

See 20 Cent. Dig. tit. "Evidence," §§ 826, 845.

1. Res gestæ.— These declarations of claim have been said to be admissible on the "principle of the *res gestæ*." Brice *v.* Lide, 30 Ala. 647, 68 Am. Dec. 148; Price *v.* Decatur Branch Bank, 17 Ala. 374; Roeber *v.* Bowe, 30 Hun (N. Y.) 379; Trotter *v.* Watson, 6 Humphr. (Tenn.) 509.

2. Steed *v.* Knowles, 97 Ala. 573, 580, 12 So. 75 [*citing* Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 246; Jones *v.* Pelham, 84 Ala. 208, 4 So. 22; Humes *v.* O'Bryan, 74 Ala. 64; Daffron *v.* Crump, 69 Ala. 77].

3. Wilson *v.* Terry, 9 Allen (Mass.) 214.

4. Hamilton *v.* Paine, 17 Me. 219; New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

5. *Alabama.*—Gillespie *v.* Burleson, 28 Ala. 551; Miller *v.* Jones, 26 Ala. 247.

Georgia.— Smith *v.* Page, 72 Ga. 539; White *v.* Dinkins, 19 Ga. 285.

Louisiana.— Brown *v.* Stroud, 34 La. Ann. 374.

Massachusetts.— Fellows *v.* Smith, 130 Mass. 378.

New Hampshire.— Caswell *v.* Hill, 47 N. H. 407.

Tennessee.— Lee *v.* Johnson, (Ch. App. 1899) 53 S. W. 183.

6. Fisher *v.* Leland, 4 Cush. (Mass.) 456, 458, 50 Am. Dec. 805.

7. See *supra*, IV, D, 3, d.

8. *Connecticut.*— Carney *v.* Hennessey, 74 Conn. 107, 49 Atl. 910, 53 L. R. A. 199.

Kentucky.— Adams *v.* Buford, 6 Dana 406.

Louisiana.—Groves *v.* Steel, 3 La. Ann. 280.

Massachusetts.— Gibbs *v.* Estey, 15 Gray 587.

Mississippi.— Wilkerson *v.* Moffett-West Drug Co., (1897) 21 So. 564.

North Carolina.— Norfolk City Nat. Bank *v.* Bridges, 128 N. C. 322, 38 S. E. 888.

Texas.— Copp *v.* Swift, (Civ. App. 1894) 26 S. W. 438.

9. *Connecticut.*— Wainwright *v.* Talcott, 60 Conn. 43, 22 Atl. 484.

Indiana.— Wallis *v.* Luhring, 134 Ind. 447, 34 N. E. 231.

Massachusetts.— Whitney *v.* Wheeler, 116 Mass. 490.

New York.— Hopkins *v.* Clark, 90 Hun 4, 35 N. Y. Suppl. 360.

Pennsylvania.— Perkins *v.* Hasbrouck, 155 Pa. St. 494, 26 Atl. 695.

Vermont.— Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230.

10. Stallings *v.* Finch, 25 Ala. 518; Nunn *v.* Owens, 2 Strobh. (S. C.) 101; Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633. But the assent must be relevant in point of time. Gibbs *v.* Estey, 15 Gray (Mass.) 587, 589.

11. *Alabama.*— Stewart *v.* Hood, 10 Ala. 600.

Arizona.— Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

Massachusetts.— Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130; Holbrook *v.* Jackson, 7 Cush. 136; Fisher *v.* Leland, 4 Cush. 456, 50 Am. Dec. 805.

Missouri.— Taliaferro *v.* Evans, 160 Mo. 380, 61 S. W. 185.

New York.—Adams *v.* Bowerman, 109 N. Y. 23, 15 N. E. 874.

12. Howell *v.* Howell, 59 Ga. 145; Howell *v.* Howell, 47 Ga. 492; Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56. See *infra*, VIII, B, 9.

or operation of undue influence,[13] may be established by declarations of a predecessor in interest. Such declarations may be relevant for a collateral purpose, for example to fix a date;[14] and may be admissible, although made after alienation, if not too remote to be relevant.[15] Directly self-serving and narrative declarations by an alienor made after alienation are rejected, under general rules,[16] when offered against the alienee.[17]

4. Agents and Employees — a. In General — (i) *Rule Stated.* Relevant declarations of an agent, provided they are within the scope of his authority and in the course of the negotiation to which it refers, but not otherwise,[18] are admissible in evidence against the principal.[19] It is not alone sufficient that a declaration is made by an agent competent to make admissions on the subject; it must

13. Lemon *v.* Jenkins, 48 Ga. 313.

14. Cook *v.* Knowles, 38 Mich. 316.

15. Howell *v.* Howell, 59 Ga. 145; Lemon *v.* Jenkins, 48 Ga. 313; Howell *v.* Howell, 47 Ga. 492.

16. See *supra*, IV, C, D, 3, c, (I), (C); IV, D, 3, b, (I), (C).

17. Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665; Massey *v.* Huntington, 118 Ill. 80, 7 N. E. 269; Gay *v.* Gay, 26 Ohio St. 402.

18. *Alabama.*— Winter *v.* Burt, 31 Ala. 33.

California.— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

Georgia.— Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76; Toole *v.* Americus First Nat. Bank, 54 Ga. 497; Wilcox *v.* Hall, 53 Ga. 635; Wright *v.* Georgia R., etc., Co., 34 Ga. 330.

Illinois.— Curran *v.* Pullman Palace Car Co., 27 Ill. App. 572; Bates *v.* Sandy, 27 Ill. App. 552; Bensley *v.* Brockway, 27 Ill. App. 410.

Indiana.— Baker *v.* Carr, 100 Ind. 330.

Kansas.— Missouri Pac. R. Co. *v.* Johnson, 55 Kan. 344, 40 Pac. 641; Kilpatrick-Koch Dry-Goods Co. *v.* Kahn, 53 Kan. 274, 36 Pac. 327.

Kentucky.— Parker *v.* Cumberland Telephone, etc., Co., 77 S. W. 1109, 25 Ky. L. Rep. 1391.

Massachusetts.— Creed *v.* Creed, 161 Mass. 107, 36 N. E. 749.

Missouri.— Lackey *v.* Schreiber, 17 Mo. 146.

Montana.— Hogan *v.* Kelly, (1904) 75 Pac. 81; Wilson *v.* Harris, 19 Mont. 69, 47 Pac. 1101.

New Hampshire.— Batchelder *v.* Emery, 20 N. H. 165; Woods *v.* Banks, 14 N. H. 101.

New York.—Diehl *v.* Watson, 89 N. Y. App. Div. 445, 85 N. Y. Suppl. 851; Rogers *v.* Interurban St. R. Co., 84 N. Y. Suppl. 974.

Pennsylvania.— Monocacy Bridge Co. *v.* American Iron Bridge Mfg. Co., 83 Pa. St. 517.

South Carolina.— Moore *v.* Dickinson, 39 S. C. 441, 17 S. E. 998.

Texas.— St. Louis, etc., R. Co. *v.* Carlisle, (Civ. App. 1904) 78 S. W. 553.

Vermont.— Wheelock *v.* Hardwick, 48 Vt. 19.

See 20 Cent. Dig. tit. "Evidence," § 887.

Res gestæ statements see *infra*, IV, D, 4, a, (III).

Narrative statements see *infra*, IV, D, 4, a, (IV).

19. *Alabama.*— Belmont Coal, etc., Co. *v.* Smith, 74 Ala. 206; Williams *v.* Shackelford, 16 Ala. 318.

Arkansas.— Shields *v.* Smith, 37 Ark. 47; Campbell *v.* Hastings, 29 Ark. 512.

California.— Knarston *v.* Manhattan L. Ins. Co., 140 Cal. 57, 73 Pac. 740; Beasley *v.* San Jose Fruit-Packing Co., 92 Cal. 388, 28 Pac. 485; Ward *v.* Preston, 23 Cal. 468; Neely *v.* Naglee, 23 Cal. 152.

Colorado.— Edmunds *v.* Curtis, 8 Colo. 605, 9 Pac. 793; Schaefer *v.* Gildea, 3 Colo. 15; Union Gold-Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Connecticut.— Perkins *v.* Burnet, 2 Root 30.

District of Columbia.— Main *v.* Aukam, 12 App. Cas. 375.

Georgia.— Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366; Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121; Galceran *v.* Noble, 66 Ga. 367; Lunday *v.* Thomas, 26 Ga. 537.

Illinois.— Matzenbaugh *v.* People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134; Linblom *v.* Ramsey, 75 Ill. 246; Mix *v.* Osby, 62 Ill. 193; Mann *v.* Sodakat, 66 Ill. App. 393; Mellor *v.* Carithers, 52 Ill. App. 86; Ehrler *v.* Worthen, 47 Ill. App. 550.

Indiana.— Burns *v.* Thompson, 91 Ind. 146; Louisville, etc., R. Co. *v.* Henly, 88 Ind. 535; Pavey *v.* Wintrode, 87 Ind. 379; Crowder *v.* Reed, 80 Ind. 1.

Iowa.— D. M. Osborne *v.* Ringland, (1904) 98 N. W. 116; Williams *v.* Niagara F. Ins. Co., 50 Iowa 561; Wilson Sewing Mach. Co. *v.* Sloan, 50 Iowa 367; Howe Mach. Co. *v.* Snow, 32 Iowa 433; Wiggins *v.* Leonard, 9 Iowa 194.

Kentucky.— Yocum *v.* Barnes, 8 B. Mon. 496; D. H. Baldwin *v.* Tucker, 75 S. W. 196, 25 Ky. L. Rep. 222.

Louisiana.— Barrow *v.* Brown, 28 La. Ann. 459; Reynolds *v.* Rowley, 2 La. Ann. 890; Reynolds *v.* Rowley, 3 Rob. 201, 38 Am. Dec. 233; Halphen *v.* Fuselier, 1 Rob. 417.

Maine.— Heath *v.* Jaquith, 68 Me. 433; Gooch *v.* Bryant, 13 Me. 386.

Maryland.— Thomas *v.* Sternheimer, 29 Md. 268; Whiteford *v.* Burckmyer, 1 Gill 127, 39 Am. Dec. 640; Franklin Bank *v.* Pennsylvania, etc., Steam Nav. Co., 11 Gill & J. 28, 33 Am. Dec. 687; Baltimore City Bank *v.* Bateman, 7 Harr. & J. 104.

Massachusetts.— Copeland *v.* Boston Dairy Co., 184 Mass. 207, 68 N. E. 218; Cooley *v.* Norton, 4 Cush. 93; Baring *v.* Clarke, 19 Pick. 220.

be made in connection with the discharge of his duty[20] and on his own knowledge,[21] and must constitute matter of fact rather than mere expression of opinion[22] or of conjecture as to probable conduct under hypothetical conditions.[23] The

Minnesota.— Greene *v.* Dockendorf, 13 Minn. 66.

Mississippi.— Cook *v.* Whitfield, 41 Miss. 541; Skipwith *v.* Robinson, 24 Miss. 688.

Missouri.— Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77, 15 S. W. 992; Scovill *v.* Glasner, 79 Mo. 449; Peck *v.* Ritchey, 66 Mo. 114; Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479 (subagent of architect); Hill *v.* Seneca Bank, 100 Mo. App. 230, 73 S. W. 307; Hawk *v.* Applegate, 37 Mo. App. 32; Meagher *v.* People's, etc., R. Co., 14 Mo. App. 499.

New Hampshire.—Woods *v.* Banks, 14 N. H. 101.

New Jersey.— Callaway *v.* Equitable Trust Co., 67 N. J. L. 44, 50 Atl. 900; Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 38 N. J. L. 13.

New York.— Keeler *v.* Salisbury, 33 N. Y. 648; Weigley *v.* Kneeland, 18 N. Y. App. Div. 47, 45 N. Y. Suppl. 388; Johnston *v.* Thompson, 23 Hun 90; Hydorn *v.* Cushman, 16 Hun 107; Vail *v.* Craig, 13 N. Y. St. 448; Thallhimer *v.* Brinckerhoff, 4 Wend. 394, 21 Am. Dec. 155.

North Carolina.— Holt *v.* Johnson, 129 N. C. 138, 39 S. E. 796; Smith *v.* North Carolina R. Co., 68 N. C. 107; Howard *v.* Stutts, 51 N. C. 372.

Oregon.— Patterson *v.* United Artisans, 43 Oreg. 333, 72 Pac. 1095; North Pac. Lumber Co. *v.* Willamette Steam Mill Lumbering, etc., Co., 29 Oreg. 219, 44 Pac. 286.

Pennsylvania.— Merrick Thread Co. *v.* Philadelphia Shoe Mfg. Co., 115 Pa. St. 314, 8 Atl. 794; Chorpenning *v.* Royce, 58 Pa. St. 474; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229; Woodwell *v.* Brown, 44 Pa. St. 121; Dick *v.* Cooper, 24 Pa. St. 217, 64 Am. Dec. 652; Dick *v.* Lindsay, 2 Grant 431.

Texas.—Standefer *v.* Aultman, etc., Machinery Co., (Civ. App. 1904) 78 S. W. 552; McCarty *v.* Hartford F. Ins. Co., (Civ. App. 1903) 75 S. W. 934; Atchison, etc., R. Co. *v.* Bryan, (Civ. App. 1894) 28 S. W. 98.

Vermont.— Baldwin *v.* Doubleday, 59 Vt. 7, 8 Atl. 576; Deming *v.* Chase, 48 Vt. 382; Austin *v.* Chittenden, 33 Vt. 553; Barnard *v.* Henry, 25 Vt. 289.

Washington.— Selber *v.* Springbrook Trout Farm, 19 Wash. 49, 52 Pac. 238.

West Virginia.— Baltimore, etc., R. Co. *v.* Christie, 5 W. Va. 325.

Wisconsin.— Fey *v.* I. O. O. F. Mutual L. Ins. Soc., (1904) 98 N. W. 206; Hupfer *v.* National Distilling Co., 119 Wis. 417, 96 N. W. 809.

United States.— Cliquot *v.* U. S., 3 Wall. 114, 18 L. ed. 116; U. S. *v.* The Burdett, 9 Pet. 682, 9 L. ed. 273; American Fur Co. *v.* U. S., 2 Pet. 358, 7 L. ed. 450; Hough *v.* Richardson, 12 Fed. Cas. No. 6,722, 3 Story 659; U. S. *v.* Martin, 26 Fed. Cas. No. 15,732, 2 Paine 68.

England.— Peto *v.* Hague, 3 Esp. 134; Schumack *v.* Lock, 3 L. J. C. P. O. S. 57, 10 Moore C. P. 39, 17 E. C. L. 565.

See 20 Cent. Dig. tit. "Evidence," § 887.

Common agent.— Where, in an action for milk alleged to have been sold by plaintiff to defendant, it appeared that a teamster and collector who took the milk from plaintiff and other farmers to a railway station was paid both by plaintiff and defendant, and was the common agent of each, it was held that a pass-book kept by him showing the amount of milk purchased was admissible as against defendant. Copeland *v.* Boston Dairy Co., 184 Mass. 207, 68 N. E. 218.

20. Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675.

21. McCormick Harvesting Mach. Co. *v.* Ripley, 6 Ky. L. Rep. 658.

22. *Alabama.*— North Alabama Home Protection *v.* Whidden, 103 Ala. 203, 15 So. 567.

Georgia.— People's Nat. Bank *v.* Harper, 114 Ga. 603, 40 S. E. 717.

Illinois.— School Trustees *v.* Mitchell, 73 Ill. App. 543; Chicago City R. Co. *v.* McMeen, 70 Ill. App. 220; Teal *v.* Meravey, 12 Ill. App. 32.

Indiana.— Ohio, etc., R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733.

Kentucky.— East Tennessee Telephone Co. *v.* Simms, 99 Ky. 404, 36 S. W. 171, 38 S. W. 131, 18 Ky. L. Rep. 761; Louisville, etc., R. Co. *v.* Lawson, 9 Ky. L. Rep. 681.

Massachusetts.— Boston, etc., R. Co. *v.* Ordway, 140 Mass. 510, 5 N. E. 627.

Michigan.— Rhode *v.* Metropolitan L. Ins. Co., 129 Mich. 112, 88 N. W. 400; Farmers' Mut. F. Ins. Co. *v.* Bowen, 40 Mich. 147.

Mississippi.— Cook *v.* Whitfield, 41 Miss. 541.

Missouri.— Kearney Bank *v.* Froman, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456; Tuggle *v.* St. Louis, etc., R. Co., 62 Mo. 425; Midland Lumber Co. *v.* Kreeger, 52 Mo. App. 418.

Nebraska.— Wood River Bank *v.* Kelley, 29 Nebr. 590, 46 N. W. 86.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Sulphur Spring Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529.

South Carolina.— Patterson *v.* South Carolina R. Co., 4 S. C. 153.

Virginia.— Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

United States.— Goetz *v.* Kansas City Bank, 119 U. S. 551, 7 S. Ct. 318, 30 L. ed. 515; Fidelity, etc., Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379.

England.— The Solway, 10 P. D. 137, 5 Aspin. 482, 54 L. J. P. & Adm. 83, 53 L. T. Rep. N. S. 680, 34 Wkly. Rep. 232.

See 20 Cent. Dig. tit. "Evidence," § 905.

23. Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106.

principal is not affected by facts stated by his agent to him in writing or otherwise,[24] nor by declarations of an agent in his own favor.[25] An agent's declarations if relevant are primary evidence[26] and competent, although the declarant is in court and ready to testify;[27] nor does the death of the principal[28] or of the agent[29] render them incompetent. Admissions are none the less received against the person making them because they were made by him as agent for another.[30]

(II) *Preliminary Proof of Agency.* A relation of agency sufficient to admit the statement offered must first be established by affirmative evidence,[31]

24. Kahl *v.* Jansen, 4 Taunt. 565.

25. Greene *v.* Dockendorf, 13 Minn. 70; Slocum *v.* Putnam, (Tex. Civ. App. 1894) 25 S. W. 52.

26. Smith *v.* Wallace, 25 Wis. 55.

27. Geylin *v.* De Villeroi, 2 Houst. (Del.) 311; Phenix Mut. L. Ins. Co. *v.* Clark, 58 N. H. 164. *Contra*, Betts *v.* Planters', etc., Bank, 3 Stew. (Ala.) 18. See also Weir *v.* McGee, 25 Tex. Suppl. 20.

28. Hines *v.* Poole, 56 Ga. 638.

29. Missouri, etc., R. Co. *v.* Byrne, 3 Indian Terr. 740, 49 S. W. 41; Van Rensselaer *v.* Morris, 1 Paige (N. Y.) 13; Howerton *v.* Lattimer, 68 N. C. 370.

30. Leyner *v.* Leyner, 123 Iowa 185, 98 N. W. 628.

31. *Alabama.*— Postal Tel. Cable Co. *v.* Brantley, 107 Ala. 683, 18 So. 321; Mobile, etc., R. Co. *v.* Cogsbill, 85 Ala. 456, 5 So. 188; Galbreath *v.* Cole, 61 Ala. 139; Martin *v.* State, 28 Ala. 71; Brown *v.* Harrison, 17 Ala. 774; Governor *v.* Baker, 14 Ala. 652; Bradford *v.* Bush, 10 Ala. 386.

California.— Union Transp. Co. *v.* Bassett, 118 Cal. 604, 50 Pac. 754; People *v.* Dixon, 94 Cal. 255, 29 Pac. 504; Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

Colorado.— Union Coal Co. *v.* Edman, 16 Colo. 438, 27 Pac. 1060.

Georgia.— Blitch *v.* Central R. Co., 76 Ga. 333; McMath *v.* Teel, 64 Ga. 595.

Illinois.— Pease *v.* Trench, 197 Ill. 101, 64 N. E. 368; Matzenbaugh *v.* People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134; Callaghan *v.* Myers, 89 Ill. 566; Fairbank Canning Co. *v.* Weill, 35 Ill. App. 366.

Iowa.— Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60; Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557; Ball *v.* Sykes, 70 Iowa 525, 30 N. W. 929; Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42; Parsons *v.* Thomas, 62 Iowa 319, 17 N. W. 526.

Kansas.— Chellis *v.* Coble, 37 Kan. 558, 15 Pac. 505.

Kentucky.— Bean *v.* Taylor, 61 S. W. 31, 22 Ky. L. Rep. 1665.

Maine.— Sleeper *v.* Union Ins. Co., 61 Me. 267.

Maryland.—Atwell *v.* Miller, 11 Md. 348, 69 Am. Dec. 206.

Massachusetts.— Baker *v.* Gerrish, 14 Allen 201; Haney *v.* Donnelly, 12 Gray 361; Bierce *v.* Stocking, 11 Gray 174; McGregor *v.* Wait, 10 Gray 72, 69 Am. Dec. 305; Woods *v.* Clark, 24 Pick. 35.

Michigan.— Turner *v.* Phœnix Ins. Co., 55 Mich. 236, 21 N. W. 326, subagent.

Minnesota.— Rodes *v.* St. Anthony, etc., Elevator Co., 49 Minn. 370, 52 N. W. 27; Lowry *v.* Harris, 12 Minn. 255.

Mississippi.— Bernheim *v.* Hahn, 65 Miss. 459, 4 So. 539.

Missouri.— Hamilton *v.* Berry, 74 Mo. 176; Cosgrove *v.* Tebo, etc., R. Co., 54 Mo. 495; Beardslee *v.* Steinmesch, 38 Mo. 168; Helm *v.* Missouri Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148.

New Hampshire.— Carlton *v.* Patterson, 29 N. H. 580; Hopkinton *v.* Springfield, 12 N. H. 328.

New Jersey.— Callaway *v.* Equitable Trust Co., 60 N. J. L. 44, 50 Atl. 900; Allen *v.* Bunting, 18 N. J. L. 299; Faulkner *v.* Whitaker, 15 N. J. L. 438; Van Dyke *v.* Bastedo, 15 N. J. L. 224.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York.— Wickham *v.* Lehigh Valley R. Co., 85 N. Y. App. Div. 182, 83 N. Y. Suppl. 146; Legnard *v.* Standard L., etc., Ins. Co., 81 N. Y. App. Div. 320, 81 N. Y. Suppl. 516; Johnson *v.* Buffalo Homeopathic Hospital, 53 N. Y. App. Div. 513, 65 N. Y. Suppl. 1087; Turnier *v.* Lathers, 59 Hun 623, 13 N. Y. Suppl. 500; Holbrook *v.* Wilson, 4 Bosw. 64; Aza *v.* Eitlinger, Anth. N. P. 99.

Oregon.— Mattis *v.* Hosmer, 37 Oreg. 523, 62 Pac. 17, 632; Hannan *v.* Greenfield, 36 Oreg. 97, 58 Pac. 888.

Pennsylvania.— Myerstown Bank *v.* Roessler, 186 Pa. St. 431, 40 Atl. 963; Long *v.* North British, etc., Ins. Co., 137 Pa. St. 335, 20 Atl. 1014, 2 Am. St. Rep. 879; Baltimore, etc., Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44; Custar *v.* Titusville Gas, etc., Co., 63 Pa. St. 381; Robeson *v.* Schuylkill Nav. Co., 3 Grant 186; Boyer *v.* Potts, 14 Serg. & R. 157; Stewart *v.* Huntingdon Bank, 11 Serg. & R. 267, 14 Am. Dec. 628; Ruddy *v.* Repp, 19 Pa. Super. Ct. 437.

South Carolina.— Fraser *v.* Charleston, 8 S. C. 318.

Tennessee.— Moore *v.* Bettis, 11 Humphr. 67, 53 Am. Dec. 771.

Texas.— Blain *v.* Pacific Express Co., 69 Tex. 74, 6 S. W. 679; Latham *v.* Pledger, 11 Tex. 439; Houston, etc., R. Co. *v.* Wallace, 21 Tex. Civ. App. 394, 53 S. W. 77; Missouri Pac. R. Co. *v.* Owens, 1 Tex. App. Civ. Cas. § 384.

Utah.— Nelson *v.* Southern Pac. Co., 15 Utah 325, 49 Pac. 644.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

West Virginia.— Eastburn *v.* Norfolk, etc., R. Co., 34 W. Va. 681, 12 S. E. 819.

direct or inferential,[32] *dehors* the declarations of the agent,[33] unless the fact be admitted,[34] or the statement has been ratified by the principal,[35] or corroboration appears on the face of the transaction,[36] or by other evidence.[37]

(III) *Res Gestæ Statements.* It is frequently said that the declarations of an agent affect the principal only when they are "part of the *res gestæ*." [38] Con-

Wisconsin.— Schwalbach *v.* Chicago, etc., R. Co., 73 Wis. 137, 40 N. W. 579.

United States.— U. S. *v.* Boyd, 5 How. 29, 12 L. ed. 36; Westcott *v.* Bradford, 29 Fed. Cas. No. 17,429, 4 Wash. 492.

England.— Jones *v.* Shears, 4 A. & E. 832, 2 H. & W. 43, 5 L. J. K. B. 153, 6 N. & M. 428, 31 E. C. L. 365.

Canada.— Riley *v.* St. John, 11 N. Brunsw. 78.

See 20 Cent. Dig. tit. "Evidence," §§ 1006, 1007.

32. Porter *v.* Robertson, 34 Ill. App. 74; Hannan *v.* Greenfield, 36 Oreg. 97, 58 Pac. 888.

33. *Alabama.*— Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163; North Alabama Home Protection *v.* Whidden, 103 Ala. 203, 15 So. 567; Cobb *v.* Malone, 86 Ala. 571, 6 So. 6; Wailes *v.* Neal, 65 Ala. 59.

California.— Smith *v.* Liverpool, etc., Ins. Co., 107 Cal. 432, 40 Pac. 540.

Colorado.— Castner *v.* Rinne, 31 Colo. 256, 72 Pac. 1052; Extension Gold Min., etc., Co. *v.* Skinner, 28 Colo. 237, 64 Pac. 198.

Georgia.— Williams *v.* Kelsey, 6 Ga. 365.

Illinois.— Reynolds *v.* Ferree, 86 Ill. 570; Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184.

Indiana.— Breckenridge *v.* McAfee, 54 Ind. 141; Coon *v.* Gurley, 49 Ind. 199.

Iowa.— State *v.* Oder, 92 Iowa 767, 61 N. W. 190; Wood Mowing Mach. Co. *v.* Crow, 70 Iowa 340, 30 N. W. 609; Drake *v.* Chicago, etc., R. Co., 70 Iowa 59, 29 N. W. 804; Winch *v.* Baldwin, 68 Iowa 764, 28 N. W. 62.

Kansas.— McCormick *v.* Roberts, 36 Kan. 552, 13 Pac. 827; St. Louis, etc., R. Co. *v.* Brown, 3 Kan. App. 260, 45 Pac. 118.

Kentucky.— Farmer *v.* Lewis, 1 Bush 66, 89 Am. Dec. 610.

Maine.— Hazeltine *v.* Miller, 44 Me. 177.

Maryland.— Rowland *v.* Long, 45 Md. 439.

Massachusetts.— Richmond Iron Works *v.* Hayden, 132 Mass. 190; Boynton *v.* Laighton, 1 Allen 509; Haney *v.* Donnelly, 12 Gray 361.

Michigan.— Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276; Hatch *v.* Squires, 11 Mich. 185.

Minnesota.—Sencerbox *v.* McGrade, 6 Minn. 484.

Missouri.— Williams *v.* Edwards, 94 Mo. 447, 7 S. W. 429; Sumner *v.* Saunders, 51 Mo. 89; Werth *v.* Ollis, 61 Mo. App. 401.

New Jersey.— Gifford *v.* Landrine, 37 N. J. Eq. 127.

New York.— New York Bank Nat. Banking Assoc. *v.* American Dock, etc., Co., 143 N. Y. 559, 38 N. E. 713; Leary *v.* Albany Brewing Co., 77 N. Y. App. Div. 6, 79 N. Y. Suppl. 130.

North Carolina.— Francis *v.* Edwards, 77 N. C. 271; Grandy *v.* Ferebee, 68 N. C. 356; Royal *v.* Sprinkle, 46 N. C. 505; Williams *v.* Williamson, 28 N. C. 281, 45 Am. Dec. 494.

Pennsylvania.— Jordan *v.* Stewart, 23 Pa. St. 244; Irvine *v.* Buckaloe, 12 Serg. & R. 35; Jones *v.* Huntzinger, 6 Phila. 576.

Rhode Island.— Paulton *v.* Keith, 23 R. I. 164, 49 Atl. 635, 91 Am. St. Rep. 624.

Tennessee.— Floyd *v.* Woods, 4 Yerg. 165.

Texas.— Gonzales College *v.* McHugh, 39 Tex. 346; Waller *v.* Leonard, (Civ. App. 1896) 34 S. W. 799 [*affirmed* in 89 Tex. 507, 35 S. W. 1045].

West Virginia.— Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699.

Wisconsin.— Gibbs *v.* Holcomb, 1 Wis. 23.

See 20 Cent. Dig. tit. "Evidence," §§ 1006, 1007.

Mere reputation of holding a certain position, even if coupled with assumption of authority by the agent, is not sufficient proof of agency. Lafayette, etc., R. Co. *v.* Ehman, 30 Ind. 83.

34. Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432.

35. Toledo, etc., R. Co. *v.* Fisher, 13 Ind. 258; Marsh *v.* Hammond, 11 Allen (Mass.) 483; Greene *v.* Dockendorf, 13 Minn. 66; Thayer *v.* Street, 23 U. C. Q. B. 189.

36. Louisville, etc., R. Co. *v.* Tift, 100 Ga. 86, 27 S. E. 765.

Weight and sufficiency.— To admit proof of an agent's statements it is sufficient if there is evidence on the point, apart from the agent's declarations, on which the jury would be justified in finding a relation of agency. Huntsville, etc., R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295; Peters *v.* Davenport, 104 Iowa 625, 74 N. W. 6; Gates *v.* Manny, 14 Minn. 21; Wendell *v.* Abbott, 45 N. H. 349; Glidden *v.* Unity, 33 N. H. 571; Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St. 449, 15 Atl. 865; Barbee *v.* Spivey, (Tex. Civ. App. 1895) 32 S. W. 345. It has been said that the proof must amount to *prima facie* evidence. Munroe *v.* Stutts, 31 N. C. 49.

Order of proof.— The court may receive the declaration of the agent, permitting proof *aliunde* of his agency to be offered later. Buist *v.* Guice, 96 Ala. 255, 11 So. 280; Rhodes *v.* Lowry, 54 Ala. 4; Wabash, etc., Canal *v.* Bledsoe, 5 Ind. 133; Smith *v.* Dodge, 49 Hun (N. Y.) 611, 3 N. Y. Suppl. 866. But see Learned-Letcher Lumber Co. *v.* Ohatchie Lumber Co., 111 Ala. 453, 17 So. 934; Toledo, etc., R. Co. *v.* Fisher, 13 Ind. 258; Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125.

37. Sumner *v.* Saunders, 51 Mo. 89; Texas Standard Cotton-Oil Co. *v.* National Cotton-Oil Co., (Tex. Civ. App. 1897) 40 S. W. 159.

38. *Alabama.*— Strawbridge *v.* Spann, 8 Ala. 820.

sequently that his statements made in casual conversation not involving any business of the ageney,[39] or after the fact to which they relate and unconnected with any act of agency,[40] are inadmissible against the principal. The phrase "*res*

Arkansas.— Byers *v.* Fowler, 14 Ark. 86.

California.— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Birch *v.* Hale, 99 Cal. 299, 33 Pac. 1088; Garfield *v.* Knight's Ferry, etc., Water Co., 14 Cal. 35.

Colorado.— Edmunds *v.* Curtis, 8 Colo. 605, 9 Pac. 793; Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

Georgia.— People's Nat. Bank *v.* Harper, 114 Ga. 603, 40 S. E. 717; Thomas *v.* Kinsey, 8 Ga. 421.

Illinois.— Linblom *v.* Ramsey, 75 Ill. 246; Hovey *v.* Middleton, 56 Ill. 468; Whiteside *v.* Margarel, 51 Ill. 507; Delaware, etc, Canal Co. *v.* Mitchell, 92 Ill. App. 577; Cleveland, etc., R. Co. *v.* Jenkins, 75 Ill. App. 17; Union Nat. Bank *v.* Post, 64 Ill. App. 404; Prickett *v.* Madison County, 14 Ill. App. 454.

Indiana.— U. S. Express Co. *v.* Rawson, 106 Ind. 215, 6 N. E. 337.

Iowa.— Hackett *v.* Freeman, 103 Iowa 296, 72 N. W. 528; Golden *v.* Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257.

Kansas.— Atchison, etc., R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043; Swenson *v.* Aultman, 14 Kan. 273.

Kentucky.— Chesapeake, etc., R. Co. *v.* Smith, 101 Ky. 104, 39 S. W. 832, 18 Ky. L. Rep. 1079; Louisville, etc., R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. L. Rep. 258; McLeod *v.* Ginther, 80 Ky. 399; Covington, etc., R. Co. *v.* Ingles, 15 B. Mon. 637; Roberts *v.* Burks, Litt. Sel. Cas. 411, 12 Am. Dec. 325; Reed *v.* Brooks, 3 Litt. 127; McClure *v.* Purcel, 3 A. K. Marsh. 61; Parker *v.* Cumberland Telephone, etc., Co., 77 S. W. 1109, 25 Ky. L. Rep. 1391; Embry *v.* Louisville, etc., R. Co., 36 S. W. 1123, 18 Ky. L. Rep. 434.

Maryland.— Baltimore *v.* Lobe, 90 Md. 310, 45 Atl. 192; Bradford *v.* Williams, 2 Md. Ch. 1.

Massachusetts.— Allin *v.* Whittemore, 171 Mass. 259, 50 N. E. 618; Pratt *v.* Ogdensburg, etc., R. Co., 102 Mass. 557; Dorne *v.* Southwork Mfg. Co., 11 Cush. 205.

Michigan.— Butters Salt, etc., Co. *v.* Vogel, (1904) 97 N. W. 757; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Benedict *v.* Denton, Walk. 336.

Minnesota.— Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63; Lowry *v.* Harris, 12 Minn. 255.

Mississippi.— Dickman *v.* Williams, 50 Miss. 500; Browning *v.* State, 33 Miss. 47.

Missouri.— Hamilton *v.* Berry, 74 Mo. 176; King *v.* Phœnix Ins. Co., 101 Mo. App. 163, 76 S. W. 55.

Montana.— Hogan *v.* Kelly, 29 Mont. 485, 75 Pac. 81.

New Jersey.—Runk *v.* Ten Eyck, 24 N. J. L. 756.

New York.— Truesdell *v.* Chumar, 75 Hun 416, 27 N. Y. Suppl. 87; Gutchess *v.* Gutchess, 66 Barb. 483; Fogg *v.* Child, 13 Barb. 246; Greene *v.* Gonzales, 2 Daly 412; Anderson *v.* Broad, 2 E. D. Smith 530; Kasson *v.* Mills, 8 How. Pr. 377.

Oregon.— Wicktorwitz *v.* Farmers' Ins. Co., 31 Oreg. 569, 51 Pac. 75.

Pennsylvania.— Grim *v.* Bonnell, 78 Pa. St. 152; Patton *v.* Minesinger, 25 Pa. St. 393; Hannay *v.* Stewart, 6 Watts 487.

South Carolina.— Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837.

Tennessee.— Moore *v.* Bettis, 11 Humphr. 67, 53 Am. Dec. 771.

Texas.— Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Tuttle *v.* Turner, 28 Tex. 759.

Utah.— Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897.

Vermont.— McNeish *v.* U. S. Hulless Oat Co., 57 Vt. 316; Mason *v.* Gray, 36 Vt. 308.

Wisconsin.— Scott *v.* Home Ins. Co., 53 Wis. 238, 10 N. W. 387. And see Hupfer *v.* National Distilling Co., 119 Wis. 417, 96 N. W. 809.

United States.— Leeds *v.* Alexandria Mar. Ins. Co., 2 Wheat. 380, 4 L. ed. 266; Aiken *v.* Bemis, 1 Fed. Cas. No. 109, 2 Robb Pat. Cas. 644, 3 Woodb. & M. 348; U. S. *v.* Martin, 26 Fed. Cas. No. 15,732, 2 Paine 68.

See 20 Cent. Dig. tit. "Evidence," § 887.

Statements relating to another transaction than that on which the agent is at the time engaged are not competent, except under special conditions. Barber *v.* Bennett, 62 Vt. 50, 19 Atl. 978.

39. Presley *v.* Lowry, 25 Minn. 114; Irvine *v.* Buckaloe, 12 Serg. & R. (Pa.) 35.

Res gestæ.— It has even been required that the declarations should be "part of the *res gestæ*" properly so called; that is, part of some relevant fact, to which they assist in giving character. Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Wright Invest. Co. *v.* Fillingham, 85 Mo. App. 534; Fogg *v.* Child, 13 Barb. (N. Y.) 246; Western Ins. Co. *v.* Tobin, 32 Ohio St. 77. See also Fairlie *v.* Hastings, 10 Ves. Jr. 123, 32 Eng. Reprint 791.

40. *California.*— Innis *v.* The Senator, 1 Cal. 459, 54 Am. Dec. 305.

Colorado.— Anthony *v.* Estabrook, 1 Colo. 75, 91 Am. Dec. 702.

Illinois.— Waterman *v.* Peet, 11 Ill. 648.

Indiana.— Pittsburgh, etc., R. Co. *v.* Theobald, 51 Ind. 246; Bennett *v.* Holmes, 32 Ind. 108.

Iowa.— Osgood *v.* Bauder, 82 Iowa 171, 47 N. W. 1001; Wiggins *v.* Leonard, 9 Iowa 194.

Kansas.— Cherokee, etc., Coal, etc., Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691.

Kentucky.— Davis *v.* Whitesides, 1 Dana 177, 25 Am. Dec. 138.

Maine.— Craig *v.* Gilbreth, 47 Me. 416; Burnham *v.* Ellis, 39 Me. 319, 63 Am. Dec. 625; Haven *v.* Brown, 7 Me. 421, 22 Am. Dec. 208.

Maryland.— Franklin Bank *v.* Pennsyl-

gestæ" has imported into this subject a proposition frequently maintained in connection with statements properly "part of the *res gestæ*,"[41] namely, that a transaction is not yet past so long as its immediate effects may be supposed to exert a controlling influence on the mind of the declarant.[42]

(IV) *NARRATIVE STATEMENTS.* Declarations of an agent, in order to be admissible, must be made *dum fervet opus*,[43] while he is actually employed on the business of his principal,[44] although the authority of the agent continues until the work intrusted to him is fully completed.[45] Under the *res gestæ* rule, properly so called, in the law of evidence, narrative statements are excluded on the ground of irrelevancy.[46] But it is to be observed that in the law of agency it is no part of an agent's duty to prejudice his principal by narrative statements construing[47]

vania, etc., Steam Nav. Co., 11 Gill & J. 28, 33 Am. Dec. 687; Bradford *v.* Williams, 2 Md. Ch. 1.

Michigan.— Bowen *v.* Rutland School Dist. No. 9, 36 Mich. 149.

Missouri.— O'Bryan *v.* Kinney, 74 Mo. 125.

New York.— Clarke *v.* Anderson, 14 Daly 464, 15 N. Y. St. 363; Carpenter *v.* New York, etc., R. Co., 13 N. Y. St. 718; Butterfield *v.* Blanchard, 2 Code Rep. 31.

North Carolina.— Lyman *v.* Southern R. Co., 132 N. C. 721, 44 S. E. 550.

Vermont.— Austin *v.* Chittenden, 33 Vt. 553.

See 20 Cent. Dig. tit. "Evidence," § 910; and other cases cited *supra*, note 38. And see the cases cited *infra*, IV, D, 4, a, (IV).

41. As the statements of an agent are competent only when made by one engaged on the principal's business and concerning the subject-matter of the agency, it is merely necessary to call any particular business of the principal a transaction or "*res gestæ*" to stretch the rules as to declarations, "part of the *res gestæ*," so as to cover any competent declaration by an agent; although it is evident that such a use of the phrase "*res gestæ*" in effect removes from it any very distinctive meaning — an unfortunate complication in a subject already greatly confused.

42. Kelly *v.* Morehouse, 25 N. Y. App. Div. 359, 49 N. Y. Suppl. 552; Shafer *v.* Lacock, 168 Pa. St. 497, 32 Atl. 44, 29 L. R. A. 254, holding that on an issue of liability for setting a fire, what the agent says about it while the fire was burning is competent, as "part of the *res gestæ*." See also Stecher Lithographic Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213; Western Union Tel. Co. *v.* Barefoot, (Tex. Civ. App. 1903) 74 S. W. 560 [*reversed* in (Sup. 1903) 76 S. W. 914].

43. Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

44. *Alabama.*—Winter *v.* Burt, 31 Ala. 33; McKenzie *v.* Stevens, 19 Ala. 691.

Connecticut.— Fairfield County Turnpike Co. *v.* Thorp, 13 Conn. 173.

Georgia.—Adams *v.* Humphreys, 54 Ga. 496; Newton Mfg. Co. *v.* White, 53 Ga. 395.

Illinois.— Chicago, etc., R. Co. *v.* Riddle, 60 Ill. 534; Chicago, etc., R. Co. *v.* Lee, 60 Ill. 501.

Indiana.— Rathel *v.* Brady, 44 Ind. 412; Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235; Hynds *v.* Hays, 25 Ind. 31.

Kansas.— St. Louis Wire-Mill Co. *v.* Consolidated Barb-Wire Co., 46 Kan. 773, 27 Pac. 118.

Maine.— Whittemore *v.* Wentworth, 76 Me. 20.

Maryland.— Bradford *v.* Williams, 2 Md. Ch. 1.

Massachusetts.— Gilmore *v.* Mittineague, Paper Co., 169 Mass. 471, 48 N. E. 623.

Minnesota.— Van Doren *v.* Bailey, 48 Minn. 305, 51 N. W. 375.

Missouri.— Devlin *v.* Wabash, etc., R. Co., 87 Mo. 545; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Chillicothe *v.* Raynard, 80 Mo. 185.

New York.—Anderson *v.* Rome, etc., R. Co., 54 N. Y. 334; Sturgess *v.* Bissell, 46 N. Y. 462; Darling *v.* Oswego Falls Mfg. Co., 30 Hun 276; Bowen *v.* Newport Nat. Bank, 11 Hun 226.

South Carolina.— Raiford *v.* French, 11 Rich. 367.

Tennessee.— Cobb *v.* Johnson, 2 Sneed 73, 62 Am. Dec. 457.

Texas.— Wheelock *v.* Wright, 38 Tex. 496.

Vermont.— Baldwin *v.* Doubleday, 59 Vt. 7, 8 Atl. 576; Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29.

Wisconsin.— Austin *v.* Austin, 45 Wis. 523.

United States.— Davis *v.* Robb, 7 Fed. Cas. No. 3,649, 2 Cranch C. C. 458.

See 20 Cent. Dig. tit. "Evidence," § 887.

45. *Alabama.*— Baldwin *v.* Ashby, 54 Ala. 82.

Arizona.— Cole *v.* Bean, 1 Ariz. 377, 25 Pac. 538.

Illinois.— Wallace *v.* Goold, 91 Ill. 15.

Missouri.— Union Bank *v.* Wheat, 58 Mo. App. 11.

New York.— Graham *v.* Schmidt, 1 Sandf. 74; McCormick *v.* Barnum, 10 Wend. 104.

Vermont.— Barber *v.* Bennett, 62 Vt. 50, 19 Atl. 978.

See 20 Cent. Dig. tit. "Evidence," § 887.

46. See *infra*, VIII, A, 2.

47. *Alabama.*— Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34.

Connecticut.— C., etc., Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604.

Kentucky.— William Tarr Co. *v.* Kimbrough, 34 S. W. 528, 17 Ky. L. Rep. 1284; Wash *v.* Cary, 33 S. W. 728, 17 Ky. L. Rep. 1066.

Maine.— Merrow *v.* Goodrich, 92 Me. 393, 42 Atl. 797, 69 Am. St. Rep. 512.

or otherwise affecting his principal's rights or liabilities,[48] or to discuss the propriety of his conduct even in relation to the subject-matter of the agency.[49] On these grounds, rather than that of irrelevancy, rests the broad general rule that an agent's narrative of a past transaction does not affect the principal,[50] although

Michigan.— Maxson *v.* Michigan Cent. R. Co., 117 Mich. 218, 75 N. W. 459.

Mississippi.— Memphis, etc., R. Co. *v.* Cock, 64 Miss. 713, 2 So. 495.

New York.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Pearson, 64 Hun 638, 19 N. Y. Suppl. 485; Isles *v.* Tucker, 5 Duer 393; Timm *v.* J. G. Rose Co., 21 Misc. 337, 47 N. Y. St. 150; Hubbard *v.* Elmer, 7 Wend. 446, 22 Am. Dec. 590.

Wisconsin.— Stone *v.* Northwestern Sleigh Co., 70 Wis. 585, 36 N. W. 248; McIndoe *v.* Clarke, 57 Wis. 165, 15 N. W. 17.

England.— Fairlie *v.* Hastings, 10 Ves. Jr. 123, 32 Eng. Reprint 791.

The length of time which has elapsed between the transaction and the statement concerning it is not material. It is sufficient if the transaction is over. Ezell *v.* Giles County Justices, 3 Head (Tenn.) 583.

48. *Idaho.*— Holt *v.* Spokane, etc., R. Co., 3 Ida. 703, 35 Pac. 39.

Kansas.— Dodge *v.* Childs, 38 Kan. 526, 16 Pac. 815.

Maryland.— Burt *v.* Gwinn, 4 Harr. & J. 507.

Montana.— Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991.

New York.— Shaver *v.* New York, etc., Transp. Co., 31 Hun 55.

49. Koch *v.* Godshaw, 12 Bush (Ky.) 318.

50. *Alabama.*— Louisville, etc., R. Co. *v.* Carl, 91 Ala. 271, 9 So. 334.

Arkansas.— St. Louis, etc., R. Co. *v.* Sweet, 57 Ark. 287, 21 S. W. 587; Byers *v.* Fowler, 14 Ark. 86.

California.— Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687; Mutter *v.* X. L. Lime Co., (1895) 42 Pac. 1068; Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Birch *v.* Hale, 99 Cal. 299, 33 Pac. 1088.

Colorado.— Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179.

Dakota.— Canton First Nat. Bank *v.* North, 6 Dak. 136, 41 N. W. 736, 50 N. W. 621.

Georgia.— Hematite Min. Co. *v.* East Tennessee, etc., R. Co., 92 Ga. 268, 18 S. E. 24; Claflin *v.* Ballance, 91 Ga. 411, 18 S. E. 309; Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169; Sweet Water Mfg. Co. *v.* Glover, 29 Ga. 399; Heard *v.* McKee, 26 Ga. 332.

Idaho.— Holt *v.* Spokane, etc., R. Co., 3 Ida. 703, 35 Pac. 39.

Illinois.— Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215; Michigan Cent. R. Co. *v.* Gougar, 55 Ill. 503; Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Chicago City R. Co. *v.* McMeen, 70 Ill. App. 220; Fisher *v.* Nubian Iron Enamel Co., 60 Ill. App. 568; Chicago, etc., R. Co. *v.* Ashling, 34 Ill. App. 99.

Indiana.— Pittsburgh, etc., R. Co. *v.* Theobald, 51 Ind. 246; Vandivere *v.* Dollins, 49 Ind. 216.

Iowa.— Dubuque First Nat. Bank *v.* Booth, 102 Iowa 333, 71 N. W. 238; Yordy *v.* Marshall County, 86 Iowa 340, 53 N. W. 298; Esterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846; Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 33 N. W. 629.

Kansas.— Dodge *v.* Childs, 38 Kan. 526, 16 Pac. 815; Union Pac. R. Co. *v.* Fray, 35 Kan. 700, 12 Pac. 98; Acme Harvester Co. *v.* Madden, 4 Kan. App. 598, 46 Pac. 319.

Kentucky.— East Tennessee Telephone Co. *v.* Simms, 99 Ky. 404, 36 S. W. 171, 38 S. W. 131, 18 Ky. L. Rep. 761; Parker *v.* Cumberland Telephone, etc., Co., 77 S. W. 1109, 25 Ky. L. Rep. 1391; Louisville, etc., R. Co. *v.* Lawson, 9 Ky. L. Rep. 681; Ray *v.* Grove, 7 Ky. L. Rep. 668; McCormick Harvesting Mach. Co. *v.* Ripley, 6 Ky. L. Rep. 658; Louisville Gas Co. *v.* Gutenkuntz, 6 Ky. L. Rep. 444; Hanks *v.* Louisville, etc., Mail Line Co., 6 Ky. L. Rep. 293; Black *v.* Marion Co., 5 Ky. L. Rep. 929; Murphy *v.* May, 9 Bush 33; Clay *v.* Swett, 4 Bibb 255.

Maine.— Lime Rock Bank *v.* Hewett, 52 Me. 531; Franklin Bank *v.* Cooper, 39 Me. 542; Franklin Bank *v.* Steward, 37 Me. 519.

Maryland.— Phelps *v.* George's Creek, etc., R. Co., 60 Md. 536.

Massachusetts.— Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508; Porter *v.* Newton, 133 Mass. 56; Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Kline *v.* Baker, 106 Mass. 61; Burgess *v.* Wareham, 7 Gray 345; Corbin *v.* Adams, 6 Cush. 93; Stiles *v.* Western R. Corp., 8 Metc. 44, 12 Am. Dec. 486; Lawrence *v.* Kimball, 1 Metc. 524.

Michigan.— Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3; Horner *v.* Fellows, 1 Dougl. 51; Benedict *v.* Denton, Walk. 336.

Minnesota.— Jackson *v.* Mutual Ben. L. Ins. Co., 79 Minn. 43, 81 N. W. 545, 82 N. W. 366; Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575; Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63.

Mississippi.— Forsee *v.* Alabama, etc., R. Co., 63 Miss. 66, 56 Am. Rep. 801.

Missouri.— Rice *v.* St. Louis, 165 Mo. 636, 65 S. W. 1002; Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; McDermott *v.* Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526; King *v.* Phœnix Ins. Co., 101 Mo. App. 163, 76 S. W. 55; Huber Mfg. Co. *v.* Hunter, 78 Mo. App. 82; National Bank of Commerce *v.* Fitze, 76 Mo. App. 356; Holten *v.* Kansas City, etc., R. Co., 61 Mo. App. 204; Rider *v.* Wabash, etc., R. Co., 14 Mo. App. 529.

Montana.— Hogan *v.* Kelly, (1904) 75 Pac. 81; Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991; Ryan *v.* Gilmer, 2 Mont. 517, 25 Am. Rep. 744.

New Hampshire.— Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Grafton Bank *v.* Woodward, 5 N. H. 301.

made in writing or from memoranda taken while the transaction was proceeding[51] or as a witness in court.[52]

(v) *Statements Made Before Employment or After Its Termination.* A statement made by a person prior to his employment[53] or after its termination,[54]

New Jersey.— Callaway *v.* Equitable Trust Co., 67 N. J. L. 44, 50 Atl. 900; Bordentown, etc., Steamboat Co. *v.* Flanagan, 41 N. J. L. 115; Runk *v.* Ten Eyck, 24 N. J. L. 756; West Jersey Traction Co. *v.* Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49.

New York.— Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751; Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710; Browning *v.* Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13; Lyons First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181 [*reversing* 48 How. Pr. 148]; Anderson *v.* Rome, etc., R. Co., 54 N. Y. 334; Herrmann *v.* Sarles, 42 N. Y. App. Div. 268, 58 N. Y. St. 1017; Kelly *v.* Morehouse, 25 N. Y. App. Div. 359, 49 N. Y. Suppl. 552; Niles Tool Works Co. *v.* Reynolds, 4 N. Y. App. Div. 24, 38 N. Y. Suppl. 1028; Stone *v.* Poland, 58 Hun 21, 11 N. Y. Suppl. 498; Vassar *v.* Knickerbocker Ice Co., 60 N. Y. Super. Ct. 113, 17 N. Y. Suppl. 182; Stevens *v.* Siegel-Cooper Co., 32 Misc. (N. Y.) 250, 65 N. Y. Suppl. 665; Jones *v.* Eaton, 10 N. Y. St. 740.

North Carolina.— Rumbough *v.* Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

Ohio.— Root *v.* Monroeville, 16 Ohio Cir. Ct. 617, 4 Ohio Cir. Dec. 53; Circleville *v.* Thorne, 1 Ohio Cir. Ct. 359, 1 Ohio Cir. Dec. 200.

Pennsylvania.— Giberson *v.* Patterson Mills Co., 174 Pa. St. 369, 34 Atl. 563, 52 Am. St. Rep. 823; Chapin *v.* Cambria Iron Co., 145 Pa. St. 478, 22 Atl. 1041; Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. Rep. 895; American Steamship Co. *v.* Landreth, 102 Pa. St. 131, 48 Am. Rep. 196; Huntingdon, etc., Coal Co. *v.* Decker, 82 Pa. St. 119; Bigley *v.* Williams, 80 Pa. St. 107; Pennsylvania R. Co. *v.* Titusville, etc., Plank Road Co., 71 Pa. St. 350; Fawcett *v.* Bigley, 59 Pa. St. 411; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229; Northern Liberties Bank *v.* Davis, 6 Watts & S. 285.

South Carolina.— Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353; Patterson *v.* South Carolina R. Co., 4 Rich. 153.

South Dakota.— Estey *v.* Birnbaum, 9 S. D. 174, 68 N. W. 290; Wendt *v.* Chicago, etc., R. Co., 4 S. D. 476, 57 N. W. 226.

Tennessee.—Richardson *v.* Cato, 10 Humphr. 138.

Texas.— Southwestern Tel. Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686; Wright *v.* Daily, 26 Tex. 730; Lake Como Land, etc., Co. *v.* Coughlin, 9 Tex. Civ. App. 340, 29 S. W. 185.

Virginia.— Rausch *v.* Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358; Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. 328.

Washington.— Weideman *v.* Tacoma R., etc., Co., 7 Wash. 517, 35 Pac. 414.

West Virginia.— Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94.

Wisconsin.— Hazleton *v.* Union Bank, 32 Wis. 34; Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388. And see Hupfer *v.* National Distilling Co., 119 Wis. 417, 96 N. W. 809.

United States.— Goetz *v.* Kansas City Bank, 119 U. S. 551, 7 S. Ct. 318, 30 L. ed. 515; Northwestern Union Packet Co. *v.* Clough, 20 Wall. 528, 22 L. ed. 406; U. S. *v.* The Burdette, 9 Pet. 682, 9 L. ed. 273; St. Louis, etc., R. Co. *v.* McLelland, 62 Fed. 116, 10 C. C. A. 300; Dentz *v.* The Fanwood, 61 Fed. 523; Maltby *v.* The R. R. Kirkland, 48 Fed. 760.

England.— Great Western R. Co. *v.* Willis, 18 C. B. N. S. 748, 34 L. J. C. P. 195, 12 L. T. Rep. N. S. 349, 114 E. C. L. 748.

Canada.— Shaw *v.* De Salaberry Nav. Co., 18 U. C. Q. B. 541.

See 20 Cent. Dig. tit. "Evidence," § 910. And see the cases cited *supra*, IV, D, 4, a, (III); *infra*, IV, D, 4, f, (II), (E).

The agent's admissions of what he himself has said are not competent. Tillotson *v.* McCrillis, 11 Vt. 477.

Length of time.— If the occurrence was past, it is not important that it was not long past at the time of making the statement. Rogers *v.* McCune, 19 Mo. 557.

51. Morris *v.* Brooklyn Heights R. Co., 20 N. Y. App. Div. 557, 47 N. Y. Suppl. 242.

52. Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196; Salley *v.* Manchester, etc., R. Co., 62 S. C. 127, 40 S. E. 111; Bernheim *v.* Cumby, 1 Tex. App. Civ. Cas. § 586.

53. Moffit *v.* Witherspoon, 32 N. C. 185; Portland First Nat. Bank *v.* Linn County Nat. Bank, 30 Oreg. 296, 47 Pac. 614; Clark *v.* Baker, 2 Whart. (Pa.) 340.

A corporation is not affected by statements made before its organization by persons who subsequently become officers competent to make such statements. Fogg *v.* Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662; Matter of Kip, 1 Paige (N. Y.) 601.

54. *Arkansas.*— Levy *v.* Mitchell, 6 Ark. 138.

California.— Clunie *v.* Sacramento Lumber Co., 67 Cal. 313, 7 Pac. 708.

Colorado.— Anthony *v.* Estabrook, 1 Colo. 75, 91 Am. Dec. 702; Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179.

Georgia.— Atlanta Sav. Bank *v.* Spencer, 107 Ga. 629, 33 S. E. 878; Harris *v.* Collins, 75 Ga. 97.

Illinois.— Wallace *v.* Goold, 91 Ill. 15; Thomas *v.* Rutledge, 67 Ill. 213; School Dist. No. 2 *v.* Wallace, 9 Ill. App. 312.

Indiana.— Dickinson *v.* Colter, 45 Ind. 445.

Kansas.— Greer *v.* Higgins, 8 Kan. 519.

either by limitation or revocation,[55] cannot affect the party who will be or has been his principal.

(VI) *INDEPENDENT RELEVANCY.* Statements of an agent may be competent because they are relevant facts which either alone or with other facts constitute the transaction itself.[56] To be a constituent in the transaction it is not only necessary that the declaration be relevant to the issue, but it must have been made within the scope of the agency[57] or ratified by the principal.[58] When these

Kentucky.— Meredith *v.* Kennedy, Litt. Sel. Cas. 516.

Louisiana.—Reynolds *v.* Rowley, 2 La. Ann. 890; Reynolds *v.* Rowley, 3 Rob. 201, 38 Am. Dec. 233.

Maine.— Smith *v.* Bodfish, 39 Me. 136; Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Michigan.— North *v.* Metz, 57 Mich. 612, 24 N. W. 759; Ruggles *v.* Fay, 31 Mich. 141.

Mississippi.— Skipwith *v.* Robinson, 24 Miss. 688.

Missouri.— Pomeroy *v.* Fullerton, 131 Mo. 581, 33 S. W. 173; Walden *v.* Bolton, 55 Mo. 405; Caldwell *v.* Garner, 31 Mo. 131.

New Jersey.— Janeway *v.* Skerritt, 30 N. J. L. 97.

New York.— Ditmars *v.* Sackett, 81 Hun 317, 30 N. Y. Suppl. 721; Howard *v.* Norton, 65 Barb. 161; Card *v.* New York, etc., R. Co., 50 Barb. 39; Budlong *v.* Van Nostrand, 24 Barb. 25; Vail *v.* Judson, 4 E. D. Smith 165; Moore *v.* Rankin, 33 Misc. 749, 67 N. Y. Suppl. 179.

North Carolina.— Craven *v.* Russell, 118 N. C. 564, 24 S. E. 361; Williams *v.* Williamson, 28 N. C. 281, 45 Am. Dec. 494.

Oregon.— Adkins *v.* Monmouth, 41 Oreg. 266, 68 Pac. 737.

Pennsylvania.— Shaw *v.* Susquehanna Boom Co., 125 Pa. St. 324, 17 Atl. 426; Northwestern Mut. L. Ins. Co. *v.* Roth, 87 Pa. St. 409; Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. 179; Turnbull *v.* O'Hara, 4 Yeates 446.

South Carolina.— Raiford *v.* French, 11 Rich. 367.

Texas.— Bigham *v.* Carr, 21 Tex. 142; McAlpin *v.* Cassidy, 17 Tex. 449.

Vermont.— Stiles *v.* Danville, 42 Vt. 282; Braley *v.* French, 28 Vt. 546.

Virginia.— Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

Washington.—American Copper, etc., Works *v.* Galland-Burke Brewing, etc., Co., 30 Wash. 178, 70 Pac. 236.

United States.—Kenah *v.* The John Markee, Jr., 3 Fed. 45; Blight *v.* Ashley, 3 Fed. Cas. No. 1,541, Pet. C. C. 15.

Canada.— Pinsonnault *v.* Desjardins, 24 L. C. Jur. 100; Knox *v.* Bowin, 4 Quebec Super. Ct. 311.

See 20 Cent. Dig. tit. "Evidence," § 915.

The death of the agent does not render competent a statement made after the termination of his agency. Reynolds *v.* Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233.

55. Lewis *v.* Metcalf, 53 Kan. 219, 36 Pac. 346; Loving Co. *v.* Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095; Small *v.* McGovern, 117 Wis. 608, 94 N. W. 651.

56. *Alabama.*— Clark *v.* Taylor, 68 Ala. 453; Jemison *v.* Minor, 34 Ala. 33; Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498.

Connecticut.— Toll Bridge Co. *v.* Betsworth, 30 Conn. 380; Mather *v.* Phelps, 2 Root 150, 1 Am. Dec. 65.

Delaware.— Randel *v.* Chesapeake, etc., Canal, 1 Harr. 233.

Georgia.— Southern R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15.

Illinois.— Ohio, etc., R. Co. *v.* Porter, 92 Ill. 437; Brush *v.* Blanchard, 19 Ill. 31; Citizens' Gaslight, etc., Co. *v.* Granger, 19 Ill. App. 201; Lincoln Coal Min. Co. *v.* McNally, 15 Ill. App. 181.

Indiana.— U. S. Express Co. *v.* Rawson, 106 Ind. 215, 6 N. E. 337.

Kansas.— Water Power Co. *v.* Brown, 23 Kan. 676; Central Branch Union Pac. R. Co. *v.* Butman, 22 Kan. 639.

Michigan.— Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

New York.— Murray *v.* Sweasy, 69 N. Y. App. Div. 45, 74 N. Y. Suppl. 543; Taylor *v.* New York Cent., etc., R. Co., 63 N. Y. App. Div. 586, 71 N. Y. Suppl. 884; Matteson *v.* New York Cent. R. Co., 62 Barb. 364.

North Carolina.— Gilmer *v.* McNairy, 69 N. C. 335.

Ohio.— Tillyer *v.* Van Cleve Glass Co., 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209; Mills *v.* Grasselli, 4 Ohio Dec. (Reprint) 161, 1 Clev. L. Rep. 82.

Oregon.— Jester *v.* Lipman, 40 Oreg. 408, 67 Pac. 102.

Pennsylvania.— Sharpless *v.* Dobbins, 1 Del. Co. 25.

South Carolina.— Park *v.* Hopkins, 2 Bailey 408.

South Dakota.— Auby *v.* Rathbun, 11 S. D. 474, 78 N. W. 952.

Utah.— Wilson *v.* Southern Pac. Co., 13 Utah 352, 44 Pac. 1040, 57 Am. St. Rep. 766.

United States.— New Jersey Steam-Boat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049; Maryland Fidelity, etc., Co. *v.* Courtney, 103 Fed. 599, 43 C. C. A. 331; St. Louis, etc., R. Co. *v.* Greenthal, 77 Fed. 150, 23 C. C. A. 100; Tuthill Spring Co. *v.* Shaver Wagon Co., 35 Fed. 644.

England.— Marshall *v.* Cliff, 4 Campb. 133.

57. Capital F. Ins. Co. *v.* Watson, 76 Minn. 387, 79 N. W. 601, 77 Am. St. Rep. 657.

58. Chattanooga, etc., R. Co. *v.* Davis, 89 Ga. 708, 15 S. E. 626; Paul *v.* Berry, 78 Ill. 158; Livingston Middleditch Co. *v.* New York Dentistry College, 31 Misc. (N. Y.) 259, 64 N. Y. Suppl. 140, 7 N. Y. Annot. Cas. 398; Burke *v.* Hoover, 3 Penr. & W. (Pa.) 292.

requirements are fulfilled the agent's declarations are relevant facts, and are admissible in evidence as against the principal. Where for example an agent accepts,[59] claims,[60] disclaims,[61] ratifies,[62] or waives[63] something for his principal; acts as interpreter,[64] or makes a contract,[65] offer of settlement,[66] or ouster,[67] for him his statements may be the facts which constitute the legal result. Relevant statements of an agent may also tend to establish circumstantially the existence of material facts, such as abuse of confidence,[68] assent,[69] basis on which a transaction is conducted,[70] fraud,[71] impeachment,[72] inconsistent conduct,[73] knowledge,[74] or

59. Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181.

60. *California.*— Wormouth *v.* Johnson, 58 Cal. 621; Green *v.* Ophir Copper, etc., Min. Co., 45 Cal. 522.

Iowa.— Deere *v.* Wolf, 77 Iowa 115, 41 N. W. 588; Claussen *v.* La Franz, 1 Iowa 226.

Kentucky.— Cook *v.* Burton, 5 Bush 64; Pullins *v.* Pullins, 62 S. W. 865, 23 Ky. L. Rep. 333.

Massachusetts.— Barker *v.* Mackay, 175 Mass. 485, 56 N. E. 614.

Michigan.—Haynes *v.* Leppig, 40 Mich. 602.

Missouri.— Greene *v.* Chickering, 10 Mo. 109; Updyke *v.* Wheeler, 37 Mo. App. 680.

New York.— Smith *v.* Sergent, 4 Thomps. & C. 684.

North Dakota.— O. S. Paulson Mercantile Co. *v.* Seaver, 8 N. D. 215, 77 N. W. 1001.

Texas.— Gilmour *v.* Heinze, 85 Tex. 76, 19 S. W. 1075; Hurley *v.* Lockett, 72 Tex. 262, 12 S. W. 212.

Utah.— Burton *v.* Winsor Utah Silver Min. Co., 2 Utah 240.

61. Pearson *v.* Adams, 129 Ala. 157, 29 So. 977; Richards *v.* Murphy, 1 Whart. (Pa.) 185.

62. U. S. *v.* Conklin, 1 Wall. (U. S.) 644, 17 L. ed. 714.

63. Zielke *v.* London Assur. Corp., 64 Wis. 442, 25 N. W. 436.

64. Miller *v.* Lathrop, 50 Minn. 91, 52 N. W. 274; Schutter *v.* Williams, 1 Ohio Dec. (Reprint) 47, 1 West. L. J. 319; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

65. *Illinois.*— Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43.

Indiana.— Blessing *v.* Dodds, 53 Ind. 95; Miller *v.* Palmer, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107.

New York.— Steinbach *v.* Prudential Ins. Co., 62 N. Y. App. Div. 133, 70 N. Y. Suppl. 809.

Pennsylvania.— Reynolds *v.* Gilman, 4 L. T. N. S. 41.

Texas.— James *v.* King, 2 Tex. App. Civ. Cas. § 544.

England.— Betham *v.* Benson, Gow. 45, 5 E. C. L. 862; Fairlie *v.* Hastings, 10 Ves. Jr. 123, 32 Eng. Reprint 791.

66. Gray *v.* Rollinsford, 58 N. H. 253.

67. Morgan *v.* Short, 13 Misc. (N. Y.) 279, 34 N. Y. Suppl. 10.

68. Jones *v.* Jones, 120 N. Y. 589, 24 N. E. 1016.

69. Wood *v.* Connell, 2 Whart. (Pa.) 542.

70. *Alabama.*— Berry *v.* Hardman, 12 Ala. 604.

California.— Lewis *v.* Burns, 106 Cal. 381, 39 Pac. 778.

Illinois.— Gilson *v.* Wood, 20 Ill. 37.

Iowa.— Marion *v.* Chicago, etc., R. Co., 64 Iowa 568, 21 N. W. 86, 66 Iowa 585, 24 N. W. 39.

Minnesota.— O'Brien *v.* Northwestern Improvement, etc., Co., 82 Minn. 136, 84 N. W. 735.

New York.— Kelly *v.* Campbell, 2 Abb. Dec. 492, 1 Keyes 29.

Limited competency.— Such declarations are not necessarily competent to show the truth of the facts asserted. Marion *v.* Chicago, etc., R. Co., 64 Iowa 568, 21 N. W. 86; Hollingsworth *v.* Buchanan, 1 Phila. (Pa.) 556.

71. Northrup *v.* Sullivan, 47 La. Ann. 715, 17 So. 259; U. S. Home, etc., Assoc. *v.* Kirk, 8 Ohio Dec. (Reprint) 592, 9 Cinc. L. Bul. 48; Detwiler *v.* Graham, 17 Phila. (Pa.) 300; Meinhard *v.* Youngblood, 41 S. C. 312, 19 S. E. 675.

72. White *v.* Portland, 63 Conn. 18, 26 Atl. 342; Stillwell *v.* New York Cent. R. Co., 34 N. Y. 29; Stenhouse *v.* Charlotte, etc., R. Co., 70 N. C. 542. The statements are equally competent, although narratives of past events. Pettibone *v.* Lake View Town Co., 134 Cal. 227, 66 Pac. 218; Stenhouse *v.* Charlotte, etc., R. Co., 70 N. C. 542.

73. Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594. Expressions of satisfaction by an agent made at a time when, as he subsequently says, he was dissatisfied, are relevant facts. Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594.

74. *Colorado.*— Denver *v.* Cochran, 17 Colo. App. 72, 67 Pac. 23; Kindel *v.* Hall, 8 Colo. App. 63, 44 Pac. 781.

Illinois.— Mt. Morris *v.* Kanode, 98 Ill. App. 373; Chicago *v.* Waukesha Imperial Spring Brewing Co., 97 Ill. App. 583.

Indiana.— Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480.

Iowa.— Garretson *v.* Merchants', etc., Ins. Co., 92 Iowa 293, 60 N. W. 540.

Maryland.—Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

New York.— Chapman *v.* Erie R. Co., 55 N. Y. 579; Vandewater *v.* Wappinger, 69 N. Y. App. Div. 325, 74 N. Y. Suppl. 699.

Ohio.— Youngstown *v.* Moore, 30 Ohio St. 133.

Pennsylvania.— Vankirk *v.* Pennsylvania R. Co., 76 Pa. St. 66, 18 Am. Rep. 404; Harrisburg Bank *v.* Tyler, 3 Watts & S. 373; Steele *v.* Thompson, 3 Penr. & W. 34.

notice[75] or relevant[76] mental states, such as anger,[77] intent,[78] intention,[79] malice,[80] motive,[81] understanding,[82] or willingness.[83] Statements to one party by an agent of the other may be admissible on behalf of the former to prove that he made a particular claim at the time.[84]

b. General and Special Agency — (i) *In General.* A general agent's power to affect the principal by his statements is not impaired by undisclosed instructions or other limitations unknown to the person with whom the agent is dealing, nor by the fact that the principal is ignorant of his acts.[85] The scope of such an agency is extended where the principal is at a distance or out of the country.[86] The authority of a special agent is more restricted. Where authority has been delegated for a particular work, the statements of the agent to be competent must be within its precise scope and must be made while discharging its duties.[87] Declarations of general as well as of special agents are subject to the rule said to exclude declarations which are not part of the *res gestæ* as those which are mere narrative statements.[88]

Vermont.— McAulay *v.* Western Vermont R. Co., 33 Vt. 311, 78 Am. Dec. 627.

75. St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; South Omaha *v.* Wrzensinski, (Nebr. 1902) 92 N. W. 1045; Pritchett *v.* Sessions, 10 Rich. (S. C.) 293; Nelson *v.* Killingsley First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425.

Time of making statement.—The statement may be admissible, although not made in the course of transacting business for the principal (Garretson *v.* Merchants', etc., Ins. Co., 92 Iowa 293, 60 N. W. 540), and may be made before the occurrence (International, etc., R. Co. *v.* Telephone, etc., Co., 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45) or after it (Keough *v.* Scott County, 28 Iowa 337).

76. Evans *v.* Boyle, 94 Iowa 753, 64 N. W. 619.

77. New Jersey Steam-Boat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049.

78. *California.*— Brennen *v.* Wallace, 25 Cal. 108.

Illinois.— Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

Iowa.— Wilson *v.* Dunreath Red Stone Quarry Co., 77 Iowa 429, 42 N. W. 360, 14 Am. St. Rep. 304.

Kansas.— Taylor *v.* Deverell, 43 Kan. 469, 23 Pac. 628.

Louisiana.— Smalley *v.* Lawrence, 9 Rob. 210.

Michigan.— Wright *v.* Towle, 67 Mich. 255, 34 N. W. 578.

New Jersey.— Halsey *v.* Lehigh Valley R. Co., 45 N. J. L. 26.

New York.— Jones *v.* Jones, 120 N. Y. 589, 24 N. E. 1016; Milbank *v.* De Riesthal, 82 Hun 587, 31 N. Y. Suppl. 522.

Pennsylvania.— Dicken *v.* Winters, 169 Pa. St. 126, 32 Atl. 289; Dodge *v.* Bache, 57 Pa. St. 421; Hackman *v.* Flory, 16 Pa. St. 196.

South Carolina.— Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80; Lark *v.* Cunningham, 7 Rich. 57.

After transaction.— The declarations being relevant facts are competent, although made after the transaction if not too remote. Persse, etc., Paper Works *v.* Willett, 1 Rob. (N. Y.) 131.

79. Ball *v.* Bennett, 21 Ind. 427, 83 Am. Dec. 356.

80. International, etc., R. Co. *v.* Telephone, etc., Co., 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45.

81. Strohmeyer *v.* Zeppenfeld, 28 Mo. App. 268; Blight *v.* Ashley, 3 Fed. Cas. No. 1,541, Pet. C. C. 15.

82. Georgia R. Co. *v.* Smith, 76 Ga. 634.

83. Logan *v.* Berkshire Apartment House, 3 Misc. (N. Y.) 296, 22 N. Y. Suppl. 776.

84. Chicago, etc., R. Co. *v.* Beal, (Nebr. 1903) 94 N. W. 956.

85. Carney *v.* Hennessey, 74 Conn. 107, 49 Atl. 910, 92 Am. St. Rep. 199, 53 L. R. A. 699. And see Principal and Agent.

86. Rothschild *v.* Schuberth, 8 Bosw. (N. Y.) 289.

87. *Alabama.*— Bynum *v.* Southern Pump, etc., Co., 63 Ala. 462; Raisler *v.* Springer, 38 Ala. 703, 82 Am. Dec. 736.

Georgia.— Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224.

Indiana.— Krohn *v.* Anderson, 29 Ind. App. 379, 64 N. E. 621.

Iowa.— Lucas *v.* Barrett, 1 Greene 510.

Massachusetts.—Rowe *v.* Canney, 139 Mass. 41, 29 N. E. 219, holding that in a suit for breach of promise a conversation between defendant and a person by whom plaintiff sent a message to defendant is not admissible, as the messenger's agency is limited to the delivery of the message.

Mississippi.— Skipwith *v.* Robinson, 24 Miss. 688.

Nebraska.— Cleveland Coöperative Stove Co. *v.* Hovey, 26 Nebr. 624, 42 N. W. 707.

New Hampshire.— Demeritt *v.* Meserve, 39 N. H. 521; Cummings *v.* Putnam, 19 N. H. 569.

Ohio.— Berdan *v.* J. M. Bour Co., 10 Ohio Cir. Ct. 127, 6 Ohio Cir. Dec. 154.

Texas.— Hinson *v.* Walker, 65 Tex. 103.

Wyoming.— Kinney *v.* Rock Springs First Nat. Bank, 10 Wyo. 115, 67 Pac. 471, 98 Am. St. Rep. 972.

See 20 Cent. Dig. tit. "Evidence," § 894. And see, generally, Principal and Agent.

88. Butters Salt, etc., Co. *v.* Vogel, (Mich. 1904) 97 N. W. 757. See also *supra*, IV, D, 4, a, (III), (IV).

(II) *SUBAGENTS.* While as a general rule a delegated authority cannot without the assent of the principal be itself delegated,[89] statements of relevant facts by a subagent employed by the agent within the reasonable scope of his agency may bind the principal.[90]

(III) *PARTICULAR OCCUPATIONS*—(A) *In General.* The scope of agency between persons standing in definite business relations varies under the general rules above stated with the substantive law or mercantile usages applying to the particular relation, and eludes more precise statement. Admissibility of declarations of agents and employees has been considered in various connections,—for example in relation to building trades, involving the authority of architects[91] and building contractors;[92] mechanical occupations,[93] touching statements by foremen,[94] chief engineers,[95] or superintendents;[96] mercantile affairs[97] covering relations between a principal and bookkeepers,[98] general managers,[99] collection

89. See, generally, PRINCIPAL AND AGENT.

90. Bowman *v.* Lickey, 86 Mo. App. 47. See also Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479. See also Turner *v.* Phœnix Ins. Co., 55 Mich. 236, 21 N. W. 326.

91. Within the scope of a particular employment (Ahern *v.* Boyce, 26 Mo. App. 558) an architect may make declarations which affect the owner (Hudspeth *v.* Allen, 26 Ind. 165; Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479; Wright *v.* Reusens, 60 Hun (N. Y.) 585, 15 N. Y. Suppl. 504, 590 [*affirmed* in 133 N. Y. 298, 31 N. E. 215]).

92. Building contractors on the contrary are not agents for the owners. Happy *v.* Mosher, 48 N. Y. 313. Their statements, however, may be competent, not as admissions, but because they are in themselves relevant; for example, to show receipt of material, services, etc. Trensch *v.* Shryock, 51 Md. 162; Forbes *v.* Willamette Falls Electric Co., 19 Oreg. 61, 23 Pac. 670, 20 Am. St. Rep. 793; Dickinson College *v.* Church, 1 Watts & S. (Pa.) 462. If not relevant such a statement will necessarily be excluded. Philibert *v.* Schmidt, 57 Mo. 211; Schulenburg *v.* Hawley, 6 Mo. App. 34.

93. Admissible statements by employees in manufacturing and other mechanical occupations do not include declarations as to the condition of the works, ways, or machinery of the establishment. McCarthy *v.* Muir, 50 Ill. App. 510; Hall *v.* Murdock, 119 Mich. 389, 78 N. W. 329; McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641; Ballard *v.* Hitchcock Mfg. Co., 15 N. Y. Suppl. 405. Workmen do not affect the employer by statements as to matters with which their employment gives them no concern, such as the merits of the article (Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014) or the condition of the property with which they are dealing (Bedell *v.* The Steamship Potomac, 8 Wall. (U. S.) 590, 19 L. ed. 511; Maury *v.* Talmadge, 16 Fed. Cas. No. 9,315, 2 McLean 157).

94. Foremen are *prima facie* not concerned with the quality of the articles on which work is done. Page *v.* Parker. 40 N. H. 47.

95. Hupfer *v.* National Distilling Co., 119 Wis. 417, 96 N. W. 809, chief engineer at distillery.

96. Statements of agents intrusted with the general oversight of manufacturing establishments, who have been commissioned to discharge the duty of the principal to provide safe and convenient tools and appliances for carrying on the work affect the principal. Black *v.* Des Moines Mfg, etc., Co., (Iowa 1898) 77 N. W. 504; Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572. But declarations not made in the course of discharging these duties are incompetent. Beasley *v.* San Jose Fruit-Packing Co., 92 Cal. 388, 28 Pac. 485. Mere superintendency of a number of men, as by a "pit boss" (Smith *v.* Little Pittsburg Coal Co., 75 Mo. App. 177) or "underground captain" (Andrews *v.* Tamarack Min. Co., 114 Mich. 375, 72 N. W. 242) does not establish a relation of general agency.

97. Employees in general affect a principal by relevant statements only when acting on the specific duty with which they have been charged. A hostler for example may speak regarding the horses which he is working upon (McPherrin *v.* Jennings, 66 Iowa 622, 24 N. W. 242); a hotel clerk may declare regarding the deposit of valuables at his hotel (Weeks *v.* Barron, 38 Vt. 420); but a porter is not concerned with the condition of the water-pipes, even of the house in which he is employed (Cleveland Coöperative Stove Co. *v.* Wheeler, 14 Ill. App. 112); and a bartender for an innkeeper has no connection with the valuable packages intrusted to his employer (Mateer *v.* Brown, 1 Cal. 221, 52 Am. Dec. 303), or with his employer's title to the liquors he is himself handling (Charter *v.* Lane, 62 Conn. 121, 25 Atl. 464).

Declarations of the driver of a team as to the cause of a collision will be competent against the owner. Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185. But admissions by a teamster as to the condition of goods received by him for his employer are not competent against the latter. Sibley Warehouse, etc., Co. *v.* Durand, etc., Co., 200 Ill. 354, 65 N. E. 676 [*affirming* 102 Ill. App. 406].

98. Bookkeepers are presumably entitled to give receipts stating on what account property was received (Myers *v.* Brice, 2 Pennyp. (Pa.) 382), or to state whether a principal's books were correctly kept (Ellis *v.* Garvey, 76 Tex. 371, 13 S. W. 320).

99. General managers have authority to make statements as to the ordering of goods (Henderson Woolen Mills *v.* Edwards, 84 Mo. App. 448), as to the condition of goods sold

agents,[1] agents for buying, letting, or selling property,[2] or bailees;[3] agency for the care and management of property;[4] nautical employments,[5] involving the relation between owners and captains,[6] pilots,[7] crew,[8] or clerical assistants.[9] It

(Standefer *v.* Aultman, etc., Machinery Co., (Tex. Civ. App. 1904) 78 S. W. 552); the employment of men (Western Union Beef Co. *v.* Kirchevalle, (Tex. Civ. App. 1894) 26 S. W. 147), or the care and management of the property under their control (St. Louis Nat. Stock Yards *v.* Tiblier, 39 Ill. App. 422); but not as to the principal's title to the stock in trade (Winchester, etc., Mfg. Co. *v.* Creary, 116 U. S. 161, 6 S. Ct. 369, 29 L. ed. 591); and in no event are their declarations competent when made apart from the transaction of business of and for the principal (People's Nat. Bank *v.* Harper, 114 Ga. 603, 40 S. E. 717; Warner *v.* Warren, 46 N. Y. 228).

1. Receiving a claim for collection implies as a rule authority to make declarations concerning its payment (Cheney *v.* Beaty, 56 Ill. App. 90), but mere authority to receive money confers no right to make statements about it (Hyland *v.* Sherman, 2 E. D. Smith (N. Y.) 234).

2. Acts, verbal or otherwise, of an agent for buying, letting, or selling property affect the principal when done within the scope of the agency and while engaged in discharging its duties. Barnesville Mfg. Co. *v.* Love, 3 Pennew. (Del.) 569, 52 Atl. 267; Rahm *v.* Deig, 121 Ind. 283, 23 N. E. 141; Murray *v.* Weber, 92 Iowa 757, 60 N. W. 492; Gimbel *v.* Salomon, 54 Iowa 389, 6 N. W. 582; Lohdell *v.* Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Webster *v.* Clark, 30 N. H. 245; Standefer *v.* Aultman, etc., Machinery Co., (Tex. Civ. App. 1904) 78 S. W. 552 (agent of seller of machinery); Goddard *v.* Crefield Mills, 75 Fed. 818, 21 C. C. A. 530; Garth *v.* Howard, 8 Bing. 451, 21 E. C. L. 616, 5 C. & P. 346, 24 E. C. L. 599, 1 L. J. C. P. 129, 1 Moore & S. 628. But an agent is not concerned with the title which his employer has acquired to the goods he is employed to sell. Bowman *v.* Griffith, 35 Nebr. 361, 53 N. W. 140; Sharp *v.* Lamy, 37 N. Y. App. Div. 136, 55 N. Y. Suppl. 784; Pier *v.* Duff, 63 Pa. St. 59.

Common agent of buyer and seller.— A passbook kept by a teamster and collector who was the common agent of the buyer and sellers of milk, showing the amount of milk purchased, was held admissible in an action by the seller against one of the purchasers for the price of milk alleged to have been sold to him. Copeland *v.* Boston Dairy Co., 184 Mass. 207, 68 N. E. 218.

3. While mere possession of property does not constitute a relation of agency (Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837; Sheaffer *v.* Eakman, 56 Pa. St. 144; Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Mooring *v.* McBride, 62 Tex. 309), it is an important circumstance as to whether an agency exists and its general scope; and an owner will be assumed to have conferred upon his bailee all usual and customary powers necessary for the safety of the property (Morrison *v.* New York, etc., R. Co., 32 Barb. (N. Y.) 568), and its proper and profitable use (Corson *v.* Berson, 86 Cal. 433, 25 Pac. 7; Pierce *v.* State, 109 Ind. 535, 10 N. E. 302; Salvini *v.* Legumazabel, (Tex. Civ. App. 1902) 68 S. W. 183).

4. Peterson *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 (excluding admissions as to the condition of goods sold made by the superintendent of a prune ranch whose duties were to prepare the prunes for market and to manage the ranch generally, but who had neither actual nor ostensible authority with respect to sales); Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76 (holding that the declarations of an agent in possession of real property to manage and care for the same only are not admissible against the principal to disparage his title); Diehl *v.* Watson, 89 N. Y. App. Div. 445, 85 N. Y. Suppl. 851 (excluding declarations of the janitor of an apartment house to the effect that disagreeable odors, on account of which a constructive eviction was claimed, came from a particular source or cause).

5. Declarations of workmen employed for a specific purpose, such as storage of cargo, do not affect the principal. Mallory *v.* Perkins, 9 Bosw. (N. Y.) 572.

6. In maritime affairs the captain of a vessel is general agent for her owners, and his declarations are competent against them if made in the course of his employment. Gerke *v.* California Steam Nav. Co., 9 Cal. 251, 70 Am. Dec. 650 (damages caused by fire set by vessel); Price *v.* Thornton, 10 Mo. 135 (stealing slave); Western Ins. Co. *v.* Tobin, 32 Ohio St. 77; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Eads *v.* The H. D. Bacon, 8 Fed. Cas. No. 4,232, 1 Newb. Adm. 274. His declarations as to the payment of passage money (Holladay *v.* Littlepage, 2 Munf. (Va.) 316) and the handling (Price *v.* Powell, 3 N. Y. 322) and disposition (Burpee *v.* Carvill, 16 N. Brunsw. 141) of cargo are therefore within his authority. But the rule falls with the reason for it, and where a captain has chartered a vessel and is no longer sailing it as agent for the owners his declarations cease to affect them. Tucker *v.* Stimson, 12 Gray (Mass.) 487. Statements of facts not connected with the transaction of his business, such as who the owners are, do not come within his commission. Chambers *v.* Davis, 3 Whart. (Pa.) 40.

7. A pilot is not usually the agent of the owners. Ready *v.* The Highland Mary, 20 Mo. 264.

8. Statements of the crew do not affect the owners. Maltby *v.* The R. R. Kirkland, 48 Fed. 760.

9. Declarations by employees who have only specific clerical duties to perform cannot affect the principal. Ward's Cent., etc.,

has also been considered in relation to the service of legal process by sheriffs,[10] deputy sheriffs,[11] or constables.[12]

(B) *Insurance Business.*[13] In order to render the statement of an agent of an insurance company admissible against the company it must affirmatively appear to have been within the scope of his authority[14] at the time when it was made,[15] and that he made it while engaged on the business of the company.[16] The agency conferred by a particular employment is broad in proportion as the range of the duties assigned is general rather than specific — a rule best understood by its applications.[17] As between the assured under an insurance contract

Co. *v.* Elkins, 34 Mich. 439, 22 Am. Rep. 544.

10. Sheriffs employed for the service of civil as distinguished from criminal process may affect the person employing them within the scope of the employment by statements made in a reasonable discharge of the duties of the agency. Chrisman *v.* Carney, 33 Ark. 316; Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489. But it is not within the agency of a sheriff to characterize the *bona fides* of a sale conducted by him. Kean *v.* Newell, 2 Mo. 9.

11. Declarations of a deputy or under-sheriff affect the sheriff (Savage *v.* Balch, 8 Me. 27; Mantz *v.* Collins, 4 Harr. & M. (Md.) 65; Somervell *v.* Hunt, 3 Harr. & M. (Md.) 113; Tyler *v.* Ulmer, 12 Mass. 163; Terral *v.* McRae, 6 Sm. & M. (Miss.) 136; Mott *v.* Kip, 10 Johns. (N. Y.) 478; State *v.* Allen, 27 N. C. 36; Wheeler *v.* Hambright, 9 Serg. & R. (Pa.) 390; Lyman *v.* Lull, 20 Vt. 349), if made within the scope of the declarant's official duty and while engaged in discharging it (Grimshaw *v.* Paul, 76 Ill. 164; Barker *v.* Binninger, 14 N. Y. 270; Snowball *v.* Goodricke, 4 B. & Ad. 541, 2 L. J. K. B. 53, 1 N. & M. 234, 24 E. C. L. 238), and when the process is in force (Mott *v.* Kip, 10 Johns. (N. Y.) 478), and in the officer's hands, although service has already been made (Wheeler *v.* Hambright, 9 Serg. & R. (Pa.) 390).

12. A sheriff who intrusts a constable with the service of a writ is affected by the latter's declarations while serving it. Walker *v.* Howell, 1 Coldw. (Tenn.) 238. But a constable is not, simply by having process committed to him for service, authorized by his principal to tamper with witnesses. Green *v.* Woodbury, 48 Vt. 5.

13. See, generally, INSURANCE.

14. Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264.

15. Brown *v.* Dutchess County Mut. Ins. Co., 64 N. Y. App. Div. 9, 71 N. Y. Suppl. 670.

16. Dean *v.* Ætna L. Ins. Co., 62 N. Y. 642; United Brethren Mut. Aid Soc. *v.* McDermond, 12 Wkly. Notes Cas. (Pa.) 73.

Narrative excluded.— As the authority of an agent does not normally extend to discussing the rights of his principal after they have become fixed, narrative statements in this connection as in others (see *supra*, IV, D, 4, a, (IV)) are excluded.

Indiana.— Union Cent. L. Ins. Co. *v.* Thomas, 46 Ind. 44.

Iowa.— Schoep *v.* Bankers' Alliance Ins. Co., 104 Iowa 354, 73 N. W. 825; Walker *v.* Farmers' Ins. Co., 51 Iowa 679, 2 N. W. 583.

Kentucky.— Hartford L., etc., Ins. Co. *v.* Hayden, 90 Ky. 39, 13 S. W. 585, 11 Ky. L. Rep. 993.

New York— Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 28 N. Y. 153.

South Carolina.— Mars *v.* Virginia Home Ins. Co., 17 S. C. 514.

Texas.— Laughlin *v.* Fidelity Mut. L. Assoc., 8 Tex. Civ. App. 448, 28 S. W. 411.

Utah.— Idaho Forwarding Co. *v.* Fireman's Fund Ins. Co., 8 Utah 41, 29 Pac. 826, 17 L. R. A. 586.

United States.— Fidelity, etc., Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379.

England.— Redpath *v.* Sun Mut. Ins. Co., 14 L. C. Jur. 90.

See 20 Cent. Dig. tit. "Evidence," § 930.

Declaration of opinion is not admissible; it must be a declaration of a fact. American L. Ins. Co. *v.* Mahone, 21 Wall. (U. S.) 152, 22 L. ed. 593; Fidelity, etc., Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379. See also *supra*, IV, D, 4, a, (I).

Self-serving statements by an agent are not regarded as being made within the scope of his agency. Neuendorff *v.* World Mut. L. Ins. Co., 69 N. Y. 389.

17. General agents are so far identified with the principal that their statement may be competent even as to a past transaction. Bartlett *v.* Fireman's Fund Ins. Co., 77 Iowa 155, 41 N. W. 601; Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541. A letter written by the general agent of a life-insurance company to its home office, announcing the death of insured, referring to the failure of insured to pay a premium, and stating, "In response to three visits of our collector he promised to pay the renewal within a few days," is admissible in an action on the policy as a declaration of the general agent in the line of duty. Knarston *v.* Manhattan L. Ins. Co., 140 Cal. 57, 73 Pac. 740.

Medical examiners.— Statements by a company medical examiner (McGowan *v.* Supreme Ct. I. O. of F., 104 Wis. 173, 80 N. W. 603) or an examining physician (Rhode *v.* Metropolitan L. Ins. Co., 129 Mich. 112, 88 N. W. 400) made in connection with the examination as to the condition of the assured affect the principal.

Declarations of a soliciting agent made in the course of his employment and relating thereto are admissible against the company. Heller *v.* Crawford, 37 Ind. 279; Hays *v.*

and the beneficiary to whom the loss is payable, no general relation of agency as a rule exists.[18] Therefore statements of the assured are not in general competent against the beneficiary,[19] especially if made before the inception of the insurance contract.[20] But declarations intimately connected with the existence of the contract, as that it has lapsed,[21] or that statements made in the application on which the policy issued were untrue,[22] are competent. Where the assured reserves a *jus disponendi* as to the beneficial interest in the policy the number of relevant facts as to which his declaration may affect the beneficiary is much increased.[23] Admissions of one beneficiary are received against the others if adopted by them.[24] The record of a coroner's inquest attached to proofs of death is competent against the beneficiary if the proofs are made by him,[25] but not where such proofs are furnished by the company's agent.[26]

c. Form of Statement — (i) *In General.* The statement of an agent may

Hynds, 28 Ind. 531; Fogg *v.* Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662; Sisk *v.* American Cent. F. Ins. Co., (Mo. App. 1902) 69 S. W. 687; Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 18 Barb. (N. Y.) 69; Muhleman *v.* National Ins. Co., 6 W. Va. 508. See also Duffy *v.* Stymest, 10 N. Brunsw. 197. But he has no concern with outside matters, for example as to whether the capital stock of the company has been paid in. Fogg *v.* Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662.

18. Bagley *v.* Grand Lodge A. O. U. W., 131 Ill. 498, 22 N. E. 487; Masonic Mut. Ben. Soc. *v.* Buckhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Richmond *v.* Johnson, 28 Minn. 447, 10 N. W. 596; Lahrs *v.* Lahrs, 123 N. Y. 367, 25 N. E. 388, 20 Am. St. Rep. 754, 9 L. R. A. 534; Hellenberg *v.* I. O. B. B. District No. 1, 94 N. Y. 580; Luhrs *v.* Supreme Lodge K. & L. of H., 3 Silv. Supreme (N. Y.) 572, 7 N. Y. Suppl. 487.

19. *Iowa.*— Sutcliffe *v.* Iowa State Traveling Men's Assoc., 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298 ("the beneficiary is not bound by admissions of the assured unless a part of the *res gestæ*"); Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

New Jersey.— Henn *v.* Metropolitan L. Ins. Co., 67 N. J. L. 310, 51 Atl. 689.

New York.— Swift *v.* Massachusetts Mut. L. Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522; Demings *v.* Supreme Lodge K. of P. of W., 60 Hun 350, 14 N. Y. Suppl. 834; Smith *v.* Exchange F. Ins. Co., 40 N. Y. Super. Ct. 492; McGinley *v.* U. S. Life Ins. Co., 8 Daly 390.

Pennsylvania.— Hermany *v.* Fidelity Mut. L. Assoc., 151 Pa. St. 17, 24 Atl. 1064.

South Carolina.— Thompson *v.* Security Trust, etc., Co., 63 S. C. 290, 41 S. E. 464.

Tennessee.— Southern L. Ins. Co. *v.* Booker, 9 Heisk. 606, 24 Am. Rep. 344.

Texas.— Thies *v.* Kentucky Mut. L. Ins. Co., 13 Tex. Civ. App. 280, 35 S. W. 676.

West Virginia.— Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

See 20 Cent. Dig. tit. "Evidence," §§ 989, 992.

20. Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Edington *v.* New York Mut. L. Ins. Co., 5 Hun (N. Y.) 1; Union Cent. L. Ins. Co. *v.* Cheever, 36 Ohio St. 201, 38 Am. Rep. 573; Mobile L. Ins. Co. *v.* Morris, 3 Lea (Tenn.) 101, 31 Am. Rep. 631.

21. Manhattan L. Ins. Co. *v.* Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. Rep. 875.

22. Washington L. Ins. Co. *v.* Haney, 10 Kan. 525; Callies *v.* M. W. of A., 98 Mo. App. 521, 72 S. W. 713. See also Connecticut Mut. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 S. Ct. 294, 47 L. ed. 446 [*reversing* 107 Fed. 834, 46 C. C. A. 668].

23. Steinhausen *v.* Preferred Mut. Acc. Assoc., 59 Hun (N. Y.) 336, 13 N. Y. Suppl. 36; Fidelity Mut. L. Assoc. *v.* Winn, 96 Tenn. 224, 33 S. W. 1045. See also Foxhever *v.* O. of R. C., 24 Ohio Cir. Ct. 56.

24. Fey *v.* I. O. G. F. Mutual L. Ins. Soc., (Wis. 1904) 98 N. W. 206, holding that in an action on an insurance policy, statements in the proofs of death made by another than plaintiffs were nevertheless admissible against them, where such proofs were made in behalf of all the beneficiaries, and, no other proofs having been made, the right of plaintiffs to recover depended on them.

25. Cox *v.* Royal Tribe, 42 Oreg. 365, 71 Pac. 73, 95 Am. St. Rep. 740, 59 L. R. A. 782 [*citing* to this "well-established rule" Walther *v.* New York Mut. L. Ins. Co., 65 Cal. 417, 4 Pac. 413; Hart *v.* Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; Mutual Ben. L. Ins. Co. *v.* Higginbotham, 95 U. S. 380, 24 L. ed. 499; Mutual Ben. L. Ins. Co. *v.* Newton, 22 Wall. (U. S.) 32, 22 L. ed. 793; Sharland *v.* Washington L. Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Keels *v.* Mutual Reserve Fund L. Assoc., 29 Fed. 198].

26. Cox *v.* Royal Tribe, 42 Oreg. 365, 373, 71 Pac. 73, 95 Am. St. Rep. 740, 59 L. R. A. 782, where Wolverton, J., said: "When thus furnished, nothing contained therein, unless subscribed by the beneficiary or his agent, or at least with his express or implied sanction, can operate as an admission on his part, and against his interest. Such declarations, from their very nature, must necessarily be self-serving, and could hardly fail to be conducive of abuse or injustice."

be in any form, oral[27] or written,[28] including a statement made in a pleading[29] or as a witness on a former trial;[30] in which latter case he stands in the same position as any other witness and his absence must be satisfactorily explained,[31] unless the declarant is a party to the second case.[32] An incompetent admission does not become competent merely because it was made by a witness.[33]

(II) *Statements of Person to Whom Reference Is Made.* A declaration competent as an admission may be made by one to whom the party to be affected by it has sent another for information on a given point, agreeing expressly or by implication to be so affected;[34] a relation of agency within the scope of the reference being established by it[35] as to declarations subsequent to the reference,[36] provided that the declarant states facts rather than his opinion,[37] and is possessed of adequate information on the subject.[38] The result is the same where a party agrees that the decision of a body of men[39] shall be binding.[40] The range of permissible subjects of reference is extensive, and may include the sender's "sentiments,"[41] or his legal liability under certain facts.[42] The referring party is affected only by what the person referred to sees fit to state, and is not responsible for the fact that the answer might more properly have been different.[43] Like

27. Cocke *v.* Campbell, 13 Ala. 286.

28. Cocke *v.* Campbell, 13 Ala. 286; Lamb *v.* Barnard, 16 Me. 364; La Abra Silver Min. Co. *v.* U. S., 175 U. S. 423, 20 S. Ct. 168, 44 L. ed. 223. As in case of other admissions the declarations of an agent are still competent, although contained in a document inoperative for the purpose for which it was designed. Morrell *v.* Cawley, 17 Abb. Pr. (N. Y.) 76.

Admissions by conduct.— Statements of an agent may not only be made personally but may be the statements of others acquiesced in or adopted by him in failing to deny them under circumstances which would have made such a denial natural, if the fact were otherwise. Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 29 C. C. A. 250.

29. Whiting *v.* Beebe, 12 Ark. 421.

30. Peden *v.* Chicago, etc., R. Co., 78 Iowa 131, 42 N. W. 625, 4 L. R. A. 401.

31. Salley *v.* Manchester, etc., R. Co., 62 S. C. 127, 40 S. E. 111.

32. Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272.

33. Denver, etc., R. Co. *v.* Watson, 6 Colo. App. 429, 40 Pac. 778; Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

34. *California.*— People *v.* Brady, (1894) 36 Pac. 949.

Connecticut.— Chadsey *v.* Greene, 24 Conn. 562.

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91.

Maine.— Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

New Hampshire.— Holderness *v.* Baker, 44 N. H. 414; Folsom *v.* Batchelder, 22 N. H. 47.

New York.— Wehle *v.* Spelman, 1 Hun 634, 4 Thomps. & C. 649; Volkman *v.* Feldmann, 42 N. Y. Super. Ct. 44.

Wisconsin.— Thayer *v.* Davis, 75 Wis. 205, 43 N. W. 902.

England.— Daniel *v.* Pitt, 1 Campb. 366 note, 6 Esp. 74, Peake Add. Cas. 238, 10 Rev. Rep. 706; Brock *v.* Kent, 1 Campb. 366 note, 10 Rev. Rep. 706 note; Williams *v.* Innes, 1 Campb. 364, 10 Rev. Rep. 702. See 20 Cent. Dig. tit. "Evidence," § 950.

Condition of admissibility.— There must be some uncertain or disputed matter (Robertson *v.* Hamilton, 16 Ind. App. 328, 45 N. E. 46, 59 Am. St. Rep. 319) and the intention to refer must be distinct (Robertson *v.* Hamilton, 16 Ind. App. 328, 45 N. E. 46, 59 Am. St. Rep. 319).

35. *Indiana.*— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Barnard *v.* Macy, 11 Ind. 536; Robertson *v.* Hamilton, 16 Ind. App. 328, 45 N. E. 46, 59 Am. St. Rep. 319.

Maryland.— McDowell *v.* Goldsmith, 2 Md. Ch. 370.

Missouri.—Adler-Goldman Commission Co. *v.* Adams Express Co., 53 Mo. App. 284; Price *v.* Lederer, 33 Mo. App. 426.

New York.— Duval *v.* Covenhoven, 4 Wend. 561.

Ohio.— Jennings *v.* Haynes, 1 Ohio Cir. Ct. 22, 1 Ohio Cir. Dec. 13.

United States.— Murphy *v.* Killinger, 8 Wall. 480, 19 L. ed. 470.

See 20 Cent. Dig. tit. "Evidence," §§ 950, 952.

36. Cohn *v.* Goldman, 76 N. Y. 284.

37. Lambert *v.* People, 76 N. Y. 220, 6 Abb. N. Cas. (N. Y.) 181, 32 Am. Rep. 293.

38. Hood *v.* Reeve, 3 C. & P. 532, 14 E. C. L. 700.

39. Sybray *v.* White, 2 Gale 68, 5 L. J. Exch. 173, 1 M. & W. 435, 1 Tyrw. & G. 746, a miner's jury.

40. The reference must be specific, either to a particular individual or body of persons. A general reference as to "the business men" of a former residence is not sufficient. Rosenbury *v.* Angell, 6 Mich. 508.

41. Hood *v.* Reeve, 3 C. & P. 532, 14 E. C. L. 700.

42. Jennings *v.* Haynes, 1 Ohio Cir. Ct. 22, 1 Ohio Cir. Dec. 13; Daniel *v.* Pitt, 1 Campb. 366 note, 6 Esp. 74, Peake Add. Cas. 238, 10 Rev. Rep. 706.

43. Chilton *v.* Jones, 4 Harr. & J. (Md.) 62.

other admissions the evidence is primary,[44] and the declarant need not be produced or his absence excused;[45] and the statement is competent even after the declarant's death.[46]

d. Agents For Private Corporations[47]— (i) *In General.* Since a corporation necessarily acts by agents, the legality of corporate action is largely a question of agency.[48] The powers of its general and special agents are as a rule limited (1) by the powers of the corporation itself, and (2) by the scope of authority conferred by corporate action.[49] Relevant[50] statements of an agent within the scope of his duty to the corporation are admissible against it.[51] Financial managers, like cashiers are general agents,[52] and their statements made while discharging their duties, affect the corporation.[53] A corporation as principal cannot take advantage

44. Craig *v.* Craig, 3 Rawle (Pa.) 472, 24 Am. Dec. 390.

45. Craig *v.* Craig, 3 Rawle (Pa.) 472, 24 Am. Dec. 390.

46. McElwee Mfg. Co. *v.* Trowbridge, 68 Hun (N. Y.) 28, 22 N. Y. Suppl. 674.

47. See, generally, CORPORATIONS, 10 Cyc. 924 *et seq.*, 933 *et seq.* And particularly as to declarations of agents of corporations see CORPORATIONS, 10 Cyc. 937, 947.

48. Stock-holders are not as a rule agents of the corporation and their statements (Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297; Long *v.* Moore, 19 Tex. Civ. App. 363, 48 S. W. 43), especially when made after parting with their interests as stock-holders (Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 419), do not affect the corporation, even when the declarant is party to a suit (Beardsley *v.* Smith, 16 Conn. 368, 41 Am. Dec. 148; Hartford Bank *v.* Hart, 3 Day (Conn.) 491, 3 Am. Dec. 274). See CORPORATIONS, 10 Cyc. 760, 936, 947.

49. See, generally, CORPORATIONS, 10 Cyc. 903 *et seq.*

50. Pacific Express Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898.

51. *Missouri.*— State *v.* Armour Packing Co., 173 Mo. 356, 73 S. W. 645, 96 Am. St. Rep. 515, 61 L. R. A. 464.

New York.— New York L. Ins., etc., Co. *v.* Beebe, 7 N. Y. 364.

Tennessee.— Sewanee Min. Co. *v.* McMahon, 1 Head 582.

Texas.— Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225; Cooper Grocer Co. *v.* Britton, (Civ. App. 1903) 74 S. W. 91.

Vermont.— Hardwick Sav. Bank, etc., Co. *v.* Drenan, 72 Vt. 438, 48 Atl. 645.

See 20 Cent. Dig. tit. "Evidence," § 917. And see CORPORATIONS, 10 Cyc. 937, 947.

An agent's report to the corporation, although for its information alone, is admissible if made in the discharge of his duty. Lipscomb *v.* South Bound R. Co., 65 S. C. 148, 43 S. E. 388.

A cashier of a banking corporation is a general agent whose statements are competent against the company (Xenia First Nat. Bank *v.* Stewart, 114 U. S. 224, 5 S. Ct. 845, 29 L. ed. 101), when acting within the scope of his employment (Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec 300; Xenia First Nat. Bank *v.* Stewart, 114 U. S. 224, 5 S. Ct. 845, 29 L. ed. 101) and transacting the bank's business (Lee *v.* Marion Sav. Bank, 108 Iowa 716, 78 N. W. 692; Sioux Valley State Bank *v.* Kellog, 81 Iowa 124, 46 N. W. 859; Franklin Bank *v.* Steward, 37 Me. 519; Baltimore City Bank *v.* Bateman, 7 Harr. & J. (Md.) 104; Simmons Hardware Co. *v.* Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700; Plymouth County Bank *v.* Gilman, 3 S. D. 170, 52 N. W. 869, 44 Am. St. Rep. 782, 4 S. D. 265, 56 N. W. 892, 46 Am. St. Rep. 786; Goodbar *v.* Sulphur Springs City Nat. Bank, 78 Tex. 461, 14 S. W. 851). His statements to an employee appointed by him with the assent of the bank may be admissible as made within his authority in the particular instance. Meislahn *v.* Irving Nat. Bank, 62 N. Y. App. Div. 231, 70 N. Y. Suppl. 988 [*affirmed* in 172 N. Y. 631, 65 N. E. 1119]. See also BANKS AND BANKING, 5 Cyc. 470.

A claim adjuster's statements made while acting within the scope of his employment are competent evidence against the principal. Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; Howe Mach. Co. *v.* Snow, 32 Iowa 433.

52. Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98.

General managers (Vaughn Mach. Co. *v.* Quintard, 165 N. Y. 649, 59 N. E. 1132; Laredo Electric Light, etc., Co. *v.* U. S. Electric Lighting Co., (Tex. Civ. App. 1894) 26 S. W. 310) or other general agents (Webb *v.* Smith, 6 Colo. 365; Watertown Agricultural Ins. Co. *v.* Potts, 55 N. J. L. 158, 26 Atl. 27, 537, 39 Am. St. Rep. 637), such as superintendents (McGenness *v.* Adriatic Mills, 116 Mass. 177; Rogers *v.* New York, etc., Bridge, 11 N. Y. App. Div. 141, 42 N. Y. Suppl. 1046), may make competent declarations concerning the business intrusted to them while conducting it. See CORPORATIONS, 10 Cyc. 924 *et seq.*, 947.

53. See the cases cited in the preceding note.

Narrative excluded.— An agent of a corporation is not empowered to affect it by statements regarding past transactions. Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285; East Tennessee Telephone Co. *v.* Simms, 99 Ky. 404, 36 S. W. 171, 38 S. W. 131, 18 Ky. L. Rep. 761; Graddy *v.* Western Union Tel. Co., 43 S. W. 468, 19 Ky. L. Rep.

of the acts of one who has purported to act as its agent without at the same time conceding that it is affected by declarations or other acts of the agent.[54]

(II) *Officers.*[55] A private corporation will be affected by the relevant declarations of its proper officers[56] of general or limited authority, if made in the line of the declarant's official duty.[57] In the absence of regulation by the corporation an officer has the powers usually attaching to the office among similar corporations.[58]

1455; Harper *v.* Western Union Tel. Co., 92 Mo. App. 304; Congdon, etc., Co. *v.* Sheehan, 11 N. Y. App. Div. 456, 42 N. Y. Suppl. 255; Williams *v.* Southern Bell Telephone, etc. Co., 116 N. C. 558, 21 S. E. 298; Aiken *v* Western Union Tel. Co., 5 S. C. 358; Randall *v.* Northwestern Tel. Co., 54 Wis. 140 11 N. W. 419, 41 Am. Rep. 17. See also *supra*, IV, D, 4, a, (IV). Such a statement is not in the average instance made in the course of the agent's employment. American Merchants' Union Express Co. *v.* Gilbert, 57 Ill. 468; Druecker *v.* Sandusky Portland Cement Co., 93 Ill. App. 406; Delaware, etc., Canal Co. *v.* Mitchell, 92 Ill. App. 577. It follows, however, from the fact that a corporation like an individual may make admissions after the event, and can act only by agents, that the general officers or agents of the company may affect it by subsequent statements. Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Costigan *v.* Michael Transp. Co., 38 Mo. App. 219.

A distinction is drawn between the effect of a statement of a corporation agent in relation to third persons and as regards the members of the corporation itself. While the books of a corporation may not as between it and third persons be competent against the company (Columbus Bldg., etc., Assoc. *v.* Kriete, 87 Ill. App. 51), they may as between it and its stock-holders be competent against the stock-holders as admissions (Steam Stone-Cutter Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076); and so confidential communications by the officers (*In re* Devala Provident Gold Min. Co., 22 Ch. D. 593, 52 L. J. Ch. 434, 48 L. T. Rep. N. S. 259, 31 Wkly. Rep. 425) or receiver (Ft. Payne Coal, etc., Co. *v.* Webster, 163 Mass. 134, 39 N. E. 786) of a corporation, however binding on the stock-holders, are not competent in favor of outsiders against the corporation.

54. Southern Express Co. *v.* Duffey, 48 Ga. 358.

55. See also Corporations, 10 Cyc. 947.

56. McGenness *v.* Adriatic Mills, 116 Mass. 177; Liter *v.* Ozokerite Min. Co., 7 Utah 487, 27 Pac. 690.

57. *Alabama.*— Stanton *v.* Baird Lumber Co., 132 Ala. 635, 32 So. 299; Alabama, etc., R. Co. *v.* Johnson, 42 Ala. 242.

Illinois.— Chicago, etc., R. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544; Delaware, etc., Canal Co. *v.* Mitchell, 92 Ill. App. 577.

Iowa.— Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

Maine.— Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Minnesota.—Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602, 87 Am. St. Rep. 351.

Missouri.—Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37; Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337.

New York.— Pierson *v.* Atlantic Nat. Bank, 77 N. Y. 304; Utica City Nat. Bank *v.* Tallman, 63 N. Y. App. Div. 480, 71 N. Y. Suppl. 861; Cosgray *v.* New England Piano Co., 22 N. Y. App. Div. 455, 48 N. Y. Suppl. 7; Ginsburg *v.* Union Cloak, etc., Co., 35 Misc. 389, 71 N. Y. Suppl. 1030.

Pennsylvania.— Huntingdon, etc., R., etc., Co. *v.* Decker, 82 Pa. St. 119; Nichols *v.* Delaware, etc., Canal Co., 2 Wkly. Notes Cas. 708.

Texas.— Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

See 20 Cent. Dig. tit. "Evidence," § 916. And see Corporations, 10 Cyc. 947.

Official capacity.— The statement must be made in discharge of official duty to the particular corporation to whose affairs the statement purports to relate. McMillan *v.* Carson Hill Union Min. Co., 12 Phila. (Pa.) 404. Hence where an officer of a corporation is made a party to the record in an official capacity declarations in his individual capacity do not affect the company. Baltimore City Bank *v.* Bateman, 7 Harr. & J. (Md.) 104.

Presumption.— A statement made to a person in no way connected with the transaction in question is presumably not made in the course of the agent's employment. Sloss Marblehead Lime Co. *v.* Smith, 11 Ohio Cir. Ct. 213, 5 Ohio Cir. Dec. 79.

58. As a clerk or secretary is the natural custodian of the papers and records of the corporation his statements as to the existence or disposition of such documents affect the company. Fowles *v.* Ætna Loan Co., 86 Mo. App. 103. See Corporations, 10 Cyc. 903 *et seq.*, 947.

Directors.— Where management of the general business affairs is committed to a board of directors, the action of such a body affects the corporation if done in a reasonable attempt to discharge the duty confided to it and within the powers of the corporation. But it is otherwise with the acts of individual directors. Franklin Bank *v.* Cooper, 36 Me. 179; Kalamazoo Novelty Mfg. Co. *v.* McAlister, 36 Mich. 327; Peek *v.* Detroit Novelty Works, 29 Mich. 313; Kearney Bank *v.* Froman, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456; Niagara Falls Suspension Bridge Co. *v.* Bachman, 66 N. Y. 261; East River Bank *v.* Hoyt, 41 Barb. (N. Y.) 441; Salado College *v.* Davis, 47 Tex. 131. Declarations of a director of a corporation are not binding upon the corporation, unless they are

While limitations may be imposed by law or by the by-laws of the corporation, the authority of the president is that of a general officer and extends to the doing of acts of general management.[59] Competent declarations of all officers relate properly only to the routine business of the corporation. Its fundamental interests, such as the ownership of the *corpus* of the property, cannot be deemed within the control of declarations by agents however general may be their powers.[60]

(III) *Agents For Railroad Corporations*[61] — (A) *In General.* A railroad corporation is affected by the statements of an agent, provided the agent is duly qualified to act in the matter concerning which the statement is made, and makes the statement while he is acting in regard to that particular matter and in the reasonable discharge of his duties.[62] Subject to these conditions the declarations of agents of general authority, such as general managers,[63] superintendents,[64] general freight or passenger agents,[65] or claim agents,[66] may be competent as admissions of the company, while, on the other hand, the statements of agents or employees

within the scope of his ordinary powers, or some special agency relative to the subject-matter is shown. Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297; Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., (Mich. 1903) 95 N. W. 562; Soper *v.* Buffalo, etc., R. Co., 19 Barb. (N. Y.) 310. See also Corporations, 10 Cyc. 947, 948.

59. *Alabama.*— Cunningham *v.* Cochran, 18 Ala. 479, 52 Am. Dec. 230.

Florida.— Jacksonville, etc., R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327.

Indiana.— La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

Iowa.— Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496; Deere *v.* Wolf, 77 Iowa 115, 41 N. W. 588.

Michigan.— Wisconsin M. & F. Ins. Co.'s Bank *v.* Manistee Salt, etc., Co., 77 Mich. 76, 43 N. W. 907.

Missouri.— Pitts *v.* D. M. Steele Mercantile Co., 75 Mo. App. 221; Costigan *v.* Michael Transp. Co., 38 Mo. App. 219.

New Jersey.— Halsey *v.* Lehigh Valley R. Co., 45 N. J. L. 26.

New York.— Wild *v.* New York, etc., Silver Min. Co., 59 N. Y. 644; Hoag *v.* Lamont, 16 Abb. Pr. N. S. 91 [*affirmed* in 60 N. Y. 96]; Monroe Bank *v.* Field, 2 Hill 445.

Pennsylvania.— Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28; Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. 179.

South Carolina.— Charleston, etc., R. Co. *v.* Blake, 12 Rich. 634.

Tennessee.— Ward *v.* Tennessee Coal, etc., Co., (Ch. App. 1900) 57 S. W. 193.

See 20 Cent. Dig. tit. "Evidence," §§ 920, 922. See also Corporations, 10 Cyc. 903 *et seq.*, 947.

President's declaration as to past transaction not constituting a part of the *res gestæ* is inadmissible. Childs *v.* Ponder, 117 Ga. 553, 43 S. E. 986; Rondout Nat. Bank *v.* Byrnes, 84 N. Y. App. Div. 100, 82 N. Y. Suppl. 497; Flour City Nat. Bank *v.* Grover, 88 Hun (N. Y.) 4, 34 N. Y. Suppl. 496. See also McEntyre *v.* Levi Cotton Mills Co., 132 N. C. 598, 44 S. E. 109.

Trustees having charge of the assets of the corporation are general officers within the rule. Franklin Bank *v.* Cooper, 36 Me. 179; Josephi *v.* Mady Clothing Co., 13 Mont. 195, 33 Pac. 1.

Vice-president's declaration not made in his official capacity is inadmissible against the corporation. Utica City Nat. Bank *v.* Tallman, 63 N. Y. App. Div. 480, 71 N. Y. Suppl. 861 [*affirmed* in 172 N. Y. 642, 65 N. E. 1123].

Insufficient knowledge on the part of the declarant merely affects the weight of his declaration. Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251.

60. Overman Silver Min. Co. *v.* American Min. Co., 7 Nev. 312. See also Central Electric Co. *v.* Sprague Electric Co., 120 Fed. 925, 57 C. C. A. 197.

61. See also Carriers; Corporations; Railroads.

62. It is not sufficient that the declarant should be an agent of the company or that the subject-matter of the declaration should be within his management. It is further necessary that the making of the declaration itself be within the line of his employment. Wellington *v.* Boston, etc., R. Co., 158 Mass. 185, 33 N. E. 393; Huebner *v.* Erie R. Co., 69 N. J. L. 327, 55 Atl. 273.

63. McCammon *v.* Detroit, etc., R. Co., 66 Mich. 442, 33 N. W. 728.

64. Alabama Great Southern R. Co. *v.* Hill, 76 Ala. 303; Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Halsey *v.* Lehigh Valley R. Co., 45 N. J. L. 26. See also Betts *v.* Farmers' L. & T. Co., 21 Wis. 80, 91 Am. Dec. 460.

65. Burnside *v.* Grand Trunk R. Co., 47 N. H. 554, 93 Am. Dec. 474.

A passenger agent has no authority to make declarations as to the transportation of freight. Taylor *v.* Chicago, etc., R. Co., 74 Ill. 86.

66. Missouri Pac. R. Co. *v.* Gernan, 84 Tex. 141, 19 S. W. 461; Missouri Pac. R. Co. *v.* Rountree, 2 Tex. App. Civ. Cas. § 387; Reg. *v.* Peters, 16 N. Brunsw. 77. But the statements of a railroad claim agent required to make investigations are not as a rule competent to determine the liability of the principal upon the facts which he has ascertained

of more limited authority connected with the engineering,[67] operating,[68] station,[69]

(Mobile, etc., R. Co. *v.* Klein, 43 Ill. App. 63; Chesapeake, etc., R. Co. *v.* Smith, 101 Ky. 104, 39 S. W. 832, 18 Ky. L. Rep. 1079; Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, 43 N. W. 787), or to waive the advantage of any beneficial adjustment which the principal has reached (Chicago, etc., R. Co. *v.* Belliwith, 83 Fed. 437, 28 C. C. A. 358).

67. Baltimore, etc., R. Co. *v.* Sulphur Spring Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529. But see Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256, where it was held that the statements of an engineer regarding the way in which engineering work is done on the road-bed of the company is competent.

68. A baggage-master's statements concerning the loss of baggage may affect the company if made in reply to legitimate inquiries by the passenger (Morse *v.* Connecticut River R. Co., 6 Gray (Mass.) 450; Curtis *v.* Avon, etc., R. Co., 49 Barb. (N. Y.) 148), but the declarations of a train baggage-master as to the running of his train are incompetent (N. N. & M. V. R. Co. *v.* Decker, 14 Ky. L. Rep. 108).

A brakeman's declarations are ordinarily incompetent (Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248; Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91, 19 N. W. 761), but they are admissible when made within the scope of actual authority (Chicago, etc., R. Co. *v.* Flaherty, 202 Ill. 151, 66 N. E. 1083).

Conductors.— The duties of conductors of freight (St. Louis, etc., R. Co. *v.* Carlisle, (Tex. Civ. App. 1904) 78 S. W. 553) or passenger trains do not require or permit them to make narrative statements involving the legal liability of the railroad (Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; Griffin *v.* Montgomery, etc., R. Co., 26 Ga. 111; Chicago, etc., R. Co. *v.* Fillmore, 57 Ill. 265; Hannibal, etc., R. Co. *v.* Martin, 11 Ill. App. 386; Louisville, etc., R. Co. *v.* Ellis, 97 Ky. 330, 30 S. W. 979, 17 Ky. L. Rep. 259; Parker *v.* Winona, etc., R. Co., 83 Minn. 212, 86 N. W. 2; Moore *v.* Chicago, etc., R. Co., 59 Miss. 243; Wengler *v.* Missouri Pac. R. Co., 16 Mo. App. 493; Nebonne *v.* Concord R. Co., 67 N. H. 531, 38 Atl. 17; North Hudson County R. Co. *v.* May, 48 N. J. L. 401, 5 Atl. 276; Jammison *v.* Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813). Their declarations made prior to the occurrence are equally incompetent. Mobile, etc., R. Co. *v.* Ashcraft, 49 Ala. 305. A conductor's statements as to matters immediately connected with his employment, as the giving of information to a proper person concerning the time of the arrival of trains (San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474), or other matters relating to the movement of the train in his present charge (Chicago, etc., R. Co. *v.* Gore, 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224), enforcing the payment of fares (Chicago, etc., R. Co. *v.* Flaharty, 96 Ill. App. 563; Beckham *v.* Southern R. Co., 50 S. C. 25, 27 S. E. 611), or attaching a car to his train (Beckham *v.* Southern R. Co., 50 S. C. 25, 27 S. E. 611) are admissible.

The engineer of a train is not the agent of the company to discourse on its account as to the condition of his engine (Ohio, etc., R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733; Atchison, etc., R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220), or as to the facts attending an accident caused by his train (Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Rep. 201; Treadway *v.* Sioux City, etc., R. Co., 40 Iowa 526; Kentucky Cent. R. Co. *v.* Bowen, 8 Ky. L. Rep. 609; Cole *v.* New York, etc., R. Co., 174 Mass. 537, 55 N. E. 1044; Eastman *v.* Boston, etc., R. Co., 165 Mass. 342, 43 N. E. 115; Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227; Robinson *v.* Fitchburg, etc., R. Co., 7 Gray (Mass.) 92; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229; Travis *v.* Louisville, etc., R. Co., 9 Lea (Tenn.) 231).

Firemen are not competent declarants as to the knowledge on the part of the company of defects in the machinery under their charge. Lyter *v.* Louisville, etc., R. Co., 6 Ky. L. Rep. 223.

Trainmen may while discharging their duties make competent statements as to matters relating thereto (Atchison, etc., R. Co. *v.* Consolidated Cattle Co., 59 Kan. 111, 52 Pac. 71; Pullman Car Co. *v.* Gardner, 3 Pennyp. (Pa.) 78), but statements made under other circumstances are not admissions of the principal (Drake *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 490, 30 N. Y. Suppl. 671).

69. Station agents are not concerned with the company's demands for cars on account of its through traffic (Branch *v.* Wilmington, etc., R. Co., 88 N. C. 573), and a station freight agent is not merely by virtue of his employment entitled to affect the principal by his statements (Boston, etc., R. Co. *v.* Ordway, 140 Mass. 510, 5 N. E. 627). So long, however, as anything remains to be done by the company in delivering at its destination freight shipped by its line, statements by station freight agents of the company in reply to questions of the shipper relating to the freight are competent as being within the duty of the agency (Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Green *v.* Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370; Lane *v.* Boston, etc., R. Co., 112 Mass. 455), and the rule is the same as to the baggage of passengers (Gott *v.* Dinsmore, 111 Mass. 45; Morse *v.* Connecticut River R. Co., 6 Gray (Mass.) 450; Thompson *v.* St. Louis, etc., R. Co., 59 Mo. App. 37; Baltimore, etc., R. Co. *v.* Campbell, 36 Ohio St. 647, 38 Am. Rep. 617). See also Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134. The statements of a ticket agent as to

track,[70] or other specific departments of the railroad company's work would under the same circumstances be incompetent as admissions of the principal.

(B) *Officers.*[71] Relevant statements of the president,[72] secretary,[73] general solicitor,[74] or specially authorized director[75] of a railroad corporation affect the latter if made within the scope of the officer's employment and while engaged in discharging its duties.[76]

(C) *Agents For Street Railways* — (1) IN GENERAL. An agent[77] or employee[78] of a street railway corporation may affect it by his declarations only when they concern matters connected with his duty and are made in the course of discharging the same.[79]

(2) OFFICERS. Statements of officers, even though general officers, of a street railway corporation, if not made in pursuance of some duty to the corporation are inadmissible against it.[80]

the stopping of trains are said to affect the company, and even to be conclusive. Miller *v.* King, 84 Hun (N. Y.) 308, 32 N. Y. Suppl. 332. A station agent's duties do not include making statements as to the condition of the station (St. Louis, etc., R. Co. *v.* Barger, 52 Ark. 78, 12 S. W. 156, 20 Am. St. Rep. 155), the transportation facilities of the company (Atchison, etc., R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286), or the cause of an accident (Meyer *v.* Virginia, etc., R. Co., 16 Nev. 341).

70. Trackmen.— An employee upon the road-bed and right of way or sections thereof, as a foreman (Atchison, etc., R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286; Louisville, etc., R. Co. *v.* Beauchamp, 108 Ky. 47, 55 S. W. 716, 21 Ky. L. Rep. 1476; Rowe *v.* Baltimore, etc., R. Co., 82 Md. 493, 33 Atl. 761), a road master (Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656), section boss (Halverson *v.* Chicago, etc., R. Co., 57 Minn. 142, 58 N. W. 871; Waldrop *v.* Greenwood, etc., R. Co., 28 S. C. 157, 5 S. E. 471), or a superintendent (Livingston *v.* Iowa Midland R. Co., 35 Iowa 555) can make as against the company only such statements of fact as are fairly called for by his employment. Declarations as to new construction (Livingston *v.* Iowa Midland R. Co., 35 Iowa 555), the condition of the road-bed (Louisville, etc., R. Co. *v.* Beauchamp, 108 Ky. 47, 55 S. W. 716; Rowe *v.* Baltimore, etc., R. Co., 82 Md. 493, 33 Atl. 761) or rolling-stock (Atchison, etc., R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286), the cause of an accident (Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656), or the value of stock killed (Halverson *v.* Chicago, etc., R. Co., 57 Minn. 142, 58 N. W. 871) are not competent. Agents in charge of the construction or repair of the road-bed may, however, affect the company by declarations as to the manner in which this specific work was done. Matteson *v.* New York Cent. R. Co., 62 Barb. (N. Y.) 364.

71. See, generally, CORPORATIONS, 10 Cyc. 903 *et seq.*

72. *Illinois.*— Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91.

Iowa.— Hewett *v.* Chicago, etc., Co., 63 Iowa 611, 19 N. W. 790.

Kentucky.— Louisville, etc., R. Co. *v.* Geoghegan, 13 Ky. L. Rep. 144.

Michigan.— Grand Trunk R. Co. *v.* Nichol, 18 Mich. 170.

Pennsylvania.— Mellick *v.* Pennsylvania R. Co., 17 Pa. Super. Ct. 12.

South Carolina.— Charleston, etc., R. Co. *v.* Blake, 12 Rich. 634.

See 20 Cent. Dig. tit. "Evidence," §§ 922, 925.

73. Indianapolis, etc., R. Co. *v.* Jewett, 16 Ind. 273.

74. Ohio, etc., R. Co. *v.* Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20.

75. Norwich, etc., R. Co. *v.* Cahill, 18 Conn. 484.

76. See the preceding notes.

77. A claim agent cannot affect the corporation by statements as to responsibility for an accident (Nowack *v.* Metropolitan St. R. Co., 54 N. Y. App. Div. 302, 66 N. Y. Suppl. 533) or as to the knowledge of his principal (Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778).

Declarations of a conductor of a street-car relating to responsibility for a past occurrence are not competent. Blackman *v.* West Jersey, etc., R. Co., 68 N. J. Eq. 1, 52 Atl. 370; Furst *v.* Second Ave. R. Co., 72 N. Y. 542.

78. A driver or motorman can make competent statements only as connected with present discharge of his duty. Luby *v.* Hudson River R. Co., 17 N. Y. 131. His statements as to causes of past events are incompetent. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453; Rogers *v.* Interurban St. R. Co., 84 N. Y. Suppl. 974, excluding the statement of a motorman, made after colliding with a wagon, that he could not help it.

79. An agent's attempt to bribe witnesses may be admissible evidence against the corporation. Nowack *v.* Metropolitan St. R. Co., 166 N. Y. 433, 60 N. E. 32, 82 Am. St. Rep. 691, 54 L. R. A. 592.

80. Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353 (president); Hayzel *v.* Columbia R. Co., 19 App. Cas. (D. C.) 359; Lombard, etc., Pass. R. Co. *v.* Christian, 124 Pa. St. 114, 16 Atl. 628 (president); Huntingdon, etc., Coal Co. *v.* Decker, 82 Pa. St. 119.

e. Agents For Public Corporations.[81] Statements of a public officer in the absence of express authority are not competent against the national[82] or state[83] government; and even where authority is conferred on a public officer which would enable him to affect the national,[84] state, or municipal[85] government by his statement, it must affirmatively appear that the statement was made within the scope of his authority.[86] Public corporations, such as counties,[87] cities, or towns,[88] being instrumentalities of government rather than institutions for profit-making purposes, are in a measure relieved from liability for acts or statements of officers, agents, or employees who are regarded rather as public functionaries than as agents of the municipality itself.[89] But with this qualification the municipality may be affected by declarations of public officers within the scope of their authority as to the ownership of its property[90] or the management of its business enterprises.[91] A committee specially commissioned for a particular duty has the general powers of the municipality relating to the matter intrusted to it, and may make competent declarations regarding this duty while engaged in discharging it.[92]

f. Special Forms of Agency — (i) *Attorneys.* An attorney in civil cases may make admissions of fact which will affect his client, provided that his authority be made affirmatively to appear[93] either by direct evidence, not includ-

81. See, generally, COUNTIES; MUNICIPAL CORPORATIONS; STATES; UNITED STATES.

82. Water *v.* U. S., 4 Ct. Cl. 389.

83. County commissioners when acting under a statutory power on behalf of the state do not affect the state by their declarations. State *v.* Olson, 55 Minn. 118, 56 N. W. 585.

84. Lee *v.* Munroe, 7 Cranch (U. S.) 366, 3 L. ed. 373; U. S. *v.* Martin, 26 Fed. Cas. No. 15,732, 2 Paine 68.

85. *Connecticut.*— Connecticut Insane Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017.

Maine.— Foss *v.* Whitehouse, 94 Me. 491, 48 Atl. 109; Smyth *v.* Bangor, 72 Me. 249; Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252; Corrinna *v.* Exeter, 13 Me. 321.

Massachusetts.— Blanchard *v.* Blackstone, 102 Mass. 343, selectman; building committee.

New Hampshire.— Thornton *v.* Campton, 17 N. H. 338, selectman.

New York.— Cortland County *v.* Herkimer County, 44 N. Y. 22.

Pennsylvania.— Weir *v.* Plymouth, 148 Pa. St. 566, 24 Atl. 94; Coal Centre K. of P. Benev. Assoc. *v.* Leadbetter, 2 Pa. Super. Ct. 461.

Vermont.— Tower *v.* Rutland, 56 Vt. 28; Burlington *v.* Calais, 1 Vt. 385, 18 Am. Dec. 691.

United States.— Chicago *v.* Greer, 9 Wall. 726, 19 L. ed. 769; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

Canada.—Girvan *v.* St. John, 11 N. Brunsw. 411.

See 20 Cent. Dig. tit. "Evidence," § 939.

86. See the cases cited in last two notes.

87. Declarations of county commissioners are not evidence against the county, unless made while officially representing the county, and while the declarants are engaged in transactions to which the declarations relate. La Salle County *v.* Simmons, 10 Ill. 513. See, generally, COUNTIES.

88. See, generally, MUNICIPAL CORPORATIONS.

Highway surveyors have no authority to bind the town by declarations of knowledge as to defects in a highway. Weeks *v.* Needham, 156 Mass. 289, 31 N. E. 8.

Overseers of the poor are public officers whose statements are not usually competent against the municipality. Brighton *v.* St. Albans, 77 Me. 177; Corrinna *v.* Exeter, 13 Me. 321; New Bedford *v.* Taunton, 9 Allen (Mass.) 207; Dartmouth *v.* Lakeville, 7 Allen (Mass.) 284; Green *v.* North Buffalo Tp., 56 Pa. St. 110.

Town liability being based on statute, admissions of town authorities, committees, or other agents, as to the repair of a highway (Wheeler *v.* Framingham, 12 Cush. (Mass.) 287; Collins *v.* Dorchester, 6 Cush. (Mass.) 396; Folsom *v.* Underhill, 36 Vt. 580) or bridge (Moore *v.* Hazelton Tp., 118 Mich. 425, 76 N. W. 977) are not competent.

An inhabitant of a town is not an agent for the corporation. *In re* Landaff, 34 N. H. 163; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168.

89. See the last two notes.

90. Blackmore *v.* Boardman, 28 Mo. 420.

91. Peyton *v.* London, 9 B. & C. 725, 17 E. C. L. 324, 3 C. & P. 363, 14 E. C. L. 610, 7 L. J. K. B. O. S. 322, 4 M. & R. 625.

92. Riley *v.* St. John, 11 N. Brunsw. 78, 264.

93. *Connecticut.*— Rockwell *v.* Taylor, 41 Conn. 55.

Georgia.— Cable Co. *v.* Parantha, 118 Ga. 913, 45 S. E. 787; Cassels *v.* Usry, 51 Ga. 621.

Indiana.— Ohio, etc., R. Co. *v.* Levy, 7 Ind. App. 696, 34 N. E. 245.

Massachusetts.— Proctor *v.* Old Colony R. Co., 154 Mass. 251, 28 N. E. 13; Pickert *v.* Hair, 146 Mass. 1, 15 N. E. 79; Murray *v.* Chase, 134 Mass. 92.

Michigan.— Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330; Kramer *v.* Gustin, 53 Mich. 291, 19 N. W. 1.

Minnesota.— Gray *v.* Minnesota Tribune Co., 81 Minn. 333, 84 N. W. 113.

ing the declarations of the attorney,[94] or by necessary inference,[95] and that the statement be shown to have been made within the actual or ostensible scope of the authority delegated,[96] and while engaged in a *bona fide*[97] attempt to discharge the duties of his employment.[98]

(II) *Conspirators and Persons Acting Together* — (A) *In General.* Where it is proved that parties have a community of interest and object, the declarations of one of them, if fairly within the scope of the common design and made while engaged in an attempt to effectuate it, are evidence against the others.[99]

(B) *Proof of Common Purpose — Province of Court and Jury.* To render the statements of one alleged to be engaged in furtherance of a common design competent against other persons than himself it is essential that there be proof of an agreement, express or implied, to carry out the common purpose in a definite way by united efforts.[1] If there is evidence, direct or circumstantial,[2] from which a jury might reasonably infer the existence of such agreement, and

Missouri.— Anderson *v.* McPike, 86 Mo. 293.

New York.— Lewis *v.* Duane, 69 Hun 28, 23 N. Y. Suppl. 433; Breck *v.* Ringler, 59 Hun 623, 13 N. Y. Suppl. 501.

Pennsylvania.— Snyder *v.* Armstrong, 6 Wkly. Notes Cas. 412.

South Carolina.— Rock Island First Nat. Bank *v.* Anderson, 28 S. C. 143, 5 S. E. 343.

Wisconsin.— Fosha *v.* Prosser, (1904) 97 N. W. 924.

England.— Wagstaff *v.* Wilson, 4 B. & Ad. 339, 1 N. & M. 1, 24 E. C. L. 154; Pope *v.* Andrews, 9 C. & P. 564, 38 E. C. L. 331.

See 20 Cent. Dig. tit. "Evidence," § 945.

Where a letter was written before suit by one who subsequently appeared as defendant's attorney in the suit, it was held not to be admissible without proof that the letter was authorized. Wagstaff *v.* Wilson, 4 B. & Ad. 339, 1 N. & M. 1, 24 E. C. L. 154; Pope *v.* Andrews, 9 C. & P. 564, 38 E. C. L. 331.

A presumption of fact exists that an attorney appearing in a cause has been duly retained. This has been given a *prima facie* value. Holder *v.* State, 35 Tex. Cr. 19, 29 S. W. 793.

An attorney's clerk having the management of a cause may by his statement affect the client to the same extent as the attorney himself could have done. Standage *v.* Creighton, 5 C. & P. 406, 24 E. C. L. 628; Ashbourne *v.* Price, D. & R. N. P. 48, 25 Rev. Rep. 787, 16 E. C. L. 430. See also Lord *v.* Wood, 120 Iowa 303, 94 N. W. 842.

94. Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260; Knapp *v.* Runals, 37 Wis. 135.

95. See *supra*, IV, D, 4, a, (II).

96. Chicago, etc., R. Co. *v.* McMeen, 70 Ill. App. 220; Wenans *v.* Lindsey, 1 How. (Miss.) 577; O'Brien *v.* Weiler, 68 Hun (N. Y.) 64, 22 N. Y. Suppl. 627; Young *v.* Mahoning County, 51 Fed. 585.

97. Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; Alton *v.* Gilmanton, 2 N. H. 520; Lloyd *v.* Willan, 1 Esp. 178.

Good faith of the client is also demanded, and if he understood the statement of his counsel when made he will be affected by it (Holt *v.* Jesse, 3 Ch. D. 177, 46 L. J. Ch. 254, 24 Wkly. Rep. 879), unless he exercises due diligence in disavowing it as an unauthorized act (Rumsey *v.* King, 33 L. T. Rep. N. S. 728).

98. Loomis *v.* New York, etc., R. Co., 159 Mass. 39, 34 N. E. 82; Ward *v.* Beecher, 56 Mich. 616, 23 N. W. 438. It is no part of an attorney's agency to discuss his client's affairs with third persons. Fay *v.* Hebbard, 42 Hun (N. Y.) 490; Underwood *v.* Hart, 23 Vt. 120.

99. *Illinois.*— Miller *v.* John, 208 Ill. 173, 70 N. E. 27; Lasher *v.* Littell, 202 Ill. 551, 67 N. E. 372 [*affirming* 104 Ill. App. 211]; Snyder *v.* Laframboise, 1 Ill. 343, 12 Am. Dec. 187.

Kentucky.— Smithern *v.* Waddle, 43 S. W. 453, 19 Ky. L. Rep. 1418.

Montana.— Lane *v.* Bailey, (1904) 75 Pac. 191.

Oregon.—Walker *v.* Harlod, (1903) 74 Pac. 705.

Pennsylvania.—Lowe *v.* Dalrymple, 117 Pa. St. 564, 12 Atl. 567.

Vermont.— Broughton *v.* Ward, 1 Tyler 137.

Wisconsin.— Tucker *v.* Finch, 66 Wis. 17, 27 N. W. 817.

United States.— Connecticut Mut. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 S. Ct. 294, 47 L. ed. 446 [*reversing* 107 Fed. 834, 46 C. C. A. 668].

See 20 Cent. Dig. tit. "Evidence," § 994; and Conspiracy, 8 Cyc. 679; Criminal Law, 12 Cyc. 70.

1. Suttles *v.* Sewell, 117 Ga. 214, 43 S. E. 486; Henrich *v.* Saier, 124 Mich. 86, 82 N. W. 879; Lyons *v.* Wattenbarger, 1 Heisk. (Tenn.) 193; Triplett *v.* Goff, 83 Va. 784, 3 S. E. 525.

2. Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500; Farley *v.* Peebles, 50 Nebr. 723, 70 N. W. 231; McCarty *v.* Hartford F. Ins. Co., (Tex. Civ. App. 1903) 75 S. W. 934.

An allegation of conspiracy does not suffice to admit the declaration as against others than the declarant. Foster *v.* Thrasher, 45 Ga. 517; Wood *v.* Carpenter, 166 Mo. 465, 66 S. W. 172; Ferguson *v.* Reeve, 16 N. J. L. 193; Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

the other conditions of admissibility[3] exist, the court may admit the declarations of any one of the persons interested.[4] Declarations of one of the persons alleged to be engaged in the common design are not admissible to prove it,[5] but may be received in corroboration if sufficient evidence be produced *aliunde*.[6] Declarations made before an agreement was formed are not admissible against others than the declarant,[7] although it is otherwise if the declarations and the overt acts showing the existence of a conspiracy are contemporaneous.[8] Whether sufficient evidence has been produced to authorize a jury to find the existence of a conspiracy is ordinarily a preliminary question for determination by the court.[9] Declarations of one alleged conspirator may in the discretion of the court be admitted against another prior to proof of a conspiracy between them, upon assurance by counsel that such proof will be made during the trial.[10] The fact of conspiracy is ultimately a question for the jury.[11]

(c) *Res Gestæ as Defining Scope of Agency.* Where combination of individuals in an enterprise is shown, every act and declaration of each member of the confederacy in pursuance of the original plan with reference to the common

3. See *supra*, IV, C, 4, f, (II), (A).

4. *Alabama.*— Scott *v.* State, 30 Ala. 503.
Arkansas.— Clinton *v.* Estes, 20 Ark. 216.
Indiana.— Wolfe *v.* Pugh, 101 Ind. 293.
Iowa.— Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; Wiggins *v.* Leonard, 9 Iowa 194.
Louisiana.— Reid *v.* Louisiana State Lottery Co., 29 La. Ann. 388; Burroughs *v.* Nettles, 7 La. 113.
Massachusetts.— Burke *v.* Miller, 7 Cush. 547.
Missouri.— Hart *v.* Hicks, 129 Mo. 99, 31 S. W. 351; Missouri Exch. Bank *v.* Russell, 50 Mo. 531; Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500.
Nebraska.— Cleland *v.* Anderson, (1902) 92 N. W. 306; Brown *v.* Herr, 21 Nebr. 113, 31 N. W. 246.
New Hampshire.—Page *v.* Parker, 40 N. H. 47.
New York.— Douglas *v.* McDermott, 21 N. Y. App. Div. 8, 47 N. Y. Suppl. 336; Osborn *v.* Robbins, 7 Lans. 44; Peck *v.* Yorks, 47 Barb. 131; Carpenter *v.* Sheldon, 5 Sandf. 77; Brush *v.* Holland, 3 Bradf. Surr. 240.
Ohio.— Roberts *v.* Briscoe, 1 Ohio Cir. Ct. 577, 1 Ohio Cir. Dec. 323.
Oregon.— Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.
Pennsylvania.— Farren *v.* Mintzer, (1888) 14 Atl. 267; Burns *v.* McCabe, 72 Pa. St. 309; McDowell *v.* Rissell, 37 Pa. St. 164; Kelsey *v.* Murphy, 26 Pa. St. 78; Bredin *v.* Bredin, 3 Pa. St. 81; Holton *v.* New Castle Northern R. Co., 8 Pa. Co. Ct. 430.
Tennessee.— Girdner *v.* Walker, 1 Heisk. 186.
Texas.— Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975; McCarty *v.* Hartford F. Ins. Co., (Civ. App. 1903) 75 S. W. 934; Joy *v.* Liverpool, etc., Ins. Co., (Civ. App. 1903) 74 S. W. 822; Hughes *v.* Waples-Platter Grocer Co., 25 Tex. Civ. App. 212, 60 S. W. 981.
Vermont.— Windover *v.* Robbins, 2 Tyler 1.
West Virginia.— Carskadon *v.* Williams, 7 W. Va. 1.
United States.— Drake *v.* Stewart, 76 Fed. 140, 22 C. C. A. 104; U. S. *v.* Goldberg, 25 Fed. Cas. No. 15,223, 7 Biss. 175; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,288; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,393, 2 Hask. 164.
See 20 Cent. Dig. tit. "Evidence," §§ 994, 1010; and CONSPIRACY, 8 Cyc. 682; CRIMINAL LAW, 12 Cyc. 70.
Prima facie evidence of a conspiracy or common purpose should be produced. Hubble *v.* Osborn, 31 Ind. 249; Wilson *v.* O'Day, 5 Daly (N. Y.) 354; Danville Bank *v.* Waddill, 31 Gratt. (Va.) 469. See also CONSPIRACY, 8 Cyc. 683.
Subsequent agreement on the subject of the declaration will not suffice to admit it in evidence. Fouts *v.* State, 7 Ohio St. 471.

5. *Kentucky.*— Metcalfe *v.* Conner, Litt. Sel. Cas. 497, 12 Am. Dec. 340.
Minnesota.— Cooper *v.* Breckenridge, 11 Minn. 341.
New York.— Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2 [*reversing* 20 N. Y. App. Div. 624, 46 N. Y. Suppl. 1095].
Pennsylvania.— Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545.
Virginia.— Danville Bank *v.* Waddill, 31 Gratt. 469.
West Virginia.— Dickinson *v.* Clarke, 5 W. Va. 280.
See 20 Cent. Dig. tit. "Evidence," § 1010.

6. Chicago, etc., R. Co. *v.* Collins, 56 Ill. 212; Bryce *v.* Butler, 70 N. C. 585.

7. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847; Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481; Legg *v.* Olney, 1 Den. (N. Y.) 202; Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668.

8. Kelly *v.* People, 55 N. Y. 565, 14 Am. Rep. 342.

9. Com. *v.* Brown, 14 Gray (Mass.) 419.

10. Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832; St. Paul Distilling Co. *v.* Pratt, 45 Minn. 215, 47 N. W. 789; Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

11. Stewart *v.* Johnson, 18 N. J. L. 87.

object and while engaged in carrying it out is the act and declaration of all.[12] On the other hand declarations of one conspirator, if not made in pursuance of the common design, are not admissible against the others because, as is said, they constitute no part of the *res gestæ*.[13] A competent declaration may be made at any time before the common object is attained or definitely abandoned;[14] completion of a stage in the projected enterprise does not exclude an otherwise relevant statement.[15]

(D) *Independent Relevancy.* The statement of a fellow conspirator may be not so much an admission as a verbal act in the transaction relevant in and of itself.[16] It may for example tend to establish circumstantially the existence of a relevant mental state, such as the intention with which an act was done,[17] motive,[18] purpose,[19] or adulterous disposition,[20] and thus affect not only the declarant, but so far as

12. *California.*— Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1.

Connecticut.— Gardner *v.* Preston, 2 Day 205, 2 Am. Dec. 91.

District of Columbia.— Main *v.* Aukam, 4 App. Cas. 51.

Maine.— Aldrich *v.* Warren, 16 Me. 465.

Michigan.—Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501.

Mississippi.— Trimble *v.* Turner, 13 Sm. & M. 348, 53 Am. Dec. 90; Helm *v.* Natchez Ins. Co., 8 Sm. & M. 197.

Nebraska.— Baker *v.* Union Stock Yards Nat. Bank, 63 Nebr. 801, 89 N. W. 269, 93 Am. St. Rep. 484.

New Hampshire.— Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586; Lee *v.* Lamprey, 43 N. H. 13.

New York.— Voisin *v.* Commercial Mut. Ins. Co., 60 N. Y. App. Div. 139, 70 N. Y. Suppl. 147; Miller *v.* Barber, 4 Hun 802 [*affirmed* in 66 N. Y. 558]; Brackett *v.* Griswold, 14 N. Y. St. 449; Moers *v.* Martens, 8 Abb. Pr. 257.

Pennsylvania.— Price *v.* Junkin, 4 Watts 85, 28 Am. Dec. 685; Wilbur *v.* Strickland, 1 Rawle 458; Hinchman *v.* Richie, Brightly 143; Wood Paving Co. *v.* Bickel, 14 Phila. 152.

Vermont.— Jenne *v.* Joslyn, 41 Vt. 478.

United States.— Jack *v.* Mutual Reserve Fund L. Assoc., 113 Fed. 49, 51 C. C. A. 36; U. S. Bank *v.* Lyman, 2 Fed. Cas. No. 924, 1 Blackf. 297, 20 Vt. 666.

See 20 Cent. Dig. tit. "Evidence," § 994; and CONSPIRACY, 8 Cyc. 679; CRIMINAL LAW, 12 Cyc. 70.

13. *Connecticut.*— Cowles *v.* Coe, 21 Conn. 220.

Indiana.— Smith *v.* Freeman, 71 Ind. 85.

Minnesota.— Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108; Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63.

Missouri.— Poe *v.* Stockton, 39 Mo. App. 550; St. Louis Paint Mfg. Co. *v.* Mepham, 30 Mo. App. 15; Weinstein *v.* Reid, 25 Mo. App. 41.

Montana.— Harrington *v.* Butte, etc., Min. Co., 19 Mont. 411, 48 Pac. 758.

Nebraska.— Farley *v.* Peebles, 50 Nebr. 723, 70 N. W. 231.

New York.— Flagler *v.* Newcombe, 13 N. Y. Suppl. 299; Sellick *v.* Keeler, 1 N. Y. St. 594; Apthorp *v.* Comstock, 2 Paige 482.

Oregon.— Sheppard *v.* Yocum, 10 Oreg. 402.

Pennsylvania.— Scott *v.* Baker, 37 Pa. St. 330; Rogers *v.* Hall, 4 Watts 359.

Texas.— Brown *v.* Chenoworth, 51 Tex. 469.

Virginia.— Claytor *v.* Anthony, 6 Rand. 285.

Wisconsin.— Tucker *v.* Finch, 66 Wis. 17, 27 N. W. 817.

See 20 Cent. Dig. tit. "Evidence," § 996; and *supra*, IV, D, 4, a, (III).

14. Fogerty *v.* Jordan, 2 Rob. (N. Y.) 319.

15. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Miller *v.* Dayton, 57 Iowa 423, 10 N. W. 814.

16. Stovall *v.* Farmers', etc., Bank, 8 Sm. & M. (Miss.) 305, 47 Am. Dec. 85; Patton *v.* Freeman, 1 N. J. L. 113.

17. *California.*— Banning *v.* Marleau, 133 Cal. 485, 65 Pac. 964; Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635; Howe *v.* Scannell, 8 Cal. 325.

District of Columbia.— Rich *v.* Henry, 4 Mackey 155.

Georgia.— Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898.

Illinois.— Ellwood Mfg. Co. *v.* Faulkner, 87 Ill. App. 294.

Indiana.— Wiler *v.* Manley, 51 Ind. 169.

Maryland.— Main *v.* Lynch, 54 Md. 658.

Minnesota.— Carson *v.* Hawley, 82 Minn. 204, 84 N. W. 746.

New Jersey.— Stewart *v.* Johnson, 18 N. J. L. 87.

New York.— Avard *v.* Carpenter, 72 N. Y. App. Div. 258, 76 N. Y. Suppl. 105.

Pennsylvania.— Sommer *v.* Sommer, 160 Pa. St. 129, 28 Atl. 654; Palmer *v.* Gilmore, 148 Pa. St. 48, 23 Atl. 1041; McCabe *v.* Burns, 66 Pa. St. 356.

South Dakota.— Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687.

Tennessee.— Harrison *v.* Wisdom, 7 Heisk. 99.

West Virginia.—Ellis *v.* Dempsey, 4 W. Va. 126.

See 20 Cent. Dig. tit. "Evidence," §§ 994–1001.

18. Gray *v.* Nations, 1 Ark. 557.

19. McCaskey *v.* Graff, 23 Pa. St. 321, 62 Am. Dec. 336.

20. Rice *v.* Rice, (N. J. Ch. 1892) 23 Atl. 946.

connected with the statement[21] all his associates in the common enterprise. The statement being relevant in itself may be competent, although made prior to the conspiracy.[22]

(E) *Narrative Statements.* Statements concerning past transactions are not in general within the scope of agency conferred by unity of purpose.[23] A statement by a conspirator made when the common purpose has been accomplished[24] is incompetent against his associates, although given as a witness in court.[25]

(III) *Domestic Relations*—(A) *Parent and Child.* The relation of parent and child does not constitute the latter an agent to make admissions for the former;[26] but express authority in that behalf may be conferred upon a child, as on any other agent.[27] It is equally true that a father[28] or mother[29] has by virtue of the relationship no authority to affect a child by relevant statements available as admissions.

(B) *Husband and Wife.*[30] In order to render a statement by a husband or wife admissible in evidence against the other there must, as in other cases, be such preliminary proof as would authorize a jury to find that the declarant had authority to make the statement as an agent.[31] This proof may be either direct or

21. Pond *v.* Pond, 132 Mass. 219; Stewart *v.* Johnson, 18 N. J. L. 87; Hobby *v.* Hobby, 64 Barb. (N. Y.) 277; Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531.

22. Wallace *v.* Bernheim, 63 Ark. 108, 37 S. W. 712; Stewart *v.* Johnson, 18 N. J. L. 87.

23. Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57; Roberts *v.* Kendall, 3 Ind. App. 339, 29 N. E. 487; Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63; Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668.

Declarations of a paramour, not made in the presence of the wife, are not admissible to prove her adultery. Leary *v.* Leary, 18 Ga. 696; Rodgers *v.* Rodgers, 13 Ky. L. Rep. 203; Doughty *v.* Doughty, 32 N. J. Eq. 32; Berckmans *v.* Berckmans, 16 N. J. Eq. 122; Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Fairchild *v.* Fairchild, 1 Kulp 400.

See 20 Cent. Dig. tit. "Evidence," § 995.

24. *California.*—Barkly *v.* Copeland, (1890) 25 Pac. 405 [*reversing* 86 Cal. 483, 25 Pac. 1].

Illinois.— Beeler *v.* Webb, 113 Ill. 436.

Indiana.— Hubble *v.* Osborn, 31 Ind. 249.

Louisiana.— Reid *v.* Louisiana State Lottery Co., 29 La. Ann. 860.

Missouri.— Laytham *v.* Agnew, 70 Mo. 48.

Nebraska.— Stratton *v.* Oldfield, 41 Nebr. 702, 60 N. W. 82.

New York.— Scofield *v.* Spaulding, 54 Hun 523, 7 N. Y. Suppl. 927; Panama R. Co. *v.* Charlier, 4 Silv. Supreme 439, 7 N. Y. Suppl. 528; Dart *v.* Walker, 3 Daly 136.

North Carolina.— Barnhardt *v.* Smith, 86 N. C. 473.

Oregon.— Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780.

Pennsylvania.—Marshall *v.* Faddis, 199 Pa. St. 397, 49 Atl. 225; Wagner *v.* Haak, 170 Pa. St. 495, 32 Atl. 1087; Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545; Gaunce *v.* Backhouse, 37 Pa. St. 350.

Vermont.— Hall *v.* Jones, 55 Vt. 297.

Virginia.— Danville Bank *v.* Waddill, 31 Gratt. 469.

United States.— *In re* Martin, 16 Fed. Cas. No. 9,151, 5 Blatchf. 303.

See 20 Cent. Dig. tit. "Evidence," § 998.

25. Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

26. *Arkansas.*— Milwaukee Harvester Co. *v.* Tymich, 68 Ark. 225, 58 S. W. 252.

Georgia.— Vaughan *v.* McDaniel, 73 Ga. 97.

Illinois.— Boyd *v.* Jennings, 46 Ill. App. 290.

Indiana.—Alexandria Bldg. Co. *v.* McHugh, 12 Ind. App. 282, 39 N. E. 877, 40 N. E. 80.

Iowa.— Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60; Oxtoby *v.* Henley, 112 Iowa 697, 84 N. W. 942.

Missouri.—Sherlock *v.* Kimmell, 75 Mo. 77; Dunn *v.* Altman, 50 Mo. App. 231.

North Carolina.—Love *v.* McClure, 99 N. C. 290, 6 S. E. 250.

Pennsylvania.— Beates *v.* Retallick, 23 Pa. St. 288.

See 20 Cent. Dig. tit. "Evidence," § 883. And see, generally, Parent and Child.

27. Buchanan *v.* Collins, 42 Ala. 419; Allen *v.* Denstone, 8 C. & P. 760, 34 E. C. L. 1006.

28. Gaines *v.* State, 99 Ga. 703, 26 S. E. 760; Cochran *v.* McDowell, 15 Ill. 10; Wallingford *v.* Atkins, 72 S. W. 794, 24 Ky. L. Rep. 1995; Dosch *v.* Diem, 176 Pa. St. 603, 35 Atl. 207.

29. *Kentucky.*— Wallinford *v.* Atkins, 72 S. W. 794, 24 Ky. L. Rep. 1995.

Maryland.— Berry *v.* Waring, 2 Harr. & G. 103.

Massachusetts.— Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481.

Mississippi.— Prewett *v.* Land, 36 Miss. 495.

Virginia.— Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

30. See, generally, Husband and Wife.

31. Estes *v.* World Mut. L. Ins. Co., 6 Hun (N. Y.) 349; Winans *v.* Demarest, 84 N. Y. Suppl. 504; Yager *v.* Larsen, 22 Wis. 184. See also Aldrich *v.* Earle, 13 Gray (Mass.) 578.

circumstantial,[32] not including in the first instance, however, declarations of the alleged agent.[33] In the absence of sufficient proof of agency on the part of a husband for his wife or *vice versa* declarations of the husband not made in the presence of the wife, or subsequently adopted by her,[34] are not admissible against her,[35] and statements of a wife are not competent against her husband[36] or his

32. See *supra*, IV, D, 4, a, (II).

Possession of a joint interest in land does not make a statement of a husband (Texas, etc., R. Co. *v.* Speights, (Tex. Civ. App. 1900) 59 S. W. 572 [*affirmed* in 94 Tex. 350, 60 S. W. 659]) or wife (White *v.* Holman, 12 Me. 157; Steer *v.* Little, 44 N. H. 613; Churchill *v.* Smith, 16 Vt. 560; Aveson *v.* Kinnaird, 6 East 188, 2 Smith K. B. 286, 8 Rev. Rep. 455; Alban *v.* Pritchett, 6 T. R. 680) competent against the other.

33. Watkins Second Nat. Bank *v.* Miller, 2 Thomps. & C. (N. Y.) 104 [*affirmed* in 63 N. Y. 639]. See also *supra*, IV, D, 4, a, (II).

34. The wife's assent to a prior statement of the husband renders such statement admissible against her. McIntire *v.* Schiffer, 31 Colo. 246, 72 Pac. 1056.

35. *Alabama.*— Brunson *v.* Brooks, 68 Ala. 248.

Connecticut.— Fitzgerald *v.* Brennan, 57 Conn. 511, 18 Atl. 743; Benedict *v.* Pearce, 53 Conn. 496, 5 Atl. 371.

Georgia.— Virgin *v.* Dunwody, 93 Ga. 104, 19 S. E. 84.

Illinois.— Bennett *v.* Stout, 98 Ill. 47; Pierce *v.* Hasbrouck, 49 Ill. 23.

Indiana.— Stanfield *v.* Stiltz, 93 Ind. 249; Indianapolis *v.* Scott, 72 Ind. 196; Louisville, etc., R. Co. *v.* Richardson, 66 Ind. 43, 32 Am. Rep. 94.

Maine.— Hanson *v.* Millett, 55 Me. 184.

Maryland.— Bradford *v.* Williams, 2 Md. Ch. 1.

Massachusetts.— Broderick *v.* Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296; Shaw *v.* Boston, etc., R. Corp., 8 Gray 45.

Michigan.— Whelpley *v.* Stoughton, 112 Mich. 594, 70 N. W. 1098; Camphell *v.* Quackenbush, 33 Mich. 287; Glover *v.* Alcott, 11 Mich. 470; Dawson *v.* Hall, 2 Mich. 390.

Missouri.—Lemmons *v.* McKinney, 162 Mo. 525, 63 S. W. 92; Fox *v.* Windes, 127 Mo. 502, 30 S. W. 323, 48 Am. St. Rep. 648; Newberry *v.* Durand, 87 Mo. App. 290; Bates *v.* Holladay, 31 Mo. App. 162.

Nebraska.— Woodruff *v.* White, 25 Nebr. 745, 41 N. W. 781.

New York.— Deck *v.* Johnson, 1 Abb. Dec. 497, 2 Keyes 348; Bouton *v.* Welch, 59 N. Y. App. Div. 288, 69 N. Y. Suppl. 407; Bates *v.* Brockport First Nat. Bank, 23 Hun 420 [*affirmed* in 89 N. Y. 286]; Kennedy *v.* McGuire, 15 Hun 70; Bennett *v.* McGuire, 5 Lans. 183.

North Carolina.—Towles *v.* Fisher, 77 N. C. 437.

Pennsylvania.— Leedom *v.* Leedom, 160 Pa. St. 273, 28 Atl. 1024; Evans *v.* Evans, 155 Pa. St. 572, 26 Atl. 755; Martin *v.* Rutt, 127 Pa. St. 380, 17 Atl. 993; Sweigart *v.* Conrad, 16 Lanc. L. Rev. 340; Lang's Estate, 33 Pittsb. Leg. J. 9.

Texas.— Clapp *v.* Engledow, 82 Tex. 290, 18 S. W. 146; Reddin *v.* Smith, 65 Tex. 26; McKay *v.* Treadwell, 8 Tex. 176; Word *v.* Kennon, (Civ. App. 1903) 75 S. W. 365; Evans *v.* Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350; Owen *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; Smith *v.* Redden, 1 Tex. Unrep. Cas. 360; La Master *v.* Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911.

Vermont.— Pierce *v.* Pierce, 66 Vt. 369, 29 Atl. 364.

Wisconsin.— Swager *v.* Lehman, 63 Wis. 399, 23 N. W. 579.

United States.— Frankenthal *v.* Gilbert, 34 Fed. 5.

Canada.— Dill *v.* Wilkins, 2 Nova Scotia 113.

See 20 Cent. Dig. tit. "Evidence," §§ 953, 954.

36. *California.*— Svetinich *v.* Sheean, 124 Cal. 216, 56 Pac. 1028, 71 Am. St. Rep. 50.

Indiana.—Underwood *v.* Linton, 44 Ind. 72.

Louisiana.— Bray *v.* Cumming, 5 Mart. N. S. 252.

Massachusetts.— Rideout *v.* Knox, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81; McGregor *v.* Wait, 10 Gray 72, 69 Am. Dec. 305.

Michigan.— Burns *v.* Kirpatrick, 91 Mich. 364, 51 N. W. 893, 30 Am. St. Rep. 485; Rose *v.* Chapman, 44 Mich. 312, 6 N. W. 681; Hunt *v.* Strew, 33 Mich. 85.

Missouri.— Wall *v.* Coppedge, 15 Mo. 448; Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209.

Nebraska.— Norfolk Nat. Bank *v.* Wood, 33 Nebr. 113, 49 N. W. 958.

New Hampshire.— Horan *v.* Byrnes, 70 N. H. 531, 49 Atl. 569.

New York.—Macondray *v.* Wardle, 26 Barb. 612, 7 Abb. Pr. 3; Lay Grae *v.* Peterson, 2 Sandf. 338; Logue *v.* Link, 4 E. D. Smith 63; McLean *v.* Jagger, 13 How. Pr. 494.

North Carolina.— May *v.* Little, 25 N. C. 27, 38 Am. Dec. 707.

Pennsylvania.— Gardner's Appeal, (1886) 8 Atl. 176; Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545; Fleming *v.* Parry, 24 Pa. St. 47; Peck *v.* Ward, 18 Pa. St. 506; Jones *v.* McKee, 3 Pa. St. 496, 45 Am. Dec. 661.

Tennessee.— Queener *v.* Morrow, 1 Coldw. 123.

Texas.— Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

Wisconsin.— Meek *v.* Pierce, 19 Wis. 300.

England.— Kelly *v.* Small, 2 Esp. 716; Alban *v.* Pritchett, 6 T. R. 680.

See 20 Cent. Dig. tit. "Evidence," §§ 953, 954.

Where the wife would be an incompetent witness against her husband, her admissions

estate.[37] If authority as an agent be proved, it must still be shown that the declarations were within its scope,[38] and made while the declarant was discharging the duties of the agency;[39] in other words that the declarations were, as is commonly said, part of the *res gestæ*.[40] Narrative statements[41] and statements as to transactions occurring before coverture,[42] whenever made, are not within the scope of the agency. Statements of a husband, if otherwise competent, are not the less admissible against him that they were made by him as the agent for his wife or *vice versa*.[43]

(c) *Brothers.* In the absence of special authority duly established by preliminary proof a person is not affected by declarations of his brother.[44]

(iv) *Master and Servant.* A servant's declarations regarding the rights[45] or liabilities[46] of the master are incompetent in the absence of some proof of

are not competent against him. Funkhouser *v.* Pogue, 13 Ark. 295; Hawkins *v.* Hatton, 2 Nott & M. 374; Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666; Schooley *v.* Goodman, 1 Bing. 349, 8 E. C. L. 543, 1 C. & P. 36, 12 E. C. L. 32, 8 Moore C. P. 350.

37. Downing *v.* Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896.

38. *Alabama.*— Pearce *v.* Smith, 126 Ala. 116, 28 So. 37; Dyer *v.* State, 88 Ala. 225, 7 So. 267.

Indiana.— Casteel *v.* Casteel, 8 Blackf. 240, 44 Am. Dec. 763.

Kansas.— Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295.

Kentucky.— Bonney *v.* Reardin, 6 Bush 34.

Louisiana.— Barataria, etc., Canal Co. *v.* Field, 17 La. 421.

New Hampshire.— Pickering *v.* Pickering, 6 N. H. 120.

New York.— Post *v.* Smith, 54 N. Y. 648; Barton *v.* Lynch, 69 Hun 1, 23 N. Y. Suppl. 217; Riley *v.* Suydam, 4 Barb. 222; Fenner *v.* Lewis, 10 Johns. 38.

North Carolina.— Hughes *v.* Stokes, 2 N. C. 372.

Ohio.— Thomas *v.* Hargrave, Wright 595.

Pennsylvania.— Murphy *v.* Hubert, 16 Pa. St. 50; Sharpless *v.* Dobbins, 1 Del. Co. 25.

Texas.— Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. 487.

Vermont.— Goodrich *v.* Tracy, 43 Vt. 314, 5 Am. Rep. 281; Gilson *v.* Gilson, 16 Vt. 464; Curtis *v.* Ingham, 2 Vt. 287.

England.— Clifford *v.* Burton, 1 Bing. 199, 1 L. J. C. P. O. S. 61, 8 Moore C. P. 16, 25 Rev. Rep. 614, 8 E. C. L. 471; Wharton *v.* Wright, 1 C. & K. 585, 47 E. C. L. 585; Emerson *v.* Blonden, 1 Esp. 142, 5 Rev. Rep. 725; Anderson *v.* Sanderson, Holt N. P. 591, 3 E. C. L. 232, 2 Stark. 204, 3 E. C. L. 377, 17 Rev. Rep. 681, 19 Rev. Rep. 703; Meredith *v.* Footner, 12 L. J. Exch. 183, 11 M. & W. 202; Pratt *v.* Baker, 1 L. J. K. B. 12.

See 20 Cent. Dig. tit. "Evidence," §§ 953, 954.

39. May *v.* Sturdivant, 75 Iowa 116, 39 N. W. 221, 9 Am. St. Rep. 463; Robinson *v.* Dale, 6 Wkly. Notes Cas. (Pa.) 166; Duncan *v.* Landis, 106 Fed. 839.

40. Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295; Wright *v.* Rambo, 21 Gratt. (Va.) 158. See also Brush *v.* Blanchard, 19 Ill. 31, 35; and *supra*, IV, D, 4, a, (III).

41. *Alabama.*— Ward *v.* Johnson, 80 Ala. 281.

Iowa.— Montgomery *v.* Mann, 120 Iowa 609, 94 N. W. 1109; Phelps *v.* James, 86 Iowa 398, 53 N. W. 274, 41 Am. St. Rep. 497.

Louisiana.— Simmons *v.* Norwood, 21 La. Ann. 421.

Michigan.— Stansell *v.* Leavitt, 51 Mich. 536, 16 N. W. 892.

New Hampshire.— Chamberlain *v.* Davis, 33 N. H. 121.

New York.— Gillespie *v.* Walker, 56 Barb. 185; Ripley *v.* Mason, Lalor 66.

South Carolina.— Raiford *v.* French, 11 Rich. 367.

Wisconsin.— Livesley *v.* Lasalette, 28 Wis. 38.

See 20 Cent. Dig. tit. "Evidence," § 961. And see *supra*, IV, D, 4, a, (IV).

42. *Indiana.*— Brown *v.* Lasselle, 6 Blackf. 147, 38 Am. Dec. 135.

New Jersey.— Ross *v.* Winners, 6 N. J. L. 366.

New York.—Lay Grae *v.* Peterson, 2 Sandf. 338.

Vermont.— Churchill *v.* Smith, 16 Vt. 560.

Virginia.— Sheppard *v.* Starke, 3 Munf. 29.

See 20 Cent. Dig. tit. "Evidence," § 963.

Privity may be shown.— Where the husband claims property which came to him from the wife through marriage, her declarations as to her rights made before coverture may be competent. Brush *v.* Blanchard, 19 Ill. 31; Claussen *v.* La Franz, 1 Iowa 226; Willis *v.* Snelling, 6 Rich. (S. C.) 280. See *supra*, IV, D, 3.

43. Leyner *v.* Leyner, 123 Iowa 185, 98 N. W. 628.

44. Owens *v.* State, 74 Ala. 401; State *v.* Robinson, 37 La. Ann. 673; Pratt *v.* State, 19 Ohio St. 277; Rushing *v.* State, 25 Tex. App. 607, 8 S. W. 807.

45. Guerin *v.* New England Telephone, etc., Co., 70 N. H. 133, 46 Atl. 185.

46. *Georgia.*— Lee *v.* Nelms, 57 Ga. 253.

Missouri.— Kelly *v.* Chicago, etc., R. Co., 88 Mo. 534.

Montana.— Ryan *v.* Gilmer, 2 Mont. 517, 25 Am. Rep. 744.

Ohio.— Gobrecht *v.* Sicking, 18 Ohio Cir. Ct. 881, 9 Ohio Cir. Dec. 851, as to knowledge of character of master's animals.

express agency and evidence that the statements were within the line of the declarant's duty and made while he was in good faith seeking to discharge it.

(v) *Partners* — (a) *Preliminary Proof of Partnership.* Before an admission made by one partner can be received in evidence against another partner, affirmative proof, not including statements of the declarant,[47] must be introduced sufficient to reasonably satisfy the court that the jury would be justified in finding the existence of such a relation of partnership as to render the admission competent.[48]

(b) *Scope of Declarations.*[49] Within the scope of such agency as is established the declarations of a partner while engaged in discharging the partnership business are competent not only against himself but against copartners in the business to which the declaration relates.[50] It follows that a partner is bound by

United States.— Elcox *v.* Hill, 98 U. S. 218, 25 L. ed. 103.

England.— Johnson *v.* Lindsay, 53 J. P. 599.

See 20 Cent. Dig. tit. "Evidence," § 898.

Declarations of slaves were held to be clearly incompetent to affect the legal rights of the owner. Thorpe *v.* Burroughs, 31 Ala. 159; Ridge *v.* Featherston, 15 Ark. 159; Phillips *v.* Towler, 23 Mo. 401; Maddin *v.* Edmondson, 10 Mo. 643; Doty *v.* Moore, 16 Tex. 591. But the fact that a statement had been made and its accuracy verified was entirely competent, no question of admissions being presented. Fackler *v.* Chapman, 20 Mo. 249.

47. *Alabama.*— Cross *v.* Langley, 50 Ala. 8.

Arkansas.— Campbell *v.* Hastings, 29 Ark. 512.

Iowa.— Holmes *v.* Budd, 11 Iowa 186.

Massachusetts.— Tuttle *v.* Cooper, 5 Pick. 414.

Minnesota.— Slipp *v.* Hartley, 50 Minn. 118, 52 N. W. 386, 36 Am. St. Rep. 629.

Missouri.— Osceola Bank *v.* Outhwaite, 50 Mo. App. 124.

Nebraska.—Converse *v.* Shambaugh, 4 Nebr. 376.

New Jersey.— Flanagin *v.* Champion, 2 N. J. Eq. 51.

New York.— Davidson *v.* Hutchins, 1 Hilt. 123.

North Carolina.— Henry *v.* Willard, 73 N. C. 35; McFadyen *v.* Harrington, 67 N. C. 29.

Pennsylvania.— Wolle *v.* Brown, 4 Whart. 365.

Canada.— Carfrae *v.* Vanbuskirk, 1 Grant Ch. (U. C.) 539.

See 20 Cent. Dig. tit. "Evidence," § 1009.

Where the form of the transaction is such as clearly to indicate that it is not a firm matter a partner cannot make it such by his declaration to that effect. Ostrom *v.* Jacobs, 9 Metc. (Mass.) 454; Uhler *v.* Browning, 28 N. J. L. 79; Lazarus *v.* Long, 25 N. C. 39.

For corroboration.— Statements of an alleged partner may be used to corroborate other independent proof of agency. Berry *v.* Lathrop, 24 Ark. 12.

48. *Alabama.*— Hutchins *v.* Childress, 4 Stew. & P. 34.

California.— Dennis *v.* Kolm, 131 Cal. 91, 63 Pac. 141.

Georgia.— Thompson *v.* Mallory, 108 Ga. 797, 33 S. E. 986; McCutchin *v.* Bankston, 2 Ga. 244.

Louisiana.— Flower *v.* Millaudon, 6 La. 697.

Maryland.— Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599.

Massachusetts.— Allcott *v.* Strong, 9 Cush. 323; Cady *v.* Shepherd, 11 Pick. 400, 22 Am. Dec. 379; Odiorne *v.* Maxcy, 15 Mass. 39.

New York.— Paine *v.* Ronan, 6 N. Y. St. 420.

Pennsylvania.— Tussey *v.* Behmer, 9 Lanc. Bar 45.

South Carolina.— Allen *v.* Owens, 2 Speers 170.

See 20 Cent. Dig. tit. "Evidence," §§ 965, 1009.

In the discretion of the court the declarations of a partner may be received as against himself, to become competent against the remaining partners should a partnership relation become established later in the trial. Jennings *v.* Estes, 16 Me. 323; Fogerty *v.* Jordan, 2 Rob. (N. Y.) 319.

49. See, generally, Partnership.

50. *Alabama.*— Fail *v.* McArthur, 31 Ala. 26; Rowland *v.* Boozer, 10 Ala. 690.

California.— Dennis *v.* Kolm, 131 Cal. 91, 63 Pac. 141; Mamlock *v.* White, 20 Cal. 598.

Connecticut.— Munson *v.* Wickwire, 21 Conn. 513.

Georgia.— Perry *v.* Butt, 14 Ga. 699; Dennis *v.* Ray, 9 Ga. 449.

Illinois.— Low *v.* Arnstein, 73 Ill. App. 215; Gruenenberg *v.* Smith, 58 Ill. App. 281.

Indiana.— Hickman *v.* Reineking, 6 Blackf. 387; Britton *v.* Britton, 19 Ind. App. 638, 49 N. E. 1076.

Iowa.— Wiley *v.* Griswold, 41 Iowa 375.

Kentucky.— Rudy *v.* Katz, 66 S. W. 18, 23 Ky. L. Rep. 1697.

Louisiana.—Allen *v.* May, 11 La. Ann. 627.

Maine.— Fickett *v.* Swift, 41 Me. 65, 66 Am. Dec. 214; Gilmore *v.* Patterson, 36 Me. 544; Phillips *v.* Purington, 15 Me. 425.

Maryland.— Wells *v.* Turner, 16 Md. 133; Doremus *v.* McCormick, 7 Gill 49.

Massachusetts.— Nickerson *v.* Russell, 172 Mass. 584, 53 N. E. 141; Collett *v.* Smith, 143 Mass. 473, 10 N. E. 173; Shaw *v.* Stone, 1 Cush. 228; Chapin *v.* Coleman, 11 Pick. 331; Odiorne *v.* Maxcy, 15 Mass. 39.

Michigan.— Towle *v.* Dunham, 84 Mich.

statements in accounts and other communications sent out by a copartner, as far as the matters are within the scope of the partner's business,[51] but not by declarations of a partner concerning personal relations of other partners, or in the declarant's own favor,[52] or as to his individual business.[53] Statements concerning past transactions are not as a rule within the agency conferred by the partnership relation.[54] Admissibility of statements otherwise competent is not affected by the fact that the declarant has since died,[55] or has ceased to be a member of the firm,[56] or that the person to whom the declaration was made was not a member of the firm.[57]

(c) *After Dissolution of Partnership.*[58] Following early English authority,[59] it has been held in several of the United States that statements of a partner made after dissolution of the firm in regard to business previously transacted are admis-

268, 47 N. W. 683; Heffron *v.* Hanaford, 40 Mich. 305.

Minnesota.— Slipp *v.* Hartley, 50 Minn. 118, 52 N. W. 386, 36 Am. St. Rep. 629; Lindhjen *v.* Mueller, 42 Minn. 307, 44 N. W. 203.

Mississippi.— Lea *v.* Guice, 13 Sm. & M. 656.

Missouri.— Evers *v.* Life Assoc. of America, 59 Mo. 429; Dowzelot *v.* Rawlings, 58 Mo. 75; Henslee *v.* Cannefax, 49 Mo. 295; Cunningham *v.* Sublette, 4 Mo. 224; Rainwater *v.* Burr, 55 Mo. App. 468.

New Hampshire.— Webster *v.* Stearns, 44 N. H. 498; Rich *v.* Flanders, 39 N. H. 304; Tucker *v.* Peaslee, 36 N. H. 167.

New Jersey.— Gulick *v.* Gulick, 14 N. J. L. 578; Coyne *v.* Sayre, 54 N. J. Eq. 702, 36 Atl. 96; Ruckman *v.* Decker, 23 N. J. Eq. 283.

New Mexico.— Albuquerque First Nat. Bank *v.* Lesser, 9 N. M. 604, 58 Pac. 345.

New York.— Randall *v.* Bank of America, 161 N. Y. 632, 57 N. E. 1122; Union Nat. Bank *v.* Underhill, 102 N. Y. 336, 7 N. E. 293; Randall *v.* Knevals, 27 N. Y. App. Div. 146, 50 N. Y. Suppl. 748; Cheever *v.* Lamar, 19 Hun 130; Elliott *v.* Dudley, 19 Barb. 326; Parker *v.* Paine, 37 Misc. 768, 76 N. Y. Suppl. 942; Walden *v.* Sherburne, 15 Johns. 409.

North Carolina.— Brown Chemical Co. *v.* Atkinson, 91 N. C. 389; McLeod *v.* Bullard, 84 N. C. 515; Carter *v.* Beaman, 51 N. C. 44.

Ohio.— Benninger *v.* Hess, 41 Ohio St. 64.

Texas.— American F. Ins. Co. *v.* Stuart, (Civ. App. 1896) 38 S. W. 395.

Wisconsin.— Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

Wyoming.— Hester *v.* Smith, 5 Wyo. 291, 40 Pac. 310.

United States.— Garrett *v.* Woodward, 10 Fed. Cas. No. 5,253, 2 Cranch C. C. 190.

See 20 Cent. Dig. tit. "Evidence," § 965.

Admissions of a silent partner are within the rule stated in the text. Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; Weed *v.* Kellogg, 29 Fed. Cas. No. 17,345, 6 McLean 44.

The statement must be one of fact. A declaration of opinion is not competent. Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Folk *v.* Schaeffer, 180 Pa. St. 613, 37 Atl. 104.

51. Colcman *v.* Pearce, 26 Minn. 123, 1 N. W. 846; Jones *v.* O'Farrel, 1 Nev. 354.

Acquiescence by partner in book entries.— The failure of a partner to inspect the firm books and object to any charges against him amounts to such an acquiescence in the entries therein relating to himself or his relation to his partners as to bind him by them in an action for an accounting. Safe Deposit, etc., Co. *v.* Turner, (Md. 1903) 55 Atl. 1023.

52. Lewis *v.* Allen, 17 Ga. 300.

53. Hahn *v.* St. Clair Sav., etc., Co., 50 Ill. 456; Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

54. Taft *v.* Church, 162 Mass. 527, 39 N. E. 283; Thorn *v.* Smith, 21 Wend. (N. Y.) 365; Clements *v.* Rogers, 95 N. C. 248; White *v.* Gibson, 33 N. C. 283; Stringfellow *v.* Montgomery, 57 Tex. 349; Atwood *v.* Brooks, (Tex. App. 1890) 16 S. W. 535. But see Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800, holding that in an action for injuries occasioned by a falling pulley in an elevator, statements by a copartner with the other defendants, after the accident, as to the way in which the accident was caused, and the manner in which the pulley was attached to the ceiling, were admissible.

55. *Alabama.*— Smitha *v.* Cureton, 31 Ala. 652.

Indiana.— Dodds *v.* Rogers, 68 Ind. 110.

Maryland.— Doremus *v.* McCormick, 7 Gill 49.

New York.— Klock *v.* Beekman, 18 Hun 502.

Ohio.— Goodenow *v.* Duffield, Wright 455.

Vermont.— Adams *v.* Brownson, 1 Tyler 452.

See 20 Cent. Dig. tit. "Evidence," § 975.

56. Munson *v.* Wickwire, 21 Conn. 513.

57. Willis Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348.

58. Statements made during the existence of the partnership are not rendered inadmissible by dissolution of the firm by death of the declarant or otherwise. See *supra*, IV, D, 4, f, (v), (B).

59. Wood *v.* Braddick, 1 Taunt. 104, 105, 9 Rev. Rep. 711, where Mansfield, C. J., said: "Since it is clear that one partner can bind the other during all the partnership, upon what principle is it, that from the moment when it is dissolved, his account of their joint contracts should cease to be evi-

sible against all the partners,[60] although incompetent to create a new or additional liability,[61] or alone to prove indebtedness of the firm.[62] But the prevailing opinion in the United States is that such declarations cannot be received,[63] in the absence of prior authority or subsequent ratification,[64] against any partner other than the declarant,[65] even as to matters pending at the time of dissolution.[66] When one of the partners acts as agent of the others in winding up the business of the late firm he has no agency to bind his former associates as to new business,[67] or to create a new partnership contract;[68] but his declarations as to firm debts or lia-

dence? and that those who are to-day as one person in interest, should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united."

60. *Maine.*— Hinkley *v.* Gilligan, 34 Me. 101; Parker *v.* Merrill, 6 Me. 41.

Massachusetts.— Buxton *v.* Edwards, 134 Mass. 567; Taunton Iron Co. *v.* Richmond, 8 Metc. 434 (book entries); Gay *v.* Bowen, 8 Metc. 100; Vinal *v.* Burrill, 16 Pick. 401; Bridge *v.* Gray, 14 Pick. 55, 25 Am. Dec. 358; Cady *v.* Shepherd, 11 Pick. 400, 22 Am. Dec. 379.

New Hampshire.— Rich *v.* Flanders, 39 N. H. 304; Pierce *v.* Wood, 23 N. H. 519; Mann *v.* Locke, 11 N. H. 246.

New Jersey.— McElroy *v.* Ludlum, 32 N. J. Eq. 828.

South Carolina.— Kendrick *v.* Campbell, 1 Bailey 522; Fisher *v.* Tucker, 1 McCord Eq. 169. But see Fripp *v.* Williams, 14 S. C. 502; Meggett *v.* Finney, 4 Strobh. 220.

Texas.— Nalle *v.* Gates, 20 Tex. 315; Cohen *v.* Adams, 13 Tex. Civ. App. 118, 35 S. W. 303.

Vermont.— Loomis *v.* Loomis, 26 Vt. 198.

Virginia.— Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

Canada.— See Fisher *v.* Russell, 2 L. C. Jur. 191; Taylor *v.* Cook, 11 Ont. Pr. 60; Dansereau *v.* Gervais, 12 Quebec Super. Ct. 86.

See 20 Cent. Dig. tit. "Evidence," § 971.

Operation of the statute of limitations when it has not as yet barred a partnership debt may be arrested by declarations of a partner after dissolution. Bissell *v.* Adams, 35 Conn. 299; McClurg *v.* Howard, 45 Mo. 365, 100 Am. Dec. 378; Merrett *v.* Day, 38 N. J. L. 32, 20 Am. Rep. 362; Hopkins *v.* Banks, 7 Cow. (N. Y.) 650. As to creditors who receive part payment of a debt from a partner without notice of a previous dissolution of the partnership, the same result follows. Buxton *v.* Edwards, 134 Mass. 367; Gates *v.* Fisk, 45 Mich. 522, 8 N. W. 558; Davison *v.* Sherburne, 57 Minn. 355, 59 N. W. 316, 47 Am. St. Rep. 618; Tappan *v.* Kimball, 30 N. H. 136.

61. Fripp *v.* Williams, 14 S. C. 502; Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

62. Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

63. *Alabama.*—Cochran *v.* Cunningham, 16 Ala. 448, 50 Am. Dec. 186; Wilson *v.* Torbert, 3 Stew. 296, 21 Am. Dec. 632.

California.— Burns *v.* McKenzie, 23 Cal. 101.

Illinois.— Winslow *v.* Newlan, 45 Ill. 145; Miller *v.* Neimerick, 19 Ill. 172; Wilson *v.* Whitten, 99 Ill. App. 233.

Indiana.— Conkey *v.* Barbour, 22 Ind. 196; Yandes *v.* Lefavour, 2 Blackf. 371.

Kentucky.— Hamilton *v.* Summers, 12 B. Mon. 11, 54 Am. Dec. 509; Daniel *v.* Nelson, 10 B. Mon. 316; Craig *v.* Alverson, 6 J. J. Marsh. 609; Walker *v.* Duberry, 1 A. K. Marsh. 189.

Louisiana.— Buard *v.* Lemée, 12 Rob. 243; Dupré *v.* Richard, 11 Rob. 497; Lambeth *v.* Vawter, 6 Rob. 127; Lachomette *v.* Thomas, 5 Rob. 172.

Maryland.— Ward *v.* Howell, 5 Harr. & J. 60.

Michigan.— Gates *v.* Fisk, 45 Mich. 522, 8 N. W. 558.

Minnesota.— Shakopee First Nat. Bank *v.* Strait, 65 Minn. 162, 67 N. W. 987; National Bank of Commerce *v.* Meader, 40 Minn. 325, 41 N. W. 1043.

Mississippi.— Maxey *v.* Strong, 53 Miss. 280.

Missouri.— Dowzelot *v.* Rawlings, 58 Mo. 75; Flowers *v.* Helm, 29 Mo. 324; American Iron Mountain Co. *v.* Evans, 27 Mo. 552; Pope *v.* Risley, 23 Mo. 185; Brady *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503.

New York.— Williams *v.* Manning, 41 How. Pr. 454; Baker *v.* Stackpoole, 9 Cow. 420, 18 Am. Dec. 508; Gleason *v.* Clark, 9 Cow. 57.

North Carolina.— Detrick *v.* McLean, 112 N. C. 840, 17 S. E. 165.

Pennsylvania.— Wilson *v.* Waugh, 101 Pa. St. 233.

Tennessee.— Crumless *v.* Sturgess, 6 Heisk. 190.

United States.— Thompson *v.* Bowman, 6 Wall. 316, 18 L. ed. 736; Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Cronkhite *v.* Herrin, 15 Fed. 888; Bispham *v.* Patterson, 3 Fed. Cas. No. 1,441, 2 McLean 87.

See 20 Cent. Dig. tit. "Evidence," § 971.

A retiring partner is not affected by the statements of his associates made subsequent to his retirement. Pringle *v.* Leverich, 97 N. Y. 181, 49 Am. Rep. 522.

64. Shakopee First Nat. Bank *v.* Strait, 65 Minn. 162, 67 N. W. 987.

65. Kahn *v.* Boltz, 39 Ala. 66; Hogg *v.* Orgill, 34 Pa. St. 344.

66. White *v.* Kearney, 9 Rob. (La.) 495.

67. Clarke *v.* Jones, 1 Rob. (La.) 78.

68. *Louisiana.*— Conery *v.* Hayes, 19 La. Ann. 325.

Maryland.— Owings *v.* Low, 5 Gill & J. 134.

bilities,[69] as by waiving the benefit of the statute of limitations,[70] or other declarations fairly incident to winding up the business,[71] are still within the scope of the agency conferred on a partner to whom that duty has been confided.

(VI) *Principal and Surety.* When joint obligation is shown to exist, even where the obligors sustain to each other the relation of principal and surety, an agency is established by virtue of which the principal may by statements made in good faith[72] within the scope of the duties connected with the joint liability, and while engaged in discharging them, affect the surety,[73] although not to the extent of varying his liability[74] or of determining the rights as between themselves of several sureties.[75] Where the undertaking of the surety is that his principal shall properly account for money received by him, statements in books of account kept by or under the principal's direction showing the receipt of moneys covered by

Massachusetts.— Ostrom *v.* Jacobs, 9 Metc. 454.

Michigan.— Pennoyer *v.* Davis, 8 Mich. 407.

New York.— Hackley *v.* Patrick, 3 Johns. 536.

See 20 Cent. Dig. tit. "Evidence," § 971.

69. Kirk *v.* Hiatt, 2 Ind. 322; Lefavour *v.* Yandes, 2 Blackf. (Ind.) 240; Beckam *v.* Peay, 1 Bailey (S. C.) 121; Pritchard *v.* Draper, 1 Russ. & M. 191, 5 Eng. Ch. 191, Taml. 332, 12 Eng. Ch. 332.

70. Warner *v.* Allee, 1 Del. Ch. 49; Wilson *v.* Waugh, 101 Pa. St. 233.

71. *Alabama.*— Catlin *v.* Gilders, 3 Ala. 536.

Connecticut.—Story *v.* Barrell, 2 Conn. 665.

Indiana.— Taylor *v.* Hillyer, 3 Blackf. 433, 26 Am. Dec. 430.

Kentucky.— Stockton *v.* Johnson, 6 B. Mon. 408.

Massachusetts.— Ide *v.* Ingraham, 5 Gray 106.

Michigan.— Pennoyer *v.* David, 8 Mich. 407.

Missouri.— Little *v.* Ferguson, 11 Mo. 598.

New York.— Nichols *v.* White, 85 N. Y. 531.

Ohio.— Feigley *v.* Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778, rule is the same where each partner assists in winding up the business of the firm.

See 20 Cent. Dig. tit. "Evidence," § 971.

72. If evidence of collusion between the principal and the creditor appears, declarations of the principal will no longer affect the surety. Com. *v.* Kendig, 2 Pa. St. 448.

73. *Alabama.*—Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433; Lewis *v.* Lee County, 73 Ala. 148; Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186; Dumas *v.* Patterson, 9 Ala. 484.

Colorado.— Jenness *v.* Black Hawk, 2 Colo. 578.

Georgia.— Dobbs *v.* Justices of Murray County Inferior Ct., 17 Ga. 624; Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

Illinois.— Magner *v.* Knowles, 67 Ill. 325; Guarantee Co. of North America *v.* Chicago Mut. Bldg., etc., Assoc., 57 Ill. App. 254; Schureman *v.* People, 55 Ill. App. 629.

Indiana.— Parker *v.* State, 8 Blackf. 292.

Kentucky.— Pendleton *v.* Commonwealth Bank, 1 T. B. Mon. 171.

Louisiana.— Reynes *v.* Zacharie, 10 La. 127.

Massachusetts.— Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417; Brighton Bank *v.* Smith, 12 Allen 243, 90 Am. Dec. 144; Amherst Bank *v.* Root, 2 Metc. 522; Dexter *v.* Clemans, 17 Pick. 175; Boston Hat Manufactory *v.* Messinger, 2 Pick. 223.

Minnesota.— Hall *v.* U. S. Fidelity, etc., Co., 77 Minn. 24, 79 N. W. 590; Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475.

Mississippi.— Montgomery *v.* Dillingham, 3 Sm. & M. 647.

Missouri.— Babb *v.* Ellis, 76 Mo. 459; Union Sav. Assoc. *v.* Edwards, 47 Mo. 445; State *v.* Grupe, 36 Mo. 365; Withers *v.* The El Paso, 24 Mo. 204; State *v.* Bird, 22 Mo. 470; Nolley *v.* Callaway County Ct., 11 Mo. 447; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

New York.— Vaughn Mach. Co. *v.* Quintard, 37 N. Y. App. Div. 368, 55 N. Y. Suppl. 1114.

North Carolina.— State *v.* Woodside, 30 N. C. 104.

Pennsylvania.— Bachman *v.* Killinger, 55 Pa. St. 414; Meade *v.* McDowell, 5 Binn. 195.

Texas.— Barry *v.* Screwmen's Benev. Assoc., 67 Tex. 250, 3 S. W. 261; Bates *v.* Evans, 2 Tex. App. Civ. Cas. § 211.

Vermont.— Wilson *v.* Green, 25 Vt. 450, 60 Am. Dec. 279; Brown *v.* Munger, 16 Vt. 12.

United States.— Guarantee Co. of North America *v.* Phoenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376; U. S. *v.* Cutter, 25 Fed. Cas. No. 14,911, 2 Curt. 617.

See 20 Cent. Dig. tit. "Evidence," § 976.

Death of the declarant does not render inadmissible any statements that were originally competent. Hinkley *v.* Davis, 6 N. H. 210, 25 Am. Dec. 457; Walker *v.* Pierce, 21 Gratt. (Va.) 722.

A statement by a surety under like conditions is admissible against him and his principal in the absence of collusion. Chapel *v.* Washburn, 11 Ind. 393.

74. Nickols *v.* Jones, 166 Pa. St. 599, 31 Atl. 329. See also Barkley *v.* Bradford, 100 Ky. 304, 38 S. W. 432, 18 Ky. L. Rep. 725.

75. Very *v.* Watkins, 23 How. (U. S.) 469, 16 L. ed. 522.

the joint contract,[76] accounts filed by him in court to the same effect,[77] or his official reports as a public officer[78] are competent against the surety, provided the duty of the principal required him to keep the accounts or publish the report.[79] If the declaration is one which it is the principal's duty to make, it is immaterial that he had been at the time removed for misconduct from the performance of other duties connected with the office.[80] Statements by the principal are not evidence against a surety, if made prior to the execution of the joint obligation,[81] or where they are recitals of past transactions and are made after breach of the obligation[82] or expiration of the time for which the surety has undertaken to be responsible.[83] Admissions of the personal representative of the principal or his recognition of the obligation are not competent evidence against the surety.[84]

76. *Maryland.*— State *v.* McKee, 11 Gill & J. 378.

Nebraska.— State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983.

North Carolina.— Peck *v.* Gilmer, 20 N. C. 391.

Pennsylvania.— Morrell *v.* Adams Express Co., 34 Leg. Int. 321.

South Carolina.— State *v.* Teague, 9 S. C. 149.

Texas.— Bates *v.* Evans, 2 Tex. App. Civ. Cas. § 211.

Canada.— See Murray *v.* Gibson, 28 Grant Ch. (U. C.) 12; Welland *v.* Brown, 4 Ont. 217. See also Victoria Mut. F. Ins. Co. *v.* Davidson, 3 Ont. 378.

See 20 Cent. Dig. tit. "Evidence," § 976.

77. State *v.* Stewart, 36 Miss. 652; State *v.* Rosswaag, 3 Mo. App. 11.

78. Tompkins County *v.* Bristol, 99 N. Y. 316, 1 N. E. 878.

79. State *v.* Fullenwider, 26 N. C. 364.

Oral statements to the same effect are equally admissible.

Illinois.— Swift *v.* School Trustees, 189 Ill. 584, 60 N. E. 44; Drabek *v.* Grand Lodge Bohemian Slavonian Ben. Soc., 24 Ill. App. 82.

Maryland.— McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552.

New York.— Yates *v.* Thomas, 35 Misc. 552, 71 N. Y. Suppl. 1113.

Rhode Island.— Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231.

United States.— Ingle *v.* Collard, 13 Fed. Cas. No. 7,042, 1 Cranch C. C. 134.

See 20 Cent. Dig. tit. "Evidence," § 976.

80. Father Matthew Young Men's Total Abstinence, etc., Soc. *v.* Fitzwilliam, 12 Mo. App. 445 [*affirmed* in 84 Mo. 406].

81. Cheltenham Fire-Brick Co. *v.* Cook, 44 Mo. 29; Smith *v.* Whittingham, 6 C. & P. 78, 25 E. C. L. 330.

82. *Illinois.*— Kirkpatrick *v.* Howk, 80 Ill. 122.

Indiana.— Bocard *v.* State, 79 Ind. 270.

Kansas.— Lee *v.* Brown, 21 Kan. 458.

Kentucky.— Cassity *v.* Robinson, 8 B. Mon. 279.

Maryland.— Griffith *v.* Turner, 4 Gill 111.

New York.— Hatch *v.* Elkins, 65 N. Y. 489; Ayer *v.* Getty, 46 Hun 287; Wieder *v.* Union Surety, etc., Co., 42 Misc. 499, 86 N. Y. Suppl. 105; Eichhold *v.* Tiffany, 20 Misc. 681, 46 N. Y. Suppl. 534.

Ohio.— Stetson *v.* New Orleans Bank, 2 Ohio St. 167.

Tennessee.—White *v.* Memphis German Nat. Bank, 9 Heisk. 475; Wheeler *v.* State, 9 Heisk. 393; Trousdale *v.* Philips, 2 Swan 384.

Virginia.— Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

England.—Smith *v.* Whittingham, 6 C. & P. 78, 25 E. C. L. 330.

Canada.— Palmer *v.* Wilbur, 8 N. Brunsw. 443; Freeland *v.* Jones, 6 U. C. Q. B. O. S. 44.

See 20 Cent. Dig. tit. "Evidence," § 981.

Res gestæ.— "Declarations of a principal are not, in general, evidence in an action against the surety upon his collateral undertaking unless made during the transaction, so as to become part of the *res gestæ*." Snell *v.* Allen, 1 Swan (Tenn.) 208, 210, per McKinney, J. To the same effect see Shelby *v.* Governor, 2 Blackf. (Ind.) 289.

Hearsay.— Liability of the surety cannot be established by the principal's statement of what the surety has said. Root Music Co. *v.* Caldwell, 54 Iowa 432, 6 N. W. 695.

83. *Alabama.*— Evans *v.* State Bank, 13 Ala. 787.

Colorado.— Jenness *v.* Black Hawk, 2 Colo. 578.

Illinois.— Drabek *v.* Grand Lodge Bohemian Slavonian Ben. Soc., 24 Ill. App. 82.

Indiana.— Hotchkiss *v.* Lyon, 2 Blackf. 222.

Kentucky.— Pollard *v.* Louisville, etc., R. Co., 7 Bush 597; Com. *v.* Brassfield, 7 B. Mon. 447.

Massachusetts.— Chelmsford Co. *v.* Demarest, 7 Gray 1.

Missouri.— Union Sav. Assoc. *v.* Edwards, 47 Mo. 445; St. Louis *v.* Foster, 24 Mo. 141; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

New York.— Tompkins County *v.* Bristol, 15 Hun 116; New York City Tenth Nat. Bank *v.* Darragh, 1 Hun 111, 3 Thomps. & C. 138.

South Carolina.— State Bank *v.* Johnson, 1 Mill 404, 12 Am. Dec. 645.

Texas.— Lacoste *v.* Bexar County, 28 Tex. 420; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

See 20 Cent. Dig. tit. "Evidence," § 982.

84. Harrison *v.* Heflin, 54 Ala. 552.

(VII) *TRUSTEES AND CESTUIS QUE TRUSTENT*—(A) *In General.* It is essential to the competency of statements made by a trustee as agent for a beneficiary that he should not only have been appointed to his trust,[85] but have fully qualified to discharge its duties,[86] and that the declaration should have been made in discharge of those duties.[87] The powers conferred by the nature of the trust, or the instrument under which the trustee is acting, generally determine the competency of particular statements,[88] although it has been held that the authority of a trustee must be express.[89] Statements as to his conduct in discharge of his duties,[90] or in his own favor,[91] or impairing the rights of his beneficiaries,[92] are incompetent. Declarations of a trustee without interest in the estate do not affect the *cestui que trust.*[93]

(B) *Administrators.* Statements by an administrator made under conditions applying to trustees generally [94] are competent against the estate.[95] It has been held that an administrator cannot, without his own consent, be affected by statements of a predecessor in the trust.[96] Declarations of one of several administrators are incompetent against the estate,[97] even where they were severally appointed by courts in different jurisdictions.[98] The agency of an administrator does not in general authorize him to make statements injuriously affecting the interests of the trust estate.[99]

85. Moore *v.* Butler, 48 N. H. 161; Phillips *v.* Herndon, 78 Tex. 378, 14 S. W. 857, 22 Am. St. Rep. 59; Webb *v.* Smith, 1 C. & P. 337, 12 E. C. L. 202, R. & M. 106, 21 E. C. L. 712.

86. *Arkansas.*— Prater *v.* Frazier, 11 Ark. 249.

Louisiana.— Jeter *v.* Sandall, 10 La. Ann. 237.

Maryland.— Mangun *v.* Webster, 7 Gill 78.

New Hampshire.— Moore *v.* Butler, 48 N. H. 161.

Oregon.— Williams *v.* Culver, 39 Oreg. 337, 64 Pac. 763.

Texas.—Lindsey *v.* White, (Civ. App. 1901) 61 S. W. 438.

England.— Legge *v.* Edmonds, 25 L. J. Ch. 125, 4 Wkly. Rep. 71.

See 20 Cent. Dig. tit. "Evidence," §§ 983–988.

Subsequent qualification does not render a previous statement competent. Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009.

87. *Arkansas.*— Fargason *v.* Edrington, 49 Ark. 207, 4 S. W. 763.

Georgia.— Knorr *v.* Raymond, 73 Ga. 749; Cunningham *v.* Schley, 41 Ga. 426.

Illinois.— Unity Co. *v.* Equitable Trust Co., 204 Ill. 595, 68 N. E. 654 [*affirming* 107 Ill. App. 449], declarations of trustee under deed of trust not admissible against bondholders.

New York.— Putnam *v.* Lincoln Safe Deposit Co., 87 N. Y. App. Div. 13, 83 N. Y. Suppl. 1091 [*reversing* 39 Misc. 738, 80 N. Y. Suppl. 961], declarations of husband not admissible against wife for whom he was trustee.

Pennsylvania.— Trego *v.* Huzzard, 19 Pa. St. 441.

Tennessee.— Helm *v.* Steele, 3 Humphr. 472.

United States.— Waterman *v.* Wallace, 29 Fed. Cas. No. 17,261, 2 Ban. & A. 126, 13 Blatchf. 128.

See 20 Cent. Dig. tit. "Evidence," § 983.

88. Reed *v.* Beardsley, 6 Nebr. 493; Church *v.* Howard, 79 N. Y. 415; Hueston *v.* Hueston, 2 Ohio St. 488.

89. Eitelgeorge *v.* Mutual House Bldg. Assoc., 69 Mo. 52.

90. Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212.

91. Stratton *v.* Edwards, 174 Mass. 374, 54 N. E. 886.

92. Thomas *v.* Bowman, 29 Ill. 426; Allen *v.* Everett, 12 B. Mon. (Ky.) 371; Brennan *v.* Hall, 131 N. Y. 160, 29 N. E. 1009; Calwell *v.* Prindle, 19 W. Va. 604. See also Castner *v.* Rinne, 31 Colo. 256, 72 Pac. 1052.

93. Thompson *v.* Drake, 32 Ala. 99; Graham *v.* Lockhart, 8 Ala. 9.

94. See *supra*, IV, D, 4, f, (VII), (A).

95. Pharis *v.* Leachman, 20 Ala. 662; Horkan *v.* Benning, 111 Ga. 126, 36 S. E. 432; Sample *v.* Lipscombe, 18 Ga. 687; Tucker *v.* Baker, 94 N. C. 162; Matoon *v.* Clapp, 8 Ohio 248.

96. Rogers *v.* Grannis, 20 Ala. 247; McLaughlin *v.* Nelms, 9 Ala. 925; Pease *v.* Phelps, 10 Conn. 62. *Contra*, Eckert *v.* Triplett, 48 Ind. 174, 17 Am. Rep. 735; Lashlee *v.* Jacobs, 9 Humphr. (Tenn.) 718.

97. Marshall *v.* Adams, 11 Ill. 37; Berdan *v.* Allan, 10 Ill. App. 91; Walkup *v.* Pratt, 5 Harr. & J. (Md.) 51; Hummel *v.* Brown, 24 Pa. St. 310. But see Crouse *v.* Judson, 41 Misc. (N. Y.) 338, 84 N. Y. Suppl. 755, holding that the admission of one of two administrators is competent, although not conclusive, to charge the estate.

98. Norwood *v.* Cobb, 20 Tex. 588.

99. *Connecticut.*— Crandall *v.* Gallup, 12 Conn. 365.

Iowa.— Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663, 51 N. W. 75.

New York.— More *v.* Finch, 65 Hun 404, 20 N. Y. Suppl. 164.

Ohio.— Bird *v.* Hueston, 10 Ohio St. 418.

Pennsylvania.— Krouse's Estate, 15 Phila. 564; Orr's Appeal, 7 Wkly. Notes Cas. 126.

(c) *Executors.* Statements of an executor within the scope of his agency and fairly within the line of his duty in discharging it are competent against the estate;[1] but one of several executors cannot affect the estate by his declarations.[2] An executor's declarations are incompetent to affect injuriously the interest of heirs or devisees.[3]

(d) *Guardians.* Declarations of a guardian within the scope of his agency affect the ward,[4] but his agency does not extend to statements in disparagement of the ward's interest.[5]

(e) *Statements of Beneficiaries.* A trustee is not affected by statements of the beneficiary,[6] even when the latter is in possession of part of the estate.[7]

E. Proof and Effect* — **1. Mode and Requisites of Proof — a. Preliminary Evidence.** Before a statement can be used against a party as an admission there must be at least *prima facie* proof that it was made by him, by his authority,[8] or by some person whose statements may legally affect the party.[9]

b. Proof of Admissions. An oral admission may be proved by any person who heard it.[10] If a witness cannot give the exact words of a conversation he may state the substance of it,[11] but not merely his understanding of the admission,[12] or his conclusion of what it would prove.[13] Testimony to an admission in conversation may be received for what it is worth, although the witness states that he did not hear the whole conversation.[14] But a witness cannot testify to an

South Carolina.— Ciples *v.* Alexander, 2 Treadw. 767; Wright *v.* Wright, 2 Brev. 125.

Texas.— Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510.

See 20 Cent. Dig. tit. "Evidence," § 986.

1. Starke *v.* Keenan, 5 Ala. 590; Sample *v.* Lipscomb, 18 Ga. 687.

2. Bruyn *v.* Russell, 52 Hun (N. Y.) 17, 4 N. Y. Suppl. 784; Potter *v.* Greene, 51 Hun (N. Y.) 6, 3 N. Y. Suppl. 605; Finnern *v.* Hinz, 38 Hun (N. Y.) 465; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Hammon *v.* Huntley, 4 Cow. (N. Y.) 493. See also Peek *v.* Ray, [1894] 3 Ch. 282, 63 L. J. Ch. 647, 70 L. T. Rep. N. S. 769, 7 Reports 259, 42 Wkly. Rep. 498.

3. Lawrence *v.* Wilson, 160 Mass. 304, 35 N. E. 858; Leeper *v.* McGuire, 57 Mo. 360; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Osgood *v.* Manhattan Co., 3 Cow. (N. Y.) 612, 15 Am. Dec. 304.

4. Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239; Westenfelder *v.* Green, 24 Oreg. 448, 34 Pac. 23.

5. Neal *v.* Lapleine, 48 La. Ann. 424, 19 So. 261; Cooper *v.* Mayhew, 40 Mich. 528; Stevens *v.* Continental Casualty Co., (N. D. 1903) 97 N. W. 862; Dement *v.* Scott, 2 Head (Tenn.) 367, 75 Am. Dec. 747. See also Schlotterer *v.* Brooklyn, etc., Ferry Co., 75 N. Y. App. Div. 330, 78 N. Y. Suppl. 202.

6. Barker *v.* Hamilton, 3 Colo. 291.

7. Harrison *v.* Mock, 16 Ala. 616; Warren *v.* Carey, 145 Mass. 78, 12 N. E. 999. But see McDonald *v.* Wright, 12 Grant Ch. (U. C.) 552, holding that admissions good against the *cestui que trust* are good against the trustee.

8. Atchison, etc., R. Co. *v.* Palmore, (Kan. Sup. 1904) 75 Pac. 509; Lord Electric Co. *v.* Morrill, 178 Mass. 304, 59 N. E. 807 (testimony to recognition of voice over telephone sufficient); Lincoln Mill Co. *v.* Wissler, (Nebr. 1903) 95 N. W. 857 (where, however, a party communicating by telephone was sufficiently identified); Arnold *v.* Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 61 (where the party was circumstantially but sufficiently identified); Stevens *v.* Equitable Mfg. Co., 29 Tex. Civ. App. 168, 67 S. W. 1041 (authenticity of letters).

Admission made by party or by another, the evidence leaving it uncertain by whom, is incompetent. Butterfield *v.* Kirtley, 114 Iowa 520, 87 N. W. 407.

Proof of agency.—Gates *v.* Manny, 14 Minn. 21; Wendell *v.* Abbott, 45 N. H. 349; Munroe *v.* Stutts, 31 N. C. 49. Testimony of an alleged agent is competent to prove agency. Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240.

9. See *supra*, IV, D, 4, a, (II).

Proof of partnership.— Dennis *v.* Kolm, 131 Cal. 91, 63 Pac. 141; Harris *v.* Wilson, 7 Wend. (N. Y.) 57; Hilton *v.* McDowell, 87 N. C. 364.

10. Lyman *v.* Lull, 20 Vt. 349. A witness may testify to an oral admission without producing, unless on cross-examination, a memorandum of it made by him at the time. Parsons *v.* Disbrow, 1 E. D. Smith (N. Y.) 547.

11. Grandstaff *v.* Brown, 23 Kan. 176.

General offer of proof of admission should not be rejected merely because the offer does not specify the precise words used. Nissley *v.* Brubaker, 192 Pa. St. 388, 43 Atl. 967.

12. Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186.

13. Marshall *v.* Adams, 11 Ill. 37.

14. Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243. *Compare* Scott *v.* Young, 4 Paige (N. Y.) 542, 547. A witness may state the substance of a portion of the conversation, even if he cannot remember the sub-

* By Charles C. Moore.

admission if he is unable to state whether it was made by a party or by a person whose statement would be hearsay and incompetent.[15] An alleged admission should not be considered where the subject-matter to which it refers is left uncertain.[16] Contents of a document cannot be established by admission thereof, when the document itself can be produced.[17] Where a person claims a beneficial interest under a written instrument to which he is not a party, not having signed it, his admission as to the purpose for which it was executed may be used against him without first proving the execution of the instrument by those who signed it.[18] When admissions of a predecessor in title are offered in evidence[19] it is material to show accurately or approximately when they were made.[20] The general rule is that a party need not put in any mode of an admission, oral or written, other than he desires to use; and he may leave it to the other party to put in the remainder.[21] Pleadings are not evidence unless they are introduced on the trial at the proper time and in the proper way.[22] Admissions by a party to a suit may be proved against him without laying a predicate therefor by examining him touching such admissions.[23]

stance of the rest of it. Voorheis *v.* Bovell, 20 Ill. App. 538.

15. Redding *v.* Godwin, 44 Minn. 355, 46 N. W. 563. Admission of a fact, evidently made without personal knowledge, but stating the source of information, is competent (Stephens *v.* Vroman, 18 Barb. (N. Y.) 250), but may have little weight. If an alleged admission is not sufficiently connected with the party the jury may be instructed to disregard it. Wright *v.* Gillespie, 43 Mo. App. 244.

16. A party's statement in conversation that he had executed such a note as was described by his interlocutor was held not to be an admission of execution of such a note, which was in the interlocutor's pocket and not produced at the time. Palmer *v.* Manning, 4 Den. (N. Y.) 131. Admission that some items of an account are correct with a disclaimer of knowledge as to other items is not sufficient proof of any part of the account. Quarles *v.* Littlepage, 2 Hen. & M. (Va.) 401, 3 Am. Dec. 637. "Whether a statement or admission of a party has reference to the issue, is a question of fact for the determination of the jury, the duty of the court being to admit proof of the statement or admission if there is evidence tending to show that it referred to the controversy in hearing." Von Reeden *v.* Evans, 52 Ill. App. 209, 211.

Statements obviously not founded on personal knowledge are not competent as admissions of fact. Mittnacht *v.* Bache, 16 N. Y. App. Div. 426, 45 N. Y. Suppl. 81, affidavit in another case.

17. Hasbrouck *v.* Baker, 10 Johns. (N. Y.) 248; Jenner *v.* Joliffe, 6 Johns. (N. Y.) 9. Admission of having collected money on executions is competent without production of the executions or copies thereof. Mantz *v.* Collins, 4 Harr. & M. (Md.) 65.

18. Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243.

19. See *supra*, IV, D, 3, b, c, d.

20. Whelchel *v.* Gainsville, etc., Electric R. Co., 116 Ga. 431, 42 S. E. 776.

21. Southern L. & T. Co. *v.* Benbow, 131 N. C. 413, 42 S. E. 896 (testimony in another case); Lewis Pub. Co. *v.* Lenz, 86 N. Y. App. Div. 451, 83 N. Y. Suppl. 841. See also Kentucky, etc., Cement Co. *v.* Cleveland, 4 Ind. App. 171, 30 N. E. 802; Jones *v.* U. S. Mutual Acc. Assoc., 90 Iowa 652, 61 N. W. 485. *Contra*, Bompart *v.* Lucas, 32 Mo. 123. But see Kritzer *v.* Smith, 21 Mo. 296. Where an answer in chancery is offered as an admission, the bill should also be read so far as necessary to make the answer intelligible. Randall *v.* Parramore, 1 Fla. 409. Part of a letter may be introduced without the remainder, where the opposite party has a letter-press copy of the entire letter. Cramer *v.* Gregg, 40 Ill. App. 442. The party offering an admission in conversation may show all the conversation, especially so far as it accentuates the admission. Devlin *v.* Kilcrease, 2 McMull. (S. C.) 425.

22. Greenville *v.* Old Dominion Steamship Co., 104 N. C. 91, 10 S. E. 147; Smith *v.* Nimocks, 94 N. C. 243.

23. *Alabama.*— Moore *v.* Crosthwait, 135 Ala. 272, 33 So. 28.

Illinois.—Second Borrowers, etc., Bldg. Assoc. *v.* Cochrane, 103 Ill. App. 29.

Indiana.— Pritchett *v.* Sheridan, 29 Ind. App. 81, 63 N. E. 865.

Indian Territory.— Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110.

Iowa.— Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513.

Maryland.— Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

Nebraska.— Dunafon *v.* Barber, 3 Nebr. (Unoff.) 613, 92 N. W. 198; Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

New Jersey.—McBlain *v.* Edgar, 65 N. J. L. 634, 48 Atl. 600.

New York.— Root *v.* Brown, 4 Hun 797; Stickney *v.* Ward, 20 Misc. 667, 46 N. Y. Suppl. 382.

Texas.— Simpson *v.* Edens, 14 Tex. Civ. App. 235, 38 S. W. 474.

See 20 Cent. Dig. tit. "Evidence," § 1004.

In the case of a mere witness the general rule is otherwise and his contradictory state-

2. Entire Statement to Be Received — a. In General. Where a witness testifies to part of a statement of a party as an admission, the party is entitled, by cross-examination or redirect examination of the same witness[24] or by other witnesses,[25] to show his entire statement made at the same time, provided the part which he thus proves relates to the subject-matter of the admission in evidence

ments are not admissible to impeach his testimony without first questioning him concerning such statements. See, generally, Witnesses.

24. Oral statement.— *Alabama.*— Jones *v.* Fort, 36 Ala. 449.

Arkansas.— Murry *v.* Meredith, 25 Ark. 164; Trammell *v.* Bassett, 24 Ark. 499; Adkins *v.* Hershy, 14 Ark. 442.

Illinois.— Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628; Moore *v.* Wright, 90 Ill. 470; Phares *v.* Barber, 61 Ill. 271.

Iowa.— Courtright *v.* Deeds, 37 Iowa 503.

Kentucky.— Taylor *v.* Whiting, 2 B. Mon. 268; Withers *v.* Richardson, 5 T. B. Mon. 94, 17 Am. Dec. 44.

Louisiana.— Lewis *v.* Gibson, 9 Rob. 146.

Maine.— Oakland Ice Co. *v.* Maxcy, 74 Me. 294.

Massachusetts.—Adam *v.* Eames, 107 Mass. 275; Goodhue *v.* Hitchcock, 8 Metc. 62.

Michigan.— Swift Electric Light Co. *v.* Grant, 90 Mich. 469, 51 N. W. 539; Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62.

Mississippi.— McIntyre *v.* Harris, 41 Miss. 81.

Missouri.— Howard *v.* Newsom, 5 Mo. 523.

New Hampshire.— Barker *v.* Barker, 16 N. H. 333, 339.

New York.— Rouse *v.* Whited, 25 N. Y. 170, 82 Am. Dec. 337; Stedman *v.* Ranney, 80 Hun 37, 29 N. Y. Suppl. 866; Garey *v.* Nicholson, 24 Wend. 350; Munford *v.* Whitney, 15 Wend. 380, 30 Am. Dec. 60.

North Carolina.— Roberts *v.* Roberts, 85 N. C. 9.

Pennsylvania.— Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Pa. St. 180; Hamsher *v.* Kline, 57 Pa. St. 397; Stevenson *v.* Hoy, 43 Pa. St. 191; West Branch Bank *v.* Donaldson, 6 Pa. St. 179; Postens *v.* Postens, 3 Watts & S. 127.

Tennessee.— Haisten *v.* Hixen, 3 Sneed 691.

Texas.— McGehee *v.* Lane, 34 Tex. 390.

England.— Prince *v.* Samo, 7 A. & E. 627, 2 Jur. 323, 7 L. J. Q. B. 123, 3 N. & P. 139, W. W. & H. 132, 34 E. C. L. 333.

See 20 Cent. Dig. tit. "Evidence," § 1023.

Questions and answers.— Where a party's answer to a question put by the witness, or another person, is sought to be introduced, and such answer could not be understood, or would be unintelligible, without stating the question also, to which it was made, then the question is admissible (Young *v.* Bennett, 5 Ill. 43; Mullins *v.* Cottrell, 41 Miss. 291); otherwise the remarks and conversation of the witness are not admissible (Young *v.* Bennett, *supra*). A witness testifying to admissions in conversation is not confined to what the party said in chief, but may state his answers to questions. Barnum *v.* Barnum, 9 Conn. 242, where Daggett, J., said: "Such answers may explain or destroy the substance of the conversation."

25. Oral statement.— *Alabama.*—Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46; Scruggs *v.* Bibb, 33 Ala. 481; Wittick *v.* Keiffer, 31 Ala. 192; Bradford *v.* Bush, 10 Ala. 386; Lee *v.* Hamilton, 3 Ala. 529, 533; Rogers *v.* Wilson, Minor 407, 12 Am. Dec. 61.

California.— Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748.

Connecticut.— Clark *v.* Smith, 10 Conn. 1, 25 Am. Dec. 47.

Florida.— Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243.

Georgia.— Dixon *v.* Edwards, 48 Ga. 142; Doonan *v.* Mitchell, 26 Ga. 472.

Illinois.— Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742 [*affirming* 99 Ill. App. 32]; Young *v.* Bennett, 5 Ill. 43; Pittsburgh, etc., R. Co. *v.* Story, 104 Ill. App. 132.

Indiana.— Grand Rapids, etc., R. Co. *v.* Diller, 110 Ind. 223, 9 N. E. 710; Crowder *v.* Reed, 80 Ind. 1.

Iowa.— Hess *v.* Wilcox, 58 Iowa 380, 10 N. W. 847.

Kentucky.— Beauchamp *v.* Tennel, 1 Bibb 441.

Louisiana.—Agricultural Bank *v.* The Jane, 19 La. 1.

Maine.— Barbour *v.* Martin, 62 Me. 536, 539, where Danforth, J., said: "It is sufficient that it is the same conversation, and relates to the same subject matter."

Maryland.— Turner *v.* Jenkins, 1 Harr. & G. 161.

Massachusetts.— Farley *v.* Rodocanachi, 100 Mass. 427, 492, where Colt, J., said: "When a part of a conversation or admission is introduced the other party may prove all that was said."

Michigan.— Continental L. Ins. Co. *v.* Willets, 24 Mich. 268.

Missouri.— Reevs *v.* Hardy, 7 Mo. 348; Haver *v.* Schwyhart, 48 Mo. App. 50.

New York.— Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372; Bearss *v.* Copley, 10 N. Y. 93; Root *v.* Brown, 4 Hun 797; Roberts *v.* Gee, 15 Barb. 449; Delamater *v.* Pierce, 3 Den. 315; Schwartz *v.* Wood, 21 N. Y. Suppl. 1053; Putnam *v.* Mathewson, 2 N. Y. Suppl. 579.

North Carolina.— Steele *v.* Wood, 78 N. C. 365.

Pennsylvania.—Sherwood *v.* Titman, 55 Pa. St. 77; Newman *v.* Bradley, 1 Dall. 240, 1 L. ed. 118; Wonsetler *v.* Wonsetler, 23 Pa. Super. Ct. 321, 324.

and tends to explain or qualify it.[26] This principle applies not only to statements in conversation,[27] but to letters or other written statements[28] and to judicial admissions in the same[29] or in another case.[30]

b. Independent Self-Serving Statements. It is generally held that where part of a conversation, of a written statement, or of a judicial admission[31] is introduced by one party as an admission, the other party is not entitled to the remainder on his own behalf, unless it relates to the subject-matter of the admission and explains or modifies the same;[32] nor can he introduce his own self-serving state-

South Carolina.— Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124.

United States.— Elizabeth City Cotton Mills *v.* Loeb, 119 Fed. 154, 56 C. C. A. 42.

See 20 Cent. Dig. tit. "Evidence," § 1023.

26. See *infra*, IV, E, 2, b.

27. See *supra*, notes 24, 25.

28. *Iowa.*— Jones *v.* Hopkins, 32 Iowa 503.

Kentucky.— Illinois Cent. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40, 23 Ky. L. Rep. 2267.

Maine.— Lombard *v.* Chaplin, 98 Me. 309, 56 Atl. 903.

New York.— Grattan *v.* New York Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372.

Pennsylvania.— Robeson *v.* Schuylkill Nav. Co., 3 Grant 186, 188, where Black, J., said: "You cannot have one part and suppress another part of a conversation, admission, a deed, contract, record, a letter, or any other document."

See 20 Cent. Dig. tit. "Evidence," § 1023.

Letter accompanying statement of account is admissible. Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742 [*affirming* 99 Ill. App. 32].

Contemporaneous oral explanation of a written admission is admissible. Marks *v.* Hardy, 78 S. W. 864, 25 Ky. L. Rep. 1770; Steckel *v.* Desh, 2 Pennyp. (Pa.) 303.

Counsel has put in part of a letter whenever he has in his examination so referred to it and its contents that the jury must necessarily come to the conclusion that they are listening to testimony concerning the contents of a particular letter. Lombard *v.* Chaplin, 98 Me. 309, 56 Atl. 903.

29. When admissions in pleading are introduced in evidence the rest of the pleading is admissible so far as it explains or qualifies. Hewlett *v.* Hyden, (Indian Terr. 1902) 69 S. W. 839; Bompart *v.* Lucas, 32 Mo. 123; Stuart *v.* Kissam, 2 Barb. (N. Y.) 493 [*reversed* on other grounds in 11 Barb. 271]; McCord *v.* Southern R. Co., 130 N. C. 491, 41 S. E. 886. See also Reiter *v.* Morton, 96 Pa. St. 229.

30. Testimony in a former case.— Benedict *v.* Nichols, 1 Root (Conn.) 434; Illinois Steel Co. *v.* Wierzbicky, 107 Ill. App. 69 [*affirmed* in 206 Ill. 201, 68 N. E. 1101]; Lynde *v.* McGregor, 13 Allen (Mass.) 182, 90 Am. Dec. 188; Kritzer *v.* Smith, 21 Mo. 296; Dean *v.* Dean, 43 Vt. 337.

Pleadings in another suit.— Callan *v.* McDaniel, 72 Ala. 96; Crocker *v.* Clements, 23 Ala. 296; McNutt *v.* Dare, 8 Blackf. (Ind.) 35; Eldridge *v.* Duncan, 1 B. Mon. (Ky.) 101 (holding that where an answer in another suit was read the bill was admissible to explain it); Smith *v.* Chenault, 48 Tex. 455.

31. Conversations.— Straw *v.* Greene, 14 Allen (Mass.) 206; People *v.* Beach, 87 N. Y. 508; Platner *v.* Platner, 78 N. Y. 90; Rouse *v.* Whited, 25 N. Y. 170, 82 Am. Dec. 337; Stedman *v.* Ranney, 80 Hun (N. Y.) 37, 29 N. Y. Suppl. 866; Rouse *v.* Whited, 25 Barb. (N. Y.) 279; Dorlon *v.* Douglass, 6 Barb. (N. Y.) 451; Garey *v.* Nicholson, 24 Wend. (N. Y.) 350; Mumford *v.* Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; Wendt *v.* Chicago, etc., R. Co., 4 S. D. 476, 57 N. W. 226; Prince *v.* Samo, 7 A. & E. 627, 2 Jur. 323, 7 L. J. Q. B. 123, 3 N. & P. 139, W. W. & H. 132, 34 E. C. L. 333. See also Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51; Atherton *v.* Defreeze, 129 Mich. 364, 88 N. W. 886; Overman *v.* Coble, 35 N. C. 1; Edwards *v.* Ford, 2 Bailey (S. C.) 461; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446. In Queen's Case, 2 B. & B. 284, 22 Rev. Rep. 662, 6 E. C. L. 147, Lord Tenterden declared that the remainder of a conversation is admissible, provided only that it relates to the subject-matter of the suit. This doctrine was repudiated in Prince *v.* Samo, *supra*, but seems to have been approved in Robinson *v.* Ferry, 11 Conn. 460; Clark *v.* Smith, 10 Conn. 1, 25 Am. Dec. 47; Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243; and especially in Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742 [*affirming* 99 Ill. App. 32]. But *compare* with the last case above cited Rollins *v.* Duffy, 18 Ill. App. 398. In Missouri "where part of a conversation is offered in evidence, containing admissions of a party to the suit, he may show . . everything that was said by him in the same conversation on the subject to which the admission relates, as well as everything which may tend to qualify or explain the particular statement testified to." Lyon *v.* Batz, 42 Mo. App. 606, 618, per Rombauer, P. J. This case reviews Burghart *v.* Brown, 51 Mo. 600; Howard *v.* Newson, 5 Mo. 323; Reevs *v.* Hardy, 7 Mo. 348, and several criminal cases in the Missouri supreme court.

Answers to interrogatories.— Lynde *v.* McGregor, 13 Allen (Mass.) 172; Mershon *v.* Hood, 2 Pittsb. (Pa.) 207.

Pleadings.— Gunn *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231; Lewis *v.* Norfolk, etc., R. Co., 132 N. C. 382, 43 S. E. 919.

Testimony in former case.— Starin *v.* People, 45 N. Y. 333, 340; Suffolk County *v.* Shaw, 21 N. Y. App. Div. 146, 47 N. Y. Suppl. 349; Dean *v.* Dean, 43 Vt. 337.

32. See cases cited *supra*, notes 30, 31.

ments made on another and separate occasion,[33] and the burden is upon him to prove that statements offered by him were not thus made.[34] Where part of a conversation containing no admission is introduced for another proper purpose, the remainder is not admissible unless it be necessary that all shall be taken together.[35]

3. Entire Statement to Be Considered. When an entire statement is admitted in evidence under the rule hereinbefore stated,[36] the self-serving part of it must be duly considered and weighed together with the unfavorable part.[37] But all parts of the statement are not necessarily to be regarded as worthy of equal credit.[38] The triers of fact may reject such portions, if any, as appear to be inconsistent, improbable, or rebutted by other circumstances in evidence;[39] but

33. Beebe *v.* Smith, 194 Ill. 634, 62 N. E. 856 [*affirming* 96 Ill. App. 363] (especially if they contain nothing relevant to the admission); Adam *v.* Eames, 107 Mass. 275; McPeake *v.* Hutchinson, 5 Serg. & R. (Pa.) 295; Wonsetler *v.* Wonsetler, 23 Pa. Super. Ct. 321. See, however, in favor of admissibility of continuous and connected conversations or correspondence, Swift Electric Light Co. *v.* Grant, 90 Mich. 469, 51 N. W. 539; Lewis Pub. Co. *v.* Lenz, 86 N. Y. App. Div. 451, 83 N. Y. Suppl. 841; Lexow *v.* Belding, 72 N. Y. App. Div. 446, 76 N. Y. Suppl. 602; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414; Halsey *v.* Jarvis, 7 Bosw. (N. Y.) 461; Elizabeth City Cotton Mills *v.* Loeb, 119 Fed. 154, 56 C. C. A. 42. Where part of a conversation is introduced as an admission of the party, "if in that conversation reference is had to expressions used by him on former occasions, he may bring these forward so far as they are required to render complete and intelligible the conversation first shown in evidence." Barker *v.* Barker, 16 N. H. 333, 339, per Gilchrist, J.

By statute in Iowa (Code, § 2399) "when a detached act, declaration, conversation or writing, is given in evidence, any other act, declaration or writing, which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Hutton *v.* Doxsee, 116 Iowa 13, 89 N. W. 79. The foregoing provision does not render competent all that the party may have said at other times, with regard to the subject of the suit, or the matter in controversy. Dougherty *v.* Posegate, 3 Iowa 88.

34. Robinson *v.* Ferry, 11 Conn. 460, holding also that it is a question for the court, and not for the jury, to determine whether the statement offered was a part of the statement offered by his opponent.

35. Collins *v.* Johnson, 6 Fed. Cas. No. 3,015*a*, Hempst. 279.

36. See *supra*, IV, E, 2, a.

37. *Alabama.*— Hudson *v.* Howlett, 32 Ala. 478.

Connecticut.—Bristol *v.* Warner, 19 Conn. 7.

Delaware.— Lattomus *v.* Gorman, 3 Del. Ch. 232.

Florida.— Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243.

Illinois.— Arnold *v.* Johnson, 2 Ill. 196.

Iowa.— Veiths *v.* Hagge, 8 Iowa 163.

Louisiana.— Bordes *v.* Duprat, 52 La. Ann. 306, 26 So. 821; Agricultural Bank *v.* The Jane, 19 La. 1; Poultney *v.* Cecil, 8 La. 321.

Maine.— Storer *v.* Gowen, 18 Me. 174.

Maryland.— Higdon *v.* Stewart, 17 Md. 105; Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318.

Massachusetts.—O'Brien *v.* Cheney, 5 Cush. 148; Whitwell *v.* Wyer, 11 Mass. 6.

Minnesota.—Searles *v.* Thompson, 18 Minn. 316.

Missouri.— Hormann *v.* Wirtel, 59 Mo. App. 646.

New York.— Shrady *v.* Shrady, 42 N. Y. App. Div. 9, 58 N. Y. Suppl. 546; Vanderbilt *v.* Schreyer, 21 Hun 537 [*affirmed* in 91 N. Y. 392]; Nesbit *v.* Stringer, 2 Duer 26; Hopkins *v.* Smith, 11 Johns. 161; Credit *v.* Brown, 10 Johns. 365; Fenner *v.* Lewis, 10 Johns. 38.

Pennsylvania.—Wilhelm *v.* Cornell, 3 Grant 178; Farrell *v.* M'Clea, 1 Dall. 392, 1 L. ed. 191; Newman *v.* Bradley, 1 Dall. 240, 1 L. ed. 118.

South Carolina.— Carrier *v.* Hague, 9 S. C. 454; Cohen *v.* Robert, 2 Strobh. 410.

Vermont.— Brown *v.* Munger, 16 Vt. 12.

Virginia.— Perkins *v.* Lane, 82 Va. 59; Waggoner *v.* Gray, 2 Hen. & M. 603.

Wisconsin.— Jones *v.* Webb, 1 Pinn. 412.

See 20 Cent. Dig. tit. "Evidence," §§ 1023, 1041.

38. *Alabama.*— Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

Arkansas.— Sadler *v.* Sadler, 16 Ark. 628.

California.— Thrall *v.* Smiley, 9 Cal. 529.

Connecticut.— Robinson *v.* Ferry, 11 Conn. 460, 462.

New York.— Pierce *v.* Delamater, 3 How. Pr. 162.

North Carolina.— Walker *v.* Fentress, 18 N. C. 17 (where Daniel, J., said: "It still rests with the jury to decide whether they will believe the whole of it"); Jacobs *v.* Farrall, 9 N. C. 570.

See 20 Cent. Dig. tit. "Evidence," § 1041.

39. *Alabama.*— Wilson *v.* Calvert, 8 Ala. 757.

Arkansas.— Adkins *v.* Hershy, 14 Ark. 442.

Connecticut.—Ives *v.* Bartholomew, 9 Conn. 309.

Illinois.— Schmidt *v.* Pfau, 14 Ill. 494, 2 N. E. 522; Hanrahan *v.* People, 91 Ill. 142.

Massachusetts.— Field *v.* Hitchcock, 17 Pick. 182, 28 Am. Dec. 288.

they are not at liberty to disbelieve the self-serving part capriciously and without any reasonable grounds.[40] The assertion of a legal right to do an act, coupled with an admission that the party did the act, does not neutralize the admission.[41]

4. Construction of Admissions. In order to deduce an admission from the statement of a person his language must be reasonably capable of construction as an admission,[42] and a statement should not be extended by strained construction beyond the fair import of its terms.[43] It should be construed in view of the pur-

Michigan.— Detroit Electric Light, etc., Co. *v.* Applebaum, 132 Mich. 555, 94 N. W. 12.

New Hampshire.— Pearson *v.* Sabin, 10 N. H. 205.

New Jersey.— Parret *v.* Craig, 56 N. J. Eq. 280, 38 Atl. 305.

New York.— Barnes *v.* Allen, 1 Abb. Dec. 111, 1 Keyes 390; Penfield *v.* Jacobs, 21 Barb. 335; Dorlon *v.* Douglass, 6 Barb. 451.

Vermont.— Mattocks *v.* Lyman, 18 Vt. 98, 46 Am. Dec. 138.

See 20 Cent. Dig. tit. "Evidence," § 1041.

"Where a man admits the justice of an account, but contends that he has paid it, all his statements must go to the jury; yet if he can give no reason for his belief, nor show any thing in support of it, the jury are not bound to believe it, and may give judgment on the admission." Craighead *v.* State Bank, Meigs (Tenn.) 199, 206, per Turley, J. Admission of correctness of account is *prima facie* neutralized by accompanying positive statement that it has been paid (Smith *v.* Jones, 15 Johns. (N. Y.) 229), but not by statement of admitting party that he supposed it was paid (Jones *v.* Webb, 1 Pinn. (Wis.) 412).

40. Wilson *v.* Calvert, 8 Ala. 757; Harris *v.* Woodard, 40 Mich. 408; Barnes *v.* Allen, 1 Abb. Dec. (N. Y.) 111, 1 Keyes (N. Y.) 390; Perego *v.* Purdy, 1 Hilt. (N. Y.) 269; Kelsey *v.* Bush, 2 Hill (N. Y.) 440. See also Wailing *v.* Toll, 9 Johns. (N. Y.) 141; Carver *v.* Tracy, 3 Johns. (N. Y.) 427. In Fox *v.* Lambson, 8 N. J. L. 275, it was said that a court or jury cannot believe part and disbelieve another part unless such parts are distinct and relate to different matters or facts.

Indefinite qualification is insufficient alone to overcome an admission. Pierce *v.* Delamater, 3 How. Pr. (N. Y.) 162, claim of offset without indicating amount thereof.

41. Moore *v.* Ross, 11 N. H. 547.

42. A statement equally consistent with an admission and with no admission has no force. Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60. See also Doe *v.* Garrison, 1 Dana (Ky.) 35.

43. *Alabama.*—Nove *v.* Garner, 70 Ala. 443. See also Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425.

Indiana.— Sharp *v.* McBride, 69 Ind. 396; Tyner *v.* Stoops, 11 Ind. 22, 71 Am. Dec. 341.

Kentucky.— Hume *v.* Long, 6 T. B. Mon. 116; Carter *v.* Sanderson, 41 S. W. 306, 19 Ky. L. Rep. 620.

Maryland.— Matthews *v.* Dare, 20 Md. 248; Walters *v.* Munroe, 17 Md. 150.

Michigan.— Mack *v.* Cole, 130 Mich. 84, 89 N. W. 564; Kinney *v.* Folkerts, 78 Mich. 687, 44 N. W. 152.

Missouri.— Robidoux *v.* Cassilegi, 10 Mo. App. 516.

New Hampshire.— Jones *v.* Jones, 21 N. H. 219.

New York.— Hamilton *v.* Patrick, 62 Hun 74, 16 N. Y. Suppl. 578; Granger *v.* American Brewing Co., 25 Misc. 701, 55 N. Y. Suppl. 695 [*reversing* 25 Misc. 302, 54 N. Y. Suppl. 590]; Akers *v.* Overbeck, 18 Misc. 198, 41 N. Y. Suppl. 382.

Oregon.— Ladd *v.* Hawkes, 41 Oreg. 247, 68 Pac. 422.

Virginia.— Edgar *v.* Donally, 2 Munf. 387.

Wisconsin.— See Pym *v.* Pym, 118 Wis. 662, 96 N. W. 429.

See 20 Cent. Dig. tit. "Evidence," § 1028.

A construction qualifying the ordinary meaning of the terms of the admission should not be adopted without other explanatory testimony. Ripley *v.* Paige, 12 Vt. 353.

"We being receiptors" in a written statement was held not to admit that a receipt was given in the usual form, but only that a receipt was given, and in an action on the receipt other proof of its contents was necessary. Taylor *v.* Rhodes, 26 Vt. 57.

Admission of genuineness of deed does not admit truth of recitals therein. Middleton *v.* Westeney, 7 Ohio Cir. Ct. 393, 399, 4 Ohio Cir. Dec. 650.

Acceptance of a release of a right of action for a consideration paid does not admit that there was a liability. Crawford *v.* McLeod, 64 Ala. 240.

Admission of correctness of transcript of judgment does not admit validity of judgment. Lockwood *v.* Dills, 74 Ind. 56.

Admission of deed in chain of title does not admit its validity or the truth of its recitals. Lyons *v.* Holmes, 19 S. C. 406.

Fears expressed as to validity of title do not constitute an admission of knowledge and notice of adverse claim. Churcher *v.* Guernsey, 39 Pa. St. 84.

Admission of receipt of money from a testator does not authorize an inference that it was not a gift or that it was obtained surreptitiously and fraudulently. Miller's Estate, 151 Pa. St. 525, 25 Atl. 144.

Party's admission that another person is the wife of the other party is not an admission of marriage in fact, but only of marriage by reputation. Morris *v.* Miller, 4 Burr. 2057, action of criminal conversation. *Compare* Forney *v.* Hallacher, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590.

Admission of service of notice is no admis-

pose for which it was made,[44] and is competent evidence of all that can be justly inferred from it.[45] Thus an admission of the correctness of an account for goods sold admits the sale and delivery of the goods.[46] Ambiguous oral statements should not, it seems, be construed contrary to the contention of their author.[47] An admission in a party's testimony may be construed by the subsequent course of both parties on the trial.[48] No presumption of a fact can be drawn from a statement expressly denying the fact.[49] Construction of a statement, either oral[50] or written,[51] which is introduced as an admission is for the jury.

5. Sufficiency to Establish Fact Admitted. Proof of a party's express and unqualified admission of a fact, either orally or in writing, suffices to establish the fact as against him, in the absence of opposing evidence,[52] unless a statute pre-

sion as to time of service. Hensel *v.* Johnson, 94 Md. 729, 51 Atl. 575.

Admission that claim is made does not admit its validity. Siebert *v.* Steinmeyer, 204 Pa. St. 419, 54 Atl. 336.

Correctness of balance sheets showing indebtedness conceded in a general way is not an admission of specific indebtedness appearing thereon, the sheets not being present at the time. Safe Deposit, etc., Co. *v.* Turner, (Md. 1903) 55 Atl. 1023.

Admission of correctness of part of an account, without stating what part, is not, standing alone, sufficient to uphold any conclusion against the party. Watson *v.* Byers, 6 Ala. 393.

Authority.— A husband's admission of authority given to his wife to purchase property and to give notes therefor was construed to mean that the notes were to be given for the husband, and in his name, not in the name of the wife. Minard *v.* Mead, 7 Wend. (N. Y.) 68.

44. Conley *v.* Bryant, 19 R. I. 404, 35 Atl. 309. An admission by counsel on a trial will not readily be construed as a surrender of a vital point in controversy. Hoffman *v.* Bloomsburg, etc., R. Co., 143 Pa. St. 503, 22 Atl. 823. "An admission, made for the purpose of preventing other evidence from being resorted to, should, in case of doubt or ambiguity, be construed most strongly against the party making it." Scammon *v.* Scammon, 33 N. H. 52, 58, per Bell, J.

45. *Alabama.*— Darnell *v.* Griffin, 46 Ala. 520.

California.— Sloan *v.* Diggins, 49 Cal. 38, admission in pleading by failure to deny.

Iowa.— Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Kentucky.— Nantz *v.* McPherson, 7 T. B. Mon. 597, 18 Am. Dec. 216.

Maryland.— Tyson *v.* Shueey, 5 Md. 540.

New Hampshire.— Scammon *v.* Scammon, 33 N. H. 52, 58.

See 20 Cent. Dig. tit. "Evidence," § 1028.

Sale for a specified sum, admitted by a party in his testimony, justifies an inference that he received the amount in money. De Clerq *v.* Mungin, 46 Ill. 112.

Admission that bill is "all right" admits liability for the amount. Lathrop *v.* White, 2 Kulp (Pa.) 440.

Admission of correctness of account admits correctness in every particular. Keller *v.* Jackson, 58 Iowa 629, 12 N. W. 618.

Admission that a claim is just admits every fact necessary to establish it. Nealley *v.* Greenough, 25 N. H. 325.

Joint liability.— An offer to pay half of an account presented as joint without denying its correctness admits joint liability. Gwinn *v.* O'Daniel, (Tex. Civ. App. 1893) 22 S. W. 754.

Judicial admission of execution of deed executed by attorney admits authority of the attorney. Strippelmann *v.* Clark, 11 Tex. 296.

Admission of record of instrument, in agreed case, admits it was properly recorded. Rendlemann *v.* Willard, 15 Mo. App. 375.

Sheriff's admission of receipt of clerk's fee bills for collection authorizes the inference that he received them at the proper time and in the manner required by law. Logan *v.* State, 39 Md. 177.

Declaration that a note was nearly paid is a negative admission that it was not entirely paid. Benson *v.* Mathews, 7 La. 356, 359.

46. New York Ice Co. *v.* Parker, 8 Bosw. (N. Y.) 688.

47. Wright *v.* Dickinson, (Mich. 1889) 42 N. W. 849, statement of counsel on trial.

48. Akers *v.* Overbeck, 18 Misc. (N. Y.) 198, 41 N. Y. Suppl. 382.

49. Clarendon *v.* Weston, 16 Vt. 332. See also Reynolds *v.* Stille, 15 La. Ann. 543.

50. Stewart *v.* De Loach, 86 Ga. 729, 12 S. E. 1067; Bohler *v.* Owens, 60 Ga. 185, 188; Phillips *v.* Ford, 9 Pick. (Mass.) 39 (jury to determine to what subject-matter it applies); Harris *v.* Woodard, 40 Mich. 408.

51. Richmond, etc., R. Co. *v.* Kerler, 88 Ga. 39, 13 S. E. 833; Dampf *v.* Greener, 11 N. Y. St. 90; Patrick *v.* Hazen, 10 Vt. 183. *Compare* Stacy *v.* Graham, 3 Duer (N. Y.) 444.

52. *California.*— Harrison *v.* Peabody, 34 Cal. 178.

Colorado.— Joralmon *v.* McPhee, 31 Colo. 26, 71 Pac. 419.

Georgia.— Alabama Midland R. Co. *v.* Guilford, 119 Ga. 523, 46 S. E. 655; Burk *v.* Hill, 119 Ga. 38, 45 S. E. 732; Burch *v.* Harrell, 93 Ga. 719, 20 S. E. 212; Kitchen *v.* Robbins, 29 Ga. 713. See also McGinnis *v.* Chamberlain, 30 Ga. 32.

Illinois.— Illinois Cent. R. Co. *v.* Cowles,

scribes the only evidence by which the fact can be proved.[53] A tacit admission[54] may be equally efficacious in that regard.[55] Conceded existence of a written agreement touching the matter involved, which is in the possession of the opposite

32 Ill. 116; Warren *v.* Dickson, 30 Ill. 363. See also North *v.* Zerwick, 97 Ill. App. 306, 309, where Worthington, J., said: "Decisions in criminal cases to the effect that admissions alone are not sufficient to convict without proof of the *corpus delicti* are not applicable to civil cases."

Indiana.— Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

Iowa.— Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Kentucky.— Rone *v.* Smith, 42 S. W. 740, 19 Ky. L. Rep. 972.

Louisiana.— Bair *v.* Abrams, 12 La. Ann. 753.

Maine.— Robinson *v.* Stuart, 68 Me. 61; Hilton *v.* Dinsmore, 21 Me. 410, 414.

Maryland.— Logan *v.* State, 39 Md. 177; Tyson *v.* Shueey, 5 Md. 540. See also Williams *v.* Annapolis, 6 Harr. & J. 529, admission in pleading in another case.

Michigan.— Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436.

Missouri.— White City State Bank *v.* St. Joseph Stock Yards Bank, 90 Mo. App. 395, 399 (where Ellison, J., said: "There is never need to prove that which your adversary concedes"); Wolff *v.* Famous Mut. Sav. Fund, etc., Assoc., 67 Mo. App. 678.

Nebraska.— Miller *v.* Nicodemus, 58 Nebr. 352, 78 N. W. 618.

New Jersey.—Welsh *v.* Brown, 50 N. J. Eq. 387, 26 Atl. 568.

New York.— Gottlieb *v.* Alton Grain Co., 87 N. Y. App. Div. 380, 84 N. Y. Suppl. 413 (admission by counsel on trial); Martin *v.* Farrell, 66 N. Y. App. Div. 177, 72 N. Y. Suppl. 934; Penfield *v.* Jacobs, 21 Barb. 335; Walrod *v.* Ball, 9 Barb. 271; Griffin *v.* Keith, 1 Hilt. 58; Fenn *v.* Timpson, 4 E. D. Smith 276; Delamater *v.* Pierce, 3 Den. 315; Doyle *v.* St. James' Church, 7 Wend. 178. See also Humes *v.* Proctor, 151 N. Y. 520, 45 N. E. 948; Dunning *v.* Merrill, Clarke 252.

Oklahoma.—Lane Implement Co. *v.* Lowder, 11 Okla. 61, 65 Pac. 926.

Oregon.—Anderson *v.* Adams, 43 Oreg. 621, 74 Pac. 215, testimony in another case.

Pennsylvania.— See McCarty *v.* Scanlon, 187 Pa. St. 495, 41 Atl. 345; Siebelist *v.* Metropolitan L. Ins. Co., 19 Pa. Super. Ct. 22.

South Carolina.— Fraser *v.* McPherson, 3 Desauss. (S. C.) 393.

Tennessee.— Rice *v.* Southwestern R. Bank, 7 Humphr. 39.

Texas.— Texas, etc., R. Co. *v.* Ross, 62 Tex. 447.

Wisconsin.— Jones *v.* Webb, 1 Pinn. 412.

United States.— Union Mut. L. Ins. Co. *v.* Masten, 3 Fed. 881; Cambioso *v.* Maffet, 4 Fed. Cas. No. 2,330, 2 Wash. 98.

See 20 Cent. Dig. tit. "Evidence," § 1029.

"Such admissions . . . are generally followed by juries, unless some satisfactory explanation is made by which their reasonable effect is counteracted." Harrison *v.* Peabody, 34 Cal. 178, 180, per Sanderson, J.

Intestate's admission of payment suffices to defeat administrator's action for a debt. McCain *v.* McCain, 11 Ky. L. Rep. 582.

An unsigned account stated may be proved against either party by his admission of its correctness. Vinal *v.* Burrill, 16 Pick. (Mass.) 401.

Admission of genuineness of his signature to an instrument may suffice without other proof, even where the instrument is not present at the time of the admission. Stewart *v.* Gleason, 23 Pa. Super. Ct. 325 [*distinguishing* Palmer *v.* Manning, 4 Den. (N. Y.) 131; Minard *v.* Mead, 7 Wend. (N. Y.) 68; Shaver *v.* Ehle, 16 Johns. (N. Y.) 201]. See also Pentz *v.* Winterbottom, 5 Den. (N. Y.) 51; Rowley *v.* Ball, 3 Cow. (N. Y.) 303; Nichols *v.* Allen, 112 Mass. 23; Smith *v.* Witton, 69 Mo. 458.

Admission of marriage between third parties may, it seems, be *prima facie* evidence of the fact of marriage, and not merely marriage by cohabitation, in an action for criminal conversation. Forney *v.* Hallacher, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590. *Compare* Morris *v.* Miller, 4 Burr. 2057. See also Cayford's Case, 7 Me. 57. And see, generally, HUSBAND AND WIFE.

Admission of part of a claim suffices to sustain judgment for that part, although the opposite party contended for more. Alexander *v.* Barrett, 46 Ill. 226.

Admission in disparagement of title to bonds may overcome the presumption arising from possession of the property. Comer *v.* Comer, 120 Ill. 420, 11 N. E. 848.

Presumption of payment of a judgment after twenty years is a strong presumption of fact which cannot, it seems, be overcome by oral admission alone. McQueen *v.* Fletcher, 4 Rich. Eq. (S. C.) 152.

Admission of a purchase accompanied by a statement that the price had been paid was held not to justify a verdict for the price. Smith *v.* Jones, 15 Johns. (N. Y.) 229. *Compare* Fox *v.* Lambson, 8 N. J. L. 275; Delamater *v.* Pierce, 3 Den. (N. Y.) 315.

Admission that a person was appointed administrator on a particular date does not prove that he was qualified and duly acting as such at a later specified date. Simon *v.* Reynaud, 10 La. Ann. 506.

53. Hickman *v.* Thompson, 28 La. Ann. 265.

54. See *supra*, IV, B, 6, 7.

55. Bordine *v.* Combs, 15 N. J. L. 412; White *v.* White, 20 N. Y. App. Div. 560, 47 N. Y. Suppl. 273; Staples *v.* Hage, 11 N. Y. App. Div. 631, 42 N. Y. Suppl. 458; Commercial Bank *v.* Jackson, 9 S. D. 605, 70 N. W. 846. See also Nealley *v.* Greenough, 25 N. H. 325.

party, does not impair the effect of an admission.[56] Nor is this effect of an admission vitiated by a qualifying statement of a fact irrelevant to the issue in the case.[57] But an admission evidently made without personal knowledge of the fact admitted,[58] or a statement inconsistent and contradictory,[59] indefinite,[60] or equivocal and not elucidated by further proof,[61] may have little or no weight as evidence. An admission is of no benefit to the opposite party where witnesses of the latter prove the fact to be otherwise.[62] Admissions properly introduced in evidence may be used by either side in support of its views,[63] and their weight is wholly a question of fact for the jury.[64] Circumstances affecting the weight of testimony to oral admissions of a party and also the weight of written admissions are considered elsewhere in this article.[65]

6. Conclusiveness of Admissions — a. Extrajudicial Admissions — (i) *In General.* When no element of estoppel exists,[66] extrajudicial admissions,[67] whether oral or written, are not conclusive upon the party making them, but may be explained, limited, or qualified, or their effect may be weakened by proof of the attending facts and circumstances or by other evidence relevant to that purpose.[68]

56. Burch *v.* Harrell, 93 Ga. 719, 20 S. E. 212, because the party making the admission may produce the writing himself.

57. Where a party stated that a judgment against him was unjust, in connection with his admission that the judgment was valid and regular, the former statement did not impair the effect of the admission in an action of debt on the judgment. Gay *v.* Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499.

58. Stephens *v.* Vroman, 18 Barb. (N. Y.) 250.

59. Ayers *v.* Metcalf, 39 Ill. 307.

60. Bare acknowledgment of a debt without mentioning any particular amount will not authorize a jury to give a verdict for a specific sum. Douglass *v.* Davie, 2 McCord (S. C.) 218; Harrison *v.* McKinney, 1 Brev. (S. C.) 212, 2 Bay (S. C.) 412.

Vague and uncertain admissions have no probative force. State *v.* Eisenmeyer, 94 Ill. 96, in affidavit for continuance.

61. Petzolt *v.* Thiess, 25 Misc. (N. Y.) 707, 55 N. Y. Suppl. 740.

62. Boyd *v.* L. H. Quinn Co., 18 Misc. (N. Y.) 169, 41 N. Y. Suppl. 391.

63. Brown *v.* Brown, 4 Fed. Cas. No. 1,994, 1 Woodb. & M. 325.

64. Stephens *v.* Vroman, 18 Barb. (N. Y.) 250; Ellen *v.* Ellen, 18 S. C. 489.

65. See *infra*, XVII.

66. As to requisites of an estoppel see, generally, Estoppel, *ante*, p. 671 *et seq.*

A judgment by confession cannot be impeached by parol evidence. Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335. See, generally, Judgments.

67. For definition of judicial and extrajudicial admissions see *supra*, IV, A.

68. Oral admissions.— *Georgia.*— Cleghorn *v.* Janes, 68 Ga. 87.

Iowa.— Betts *v.* Betts, 113 Iowa 111, 84 N. W. 975.

Kansas.— Davis *v.* McCrocklin, 34 Kan. 218, 8 Pac. 196.

Kentucky.— South Covington, etc., R. Co. *v.* McHugh, 77 S. W. 202, 25 Ky. L. Rep. 1112.

Massachusetts.— Wallis *v.* Truesdell, 6 Pick. 455.

Missouri.—Kirkwood Gymnasium, etc., Assoc. *v.* Van Ness, 61 Mo. App. 361.

New York.— Stephens *v.* Vroman, 18 Barb. 250.

North Carolina.— McCraw *v.* Old North State Ins. Co., 78 N. C. 149 (party may testify that he made the admission while excited and confused and without reflection); Morisey *v.* Bunting, 12 N. C. 3.

Tennessee.— Gardner *v.* Standfield, 12 Heisk. 150; Rogers *v.* Kincannon, 3 Humphr. 252.

Vermont.— La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526 (party may testify that he was excited, etc.); Brown *v.* Munger, 16 Vt. 12.

Wisconsin.—Husbrook *v.* Strawser, 14 Wis. 403.

See 20 Cent. Dig. tit. "Evidence," §§ 1029–1034.

Written admissions.— *California.*— Bush *v.* Barnett, 96 Cal. 202, 31 Pac. 2, party may testify that he was ignorant of the meaning of the language.

Illinois.— Stone *v.* Cook, 79 Ill. 424 (admission in affidavit); Patterson *v.* Houston, 92 Ill. App. 624 (statement of account in bill rendered).

Iowa.— Coldren *v.* Le Gore, 118 Iowa 212, 91 N. W. 1066 (letter); Mickey *v.* Burlington Ins. Co., 35 Iowa 174, 14 Am. Rep. 494 (affidavit of loss).

Kentucky.— Thomson *v.* Thomson, 93 Ky. 435, 20 S. W. 373, 14 Ky. L. Rep. 513.

Massachusetts.— Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381, charge on book.

Michigan.— Getman *v.* Riopelle, 18 Mich. 145, consideration expressed in deed.

Minnesota.—Allis *v.* Day, 14 Minn. 516, value of plaintiff's services as specified in his bill rendered therefor not binding on him.

New York.— Miner *v.* Baron, 131 N. Y. 677, 30 N. E. 481 [*affirming* 15 N. Y. Suppl. 491] (letter); Pennsylvania Ins. Co. *v.* Telfair, 45 N. Y. App. Div. 564, 61 N. Y. Suppl. 322 [*reversing* 27 Misc. 247, 57 N. Y. Suppl.

Thus he is at liberty to show that his statement, even though made under oath,[69] was founded upon mistake,[70] or that it was made in ignorance of his rights or of the facts,[71] or was made in jest;[72] and without explaining why the admission was made,[73] he may prove it to be simply untrue in fact.[74] For these purposes parol

780] (letter); Metropolitan L. Ins. Co. *v.* Schaefer, 16 Misc. 625, 40 N. Y. Suppl. 984; Weinberg *v.* Kram, 17 N. Y. Suppl. 535.

Pennsylvania.— Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599; Holleran *v.* Life Assur. Co. of America, 18 Pa. Super. Ct. 573.

Texas.— Boyer *v.* St. Louis, etc., R. Co., (Sup. 1903) 76 S. W. 441.

Vermont.— Reed *v.* Newcomb, 62 Vt. 75, 19 Atl. 367, recital in sealed instrument not conclusive when offered in evidence by stranger to the transaction.

United States.— West *v.* Smith, 101 U. S. 263, 25 L. ed. 809 (letter, to avoid controversy); Sargent *v.* Home Ben. Assoc., 35 Fed. 711.

See 20 Cent. Dig. tit. "Evidence," §§ 1029–1034.

Admissions by conduct (see *supra*, IV, B, 6) or by silence or acquiescence (see *supra*, IV, B, 7). Yarborough *v.* Moss, 9 Ala. 382; Goodwin *v.* U. S. Annuity, etc., Ins. Co., 24 Conn. 591; Traders' Nat. Bank *v.* Rogers, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, 36 L. R. A. 539; Webster *v.* Kansas City, etc., R. Co., 116 Mo. 114, 22 S. W. 474. See also Parlin *v.* Miller, (Tex. Civ. App. 1901) 60 S. W. 881.

Receipts for money paid may generally be contradicted, varied, or explained by parol. Winchester *v.* Grosvenor, 44 Ill. 425; Chicago, etc., R. Co. *v.* Bartlett, 20 Ill. App. 96, 106; People *v.* Palmer, 2 Ill. App. 295; Illinois Cent. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40, 23 Ky. L. Rep. 2267; Ryan *v.* Rand, 26 N. H. 12. For numerous other authorities see ESTOPPEL, *ante*, p. 671; and, generally, PAYMENT. And as to weight and sufficiency of evidence to overcome a written receipt see *infra*, XVII.

An account stated, however, is conclusive unless fraud or mistake is shown. Peters' Estate, 20 Pa. Super. Ct. 223.

"The understanding with which an admission was made may always be shown, to affect its weight. And this is no less true where misunderstanding of the law is asserted in explanation." State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983, 992, per Pound, C., admission in pleading introduced in evidence.

Admission in foreign language.—Testimony to an oral admission made in a foreign language may be rebutted by evidence that the English equivalent is different from that given by the witness. Thon *v.* Rochester R. Co., 83 Hun (N. Y.) 443, 29 N. Y. Suppl. 675, 30 N. Y. Suppl. 620.

A party may deny of course that he made the statement attributed to him (Robinson *v.* Smith, 3 Silv. Supreme (N. Y.) 490, 7 N. Y. Suppl. 38), or he may give his own version of an alleged conversation (Johnson *v.* Opfer, 58 Nebr. 631, 79 N. W. 547; Dalton *v.* Bowker, 8 Nev. 190; New York Fidelity, etc., Co. *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364).

69. Carter *v.* Bennett, 4 Fla. 283. See also *infra*, IV, E, 6, b, (II).

70. In general.— *Arkansas.*— Adams *v.* Eichenberger, (1892) 18 S. W. 853.

Illinois.— Ray *v.* Bell, 24 Ill. 444.

Indiana.— Bright *v.* Coffman, 15 Ind. 371, 77 Am. Dec. 96.

Maryland.— Starr *v.* Yourtee, 17 Md. 341.

New York.— Moore *v.* Hitchcock, 4 Wend. 292.

Vermont.— Brown *v.* Mudgett, 40 Vt. 68; Crowell *v.* Beebe, 10 Vt. 33, 33 Am. Dec. 172.

See 20 Cent. Dig. tit. "Evidence," § 1042.

Written admissions.— Richmond, etc., R. Co. *v.* Kerler, 88 Ga. 39, 13 S. E. 833; Chicago, etc., R. Co. *v.* Bartlett, 20 Ill. App. 96; Governor *v.* Sutton, 20 N. C. 622; Cullen *v.* Bimm, 37 Ohio St. 236.

A tender may be shown to have been made under the mistaken belief that the amount tendered was due. Ashuelot R. Co. *v.* Cheshire R. Co., 60 N. H. 356.

71. Pennsylvania Ins. Co. *v.* Telfair, 45 N. Y. App. Div. 564, 61 N. Y. Suppl. 322; Rowen *v.* King, 25 Pa. St. 409; Kansas City Nat. Bank of Commerce *v.* Kansas City First Nat. Bank, 61 Fed. 809. *Compare* Nations *v.* Thomas, 25 Tex. Suppl. 221, holding that an admission of fact in a letter might be shown to have been written in ignorance of facts, but that evidence that it was written in ignorance of legal rights was inadmissible.

That the party was ignorant and dull cannot be proved by opinion evidence in order to impair the effect of his admissions, without any proof of undue influence. Stewart *v.* Conner, 13 Ala. 94.

72. Beebe *v.* De Baun, 8 Ark. 510.

73. Want of explanation is only a circumstance to be considered in weighing evidence of the falsity of the admission. Husbrook *v.* Strawser, 14 Wis. 436.

74. Oral admissions.— *Alabama.*— Garrett *v.* Garrett, 27 Ala. 687.

Arkansas.— Bertrand *v.* Taylor, 32 Ark. 470; Prater *v.* Frazier, 11 Ark. 249.

Colorado.— Murley *v.* Ennis, 2 Colo. 300.

Georgia.— Rose *v.* West, 50 Ga. 474.

Illinois.— Young *v.* Foute, 43 Ill. 33; Clinton Mut. County F. Ins. Co. *v.* Zeigler, 101 Ill. App. 165.

Indiana.— Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

Kansas.— Home Ins. Co. *v.* Atchison, etc., R. Co., 4 Kan. App. 60, 46 Pac. 179.

Kentucky.— Stevenson *v.* Dunlap, 7 T. B. Mon. 134; Owsley *v.* Owsley, 77 S. W. 397, 25 Ky. L. Rep. 1186.

evidence is competent, although the admission was in writing.[75] But evidence thus to overcome a clear admission must be full and unquestionable;[76] and evidence which does not in any way impugn or qualify a fact admitted is irrelevant.[77] An admission of a party introduced in evidence by the other party is not conclusive on the latter.[78]

(II) *Admissions of Coparty or Privy.* Statements received in evidence because they are admissions by a coparty or by one in privity with a party[79] may be explained, qualified, or contradicted[80] to the same extent as admissions of the party himself.[81]

(III) *Admissibility of Counter Declarations.* When it is sought to bind a party by his declarations and admissions, which are produced in evidence against

Michigan.— King *v.* Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10.

Minnesota.— Whiteacre *v.* Culver, 8 Minn. 133.

New Hampshire.— Pearson *v.* Sabin, 10 N. H. 205.

New York.— Wall *v.* New York Cent., etc., R. Co., 56 N. Y. App. Div. 599, 67 N. Y. Suppl. 519; Martin *v.* Peters, 4 Rob. 434; Taube *v.* Dry Dock, etc., R. Co., 12 Misc. 650, 33 N. Y. Suppl. 1119.

North Carolina.— Cheek *v.* Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400; Ufford *v.* Lucas, 9 N. C. 214.

Ohio.— Bennet *v.* Kesarty, Wright 696.

Pennsylvania.— Stewart *v.* Gleason, 23 Pa. Super. Ct. 325.

Utah.— Copley *v.* Union Pac. R. Co., 26 Utah 361, 73 Pac. 517.

United States.— Conyngham *v.* Baldwin, 120 Fed. 500, 56 C. C. A. 650. See also The John H. Pearson, 14 Fed. 749.

See 20 Cent. Dig. tit. "Evidence," § 1041.

Written admissions.— *Alabama.*— Vaughn *v.* Wood, 5 Ala. 304.

Arkansas.— Wynn *v.* Garland, 16 Ark. 440.

Connecticut.— Beers *v.* Broome, 4 Conn. 247.

District of Columbia.— Posey *v.* Hanson, 10 App. Cas. 496.

Illinois.— Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116.

Indiana.— Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Massachusetts.— Knight *v.* New England Wooster Co., 2 Cush. 271.

Missouri.— Newcomb *v.* Jones, 37 Mo. App. 475.

Pennsylvania.— Eldred *v.* Hazlett, 33 Pa. St. 307; Lincoln *v.* Wright, 23 Pa. St. 76, 62 Am. Dec. 316.

South Carolina.— Fisher *v.* Tucker, 1 McCord Eq. 169.

South Dakota.— Lee *v.* Neumen, 15 S. D. 642, 91 N. W. 320.

Tennessee.— Rice *v.* Southwestern R. Bank, 7 Humphr. 39.

Texas.— McKee *v.* Le Gette, 1 Tex. App. Civ. Cas. § 1144.

See 20 Cent. Dig. tit. "Evidence," § 1041.

75. *Dakota.*— Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667.

Iowa.— Hartley State Bank *v.* McCorkell, 91 Iowa 660, 60 N. W. 197.

Kentucky.— Phillips *v.* Owsley, 4 Ky. L. Rep. 832.

Massachusetts.— Sperry *v.* Wilcox, 1 Metc. 267.

Minnesota.— Bingham *v.* Bernard, 36 Minn. 114, 30 N. W. 404.

76. Rice *v.* Southwestern R. Bank, 7 Humphr. (Tenn.) 39, 41, fact admitted in letter here satisfactorily disproved, however. See also *infra*, XVII.

77. Pearson *v.* Adams, 129 Ala. 157, 29 So. 977, reason for existence of fact admitted not admissible.

78. Patrick *v.* Hazen, 10 Vt. 183, party offering admission that only a certain amount was due may prove that a less amount was due.

79. See *supra*, IV, D, 1, c; IV, D, 3.

80. *California.*—Donnelly *v.* Rees, 141 Cal. 56, 74 Pac. 433, admission in affidavit by privy in estate.

Illinois.— Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493 [*affirming* 101 Ill. App. 380].

Kentucky.— Rogers *v.* Rogers, 2 B. Mon. 324; Beall *v.* Cunningham, 1 B. Mon. 399, both of which cases were admissions by a devisee tending to invalidate the will.

Minnesota.— Beatty *v.* Ambs, 11 Minn. 331, by partner.

New York.— Meister *v.* Sharkey's Monument Works, 5 N. Y. App. Div. 470, 39 N. Y. Suppl. 789 (by decedent); Davidson *v.* Rightmyer, 38 Misc. 493, 77 N. Y. Suppl. 977; James *v.* Hackley, 16 Johns. 273 (by one of several joint personal representatives); Bissell *v.* Saxton, 66 N. Y. 55 (by principal not conclusive on surety). See also U. S. *v.* Boyd, 5 How. (U. S.) 29, 50, 12 L. ed. 36.

North Carolina.— McPhaul *v.* Gilchrist, 29 N. C. 169, by predecessor in title.

South Carolina.— Ellen *v.* Ellen, 16 S. C. 132 [*distinguished* in Brown *v.* Moore, 26 S. C. 160, 2 S. E. 9], by predecessor in title.

See 20 Cent. Dig. tit. "Evidence," § 1049.

81. See *supra*, IV, E, 6, a, (I).

Admissions of a partner after dissolution of the firm may be proved untrue by his copartners when they are sued. Cady *v.* Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379.

Absence of interest of declarant.— Where admissions of a party to the record are properly admitted against a coparty, the fact that the former had no interest at the time is irrelevant and inadmissible. Bulkley *v.* Landon, 3 Conn. 76.

him, it is not competent for him to show that he made at other times declarations of a contrary character,[82] even in a conversation relating to the same matter.[83] Likewise statements admitted in evidence because they were made by a person in privity with a party to the suit,[84] or were made against the interest of the declarant,[85] cannot be counteracted by proof of opposite statements made at another time by the same person.[86]

b. Judicial Admissions — (1) *In Same Case.* An express judicial admission is usually conclusive upon the party in the cause in which it was made, dispensing with proof of the fact admitted, and cannot be contradicted by him unless it be first shown that the admission was made by mistake.[87] Thus a party is bound

82. *Alabama.*— Woodruff *v.* Winston, 68 Ala. 412; Pearsall *v.* McCartney, 28 Ala. 110; Bradford *v.* Bush, 10 Ala. 386; Lee *v.* Hamilton, 3 Ala. 529.

Arkansas.—Johnson *v.* Brock, 23 Ark. 282; Hazen *v.* Henry, 6 Ark. 86.

Colorado.— Nutter *v.* O'Donnell, 6 Colo. 253.

Connecticut.— Robinson *v.* Ferry, 11 Conn. 460.

Illinois.— Hatch *v.* Potter, 7 Ill. 725, 43 Am. Dec. 88.

Indiana.— Logansport, etc., Turnpike Co., *v.* Heil, 118 Ind. 135, 20 N. E. 703; Brown *v.* Kenyon, 108 Ind. 283, 9 N. E. 283; Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675.

Kentucky.— Beauchamp *v.* Tennel, 1 Bibb 441.

Massachusetts.— Hunt *v.* Roylance, 11 Cush. 117, 59 Am. Dec. 140, per Bigelow, J.

Missouri.— Clark *v.* Huffaker, 26 Mo. 264.

New Hampshire.—Woods *v.* Allen, 18 N. H. 28; Barker *v.* Barker, 16 N. H. 333.

New York.—Smith *v.* Dodge, 3 N. Y. Suppl. 866.

Pennsylvania.— Patton *v.* Goldsborough, 9 Serg. & R. 47; Seibert's Estate, 17 Wkly. Notes Cas. 271.

South Carolina.— Davis *v.* Kirksey, 2 Rich. 176; Edwards *v.* Ford, 2 Bailey 461. But see Stone *v.* Stroud, 6 Rich. 306.

Texas.— Edwards *v.* Osman, 84 Tex. 656, 19 S. W. 868.

United States.— Blight *v.* Ashley, 3 Fed. Cas. No. 1,541, Pet. C. C. 15. See also Pennock *v.* Dialogue, 19 Fed. Cas. No. 10,941, 4 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327]. But *compare* Riggs *v.* Lindsay, 7 Cranch (U. S.) 500, 3 L. ed. 419, holding that written admissions of co-defendant, admitted in evidence, may be rebutted by proof of his contrary written declarations.

See 20 Cent. Dig. tit. "Evidence," § 1041.

Admissions by conduct (see *supra*, IV, B, 6) are not rebuttable by subsequent unconnected, contradictory declarations. Roberts *v.* Trawick, 22 Ala. 490; Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83.

83. Stewart *v.* Sherman, 5 Conn. 244.

84. See *supra*, IV, D, 3.

85. See *infra*, IX, B.

86. Statements by privy.— *Alabama.*— High *v.* Stainback, 1 Stew. 24.

Maine.— Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305.

Massachusetts.— Pickering *v.* Reynolds, 119 Mass. 111; Baxter *v.* Knowles, 12 Allen 114.

Missouri.— Wilson *v.* Woodruff, 5 Mo. 40, 31 Am. Dec. 194 [*explaining* Foster *v.* Nowlin, 4 Mo. 18].

Pennsylvania.— Malter's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394; Moore *v.* Pearson, 6 Watts & S. 51; McPeake *v.* Hutchinson, 5 Serg. & R. 295. *Contra*, O'Reilly *v.* Shadle, 33 Pa. St. 489.

South Carolina.— Ellen *v.* Ellen, 18 S. C. 489; Snowden *v.* Pope, Rice Eq. 174 [*disapproving* Sims *v.* Sanders, Harp. 374]. But see Wingo *v.* Caldwell, 36 S. C. 598, 15 S. E. 382; Caldwell *v.* Wilson, 2 Speers 75.

Vermont.— Lyman *v.* Lull, 20 Vt. 349.

See 20 Cent. Dig. tit. "Evidence," § 1049.

Contra, it seems, Wheaton *v.* Weld, 9 Humphr. (Tenn.) 773.

Statements against interest.— Taylor *v.* Brown, 65 Md. 366, 4 Atl. 888.

87. *Alabama.*— Montgomery *v.* Givhan, 24 Ala. 568, admission on trial cannot be withdrawn in appellate court.

Arkansas.—Adams *v.* Eichenberger, (1892) 18 S. W. 853, agreed statement of facts.

California.— Hearne *v.* De Young, 111 Cal. 373, 43 Pac. 1108, admission on the trial.

Illinois.— Leroy Payne Co. *v.* Van Evra, 94 Ill. App. 356 (admission on trial); Illinois Cent. R. Co. *v.* Fishell, 32 Ill. App. 41 (written stipulation).

Iowa.— Burrows *v.* Stryker, 47 Iowa 477, admission of record.

Louisiana.— Hughey *v.* Barrow, 4 La. Ann. 248; Kohn *v.* Marsh, 3 Rob. (La.) 48, admission entered of record.

Michigan.— Morrison *v.* Riker, 26 Mich. 385, admission on trial.

Missouri.— Moling *v.* Barnard, 65 Mo. App. 600, admission by counsel on trial.

Montana.— Taylor *v.* Stewart, 1 Mont. 316, admission by counsel on trial.

New Hampshire.— Burbank *v.* Rockingham Mut. F. Ins. Co., 24 N. H. 550, 57 Am. Dec. 300, stipulation placed on record.

New Jersey.—Turrell *v.* Elizabeth, 43 N. J. L. 272 (admission on trial); Marsh *v.* Mitchell, 26 N. J. Eq. 497 (admission by solicitor before a master).

United States.— *In re* Henschel, 114 Fed. 968, sworn allegations made as part of the proceedings.

On subsequent trial.— Admissions by counsel for the purpose of dispensing with proof are usually binding upon a subsequent trial

by admissions in the pleadings on which he goes to trial.[88] But admissions in withdrawn, abandoned, or superseded pleadings are treated as extrajudicial admissions[89] by which the pleader is not concluded.[90] A party is not bound by the admission of his adversary in a pleading, but may use it as far as it makes in his favor and disprove the residue.[91]

of the same case unless upon application to the court the party is relieved therefrom. Holley *v.* Young, 68 Me. 215, 28 Am. Rep. 40; Owen *v.* Cawley, 36 N. Y. 600. *Contra*, where the admission may reasonably be presumed to have been made only for the pending trial. Perry *v.* Simpson Waterproof Mfg. Co., 40 Conn. 313. And on appeal and trial *de novo* the admission is not conclusive. Morrison *v.* Riker, 26 Mich. 385. See, generally, STIPULATIONS.

Admission by party in his testimony on the trial dispenses with proof of the fact admitted. Roach *v.* Burgess, (Tex. Civ. App. 1901) 62 S. W. 803. But an admission which is really an estimate or guess by the party may well be overcome by evidence of the facts and circumstances constituting the basis of the admission. Culberson *v.* Chicago, etc., R. Co., 50 Mo. App. 556. And it has been held that the testimony of a party against his interest is not as a matter of law to be taken as true. Ephland *v.* Missouri Pac. R. Co., 71 Mo. App. 597.

Admission of a conclusion of law made on the trial is not binding on the court (Rice *v.* Ruddiman, 10 Mich. 125), nor is it binding on the party if made under a mistaken belief as to the law (Hays *v.* Cage, 2 Tex. 501. See also Rawlings *v.* Neal, 122 N. C. 173, 29 S. E. 93).

Admission in deposition taken before trial does not conclude the deponent on the trial. McCombs *v.* Foster, 62 Mo. App. 303.

Bill of exceptions in a cause is not necessarily conclusive on a retrial in respect of its statements as to concessions made on the first trial. Mullin *v.* Vermont Mut. F. Ins. Co., 56 Vt. 39, holding that a party may show the exact terms and limitations of the concession.

Admissions to avoid continuance see CONTINUANCES IN CIVIL CASES, 9 Cyc. 155; CRIMINAL LAW, 9 Cyc. 185, 186.

88. "Admissions in the pleadings can not be either proved or disproved on the trial, but must be accepted for whatever they amount to in legal effect, without reference to any other evidence that may be adduced." New Albany, etc., Plank Road Co. *v.* Stallcup, 62 Ind. 345, 347, per Niblack, J. To the same effect see the following cases:

Arkansas.— Bertrand *v.* Taylor, 32 Ark. 470.

Illinois.— Weeder *v.* Clark, 27 Ill. 251.

Iowa.— Raridan *v.* Central Iowa R. Co., 69 Iowa 527, 29 N. W. 599.

Kentucky.— Jackson *v.* Speed, 2 Duv. (Ky.) 426.

Louisiana.— Soulie *v.* Ranson, 29 La. Ann. 161 (admission in answer); Delacroix *v.* Prevost, 6 Mart. (La.) 276 (admission in plaintiff's petition).

Michigan.— Morrison *v.* Riker, 26 Mich. 385.

Minnesota.— Coit *v.* Waples, 1 Minn. 134.

New York.— Cook *v.* Barr, 44 N. Y. 156; Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739 (admission in sworn answer); Johnson *v.* Thorn, 57 N. Y. Suppl. 762 (admission in answer); Murray *v.* Coster, 4 Cow. (N. Y.) 630 (admission in answer). See also Walter *v.* Meader, 77 N. Y. Suppl. 407, admission in sworn answer.

North Carolina.— Smith *v.* Nimocks, 94 N. C. 243.

Texas.— Hughes *v.* Prewitt, 5 Tex. 264, admission in answer.

Washington.— Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409; Oregon R., etc., Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415.

United States.— California Electrical Works *v.* Finck, 47 Fed. 583.

See 20 Cent. Dig. tit. "Evidence," § 1036.

An answer pleading tender is ordinarily conclusive, but not where the answer also sets up usury. Brennich *v.* Weselmann, 49 N. Y. Super. Ct. 31.

The confessing allegations in a single defense of confession and avoidance are not conclusive but may be rebutted or explained. Young *v.* Katz, 22 N. Y. App. Div. 542, 48 N. Y. Suppl. 187; Garrie *v.* Schmidt, 25 Misc. (N. Y.) 753, 55 N. Y. Suppl. 703. See Lattomus *v.* Garman, 3 Del. Ch. 232, holding that in a confession and avoidance by answer forming issues in a cause at law or in equity, defendant is held to his confession, and put to prove the matter of avoidance.

89. See *supra*, IV, E, 6, a, (I).

90. *Indiana.*— Boots *v.* Canine, 94 Ind. 408.

Iowa.— McDonald *v.* Nugent, 122 Iowa 651, 98 N. W. 506; Caldwell *v.* Drummond, (1903) 96 N. W. 1122; Raridan *v.* Central Iowa R. Co., 69 Iowa 527, 29 N. W. 599.

Missouri.— Trask *v.* German Ins. Co., 58 Mo. App. 431.

Nebraska.— Miller *v.* Nicodemus, 58 Nebr. 352, 78 N. W. 618.

Texas.— Houston, etc., R. Co. *v.* De Walt, (Civ. App. 1903) 71 S. W. 774; Baxter *v.* New York, etc., R. Co., (Civ. App. 1893) 22 S. W. 1002.

Washington.— Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409.

See 20 Cent. Dig. tit. "Evidence," § 1036. And see, generally, PLEADINGS.

Admissions in a case stated which has been withdrawn or has become inoperative are not conclusive. McLughan *v.* Bovard, 4 Watts (Pa.) 308.

91. Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675; Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Lewis Pub. Co. *v.* Lenz, 86 N. Y. App. Div. 451, 83 N. Y. Suppl. 841;

(II) *In Other Proceedings.* Admissions in other judicial proceedings,[92] for example, in an affidavit,[93] or in a pleading[94]— even in a sworn pleading[95]— or in his testimony,[96] or a plea of guilty in a criminal case,[97] are not conclusive upon the party, but may be explained or contradicted[98] in the same manner as purely extrajudicial admissions.[99]

V. PRESUMPTIONS.*

A. Presumptions of Fact — 1. In General. Generically considered, a presumption of fact is that mental process by which the existence of one fact is inferred from proof of some other fact with which experience shows it is usually associated by succession or coexistence. It is inseparable from inductive reasoning as an inference of the unknown from proof of the known.[1] As commonly used in the law of evidence the term "presumption of fact" is applied to certain

Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun (N. Y.) 472, 29 N. Y. Suppl. 101; Fogg *v.* Edwards, 20 Hun (N. Y.) 90; Cromwell *v.* Hughes, 12 Misc. (N. Y.) 372, 33 N. Y. Suppl. 643.

92. *In re* Duncan, 64 S. C. 461, 42 S. E. 433.

Judgment by default against partners introduced as admission of partnership explainable by proof of the circumstances. Parks *v.* Mosher, 71 Me. 304.

93. Sharp *v.* Swayne, 1 Pennew. (Del.) 210, 40 Atl. 113; Jewett *v.* Cook, 81 Ill. 260.

94. *Connecticut.*— Robbins *v.* Walcott, 28 Conn. 396.

Indiana.— Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193, 18 N. E. 611.

Kansas.— Murphy *v.* Hindman, 58 Kan. 184, 48 Pac. 850.

Louisiana.— Martin *v.* Boler, 13 La. Ann. 369.

Maine.— Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628.

Minnesota.— Rich *v.* Minneapolis, 40 Minn. 82, 41 N. W. 455.

Missouri.— Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614.

South Carolina.— Martin *v.* Campbell, 11 Rich. Eq. 205.

Vermont.— Whitcher *v.* Morey, 39 Vt. 459.

Virginia.— Tabb *v.* Cabell, 17 Gratt. (Va.) 160.

Wisconsin.— Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

See 20 Cent. Dig. tit. "Evidence," § 1036.

95. *Illinois.*—Burnham *v.* Roberts, 70 Ill. 19.

Kansas.— Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

Maryland.— Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484.

Massachusetts.— Elliott *v.* Hayden, 104 Mass. 180.

United States.— Blanks *v.* Klein, 53 Fed. 436, 3 C. C. A. 585.

See 20 Cent. Dig. tit. "Evidence," § 1036.

96. La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526. A party on a second trial of his case may testify in direct contradiction to what he swore in his first. Phœnix Ins. Co. *v.* Gray, 113 Ga. 424, 38 S. E. 992.

97. Plea of guilty in a criminal case is not conclusive in a civil case. Young *v.* Copple, 52 Ill. App. 547; Jones *v.* Cooper, 97 Iowa 735, 65 N. W. 1000; Clark *v.* Irvin, 9 Ohio 131.

98. See cases cited *supra*, notes 95–97.

99. See *supra*, IV, E, 6, a, (I).

1. Com. *v.* Frew, 3 Pa. Co. Ct. 492, 496, per Yerkes, P. J. See also Lawhorn *v.* Carter, 71 Bush (Ky.) 7, 9, where it is said: "Presumptions of facts are, at best, but mere arguments, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating conviction in the mind, and should not be aided by suggestions or intimations from the court as to what they do or do not prove." In Graham *v.* Badger, 164 Mass. 42, 47, 41 N. E. 61, Mr. Justice Holmes, discussing the rule of *res ipsa loquitur*, said that "presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury."

Further expositions of presumptions of fact are: "When a fact is established in a cause by evidence, the jury may properly be allowed to draw therefrom such inferences as are logically deducible from it. . . A presumption should always be based upon a fact, and should be a reasonable and natural deduction from such fact." Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431, 433, 37 Am. Rep. 699, per Paxson, J.

A presumption of fact is a "natural probability" of a given fact upon proof of another particular fact. Tanner *v.* Hughes, 53 Pa. St. 289, 290.

"The policy of the law attaches a presumption of law to all men generally. A presumption of fact is such that our knowledge of human nature and affairs leads us to draw from a particular range of facts presented in a specific case." Com. *v.* Frew, 3 Pa. Co. Ct. 492, 496, per Yerkes, P. J.

"As proof of a fact, the law permits inferences from other facts." Douglass *v.* Mitchell, 35 Pa. St. 440, 443, per Thompson, J.

"The fair inferences from evidence founded upon the natural course of business and of human experience, are as much evidence as

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

of the more frequent and strongly probative of the great mass of these logical inferences. In connection with this specific use, not only must the fact from which the inference is drawn be established in evidence and not rest on the accuracy of a reasoning process,[2] but the inference to which it gives rise should, in the majority of cases, be strong and almost inevitable.[3] A failure to comply with these requirements when announcing such a presumption has been severely criticized[4] and the caution deserves attention, as it is on the legally recognized presumptions of fact that the true "presumptions" or assumptions of law are based. It follows from the nature of the presumption of fact that it is rebuttable.[5]

2. BASED ON FACTS, NOT ON PRESUMPTIONS. No inference of fact should be drawn from premises which are uncertain.[6] Facts upon which an inference may legitimately rest must, it is said, be established by direct evidence as if they were the very facts in issue;[7] one presumption cannot be based upon another presumption.[8]

the principal facts from which the deductions flow." Austin *v.* Bingham, 31 Vt. 577, 581, per Redfield, C. J.

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred." Manning *v.* John Hancock Mut. L. Ins. Co., 100 U. S. 693, 697, 25 L. ed. 761, per Strong, J.

"Presumptions of fact result from the proof of a fact, or a number of facts and circumstances, which human experience has shown are usually associated with the matter under investigation." U. S. *v.* Searcey, 26 Fed. 435, 437, per Dick, J.

Presumptions of fact "are, in truth, but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which are shown by experience, irrespective of any legal relations." 1 Greenleaf Ev. § 44.

Distinction between presumptions of law and of fact see *infra*, V, B, 1.

2. See *infra*, V, A, 2.

3. Bach *v.* Cohn, 3 La. Ann. 101, 103, per Slidell, J.

4. O'Gara *v.* Eisenlohr, 38 N. Y. 296, 299, per Mason, J., where the opinion of the court continues as follows: "There are many cases in the books which cannot be considered as law, and which are condemned by the best commentators. (Best on Presumptions of Law and Fact, 46; Law Library [N. S.], vol. 31, p. 47.) It has been well and truly said by Mr. Gresley, in his valuable treatise on equity evidence, while considering this subject, that the power of directing the jury to what length they might venture, has often been stretched beyond due limits by the judges, for, in cases of hardship, they have urged juries to presume facts which were manifestly incredible. (Gresley's Eq. Ev. 272, 273). And such are the cases of Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480, and Wilkinson *v.* Payne, 4 T. R. 468, both of which have been severely criticized, and Eyre, Ch. B., characterized the latter case as one of 'presumption run mad.' It must be confessed that decisions of this kind, requiring courts and jurors to presume facts to be true which are probably, if not obviously, false, are pernicious and ought not to be followed. The presuming of absurdities in order to meet the exigencies of a particular case, must ever be fraught with mischief. Best on Presumptions of Law and Fact, 47."

5. *Alabama.*— Givens *v.* Tidmore, 8 Ala. 745.

Connecticut.— Chillingworth *v.* Eastern Tinware Co., 66 Conn. 306, 33 Atl. 1009; Donahue *v.* Coleman, 49 Conn. 464.

Illinois.— Graves *v.* Colwell, 90 Ill. 612.

Minnesota.— Morris *v.* McClary, 43 Minn. 346, 46 N. W. 238.

New Hampshire.— Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411.

Vermont.— Philadelphia F. Assoc. *v.* Merchants' Nat. Bank, 54 Vt. 657.

United States.—Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Bottomley *v.* U. S., 3 Fed. Cas. No. 1,688, 1 Story 135.

See 20 Cent. Dig. tit. "Evidence," § 111.

6. U. S. *v.* Ross, 92 U. S. 281, 23 L. ed. 707.

7. Starkie Ev. 80 [*quoted* in U. S. *v.* Ross, 92 U. S. 281, 284, 23 L. ed. 707].

8. *Arkansas.*— Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

Connecticut.— Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

District of Columbia.— Davis *v.* U. S., 18 App. Cas. 468.

Illinois.— Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486; Morris *v.* Indianapolis, etc., R. Co., 10 Ill. App. 389.

Indian Territory.— Missouri, etc., R. Co. *v.* Wilder, 3 Indian Terr. 85, 53 S. W. 490.

Kansas.—Atchison, etc., R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788.

3. Continuance of Fact or Condition — a. General Rule. Proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time;[9] but not that it has previously existed,[10] or that it will continue to exist for any definite period of

Missouri.— Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367.

New Hampshire.— Cole *v.* Boardman, 63 N. H. 580, 4 Atl. 572.

Pennsylvania.— Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431, 37 Am. Rep. 699; McAleer *v.* McMurray, 58 Pa. St. 126; Tanner *v.* Hughes, 53 Pa. St. 289; Douglass *v.* Mitchell, 35 Pa. St. 440.

Texas.— Missouri, etc., R. Co. *v.* Porter, 73 Tex. 304, 11 S. W. 324.

Vermont.— Doolittle *v.* Holton, 26 Vt. 588; Richmond *v.* Aiken, 25 Vt. 324.

United States.— Manning *v.* John Hancock Mut. L. Ins. Co., 100 U. S. 693, 25 L. ed. 761; Cunard Steamship Co. *v.* Kelley, 126 Fed. 610, 61 C. C. A. 532; Uhlman *v.* Arnholdt, etc., Brewing Co., 53 Fed. 485; U. S. *v.* Ross, 92 U. S. 28, 23 L. ed. 707. See also Xenia First Nat. Bank *v.* Stewart, 114 U. S. 224, 5 S. Ct. 845, 29 L. ed. 101; U. S. *v.* Pugh, 99 U. S. 265, 25 L. ed. 322.

See 20 Cent. Dig. tit. "Evidence," § 74.

9. *Alabama.*— Garner *v.* Green, 8 Ala. 96.

Indiana.— McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957.

Iowa.— Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 172, 52 N. W. 119.

Massachusetts.— McCraw *v.* McCraw, 171 Mass. 146, 50 N. E. 526; Martin *v.* Fishing Ins. Co., 20 Pick. 389, 32 Am. Dec. 220.

Missouri.— Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 12 S. W. 891; Haskings *v.* St. Louis, etc., R. Co., 58 Mo. 302; Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118.

Nevada.— Table Mountain Gold, etc., Min. Co. *v.* Waller's Defeat Silver Min. Co., 4 Nev. 218, 97 Am. Dec. 526.

New Hampshire.— Cobleigh *v.* Young, 15 N. H. 493.

New York.— People *v.* McLeod, 1 Hill 377, 37 Am. Dec. 328.

Pennsylvania.— Oller *v.* Bonebrake, 65 Pa. St. 338.

Texas.— Kosminsky *v.* Estes, 27 Tex. Civ. App. 69, 65 S. W. 1108.

Wisconsin.— Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795.

England.— Reg. *v.* Willshire, 6 Q. B. D. 366, 14 Cox C. C. 541, 45 J. P. 375, 50 L. J. M. C. 57, 44 L. T. Rep. N. S. 222, 29 Wkly. Rep. 473; Marine Invest. Co. *v.* Haviside, L. R. 5 H. L. 624, 42 L. J. Ch. 173.

See 20 Cent. Dig. tit. "Evidence," § 87.

Strength of inference.— The limits of time within which the inference of continuance possesses sufficient probative force to be relevant vary with each case. Always strongest in the beginning (Nash *v.* Classon, 55 Ill. App. 356; Bexar Bldg., etc., Assoc. *v.* Seebe. (Tex. Civ. App. 1897) 40 S. W. 875), the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference (Oliver *v.* Ellzy, 11 Ala. 632; Goodwin *v.* Dean, 50 Conn. 517; Donahue *v.* Coleman, 49 Conn. 464; Allen *v.* Brown, 83 Ga. 161, 9 S. E. 674). In other words it will be inferred that a given fact or set of facts whose existence at a particular time is once established in evidence continues to exist as long as such facts usually do exist.

California.— Hohenshell *v.* South Riverside Land, etc., Co., 128 Cal. 627, 61 Pac. 371; High *v.* Bank of Commerce, 103 Cal. 525, 37 Pac. 508; Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

Indiana.— Toledo, etc., R. Co. *v.* Smith, 25 Ind. 288.

Massachusetts.— Martin *v.* Fishing Ins. Co., 20 Pick. 389, 32 Am. Dec. 220.

Michigan.— Bethel *v.* Linn, 63 Mich. 464, 474, 30 N. W. 84.

Missouri.— Haskings *v.* St. Louis, etc., R. Co., 58 Mo. 302.

New York.— Gernau *v.* Oceanic Steam Nav. Co., 141 N. Y. 588, 36 N. E. 739.

The inference is extremely faint in respect of possession of small articles of transient value, such as letters (Drew *v.* Durnborough, 2 C. & P. 198, 12 E. C. L. 525), or in connections of intrinsic impermanency, as a small deposit in a bank (High *v.* Bank of America, 103 Cal. 525, 37 Pac. 508), or the possession of a sum of money (McCabe *v.* Com., (Pa. 1886) 8 Atl. 45).

10. *Alabama.*— Murdock *v.* State, 68 Ala. 567.

Arkansas.— Butler *v.* Henry, 48 Ark. 551, 3 S. W. 878.

California.— Windhaus *v.* Bootz, 92 Cal. 617, 28 Pac. 557.

Illinois.— Erskine *v.* Davis, 25 Ill. 251.

Iowa.— State *v.* Dexter, 115 Iowa 678, 87 N. W. 417; State *v.* Hubbard, 60 Iowa 466, 468, 15 N. W. 287, where, however, the court said that "evidence of profound intoxication would, of course, be evidence that an intoxicated condition had existed, at least, for a short time."

Kentucky.— Hyatt *v.* James, 2 Bush 463, 92 Am. Dec. 505.

Louisiana.— Barelli *v.* Lytle, 4 La. Ann. 557. But *compare* Dohan *v.* Wilson, 14 La. Ann. 353.

Massachusetts.— Hingham *v.* South Scituate, 7 Gray 229.

Michigan.— Blank *v.* Livonia, 79 Mich. 1, 44 N. W. 157.

New Jersey.— Dixon *v.* Dixon, 24 N. J. Eq. 133.

North Carolina.— Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302.

Texas.— Henderson *v.* Lindley, 75 Tex. 185, 188, 12 S. W. 979.

time.[11] Inferences of continuance are merely inferences of fact and may therefore, under the general rule, be rebutted.[12]

b. Applications of Rule. This presumption of continuance of facts once shown to exist has been applied in respect of life;[13] conditions of bodily health or strength;[14] sanity and insanity;[15] intention of a person;[16] reputation or character;[17] personal[18] or legal[19] status; relation between persons,[20] sueh as a partnership[21] or other contractnal positions;[22] illicit relations;[23] personal habits;[24]

Vermont.— Martyn *v.* Curtis, 67 Vt. 263, 31 Atl. 296.

Wisconsin.— Body *v.* Jewsen, 33 Wis. 402.

Canada.— Cullen *v.* Voss, 15 N. Brunsw. 464.

Contra.— Gaulden *v.* Lawrence, 33 Ga. 159 (physical infirmities of a slave); Emmerich *v.* Hefferan, 58 N. Y. Super. Ct. 217, 9 N. Y. Suppl. 801 (retrospective presumption of insolvency in action to set aside fraudulent conveyance, the court citing Carlisle *v.* Rich, 8 N. H. 44; Strong *v.* Laurence, 58 Iowa 55, 12 N. W. 74); Doe *v.* Young, 8 Q. B. 63, 65, 9 Jur. 941, 15 L. J. Q. B. 9, 55 E. C. L. 63 (where Coleridge, J., said: "The inference may be carried upwards as well as downwards"). See also Pickup *v.* Thames, etc., Mar. Ins. Co., 3 Q. B. D. 594, 4 Aspin. 43, 47 L. J. Q. B. 749, 39 L. T. Rep. N. S. 341, 26 Wkly. Rep. 689.

See 20 Cent. Dig. tit. "Evidence," § 88.

The inference may, however, be reinforced by evidence that the state of affairs continued to exist at a period subsequent to the time involved in the inquiry. Howland *v.* Davis, 40 Mich. 545. See also Coghill *v.* Boring, 15 Cal. 213, 219.

11. Covert *v.* Gray, 34 How. Pr. (N. Y.) 450.

12. Chillingworth *v.* Eastern Tinware Co., 66 Conn. 306, 33 Atl. 1009; Donahue *v.* Coleman, 49 Conn. 464.

13. Continuance of life see ADULTERY, 1 Cyc. 960; BIGAMY, 5 Cyc. 699; DEATH, 13 Cyc. 290.

14. Green *v.* Southern Pac. Co., 122 Cal. 563, 55 Pac. 577; Draves *v.* People, 97 Ill. App. 151.

15. Sanity and insanity see CRIMINAL LAW; INSANE PERSONS.

16. Leport *v.* Todd, 32 N. J. L. 124; Oller *v.* Bonebrake, 65 Pa. St. 338. But *compare* State *v.* Brown, 64 Mo. 367.

17. People *v.* Squires, 49 Mich. 487, 13 N. W. 828 (want of chastity); Sleeper *v.* Van Middlesworth, 4 Den. (N. Y.) 431; Lum *v.* State, 11 Tex. App. 483; State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587. But the time at which reputation or character is proved to exist must not be too remote to be relevant. State *v.* Chittenden, *supra*.

18. Such as coverture (Wilson *v.* Allen, 108 Ga. 279, 33 S. E. 979; Erskine *v.* Davis, 25 Ill. 251; Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31. See also BIGAMY, 5 Cyc. 95), or disqualification as a voter by a conviction of crime (Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694).

19. Beckwith *v.* Whalen, 65 N. Y. 322 (highway lawfully laid out); Bolling *v.* Anderson, 4 Baxt. (Tenn.) 550 (disqualification of judge).

20. Montgomery, etc., Plank-Road Co. *v.* Webb, 27 Ala. 618; and other cases in the notes following.

21. *Alabama.*—Garner *v.* Elliott, 8 Ala. 96.

Arkansas.— Butler *v.* Henry, 48 Ark. 551, 3 S. W. 878.

Georgia.— Pursley *v.* Ramsey, 31 Ga. 403.

Missouri.—Anslyn *v.* Franke, 11 Mo. App. 598.

New Jersey.— Princeton, etc., Turnpike Co. *v.* Gulick, 16 N. J. L. 161. *Compare* Farmers', etc., Bank *v.* Green, 30 N. J. L. 316.

New York.— Cooper *v.* Dedrick, 22 Barb. 516.

Ohio.— Marks *v.* Sigler, 3 Ohio St. 358.

England.— Clark *v.* Alexander, 13 L. J. C. P. 133, 8 Scott N. R. 147. See also Alderson *v.* Clay, 1 Stark. 405, 18 Rev. Rep. 788, 2 E. C. L. 157.

22. *Alabama.*— Montgomery, etc., Plank-Road Co. *v.* Webb, 27 Ala. 618 (stock-holder in corporation); McKenzie *v.* Stevens, 19 Ala. 691.

Arkansas.— Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 265; Spencer *v.* McDonald, 22 Ark. 466.

Michigan.— Hensel *v.* Maas, 94 Mich. 563, 54 N. W. 381.

Missouri.— McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207.

New Hampshire.— Eames *v.* Eames, 41 N. H. 177.

North Carolina.— Love *v.* Edmonston, 27 N. C. 354.

Pennsylvania.— Bell *v.* Young, 1 Grant 175.

United States.— The Tribune, 24 Fed. Cas. No. 14,171, 3 Sumn. 144.

23. *Maryland.*— Jones *v.* Jones, 45 Md. 144; Barnum *v.* Barnum, 42 Md. 25.

Mississippi.— Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.

Missouri.— Cargile *v.* Wood, 63 Mo. 501.

New York.— Caujolle *v.* Ferrié, 23 N. Y. 90.

Pennsylvania.— Reading F. Ins., etc., Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Strauss' Estate, 34 Wkly. Notes Cas. 478.

24. Leonard *v.* Mixon, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134 (in respect of business correspondence); McCraw *v.* McCraw, 171 Mass. 146, 50 N. E. 526 (where a divorce was granted upon the presumption of continuance of habits of intoxication shown to have been gross and confirmed about five years previously, at which time the party went to parts unknown).

financial condition,[25] such as solvency or insolvency,[26] or a definite indebtedness;[27] course of business dealing between persons;[28] occupation;[29] absence,[30] residence, or non-residence[31] of a person; seizin,[32] ownership,[33] or possession[34] of property;

25. Wallace *v.* Hull, 28 Ga. 68; Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811; Scammon *v.* Scammon, 28 N. H. 419; Body *v.* Jewsen, 33 Wis. 402.

26. *Connecticut.*— Donahue *v.* Coleman, 49 Conn. 464.

Indiana.— Adams *v.* Slate, 87 Ind. 573.

Minnesota.— Redding *v.* Godwin, 44 Minn. 355, 46 N. W. 563.

Missouri.— Mullen *v.* Pryor, 12 Mo. 307.

Utah.— Warren *v.* Robison, 25 Utah 205, 70 Pac. 989.

Wisconsin.— Body *v.* Jewsen, 33 Wis. 402.

Strength of inference.—In Donahue *v.* Coleman, 49 Conn. 464, 466, the court said that the presumption of continuance "must in some cases (and we think bankruptcy is one) be confined to a limited range of time," and it was held that the inference of continuance of bankruptcy for five months would be slight, since there are so many ways according to common experience and observation in which an estate could come to a person in the interval. See also Coghill *v.* Boring, 15 Cal. 213.

27. Carder *v.* Primm, 52 Mo. App. 102; State *v.* McAlpin, 26 N. C. 140; Farr *v.* Payne, 40 Vt. 615.

28. Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289.

29. One shown to have been a professional gambler at some antecedent time will be presumed to have continued in that employment. McMahon *v.* Harrison, 6 N. Y. 443.

30. Com. *v.* Pollitt, 76 S. W. 412, 25 Ky. L. Rep. 790, holding that in case of a gift to a school-district, subject to be defeated if testator's son, who had disappeared, and who had not returned at testator's death, should return, the presumption was that he had not returned.

31. *Alabama.*— Daniels *v.* Hamilton, 52 Ala. 105; Wray *v.* Wray, 33 Ala. 187.

Arkansas.— Davis *v.* Sullivan, 7 Ark. 449; Prather *v.* Palmer, 4 Ark. 456.

Iowa.— Caudill *v.* Tharp, 1 Greene (Iowa) 94.

Maine.— Greenfield *v.* Camden, 74 Me. 56.

New York.— Nixon *v.* Palmer, 10 Barb. (N. Y.) 175.

North Carolina.— Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691.

Vermont.— Rixford *v.* Miller, 49 Vt. 319.

See also DOMICILE; and, generally, PAUPERS.

32. A seizin, once proved or admitted, is presumed to continue until disseizin is proved.

Massachusetts.— Currier *v.* Gale, 9 Allen 522; Brown *v.* King, 5 Metc. 173.

Minnesota.— Lind *v.* Lind, 53 Minn. 48, 54 N. W. 934.

Missouri.— Brown *v.* Brown, 45 Mo. 412.

New Hampshire.— Cobleigh *v.* Young, 15 N. H. 493; Smith *v.* Smith, 11 N. H. 459.

New York.— Adair *v.* Lott, 3 Hill 182.

Tennessee.— Watkins *v.* Specht, 7 Coldw. 585.

Vermont.— State *v.* Atkinson, 24 Vt. 448.

Washington.— Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648.

United States.— Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

See 20 Cent. Dig. tit. "Evidence," § 87.

33. When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged until the contrary appears.

Alabama.—Jones *v.* Sims, 6 Port. 138, joint ownership presumed to continue joint.

Arkansas.— Smith *v.* Graves, 25 Ark. 458.

California.— Hohenshell *v.* South Riverside Land, etc., Co., 128 Cal. 627, 61 Pac. 371; Kidder *v.* Stevens, 60 Cal. 414.

Connecticut.— Chillingworth *v.* Eastern Tinware Co., 66 Conn. 306, 33 Atl. 1009.

Georgia.— Coleman, etc., Co. *v.* Rice, 105 Ga. 163, 31 S. E. 424.

Illinois.— Meacham *v.* Sunderland, 10 Ill. App. 123.

Indiana.— Abbott *v.* Union Mut. L. Ins. Co., 127 Ind. 70, 26 N. E. 153; McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957.

Louisiana.—Hunter *v.* Bennett, 15 La. Ann. 715.

Massachusetts.— Magee *v.* Scott, 9 Cush. 148, 55 Am. Dec. 49.

Minnesota.— Lind *v.* Lind, 53 Minn. 48, 54 N. W. 934; Rhone *v.* Gale, 12 Minn. 54.

Mississippi.— Newman *v.* Greenville Bank, 67 Miss. 770, 7 So. 403.

Missouri.— Zwisler *v.* Storts, 30 Mo. App. 163.

Nevada.— Hanson *v.* Chiatovich, 13 Nev. 395.

New Hampshire.— Scammon *v.* Scammon, 28 N. H. 419.

New York.— Flanders *v.* Merritt, 3 Barb. 201; Ne-Ha-Sa-Ne Park Assoc. *v.* Lloyd, 25 Misc. 207, 55 N. Y. Suppl. 108; Jackson *v.* Potter, 4 Wend. 672.

Pennsylvania.— Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

South Carolina.—Boozer *v.* Teague, 27 S. C. 348.

Wisconsin.— Teetshorn *v.* Hull, 30 Wis. 162; U. S. *v.* De Coursey, 1 Pinn. 508.

United States.— Stickney *v.* Stickney, 131 U. S. 227, 9 S. Ct. 677, 33 L. ed. 136; Fischer *v.* Neil, 6 Fed. 89; U. S. *v.* Mathoit, 26 Fed. Cas. No. 15,740, 1 Sawy. 142.

See 20 Cent. Dig. tit. "Evidence," § 87.

34. *Alabama.*— Clements *v.* Hays, 76 Ala. 280.

Connecticut.— Gray *v.* Finch, 23 Conn. 495, 513.

Georgia.— Robson *v.* Rawlings, 79 Ga. 354, 7 S. E. 212.

Illinois.— Choisser *v.* People, 140 Ill. 211, 29 N. E. 546; Butler *v.* Chapin, 28 Ill. 230.

Louisiana.— Drummond *v.* Clinton, etc., R. Co., 7 Rob. 234.

Missouri.— Janssen *v.* Stone, 60 Mo. App. 402.

tenure of real[35] or personal[36] property or official position;[37] rules for the operation of street railroads;[38] foreign municipal ordinances;[39] or foreign statutory laws.[40]

4. Identity of Persons and Things — a. Of Persons. It is an inference of fact that identity of name indicates an identity of person;[41] and it has been held that the court itself will assume the inference to be correct in the absence of

Vermont.— Chilson *v.* Buttolph, 12 Vt. 231.
Wisconsin.— Smith *v.* Hardy, 36 Wis. 417. See also Eaton *v.* Woydt, 26 Wis. 383.
United States.— Lazarus *v.* Phelps, 156 U. S. 202, 15 S. Ct. 271, 39 L. ed. 397; Bayard *v.* Colfax, 3 Fed. Cas. No. 1,130, 4 Wash. 38.

See 20 Cent. Dig. tit. "Evidence," § 87.

The inference may cease with lapse of considerable time and in view of the ephemeral character of the subject-matter. Adams *v.* Clark, 53 N. C. 56.

"Where a firm is engaged in merchandizing, and in continued buying and selling of commodities in their line of business I do not see how the presumption arises that goods purchased and shown to be in the possession of such firm are presumed to continue in their possession for four and a half months thereafter." Bethel *v.* Linn, 63 Mich. 464, 474, 30 N. W. 84, per Champlin, J.

35. Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43; Leport *v.* Todd, 32 N. J. L. 124; Bradt *v.* Church, 39 Hun (N. Y.) 262; Caffrey *v.* McFarland, 1 Phila. (Pa.) 555.

36. Buckley *v.* Buckley, 16 Nev. 180.

37. *Arkansas.*—Kaufman *v.* Stone, 25 Ark. 336 (commissioner of deeds); Norris *v.* State, 22 Ark. 524 (sheriff).
Maine.— Mason *v.* Belfast Hotel Co., 89 Me. 384, 36 Atl. 624 (treasurer of corporation); Sawyer *v.* Knowles, 33 Me. 208 (administrator).
Michigan.— Kinyon *v.* Duchene, 21 Mich. 498, township supervisor.
Missouri.— Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687, president of corporation.
New Hampshire.— Lucier *v.* Pierce, 60 N. H. 13, sheriff.
England.— Steward *v.* Dunn, 1 D. & L. 642, 8 Jur. 218, 13 L. J. Exch. 324, 12 M. & W. 655 (registered public officer of banking company); Rex *v.* Budd, 5 Esp. 230 (first lord of the admiralty).

38. Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118, holding that when a rule necessary to the safe and orderly operation of street railway cars has once been shown to be in force, the presumption is in the absence of countervailing evidence that it was in force at the time of an accident. See also Master and Servant; Railroads; Street Railroads.

39. Cleveland, etc., R. Co. *v.* Bender, 69 Ill. App. 262, in sister state.

40. See *infra*, V, C, 3, g.

41. *Alabama.*— Garrett *v.* State, 76 Ala. 18; Moog *v.* Benedicks, 49 Ala. 512; Givens *v.* Tidmore, 8 Ala. 745.
California.— Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955; People *v.* Rolfe, 61 Cal. 540; Thompson *v.* Manrow, 1 Cal. 428.
Florida.— Hogans *v.* Carruth, 18 Fla. 587.
Georgia.— Mullery *v.* Hamilton, 71 Ga. 720, 51 Am. Rep. 288.
Indiana.— Hendricks *v.* State, 26 Ind. 493.
Kentucky.—Cobb *v.* Haynes, 8 B. Mon. 137; Cates *v.* Loftus, 3 A. K. Marsh. 202. *Compare* Robards *v.* Wolfe, 1 Dana 155; Allin *v.* Shadburne, 1 Dana 68, 25 Am. Dec. 121.
Maine.— Grindle *v.* Stone, 78 Me. 176, 3 Atl. 183. See also State *v.* Robinson, 39 Me. 150.
Michigan.— Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521; Campbell *v.* Wallace, 46 Mich. 320, 9 N. W. 432; Goodell *v.* Hibbard, 32 Mich. 47.
Minnesota.— Morris *v.* McClary, 43 Minn. 346, 46 N. W. 238.
Missouri.— State *v.* McGuire, 87 Mo. 642; Long *v.* McDow, 87 Mo. 197; La Riviere *v.* La Riviere, 77 Mo. 512; State *v.* Kelsoe, 76 Mo. 505; Phillips *v.* Evans, 64 Mo. 17, 23; State *v.* Moore, 61 Mo. 276; Hoyt *v.* Davis, 21 Mo. App. 235.
Nebraska.— Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824.
New York.—Hatcher *v.* Rocheleau, 18 N. Y. 86; Fink *v.* Manhattan R. Co., 15 Daly 479, 481, 8 N. Y. Suppl. 327; Jackson *v.* King, 5 Cow. 237, 15 Am. Dec. 468.
North Carolina.— Freeman *v.* Loftis, 51 N. C. 524.
Pennsylvania.— McConeghy *v.* Kirk, 68 Pa. St. 200; Hamsher *v.* Kline, 57 Pa. St. 397.
Texas.— Leland *v.* Eckert, 81 Tex. 226, 16 S. W. 897.
Vermont.— Cross *v.* Martin, 46 Vt. 14; Bogue *v.* Bigelow, 29 Vt. 179.
Washington.— Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.
England.— Sewell *v.* Evans, 4 Q. B. 626, 3 G. & D. 604, 7 Jur. 213, 12 L. J. Q. B. 276, 45 E. C. L. 626; Simpson *v.* Dismore, 1 Dowl. P. C. N. S. 357, 5 Jur. 1012, 11 L. J. Exch. 137, 9 M. & W. 47. See also Salter *v.* Turner, 2 Campb. 87. But *compare* Middleton *v.* Sandford, 4 Campb. 34; Smith *v.* Fuge, 3 Campb. 456; Hodgkinson *v.* Willis, 3 Campb. 401; Giles *v.* Cornfoot, 2 C. & K. 653, 61 E. C. L. 653; Whitelocke *v.* Musgrove, 1 Cromp. & M. 511, 3 Tyrw. 541, 2 L. J. Exch. 210; Studdy *v.* Sanders, 2 D. & R. 347, 16 E. C. L. 93; Barber *v.* Holmes, 3 Esp. 190.
Canada.— Hesketh *v.* Ward, 17 U. C. Q. B. 190.

See 20 Cent. Dig. tit. "Evidence," § 75.

The strength of the inference is augmented when both the surnames and given names are identical (Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181), where the name is not of common occurrence (Sewell *v.* Evans, 4 Q. B. 626, 3 G. & D. 604, 7 Jur. 213, 12 L. J. Q. B. 276, 45 E. C. L. 626), where an appropriate initial is written out

evidence to the contrary,[42] especially where the presumption of identity is invoked as an aid in tracing titles to land.[43] But identity cannot be inferred where evi-

in full (Paxton *v.* Ross, 89 Iowa 661, 57 N. W. 428), or where there is other identification (Bennett *v.* Libhart, 27 Mich. 489; Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641; Bulkeley *v.* Butler, 2 B. & C. 434, 3 D. & R. 625, 9 E. C. L. 194), such as that furnished by a document produced from proper custody (Simpson *v.* Dismore, 1 Dowl. P. C. N. S. 357, 5 Jur. 1012, 11 L. J. Exch. 137, 9 M. & W. 47), or similarity in handwriting (Sewell *v.* Evans, *supra*; Greenshields *v.* Crawford, 1 Dowl. P. C. N. S. 439, 6 Jur. 303, 11 L. J. Exch. 372, 9 M. & W. 314; Sayer *v.* Glossop, 2 Exch. 409, 12 Jur. 465, 17 L. J. Exch. 300; Nicholson *v.* Burkholder, 21 U. C. Q. B. 108, 111; Hesketh *v.* Ward, 17 U. C. Q. B. 190. See also Stebbing *r.* Spicer, 8 C. B. 827, 65 E. C. L. 827). On the other hand the strength of the inference depends largely upon circumstances, and these may defeat entirely the presumption that would otherwise arise from mere identity of name.

Alabama.— Stevenson *v.* Murray, 87 Ala. 442, 6 So. 301.

Florida.— Liddon *v.* Hodnett, 22 Fla. 442.

Indiana.— Mode *v.* Beasley, 143 Ind. 306, 333, 42 N. E. 727.

New Hampshire.—Jones *v.* Parker, 20 N. H. 312.

Texas.— McNeil *v.* O'Connor, 79 Tex. 227, 229, 14 S. W. 1058.

See 20 Cent. Dig. tit. "Evidence," § 75.

The initial of a middle name inserted in one of the names does not destroy the inference of identity. Hunt *r.* Stewart, 7 Ala. 525. It is otherwise where the middle initials in both names are dissimilar. Ambs *v.* Chicago, etc., R. Co., 44 Minn. 266, 46 N. W. 321.

Identity of given names of a woman, in connection with circumstances showing probability that one was her maiden name and the other her name after marriage, was held to be *prima facie* evidence of identity of person in a chain of conveyances. Chamblee *v.* Tarbox, 27 Tex. 139, 84 Am. Dec. 614. See also Dowdy *v.* McArthur, 94 Ga. 577, 21 S. E. 148.

Identity of family names and of initials of the other names was held not to support an inference of identity of persons in Bennett *v.* Libhart, 27 Mich. 489. See also Andrews *v.* Wynn, 4 S. D. 40, 54 N. W. 1047.

If a person answers when addressed by a certain name it is some evidence that he is a particular person of that name, where the surroundings tend to support the inference. Garrett *v.* State, 76 Ala. 18, 22; Collier *v.* Nokes, 2 C. & K. 1012, 61 E. C. L. 1012; Reynolds *v.* Staines, 2 C. & K. 745, 61 E. C. L. 745. See also Wilton *r.* Edwards, 6 C. & P. 677, 25 E. C. L. 634. But *compare* Corfield *v.* Parsons, 1 Cromp. & M. 730, 2 L. J. Exch. 262, 3 Tyrw. 806.

42. *Alabama.*— Wilson *v.* Holt, 83 Ala. 528, 541, 3 So. 321, 3 Am. St. Rep. 768.

Arkansas.— Driver *v.* Lanier, 66 Ark. 126, 49 S. W. 816; McNamee *v.* U. S., 11 Ark. 148.

California.— Garwood *v.* Garwood, 29 Cal. 514.

Colorado.— Coon *v.* Rigden, 4 Colo. 275.

Georgia.— Clark *v.* Pearson, 53 Ga. 496.

Illinois.— Brown *v.* Metz, 33 Ill. 339, 85 Am. Dec. 277.

Indiana.— Aultman *v.* Timm, 93 Ind. 158; Wire *v.* Heaston, 5 Ind. 539. But see Hendricks *v.* State, 26 Ind. 493.

Kansas.— Bayha *v.* Mumford, 58 Kan. 445, 49 Pac. 601.

Michigan.— Howard *v.* Rockwell, 1 Dougl. 315.

Montana.— Stapleton *r.* Pease, 2 Mont. 550.

Ohio.— Hazzard *v.* Nottingham, Tapp. 192.

Rhode Island.— Liscomb *v.* Eldredge, 20 R. I. 335, 38 Atl. 1052.

Tennessee.—Tharpe *v.* Dunlap, 4 Heisk. 674.

Texas.— Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300.

England.— Hennell *v.* Lyon, 1 B. & Ald. 182, 18 Rev. Rep. 456; Hamber *v.* Roberts, 7 C. B. 861, 18 L. J. C. P. 250, 62 E. C. L. 861.

See 20 Cent. Dig. tit. "Evidence," § 75.

Identity of adverse parties to an action by reason of identity of name was presumed in Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352, sustaining a demurrer to the declaration, but not presumed on appeal from a judgment in the action (Wilson *v.* Benedict, 90 Mo. 208, 2 S. W. 283), nor on a collateral attack thereon (Bryan *v.* Kales, 3 Ariz. 423, 31 Pac. 517).

43. In deraigning title identity of names in successive conveyances creates a *prima facie* presumption of identity of person.

California.— Mott *v.* Smith, 16 Cal. 533. See also Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955; Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

District of Columbia.— Scott *v.* Hyde, 21 D. C. 531.

Illinois.— Brown *v.* Metz, 33 Ill. 339, 85 Am. Dec. 277. See also Graves *v.* Colwell, 90 Ill. 612, holding it to be a legal *prima facie* presumption that the father is intended where he has a son of the same name.

Iowa.— Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299.

Michigan.— Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837; Goodell *v.* Hibbard, 32 Mich. 47.

Minnesota.— See Morris *v.* McClary, 43 Minn. 346, 46 N. W. 238.

Missouri.— Geer *v.* Missouri Lumber, etc., Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489 [*citing* Mosely *v.* Reily, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721]; Gitt *v.* Watson, 18 Mo. 274 [*citing* Flournoy *v.* Worden, 17 Mo. 435].

New York.— Jackson *v.* Cody, 9 Cow. 140; Jackson *r.* King, 5 Cow. 237, 15 Am. Dec. 468. See also People *v.* Snyder, 41 N. Y. 397.

dence is introduced to contradict the inference,[44] where incongruity appears in diversity of function,[45] or where the transactions in question are too remote to be relevant.[46] Any inference of identity may, it has been said, be overcome by a conflicting presumption of law.[47]

b. Of Things. It may be presumed within reasonable limits that objects of the same name or description are identical.[48]

5. Love of Life and Avoidance of Danger. The instinct of self-preservation and the disposition of men to avoid personal harm reinforce an inference that a person killed or injured was in the exercise of ordinary care.[49] For similar

Texas.— Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794; Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300; Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668; Grant *v.* Searcy, (Civ. App. 1896) 35 S. W. 861.

United States.— Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641, where the court said that, in tracing titles, identity of name is *prima facie* evidence of identity of person.

Canada.— Nicholson *v.* Burkholder, 21 U. C. Q. B. 108. See also Brown *v.* Livingstone, 29 U. C. Q. B. 520.

Compare Mooers *v.* Bunker, 29 N. H. 420, 431, where the court said: "If a question is made, a jury is not at liberty to presume that a person even of so peculiar a name as Timothy Mooers, is the same person as the man of the same name [the plaintiff] who is shown to be entitled to a particular estate."

44. *Alabama.*— Givens *v.* Tidmore, 8 Ala. 745.

California.— McMinn *v.* Whelan, 27 Cal. 300, 317, evidence that two persons bore the same name.

Illinois.— Graves *v.* Colwell, 90 Ill. 612.

New Hampshire.— See State *v.* Vittum, 9 N. H. 519.

New York.— Jackson *v.* Goes, 13 Johns. 518, 7 Am. Dec. 399; Jackson *v.* Cody, 9 Cow. 140.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411. See also McNeil *v.* O'Connor, 75 Tex. 227, 229, 14 S. W. 1058.

"Very slight evidence may be sufficient to overcome the presumption of identity of person which identity of name raises." Morris *v.* McClary, 43 Minn. 346, 347, 46 N. W. 238, per Gilfillan, C. J.

45. Richardson *v.* People, 85 Ill. 495 (judge and surety); Dow *v.* Seely, 29 Ill. 495 (solicitor and commissioner); Wickersham *v.* People, 2 Ill. 128 (petit juror and grand juror); Ellsworth *v.* Moore, 5 Iowa 486 (attorney and judge); Howard *v.* Lock, 22 S. W. 332, 15 Ky. L. Rep. 154 (plaintiff and officer serving process); Waller *v.* Edmonds, 47 Tex. 468 (sheriff and party to the suit).

46. Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207; Sailor *v.* Hertzogg, 2 Pa. St. 182; Giles *v.* Cornfoot, 2 C. & K. 653, 61 E. C. L. 653.

47. Presumption of innocence in criminal cases. Wedgwood's Case, 8 Me. 75. See also Com. *v.* Briggs, 5 Pick. (Mass.) 429; Com. *v.* Norcross, 9 Mass. 492; Bogue *v.* Bigelow, 29 Vt. 179, 183; Reg. *v.* Lloyd, 1 Cox C. C. 51.

Presumption of validity of contract.— Cooper *v.* Poston, 1 Duv. (Ky.) 92, 85 Am. Dec. 610.

48. Howard *v.* Rockwell, 1 Dougl. (Mich.) 315 (holding that a case removed by certiorari from a justice's court to the supreme court might properly be presumed to be identical with a case between parties of the same names dismissed shortly afterward by the supreme court); Wilbur *v.* Clark, 22 Mo. 503 (where identity of notes was presumed from identity in names, dates, terms, etc.); Barrow *v.* Philleo, 14 Tex. 345 (where goods delivered in a damaged condition by a common carrier were presumed to be identical with goods not damaged but otherwise answering the same description, which were covered by a bill of lading issued at the place of shipment a short time previously); Stahl *v.* Ertel, 62 Fed. 920 (holding that patented machines sold by a certain name were identical with machines of the same name the sale of which by the same person had been enjoined). See also Gaulden *v.* Lawrence, 33 Ga. 159, 161.

49. *Colorado.*— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Kansas.— Atchison, etc., R. Co. *v.* Hill, 57 Kan. 139, 45 Pac. 581.

Maryland.—Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

New York.— Morrison *v.* New York Cent., etc., R. Co., 63 N. Y. 643.

Pennsylvania.— Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407.

United States.— Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 366, 16 S. Ct. 1104, 41 L. ed. 186. See Carriers, 6 Cyc. 656; Master and Servant; Negligence; Railroads; Street Railroads.

"The presumption is prima facie only and may be rebutted by proof of the acts of the injured person or of the circumstances surrounding the accident." Connerton *v.* Delaware, etc., Canal Co., 169 Pa. St. 339, 32 Atl. 416.

In Iowa the doctrine is that "where the person injured is living, and does or can testify to the facts and circumstances, and in what manner the injury was received, then there is no reason why the inference arising from the instinct of self-preservation should be indulged." Reynolds *v.* Keokuk, 72 Iowa 371, 372, 34 N. W. 167, holding that an instruction authorizing such an inference by the jury was erroneous.

reasons it is to be inferred that the death of a sane person[50] is not attributable to suicide.[51]

6. Spoliation, Fabrication, or Non-Production of Evidence[52] — a. Spoliation in General. The presumption hinted at rather than stated in the phrase *omnia præsumuntur contra spoliatorem*,[53] so far as it rests upon logic, is reinforced by the proposition of experience that men do not as a rule withhold from a tribunal facts beneficial to themselves. In practical administration, however, courts have, under a natural feeling of resentment at double dealing or bad faith, at times imposed penalties which, however justified by this feeling or considerations of public policy, go beyond the natural and logical effect of the situation.[54] The presumption *contra spoliatorem* does not justify the substitution of mere allegation or conjecture for proof,[55] nor arbitrarily overthrow a contention clearly established by evidence;[56] and its legitimate effect is confined to rendering evidence admissible which could not be received under ordinary circumstances, or giving to the evidence of the party claiming the benefit of the presumption the strongest construction in his favor that it will reasonably bear.[57] A spoliator of evidence cannot be deprived of his legal rights by excluding other and totally independent evidence offered by him.[58] In the application of principles the term "spoliation" may be regarded as generic for the various acts or omissions discussed in the following subsections.[59]

b. Destruction of Evidence. Deliberate destruction of written evidence,[60]

50. Death of an insane person, where death was either accidental or suicidal, raises no presumption against suicide. Germain *v.* Brooklyn L. Ins. Co., 26 Hun (N. Y.) 604.

51. Supreme Ct. of Honor *v.* Barker, 96 Ill. App. 490; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 55, 7 Am. Rep. 410, where the court said that suicide "shows gross moral turpitude in a sane person." See also Homicide; Insurance.

52. In criminal prosecutions see Criminal Law, 12 Cyc. 398, 405.

53. **Maxim omnia præsumuntur, etc.,** see Broom Leg. Max (7th Am. ed.) 938; Bush *v.* Guion, 6 La. Ann. 797; Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312.

54. Armory *v.* Delamirie, 1 Str. 505.

55. Cartier *v.* Troy Lumber Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470; Larkin *v.* Taylor, 5 Kan. 433; Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31; Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

A presumption of highest quantity of goods alleged, but in respect of quantity not distinctly shown to have been taken by defendant trespasser, could not be indulged against him pursuant to the maxim stated in the text. Harris *v.* Rosenberg, 43 Conn. 227.

56. Rayssiguier *v.* Fourchy, 49 La. Ann. 1627, 22 So. 833; Welty *v.* Lake Superior Terminal, etc., Co., 100 Wis. 128, 75 N. W. 1022. See also Gray *v.* Haig, 20 Beav. 219, 226, where the master of the rolls said he would presume against a spoliator everything most unfavorable to him, "which is consistent with the rest of the facts, which are either admitted or proved."

57. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

Presumption as corroboration.— When written evidence existed which would be decisive of a fact depending upon the testimony of a witness for plaintiff, directly contradicted by the oath of defendant, the court, contrary to the usual practice in such cases, decided the fact against defendant because it appeared that pending the litigation he had destroyed the written evidence. Gray *v.* Haig, 20 Beav. 219.

58. Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238, holding that in an action for breach of promise of marriage letters between the parties offered as evidence by plaintiff to prove defendant's admission of the contract could not be excluded on the ground that plaintiff had destroyed other of defendant's letters.

59. Generic meaning of maxim.—It "legitimately applies to tortious acts of withholding, suppressing, concealing, mutilating or fabricating evidence, or the instruments of evidence." Harris *v.* Rosenberg, 43 Conn. 227, 232, per Loomis, J.

60. *California.*— Johnson *v.* White, 46 Cal. 328; Bagley *v.* McMickle, 9 Cal. 430.

Illinois.— Tanton *v.* Keller, 167 Ill. 129, 47 N. E. 376; Gage *v.* Parmelee, 87 Ill. 329.

Indiana.— Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Iowa.— Warren *v.* Crew, 22 Iowa 315.

Louisiana.— Lucas *v.* Brooks, 23 La. Ann. 117.

Maryland.— Love *v.* Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290.

Massachusetts.— Joannes *v.* Bennett, 5 Allen 169, 81 Am. Dec. 738.

Missouri.— State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145; Hays *v.* Bayliss, 82 Mo. 209.

New Jersey.— Jones *v.* Knauss, 31 N. J. Eq. 609.

New York.— Ames *v.* Manhattan L. Ins. Co., 31 N. Y. App. Div. 180, 52 N. Y. Suppl. 759; Blade *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126.

such as books of account,[61] official papers on file,[62] records,[63] or ship papers,[64] or other articles important as evidence,[65] or mutilation or alteration of material documents,[66] gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator. This inference, while it furnishes no affirmative evidence of facts inimical to him, enhances the probative value of his opponent's evidence,[67] and diminishes the force of his own.[68] But it cannot operate when there is positive evidence of the contents of the instrument destroyed,[69] and is, like other inferences, rebuttable by satisfactory explanation.[70]

c. Eloignment of Evidence. Where a party[71] eloigns witnesses[72] by removing them beyond the reach of process[73] or dissuading them from attendance,[74] or removes or conceals relevant documents[75] or portions thereof,[76] an inference arises that the evidence thus kept out of the case would be highly prejudicial to him.

d. Suppression of Evidence. Where a party to judicial proceedings suppresses documents that are relevant to the matter in question and within his control,[77]

North Carolina.— Henderson *v.* Hoke, 21 N. C. 119.

Pennsylvania.— Diehl *v.* Emig, 65 Pa. St. 320.

South Carolina.— Halyburton *v.* Kershaw, 3 Desauss. 105.

United States.—Dinniny *v.* The Sam Sloan, 65 Fed. 125; Askew *v.* Odenheimer, 2 Fed. Cas. No. 587, Baldw. 380.

See 20 Cent. Dig. tit. "Evidence," § 98.

Against a party not privy to the destruction no prejudicial inference arises. Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023; Blake *v.* Blake, 56 Wis. 392, 14 N. W. 173.

61. Gray *v.* Haig, 20 Beav. 219; St. Louis *v.* Reg., 25 Can. Supreme Ct. 649.

62. Dinniny *v.* The Sam Sloan, 65 Fed. 125.

63. Murray *v.* Lepper, 99 Mich. 135, 57 N. W. 1097; Hunter *v.* Lauder, 8 Can. L. J. N. S. 17.

64. The Olinde Rodrigues, 174 U. S. 510, 19 S. Ct. 851, 43 L. ed. 1065; Haigh *v.* U. S., 3 Wall. (U. S.) 514, 18 L. ed. 200.

65. Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31.

66. Blake *v.* Lowe, 3 Desauss. (S. C.) 263 (in which case a party who had improperly got possession of books and mutilated them by cutting out leaves was not allowed to take advantage of any entries in such books); Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.

Alteration of instrument see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 137.

Cancellation of postmarks.—Murray *v.* Lepper, 99 Mich. 135, 57 N. W. 1097.

67. Gage *v.* Parmelee, 87 Ill. 329; Murray *v.* Lepper, 99 Mich. 135, 57 N. W. 1097; Bott *v.* Wood, 56 Miss. 136; Pomeroy *v.* Benton, 77 Mo. 64.

68. Downing *v.* Plate, 90 Ill. 268; Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238; Pomeroy *v.* Benton, 77 Mo. 64; Gray *v.* Haig, 20 Beav. 219.

69. Bott *v.* Wood, 56 Miss. 136; St. Louis *v.* Reg., 25 Can. Supreme Ct. 649.

70. The Olinde Rodrigues, 174 U. S. 510, 19 S. Ct. 851, 43 L. ed. 1065; The Pizarro, 2 Wheat. (U. S.) 227, 4 L. ed. 226.

71. Party blameless.— Evidence that a prosecuting witness was made to leave the neighborhood by persons other than accused is not admissible against the latter. State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104.

72. Cruikshank *v.* Gorden, 118 N. Y. 178, 23 N. E. 457 (attempt to hire adverse party's witness to leave the country); Frank Waterhouse *v.* Rock Island Alaska Min. Co., 97 Fed. 466, 38 C. C. A. 281 (facilitating absence of witness).

73. Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488.

74. Houser *v.* Austin, 2 Ida. (Hasb.) 204, 10 Pac. 37; Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488; Pratt *v.* Battles, 34 Vt. 391.

75. Bricker *v.* Lightner, 40 Pa. St. 199; Lee *v.* Lee, 9 Pa. St. 169.

76. The Sam Sloan, 65 Fed. 125.

77. *Illinois.*— Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425.

Indiana.— Westervelt *v.* National Mfg. Co., (App. 1903) 69 N. E. 169, blue-prints of machine.

Kentucky.— Benjamin *v.* Ellinger, 80 Ky. 472.

Louisiana.— Johnson *v.* Marx Levy, 109 La. 1036, 34 So. 68 (drafts); Bush *v.* Guion, 6 La. Ann. 797.

Michigan.— Battersbee *v.* Calkins, 128 Mich. 569, 87 N. W. 760; Wallace *v.* Harris, 32 Mich. 380.

Mississippi.— Bott *v.* Wood, 56 Miss. 136.

Missouri.— Thompson *v.* Chappell, 91 Mo. App. 297.

New Hampshire.— Cross *v.* Bell, 34 N. H. 82.

Ohio.— Heller *v.* Beal, 23 Ohio Cir. Ct. 540, written notice to vacate not produced in forcible entry and detainer.

Pennsylvania.— Lee *v.* Lee, 9 Pa. St. 169.

Tennessee.— Webster *v.* Whitworth, (Ch. App. 1901) 63 S. W. 290.

Texas.— Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529.

United States.— The Pizarro, 2 Wheat. 227, 4 L. ed. 226; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

England.—Atty.-Gen. *v.* Windsor, 24 Beav. 679, 4 Jur. 518, 27 L. J. Ch. 320, 6 Wkly. Rep. 220; James *v.* Biou, 2 Sim. & St. 600, 1 Eng. Ch. 600; Crisp *v.* Anderson, 1 Stark. 35, 18 Rev. Rep. 744, 2 E. C. L. 23.

such as books of account[78] or records,[79] and in lieu of their production offers secondary[80] or other evidence inferior in probative value,[81] there is a presumption that the suppressed evidence would injure his case,[82] especially where a summons or order to produce is disregarded.[83] The principle also applies in case of the suppression of other evidence.[84] A like rule obtains where a party refuses to produce relevant documents and his adversary gives secondary or parol proof of their contents.[85] Inferences from suppression of documents or failure to produce them on notice increase the weight of evidence produced by the other party as to the contents of the documents, or as to the facts to which the docu-

Canada.— Lowell *v.* Todd, 15 U. C. C. P. 306; Atty.-Gen. *v.* Halliday, 26 U. C. Q. B. 397.

See 20 Cent. Dig. tit. "Evidence," §§ 95, 98.

Suppression must be proved; the facts should not rather give rise to an inference that the document is lost. Clark *v.* Hornbeck, 17 N. J. Eq. 430.

78. *Connecticut.*— Merwin *v.* Ward, 15 Conn. 377; Palmer *v.* Green, 6 Conn. 14.

Illinois.— Cartier *v.* Troy Lumber Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470; Albee *v.* Wachter, 74 Ill. 173.

Iowa.— Wallace *v.* Berger, 14 Iowa 183.

Kentucky.— Bowler *v.* Blair, 6 Ky. L. Rep. 658.

Louisiana.— State *v.* New Orleans Waterworks Co., 107 La. 1, 31 So. 395; Bach *v.* Cornen, 5 La. Ann. 109.

New Hampshire.— Cross *v.* Bell, 34 N. H. 82.

New York.— Schenck *v.* Wilson, 2 Hilt. 92.

United States.— Chaffee *v.* U. S., 18 Wall. 516, 21 L. ed. 908; Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188; U. S. *v.* Flemming, 18 Fed. 907.

Canada.— Lowell *v.* Todd, 15 U. C. C. P. 306; Atty.-Gen. *v.* Halliday, 26 U. C. Q. B. 397.

See 20 Cent. Dig. tit. "Evidence," §§ 95, 98.

79. *Arkansas.*— Clark *v.* Oakley, 4 Ark. 236.

Kansas.— Towne *v.* Milner, 31 Kan. 207, 1 Pac. 613; Ogden *v.* Walters, 12 Kan. 282.

Louisiana.— Hubee's Succession, 20 La. Ann. 97.

North Carolina.— State *v.* Atkinson, 51 N. C. 65.

Canada.— Hunter *v.* Lauder, 8 Can. L. J. N. S. 17.

See 20 Cent. Dig. tit. "Evidence," §§ 95, 98.

80. Merwin *v.* Ward, 15 Conn. 377.

81. Savannah, etc., R. Co. *v.* Gray, 77 Ga. 440, 3 S. E. 158; Thompson *v.* Chappell, 91 Mo. App. 297; Wimer *v.* Smith, 22 Oreg. 469, 30 Pac. 416.

82. *Indiana.*— Westervelt *v.* National Mfg. Co., (App. 1903) 69 N. E. 169.

Louisiana.— Johnson *v.* Levy, 109 La. 1036, 34 So. 68.

Maryland.— Spring Garden Mut. Ins. Co. *v.* Evans, 9 Md. 1, 66 Am. Dec. 30.

Minnesota.—McGuiness *v.* Le Sueur County School-Dist. No. 10, 39 Minn. 499, 41 N. W. 103.

New Hampshire.— Cross *v.* Bell, 34 N. H. 82.

New Jersey.— Clark *v.* Hornbeck, 17 N. J. Eq. 430.

New York.— Rockwell *v.* Merwin, 45 N. Y. 166; Barber *v.* Lyon, 22 Barb. 622; Wylde *v.* Northern R. Co., 14 Abb. Pr. N. S. 213.

North Carolina.— Reavis *v.* Orenshaw, 105 N. C. 369, 10 S. E. 907.

Ohio.— Heller *v.* Beal, 23 Ohio Cir. Ct. 540.

Oregon.— Schreyer *v.* Turner Flouring Mills Co., 29 Oreg. 1, 43 Pac. 719.

England.— Curlewis *v.* Corfield, 1 Q. B. 814, 1 G. & D. 480, 41 E. C. L. 790.

See 20 Cent. Dig. tit. "Evidence," §§ 95, 98.

"Evidence is always to be taken most strongly against the persons who keep back a document." Atty.-Gen. *v.* Windsor, 24 Beav. 679–706, 4 Jur. 518, 27 L. J. Ch. 320, 6 Wkly. Rep. 220.

83. Mills *v.* Fellows, 30 La. Ann. 824; Devlan *v.* Wells, 65 N. J. L. 213, 47 Atl. 467; Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529.

84. Thompson *v.* Chappell, 91 Mo. App. 297, holding that where plaintiff reads part of a deposition, and defendant has permission to read the remainder and fails to do so, the presumption is that such remainder is not useful to defendant or harmful to plaintiff.

Refusal to submit to physical examination. — Where plaintiff in an action for injuries refuses to submit to an examination by physicians, such fact is proper for the jury as bearing on the credibility and sufficiency of the testimony on which he seeks to recover. Austin, etc., R. Co. *v.* Cluck, (Tex. Sup. 1903) 77 S. W. 403 [*reversing* (Civ. App. 1903) 73 S. W. 569].

Marriage to suppress woman's testimony. — In a prosecution for homicide it is competent for the state to ask defendant as a witness whether he married the prosecuting witness on the day before the trial, for the purpose of showing that defendant married her with the object of suppressing her testimony. Moore *v.* State, (Tex. Civ. App. 1903) 75 S. W. 497.

85. Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31, 34, where it is said: "If such secondary evidence is imperfect, vague, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party, who might remove all doubt by producing the higher evidence." See also Cartier *v.* Troy Lumber Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470. And *compare* Rossiter *v.* Boley, 13 S. D. 370, 83 N. W. 428; Sullivan *v.* Cranz, 21 Tex. Civ. App. 498, 52 S. W. 272.

ments are relevant, but do not constitute independent evidence of a fact.[86] Attempts to bribe a witness not to testify create an unfavorable inference.[87] It is not, however, a suppression of evidence, giving rise to adverse inferences, where a defendant in a criminal case declines to testify,[88] or a party in a civil case exercises a privilege of declining to allow his attorney[89] or physician[90] to testify, or a husband or wife thus excludes the testimony of the other.[91]

e. Fabrication of Evidence. The fabrication of oral evidence,[92] including the exercise of improper influence on witnesses,[93] or fabrication of documentary evidence,[94] raises an adverse inference probative in proportion to the effort made and risk incurred in manufacturing the false testimony,[95] and is particularly strong where one party has long neglected the assertion of an adverse claim until after the death of the other.[96]

86. *Alabama.*— Jewell *v.* Center, 25 Ala. 498; Mobile Cong. Church *v.* Morris, 8 Ala. 182.

Colorado.— Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72.

Connecticut.— Merwin *v.* Ward, 15 Conn. 377.

Illinois.— Cartier *v.* Troy Lumber Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470 [*reversing* 35 Ill. App. 449].

Indiana.— Lockwood *v.* Rose, 125 Ind. 588, 25 N. E. 710; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

Iowa.— Hunt *v.* Collins, 4 Iowa 56.

Kansas.— Nay *v.* Mograin, 24 Kan. 75.

Louisiana.— State *v.* New Orleans Waterworks Co., 107 La. 1, 31 So. 395.

Massachusetts.— McCooe *v.* Dighton, etc., St. R. Co., 173 Mass. 117, 53 N. E. 133; Sturtevant *v.* Wallack, 141 Mass. 119, 4 N. E. 615.

Missouri.— Munford *v.* Wilson, 19 Mo. 669; Ecton *v.* Continental Ins. Co., 32 Mo. App. 53.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

New York.—Wylde *v.* New Jersey Northern R. Co., 53 N. Y. 156; Hager *v.* Hager, 38 Barb. 92; Johnson *v.* Wetmore, 12 Barb. 433; Fitzpatrick *v.* Woodruff, 47 N. Y. Super. Ct. 436; Life, etc., Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. 31.

Ohio.— Heller *v.* Beal, 23 Ohio Cir. Ct. 540.

Pennsylvania.— Frick *v.* Barbour, 64 Pa. St. 120; Church *v.* Church, 25 Pa. St. 278; Dickey *v.* McCullough, 2 Watts & S. 88.

Texas.— Gayle *v.* Perryman, 6 Tex. Civ. App. 20, 24 S. W. 850; Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529.

United States.— Hanson *v.* Eustace, 2 How. 653, 11 L. ed. 416; Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188; Sharon *v.* Hill, 26 Fed. 337, 11 Sawy. 291; National Car-Brake Shoe Co. *v.* Terre Haute Car. etc., Co., 19 Fed. 514; The Osceola, 18 Fed. Cas. No. 10,602, Olcott 450.

England.— Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687.

Canada.— Ockley *v.* Masson, 6 Ont. App. 108; Atty.-Gen. *v.* Halliday, 26 U. C. Q. B.

See 20 Cent. Dig. tit. "Evidence," §§ 95, 98.

87. Chicago City R. Co. *v.* McMahon, 103 Ill. 485, 42 Am. Rep. 29, holding that the party was responsible in this behalf for the attempt made by his agent acting within the scope of his general authority, and disapproving on this point Green *v.* Woodbury, 48 Vt. 5.

88. See, generally, WITNESSES.

89. Gardner *v.* Benedict, 75 Hun (N. Y.) 204, 27 N. Y. Suppl. 3; Wentworth *v.* Lloyd, 10 H. L. Cas. 589, 10 Jur. N. S. 961, 33 L. J. Ch. 688, 10 L. T. Rep. N. S. 767.

Contra.— In Massachusetts the rule is that, if a party in a civil case "insists upon his privilege to exclude testimony that would throw light upon the merits of the case and the truth of his testimony," it is a proper subject for adverse comment. McCooe *v.* Dighton, etc., St. R. Co., 173 Mass. 117, 119, 53 N. E. 133, a case of attorney and client.

90. Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303; Lane *v.* Spokane Falls, etc., R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

91. National German-American Bank *v.* Lawrence, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363. See also Johnson *v.* State, 63 Miss. 313.

92. Chicago City R. Co. *v.* McMahon, 103 Ill. 485, 42 Am. Rep. 29; Winchell *v.* Edwards, 57 Ill. 41; Lyons *v.* Lawrence, 12 Ill. App. 531; Brown *v.* Byam, 65 Iowa 374, 21 N. W. 684; Fulkerson *v.* Murdock, 53 Mo. App. 151; McHugh *v.* McHugh, 186 Pa. St. 197, 40 Atl. 410, 65 Am. St. Rep. 849, 41 L. R. A. 805.

Maxim, "Falsus in uno falsus in omnibus," see, generally, WITNESSES.

93. People *v.* Marion, 29 Mich. 31; Taylor *v.* Crowninshield, 5 N. Y. Leg. Obs. 209; State *v.* Rozum, 8 N. D. 548, 80 N. W. 477; Cogdell *v.* State, 43 Tex. Cr. 178, 63 S. W. 645. See also CRIMINAL LAW, 12 Cyc. 398.

94. Winchell *v.* Edwards, 57 Ill. 41; McMeen *v.* Com., 114 Pa. St. 300, 9 Atl. 878; The Tillie, 23 Fed. Cas. No. 14,048, 7 Ben. 382; *In re* Tracy Peerage Case, 10 Cl. & F. 154, 8 Eng. Reprint 700.

95. U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524.

96. Daniel *v.* De Graffenreid, 14 Lea (Tenn.) 385.

f. Failure to Call Witnesses. Failure to call an available[97] witness possessing peculiar knowledge[98] concerning facts essential to a party's case, direct[99] or rebutting,[1] or to examine such witness as to the facts covered by his special knowledge,[2] especially if the witness be naturally favorable to the party's contention,[3] relying instead upon the evidence of witnesses less familiar with the matter,[4] gives rise to an inference sometimes denominated a "strong presumption of law"[5] that the testimony of such uninterrogated witness would not sustain the contention of the party.[6] By no means the same inference arises from failure to produce corrobora-

97. The inference may be rebutted by evidence that a particular witness is unavailable, or that the party has made every reasonable effort to procure his attendance and testimony. State *v.* Hogan, 67 Conn. 581, 35 Atl. 508; Pittsburg, etc., R. Co. *v.* Robson, 204 Ill. 254, 68 N. E. 468; Parker *v.* People, 94 Ill. App. 648; Fremont *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 414, 82 N. Y. Suppl. 307 (holding it error to charge the jury that they might consider defendant's failure to procure by commission the testimony of a former employee who resided in another state, and who had refused to appear as a witness for defendant); State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449. *Compare* Gillum *v.* New York, etc., Co., (Tex. Civ. App. 1903) 76 S. W. 232, holding that evidence that application had been made by defendant for a continuance for the want of the testimony of a certain witness, introduced in order to account for defendant's failure to have such testimony, was improperly admitted.

98. *Arkansas.*— Miller *v.* Jones, 32 Ark. 337.

Georgia.— East Tennessee, etc., R. Co. *v.* Douglas, 94 Ga. 547, 19 S. E. 885; Atlanta, etc., R. Co. *v.* Holcombe, 88 Ga. 9, 13 S. E. 751; East Tennessee, etc., R. Co. *v.* Culler, 75 Ga. 704.

Illinois.— Central Stock, etc., Exch. *v.* Chicago Bd. of Trade, 196 Ill. 396, 63 N. E. 740; Lebanon Coal, etc., Assoc. *v.* Zerwick, 77 Ill. App. 486.

Kentucky.— Roseberry *v.* Wilson, 68 S. W. 417, 24 Ky. L. Rep. 285.

Massachusetts.— Whitney *v.* Bayley, 4 Allen 173; Reynolds *v.* Sweetser, 15 Gray 78; Chase *v.* Lincoln, 3 Mass. 236.

Michigan.— Vergin *v.* Saginaw, 125 Mich. 499, 84 N. W. 1075; Cross *v.* Lake Shore, etc., R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399.

Minnesota.— Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

Mississippi.— Buckley *v.* Jones, 79 Miss. 1, 29 So. 1000.

Missouri.— Baldwin *v.* Whitcomb, 71 Mo. 651.

Montana.— Territory *v.* Hanna, 5 Mont. 248, 5 Pac. 252.

New York.— Minch *v.* New York, etc., R. Co., 80 N. Y. App. Div. 324, 80 N. Y. Suppl. 712; Hicks *v.* Nassau Electric R. Co., 47 N. Y. App. Div. 479, 62 N. Y. Suppl. 597; Banagan *v.* Clark, 37 Misc. 483, 75 N. Y. Suppl. 1019; *In re* Bernsee, 17 N. Y. Suppl. 669.

Pennsylvania.— Frick *v.* Barbour, 64 Pa. St. 120; Wills *v.* Hardcastle, 19 Pa. Super. Ct. 525.

Vermont.— Seward *v.* Garlin, 33 Vt. 583.

United States.— Gulf, etc., R. Co. *v.* Ellis, 54 Fed. 481, 4 C. C. A. 454; U. S. *v.* Schindler, 10 Fed. 547, 18 Blatchf. 227; The Dolphin, 7 Fed. Cas. No. 3,972, 6 Ben. 402.

See 20 Cent. Dig. tit. "Evidence," § 97.

The special nature of the knowledge must be affirmatively shown. Yula *v.* New York, etc., R. Co., 39 Misc. (N. Y.) 59, 78 N. Y. Suppl. 770, 11 N. Y. Annot. Cas. 457; State *v.* Smith, 71 Vt. 331, 45 Atl. 219.

99. *Illinois.*— Mantonya *v.* Reilly, 83 Ill. App. 275.

Missouri.— Bent *v.* Lewis, 88 Mo. 462.

New York.— Merrill *v.* Grinnell, 30 N. Y. 594; Kane *v.* Rochester R. Co., 74 N. Y. App. Div. 575, 77 N. Y. Suppl. 776; Newman *v.* Clapp, 20 Misc. 67, 44 N. Y. Suppl. 439.

Oregon.— Wimer *v.* Smith, 22 Oreg. 469, 30 Pac. 416.

Pennsylvania.—Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069; Wills *v.* Hardcastle, 19 Pa. Super. Ct. 525; Ginder *v.* Bachman, 8 Pa. Super. Ct. 405, 43 Wkly. Notes Cas. 120.

Tennessee.— Wright *v.* Durrett, (Ch. App. 1899) 52 S. W. 710.

Texas.— Schram *v.* Strouse, (Civ. App. 1894) 28 S. W. 262.

West Virginia.— Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

United States.— Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; Gulf, etc., R. Co. *v.* Ellis, 54 Fed. 481, 4 C. C. A. 454.

See 20 Cent. Dig. tit. "Evidence," § 97.

1. Schwier *v.* New York Cent., etc., R. Co., 90 N. Y. 558.

2. Bornhofen *v.* Greenebaum, 68 Ill. App. 645; Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095; Seward *v.* Garlin, 33 Vt. 583.

3. Yula *v.* New York, etc., R. Co., 39 Misc. (N. Y.) 59, 78 N. Y. Suppl. 770.

4. Lawrence Bank *v.* Raney, etc., Iron Co., 77 Md. 321, 26 Atl. 119; Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884; Ludwig *v.* Metropolitan St. R. Co., 71 N. Y. App. Div. 210, 75 N. Y. Suppl. 667; Wimer *v.* Smith, 22 Oreg. 469, 30 Pac. 416.

5. Princeville *v.* Hitchcock, 101 Ill. App. 588, per Dibell, J.

6. *Alabama.*— Roney *v.* Moss, 74 Ala. 390; Blakey *v.* Blakey, 9 Ala. 391; Mordecai *v.* Beal, 8 Port. 529.

Arkansas.— Miller *v.* Jones, 32 Ark. 337.

Connecticut.— Palmer *v.* Green, 6 Conn. 14.

Georgia.— Hoffer *v.* Gladden, 75 Ga. 532.

tive,[7] cumulative,[8] or possibly unnecessary[9] evidence; or when for any other reason,[10] such as a legal prohibition against calling the particular witness[11] or some ground of privilege,[12] the reason for the inference fails. The probative force of the inference varies with the strength of the inducement to call the witness, were his evidence favorable,[13] and is intensified where a party declines to avail himself of such evidence to meet a *prima facie* case of fraud or illegality.[14] Where the witness is equally within the control of both parties and both are equally interested to procure his evidence, there is no presumption of suppression.[15] But where a person is the natural witness of an opponent,[16] such as a person who is a

Illinois.— Princeville *v.* Hitchcock, 101 Ill. App. 588.

Kentucky.— Benjamin *v.* Ellinger, 80 Ky. 472, 4 Ky. L. Rep. 317.

Louisiana.— Crescent City Ice Co. *v.* Ermann, 36 La. Ann. 841; New Orleans Draining Co. *v.* De Lizardi, 2 La. Ann. 281; Cockerell *v.* Smith, 1 La. Ann. 1.

Michigan.— Page *v.* Stephens, 23 Mich. 357.

New Jersey.— Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433.

New York.— Fremont *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 414, 82 N. Y. Suppl. 307; Minch *v.* New York, etc., R. Co., 80 N. Y. App. Div. 324, 80 N. Y. Suppl. 712; Boler *v.* Sorgenfrei, 86 N. Y. Suppl. 180; Livingston *v.* Newkirk, 3 Johns. Ch. 312.

North Carolina.— Black *v.* Wright, 31 N. C. 447.

Ohio.— Christy *v.* Douglas, Wright 485; Katafiasz *v.* Toledo Consol. Electric Co., 24 Ohio Cir. Ct. 127; Michigan Cent. R. Co. *v.* Butler, 23 Ohio Cir. Ct. 459.

Pennsylvania.—Fowler *v.* Sergeant, 1 Grant 355.

Texas.— Bailey *v.* Hicks, 16 Tex. 222.

West Virginia.— Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112; Bindlley *v.* Martin, 28 W. Va. 773; Hefflebower *v.* Detrick, 27 W. Va. 16.

United States.— Kirby *v.* Tallmadge, 160 U. S. 379, 16 S. Ct. 349, 40 L. ed. 463; *In re* Kellogg, 113 Fed. 120; Jensen *v.* The Joseph B. Thomas, 81 Fed. 578.

See 20 Cent. Dig. tit. "Evidence," § 97.

7. Sugarman *v.* Brengel, 68 N. Y. App. Div. 377, 74 N. Y. Suppl. 167; Kenyon *v.* Kenyon, 88 Hun (N. Y.) 211, 34 N. Y. Suppl. 720.

8. Haynes *v.* McRae, 101 Ala. 318, 13 So. 270; Pollak *v.* Harmon, 94 Ala. 420, 10 So. 156; Patton *v.* Rambo, 20 Ala. 485; Mooney *v.* Holcomb, 15 Oreg. 639, 16 Pac. 716; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496.

9. *Alabama.*— Pollak *v.* Davidson, 87 Ala. 551, 6 So. 312; McGar *v.* Adams, 65 Ala. 106.

Iowa.— Ellis *v.* Sanford, 106 Iowa 743, 75 N. W. 660.

Michigan.— Higman *v.* Stewart, 38 Mich. 513.

New York.— Meagley *v.* Hoyt, 125 N. Y. 771, 26 N. E. 719; Stickney *v.* Ward, 21 Misc. 449, 47 N. Y. Suppl. 597.

Pennsylvania.— Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971.

Texas.— Wright *v.* Gussett, 31 Tex. 486.

10. Cartier *v.* Troy Lumber Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470.

11. Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; Carter *v.* Beals, 44 N. H. 408.

12. Pronk *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 390, 74 N. Y. Suppl. 375, physician.

13. Stickney *v.* Ward, 21 Misc. (N. Y.) 449, 47 N. Y. Suppl. 597.

14. Cheney *v.* Gleason, 125 Mass. 166; Knight *v.* Capito, 23 W. Va. 639.

15. *Alabama.*— Brock *v.* State, 123 Ala. 24, 26 So. 329; Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Haynes *v.* McRae, 101 Ala. 318, 13 So. 270.

Connecticut.— Scovill *v.* Baldwin, 27 Conn. 316.

Georgia.— Smalls *v.* State, 105 Ga. 669, 31 S. E. 571; Davis *v.* Central R. Co., 75 Ga. 645.

Illinois.— Princeville *v.* Hitchcock, 101 Ill. App. 588.

Iowa.— State *v.* Cousins, 58 Iowa 250, 12 N. W. 281.

Missouri.— Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745; Diel *v.* Missouri Pac. R. Co., 37 Mo. App. 454.

New York.— People *v.* Sweeney, 41 Hun 332; Horowitz *v.* Hamburg-American Packet Co., 18 Misc. 24, 41 N. Y. Suppl. 54. See Blum *v.* Sadofsky, 86 N. Y. Suppl. 22, holding that where in an action for goods sold defendant on a prior trial pleaded payment by the note of a third person, and plaintiff denied receiving such note, and endeavored to produce the maker, the fact that defendant on a subsequent trial failed to produce such maker did not raise such a strong presumption against him as to entitle plaintiff to the reversal of a judgment for defendant on the plea of payment, as plaintiff might himself have produced such witness.

Pennsylvania.— Shannon *v.* Castner, 21 Pa. Super. Ct. 294, holding that in a proceeding to determine the validity of a paper alleged to have been forged, where neither party called as a witness the alleged forger, the court was justified in refusing to charge as a matter of law that there was a "presumption" against either party.

Vermont.— Daggett *v.* Champlain Mfg. Co., 72 Vt. 332, 47 Atl. 1081; Wood *v.* Agostines, 72 Vt. 51, 47 Atl. 108.

United States.—Atchison, etc., R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314; Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129.

See 20 Cent. Dig. tit. "Evidence," § 97.

16. Western, etc., R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173,

coparty,[17] confederate,[18] employee,[19] or relative,[20] his mere production in court does not free the party producing him from the inference which may arise from his not being called. He is not really a witness equally available to both parties, and it becomes the duty of the jury to say what inference, if any, arises in a given case from the failure to call him.[21]

g. Failure of Party to Testify. The non-appearance of a litigant[22] or his failure to testify[23] as to facts material to his case[24] and as to which he has especially full knowledge[25] creates an inference that he refrains from appearing or testifying because the truth if made to appear would not aid his contention; and, in connection with an unequivocal statement on the other side, which if untrue could be disproved by his testimony, often furnishes strong evidence of the fact asserted.[26] This inference does not in itself supply the place of evidence of

40 L. R. A. 84; Kenyon *v.* Kenyon, 88 Hun (N. Y.) 211, 34 N. Y. Suppl. 720.

17. State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

18. Kenyon *v.* Kenyon, 88 Hun (N. Y.) 211, 34 N. Y. Suppl. 720.

19. Western, etc., R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173, 40 L. R. A. 84; Michigan Cent. R. Co. *v.* Butler, 23 Ohio Cir. Ct. 459. See also Gallagher *v.* Hastings, 21 App. Cas. (D. C.) 88, holding that any unfavorable inference arising from the failure to call as a witness the one person besides the parties to a patent interference case who had any direct knowledge of their claims to the conception of the invention should operate rather against the party in the employment of whose assignee such person was, the presumption being that the other party did not have an equal opportunity of knowing what his recollection of the occurrence might be.

20. People *v.* Hovey, 92 N. Y. 554; Carpenter *v.* Pennsylvania R. Co., 13 N. Y. App. Div. 328, 43 N. Y. Suppl. 203 (wife); Boler *v.* Sorgenfrei, 86 N. Y. Suppl. 180 (wife); Toomey *v.* Lyman, 15 N. Y. Suppl. 883 (husband).

21. Harriman *v.* Reading, etc., St. R. Co., 173 Mass. 28, 53 N. E. 156.

22. Cole *v.* Lake Shore, etc., R. Co., 95 Mich. 77, 54 N. W. 638; Brown *v.* Schock, 77 Pa. St. 471.

23. *Illinois.*— Central Stock etc., Exch. *v.* Chicago Bd. of Trade, 196 Ill. 396, 63 N. E. 740.

Louisiana.—Prater *v.* Pritchard, 6 La. Ann. 729; Whiting *v.* Ivey, 3 La. Ann. 649.

Maine.— State *v.* McAllister, 24 Me. 139.

Maryland.— Safe Deposit, etc., Co. *v.* Turner, (1903) 55 Atl. 1023.

Massachusetts.— McDonough *v.* O'Niel, 113 Mass. 92; Whitney *v.* Bayley, 4 Allen 173.

Michigan.— Cole *v.* Lake Shore, etc., R. Co., 95 Mich. 77, 54 N. W. 638. See also Ruppe *v.* Steinbach, 48 Mich. 465, 12 N. W. 658.

Missouri.— Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

New Jersey.— Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433. See also Welsh *v.* Brown, 50 N. J. Eq. 387, 26 Atl. 568.

New York.— Nuttings *v.* Kings County El. R. Co., 21 N. Y. App. Div. 72, 47 N. Y. Suppl. 327; Boler *v.* Sorgenfrei, 86 N. Y. Suppl. 180.

Pennsylvania.— Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069.

South Carolina.— Johnson *v.* Boon, 1 Speers 268.

Texas.— Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529.

England.— Barker *v.* Furlong, [1891] 2 Ch. 172, 64 L. T. Rep. N. S. 411, 39 Wkly. Rep. 621.

Canada.— Miller *v.* McCuaig, 13 Manitoba 220; Briggs *v.* McBride, 17 N. Brunsw. 663.

See 20 Cent. Dig. tit. "Evidence," § 96.

24. Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164; Werner *v.* Litzsinger, 45 Mo. App. 106; Jackson *v.* Blanton, 2 Baxt. (Tenn.) 63.

25. *Louisiana.*— Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164; Union Parish School Bd. *v.* Trimble, 33 La. Ann. 1073.

Maine.— Perkins *v.* Hitchcock, 49 Me. 468; Page *v.* Smith, 25 Me. 256.

Michigan.— Cole *v.* Lake Shore, etc., R. Co., 81 Mich. 156, 45 N. W. 983.

Missouri.— Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Mabary *v.* McClurg, 74 Mo. 575; Werner *v.* Litzsinger, 45 Mo. App. 106; Strohmeyer *v.* Zeppenfeld, 28 Mo. App. 268.

New York.— Nuttings *v.* Kings County El. R. Co., 21 N. Y. App. Div. 72, 47 N. Y. Suppl. 327; Ham *v.* Gilmore, 7 Misc. 596, 28 N. Y. Suppl. 126; Watson *v.* Oswego St. R. Co., 7 Misc. 562, 28 N. Y. Suppl. 84.

Tennessee.— Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185; Dunlap *v.* Haynes, 4 Heisk. 476.

Texas.— Muckelroy *v.* House, 21 Tex. Civ. App. 673, 52 S. W. 1038.

United States.— Kirby *v.* Tallmadge, 160 U. S. 379, 16 S. Ct. 349, 40 L. ed. 463; The Silver Moon, 22 Fed. Cas. No. 12,856, 1 Hask. 262.

Canada.— Tufts *v.* Hatheway, 9 N. Brunsw. 62.

See 20 Cent. Dig. tit. "Evidence," § 96.

26. *Colorado.*— Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72.

Louisiana.— Prater *v.* Pritchard, 6 La. Ann. 729.

Maine.— Perkins *v.* Hitchcock, 49 Me. 468.

Michigan.— Heath *v.* Waters, 40 Mich. 457.

material facts,[27] and may be rebutted by proof, for example of adequate reasons for declining to testify.[28]

7. Mailing and Delivery of Mail Matter — a. General Rule and Reason Therefor. When a letter[29] is properly addressed[30] and mailed,[31] with postage prepaid,[32] there is a rebuttable[33] presumption of fact[34] that it was received by the addressee[35] as soon as it would be transmitted to him in the usual course of the mails.[36] In some states the presumption is recognized by express provision of

Mississippi.— Bunckley *v.* Jones, 79 Miss. 1, 29 So. 1000.

Pennsylvania.— Terry *v.* Knoll, 3 Kulp 272.

United States.— The Silver Moon, 22 Fed. Cas. No. 12,856, 1 Hask. 262.

Canada.— Leslie *v.* Hanson, 12 N. Brunsw. 263.

See 20 Cent. Dig. tit. "Evidence," § 96.

Where a party is accused of fraud and makes no denial of the accusation there is a particularly strong inference against him. Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773; Brown *v.* Schock, 77 Pa. St. 471.

27. Diel *v.* Missouri Pac. R. Co., 37 Mo. App. 454.

28. Lowe *v.* Massey, 62 Ill. 47; Princeville *v.* Hitchcock, 101 Ill. App. 588; Cramer *v.* Burlington, 49 Iowa 213; New Orleans *v.* Gauthreaux, 32 La. Ann. 1126; Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104.

29. The word "letter" is used for convenience; none of the authorities makes any distinction between letters and other mail matter.

30. Address see *infra*, V, A, 7, c.

31. Mailing see *infra*, V, A, 7, d, (I).

32. Prepayment of postage see *infra*, V, A, 7, d, (II).

33. Rebutting presumption see *infra*, V, A, 7, g.

34. Presumption of fact see *infra*, V, A, 7, b.

35. Rebuttal of presumption of receipt by addressee in person see *infra*, V, A, 7, g.

36. *Alabama.*— Pioneer Sav., etc., Co. *v.* Thompson, 115 Ala. 552, 22 So. 511; De Jarnette *v.* McDaniel, 93 Ala. 215, 9 So. 570; Steiner *v.* Ellis, (1890) 7 So. 803.

Arkansas.— Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 265.

Colorado.— German Nat. Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247; Breed *v.* Central City First Nat. Bank, 6 Colo. 235; Sherwin *v.* National Cash Register Co., 5 Colo. App. 162, 38 Pac. 392.

Connecticut.— See Hartford Bank *v.* Hart, 3 Day 491, 3 Am. Dec. 274.

Illinois.— Dick *v.* Zimmerman, 207 Ill. 636, 69 N. E. 754 [*affirming* 105 Ill. App. 615]; Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187; Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Equitable L. Assur. Soc. *v.* Frommhold, 75 Ill. App. 43; St. Louis Consol. Coal Co. *v.* Block, etc., Smelting Co., 53 Ill. App. 565.

Indiana.— See Phenix Ins. Co. *v.* Pickel, 3 Ind. App. 332, 29 N. E. 432.

Iowa.— Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407; Cushman *v.* Hassler, 82 Iowa 295, 47 N. W. 1036.

Kansas.— Vancil *v.* Hagler, 27 Kan. 407; Flenning, etc., Co. *v.* Evans, 9 Kan. App. 858, 61 Pac. 503.

Kentucky.— Bloom *v.* Wanner, 77 S. W. 930, 25 Ky. L. Rep. 1646.

Louisiana.— Bell *v.* Hardy, 9 La. Ann. 547.

Maine.— Casco Nat. Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319. *Compare* Freeman *v.* Morey, 45 Me. 50, 71 Am. Dec. 527.

Maryland.— Lawrence Bank *v.* Raney, etc., Iron Co., 77 Md. 321.

Massachusetts.— McDowell *v.* Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665; Briggs *v.* Hervey, 130 Mass. 186; Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536; Crane *v.* Pratt, 12 Gray 348 [*explained* in Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536]; Munn *v.* Baldwin, 6 Mass. 316. See also Groton *v.* Lancaster, 16 Mass. 110. *Compare* Oliver *v.* Newburyport Ins. Co., 3 Mass. 37, 3 Am. Dec. 77, where a letter was mailed in a foreign country to an address in this country and the court drew no inference of receipt.

Minnesota.— Melby *v.* Osborne, 33 Minn. 492, 24 N. E. 253.

Mississippi.— Eckerly *v.* Alcorn, 62 Miss. 228.

Missouri.— McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436; Ripley Nat. Bank *v.* Latimer, 64 Mo. App. 321. See also Cromwell *v.* Phœnix Ins. Co., 47 Mo. App. 109.

New Hampshire.— Sabre *v.* Smith, 62 N. H. 663. *Compare* Woodman *v.* Jones, 8 N. H. 344.

New Jersey.— See Starr *v.* Torrey, 22 N. J. L. 190.

New York.— Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289; Ackley *v.* Walch, 85 Hun 178, 32 N. Y. Suppl. 577; McCoy *v.* New York, 46 Hun 268; Cooke *v.* McAleena, 18 Misc. 219, 41 N. Y. Suppl. 479. See also Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Matter of Wiltse, 5 Misc. 105, 25 N. Y. Suppl. 733; Van Doren *v.* Liebman, 11 N. Y. Suppl. 769; Olney *v.* Blosier, 12 N. Y. St. 211.

Pennsylvania.— Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843; Folsom *v.* Cook, 115 Pa. St. 539, 9 Atl. 93; Susquehanna Mut. F. Ins. Co. *v.* Tunkhannock Toy Co., 97 Pa. St. 424, 39 Am. Rep. 816; Callan *v.* Gaylord, 3 Watts 321; Smyth *v.*

statute.[37] The rule is founded upon the presumption that officers and employees of the post-office department will do their dnty[38] and the regularity and certainty with which according to common experience the mail is carried.[39] The real reason is the second.

b. Nature of Presumption. The presumption of the receipt of mail matter from its regular mailing is a presumption of fact[40] even when prescribed by

Hawthorn, 3 Rawle 355. See also Bellefonte First Nat. Bank *v.* McManigle, 69 Pa. St. 156, 8 Am. Rep. 236.

Rhode Island.— Russell *v.* Buckley, 4 R. I. 525, 527, 70 Am. Dec. 167, where Ames, C. J., said: "Farther proof of the receipt of a letter than what is derived from proof of the proper direction and mailing of it would be wholly unnecessary, always difficult, and often impossible."

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007; Walworth *v.* Seaver, 30 Vt. 728, 73 Am. Dec. 332. See also Oaks *v.* Weller, 16 Vt. 63.

Washington.—Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. 13.

Wisconsin.— Small *v.* Prentice, 102 Wis. 256, 78 N. W. 415.

United States.— Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799; Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705; Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764; Rosenthal *v.* Walker, 111 U. S. 185, 4 S. Ct. 382, 28 L. ed. 395; Lindenberger *v.* Beall, 6 Wheat. 104, 5 L. ed. 216; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,485, 3 Dill. 571.

England.— *In re* Marseilles Imperial Land Co., L. R. 15 Eq. 18, 42 L. J. Ch. 372; Warren *v.* Warren, 1 C. M. & R. 250, 4 Tyrw. 850.

See 20 Cent. Dig. tit. "Evidence," § 92.

The leading case is Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536.

Menace of penalty or forfeiture.— The presumption operates regardless of the contents of the letter and does not fail where the contents would, if the letter were received, subject the party sending it to a penalty or forfeiture. Rosenthal *v.* Walker, 111 U. S. 185, 4 S. Ct. 382, 28 L. ed. 395.

Allegations in a complaint on an accident insurance policy that notice of the injuries was given in a letter addressed and mailed to defendant at the place where the policy was issued were held, by force of the presumption, to be a sufficient averment of receipt of the notice in the absence of an express denial thereof. Railroad Officials, etc., Assoc. *v.* Beddow, 112 Ky. 184, 65 S. W. 362, 23 Ky. L. Rep. 1439.

Receipt of registered letter.— It seems that a jury is warranted in inferring the receipt of a registered letter duly mailed, without any proof or explanation of the absence of proof, by the postmaster's receipt-book that it was received. Bellefonte First Nat. Bank *v.* McManigle, 69 Pa. St. 156, 8 Am. Rep. 236.

Actual notice of dissolution of a partnership is necessary as to persons who have had previous dealings with the firm. See PARTNERSHIP. And it has been held that the presumption stated in the text alone will not suffice to establish such notice when given by mail. Kenney *v.* Altvater, 77 Pa. St. 34. But see Meyer *v.* Krohn, 114 Ill. 574, 12 N. E. 495; Eckerly *v.* Alcorn, 62 Miss. 228; Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246; Van Doren *v.* Liebman, 11 N. Y. Suppl. 769; Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355.

Time of receipt see *infra*, V, A, 7, e.

37. By statute in California and Oregon the presumption is declared to be "that a letter duly directed and mailed was received in the regular course of the mail." Cal. Code Civ. Proc. § 1963, subd. 24; Hill Annot. Laws Oreg. § 776, subd. 24. See Stockton Combined Harvester, etc., Works *v.* Houser, 109 Cal. 9, 41 Pac. 809; Williams *v.* Culver, 39 Oreg. 337, 64 Pac. 763.

38. St. Louis Consolidated Coal Co. *v.* Block, etc., Smelting Co., 53 Ill. App. 565; Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407; Augusta *v.* Vienna, 21 Me. 298; Briggs *v.* Hervey, 130 Mass. 186.

Presumption of performance of official duty see, generally, *infra*, V, B, 5, c.

39. Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187; Callan *v.* Gaylord, 3 Watts (Pa.) 321; Dunlap *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 37, 11 S. Ct. 691, 35 L. ed. 332, where Brewer, J., said that the presumption is "based on the proposition that the post office is a public agency charged with the duty of transmitting letters; and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case. It is a probability resting on the custom of business and the presumption that the officers of the postal system discharged their duty."

Intimation of weakness of presumption.— It "is a presumption, contradicted daily by the immense dead letter collections never received by correspondents, and requiring the constant employment of several clerks to overhaul and dispose of, in our own general post-office alone." Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Woodb. & M. 121, 131, per Woodbury, J., sitting in Boston.

40. *Connecticut.*— Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96.

Illinois.— See Illinois cases cited *infra*, note 42.

Indiana.— Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

Kentucky.—Sullivan *v.* Kuykendall, 82 Ky. 483, 4 Ky. L. Rep. 908, 56 Am. Rep. 901; Bloom *v.* Warner, 77 S. W. 930, 25 Ky. L.

statute.[41] The presumption under favorable conditions is a strong one and has been given the *prima facie* force of a "presumption of law."[42] The verdict of a jury or the finding of a judge in opposition to this inference of fact, when based on no evidence of non-receipt,[43] or delay in transmission,[44] is against the weight of the evidence and will not be allowed to stand.

c. Address. Receipt of a letter by the person for whom it was intended cannot be presumed unless it is proved that the letter was properly addressed to him,[45]

Rep. 1646; Springfield F. & M. Ins. Co. *v.* Jenkins, 9 Ky. L. Rep. 932.

Maine.— See Freeman *v.* Morey, 45 Me. 50, 71 Am. Dec. 527.

Maryland.— Pittsburg Lawrence Bank *v.* Raney, etc., Iron Co., 77 Md. 321, 26 Atl. 119.

Massachusetts.— Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536 (the leading case on the presumption in this class of cases); Greenfield Bank *v.* Crafts, 4 Allen 447 [*explained* in Com. *v.* Jeffries, 7 Allen 548, 564, 83 Am. Dec. 712; Huntley *v.* Whittier, 105 Mass. 393, 7 Am. Rep. 536]; Crane *v.* Pratt, 12 Gray 348 [*explained* in Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536].

Minnesota.— Plath *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 23 Minn. 479, 23 Am. Rep. 697. See also Benedict *v.* Grand Lodge A. O. U. W., 48 Minn. 471, 51 N. W. 371.

Missouri.— Edwards *v.* Mississippi Valley Ins. Co., 1 Mo. App. 192.

Nebraska.— National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466.

New York.— Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246. But *compare* Hastings *v.* Brooklyn F. Ins. Co., 3 Silv. Supreme 545, 6 N. Y. Suppl. 374.

Pennsylvania.— Susquehanna Mut. F. Ins. Co. *v.* Tunkhannock Toy Co., 97 Pa. St. 424, 39 Am. Rep. 816. See also Bellefonte First Nat. Bank *v.* McManigle, 69 Pa. St. 156, 8 Am. Rep. 236; Tanner *v.* Hughes, 53 Pa. St. 289.

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

United States.— Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 25 L. ed. 332; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,485, 3 Dill. 571.

See 20 Cent. Dig. tit. "Evidence," § 92.

And see *infra*, V, A, 7, g.

Notice of dishonor of commercial paper, when given by letter properly addressed and mailed, is presumed as a matter of law to have reached the addressee in due course of mails. See COMMERCIAL PAPER, 7 Cyc. 199 *et seq.*

41. Grade *v.* Mariposa County, 132 Cal. 75, 64 Pac. 117. *Contra*, Williams *v.* Culver, 39 Oreg. 337, 64 Pac. 763, although the statutory provisions in this behalf in California and Oregon are identical.

42. Pioneer Sav., etc., Co. *v.* Thompson, 115 Ala. 522, 22 So. 511; Montelius *v.* Atherton, 6 Colo. 224; Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987. See also Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372. But *compare* Meyer *v.* Krohn, 114 Ill. 574, 21 N. E. 495; U. S. Equitable L. Assur. Soc. *v.* Frommbold, 75 Ill. App. 43, in each of which cases it is said to be a presumption of fact.

43. *Alabama.*— Pioneer Sav., etc., Co. *v.* Thompson, 115 Ala. 552, 22 So. 511.

Colorado.— Sherwin *v.* National Cash Register Co., 5 Colo. App. 162, 38 Pac. 392.

Connecticut.— Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96.

Indiana.— New York Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

Iowa.— Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236.

Maine.— Augusta *v.* Vienna, 21 Me. 298.

Maryland.— Yoe *v.* Benjamin C. Howard Masonic Mut. Benev. Assoc., 63 Md. 86.

Massachusetts.— McDowell *v.* Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665; Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536.

Minnesota.— Dade *v.* Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48.

Nebraska.— National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466.

New York.— Ackley *v.* Welch, 85 Hun 178, 32 N. Y. Suppl. 577; Hastings *v.* Brooklyn F. Ins. Co., 3 Silv. Supreme 545, 6 N. Y. Suppl. 374; Olney *v.* Blosier, 12 N. Y. St. 211.

Pennsylvania.— Whitmore *v.* Dwelling Home Ins. Co., 148 Pa. St. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; London Assur. Corp. *v.* Russell, 1 Pa. Super. Ct. 320.

Wisconsin.— Small *v.* Prentice, 102 Wis. 256, 78 N. W. 415.

United States.— Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 25 L. ed. 332.

See 20 Cent. Dig. tit. "Evidence," § 92.

In the leading case of Huntley *v.* Whittier, 105 Mass. 391, 392, 7 Am. Rep. 536, Gray, J., said: "The depositing of a letter in the post-office, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of the mails; and where there is no other evidence, the jury should be so instructed."

44. A presumption, having the force stated in the text, that the receipt of the letter was not later than the ordinary course of the mails would deliver it, appears to have been fully recognized as existing in the absence of any evidence to the contrary, in Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901.

45. Best *v.* German Ins. Co., 68 Mo. App. 598; Ward *v.* Hasbrouck, 44 N. Y. App. Div.

by directing it to the city or town where he resides,[46] with the street and number if it is a city of considerable size,[47] or to the post-office where he usually receives his mail.[48]

d. Mailing and Time of Mailing — (1) *In General.* In order to support a presumption of receipt of a letter by mail, there must be satisfactory proof that it was duly mailed,[49] although such proof need not consist of direct and positive testimony to the ultimate fact of mailing.[50] A letter deposited in a government street letter-box,[51] or delivered to an official letter carrier while on his official route,[52] or delivered to a United States mail agent while on duty on a mail

32, 60 N. Y. Suppl. 391; New York *v.* Finn, 58 N. Y. Super. Ct. 360, 11 N. Y. Suppl. 580.

Construction of testimony.— Testimony that a letter was mailed to the addressee "in the regular way" may be regarded as a statement that it was properly addressed. Schmidt *v.* Schanzlin, 53 N. Y. Super. Ct. 498. But *compare* Best *v.* German Ins. Co., 68 Mo. App. 598.

Defective address.— In U. S. Equitable L. Assur. Soc. *v.* Frommbold, 75 Ill. App. 43, evidence of the mailing of a letter addressed to "the Equitable Life Insurance Company, Chicago," was held inadmissible to prove receipt of it by the "Equitable Life Assurance Society of the United States," in Chicago, although the sender inclosed a postal card addressed to himself which was not returned.

46. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 156, 59 Am. St. Rep. 411, 32 L. R. A. 473; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 25 L. ed. 332.

47. Fleming, etc., Co. *v.* Evans, 9 Kan. App. 858, 61 Pac. 503 (address to a firm simply "Chicago, Ill.," insufficient); Manhattan L. Ins. Co. *v.* Fields, (Tex. Civ. App. 1894) 26 S. W. 280 ("San Antonio," without street or number insufficient). See also Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441, address to a different number on another street insufficient to prove receipt at particular time.

"If a party has changed his place of business, and has informed the post-office of it, there is a presumption or inference that the letter has been delivered at the new address." Marston *v.* Bigelow, 150 Mass. 45, 54, 22 N. E. 71, 5 L. R. A. 43, question of delivery left to the jury.

Identity of address on envelope and inclosed letter will be presumed in the absence of evidence to the contrary. Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441.

48. Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 181, 3 Am. St. Rep. 445, where the court said that if the addressee "is in the habit of resorting for that purpose, equally and indifferently to two post-offices, a communication may very properly be addressed to him at either."

49. Best *v.* German Ins. Co., 68 Mo. App. 598; Hetherington *v.* Kemp, 4 Campb. 193, 16 Rev. Rep. 773. See also Garretson *v.* Equitable Mut. L., etc., Assoc., 74 Iowa 419, 38 N. W. 127.

Non-receipt by addressee.— In Kingsland Land Co. *v.* Newman, 1 N. Y. App. Div. 1, 3, 36 N. Y. Suppl. 960, where the only question was whether a notice had been mailed, Brown, P. J., said: "The fact that the notice had not been received by the . . . [addressee] though it would have been of very little weight against the positive testimony of a disinterested person that it had been deposited in the post-office, was yet a circumstance which, in this case, the . . . [addressee] was entitled to have the jury consider."

50. Proof of custom in the sender's office whereby letters deposited in a particular place are taken by an employee and mailed by him, in connection with proof that the letter was so deposited and probably taken and mailed as usual, may support a presumption of due receipt. Lawrence Bank *v.* Raney, etc., Iron Co., 77 Md. 321, 26 Atl. 119; Matter of Wiltse, 5 Misc. (N. Y.) 105, 25 N. Y. Suppl. 733. See also Dana *v.* Kemble, 19 Pick. (Mass.) 112; Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007; Skilbeck *v.* Garbett, 7 Q. B. 846, 9 Jur. 939, 14 L. J. Q. B. 338, 53 E. C. L. 846; Hetherington *v.* Kemp, 4 Campb. 193, 16 Rev. Rep. 773. Even if proof of this nature be too inconclusive to warrant a ruling by the court as to a presumption, it may still suffice to uphold an inference by the jury. Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289. *Compare* New York *v.* Finn, 58 N. Y. Super. Ct. 360, 11 N. Y. Suppl. 580.

Custom of notary.— In Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372, a notary testified that it was usual for him, when the drawer or indorser lived at a distance, to send a written notice of the dishonor of the bill to them by post on the evening of the same day, and that he believed he had sent such notice in that way. This was held sufficient. See also Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454.

51. Casco Nat. Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 282 (citing U. S. Rev. St. (1878) § 3868, U. S. Comp. St. (1901) p. 2637, which authorizes establishment of street letter-boxes); McCoy *v.* New York, 46 Hun (N. Y.) 268. See also Commercial Paper, 7 Cyc. 1101.

52. Pearce *v.* Langfit, 101 Pa. St. 507, 47 Am. Rep. 737, referring to the United States postal regulations (U. S. Rev. St. (1878) § 3980 [U. S. Comp. St. (1901) p. 2712], which require carriers to receive prepaid

train,[53] is duly mailed. A postmark on the envelope affords a presumption that the letter was mailed,[54] but not that it was mailed on the day indicated.[55] The date of a letter authorizes no inference that it was mailed on that day.[56]

(II) *Prepayment of Postage.* A letter is not duly mailed so as to give rise to a presumption of receipt by the addressee, unless it is proved that the postage was prepaid.[57]

e. Time of Receipt. In the absence of evidence to the contrary it is presumed that a letter duly mailed was received in the ordinary course of the mails.[58] But receipt at a particular time cannot be presumed unless there is proof of the course of the mails,[59] as well as of the date of mailing,[60] for courts do not take judicial notice of the time of the arrival or departure of mails or trains,[61] nor of the number of mails between different places,[62] or the car-time from one place to another.[63]

f. Circumstances Strengthening Presumption. Presumption of receipt of a letter by mail is strengthened — "becomes well-nigh conclusive"[64] — where the letter bears a return request and is not returned to the sender,[65] or where it is

mail matter. See also Skilbeck *v.* Garbett, 7 Q. B. 846, 9 Jur. 939, 14 L. J. Q. B. 338, 53 E. C. L. 846.

53. Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407. See also U. S. Rev. St. (1878) § 3980 [U. S. Comp. St. (1901) p. 2712], requiring route agents to accept prepaid mail matter.

54. New Haven County Bank *v.* Mitchell, 15 Conn. 206; U. S. *v.* Williams, 3 Fed. 484; U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554. See also Babcock *v.* Huntington, 9 Ala. 869.

Inconclusive rebutting circumstances.—The presumption is not controlled by proof that in occasional instances in furtherance of justice postmasters had sent to certain persons empty envelopes bearing postmarks, the envelopes never having been through the mails. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

55. New Haven County Bank *v.* Mitchell, 15 Conn. 206; Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445, the court in the latter case, which was that of a drop letter, pointing out that it might have been mailed on the day before and not stamped until the following day, but holding that the postmark was a circumstance for the jury to consider.

56. Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441; Uhlman *v.* Arnholdt, etc., Brewing Co., 53 Fed. 485.

57. Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Welsh *v.* Chicago Guaranty Fund L. Soc., 81 Mo. App. 30; Best *v.* German Ins. Co., 68 Mo. App. 598; Ward *v.* Hasbrouck, 44 N. Y. App. Div. 32, 60 N. Y. Suppl. 391. See also Morton *v.* Morton, 16 Colo. 358, 27 Pac. 718.

Presumption of prepayment.— In Brooks *v.* Day, 11 Iowa 46, there was held to be a presumption that a notary public mailing a notice of protest of commercial paper "conformed to the established regulations of the post-office department" by prepaying the postage.

An officer's return that service was "duly" made by mail may be regarded as a statement that postage was prepaid where the addressee does not pretend that in fact he did not receive the notice mailed. People *v.* Crane, 125 N. Y. 535, 26 N. E. 736.

58. *Colorado.*— Sherwin *v.* National Cash Register Co., 5 Colo. App. 162, 38 Pac. 392.

Connecticut.— Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96.

Illinois.— Iroquois Furnace Co. *v.* Wilkin, Mfg. Co., 181 Ill. 582, 54 N. E. 987.

Kentucky.— See Sullivan *v.* Kuykendall, 82 Ky. 483, 4 Ky. L. Rep. 908, 56 Am. Rep. 901.

Maine.— Augusta *v.* Vienna, 21 Me. 298, 304, where the court said: "It must have arrived in due course of mail, unless some postmaster or mail carrier violated the law, and neglected his duty; and the presumption of law is, that he did not."

Missouri.— Bachman *v.* Brown, 56 Mo. App. 396.

Nebraska.— National Masonic Acc. Assoc. *v.* Burr, 57 Nebr. 437, 77 N. W. 1098.

Pennsylvania.— Veley *v.* Clinger, 18 Pa. Super. Ct. 125.

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

See 20 Cent. Dig. tit. "Evidence," § 92.

59. Boon *v.* State Ins. Co., 37 Minn. 426, 34 N. W. 902.

A postmark is not evidence *per se* that the letter was delivered on the date of the postmark. Early *v.* Preston, 1 Patt. & H. (Va.) 228.

60. Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441; Uhlman *v.* Arnholdt, etc., Brewing Co., 53 Fed. 485.

61. Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884. See also Melvin *v.* Purdy, 17 N. J. L. 162.

62. Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884.

63. Early *v.* Preston, 1 Patt. & H. (Va.) 228; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884.

64. Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843, per Sterrett, C. J.

65. Sherwin *v.* National Cash Register Co., 5 Colo. App. 162, 38 Pac. 392; Lawrence

found in possession of the addressee.[66] Conduct of the addressee inconsistent with the fact of non-receipt of the letter,[67] such as his refusal, on proper inquiry, to admit or deny receipt,[68] aids the presumption.

g. Rebuttal of Presumption. The presumption of due receipt of a letter may be rebutted by evidence that it was not in fact received,[69] or not received in the ordinary course of the mails.[70] And the inference of delivery to the addressee in person may be destroyed by a contrary inference arising from a course of business routine in the addressee's office whereby letters are diverted from him to the hands of an employee.[71] It has been held that evidence of non-receipt, even though it consist of the addressee's positive denial of receipt, does not nullify the presumption, but leaves the question for the determination of the jury under all the circumstances,[72] with such weight given to the presumption as they think it

Bank *v.* Raney, etc., Iron Co., 77 Md. 321, 26 Atl. 119; Matter of Wiltse, 5 Misc. (N. Y.) 105, 25 N. Y. Suppl. 733; Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843. See also Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; Hedden *v.* Robertson, 134 Mass. 38, 45 Am. Rep. 276.

66. Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 384, 34 Atl. 95, 50 Am. St. Rep. 96, where it is said that "the presumption is strengthened almost to a certainty." See also Ward *v.* Londesborough, 12 C. B. 252, 74 E. C. L. 252.

Letters addressed to an agent and found in possession of his principal may be presumed to have been seasonably received by the agent. Blodgett *v.* Webster, 24 N. H. 91.

The presumption is strong that all the papers inclosed in one envelope were received where it is shown that one of them was received. Melvin *v.* Purdy, 17 N. J. L. 162.

67. Bell *v.* Handy, 9 La. Ann. 547.

68. Woodman *v.* Jones, 8 N. H. 344.

69. *Alabama.*— Pioneer Sav., etc., Co. *v.* Thompson, 115 Ala. 552, 22 Atl. 511; De Jarnette *v.* McDaniel, 93 Ala. 215, 9 So. 570.

Arkansas.— Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 365.

Connecticut.— Pitts *v.* Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95.

Georgia.— Hamilton *v.* Stewart, 108 Ga. 472, 34 S. E. 123.

Illinois.— Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495. See also St. Louis Consol. Coal Co. *v.* Block, etc., Smelting Co., 53 Ill. App. 572.

Indiana.— New York Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

Iowa.— See Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236.

Massachusetts.— Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536 [*disapproving* contrary *dictum* in Greenfield Bank *v.* Crafts, 4 Allen 447, per Dewey, J.].

Minnesota.— Plath *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 23 Minn. 479, 23 Am. Rep. 697.

Mississippi.— Eckerly *v.* Alcorn, 62 Miss. 228.

Ohio.— Hobson *v.* Queen Ins. Co., 2 Ohio S. & C. Pl. Dec. 475, 2 Ohio N. P. 296.

Pennsylvania.— Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843; London Assur. Corp. *v.* Russell, 1 Pa. Super. Ct. 320.

Texas.— American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

Vermont.—Walworth *v.* Seaver, 30 Vt. 728, 73 Am. Dec. 332.

United States.—Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530.

England.— *In re* Marseilles Imperial Land Co., L. R. 15 Eq. 18, 42 L. J. Ch. 372; *In re* Constantinople, etc., Hotel Co., L. R. 11 Eq. 86, 40 L. J. Ch. 39, 23 L. T. Rep. N. S. 834, 19 Wkly. Rep. 219.

See 20 Cent. Dig. tit. "Evidence," § 92.

In California and Oregon the statutes expressly provide that the presumption is rebuttable. Cal. Code Civ. Proc. § 1963; Hill Annot. Laws Oreg. § 776. See Grade *v.* Mariposa County, 132 Cal. 75, 64 Pac. 117; Williams *v.* Culver, 39 Oreg. 337, 64 Pac. 763.

Suppression of evidence.— If employees in the office of the addressee testify that they did not receive the letter, but the one most likely to have knowledge of a positive kind is not produced and sworn, although still in the employ of the addressee, the omission to call him is fatal to the claim that the letter was not received. Lawrence Bank *v.* Raney, etc., Iron Co., 77 Md. 321, 26 Atl. 119. See, generally, as to adverse presumptions arising from failure to call witnesses, *supra*, V, A, 6, f.

Where notice of dishonor of commercial paper is given by letter properly addressed and mailed it is a rule of substantive law that it will be treated as if received by the addressee in the usual course of the mails. See COMMERCIAL PAPER, 7 Cyc. 1099 *et seq.*

70. Backman *v.* Brown, 56 Mo. App. 396 (holding, however, that the very circumstantial proof that the postmaster deposited the letter in the lock-box of the addressee was not rebutted by the testimony of the addressee that he did not receive it until later); National Masonic Acc. Assoc. *v.* Burr, 57 Nebr. 437, 77 N. W. 1098.

71. Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705.

72. Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536; Sutton *v.*

entitled to;[73] and the burden of proving receipt remains throughout upon the party who asserts it.[74] Testimony of the addressee that the letter was not received should be regarded with caution[75]—"with the greatest amount of caution"—where non-receipt, if proved, would relieve him of a burden;[76] and his failure to recollect whether the letter was received or not,[77] or his impression that it was not received,[78] or the fact that the letter was not on file in his office,[79] or was not found among the papers of a deceased addressee,[80] is usually deemed insufficient to overcome the presumption of receipt.

8. Sending and Delivery of Telegrams. Delivery to a telegraph company of a message for transmission, properly addressed,[81] supports a presumption of fact that the telegram reached its destination.[82] The presumption, perhaps weaker at

Corning, 59 N. Y. App. Div. 589, 69 N. Y. Suppl. 670.

Addressee's positive denial.— *Kansas.*— Fleming *v.* Evans, 9 Kan. App. 858, 61 Pac. 503.

Kentucky.— Springfield F. & M. Ins. Co. *v.* Jenkins, 9 Ky. L. Rep. 932.

Missouri.— Cromwell *v.* Phœnix Ins. Co., 47 Mo. App. 109; Edwards *v.* Mississippi Valley Ins. Co., 1 Mo. App. 192.

Nebraska.— National Masonic Acc. Assoc. *v.* Burr, 57 Nebr. 437, 77 N. W. 1098.

New York.— Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Moran *v.* Abbott, 26 N. Y. App. Div. 570, 50 N. Y. Suppl. 337; McCoy *v.* New York, 46 Hun 268; Van Doren *v.* Liebman, 11 N. Y. Suppl. 769; Matter of Wiltse, 5 Misc. 105, 25 N. Y. Suppl. 733.

Pennsylvania.— Whitmore *v.* Dwelling Home Ins. Co., 148 Pa. St. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; Pleasant Valley *v.* Burke, 5 Kulp 140.

See 20 Cent. Dig. tit. "Evidence," § 92.

Contra.— Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. 13 [*disapproved* in Fleming *v.* Evans, 9 Kan. App. 858, 61 Pac. 503], holding that the presumption was "entirely negatived," by the addressee's express denial of receipt. See also Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Hobson *v.* Queen Ins. Co., 2 Ohio S. & C. Pl. Dec. 475, 2 Ohio N. P. 296, in which latter case, a trial before the court, Smith, J., said: "Taking into consideration the fact that while ordinarily mail matter is regularly delivered at the destination for which it is intended, yet that it does frequently happen that it miscarries, I am disposed to think that the oath of the plaintiff is sufficient to overcome the presumption that the notice reached him." In the same case, and in connection with the circumstance of the addressee's denial of receipt of the letter the court said the contention that the letter was received was weakened by the failure to put in any evidence of the postal authorities that the mail upon the alleged day of receipt was regularly delivered and the omission to call the carrier who delivered mail to the addressee, etc.

73. Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43. See also cases cited in the preceding note.

74. Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536.

75. Matter of Wiltse, 5 Misc. (N. Y.) 105, 25 N. Y. Suppl. 733. But see Hobson *v.* Queen Ins. Co., 2 Ohio S. & C. Pl. Dec. 475, 2 Ohio N. P. 296, *supra*, note 72.

76. *In re* Marseilles Imperial Land Co., L. R. 15 Eq. 18, 42 L. J. Ch. 372.

77. *Alabama.*— Pioneer Sav., etc., Co. *v.* Thompson, 115 Ala. 552, 22 So. 511.

Colorado.— Breed *v.* Central City First Nat. Bank, 6 Colo. 235.

Illinois.— Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187.

New York.— Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246.

Texas.— See East Texas F. Ins. Co. *v.* Perkey, 89 Tex. 604, 35 S. W. 1050.

Wisconsin.— McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375.

See 20 Cent. Dig. tit. "Evidence," § 92.

78. Pioneer Sav., etc., Co. *v.* Thompson, 115 Ala. 552, 22 So. 511; Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187. See also Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246.

79. Gaar *v.* Stark, (Tenn. Ch. App. 1895) 36 S. W. 149.

80. Sabre *v.* Smith, 62 N. H. 663. But *compare* Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289.

81. Proper address and prepayment of price may be inferred from testimony of a witness that he wrote and sent the telegram. Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 53 Am. St. Rep. 220. See also Flint *v.* Kennedy, 33 Fed. 820.

82. *California.*— Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 53 Am. St. Rep. 220.

Colorado.—Breed *v.* Central City First Nat. Bank, 6 Colo. 235.

Massachusetts.— Com. *v.* Jeffries, 7 Allen 548, 83 Am. Dec. 712.

Nebraska.— Perry *v.* German-American Bank, 53 Nebr. 89, 73 N. W. 538, 68 Am. St. Rep. 593.

New York.— Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

South Dakota.— Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

Canada.— White *v.* Flemming, 20 Nova Scotia 335.

Compare State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39, holding that delivery to the person addressed is not to be presumed un-

the outset than the presumption of regular delivery of mail matter,[83] becomes strong and convincing where receipt of the message is not denied by the addressee having an opportunity to deny it.[84] On the other hand the presumption of receipt is rebuttable.[85]

9. Course of Business or Conduct of Affairs. Facts which usually and regularly coexist in business affairs are assumed, in the absence of evidence to the contrary,[86] to coexist in any particular case.[87] Thus it is assumed that letters in reply came from the person signing them,[88] especially if written upon his business stationery;[89] that an overdue note in possession of the maker is paid;[90] that the date on a written instrument is the day of its execution;[91] that instruments executed on different dates are separate and distinct, and not parts of the same transaction;[92] that book entries are properly authorized;[93] that a party knew what he had the opportunity of knowing and should have known;[94] that an electric light company which has begun work has obtained permission from the city officials as required by an ordinance;[95] that a decedent was in contemplation of law insolvent at the time of his death, and had no property subject to administration, where no administration was had in any county of the state.[96] It is also a rebuttable

less there is proof that the message was received by the telegraph office to which it was directed [*citing* U. S. *v.* Babcock, 24 Fed. Cas. No. 14,485, 3 Dill. 571, in support of that ruling].

See 20 Cent. Dig. tit. "Evidence," § 93.

83. Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

84. Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

85. Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 53 Am. St. Rep. 220.

86. The presumption is, like all others, rebuttable. Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922.

87. *Illinois.*— Rock Island, etc., R. Co. *v.* Potter, 36 Ill. App. 590, person answering telephone business inquiry at railroad office presumed an agent of railroad.

Missouri.— Guest *v.* Hannibal, etc., R. Co., 77 Mo. App. 258, person answering telephone presumed to be person addressed if he purports to be so.

New Jersey.— Varick *v.* Crane, 4 N. J. Eq. 128, business contracts presumed to be made at party's place of business rather than at his residence in another state.

New York.— Ferris *v.* Kilmer, 47 Barb. 411 (credit presumed to be given to known principal rather than to agent); Phillips *v.* Wright, 5 Sandf. 342 (builder of vessel presumed to be owner).

North Dakota.— Anderson *v.* Grand Forks First Nat. Bank, 6 N. D. 497, 72 N. W. 916, notes presumed to be worth their face value.

Vermont.— Austin *v.* Bingham, 31 Vt. 577, 581 (where it is said: "The fair inferences from evidence founded upon the natural course of business and human experience, are as much evidence as the principal facts from which the deductions flow"); Adams *v.* Adams, 22 Vt. 50 (note for certain amount and credit on maker's books for same amount presumed to represent different items of indebtedness).

See 20 Cent. Dig. tit. "Evidence," § 90.

88. Boykin *v.* State, 40 Fla. 484, 24 So. 141; Ragan *v.* Smith, 103 Ga. 556, 29 S. E. 759; Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253; Scofield *v.* Parlin, etc., Co., 61 Fed. 804, 10 C. C. A. 83.

89. Ragan *v.* Smith, 103 Ga. 556, 29 S. E. 759.

90. Blodgett *v.* Webster, 24 N. H. 91, 101; Halfin *v.* Winkleman, 83 Tex. 165, 18 S. W. 433. See also Kincaid *v.* Kincaid, 8 Humphr. (Tenn.) 17.

91. Hauerwas *v.* Goodloe, 101 Ala. 162, 13 So. 567; Chicago, etc., R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33 (abstract of title); Lauder *v.* Peoria Agricultural, etc., Soc., 71 Ill. App. 475; Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (power of attorney); Morgan *v.* Whitmore, 6 Exch. 716, 20 L. J. Exch. 289; Potez *v.* Glossop, 2 Exch. 191 (a letter. But see Butler *v.* Mountgarret, 7 H. L. Cas. 633, 11 Eng. Reprint 252); Malpas *v.* Clements, 19 L. J. Q. B. 435; Pomeres *v.* Provincial Ins. Co., (Hil. T.) N. Brunsw. Dig. 345 (a writ). See also Commercial Paper, 8 Cyc. 217; Deeds, 13 Cyc. 505; and, generally, Wills.

The presumption is rebuttable. H. A. Pitt's Sons Mfg. Co. *v.* Poor, 7 Ill. App. 24; Cain *v.* Robinson, 20 Kan. 456; Cutts *v.* York Mfg. Co., 18 Me. 190; Banning *v.* Edes, 6 Minn. 402. See also Commercial Paper, 8 Cyc. 217, 218; Deeds, 13 Cyc. 505; and, generally, Wills.

92. Matter of Miller, 77 N. Y. App. Div. 473, 78 N. Y. Suppl. 930 [*reversing* 37 Misc. 449, 75 N. Y. Suppl. 929].

93. Henry *v.* Travelers' Ins. Co., 42 Fed. 363.

94. Johnson *v.* Levy, 109 La. 1036, 34 So. 68 [*citing* Cady *v.* Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30, 59; Hoyt *v.* Sprague, 103 U. S. 613, 637, 26 L. ed. 585]; Moundsville, etc., R. Co. *v.* Wilson, 52 W. Va. 647, 44 S. E. 169.

95. McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, 67 N. E. 9 [*affirming* 104 Ill. App. 479].

96. Johnson *v.* Burks, 103 Mo. App. 221, 77 S. W. 133.

presumption that when a month is referred to it is a month of the current year.[97]

B. Presumptions of Law — **1. In General.** A presumption of law is a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong[98] inference of fact is *prima facie* correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown.[99] When such evidence is introduced, the assumption of law is *functus officio* and drops out of sight. The inference of fact which has been assumed to be correct continues to have its logical weight in the case.

2. Capacity of Women For Child-Bearing. In England courts frequently act upon the inference that women under various circumstances of age and other conditions have become incapable of bearing children.[1] On the other hand in

97. Tipton *v.* State, 119 Ga. 304, 46 S. E. 436. See, generally, Time.

98. It is said that "a presumption of law establishes a certainty; it is a uniform, constant rule, with conditions fixed and unvarying." Com. *v.* Frew, 3 Pa. Co. Ct. 492, 496, per Yerkes, P. J.

99. Tanner *v.* Hughes, 53 Pa. St. 289, 291, per Agnew, J.

Treatment of presumptions.— "Presumptions of Law consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things." 1 Greenleaf Ev. § 15. See also McCagg *v.* Heacock, 34 Ill. 476, 481, 85 Am. Dec. 327; Bow *v.* Allenstown, 34 N. H. 351, 365, 69 Am. Dec. 489 (where it is said: "Legal presumptions are artificial rules, established by the law, upon considerations of public policy or public convenience, against which no evidence is received"); U. S. *v.* Searcey, 26 Fed. 435, 437 (where Dick, J., said: "Presumptions of law are usually founded upon reasons of public policy, and social convenience and safety, which are warranted by the legal experience of courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only *prima facie* evidence, and may be rebutted").

Statements as to distinctions between presumptions of law and of fact.— In State *v.* Kelly, 57 Iowa 644, 646, 11 N. W. 635, the court, discussing the presumption of guilt from the recent unexplained possession of stolen property, said: "The term presumption of fact implies that from certain facts the law will raise a presumption. Either of these terms, presumption of law or presumption of fact, may be used to express the same thought, for they are identical in meaning." But *compare* Com. *v.* Frew, 3 Pa. Co. Ct. 492, 496, where Yerkes, P. J., said: "When we say a prisoner is presumed to be innocent until proved guilty, or that every man is bound to know the law, these are presumptions of law and binding upon us, however untrue and absurd they may be; but a presumption of fact depends on the proof from which it is to be inferred. Thus possession of stolen goods, when proved, is a fact from which a jury may infer that they were stolen by the possessor, but they are not bound so to do." In State *v.* Hodge, 50 N. H. 510, 521, a partial explanation is made in an interesting way as to how the confusion between the two species of presumptions originated. See also Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; U. S. *v.* Searcey, 26 Fed. 435.

1. The court inferred incapacity in *In re* Millner, L. R. 14 Eq. 245, 42 L. J. Ch. 44, 26 L. T. Rep. N. S. 825, 20 Wkly. Rep. 823 (woman forty-nine years and nine months, married twenty-six years without issue); *In re* Widdows, L. R. 11 Eq. 408, 40 L. J. Ch. 380, 24 L. T. Rep. N. S. 87, 19 Wkly. Rep. 468 (spinster, fifty-three; widow, fifty-five, never having had issue); Edwards *v.* Tuck, 23 Beav. 268 (spinster, fifty-seven); Lyddon *v.* Ellison, 19 Beav. 565, 18 Jur. 1066 (spinster, fifty-six); Brandon *v.* Woodthorpe, 10 Beav. 463 (widow, sixty-three, who had had eight children); Davidson *v.* Kimpton, 18 Ch. D. 213, 45 L. T. Rep. N. S. 131, 29 Wkly. Rep. 912 (spinster, fifty-four); Dodd *v.* Wake, 5 De G. & Sm. 226, 16 Jur. 776, 21 L. J. Ch. 356 (married woman, sixty-five, having had children); Brown *v.* Pringle, 4 Hare 124, 8 Jur. 1113, 14 L. J. Ch. 121, 30 Eng. Ch. 124 (widow, sixty-six, having had five children, and the fund in court being small); Leng *v.* Hodges, Jac. 585, 4 Eng. Ch. 585 (married woman, sixty-nine, having had two children); Fraser *v.* Fraser, Jac. 585 note *a*, 4 Eng. Ch. 585 (spinster, fifty-five); Miles *v.* Knight, 12 Jur. 666, 17 L. J. Ch. 458 (spinster, fifty-eight); Haynes *v.* Haynes, 35 L. J. Ch. 303 (spinsters of sixty and fifty-three, respectively, case decided hesitatingly as to the last); *Re* Taylor, 43 L. T. Rep. N. S. 795, 29 Wkly. Rep. 350 (woman of fifty-two, widow for twenty-five years, having had one child); *Re* Allason, 36 L. T. Rep. N. S. 653 (woman, fifty-two, married fifteen years without issue). See also *Re* Summers, 30 L. T. Rep. N. S. 377, 22 Wkly. Rep. 639, married woman, forty-seven, having had six children, but not pregnant for seventeen years and medical testimony adverse to probability of future child.

the United States a woman is assumed capable of child-bearing at any age of adult life.[2]

3. Virility of Men. It is presumed in the absence of evidence to the contrary that a male person of mature years is capable of sexual intercourse[3] and of procreation.[4]

4. Ownership of Property From Possession. A rebuttable[5] presumption of ownership, which, in the absence of evidence to the contrary, the law will assume to be correct, arises from the possession of real[6] or personal[7] property. Where

The court declined to presume against incapacity in Croxton *v.* May, 9 Ch. D. 388, 39 L. T. Rep. N. S. 461, 27 Wkly. Rep. 327, woman fifty-four and married three years without issue. But see *Re* Taylor, 43 L. T. Rep. N. S. 795, 29 Wkly. Rep. 350 (where Malins, V. C., said he thought "the lord justices were overcareful in" the case of Croxton *v.* May, *supra*); Jee *v.* Audley, 1 Cox Ch. 324, 1 Rev. Rep. 46, 29 Eng. Reprint 1186 (married woman of seventy, having had four children; the case being decided in 1787); Reynolds *v.* Reynolds, Dick. 374, 21 Eng. Reprint 314 (married woman, sixty-two, having had seven children; the case being decided in 1764); *In re* Trustee Relief Act, 17 Jur. 342 (married woman, forty-nine, having had illegitimate children); Conduit *v.* Soane, 24 L. T. Rep. N. S. 656, 19 Wkly. Rep. 817 (one woman fifty-seven, the other, fifty-two, both married more than thirty years without issue); Groves *v.* Groves, 12 Wkly. Rep. 45 (married woman, forty-nine, having had two children, but none within twenty years, and medical testimony that she was past child-bearing).

Consequence of presumption considered.— It has been held that the court will not make an inference against capacity to bear children when the effect of so doing would be to deprive a living person of a possible interest (*In re* Hocking, [1898] 2 Ch. 567, 67 L. J. Ch. 662, 79 L. T. Rep. N. S. 164, 47 Wkly. Rep. 114, widow, fifty-four, married one year, and had no child) and will make it where there will be no such effect (*In re* White, [1901] 1 Ch. 570, 70 L. J. Ch. 300, 84 L. T. Rep. N. S. 199, 49 Wkly. Rep. 429, widow, fifty-six, who had one child twenty-four years before widowhood).

2. Hill *v.* Spencer, 196 Ill. 65, 63 N. E. 614; List *v.* Rodney, 83 Pa. St. 483 (married woman, seventy-five, having had four children); Flora *v.* Anderson, 67 Fed. 182 (married woman, forty-nine, having had one illegitimate child). See also *In re* Apgar, 37 N. J. Eq. 501, married woman, fifty-eight. *Compare* Bacot's Case [*cited* in *In re* Apgar, 37 N. J. Eq. 502 note, as holding that a presumption of incapacity would be made against a woman of sixty-two].

3. Gardner *v.* State, 81 Ga. 144, 7 S. E. 144.

4. Lushington *v.* Boldero, 15 Beav. 1, 16 Jur. 140, 21 L. J. Ch. 49 (man of ninety-five); Lomax *v.* Holmden, 2 Str. 940. See also Trevor *v.* Trevor, 2 Myl. & K. 675, 7 Eng. Ch. 675, 39 Eng. Reprint 1102.

5. *Illinois.*— Amick *v.* Young, 69 Ill. 542; Roberts *v.* Haskell, 20 Ill. 59.

Maine.— Linscott *v.* Trask, 35 Me. 150.

Massachusetts.— Magee *v.* Scott, 9 Cush. 148, 55 Am. Dec. 49.

Michigan.— Trevorrow *v.* Trevorrow, 65 Mich. 234, 31 N. W. 908; Matteson *v.* Morris, 40 Mich. 52; Lull *v.* Davis, 1 Mich. 77.

New York.— New York *v.* Lent, 51 Barb. 19.

North Carolina.— Threadgill *v.* Anson County, 116 N. C. 616, 21 S. E. 425.

Pennsylvania.— Philadelphia Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 177 Pa. St. 38, 35 Atl. 688.

Tennessee.— Park *v.* Harrison, 8 Humphr. 412.

Texas.— Burroughs *v.* Farmer, (Civ. App. 1898) 45 S. W. 846; Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478.

Wisconsin.— Wausau Boom Co. *v.* Plumer, 35 Wis. 274.

See 19 Cent. Dig. tit. "Evidence," § 78.

6. *Alabama.*—Finch *v.* Alston, 2 Stew. & P. 83, 23 Am. Dec. 299.

Arkansas.— Oxley Stave Co. *v.* Staggs, 59 Ark. 370, 27 S. W. 241.

New York.—Jackson *v.* Waltermire, 5 Cow. 299.

Ohio.— Ward *v.* McIntosh, 12 Ohio St. 231.

Texas.— Burroughs *v.* Farmer, (Civ. App. 1898) 45 S. W. 846; Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478.

United States.— Bradshaw *v.* Ashley, 180 U. S. 59, 21 S. Ct. 297, 45 L. ed. 423.

England.— Asher *v.* Whitlock, L. R. 10 Q. B. 1, 11 Jur. N. S. 925, 35 L. J. Q. B. 17, 14 Wkly. Rep. 26; Jayne *v.* Price, 1 Marsh. 68, 5 Taunt. 326, 15 Rev. Rep. 518, 1 E. C. L. 173.

See also Ejectment, 15 Cyc. 1, and cross-references there given.

7. *Alabama.*— Hobbs *v.* Bibb, 2 Stew. 54.

California.— Goodwin *v.* Garr, 8 Cal. 615.

Delaware.— Drummond *v.* Hopper, 4 Harr. 327.

Illinois.— Amick *v.* Young, 69 Ill. 542; Roberts *v.* Haskell, 20 Ill. 59.

Indiana.— Wiseman *v.* Lynn, 39 Ind. 250; McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957.

Iowa.— Courtright *v.* Deeds, 37 Iowa 503.

Louisiana.— Alexander's Succession, 18 La. Ann. 337; Lee *v.* Palmer, 18 La. 405.

Maine.— Vining *v.* Baker, 53 Me. 544; Millay *v.* Butts, 35 Me. 139.

Michigan.— Trevorrow *v.* Trevorrow, 65 Mich. 234, 31 N. W. 908.

Missouri.— Miller *v.* Marks, 20 Mo. App. 369; Vogel *v.* St. Louis, 13 Mo. App. 116.

New York.—Rawley *v.* Brown, 71 N. Y. 85;

several persons are in apparent possession the presumption of title is in favor of him whose acts of control and dominion preponderate.[8]

5. Presumptions of Regularity — a. Ancient Proceedings. Upon proof of a fact so ancient as to suggest inherent difficulty in proving preliminary or attendant facts, all circumstances necessary to its legal validity will be assumed to exist.[9]

b. Judicial Proceedings. A presumption of regularity attaches to the proceedings of courts of record acting within their jurisdiction.[10] Where the

Eyre *v.* Higbee, 35 Barb. 502, 22 How. Pr. 198; Fish *v.* Skut, 21 Barb. 333.

Pennsylvania.— Entriken *v.* Brown, 32 Pa. St. 364; St. Augustine *v.* Philadelphia County, Brightly 116, 4 Pa. L. J. Rep. 120.

Texas.— Andrews *v.* Beck, 23 Tex. 455; Clifton *v.* Lilley, 12 Tex. 130.

West Virginia.— Tefft *v.* Marsh, 1 W. Va. 38.

Wisconsin.— Wausau Boom Co. *v.* Plumer, 35 Wis. 274.

United States.— Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514. See also The Carlos F. Ross, 177 U. S. 655, 20 S. Ct. 803, 44 L. ed. 929.

See 20 Cent. Dig. tit. "Evidence," § 78. See also Replevin; Trover and Conversion.

Weakness of presumption.— In Rawley *v.* Brown, 71 N. Y. 85, 89, Allen, J., said: "Possession of property alone and without explanation, is evidence of ownership; but is the lowest species of evidence. It is merely presumptive, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner. If the custody and possession is shown to be equally consistent with an outstanding ownership in a third person, as with a title in the one having the possession, no presumption of ownership arises solely from such possession. The law raises no presumption as to the character of the occupation of one cultivating the farm of another with the instruments of husbandry, beasts of the plough, teams and domestic animals of the owner of the farm, or as to the right of either to the growing crops and products of the farm, but leaves it a question of fact, to be determined by a jury upon the evidence and all the circumstances of the case." See also *In re* Binford, 3 Fed. Cas. No. 1,411, 3 Hughes 295 [*reversed* in 3 Fed. Cas. No. 1,411*a*, 3 Hughes 304].

Possession of negotiable instrument as presumptive evidence of title thereto see Commercial Paper, 8 Cyc. 227.

Possession of an open account in favor of another person does not support a presumption of ownership in the possessor. Gregg *v.* Mallett, 111 N. C. 74, 15 S. E. 936.

8. Reid *v.* Butt, 25 Ga. 28. See also Curran *v.* McGrath, 67 Ill. App. 566, where the court said: "The law presumes, in the absence of evidence to the contrary, that a married man is the head of his family, and that the property in his possession is his own."

9. *Maine.*— Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597 (twenty-six years); Freeman *v.* Thayer, 33 Me. 76 (thirty years).

Missouri.— Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647, twenty years.

New Hampshire.— Cobleigh *v.* Young, 15 N. H. 493, ten years.

Pennsylvania.— Richards *v.* Elwell, 48 Pa. St. 361.

Texas.— Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682, thirty years.

United States.— Baeder *v.* Jennings, 40 Fed. 199, two hundred years.

The presumption does not arise where the proper evidence consists of records or public documents in the custody of officers charged with their preservation and safe-keeping, unless they are proved to have been lost or destroyed. Brunswick First Parish *v.* McKean, 4 Me. 508.

10. *Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Thrasher *v.* Ingram, 32 Ala. 645; McLendon *v.* Dodge, 32 Ala. 491.

Arkansas.— Redmond *v.* Anderson, 18 Ark. 449.

California.— Talbert *v.* Hopper, 42 Cal. 397.

Georgia.— American Mortg. Co. *v.* Hill, 92 Ga. 297, 18 S. E. 425; Chalker *v.* Thompson, 72 Ga. 478; McKee *v.* McKee, 48 Ga. 332.

Illinois.— Rosenthal *v.* Renick, 44 Ill. 202; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303; Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514; Dukes *v.* Rowley, 24 Ill. 210; Johnson *v.* Mellhousin, 105 Ill. App. 367.

Indiana.— Owen *v.* State, 25 Ind. 371; Brackenbridge *v.* Dawson, 7 Ind. 383; Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

Iowa.— Church *v.* Crossman, 49 Iowa 444.

Kansas.— Ogden *v.* Walters, 12 Kan. 282; French *v.* Pease, 10 Kan. 51.

Kentucky.— Jones *v.* Edwards, 78 Ky. 6; Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222; Howes *v.* Carlisle, 52 S. W. 936, 21 Ky. L. Rep. 613.

Louisiana.— Lanfear *v.* Mestier, 18 La. Ann. 497, 89 Am. Dec. 658; Despau *v.* Swindler, 3 Mart. N. S. 705; Trepagnier *v.* Butler, 12 Mart. 534.

Maine.— Bryant *v.* Johnson, 24 Me. 304.

Massachusetts.— Brown *v.* Wood, 17 Mass. 68.

Michigan.— Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

Mississippi.— Dyson *v.* State, 26 Miss. 362.

Missouri.— State *v.* Vaile, 122 Mo. 33, 26 S. W. 672; St. Louis Third Nat. Bank *v.* Owen, 101 Mo. 558, 14 S. W. 632; Harvey *v.* Rusch, 67 Mo. 551 [*following* McNair *v.* Hunt, 5 Mo. 300].

New Jersey.— Vanderveere *v.* Gaston, 25 N. J. L. 615; Philadelphia, etc., R. Co. *v.* Little, 41 N. J. Eq. 519, 7 Atl. 356.

jurisdiction of an inferior [11] or a foreign tribunal [12] has clearly vested,[13] the validity of its proceedings will be presumed. But as a rule presumptions of regularity do not extend to jurisdictional facts.[14]

c. Official Proceedings and Acts — (i) *General Rule.* It will be presumed that public officers, including persons acting in an official capacity,[15] have been duly elected [16] and that they have qualified;[17] that their official acts are properly performed;[18] and in general that everything in connection with the official act

New York.— Rugg *v.* Spencer, 59 Barb. 383; Trinity Church *v.* Higgins, 4 Rob. 1.

North Carolina.— Morris *v.* Gentry, 89 N. C. 248.

Ohio.— Johnson *v.* Mullin, 12 Ohio 10.

Pennsylvania.— McFate's Appeal, 105 Pa. St. 323; *In re* Springbrook Road, 64 Pa. St. 451; Huston *v.* Clark, 14 Wkly. Notes Cas. 418.

South Dakota.— Cahn *v.* Farmers', etc., Bank, 1 S. D. 237, 46 N. W. 185.

Tennessee.—Martin *v.* Porter, 4 Heisk. 407; Greenlow *v.* Rawlings, 3 Humphr. 90.

Texas.— Baker *v.* Coe, 20 Tex. 429; Bayne *v.* Garrett, 17 Tex. 330; Graham *v.* Hawkins, 1 Tex. Unrep. Cas. 514.

Vermont.— Giddings *v.* Smith, 15 Vt. 344.

Virginia.— Woodhouse *v.* Fillbates, 77 Va. 317.

Wisconsin.— Jarvis *v.* Robinson, 21 Wis. 523, 94 Am. Dec. 560; Bunker *v.* Rand, 19 Wis. 253, 88 Am. Dec. 684; Tallman *v.* Ely, 6 Wis. 244.

United States.— Williams *v.* U. S., 1 How. 290, 11 L. ed. 135; Galpin *v.* Page, 9 Fed. Cas. No. 5,205, 1 Sawy. 309 [*reversed* in 18 Wall. 350, 21 L. ed. 959].

Canada.— Morrison *v.* Albee, 7 N. Brunsw. 145.

See 20 Cent. Dig. tit. "Evidence," § 104.

Special terms of court are presumed to have been properly convened and regularly held. Merchant *v.* North, 10 Ohio St. 251; Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46.

11. *Illinois.*— Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

Indiana.— Argo *v.* Barthand, 80 Ind. 63.

Iowa.— Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

North Carolina.— Hiatt *v.* Simpson, 35 N. C. 72.

Ohio.— Wilson *v.* Wickersham, 2 Ohio Dec. (Reprint) 545, 3 West. L. Month. 621.

Wisconsin.— Merritt *v.* Baldwin, 6 Wis. 439.

See 20 Cent. Dig. tit. "Evidence," § 104.

12. Christian, etc., Grocery Co. *v.* Coleman, 125 Ala. 158, 27 So. 786; Coveney *v.* Phiscator, (Mich. 1903) 93 N. W. 619 (holding that where the record of criminal proceedings in a foreign court is not produced it will be presumed that such proceedings were regular, and within the jurisdiction of the court); Taylor *v.* Ford, 29 L. T. Rep. N. S. 392, 22 Wkly. Rep. 47.

13. Allen *v.* Sowerby, 37 Md. 410; Pittsburg *v.* Walter, 69 Pa. St. 365; Hicks *v.* Haywood, 4 Heisk. (Tenn.) 598; Markham *v.* Boyd, 22 Gratt. (Va.) 544; Buchanan *v.* King, 22 Gratt. (Va.) 414.

14. Mills County *v.* Hamaker, 11 Iowa 206 But see Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260; Sheldon *v.* Wright, 7 Barb. (N. Y.) 39.

15. Doe *v.* Barnes, 8 Q. B. 1037, 10 Jur. 520, 15 L. J. Q. B. 293, 55 E. C. L. 1037; Doe *v.* Young, 8 Q. B. 63, 9 Jur. 941, 15 L. J. Q. B. 9, 55 E. C. L. 63; Hamilton Tp. *v.* Neil, 28 Grant Ch. (U. C.) 408.

16. Blanchard *v.* Dow, 32 Me. 557; Doe *v.* Barnes, 8 Q. B. 1037, 10 Jur. 520, 15 L. J. Q. B. 293, 55 E. C. L. 1037; Ganvill *v.* Utting, 9 Jur. 1081.

17. *Illinois.*— Story *v.* De Armond, 77 Ill. App. 74.

Missouri.— State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

New York.— Nelson *v.* People, 23 N. Y. 293.

Tennessee.— McLean *v.* State, 8 Heisk. 22.

England.— Miles *v.* Bough, 3 Q. B. 845, 3 G. & D. 119, 12 L. J. Q. B. 74, 3 R. & Can. Cas. 668, 43 E. C. L. 1001; Dexter *v.* Hayes, 11 Ir. C. L. 106.

Canada.— Crookshank *v.* Macfarlane, 7 N. Brunsw. 544; Dimock *v.* New Brunswick Mar. Assur. Co., 6 N. Brunsw. 398.

18. *Alabama.*—Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453; Brandon *v.* Snows, 2 Stew. 255.

Arkansas.— Rice *v.* Harrell, 24 Ark. 402; Dawson *v.* State Bank, 3 Ark. 505.

California.— Robertson *v.* Alameda Free Public Library, etc., Rooms, 136 Cal. 403, 69 Pac. 88; Spaulding *v.* Howard, 121 Cal. 194, 53 Pac. 563; Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877; Rice *v.* Cunningham, 29 Cal. 492; Guy *v.* Washburn, 23 Cal. 111; Reynolds *v.* West, 1 Cal. 322.

Colorado.— Colorado Fuel Co. *v.* Maxwell Land Grant Co., 22 Colo. 71, 43 Pac. 566; People *v.* Grand County, 6 Colo. 202.

Florida.— Dupuis *v.* Thompson, 16 Fla. 69.

Georgia.— Gibson *v.* Patterson, 75 Ga. 549; Doe *v.* Biggers, 6 Ga. 188.

Illinois.— Spring *v.* Kane, 86 Ill. 580; Cook *v.* Chicago, 57 Ill. 268; Niantic Bank *v.* Dennis, 37 Ill. 381; Robinson *v.* School Directors Dist. No. 4, 96 Ill. App. 604; Subim *v.* Isador, 88 Ill. App. 96.

Indiana.— Heagy *v.* Black, 90 Ind. 534; Mullikin *v.* Bloomington, 72 Ind. 161; Talbott *v.* Hale, 72 Ind. 1.

Iowa.— Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984; Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Eggers *v.* Redwood, 50 Iowa 289; Spitler *v.* Scofield, 43 Iowa 571; Rowan *v.* Lamb, 4 Greene 468.

Kansas.— Morrill *v.* Douglass, 14 Kan.

was legally done,[19] whether prior to the act, as giving notice,[20] serving proc-

293; Vallep Tp. *v.* King Iron Bridge, etc., Co., 4 Kan. App. 622, 45 Pac. 660.

Kentucky.— Bate *v.* Speed, 10 Bush 644; Phelps *v.* Ratcliffe, 3 Bush 334; Anderson *v.* Sutton, 2 Duv. 480.

Louisiana.— Sage *v.* Board of Liquidation, 37 La. Ann. 412; Soniat *v.* Miles, 32 La. Ann. 164; Elder *v.* New Orleans, 31 La. Ann. 500; Hefner *v.* Hesse, 29 La. Ann. 149; Coons *v.* Graham, 12 Rob. 206.

Maine.— Snow *v.* Weeks, 75 Me. 105; Brackett *v.* Ridlon, 54 Me. 426; Mills *v.* Gilhreth, 47 Me. 320, 74 Am. Dec. 487.

Maryland.— Wellersburg, etc., Plank Road Co. *v.* Bruce, 6 Md. 457.

Massachusetts.— Bruce *v.* Holden, 21 Pick. 187; Gilmore *v.* Holt, 4 Pick. 258.

Michigan.— Blair *v.* Compton, 33 Mich. 414; Hall *v.* Kellogg, 16 Mich. 135; Peck *v.* Cavell, 16 Mich. 9.

Minnesota.— Gillett-Herzog Mfg. Co. *v.* Aitkin County, 69 Minn. 297, 72 N. W. 123; Shakopee St. Peter's Church *v.* Scott County, 12 Minn. 395.

Mississippi.— Davany *v.* Koon, 45 Miss. 71; Hamblen *v.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Cooper *v.* Granberry, 33 Miss. 117.

Missouri.— Ivy *v.* Yancy, 129 Mo. 501, 31 S. W. 937; State *v.* Mastin, 103 Mo. 508, 15 S. W. 529; Klostermann *v.* Loos, 58 Mo. 290; Drehmar *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268; Roberts *v.* Central Lead Co., 95 Mo. App. 581, 69 S. W. 630.

Nebraska.— Brown *v.* Helsley, (1901) 96 N. W. 187; State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; Gate City Abstract Co. *v.* Post, 55 Nebr. 742, 76 N. W. 471; *In re* Tecumseh Town-Site Case, 3 Nebr. 267.

New Hampshire.— Shackford *v.* Newington, 46 N. H. 415; Wheelock *v.* Hall, 3 N. H. 310.

New Jersey.— State *v.* Morristown, 33 N. J. L. 57; Mercer County Traction Co. *v.* United New Jersey R., etc., Co., (Ch. 1903) 54 Atl. 819; West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333.

New York.— People *v.* Crane, 125 N. Y. 535, 26 N. E. 736; Leland *v.* Cameron, 31 N. Y. 115; Miller *v.* Lewis, 4 N. Y. 554; Hand *v.* Columbia County, 31 Hun 531; People *v.* Phœnix Bank, 4 Bosw. 363.

North Carolina.— Gregg *v.* Mallett, 111 N. C. 74, 15 S. E. 936; Clifton *v.* Wynne, 80 N. C. 145.

North Dakota.— Pine Tree Lumber Co. *v.* Fargo, (1903) 96 N. W. 357; Fisher *v.* Betts, (1903) 96 N. W. 132.

Ohio.— Ward *v.* Barrows, 2 Ohio St. 241.

Oklahoma.— Watkins *v.* Havighorst, 13 Okla. 128, 74 Pac. 318; Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

Oregon.— McLeod *v.* Lloyd, (1903) 71 Pac. 795.

Pennsylvania.— Murphy *v.* Chase, 103 Pa. St. 260; Smith *v.* Walker, 98 Pa. St. 133; Cronise *v.* Cronise, 54 Pa. St. 255; Von Storch *v.* Scranton City, 3 Pa. Co. Ct. 567; White's Estate, 11 Phila. (Pa.) 100.

Rhode Island.— Foster *v.* Berry, 14 R. I. 601.

South Carolina.— Woody *v.* Dean, 24 S. C. 499; Riley *v.* Gaines, 14 S. C. 454; Sternberger *v.* McSween, 14 S. C. 35; Douglass *v.* Owens, 5 Rich. 534.

Tennessee.— Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86; Frierson *v.* Galbraith, 12 Lea 129.

Texas.— Poer *v.* Brown, 24 Tex. 34; Sadler *v.* Anderson, 17 Tex. 245; Titus *v.* Kimbro, 8 Tex. 210; Howard *v.* Perry, 7 Tex. 259; Thompson *v.* State, 23 Tex. Civ. App. 370, 56 S. W. 603.

Vermont.— Lycoming F. Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103; Drake *v.* Mooney, 31 Vt. 617, 76 Am. Dec. 145.

Wisconsin.— State *v.* Kempf, 69 Wis. 470, 34 N. W. 226, 2 Am. St. Rep. 753; State *v.* Prince, 45 Wis. 610; Van Buren *v.* Downing, 41 Wis. 122; Tainter *v.* Lucas, 29 Wis. 375.

Wyoming.— State *v.* State Bd. Land Com'rs, 7 Wyo. 478, 53 Pac. 292.

United States.— Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799; Nofire *v.* U. S., 164 U. S. 657, 17 S. Ct. 212, 41 L. ed. 588; U. S. *v.* Crusell, 14 Wall. 1, 20 L. ed. 821; Butler *v.* Maples, 9 Wall. 766, 19 L. ed. 822; U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552; Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46; Russell *v.* Beebe, 21 Fed. Cas. No. 12,153, Hempst. 704.

England.— Sichel *v.* Lambert, 15 C. B. N. S. 781, 10 Jur. N. S. 617, 33 L. J. C. P. 137, 9 L. T. Rep. N. S. 687, 12 Wkly. Rep. 312, 109 E. C. L. 781; *Re* Cruttenden, 45 L. T. Rep. N. S. 465, 30 Wkly. Rep. 57.

See 20 Cent. Dig. tit. "Evidence," § 105.

19. *Alabama.*— Davis *v.* State, 17 Ala. 415.

Georgia.— Greer *v.* Fergeson, 104 Ga. 552, 30 S. E. 943.

Minnesota.— Kobs *v.* Minneapolis, 22 Minn. 159.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

New York.— People *v.* Johnson, 46 Hun 667.

Oregon.— Dennison *v.* Story, 1 Oreg. 272.

Pennsylvania.— Com. *v.* Read, 2 Ashm. 261.

Texas.— Wooters *v.* Hall, 61 Tex. 15; Jones *v.* Muisbach, 26 Tex. 235.

Vermont.— State *v.* Potter, 52 Vt. 33.

United States.— Holmes *v.* Cleveland, etc., R. Co., 93 Fed. 100; Young *v.* Wempe, 46 Fed. 354.

See 20 Cent. Dig. tit. "Evidence," § 105.

20. *Alabama.*— Christian, etc., Grocery Co. *v.* Coleman, 125 Ala. 158, 27 So. 786.

Colorado.— Colorado Fuel, etc., Co. *v.* State Bd. Land Com'rs, 14 Colo. App. 84, 60 Pac. 367.

Illinois.— Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

ess,[21] or determining the existence of conditions prescribed as a prerequisite to legal action,[22] or subsequent to such act.[23] It is moreover a rule of procedure that the burden of proving unlawful or irregular conduct rests upon him who asserts it,[24] since there is no presumption of official irregularity.[25] Where persons whose interests are adversely affected by an official act do not question its validity for a long period, the inference of regularity acquires additional force.[26] Such presumptions relate solely to acts done in the routine of official business.[27] As to summary or *ex parte*[28] and *a fortiori* as to extraofficial[29] proceedings, the party claiming under them must make strict proof of the performance of every prerequisite of the law. The presumption of regularity of an official act cannot be used as a substitute for proof of a definite and material fact;[30] nor as a basis for presuming irregularity in another act by the same[31] or a different[32] officer; nor to supply a fact which the official record affirmatively shows to be absent.[33] The presumption is rebuttable by affirmative evidence of irregularity.[34] The presumption in favor of the regularity of official acts does not extend to acts

Pennsylvania.— Morgan *v.* Neville, 74 Pa. St. 52; Law *v.* Smith, 3 Luz. Leg. Reg. 49.

South Carolina.— Norris *v.* Goss, 2 Speers 80.

Texas.— Thompson *v.* State, 23 Tex. Civ. App. 370, 56 S. W. 603; Wilson *v.* State, 16 Tex. App. 497.

United States.— Cofield *v.* McClelland, 16 Wall. 331, 21 L. ed. 339 [*affirming* 1 Colo. 370]; Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46.

See 20 Cent. Dig. tit. "Evidence," § 105.

21. Best *v.* Vanhook, 13 S. W. 119, 11 Ky. L. Rep. 753; Steinhardt *v.* Baker, 163 N. Y. 410, 57 N. E. 629, 8 N. Y. Annot. Cas. 13.

22. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819, determination by township committee that consent of property-owners to ordinance granting right to construct street railroad has been filed.

23. Chamberlain Banking House *v.* Woolsey, 60 Nebr. 516, 83 N. W. 729; Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689; Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9; Holmes *v.* Cleveland, etc., R. Co., 93 Fed. 100.

24. *Florida.*— Scott *v.* State, 43 Fla. 396, 31 So. 244.

Kansas.— Setter *v.* Alvey, 15 Kan. 157.

Louisiana.— State *v.* Wright, 41 La. Ann. 600, 6 So. 135.

Michigan.— Hourtienne *v.* Schnoor, 33 Mich. 274.

Ohio.— A. H. Pugh Printing Co. *v.* Yeatman, 22 Ohio Cir. Ct. 584, 12 Ohio Cir. Dec. 477.

United States.— Knox County *v.* New York Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 33 L. ed. 93; Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801; Weyauwega *v.* Ayling, 99 U. S. 112, 25 L. ed. 470; Butler *v.* Maples, 9 Wall. 766, 19 L. ed. 822; Rankin *v.* Hoyt, 4 How. 327, 11 L. ed. 996; U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552.

See 20 Cent. Dig. tit. "Evidence," § 105.

25. Pottsville Safe-Deposit Bank *v.* Schuylkill County, 190 Pa. St. 188, 42 Atl. 539. See also Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540.

26. *Kentucky.*— Belcher *v.* Belcher, 55 S. W. 693, 21 Ky. L. Rep. 1460 (thirty years); Best *v.* Vanhook, 13 S. W. 119, 11 Ky. L. Rep. 753 (forty years).

Louisiana.— Drouet *v.* Rice, 2 Rob. 374 (twenty years); Brosnaham *v.* Turner, 16 La. 433 (twenty years).

Maine.— Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597.

Pennsylvania.— McFate's Appeal, 105 Pa. St. 323.

Texas.— Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682 (thirty years); Delk *v.* Punchard, 64 Tex. 360 (fifty years).

United States.— Holmes *v.* Cleveland, etc., R. Co., 93 Fed. 100, fifty years.

England.— Williams *v.* Eyton, 4 H. & M. 357, 5 Jur. N. S. 770, 28 L. J. Exch. 146, 7 Wkly. Rep. 291, twenty-eight years.

Canada.— Hutchinson *v.* Johnston, 9 N. Brunsw. 40.

See 20 Cent. Dig. tit. "Evidence," § 105.

27. Fouke *v.* Jackson County, 84 Iowa 616, 51 N. W. 71.

28. Morton *v.* Reeds, 6 Mo. 64.

29. Fouke *v.* Jackson County, 84 Iowa 616, 51 N. W. 71; Houston *v.* Perry, 3 Tex. 390.

30. U. S. *v.* Ross, 92 U. S. 281, 23 L. ed. 707.

31. Foster *v.* Berry, 14 R. I. 601; Randall *v.* Collins, 52 Tex. 435.

32. Houghton County Sup'rs *v.* Rees, 34 Mich. 481.

33. Hathaway *v.* Clark, 5 Pick. (Mass.) 490; Gibson *v.* Martin, 7 Humphr. (Tenn.) 127.

34. *California.*— By express statute. Robertson *v.* Alameda Free Public Library, etc., 136 Cal. 403, 69 Pac. 88; Savings, etc., Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922.

Colorado.— People *v.* Grand County, 6 Colo. 202.

Kansas.— Morrill *v.* Douglass, 14 Kan. 293.

Louisiana.— Sage *v.* Board of Liquidation, 37 La. Ann. 412.

involving the forfeiture of an individual's rights, the depriving him of his property, or the placing of a charge or lien thereon.[35]

(II) *Applications of Rule.* Among the officers in favor of whose acts a presumption of regularity has been extended are the following: Alcaldes in territory formerly governed by Spanish law;[36] attorneys at law;[37] auditors of court;[38] boards of equalization;[39] clerks of court;[40] commissioners;[41] constables;[42] coroners;[43] deputies of clerks of court,[44] of sheriffs,[45] and of a surveyor-general;[46] judges,[47] justices of the peace,[48] and other magistrates;[49] military officers;[50] notaries public;[51] overseers of the poor;[52] referees;[53] registers of probate;[54] sheriffs;[55]

South Carolina.— Sternberger *v.* McSween, 14 S. C. 35.

Wisconsin.—Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

35. Watkins *v.* Havighorst, 13 Okla. 128, 74 Pac. 318; Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33.

36. Payne *v.* Treadmill, 16 Cal. 220.

37. Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262; Fambles *v.* State, 97 Ga. 625, 25 S. E. 365; Holmes *v.* Peck, 1 R. I. 242; Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209. And see Attorney and Client, 4 Cyc. 889.

38. Stannard *v.* Smith, 40 Vt. 513. And see, generally, References.

39. Adams *v.* Osgood, 60 Nebr. 779, 84 N. W. 257. And see, generally, Taxation.

40. *Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

California.— Powers *v.* Hitchcock, 129 Cal. 325, 61 Pac. 1076.

Indiana.— Mountjoy *v.* State, 78 Ind. 172.

Michigan.— Morse *v.* Hewett, 28 Mich. 481.

Nebraska.— McPherson *v.* Commercial Nat. Bank, 61 Nebr. 695, 85 N. W. 895.

New York.— Schermerhorn *v.* Talman, 14 N. Y. 93.

Texas.— Caudle *v.* Williams, (Civ. App. 1899) 51 S. W. 560.

Wisconsin.— Noonan *v.* State, 55 Wis. 258, 12 N. W. 379.

See 20 Cent. Dig. tit. "Evidence," § 105. And see Clerks of Courts, 7 Cyc. 193.

41. *Illinois.*—Regent *v.* People, 96 Ill. App. 189, jury.

Kansas.— Harper *v.* Conway Springs, 9 Kan. App. 609, 58 Pac. 488.

Kentucky.— Ellis *v.* Carr, 1 Bush 527.

Minnesota.—Kobs *v.* Minneapolis, 22 Minn. 159, street.

South Dakota.— Lyman County *v.* State, 11 S. D. 391, 78 N. W. 17.

Tennessee.— Atlanta, etc., R. Co. *v.* Horne, 106 Tenn. 73, 59 S. W. 134, interstate commerce.

England.— Williams *v.* Eyton, 4 H. & N. 357, 5 Jur. N. S. 770, 28 L. J. Exch. 146, 7 Wkly. Rep. 291.

Canada.— Montgomery *v.* McLeod, 2 N. Brunsw. 375.

See 20 Cent. Dig. tit. "Evidence," § 105.

42. McLane *v.* Moore, 51 N. C. 520. And see, generally, Sheriffs and Constables.

43. Woods *v.* State, 63 Ind. 353; People *v.* Dalton, 46 N. Y. App. Div. 264, 61 N. Y. Suppl. 263. And see Coroners, 9 Cyc. 980.

44. Miller *v.* Lewis, 4 N. Y. 554. And see Clerks of Courts, 7 Cyc. 193.

45. Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215.

46. Barnhart *v.* Ehrhart, 33 Oreg. 274, 54 Pac. 195. And see, generally, Public Lands.

47. *Georgia.*— Gibson *v.* Patterson, 75 Ga. 549.

Illinois.— Figge *v.* Rowlen, 84 Ill. App. 238 [*affirmed* in 185 Ill. 234, 57 N. E. 195].

New Jersey.— Den *v.* Applegate, 23 N. J. L. 115.

Pennsylvania.— Cromelien *v.* Brink, 29 Pa. St. 522.

Texas.— Jones *v.* Fancher, 61 Tex. 698; Staples *v.* Llano County, 9 Tex. Civ. App. 201, 28 S. W. 569.

Canada.— Reg. *v.* Atkinson, 15 Ont. 110; Reg. *v.* Fee, 3 Ont. 107.

See 20 Cent. Dig. tit. "Evidence," § 105. And see, generally, Judges.

48. Shattuck *v.* People, 5 Ill. 477; Whittington *v.* Whittington, 24 La. Ann. 157; Hourtienne *v.* Schnoor, 33 Mich. 274; Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426. And see, generally, Justices of the Peace.

49. Davis *v.* State, 17 Ala. 415; Hightower *v.* State, 58 Miss. 636; Reg. *v.* Excell, 20 Ont. 633. And see, generally, Justices of the Peace.

50. Drehman *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268; Chapman Tp. *v.* Herrold, 58 Pa. St. 106; Wolton *v.* Gavin, 16 Q. B. 48, 15 Jur. 329, 20 L. J. Q. B. 73, 71 E. C. L. 48.

51. People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984; Fanchonette *v.* Grangé, 9 Rob. (La.) 86; Montreuil *v.* Pierre, 9 La. 356; McAndrew *v.* Radway, 34 N. Y. 511. And see, generally, Notaries.

52. Red Willow County *v.* Davis, 49 Nebr. 796, 69 N. W. 138. And see, generally, Paupers.

53. Story *v.* De Armond, 77 Ill. App. 74; Leonard *v.* Root, 15 Gray (Mass.) 553; Lewis *v.* Greider, 49 Barb. (N. Y.) 606. And see, generally, References.

54. Willetts *v.* Mandlebaum, 28 Mich. 521. And see, generally, Wills.

55. *Illinois.*— Dukes *v.* Rowley, 24 Ill. 210.

Kentucky.— Case *v.* Colston, 1 Metc. 145; Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215.

Louisiana.— Drouet *v.* Rice, 2 Rob. 374; Brosnaham *v.* Turner, 16 La. 433.

Rhode Island.— Foster *v.* Berry, 14 R. I. 601.

Texas.— Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682.

supervisors;[56] tax assessors,[57] collectors,[58] and other taxing officers;[59] town clerks;[60] treasurers;[61] trustees;[62] public land officers;[63] and township committees.[64]

C. Pseudo-Presumptions of Law — 1. In General. Certain so-called presumptions of law deal with no inference of fact; they are usually paraphrases for a rule of substantive law or administration.[65] This is universally true of those termed "conclusive" presumptions — a term which is a misnomer, since *ex vi termini* a presumption is rebuttable.[66]

2. Rules of Substantive Law. Belonging to the category of pseudo-presumptions, but constituting rules of substantive law, is the *prima facie* presumption that persons above the age of seven years are capable of committing crime,[67] the presumption that subscribing witnesses to documents thirty years old are dead, so that execution of the documents need not be proved,[68] the presumption of a lost grant of corporeal or incorporeal hereditaments after twenty years' adverse possession or user,[69] the presumption that written contracts cover all prior parol negotiations,[70] the presumption of malice in certain libel and slander cases upon proof of publication of defamatory matter,[71] the rule of *res ipsa loquitur* in certain actions by passengers against carriers to recover damages for personal

United States.— Simon *v.* Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. ed. 1165.

England.— Bristol *v.* Wait, 6 C. & P. 591, 25 E. C. L. 590; McGahey *v.* Alston, 2 Gale 238, 6 L. J. Exch. 29, 2 M. & W. 206.

See 20 Cent. Dig. tit. "Evidence," § 105. And see, generally, Sheriffs and Constables.

56. Thayer *v.* McGee, 20 Mich. 195. And see Counties, 11 Cyc. 325.

57. State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; Chamberlain Banking House *v.* Woolsey, 60 Nebr. 516, 83 N. W. 729; Eureka Hill Min. Co. *v.* Eureka, 22 Utah 447, 63 Pac. 654. And see, generally, Taxation.

58. Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597 (after thirty years); Downer *v.* Woodbury, 19 Vt. 329. And see, generally, Taxation.

59. Adams *v.* Osgood, 60 Nebr. 779, 84 N. W. 257; Eureka Hill Min. Co. *v.* Eureka, 22 Utah 447, 63 Pac. 654. And see, generally, Taxation.

60. State *v.* Potter, 52 Vt. 33. And see, generally, Towns.

61. Murray *v.* Smith, 28 Miss. 31 (of county); Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689 (of state); Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295 [*affirming* 6 N. Y. Suppl. 336] (treasurer of county).

62. Miles *v.* Bough, 3 Q. B. 845, 3 G. & D. 119, 12 L. J. Q. B. 74, 3 R. & Can. Cas. 668, 43 E. C. L. 1001, trustees to build a bridge.

63. McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491, countersigning of patent by recorder of the general land-office. And see, generally, Public Lands.

64. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819.

65. See *infra*, V, C, 2, 3.

66. Billings *v.* Billings, 2 Cal. 107, 56 Am. Dec. 319; Burkhalter *v.* Farmer, 5 Kan. 477; Tilghman's Succession, 7 Rob. (La.) 387; Macarty *v.* Foucher, 12 Mart. (La.) 114; Jayne *v.* Price, 1 Marsh. 68, 5 Taunt. 326, 15 Rev. Rep. 518, 1 E. C. L. 173.

Early cases endeavored to assign a probative basis for a conclusive presumption of law; for example where it was declared that seeking to depose the king was compassing his death. Tooke's Case, 25 How. St. Tr. 1; Hardy's Case, 24 How. St. Tr. 1360.

67. See, generally, Infants.

68. Green *v.* Chelsea, 24 Pick. (Mass.) 71 (a deed); Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485 (a will). See also McReynolds *v.* Longenberger, 57 Pa. St. 13; and *infra*, XIV, D, 3.

69. *Massachusetts.*—Brattle Square Church *v.* Bullard, 2 Metc. 363; Valentine *v.* Piper, 22 Pick. 85, 94, 33 Am. Dec. 715.

Missouri.— Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647; Dessaunier *v.* Murphy, 22 Mo. 95.

New Hampshire.— Wallace *v.* Fletcher, 30 N. H. 434.

New Jersey.— State *v.* Wright, 41 N. J. L. 478.

Pennsylvania.— Carter *v.* Tinicum Fishing Co., 77 Pa. St. 310.

United States.— Fletcher *v.* Fuller, 120 U. S. 534, 7 S. Ct. 667, 30 L. ed. 757; Ricard *v.* Williams, 7 Wheat. 59, 109, 5 L. ed. 398.

England.— Lascelles *v.* Onslow, 2 Q. B. D. 433, 46 L. J. Q. B. 333, 36 L. T. Rep. N. S. 459, 25 Wkly. Rep. 496; Sewer Com'rs *v.* Glasse, L. R. 19 Eq. 134, 44 L. J. Ch. 129, 31 L. T. Rep. N. S. 495, 23 Wkly. Rep. 102; Dalton *v.* Angus, 6 App. Cas. 740, 50 L. J. Q. B. 689, 44 L. T. Rep. N. S. 844, 30 Wkly. Rep. 196; Eldridge *v.* Knott, 1 Cowp. 214; Goodtitle *v.* Baldwin, 11 East 488, 14 Rev. Rep. 674; St. Mary Magdalen's College *v.* Atty.-Gen., 3 Jur. N. S. 675; London, etc., R. Co. *v.* Fobbing Levels Sewer Com'rs, 66 L. J. Q. B. 127, 75 L. T. Rep. N. S. 629; Hillary *v.* Waller, 12 Ves. Jr. 239, 252, 33 Eng. Reprint 92.

See also Adverse Possession, 1 Cyc. 968; Easements, 14 Cyc. 1134.

70. Heyward *v.* Wallace, 4 Strobh. (S. C.) 181. See also *infra*, XVI.

71. That is to say it may be regarded as a rule of substantive law in such cases that

injuries,[72] and the presumption in respect of jurisdiction of federal courts on the ground of diverse citizenship that stock-holders of a corporation are citizens of the state which created the corporation.[73]

3. Rules of Administration — a. Consequences of Conduct. It is presumed that every person intends the natural and probable,[74] although not all or even all the necessary,[75] consequences of his acts; and that he understands the nature of instruments signed by him,[76] although executed by mark,[77] or executed for him under his direction.[78] Since there is no inference of fact in such cases,[79] the meaning is that as a maxim of jurisprudence one who has done an act cannot allege in defense that he did not also intend that its usual consequences should follow.

b. Presumption of Innocence. The phrase "presumption of innocence," much used in civil[80] but especially important in criminal[81] cases, is based on no inference of fact. In civil cases it restates the alleged presumption against illegality, etc., as a regulation of the burden of evidence with regard to it.[82] In criminal cases it restates the government's burden of proof beyond a reasonable doubt. This pseudo-presumption has no connection with the legitimate inference of the fact of innocence which may arise upon the evidence.

the absence of actual malice is immaterial. See, generally, Libel and Slander.

72. See McCurrie *v.* Southern Pac. R. Co., 122 Cal. 558, 55 Pac. 324; and Carriers, 6 Cyc. 628. In such cases it may be said that a rule of substantive law imposes a *prima facie* liability for injuries.

73. See Courts, 11 Cyc. 870.

74. Simpson *v.* State, 56 Ark. 8, 19 S. W. 99; State *v.* Strothers, 8 Ohio S. & C. Pl. Dec. 357; Timm *v.* Bear, 29 Wis. 254. See also Criminal Law, 12 Cyc. 70.

75. Nicol *v.* Crittenden, 55 Ga. 497, where the court recognized the general rule that necessary consequences are presumed to have been intended, but remarked that consequences may be necessary, and yet quite remote and unexpected; and that the fact that a given act was followed necessarily by delay to creditors, in the particular case, however strong as a circumstance to be weighed by the jury, is not ground for presuming, as matter of law, that it was intended to have that effect.

76. *Delaware.*—Green *v.* Maloney, 7 Houst. 22, 30 Atl. 672.

Illinois.— Doran *v.* Mullen, 78 Ill. 342.

Louisiana.— Boagni *v.* Fouchy, 26 La. Ann. 594.

Maine.— Mattocks *v.* Young, 66 Me. 459.

Massachusetts.— Androscoggin Bank *v.* Kimball, 10 Cush. 373.

Texas.— Howell *v.* Henrick, (Civ. App. 1894) 25 S. W. 41.

See 20 Cent. Dig. tit. "Evidence," § 91.

77. Doran *v.* Mullen, 78 Ill. 342.

78. Harris *v.* Story, 2 E. D. Smith (N. Y.) 363.

79. *Indiana.*— Clem *v.* State, 31 Ind. 480.

Kansas.— Madden *v.* State, 1 Kan. 340, 356.

Louisiana.— State *v.* Swayze, 30 La. Ann. 1323.

Maine.— State *v.* Hersom, 90 Me. 273, 38 Atl. 160.

New York.— Thomas *v.* People, 67 N. Y. 218; Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

One who throws a rock at another but misses him is not presumed to have intended to miss him because of the presumption that a person intends the probable consequences of his act. State *v.* Hersom, 90 Me. 273, 38 Atl. 160.

80. *Arkansas.*—See Hazen *v.* Henry, 6 Ark. 89.

California.— Case *v.* Case, 17 Cal. 598.

Illinois.— Russell *v.* Baptist Theological Union, 73 Ill. 339; Stein *v.* Stein, 66 Ill. App. 526. But see McDeed *v.* McDeed, 67 Ill. 545.

Mississippi.— Wilkie *v.* Collins, 48 Miss. 496.

Missouri.— Klein *v.* Laudman, 29 Mo. 259.

Nebraska.— State *v.* Scheve, 65 Nebr. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

New York.— Grant *v.* Riley, 15 N. Y. App. Div. 190, 44 N. Y. Suppl. 238; Wilcox *v.* Wilcox, 46 Hun 32; Korn *v.* Schedler, 11 Daly 234; New York, etc., Ferry Co. *v.* Moore, 18 Abb. N. Cas. 106; Hewlett *v.* Hewlett, 4 Edw. 7.

Pennsylvania.— Horan *v.* Weiler, 41 Pa. St. 470.

Vermont.— Philadelphia F. Assoc. *v.* Merchants' Nat. Bank, 54 Vt. 657.

England.— Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480.

Canada.— Wright *v.* Skinner, 17 U. C. C. P. 317.

See 20 Cent. Dig. tit. "Evidence," § 81.

81. See Criminal Law, 12 Cyc. 70.

82. See cases cited *supra*, note 80.

Contra.— "When, in the trial of a civil cause, a person is charged with . . crime, there is a legal presumption that he is innocent, and he is entitled to have such presumption considered by the jury in connection with the evidence in the case." Childs *v.* Merrill, 66 Vt. 302, 308, 29 Atl. 532, holding that where a charge of crime was involved, it was error to instruct the jury that

c. Character. The proposition that good character of a party in a civil cause[83] or of the accused in a criminal prosecution[84] is presumed states a rule that the burden of evidence as to bad character is imposed upon the party asserting it.

d. Fraud. The presumption against fraud[85] and its equivalent expression that good faith is presumed,[86] or that fraud is never presumed,[87] merely declares a rule of administration that the burden of evidence as to the existence of fraud is upon the party alleging it.

e. Illegality. The presumption against illegality,[88] and its equivalent expressions that there is no presumption against legality,[89] or in favor of illegality,[90] that there is a presumption in favor of legality,[91] that facts consistent with legality are presumed to exist,[92] or that where a situation is explainable on the basis of legality it will be assumed that such is the true explanation[93] present a rule of

the case must be disposed of "upon a consideration of all the facts and circumstances of the case appearing in evidence," without calling their attention to the presumption of innocence.

83. Goggans *v.* Monroe, 31 Ga. 331; Kennedy *v.* Holladay, 25 Mo. App. 503.

84. See CRIMINAL LAW, 12 Cyc. 70.

85. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Levy *v.* Scott, 115 Cal. 39, 46 Pac. 892; Webb *v.* Marks, 10 Colo. App. 429, 51 Pac. 518; Baxter *v.* Ellis, 57 Me. 178.

86. Weybrick *v.* Harris, 31 Kan. 92, 1 Pac. 271; State *v.* Washington Steam Fire Co., 78 Miss. 449, 24 So. 877; Henry *v.* Buddecke, 81 Mo. App. 360; Manchaca *v.* Field, 62 Tex. 135.

87. Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Seals *v.* Robinson, 75 Ala. 363; Warren *v.* Gabriel, 51 Ala. 235; Little Rock Bank *v.* Frank, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65. And see, generally. FRAUD.

88. *Arkansas.*— Hazen *v.* Henry, 6 Ark. 86.

California.— Case *v.* Case, 17 Cal. 598.

Illinois.— Russell *v.* Baptist Theological Union, 73 Ill. 337.

Louisiana.— Greenwood *v.* Lowe, 7 La. Ann. 197.

Maine.— Baxter *v.* Ellis, 57 Me. 178.

Maryland.— Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060.

Minnesota.— Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568.

Missouri.— State *v.* Hannibal, etc., R. Co., 113 Mo. 297, 21 S. W. 14.

New York.— Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295 [*affirming* 6 N. Y. Suppl. 336]; People *v.* Minck, 21 N. Y. 539.

89. Sheffield *v.* Balmer, 52 Mo. 474, 14 Am. Rep. 430.

90. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430; Luttrell *v.* State, 40 Tex. Cr. 651, 51 S. W. 930.

91. *Arkansas.*— Farmers' Sav., etc., Assoc. *v.* Ferguson, 69 Ark. 352, 63 S. W. 797, presumption that corporation complied with its by-laws.

Georgia.— White *v.* Barlow, 72 Ga. 887, presumption that in acquiring land by eminent domain a corporation pursued the mode prescribed in its charter.

Illinois.— J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106; Shendorf *v.* Gorman, 86 Ill. App. 276.

Louisiana.— New Orleans, etc., R. Co. *v.* Lea, 12 La. Ann. 388, presumption that legal notice of a corporation meeting was given to its stock-holders.

Maine.— McClinch *v.* Sturgis, 72 Me. 288; Sweetser *v.* Boston, etc., R. Co., 66 Me. 583.

New York.— Hartwell *v.* Root, 19 Johns. 345, 10 Am. Dec. 232.

Pennsylvania.—Horan *v.* Weiler, 41 Pa. St. 470.

Tennessee.— Singer Mfg. Co. *v.* Jenkins, (Ch. App. 1900) 59 S. W. 660.

Washington.— Hays *v.* Hill, 23 Wash. 730, 63 Pac. 576.

Wisconsin.— Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372, presumption that property possessed by a corporation was acquired by it *intra vires*. See also CORPORATIONS, 10 Cyc. 1155.

92. Friend *v.* Smith Gin Co., 59 Ark. 86, 26 S. W. 374 (presumption that foreign corporation did not violate the law by doing business without authority; consequently presumed that contract with it was executed in another state); Korn *v.* Schedler, 11 Daly (N. Y.) 234.

93. *California.*— Fisher *v.* McInerney, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

Illinois.— Diefenthaler *v.* Hall, 96 Ill. App. 639.

Iowa.— *In re* Edwards, 58 Iowa 431, 10 N. W. 793; Campbell *v.* Polk County, 3 Iowa 467.

Louisiana.— Selby *v.* Bass, 19 La. 499.

Missouri.— Osborn *v.* Weldon, 146 Mo. 185, 47 S. W. 936; Hamilton *v.* Hannibal, etc., R. Co., 113 Mo. 297, 21 S. W. 14.

New York.— Green *v.* Benham, 57 N. Y. App. Div. 9, 68 N. Y. Suppl. 248.

Oregon.— McEwen *v.* Portland, 1 Oreg. 300.

Tennessee.— Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

Wisconsin.—Muster *v.* Chicago, etc., R. Co., 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141.

England.— Conry *v.* Caulfield, 2 Ball & B. 255; Middleton *v.* Barned, 4 Exch. 241, 18 L. J. Exch. 433; Croft *v.* Rickmansworth Highway Bd., 57 L. J. Ch. 589; *Re* Postlethwaite, 53 J. P. 357, 60 L. T. Rep. N. S. 514, 37 Wkly. Rep. 200.

administration that he who claims the existence of illegality must prove it.[94] Although the exact order in which acts took place may be shown if required by the interests of justice,[95] it will be assumed in the absence of evidence to the contrary that the order in which acts are done is that which is essential to their legal operation as intended.[96] In accordance with this principle material alterations in written instruments *inter vivos* are assumed to have been made before execution;[97] while, in case of a will, alteration after execution, being natural and not illegal, is assumed to have taken place.[98]

f. Knowledge of Law. All persons are presumed to know the general public laws[99] of the country where they reside or do business,[1] as well as the legal meaning of terms employed in establishing legal relations.[2] But it is said that they are not presumed to know how the courts will construe the law.[3] Since there is no inference of fact that law is known,[4] the presumption means that ignorance of law is not an excuse for its violation.[5]

94. Probative force.—It has been suggested, although rarely, that such a "presumption" is more than a principle of administration and has some probative force. Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532; James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53.

95. Knowlton *v.* Culver, 2 Pinn. (Wis.) 243, 1 Chandl. (Wis.) 214, 52 Am. Dec. 156.

96. Fitzgerald *v.* Barker, 85 Mo. 13; Hughes *v.* Debnam, 53 N. C. 127; Cleavinger *v.* Reimer, 3 Watts & S. (Pa.) 486; Knowlton *v.* Culver, 2 Pinn. (Wis.) 243, 1 Chandl. (Wis.) 214, 52 Am. Dec. 156.

Validity of a written instrument is presumed. Graham *v.* O'Fallon, 4 Mo. 601; Talbot *v.* Talbot, 23 N. Y. 17; Wing *v.* Cooper, 37 Vt. 169; *In re* Sandilands, L. R. 6 C. P. 411, 40 L. J. C. P. 201, 24 L. T. Rep. N. S. 273, 19 Wkly. Rep. 641; Marine Invest. Co. *v.* Haviside, L. R. 5 H. L. 624, 42 L. J. Ch. 173; Grellier *v.* Neale, Peake 146, 3 Rev. Rep. 669; Bailey *v.* Frowan, 19 Wkly. Rep. 511; Clarke *v.* Clarke, 5 L. R. Ir. 47.

97. See ALTERATIONS OF INSTRUMENTS, 2 Cyc. 240.

98. See, generally, WILLS.

99. *District of Columbia.*— Strong *v.* District of Columbia, 1 Mackey 265.

Georgia.— Butler *v.* Livingston, 15 Ga. 565.

Indiana.— Platt *v.* Scott, 6 Blackf. 389, 39 Am. Dec. 436.

Michigan.— Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512.

Mississippi.— Whitton *v.* State, 37 Miss. 379.

New York.— New York Cent. Ins. Co. *v.* Kelsey, 13 How. Pr. 535.

North Carolina.— Hart *v.* Roper, 41 N. C. 349, 51 Am. Dec. 425.

Tennessee.— King *v.* Doolittle, 1 Head 77; Boyers *v.* Pratt, 1 Humphr. 90.

England.— Horne *v.* Barton, 8 De G. M. & G. 587, 2 Jur. N. S. 1032, 26 L. J. Ch. 225, 4 Wkly. Rep. 821, 57 Eng. Ch. 454.

See 20 Cent. Dig. tit. "Evidence," § 85.

Special laws or by-laws.— Special or private laws are not presumed to be generally known. But members of a municipal corporation are presumed to know its by-laws and ordinances (Galbreath *v.* Moberly, 80 Mo. 484; Palmyra *v.* Morton, 25 Mo. 593); and the general postal regulations are known to a post-office employee (East Tennessee, etc., R. Co. *v.* White, 15 Lea (Tenn.) 340); while no one is bound to know the by-laws of an academy (Boyers *v.* Pratt, 1 Humphr. (Tenn.) 90).

1. Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205. But see Stedman *v.* Davis, 93 N. Y. 32.

Laws of sister state.— See Keystone Driller Co. *v.* San Francisco Super. Ct., 138 Cal. 738, 72 Pac. 398, holding that the stock-holders of a corporation organized in one state to do business in another must be presumed to have known the latter's laws, particularly where they were resident therein.

2. People's Bank *v.* Hansbrough, 89 Mo. App. 252, bank cashier presumed to know the meaning of the terms "indorsers" and "makers" of promissory notes.

3. Brent *v.* State, 43 Ala. 297, not presumed to know that a particular special act would be held unconstitutional. See also Miller *v.* Proctor, 20 Ohio St. 442, a recondite rule of law.

Foreign laws, except under the conditions stated in the text, are not presumed to be known. King *v.* Doolittle, 1 Head (Tenn.) 77.

4. *Alabama.*— Brent *v.* State, 43 Ala. 297.

California.— Rued *v.* Cooper, 119 Cal. 463, 51 Pac. 704.

Georgia.— Ryan *v.* State, 104 Ga. 78, 30 S. E. 678.

Michigan.— Black *v.* Ward, 27 Mich. 191, 15 Am. Rep. 162; People *v.* Rix, 6 Mich. 144.

New Jersey.— State *v.* Cutter, 36 N. J. L. 125.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. St. 519, 6 Atl. 545.

Texas.— Morrill *v.* Graham, 27 Tex. 646.

United States.— Marsh *v.* Whitmore, 21 Wall. 178, 22 L. ed. 482.

England.— Reg. *v.* Tewkesbury, L. R. 3 Q. B. 629, 9 B. & S. 683, 37 L. J. Q. B. 288, 18 L. T. Rep. N. S. 851, 16 Wkly. Rep. 1200; Martindale *v.* Falkner, 2 C. B. 706, 2 D. & L. 600, 10 Jur. 161, 15 L. J. C. P. 91, 52 E. C. L. 706; Jones *v.* Randall, 1 Cowp. 17.

See 20 Cent. Dig. tit. "Evidence," § 85.

5. *Indiana.*— Winehart *v.* State, 6 Ind. 30.

Maryland.—Grumbine *v.* State, 60 Md. 355.

g. As to Law of Sister State or Foreign Country. The principles of administration which a court employs when called upon to decide a point according to the law of a foreign state or country, of which no evidence is furnished, are commonly stated in the phraseology of presumptions of law. In the entire absence of direct or circumstantial evidence[6] or of judicial cognizance[7] the common law, including equity,[8] in a sister state[9] or a territory,[10] is presumed to be the same as the common law of the forum, especially where such state has been part of the sovereignty of the forum,[11] and has adopted a similar system of jurisprudence,[12] unless such an assumption of similarity would impose a penalty,[13] or work a forfeiture.[14] Except in relation to countries like Turkey, which have essentially different institutions,[15] the same presumption of similarity is extended to foreign countries.[16] Certain authorities hold that the same presumption of uniformity may be indulged with respect to the statute law of the forum and that of a sister state or territory,[17] or as between colonial provinces of the same

Massachusetts.—Com. *v.* Emmons, 98 Mass. 6; Com. *v.* Bagley, 7 Pick. 279.

United States.— U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200.

England.— Reg. *v.* Coote, L. R. 4 P. C. 599, 42 L. J. M. C. 114, 29 L. T. Rep. N. S. 111, 9 Moore P. C. N. S. 463, 21 Wkly. Rep. 553, 14 Eng. Reprint 587; Montriou *v.* Jefferys, 2 C. & P. 113, R. & M. 317, 12 E. C. L. 479.

Canada.— Reg. *v.* Mailloux, 16 N. Brunsw. 493.

See 20 Cent. Dig. tit. "Evidence," § 85.

6. Where there is any evidence on the point the question becomes one of fact. Ufford *v.* Spaulding, 156 Mass. 65, 30 N. E. 360.

7. Judicial cognizance of foreign law see *supra*, II, C.

8. Equity doctrine.— "Where nothing to the contrary appears, it will be presumed that the equity doctrine of a sister state is the same as that of the former where the courts of both states have an equity jurisdiction." Johnston *v.* Gawtry, 83 Mo. 339, 342, per Norton, J.

9. See COMMON LAW, 8 Cyc. 387.

10. *In re* Hess, 5 Kan. App. 882, 48 Pac. 596; Keagy *v.* Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811.

11. State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699.

12. Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

13. Louisiana, etc., R. Co. *v.* Phelps, 70 Ark. 17, 65 S. W. 709; Atchison, etc., R. Co. *v.* Betts, 10 Colo. 431, 15 Pac. 821; Bird *v.* Olmstead, (Tenn. Ch. App. 1899) 53 S. W. 978; Tempel *v.* Dodge, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222; Houston, etc., R. Co. *v.* Baker, 57 Tex. 419; Porcheler *v.* Bronson, 50 Tex. 555.

14. *Arkansas.*— Grider *v.* Driver, 46 Ark. 50.

California.— Forbes *v.* Scannell, 13 Cal. 242.

Illinois.— Smith *v.* Whitaker, 23 Ill. 367.

Iowa.— Fred Miller Brewing Co. *v.* De France, 90 Iowa 395, 57 N. W. 959.

Kentucky.— Crozier *v.* Bryant, 4 Bibb 174.

Michigan.— Worthington *v.* Hanna, 23 Mich. 530.

New York.— Harris *v.* White, 81 N. Y. 532; Cutler *v.* Wright, 22 N. Y. 472; Sullivan *v.* Babcock, 63 How. Pr. 120.

Wisconsin.— Hull *v.* Augustine, 23 Wis. 383.

See 20 Cent. Dig. tit. "Evidence," § 101.

Contra.—Leake *v.* Bergen, 27 N. J. Eq. 360; McCraney *v.* Alden, 46 Barb. (N. Y.) 272.

No assumption will be made regarding the law of a foreign country which would avoid a transaction. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Smith *v.* Whitaker, 23 Ill. 367.

15. Aslanian *v.* Dostumian, 174 Mass. 328, 54 N. E. 845, 75 Am. St. Rep. 348, 47 L. R. A. 495.

16. Mittenthal *v.* Mascagni, 183 Mass. 19, 66 N. E. 425, 97 Am. St. Rep. 404, 60 L. R. A. 812; Savage *v.* O'Neil, 44 N. Y. 298; Stokes *v.* Macken, 62 Barb. (N. Y.) 145; Townsend *v.* Van Buskirk, 33 Misc. (N. Y.) 287, 68 N. Y. Suppl. 512; Mackey *v.* Mexican Cent. R. Co., 78 N. Y. Suppl. 966; State *v.* Richmond, etc., R. Co., 72 N. C. 634; Daniel *v.* Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884. See also Kennebrew *v.* Southern Automatic Electric Shock Mach. Co., 106 Ala. 377, 17 So. 545; Norris *v.* Harris, 15 Cal. 226.

Recognition of foreign laws in the forum. — In the absence of any positive rule affirming or denying the operation of foreign laws, courts will presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interest. State *v.* Richmond, etc., R. Co., 72 N. C. 634.

17. *California.*—*In re* Harrington, 140 Cal. 244, 73 Pac. 1000, 140 Cal. 294, 74 Pac. 136; Bovard *v.* Dickenson, 131 Cal. 162, 63 Pac. 162; Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

District of Columbia.— Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. 300.

Iowa.— McMillan *v.* American Express Co., 123 Iowa 236, 98 N. W. 629; Barringer *v.* Ryder, 119 Iowa 121, 93 N. W. 56; Bresser *v.* Saarman, 112 Iowa 720, 84 N. W. 920; Tolman *v.* Janson, 106 Iowa 455, 76 N. W. 732; Sieverts *v.* National Benev. Assoc., 96 Iowa 710, 64 N. W. 671; Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

Kansas.— Mutual Home, etc., Assoc. *v.*

nation,[18] and that it has even been assumed that the same construction is applicable to these statutes.[19] Others hold that there is no such presumption of similarity of statute laws,[20] particularly where the change from the common law is radical,[21] or the assumption of a similar statute in the foreign jurisdiction would work a forfeiture.[22] Where the law of the forum is statutory and the assumption of similarity is not made, or the foreign state is under the common law and the courts of the forum are not,[23] or where an American state and a foreign country[24] or two American states are under the common law it will be presumed either: (1) That the provision of law in the foreign state is that of the general common law,[25] includ-

Worz, 67 Kan. 506, 73 Pac. 116; Poll *v.* Hicks, 67 Kan. 191, 72 Pac. 847; Woolacott *v.* Case, 63 Kan. 35, 64 Pac. 965; Scott *v.* Beard, 5 Kan. App. 560, 47 Pac. 986.

Kentucky.— Chesapeake, etc., R. Co. *v.* Venable, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427.

Louisiana.— Sandidge *v.* Hunt, 40 La. Ann. 766, 5 So. 55.

Nebraska.—Staunchfield *v.* Jeutter, (1903) 96 N. W. 642; People's Bldg., etc., Assoc. *v.* Backus, (1902) 89 N. W. 315; Fisher *v.* Donovan, 57 Nebr. 361, 77 N. W. 778, 44 L. R. A. 383; Welton *v.* Atkinson, 55 Nebr. 674, 76 N. W. 473, 70 Am. St. Rep. 416.

New Jersey.— Dittman *v.* Distilling Co. of America, 64 N. J. Eq. 537, 54 Atl. 570.

Oklahoma.—Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

Pennsylvania.— Peter Adams Paper Co. *v.* Cassard, 206 Pa. St. 179, 55 Atl. 949.

Tennessee.— Pennsylvania R. Co. *v.* Naive, (Sup. 1904) 79 S. W. 124; Bagwell *v.* McTighe, 85 Tenn. 616, 4 S. W. 46.

Texas.— Blethen *v.* Bonner, 93 Tex. 141, 53 S. W. 1016; Caledonia Ins. Co. *v.* Wenar, (Sup. 1896) 34 S. W. 385; Texarkana, etc., R. Co. *v.* Gray, (Civ. App. 1901) 65 S. W. 85.

Utah.— Dignan *v.* Nelson, 26 Utah 186, 72 Pac. 936; American Oak Leather Co. *v.* Union Bank, 9 Utah 87, 33 Pac. 246 [*disapproving* Rudy *v.* Rio Grande Western R. Co., 8 Utah 165, 30 Pac. 366].

Washington.— Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

Wisconsin.— Richmond Second Nat. Bank *v.* Smith, 118 Wis. 18, 94 N. W. 664; MacCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707.

See 20 Cent. Dig. tit. "Evidence," § 101.

18. Langdon *v.* Robertson, 13 Ont. 497.

19. Howe *v.* Ballard, (Wis. 1902) 89 N. W. 136.

20. *Alabama.*— Downs *v.* Minchew, 30 Ala. 86.

Georgia.— Selma, etc., R. Co. *v.* Lacy, 43 Ga. 461. But see Wells *v.* Gress, 118 Ga. 566, 45 S. E. 418.

Illinois.— Miller *v.* Wilson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186; Jo Daviess County *v.* Staples, 108 Ill. App. 539.

Indiana.— Baltimore, etc., R. Co. *v.* Hollenbeck, 161 Ind. 452, 69 N. E. 136; Baltimore, etc., R. Co. *v.* Adams, 159 Ind. 688, 66 N. E. 43, 60 L. R. A. 396. *Compare* Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581.

Maryland.— Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; State *v.* Pittsburgh, etc., R. Co., 45 Md. 41.

Massachusetts.—Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389, 25 L. R. A. 806; Murphy *v.* Collins, 121 Mass. 6.

Michigan.— Gordon *v.* Ward, 16 Mich. 360.

Minnesota.— Myers *v.* Chicago, etc., R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579 [*criticizing* Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118; Cooper *v.* Reaney, 4 Minn. 528]. See, however, Mowry *v.* McQueen, 80 Minn. 385, 83 N. W. 348, holding that statutes of limitations in other states will be presumed to be the same as in Minnesota.

Missouri.— State *v.* Clark, 178 Mo. 20, 76 S. W. 1007; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894; Rohan Bros. Boiler Mfg. Co. *v.* Richmond, 14 Mo. App. 594.

New Hampshire.— Leach *v.* Pillsbury, 15 N. H. 137.

New York.— Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Harris *v.* White, 81 N. Y. 532; Bradley *v.* Mutual Ben. L. Ins. Co., 3 Lans. 341; Wright *v.* Delafield, 23 Barb. 498.

North Carolina.— Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835.

South Carolina.— Rosemand *v.* Southern R. Co., 66 S. C. 91, 44 S. E. 574.

South Dakota.— Meuer *v.* Chicago, etc., R. Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774.

See 20 Cent. Dig. tit. "Evidence," § 101.

21. Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33.

22. Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516, 61 S. W. 617; Zeltner *v.* Irwin, 25 N. Y. App. Div. 228, 49 N. Y. Suppl. 337; Allen-West Commission Co. *v.* Carroll, 104 Tenn. 489, 58 S. W. 314; Hull *v.* Augustine, 23 Wis. 383.

As to a constitutional prohibition the rule is the same. Fidelity Ins., etc., Co. *v.* Nelson, 30 Wash. 340, 70 Pac. 961.

23. Martin *v.* Boler, 13 La. Ann. 369.

24. Dempster *v.* Stephen, 63 Ill. App. 126.

25. *Alabama.*— Louisville, etc., R. Co. *v.* Williams, 113 Ala. 402, 21 So. 938; Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45.

Colorado.— Wells *v.* Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809.

District of Columbia.— Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. 300.

ing the law merchant,[26] and such part of the statutory law of England as existed before the separation and was generally adopted by the American states,[27] and further that the common law is the same in the several states;[28] or (2) that the provision of law in the foreign state is the same as the common law of the forum.[29] Between two states of civil law jurisprudence the presumption is that the provision in question is that of the civil law.[30] Where a similarity of law has been shown[31] or, as in case of a former union of territory,[32] is recognized or assumed to exist,[33] or where a particular rule, statutory[34] or unwritten,[35] has been shown to be part of the law of a foreign country[36] or sister state,[37] such similarity or provision of law will be assumed to continue to exist; and the repeal of such a statute by the legislature of the forum carries no implication of the repeal of a similar statute in the foreign state.[38] Where a special act of another state is shown, the presumption in favor of the constitutionality of legislative acts will prevent a presumption that the constitution of the other state contains a prohi-

Georgia.—Charleston, etc., R. Co. *v.* Miller, 113 Ga. 15, 38 S. E. 338.

Illinois.— Schlee *v.* Guckenheimer, 179 Ill. 593, 54 N. E. 302.

Indiana.— Baltimore, etc., R. Co. *v.* Adams, 159 Ind. 688, 66 N. E. 43, 60 L. R. A. 396; Baltimore, etc., R. Co. *v.* Jones, 158 Ind. 87, 62 N. E. 994; Gates *v.* Newman, 18 Ind. App. 392, 46 N. E. 654.

Kentucky.— Chesapeake, etc., R. *v.* Hanmer, 66 S. W. 375, 23 Ky. L. Rep. 1846.

Michigan.— Schroeder *v.* Boyce, 127 Mich. 33, 86 N. W. 387.

Minnesota.— Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458.

Missouri.— Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516, 61 S. W. 617; Gaylord *v.* Duryea, 95 Mo. App. 574, 69 S. W. 607; Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111; Davis *v.* Cohn, 85 Mo. App. 530; Searles *v.* Lum, 81 Mo. App. 607.

Nebraska.— East Omaha St. R. Co. *v.* Godola, 50 Nebr. 906, 70 N. W. 491.

New York.— Casola *v.* Kugelman, 33 N. Y. App. Div. 428, 54 N. Y. Suppl. 89; Goodman *v.* Mercantile Credit Guarantee Co., 17 N. Y. App. Div. 474, 45 N. Y. Suppl. 508; Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. 583, 54 N. Y. Suppl. 116.

North Carolina.— Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876; Terry *v.* Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663; Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835.

See 20 Cent. Dig. tit. "Evidence," § 101.

Avoiding obligation.— The assumption has been made even with the result of avoiding an obligation in part. Terry *v.* Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663.

26. Reed *v.* Wilson, 41 N. J. L. 29; Low *v.* Learned, 13 Misc. (N. Y.) 150, 34 N. Y. Suppl. 68; Montague *v.* The Henry B. Hyde, 82 Fed. 681.

27. Bradley *v.* Peabody Coal Co., 99 Ill. App. 427.

28. Engstrand *v.* Kleffman, 86 Minn. 403, 90 N. W. 1054; Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458; State *v.* Shattuck, 69 Vt. 403, 38 Atl. 81, 60 Am. St. Rep. 936, 40 L. R. A. 428.

29. Scaling *v.* Knollin, 94 Ill. App. 443; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Tllexan *v.* Wilson, 43 Me. 186; Matter of Hamilton, 76 Hun (N. Y.) 200, 27 N. Y. Suppl. 813; Holmes *v.* Broughton, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536.

30. Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356, 46 C. C. A. 334; Mexican Cent. R. Co. *v.* Olmstead, (Tex. Civ. App. 1900) 60 S. W. 267 [*citing* Mexican Nat. R. Co. *v.* Jackson, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276; Armendiaz *v.* De la Serna, 40 Tex. 291].

31. Bush *v.* Garner, 73 Ala. 162; *In re* Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620.

32. Stokes *v.* Macken, 62 Barb. (N. Y.) 145.

33. Graham *v.* Williams, 21 La. Ann. 594.

34. *Georgia.*— Seaboard Air Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494.

Illinois.— Miami Powder Co. *v.* Hotchkiss, 17 Ill. App. 622.

Indiana.— Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229.

Minnesota.— State *v.* Armstrong, 4 Minn. 335.

North Carolina.— State *v.* Cheek, 35 N. C. 114.

Vermont.— State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754.

35. *In re* Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620; Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

36. *In re* Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620. See also Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286.

37. *Georgia.*— Seaboard Air Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494.

Kentucky.— King *v.* Mims, 7 Dana 267.

Massachusetts.— Raynham *v.* Canton, 3 Pick. 293.

Michigan.— People *v.* Calder, 30 Mich. 85.

Minnesota.— State *v.* Armstrong, 4 Minn. 335.

Texas.— Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

38. *Ex p.* Lafonta, 2 Rob. (La.) 495.

bition against such acts, although there should be such a prohibition in the constitution of the forum.[39]

D. Probative Force and Conflict of Presumptions. Since only relevant facts have evidentiary value, and neither an inference from a fact — often erroneously spoken of as an argument from a fact[40] — nor the assumption that it is *prima facie* correct can in itself possess probative weight,[41] it follows: (1) That one inference cannot be predicated upon another;[42] and (2) that when the function of a presumption of law sustaining the burden of evidence is ended by the introduction of rebutting testimony the presumption of law disappears,[43] leaving in evidence the basic fact, which still retains its probative force and is capable of being weighed against other facts.[44] To balance a fact or the legitimate inferences from it with an assumption, maxim, or other rule of law is logically impossible.[45] Where presumptions are said to conflict it will usually be found that one of them at least is without basis of fact, and is spoken of as a presumption only upon the assumption that because a presumption of law sustains the burden of evidence a ruling as to the burden of evidence states a true presumption of law. Thus in civil cases presumptions against fraud[46] or illegality,[47] or in favor of innocence,[48] require proof from him who alleges improper conduct. When in discharging this burden he produces less than a *prima facie* inference of fact; for example, when it is sought to prove fraud by the presumption of payment arising from the possession of a negotiable instrument by a person liable on it,[49] or to establish bigamy by the inference of marriage from reputation and cohabitation or the continuance of a former marriage relation,[50] it is commonly declared that the presumption of proper conduct is not overcome by the presumptions mentioned.[51] In reality the ruling is upon the logical value of an inference from certain facts in satisfying a legal requirement as to the *quantum* of evidence.

39. Fidelity Ins., etc., Co. *v.* Nelson, 30 Wash. 340, 70 Pac. 961, special act of incorporation.

40. Inferences of fact as mere arguments see *supra*, V, A, 1.

41. *Colorado.*—Union Pac. R. Co. *v.* Bullis, 6 Colo. App. 64, 39 Pac. 897.

District of Columbia.— Davis *v.* U. S., 18 App. Cas. 468.

Illinois.— Morris *v.* Indianapolis, etc., R. Co., 10 Ill. App. 389.

Kansas.— Chicago, etc., R. Co. *v.* Rhoades, 64 Kan. 553, 68 Pac. 58.

Missouri.— Moore *v.* Renick, 95 Mo. App. 202, 68 S. W. 936; Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367.

New Hampshire.— Lisbon *v.* Lyman, 49 N. H. 553.

Pennsylvania.— Douglass *v.* Mitchell, 35 Pa. St. 440.

United States.— U. S. *v.* Ross, 92 U. S. 281, 23 L. ed. 707.

Compare Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90, sanity.

42. See *supra*, V, A, 2.

43. Diefenthaler *v.* Hall, 96 Ill. App. 639; Dugas *v.* Estiletts, 5 La. Ann. 559; Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121; U. S. *v.* Wiggins, 14 Pet. (U. S.) 334, 10 L. ed. 481.

44. Bates *v.* Prickett, 5 Ind. 22, 61 Am. Dec. 73; Moran *v.* Abbott, 26 N. Y. App. Div. 570, 50 N. Y. Suppl. 337; Crane *v.* Morris, 6 Pet. (U. S.) 598, 8 L. ed. 514.

45. See Roots *v.* Kilbreth, 10 Ohio Dec. (Reprint) 20, 18 Cinc. L. Bul. 58; Lisbon *v.* Lyman, 49 N. H. 553, 563, in which latter case the court said: "A legal presumption is a rule of law — a reasonable principle, or an arbitrary dogma — declared by the court. There may be a difficulty in weighing such a rule of law as evidence of a fact, or in weighing law on one side, against fact on the other. And if the weight of a rule of law as evidence of a fact, or as counterbalancing the evidence of a fact, can be comprehended, there are objections to such a use of it."

46. See *supra*, V, C, 3, d.

47. See *supra*, V, C, 3, e.

48. See *supra*, V, C, 3, b.

49. Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

50. *Arkansas.*— Sharp *v.* Johnson, 22 Ark. 79, 89.

California.— Case *v.* Case, 17 Cal. 598.

Illinois.— Stein *v.* Stein, 86 Ill. App. 526.

Maryland.— Jones *v.* Jones, 45 Md. 144.

Mississippi.— Hull *v.* Rawls, 27 Miss. 471.

Missouri.— Klein *v.* Laudman, 29 Mo. 259; Waddingham *v.* Waddingham, 21 Mo. App. 609.

New York.— Clayton *v.* Wardell, 4 N. Y. 230; Nesbit *v.* Nesbit, 3 Dem. Surr. 329.

Pennsylvania.— Sensor *v.* Bower, 1 Penr. & W. 450; Linden *v.* Kelly, 6 Wkly. Notes Cas. 95.

Texas.— Carroll *v.* Carroll, 20 Tex. 731; Lockhart *v.* White, 18 Tex. 102.

Vermont.— Greensborough *v.* Underhill, 12 Vt. 604.

England.— Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480.

Canada.—Wright *v.* Skinner, 17 U. C. C. P. 317.

51. See Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

So when the prosecution in a criminal case produces insufficient evidence to establish an essential fact beyond reasonable doubt, as where it is sought to prove that a bank officer knew of an embezzlement by evidence that books of account disclosing the fact were in his custody,[52] or claims that bigamy has been committed because the spouse of a former marriage, not being shown to have died, is inferred to be alive,[53] or asks the jury to infer that an impersonated elector was duly qualified to vote by showing that he was duly registered,[54] it is said that the presumption of innocence is not overcome; *per contra* where the prosecution makes out its case on a particular point, as by the exhibition of a public regularity,[55] as in the post-office department,[56] or relies on a statutory presumption of death arising from absence for a stated period,[57] it is likewise said that the presumption of innocence is displaced by a conflicting presumption; whereas the real ruling in both cases is, not that there is a conflict of presumptions, but that the prosecution has or has not presented inferences of fact which sustain the burden of evidence.

VI. FORMER EVIDENCE.*

A. In General — 1. Rule Stated. Facts may be established by evidence thereof given on a former trial, provided the court is satisfied: (1) That the party against whom the evidence is offered, or his privy, was a party on the former trial;[58] (2) that the issue is substantially the same in the two cases;[59] (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness;[60] and (4) that a sufficient reason is shown why the original witness is not produced.[61] The first three of these conditions render the reported evidence relevant; the fourth is necessary to justify the court in receiving it. Under these conditions the evidence is admissible from necessity,[62] even if there is other evidence to the same effect;[63] and the admission of the evidence in criminal cases does not contravene a code provision that on a new trial in such cases "all the testimony must be produced anew."[64] When the conditions of relevancy and necessity exist it is no objection that the evidence could have been offered at a former retrial and was not;[65] that the original suit was in a sense a mistrial;[66] for example that it was abandoned,[67] dismissed,[68] terminated by nonsuit,[69] or resulted in a disagreement of the jury;[70] that the court before which the former testimony was taken had no jurisdiction of the subject-matter;[71]

52. People *v.* Blackman, 127 Cal. 248, 59 Pac. 573.

53. People *v.* Blackman, 127 Cal. 248, 59 Pac. 573.

54. State *v.* Shelley, 166 Mo. 616, 66 S. W. 430.

55. Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

56. Dunlap *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

57. Gibson *v.* State, 38 Miss. 313.

58. See *infra*, VI, B.

59. See *infra*, VI, C.

60. See *infra*, VI, E.

61. See *infra*, VI, D.

62. "The admissibility of this species of evidence depends upon the necessity of the case,' . . . We receive it because it comes up to one of the demands of the law; it is the best evidence which can be produced." U. S. *v.* Macomb, 26 Fed. Cas. No. 15,702, 5 McLean 286, 292, per Drummond, J.

Value of the rule.— The supreme court of Ohio speaks of this rule as "ancient and useful." Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467. The usefulness, however, is more marked than the antiquity, a fact explained by the circumstance that the granting of new trials is essentially a modern practice. Young *v.* Dearborn, 22 N. H. 372. See also State *v.* McO'Blenis, 24 Mo. 402, 69 Am. Dec. 435.

63. Thurmond *v.* Trammell, 28 Tex. 371, 91 Am. Dec. 321; Wright *v.* Doe, 1 A. & E. 3, 28 E. C. L. 28.

64. People *v.* Devine, 46 Cal. 45.

65. Thurmond *v.* Trammell, 28 Tex. 371, 91 Am. Dec. 321.

66. Taft *v.* Little, 78 N. Y. App. Div. 74, 79 N. Y. Suppl. 507, former trial before a referee, who died after the witness' testimony was taken, but before submission of the cause.

67. McTighe *v.* Herman, 42 Ark. 285.

68. Bowie *v.* Findly, 55 Ga. 604; Saunders' Succession, 37 La. Ann. 769.

69. Hutchings *v.* Corgan, 59 Ill. 70; Hocker *v.* Jamison, 2 Watts & S. (Pa.) 438.

70. Lawson *v.* Jones, 1 N. Y. Civ. Proc. 247, 61 How. Pr. (N. Y.) 424.

71. Jerome *v.* Bohm, 21 Colo. 322, 40 Pac. 570, where, however, the court had jurisdic-

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

in case of a deposition, that the witness might have been alive at the former trial and so the deposition would have been inadmissible;[72] or that the testimony was in the witness' favor.[73] The rule of admissibility applies only to evidence actually given,[74] and not to agreements concerning it.[75] The former evidence of a witness is open to any objection which would have excluded the original evidence.[76] The reported evidence originally given in favor of plaintiff may be used by defendant,[77] and *vice versa*.[78] Where, however, a witness is examined originally by one party at a time when he would have been disqualified by interest from testifying for the other the latter cannot at a subsequent trial use the evidence so given.[79]

2. PRELIMINARY INVESTIGATIONS. Very broad latitude is given to the phrase "former trial" in favor of the subsequent admissibility of evidence adduced thereon, and the main considerations are whether the issues in the earlier and later proceedings are the same and whether the party against whom the evidence is offered had the right of cross-examination.[80] Although the former action is commonly a prior trial of the same cause,[81] the evidence of a witness otherwise competent is admissible if given at a preliminary hearing in a civil[82] or

tion of the parties and power to administer oaths. *Contra*, where the court had no jurisdiction of the subject-matter, and defendant objected to the jurisdiction, although he afterward cross-examined the witness. Deering *v.* Schreyer, 88 N. Y. App. Div. 457, 85 N. Y. Suppl. 275.

72. Llanover *v.* Homfray, 19 Ch. D. 224.

73. Earl *v.* Tupper, 45 Vt. 275.

74. See Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643 [*affirming* 78 N. Y. App. Div. 633, 79 N. Y. Suppl. 536], holding that evidence of statements made by a witness, since deceased, at the taking of her deposition for use in an action for an accounting, which were stricken out and became no part of the evidence before the referee, were not admissible as evidence taken at a former trial.

That a deceased witness merely offered to testify to certain facts on a former trial cannot be shown. Lane *v.* De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437.

Docket entries of a committing magistrate who conducted the preliminary examination of an accused to the effect: "And the defendant was on this day given a hearing on said charge, and the court being satisfied that there was probable cause to hold the defendant, and believing the presumption of his guilt to be great, he holds the defendant to the circuit court without bail," were held inadmissible, under any circumstances, on the ultimate trial of such defendant. Kirby *v.* State, (Fla. 1902) 32 So. 836.

75. Hudson *v.* Applegate, 87 Iowa 605, 54 N. W. 462, holding that where a party to prevent a continuance agreed that a certain witness if present would testify as stated in an affidavit filed by the party moving the continuance, such affidavit was not evidence on a subsequent trial after the death of the witness. But see Fortunato *v.* New York, 74 N. Y. App. Div. 441, 77 N. Y. Suppl. 575.

76. Crary *v.* Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110, where the rule is laid down that if a witness originally called by defendant would be disqualified to testify for plaintiff on the ground of interest, his evidence is not after his decease admissible for plaintiff. But whether a party entitled to have objected at the first trial when the objection could have been cured can object for the first time after the decease of the witness is doubtful. Crary *v.* Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110; Petrie *v.* Columbia, etc., R. Co., 29 S. C. 303, 317, 7 S. E. 515.

77. Morgan *v.* Nicholl, L. R. 2 C. P. 117, 12 Jur. N. S. 963, 36 L. J. C. P. 86, 15 L. T. Rep. N. S. 184, 15 Wkly. Rep. 110.

78. Morgan *v.* Nicholl, L. R. 2 C. P. 117, 12 Jur. N. S. 963, 36 L. J. C. P. 86, 15 L. T. Rep. N. S. 184, 15 Wkly. Rep. 110.

79. House *v.* Camp, 32 Ala. 341; Union Bank *v.* Jones, 4 La. Ann. 220; Crary *v.* Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110.

Evidence by deposition is subject to the same rule. George *v.* Fish, 32 N. H. 32, 48.

80. Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331; State *v.* Johnson, 12 Nev. 121; Orr *v.* Hadley, 36 N. H. 575; Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643 [*affirming* 79 N. Y. Suppl. 536]; Jackson *v.* Bailey, 2 Johns. (N. Y.) 17. "It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination." Orr *v.* Hadley, 36 N. H. 575, 580. But the evidence must have been originally taken in a court having jurisdiction of the parties and given under an oath lawfully administered. Jerome *v.* Bohm, 21 Colo. 322, 40 Pac. 570; McAdam *v.* Stilwell, 12 Pa. St. 90. The substance rather than the form is regarded. Technical errors, as impaneling a jury under the wrong statute, although ground for a new trial, do not exclude the evidence. State *v.* Johnson, 12 Nev. 121.

81. Clealand *v.* Huey, 18 Ala. 343; People *v.* Devine, 46 Cal. 45; Orr *v.* Hadley, 36 N. H. 575.

82. Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331; Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627; Lewis *v.* Roulo, 93 Mich. 475, 53 N. W. 622; Young *v.* Sage, 42 Nebr. 37, 60 N. W. 313.

criminal[83] case, provided a reasonable opportunity for cross-examination was afforded.[84]

3. Subordinate Tribunals. Other conditions of relevancy and necessity being present, the evidence is admissible, although it was originally given before a subordinate court;[85] before a judicial board, as commissioners to try land

A hearing for fixing the amount of bail is not such a trial as will make the evidence given thereon competent, unless it amounts to an admission. Jackson *v.* Winchester, 4 Dall. (Pa.) 205, 1 L. ed. 802. *Contra,* Sneed *v.* State, 47 Ark. 180, where the witness was cross-examined on the hearing.

Application to set aside a default is not a preliminary hearing, and evidence then given is not admissible on a later trial. Citizens' State Bank *v.* Adams, 91 Ind. 280.

83. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512; Knight *v.* State, 103 Ala. 48, 16 So. 7; Floyd *v.* State, 82 Ala. 16, 2 So. 683; Roberts *v.* State, 68 Ala. 515; Horton *v.* State, 53 Ala. 488; Davis *v.* State, 17 Ala. 354.

Arkansas.— Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30; Shackelford *v.* State, 33 Ark. 539.

California.— People *v.* Cady, 117 Cal. 10, 48 Pac. 908; People *v.* Sierp, 116 Cal. 249, 48 Pac. 88.

Georgia.— Gavan *v.* Ellsworth, 45 Ga. 283.

Idaho.— Territory *v.* Evans, 2 Ida. (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 646.

Illinois.— Barnett *v.* People, 54 Ill. 325.

Iowa.— State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752.

Kansas.— State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Kentucky.— O'Brien *v.* Com., 6 Bush 563.

Louisiana.— State *v.* Wheat, 111 La. 860, 35 So. 955; State *v.* Banks, 106 La. 480, 31 So. 53; State *v.* Alphonse, 34 La. Ann. 9.

Massachusetts.— Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608.

Michigan.—People *v.* Butler, 111 Mich. 483, 69 N. W. 734; People *v.* Kennedy, 105 Mich. 434, 63 N. W. 405.

Minnesota.— State *v.* George, 60 Minn. 503, 63 N. W. 100.

Mississippi.— Steele *v.* State, 76 Miss. 387, 24 So. 910.

Missouri.— State *v.* Elliott, 90 Mo. 350, 2 S. W. 411; State *v.* Harman, 27 Mo. 120; State *v.* McO'Blenis, 24 Mo. 402, 69 Am. Dec. 435; Garrett *v.* State, 6 Mo. 1.

North Carolina.— State *v.* Melton, 120 N. C. 591, 26 S. E. 933; State *v.* Valentine, 29 N. C. 225.

Pennsylvania.— Com. *v.* Keck, 148 Pa. St. 639, 24 Atl. 161; Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740.

Tennessee.— Wade *v.* State, 7 Baxt. 80.

Texas.— Clements *v.* State, 43 Tex. Cr. 400, 66 S. W. 301; Dunlap *v.* State, 9 Tex. App. 179, 35 Am. Rep. 736; Johnson *v.* State, 1 Tex. App. 333. But see Childers *v.* State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899, where it was held that under the Texas statutes a hearing on habeas corpus was not a hearing before an "examining court."

Vermont.— State *v.* Hooker, 17 Vt. 658.

United States.— U. S. *v.* Macomb, 25 Fed. Cas. No. 15,702, 5 McLean 286.

England.— Reg. *v.* Lee, 4 F. & F. 63; Morley's Case, 6 How. St. Tr. 770. "It was resolved by us all, that in case any of the witnesses which were examined before the coroner, were dead or unable to travel, and oath made thereof, that then the examination of such witnesses, so dead or unable to travel might be read, the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsover." Kelyng p. 55.

See 14 Cent. Dig. tit. "Criminal Law," § 1232.

Depositions given at preliminary hearings, if properly taken, are admissible, when otherwise competent, upon the trial of the indictment itself. Sneed *v.* State, 47 Ark. 180, 1 S. W. 68 (a hearing to fix bail. But see as against the admissibility of evidence given on such a hearing, Jackson *v.* Winchester, 4 Dall. (Pa.) 205, 1 L. ed. 802, a civil case); People *v.* Witty, 138 Cal. 576, 72 Pac. 177; State *v.* McO'Blenis, 24 Mo. 402, 69 Am. Dec. 435; Cline *v.* State, 36 Tex. Cr. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850. But a deposition taken *ex parte* in the absence of defendant is not admissible. State *v.* Campbell, 1 Rich. (S. C.) 124.

Absence of defendant when the testimony was taken does not exclude it, where his counsel was present and could have cross-examined the witness. State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Waiver of preliminary examination does not operate to exclude testimony given thereon. Percy *v.* State, 125 Ala. 52, 27 So. 844.

84. *Alabama.*— Floyd *v.* State, 82 Ala. 16, 2 So. 683.

Louisiana.— State *v.* Harvey, 28 La. Ann. 105.

Pennsylvania.— Com. *v.* Lenonsky, 206 Pa. St. 277, 55 Atl. 977, holding that testimony of an absent witness given at a preliminary examination before a justice was not admissible on the trial of an indictment for murder, where defendant was not represented by counsel at the preliminary examination, and was notified of his right to cross-examine.

South Carolina.— State *v.* Hill, 2 Hill 607, 27 Am. Dec. 406, application for a warrant.

Texas.— Byrd *v.* State, 26 Tex. App. 374, 9 S. W. 759.

Wisconsin.— Pooler *v.* State, 97 Wis. 627, 73 N. W. 336.

See 14 Cent. Dig. tit. "Criminal Law," § 1232.

85. Gannon *v.* Stevens, 13 Kan. 447; Cumberland Coal, etc., Co. *v.* Jefferies, 27 Md. 526.

titles,[86] investigate claims against absconding debtors,[87] or perpetuate the bounds of land;[88] before magistrates as arbitrators;[89] or before referees.[90]

4. Constitutional Right of Accused in Criminal Cases. In criminal cases the admission of testimony given on a former trial does not infringe the constitutional right of the accused to be confronted with the witnesses against him.[91]

B. Identity of Parties — 1. In General. The burden is on the party offering evidence given on a former trial, either in civil[92] or in criminal[93] cases, to show that the parties in the two suits are actually or constructively the same.[94] This rule insures the important result that the party against whom the reported evidence is offered or someone identified with him in legal interest should have had an opportunity of testing the evidence when originally given by a cross-examination under oath,[95] over the entire range of the testimony as delivered in

86. Jackson *v.* Bailey, 2 Johns. (N. Y.) 17.

87. Cox *v.* Pearce, 7 Johns. (N. Y.) 298.

88. Howell *v.* Tilden, 1 Harr. & M. (Md.) 84.

89. Kelly *v.* Connell, 3 Dana (Ky.) 532; Bailey *v.* Woods, 17 N. H. 365; Walbridge *v.* Knipper, 96 Pa. St. 48; New York Union Mut. Ins. Co. *v.* Johnson, 23 Pa. St. 72; Forney *v.* Hallagher, 11 Serg. & R. (Pa.) 203; White *v.* Bisbing, 1 Yeates (Pa.) 400. *Contra*, in a consent arbitration where the arbitrators had no power to administer oaths. Jessup *v.* Cook, 6 N. J. L. 434.

90. Nutt *v.* Thompson, 69 N. C. 548; Zimmerman *v.* Grotenkemper, 6 Ohio Dec. (Reprint) 832, 8 Am. L. Rec. 364; McAdams *v.* Stilwell, 13 Pa. St. 90.

91. See Criminal Law, 12 Cyc. 543.

92. *Alabama.*— Smith *v.* Keyser, 115 Ala. 455, 22 So. 149.

Arkansas.— McTighe *v.* Herman, 42 Ark. 285.

California.— Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61.

Colorado.— Tourtelotte *v.* Brown, 4 Colo. App. 377, 36 Pac. 73.

Georgia.— Hughes *v.* Clark, 67 Ga. 19; Haslam *v.* Campbell, 60 Ga. 650.

Indiana.— Earl *v.* Hurd, 5 Blackf. 248.

Kentucky.— Rucker *v.* Hamilton, 3 Dana 36.

Louisiana.— Stockmeyer *v.* Weidner, 32 La. Ann. 106; Davis *v.* Houren, 6 Rob. 255.

Michigan.— Mason *v.* Kellogg, 38 Mich. 132.

New Hampshire.— Orr *v.* Hadley, 36 N. H. 575; Young *v.* Dearborn, 22 N. H. 372.

New York.— Morehouse *v.* Morehouse, 17 Abb. N. Cas. 407; Lawrence *v.* Hunt, 10 Wend. 80, 25 Am. Dec. 539; Powell *v.* Waters, 17 Johns. 176.

North Carolina.— Harper *v.* Burrow, 28 N. C. 30.

Ohio.— Summons *v.* State, 5 Ohio St. 325.

Pennsylvania.— Wright *v.* Cumpsty, 41 Pa. St. 102; McCully *v.* Barr, 17 Serg. & R. 445.

Tennessee.— Killingsworth *v.* Bradford, 2 Overt. 204.

Texas.— Austin *v.* Dungan, 46 Tex. 236; Ellis *v.* Le Bow, 30 Tex. Civ. App. 449, 71 S. W. 576 [*affirmed* in 96 Tex. 532, 74 S. W. 528].

United States.— Tappan *v.* Beardsley, 10 Wall. 427, 19 L. ed. 974; Fresh *v.* Gilson, 16 Pet. 327, 10 L. ed. 982.

See 20 Cent. Dig. tit. "Evidence," § 2413.

Party in different capacities.—That a party in one case appeared in a personal and in the other in a representative capacity against the same defendant is not material, the objection being "too technical." Smith *v.* Keyser, 115 Ala. 455, 22 So. 149.

The parties need not be the same, nor in privity, where the former statement amounts to an admission. Kutzmeyer *v.* Ennis, 27 N. J. L. 371; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

93. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512; Lucas *v.* State, 96 Ala. 51, 11 So. 210; Pruitt *v.* State, 92 Ala. 41, 9 So. 406; Perry *v.* State, 87 Ala. 30, 6 So. 425.

California.— People *v.* Devine, 46 Cal. 45; People *v.* Murphy, 45 Cal. 137.

Illinois.— Barnett *v.* People, 54 Ill. 325.

Iowa.— State *v.* Porter, 74 Iowa 623, 38 N. W. 514.

Massachusetts.— Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608.

Missouri.— State *v.* Able, 65 Mo. 357.

Nevada.— State *v.* Johnson, 12 Nev. 121.

New York.— People *v.* Mullins, 5 N. Y. App. Div. 172, 39 N. Y. Suppl. 361.

Ohio.— Summons *v.* State, 5 Ohio St. 325.

Texas.— Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; Johnson *v.* State, 1 Tex. App. 333.

Wisconsin.— Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

United States.— U. S. *v.* Macomb, 26 Fed. Cas. No. 15,702, 5 McLean 286; U. S. *v.* Woods, 26 Fed. Cas. No. 15,756, 3 Wash. 440.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1235, 1236.

94. See cases cited in last two notes.

Evidence in a civil not admissible in a criminal case, since the parties are different. Luckie *v.* State, 33 Tex. Cr. 562, 28 S. W. 533.

95. *Alabama.*— Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483.

Georgia.— Hughes *v.* Clark, 67 Ga. 19.

Indiana.— Ephraims *v.* Murdock, 7 Blackf. 10.

Iowa.— Golden *v.* Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257.

Kentucky.— O'Brian *v.* Com., 6 Bush 563.

Louisiana.— *In re* Mason, 9 Rob. 105.

Maryland.— Walsh *v.* McIntire, 68 Md. 402, 13 Atl. 348.

evidence;[96] and where such opportunity is lacking the evidence is incompetent, as its reception "would be contrary to the first principles of justice,"[97] although it is not required that the party against whom the evidence is offered should actually have cross-examined.[98] In proceedings *in rem*, as they are not strictly

Missouri.— Breeden *v.* Feurt, 70 Mo. 624.
Pennsylvania.— Zell *v.* Benjamin, 1 Walk. 113.
South Carolina.—Yancey *v.* Stone, 9 Rich. Eq. 429.
Virginia.— Ritchie *v.* Lyne, 1 Call 489.
England.— Doe *v.* Derby, 1 A. & E. 783, 3 L. J. K. B. 191, 3 N. & M. 782, 28 E. C. L. 363.

See 20 Cent. Dig. tit. "Evidence," §§ 2411, 2412.

In criminal cases it is sufficient if the accused, although not represented by counsel, was present and accorded an adequate opportunity for cross-examination (Reg. *v.* Lee, 4 F. & F. 63; Rex *v.* Smith, R. & R. 309), even if he failed to avail himself of it (State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202).

Depositions are subject to the rule stated in the text. The party against whom they are offered in a subsequent case must have attended to cross-examine, or have had notice which would have enabled him to do so (Atty.-Gen. *v.* Davison, McClel. & Y. 160, 29 Rev. Rep. 774; Steinkeller *v.* Newton, 1 Scott N. R. 148; Fitzgerald *v.* Fitzgerald, 3 Swab. & Tr. 397), although notice by publication in the original suit has been held to give a sufficient opportunity (O'Neill *v.* Brown, 61 Tex. 34). A certain reasonableness has, however, been used in applying this requirement of the right of cross-examination. It has been held in England that upon a deposition before a committing magistrate it is sufficient if a deposition taken in his absence is read over to the prisoner and he is then permitted to cross-examine. Rex *v.* Smith, R. & R. 309. But see Baron Alderson's comments on the case last cited in Reg. *v.* Beeston, 3 C. L. R. 82, 6 Cox C. C. 425, Dears. C. C. 405, 18 Jur. 1058, 24 L. J. M. C. 5, 3 Wkly. Rep. 56.

96. Morley *v.* Castor, 63 N. Y. App. Div. 38, 71 N. Y. Suppl. 363; Noble *v.* McClintock, 6 Watts & S. (Pa.) 58.

If the cross-examination is suspended and never concluded the evidence actually taken is incompetent upon a subsequent trial. Noble *v.* McClintock, 6 Watts & S. (Pa.) 58.

97. Lane *v.* Brainerd, 30 Conn. 565, 579, per Hinman, C. J. See also Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643 [*affirming* 78 N. Y. App. Div. 633, 79 N. Y. Suppl. 536], and the cases cited *supra*, note 95.

It is not sufficient to show that the party against whom the evidence is offered was present either personally or by counsel at the former hearing. It must also affirmatively appear that he was allowed to cross-examine the witness whose evidence is offered. Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331; O'Brian *v.* Com., 6 Bush (Ky.) 563; Rex *v.* Paine, 5 Mod. 163. Where evidence was given for example at an inquest before a coroner's jury, and the record merely set out that "the respective counsel in this case were present," the court, finding itself unable to say that defendant could have cross-examined the witness if so disposed, affirmed the rejection of the evidence. Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331.

If one of the parties against whom the evidence is offered at the second trial had no opportunity, personally or by a predecessor in legal interest, to cross-examine, the evidence is incompetent even if it would have been admissible against another of the parties had he been present. Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483.

New parties.— Where a second suit, while partly between the same parties, adds others, not in privity with those common to both suits, and who therefore have had no opportunity either personally or by representatives to cross-examine the reported evidence, it is incompetent (Orr *v.* Hadley, 36 N. H. 575; Varnum *v.* Hart, 47 Hun (N. Y.) 18), even at the instance of the new party. Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483; *In re* Rushworth, Hardres 472. But where at a trial of two defendants a witness for one of the defendants, who had formerly been tried alone, was dead, the former evidence was held competent in behalf of such defendant, although it could not be allowed to affect the other. State *v.* Milam, 65 S. C. 321, 43 S. E. 677.

Nominal parties.— Where the substantial parties are the same in both cases, the fact that a nominal party required by the technical form of the former action was joined in the earlier suit and is not joined in the second does not it seems suffice to exclude the evidence. Wright *v.* Cumpsty, 41 Pa. St. 102. And it has even been held in case of a deposition that it is immaterial that other parties were joined in the former suit. Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869. See also Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627; Doe *v.* Powell, 3 C. & K. 323.

Exceptional instances in England, receiving some color of support from an act of parliament, are settlement cases. In Rex *v.* Eriswell, 3 T. R. 707, the court of king's bench was equally divided on the question as to whether the declarations of a pauper before magistrates authorized to remove him, in the absence of the parish to which removal was afterward ordered, were competent as against such parish on a hearing to remove the pauper's family after he had become insane, and therefore could no longer testify.

98. McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; Llanover *v.* Homfray, 19 Ch. D. 224; Cazenove *v.* Vaughan, 1 M. & S. 4, 14 Rev. Rep. 377.

What amounts to waiver of the right to

between parties, the requirement of identity of parties is logically and necessarily relaxed.[99]

2. Representation by Privity. Substantive law extends the term "parties" in the rule under consideration to include persons who under the law of privity are identified with them in legal interest. Accordingly the testimony of witnesses on a former trial is competent, if the other conditions are satisfied, for or against one whose privy was a party to the suit in which the evidence was given.[1] Evidence admitted against a party is therefore competent against his administrator,[2] agent,[3] executor,[4] or grantee;[5] and the principle has been so far extended in England as to cover those in privity with predecessors in title who might at their option have been parties to the previous litigation.[6] Conversely the benefit of the former evidence inures to the person in privity, and it is admissible for his administrator[7] or executor.[8] Community of interest between parties[9]

cross-examine is a question of fact for the court. Mere inaction when the opportunity is open may constitute it (Bradley *v.* Mirick, 91 N. Y. 293; Cazenove *v.* Vaughan, 1 M. & S. 4, 14 Rev. Rep. 377), although the party was embarrassed by the absence of his attorney (Bradley *v.* Mirick, 91 N. Y. 293), or full time was not afforded in which to exercise the option (Cazenove *v.* Vaughan, 1 M. & S. 4, 14 Rev. Rep. 377). Where an adverse party voluntarily announces that he will take no further part in the examination no question can arise. Bostick *v.* State, 3 Humphr. (Tenn.) 344; McCombie *v.* Anton, 6 M. & G. 27, 6 Scott N. R. 923, 46 E. C. L. 26.

99. So where the issue in two proceedings by certain alleged next of kin of A was as to their relationship to A, the fact that while the petitioners were the same the adverse interest, namely, the crown, appeared in different capacities and was represented by different persons is not sufficient to exclude the former evidence. Lawrence *v.* Maule, 4 Drew. 472, 28 L. J. Ch. 681, 7 Wkly. Rep. 314.

1. *Alabama.*— Long *v.* Davis, 18 Ala. 801.
California.— Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305; Poorman *v.* Miller, 44 Cal. 269.
Connecticut.— Lane *v.* Brainerd, 30 Conn. 565.
Georgia.—Atlanta, etc., R. Co. *v.* Venable, 67 Ga. 697.
Illinois.— Hutchings *v.* Corgan, 59 Ill. 70.
Maryland.— Cumberland Coal, etc., Co. *v.* Jeffries, 27 Md. 526.
Mississippi.— Strickland *v.* Hudson, 55 Miss. 235.
Montana.— Anaconda Copper Min. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909.
New York.— Vail *v.* Craig, 13 N. Y. St. 448; Osborn *v.* Bell, 5 Den. 370, 49 Am. Dec. 275; Jackson *v.* Crissey, 3 Wend. 251.
North Carolina.—Bryan *v.* Malloy, 90 N. C. 508; Thompson *v.* Humphrey, 83 N. C. 416.
Pennsylvania.—Sample *v.* Coulson, 9 Watts & S. 62; Ottinger *v.* Ottinger, 17 Serg. & R. 142.
Virginia.— Shelton *v.* Barbour, 2 Wash. 64; Ritchie *v.* Lyne, 1 Call 489.
United States.— Metropolitan St. R. Co. *v.* Gumby, 99 Fed. 192, 39 C. C. A. 455; Boudereau *v.* Montgomery, 3 Fed. Cas. No. 1,694, 4 Wash. 186.
See 20 Cent. Dig. tit. "Evidence," § 2413.
Between executor and devisee of a deceased person there is no such privity as to permit evidence in an action against the former to be used in an action against the latter, although the subject-matter be the same. Burnham *v.* Burnham, 165 N. Y. 659, 59 N. E. 1119.

2. Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143.
Statutes forbidding a party to testify personally against the executor or administrator of a deceased party do not exclude evidence offered against an administrator which has been originally given against his intestate. Hutchings *v.* Corgan, 59 Ill. 70; Strickland *v.* Hudson, 55 Miss. 235; Coughlin *v.* Haeussler, 50 Mo. 126; McDonald *v.* Allen, 8, Baxt. (Tenn.) 446.
Between heir and administrator there is no privity; and the testimony of a deceased witness in an action by an administrator is not admissible in a later suit by an heir against the same party. Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166.

3. Goodrich *v.* Hanson, 33 Ill. 498.

4. Clealand *v.* Huey, 18 Ala. 343.

5. Yale *v.* Comstock, 112 Mass. 267.

6. Llanover *v.* Homfray, 19 Ch. D. 224.

7. *Illinois.*— Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263.
Michigan.— Lewis *v.* Roulo, 93 Mich. 475, 53 N. W. 622.
Mississippi.— Strickland *v.* Hudson, 55 Miss. 235.
Pennsylvania.— Evans *v.* Reed, 78 Pa. St. 415.
Texas.— Houston, etc., R. Co. *v.* Perkins, 2 Tex. App. Civ. Cas. § 520.
See 20 Cent. Dig. tit. "Evidence," § 2413.
Change in the form of action is immaterial. Evans *v.* Reed, 78 Pa. St. 415.

8. McDonald *v.* Allen, 8 Baxt. (Tenn.) 446.

9. Jackson *v.* Crissey, 3 Wend. (N. Y.) 251, ejectment suit between different claimants, the evidence being excluded, although the point in issue was the same in both cases. See also Norris *v.* Nonen, 3 Watts (Pa.) 465. For the same reason statements of a deceased witness on the trial of an action against A as administrator are not evidence against

or mere relationship by consanguinity between a party to the former suit and a party to the suit in which the evidence is sought to be used [10] is not privity.

C. Identity of Issue — 1. In General. Another condition of admissibility of evidence given in a former suit is that the issue in the two cases should be the same or substantially the same,[11] and the burden is on the proponent [12] to show, either by parol evidence or by producing the record of the former trial,[13] to the satisfaction of the court,[14] that the necessary identity of issues exists. If the issue upon which the evidence was originally given and that on which it is subsequently offered are substantially common to both suits, it is immaterial that there were other issues in each case,[15] that the issue concerns a different subject-matter,[16] or that the first action was criminal in form and the second civil.[17] On the other hand if the issues are different it is not material that the two suits concern the same subject-matter, and the former evidence is still inadmissible.[18]

the sureties on his official bond. Fellers *v.* Davis, 22 S. C. 425.

10. The statement of a deceased witness in an action of ejectment between A and B, claiming as son of C, erroneously supposed to be dead, was held incompetent in ejectment relating to the same title between C and B. Morgan *v.* Nicholl, L. R. 2 C. P. 117, 12 Jur. N. S. 963, 36 L. J. C. P. 86, 15 L. T. Rep. N. S. 184, 15 Wkly. Rep. 110. It has been held, however, that A's examination *de bene* in his suit for defendant's negligence may be used in a suit by A's next of kin after his decease against the same defendant under a statutory provision to recover for the same act of negligence. Walkerton *v.* Erdman, 23 Can. Supreme Ct. 352, where the majority of the court said that while the cause of action was different the issues were practically the same and that the next of kin in effect claimed through A.

11. Otherwise an opportunity for cross-examination would have been of little or no value to the party against whom the former evidence is offered. In support of the proposition of the text see the following cases:

Alabama.— Simmons *v.* State, 129 Ala. 41, 29 So. 929; Smith *v.* Keyser, 115 Ala. 455, 22 So. 149.

Arkansas.— McTighe *v.* Herman, 42 Ark. 285.

Georgia.—Whitaker *v.* Arnold, 110 Ga. 857, 36 S. E. 231; Taylor *v.* State, 83 Ga. 647, 10 S. E. 442; Atlanta, etc., R. Co. *v.* Venable, 67 Ga. 697; Hughes *v.* Clark, 67 Ga. 19; Haslam *v.* Campbell, 60 Ga. 650. But see Hooper *v.* Southern R. Co., 112 Ga. 96, 37 S. E. 165.

Indiana.— Ephraims *v.* Murdock, 7 Blackf. 10.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.

Louisiana.— Rieger's Succession, 37 La. Ann. 104.

Maryland.— Price *v.* Lawson, 74 Md. 499, 22 Atl. 206.

Massachusetts.—Melvin *v.* Whiting, 7 Pick. 79.

Michigan.— Schindler *v.* Milwaukee, etc., R. Co., 87 Mich. 400, 49 N. W. 670.

Mississippi.—Broach *v.* Wertheimer-Swartz Shoe Co., (1897) 21 So. 300.

Missouri.— Jaccard *v.* Anderson, 37 Mo. 91.

New Hampshire.— Orr *v.* Hadley, 36 N. H. 575.

New York.— Ward *v.* Sire, 52 N. Y. App. Div. 443, 65 N. Y. Suppl. 101; Varnum *v.* Hart, 47 Hun 18; Murphy *v.* New York Cent., etc., R. Co., 31 Hun 358; People *v.* Powers, 35 Misc. 775, 72 N. Y. Suppl. 383.

North Carolina.—Bryan *v.* Malloy, 90 N. C. 508.

Pennsylvania.—Sample *v.* Coulson, 9 Watts & S. 62; Cluggage *v.* Duncan, 1 Serg. & R. 111; Kohler *v.* Henry, 4 Phila. 61.

South Carolina.—Parker *v.* Legett, 12 Rich. 198; Bishop *v.* Tucker, 4 Rich. 178; Yancey *v.* Stone, 9 Rich. Eq. 429.

Tennessee.— Carter *v.* Stewart, (Ch. App. 1897) 43 S. W. 366.

Wisconsin.—David Adler, etc., Clothing Co. *v.* Thorp, 102 Wis. 70, 78 N. W. 184.

See 14 Cent. Dig. tit. "Criminal Law," § 1235; 20 Cent. Dig. tit. "Evidence," §§ 2412, 2414.

When the statement offered is an admission by a party to a pending case, the requirement of identity of issues, as of identity of parties, is inoperative, and production of the record of the former case is equally unnecessary. Kutzmeyer *v.* Ennis, 27 N. J. L. 371.

12. Bryant *v.* Owen, 2 Stew. & P. (Ala.) 134; Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61; Mitchell *v.* State, 71 Ga. 128; Neff *v.* Smith, 91 Iowa 87, 58 N. W. 1072.

13. Ephraims *v.* Murdock, 7 Blackf. (Ind.) 10; Kutzmeyer *v.* Ennis, 27 N. J. L. 371.

14. Chase *v.* Springvale Mills Co., 75 Me. 156. His decision is final on the question of identity unless manifest error appears on the record. Chose *v.* Springvale Mills Co., 75 Me. 156.

15. Lathrop *v.* Adkisson, 87 Ga. 339, 18 S. E. 517; Yale *v.* Comstock, 112 Mass. 267, per Morton, J.

16. Doe *v.* Derby, 1 A. & E. 783, 3 L. J. K. B. 191, 3 N. & M. 782, 28 E. C. L. 363, where it was held that if the issue be the same, for example, who is the heir at law of A, it is not important that the two actions concern different pieces of land, under the same title.

17. Gavan *v.* Ellsworth, 45 Ga. 283; Charlesworth *v.* Tinker, 18 Wis. 633.

18. Evidence of a witness since deceased

Under such circumstances it is also immaterial that the evidence offered covers a fact material in both suits.[19]

2. Test of Identity. It is difficult to discover any test as to the identity of issues more definite than the inquiry whether the party against whom the evidence is offered had a fair opportunity for cross-examination. If he had that the element of surprise is eliminated. In a criminal case it is of no consequence that the two hearings are on different indictments,[20] or even that the form of the charge is different in the two cases, provided both accusations so plainly arise from the same facts as to apprise the accused of the general nature and source of his alleged liability.[21] The same test, the scope of a reasonable cross-examination, is applied in civil cases.[22]

D. Excuses For Non-Production of Witness — 1. In General. While evidence of former testimony is not open to objection as "hearsay,"[23] it clearly is substitutionary as regards the direct statement of the witness. The court will therefore insist upon being satisfied not only that the situation of the case promises some advantage from its use, but also that a sufficient reason be shown why the original witness is not produced;[24] and that it is impossible fairly speaking for the person offering the evidence to produce the living witness or

received on a former trial between A and B relating to a free fishery in a river was held incompetent on an action between A and B relating to a several fishery in the same river. Melvin *v.* Whiting, 7 Pick. (Mass.) 79. Evidence given in a suit by tenants in common for certain aliquot shares in a tract of land was not competent on a trial for certain different aliquot parts of the same tract. Norris *v.* Monen, 3 Watts (Pa.) 465. But see Long *v.* Davis, 18 Ala. 801.

19. Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61. But see Rucker *v.* Hamilton, 3 Dana (Ky.) 36; Fuentes *v.* Gaines, 25 La. Ann. 85; Jones *v.* Wood, 16 Pa. St. 25.

An anomalous doctrine.— A line of early English cases sought to establish the rule that in equity proceedings depositions against a party in one suit who is also a party to a second suit raising substantially the same questions are competent. London *v.* Perkins, 3 Bro. P. C. 602, 1 Eng. Reprint 1524; Byrne *v.* Frere, 1 Moll. 157; Carrington *v.* Cornock, 2 Sim. 567, 2 Eng. Ch. 567; Nevil *v.* Johnson, 2 Vern. Ch. 447, 23 Eng. Reprint 886. This contention was laid at rest by Vice-Chancellor Bruce in Blagrave *v.* Blagrave, 1 De G. & Sm. 252, 11 Jur. 744, 16 L. J. Ch. 346.

20. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244.

21. *Kansas.*— State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Louisiana.— State *v.* Simien, 30 La. Ann. 296.

Missouri.— State *v.* Elliott, 90 Mo. 350, 2 S. W. 411.

Texas.— Dunlap *v.* State, 9 Tex. App. 179, 35 Am. Rep. 736.

England.— Reg. *v.* Williams, 12 Cox C. C. 101; Reg. *v.* Beeston, 6 Cox C. C. 425, 3 C. L. R. 82, Dears. C. C. 405, 18 Jur. 1058, 24 L. J. M. C. 5, 3 Wkly. Rep. 56; Reg. *v.* Dilmore, 6 Cox C. C. 52; Reg. *v.* Lee, 4 F. & F. 63; Rex *v.* Smith, R. & R. 309. But see Reg. *v.* Ledbetter, 3 C. & K. 108.

See 14 Cent. Dig. tit. "Criminal Law," § 1235.

Illustrations.— Evidence given by A before a committing magistrate in the presence of the prisoner on a charge of assault with intent to murder A is competent on an indictment for A's murder. Dunlap *v.* State, 9 Tex. App. 179, 35 Am. Rep. 736. A deposition on a charge of obtaining money by false pretenses is admissible on an indictment for forgery. Reg. *v.* Williams, 12 Cox C. C. 101. An examination held under a charge of wounding with intent to do grievous bodily harm is competent on an indictment for murder. Reg. *v.* Beeston, 3 C. L. R. 82, 6 Cox C. C. 425, Dears. C. C. 405, 18 Jur 1058, 24 L. J. M. C. 5, 3 Wkly. Rep. 56.

22. The issue of simple negligence is not substantially the same as that of gross negligence. Schindler *v.* Milwaukee, etc., R. Co., 87 Mich. 400, 49 N. W. 670.

23. Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 51 Minn. 304, 53 N. W. 639.

24. *Alabama.*— Goodlett *v.* Kelly, 74 Ala. 213.

Colorado.— Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

Georgia.— Riggins *v.* Brown, 12 Ga. 271.

Illinois.— Loughry *v.* Mail, 34 Ill. App. 523.

Kansas.— State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Massachusetts.— Yale *v.* Comstock, 112 Mass. 267.

Missouri.— Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78.

Nebraska.— Omaha St. R. Co. *v.* Elkins, 39 Nebr. 480, 58 N. W. 164.

New Hampshire.— Young *v.* Dearborn, 22 N. H. 372.

New York.— Martin *v.* Cope, 28 N. Y. 180, 3 Abb. Dec. 182.

Pennsylvania.— Jones *v.* Wood, 16 Pa. St. 25, 43.

South Carolina.— Mathews *v.* Colburn, 1 Strobh. 258, 269.

take his deposition.[25] While the court decides whether the necessary preliminary facts exist to entitle the evidence to be received, admissibility itself, under proper conditions, is a matter of right.[26]

2. Absence — a. In General. Absence from the jurisdiction which makes it impossible to use compulsory process to secure the attendance of a witness may be a sufficient reason for admitting evidence of his former testimony in either civil[27]

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

England.— Pyke *v.* Crouch, 1 Ld. Raym. 730.

See 20 Cent. Dig. tit. "Evidence," §§ 2401, 2406, 2408.

Quantum of proof.— "Inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established, before the testimony is admitted, — as, that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant had caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be revisable on appeal when properly exercised." Sullivan *v.* State, 6 Tex. App. 319, 342, 32 Am. Rep. 580, per Winkler, J.

25. *Indiana.*— Schearer *v.* Harbor, 36 Ind. 536.

Kentucky.— Dye *v.* Com., 3 Bush 3.

Minnesota.— Wilder *v.* St. Paul, 12 Minn. 192.

Missouri.— Augusta Wine Co. *v.* Weippert, 14 Mo. App. 483.

New Hampshire.— Young *v.* Dearborn, 22 N. H. 372.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

Pennsylvania.— Ballman *v.* Heron, 169 Pa. St. 510, 32 Atl. 594.

Texas.— Sullivan *v.* State, 6 Tex. App. 319, 343, 32 Am. Rep. 580.

England.— Llanover *v.* Homfray, 19 Ch. D. 224, where Jessel, M. R., assumes that if the witness be "not producible" his former evidence will be received.

See 20 Cent. Dig. tit. "Evidence," §§ 2401, 2406, 2408, 2416.

26. Thus in an early English case where counsel for plaintiff moved for a rule ordering "that if any of the witnesses, many of whom were very aged, should die, or become unable to attend in the meantime," their former evidence could be read at the next trial, Lord Mansfield replied: "You do not want a rule of court for that purpose: what a witness, since dead, has sworn upon a trial between the same parties, may, without any order of the court, be given in evidence, either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given." Doncaster *v.* Day, 3 Taunt. 262, 12 Rev. Rep. 650.

27. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, (1900) 30 So. 546; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Mims *v.* Sturdevant, 36 Ala. 636; Long *v.* Davis, 18 Ala. 801.

Arkansas.— McTighe *v.* Herman, 42 Ark. 285; Shackelford *v.* State, 33 Ark. 539; Clinton *v.* Estes, 20 Ark. 216.

California.— Watson *v.* Sutro, 103 Cal. 169, 37 Pac. 201; Benson *v.* Shotwell, 103 Cal. 163, 37 Pac. 147.

Colorado.— Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

Georgia.— Owen *v.* Palmour, 111 Ga. 885, 36 S. E. 969; Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553; Eagle, etc., Mfg. Co. *v.* Welch, 61 Ga. 444; Adair *v.* Adair, 39 Ga. 75.

Illinois.— Plano Mfg. Co. *v.* Parmenter, 56 Ill. App. 258.

Kansas.—Atchison, etc., R. Co. *v.* Osborn, 64 Kan. 187, 67 Pac. 547.

Kentucky.— Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059; Louisville Water P. Co. *v.* Upton, 36 S. W. 520, 18 Ky. L. Rep. 326.

Louisiana.— Reynolds *v.* Rowley, 2 La. Ann. 890; Conway *v.* Erwin, 1 La. Ann. 391; Wafer *v.* Hemken, 9 Rob. 203; Clossman *v.* Barbancey, 7 Rob. 438.

Michigan.— Hudson *v.* Roos, 76 Mich. 173, 42 N. W. 1099; Stewart *v.* Port Huron First Nat. Bank, 43 Mich. 257, 5 N. W. 302; Howard *v.* Patrick, 38 Mich. 795.

Minnesota.— Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 51 Minn. 304, 53 N. W. 639 [*followed* in King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960].

Missouri.—Augusta Wine Co. *v.* Weippert, 14 Mo. App. 483.

Nebraska.— Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964; Young *v.* Sage, 42 Nebr. 37, 60 N. W. 313; Omaha St. R. Co. *v.* Elkins, 39 Nebr. 480, 58 N. W. 164; Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York.— Crary *v.* Sprague, 12 Wend. 41, 27 Am. Dec. 110.

Pennsylvania.— Ballman *v.* Heron, 169 Pa. St. 510, 32 Atl. 594; Wright *v.* Cumpsty, 41 Pa. St. 102; Noble *v.* McClintock, 6 Watts & S. 58; Carpenter *v.* Groff, 5 Serg. & R. 162; Magill *v.* Kauffman, 4 Serg. & R. 317, 8 Am. Dec. 713; Green *v.* Hopper, 29 Pittsb. Leg. J. N. S. 342, 12 York Leg. Rec. 4; Beers *v.* Cornelius, 1 Pittsb. 274; Hawk *v.*

or criminal[28] cases. It has been held to be sufficient if the witness is actually absent from the jurisdiction at the time of trial,[29] although merely for a temporary purpose.[30] But the rule that a transient absence suffices to admit the

Greensweig, 7 Pa. L. J. 374; Flanagin *v.* Leibert, 3 Pa. L. J. 57.

South Carolina.— Wells *v.* Drayton, 1 Nott & M. 409, 9 Am. Dec. 718; Yancey *v.* Stone, 9 Rich. Eq. 429.

Vermont.— McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

Virginia.— Powell *v.* Manson, 22 Gratt. 177.

Canada.— Sutor *v.* McLean, 18 U. C. Q. B. 490.

See 20 Cent. Dig. tit. "Evidence," § 2406.

On the other hand, where a witness is competent and available, it is error to admit proof of evidence formerly given by him.

Alabama.— Southern Car, etc., Co. *v.* Jennings, 137 Ala. 247, 34 So. 1062; Adams *v.* Thornton, 82 Ala. 260, 3 So. 20.

Georgia.— McElmurray *v.* Turner, 86 Ga. 215, 12 S. E. 359; Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

Illinois.— Campbell *v.* Campbell, 138 Ill. 612, 28 N. E. 1080; Sargeant *v.* Marshall, 38 Ill. App. 642.

Louisiana.— Reynolds *v.* Rowley, 2 La. Ann. 890; Rierdon *v.* Thompson, 5 La. 364; Hunter *v.* Smith, 6 Mart. N. S. 351.

Missouri.— Leeser *v.* Boekhoff, 38 Mo. App. 445.

New York.— McCabe *v.* Brayton, 38 N. Y. 196; Powell *v.* Waters, 17 Johns. 176; Ginochio *v.* Porcella, 3 Bradf. Surr. 277.

North Carolina.— Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417; Mott *v.* Ramsay, 92 N. C. 152.

Pennsylvania.— Lohr *v.* Phillipsburg, 165 Pa. St. 109, 30 Atl. 822; Hautz *v.* Rough, 2 Serg. & R. 349; Richardson *v.* Stewart, 2 Serg. & R. 84; Powell *v.* Powell, 3 Del. Co. 206.

The analogy followed has been that of the rule admitting proof of the execution of an attested instrument when the witness is absent from the jurisdiction (Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713), but this reasoning has been criticized (Gerhauser *v.* North British, etc., Ins. Co., 7 Nev. 174).

28. *Alabama.*— Burton *v.* State, 115 Ala. 1, 22 So. 585; Knight *v.* State, 103 Ala. 48, 16 So. 7; Lowery *v.* State, 98 Ala. 45, 13 So. 498; Perry *v.* State, 87 Ala. 30, 6 So. 425; Lowe *v.* State, 86 Ala. 47, 5 So. 435; Harris *v.* State, 73 Ala. 495.

Arkansas.— Sneed *v.* State, 47 Ark. 180, 1 S. W. 68; Dolan *v.* State, 40 Ark. 454; Shackelford *v.* State, 33 Ark. 539.

California.— People *v.* Devine, 46 Cal. 45.

Kansas.— State *v.* Nelson, (1904) 75 Pac. 505, although an opportunity to subpœna the witness may have been neglected by the prosecution.

Louisiana.— State *v.* Wheat, 111 La. 860, 35 So. 955 (where the witness has been sought for and cannot be found); State *v.* Bolden, 109 La. 484, 33 So. 571; State *v.* Timberlake, 50 La. Ann. 308, 23 So. 276; State *v.* Allen, 37 La. Ann. 685; State *v.* Jordan, 34 La. Ann. 1219; State *v.* Stewart, 34 La. Ann. 1037; State *v.* Harvey, 28 La. Ann. 105.

Texas.— Cowell *v.* State, 16 Tex. App. 57; Garcia *v.* State, 12 Tex. App. 335; Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580.

See 14 Cent. Dig. tit. "Criminal Law," § 1233.

29. *Arkansas.*—Sneed *v.* State, 47 Ark. 180, 1 S. W. 68; Clinton *v.* Estes, 20 Ark. 216.

California.— People *v.* Devine, 46 Cal. 45.

Colorado.— Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

Indiana.— Schearer *v.* Harber, 36 Ind. 536.

Kentucky.— Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059.

Michigan.— Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630; Howard *v.* Patrick, 38 Mich. 795.

Minnesota.— Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 51 Minn. 304, 53 N. W. 639; Wilder *v.* St. Paul, 12 Minn. 192. See also Stein *v.* Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234.

Nebraska.— Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

Pennsylvania.— Giberson *v.* Paterson Mills Co., 187 Pa. St. 513, 41 Atl. 525; Magill *v.* Kauffman, 4 Serg. & R. 317, 8 Am. Dec. 713. See also Lafferty's Estate, 5 Pa. Dist. 75, 17 Pa. Co. Ct. 401.

England.— Fry *v.* Wood, 1 Atk. 445, 26 Eng. Reprint 284.

See 14 Cent. Dig. tit. "Criminal Law," § 1232; 20 Cent. Dig. tit. "Evidence," §§ 2406, 2416.

Testimony given by deposition is subject to the same rule. Forney *v.* Hallagher, 11 Serg. & R. (Pa.) 203.

By statute in some jurisdictions the rule stated in the text has been established. Butcher *v.* Vaca Valley R. Co., 56 Cal. 598; Meyer *v.* Roth, 51 Cal. 582; Mechanics' Bank *v.* Woodward, 74 Conn. 689, 51 Atl. 1084; Reese *v.* Morgan Silver Min. Co., 17 Utah 489, 54 Pac. 759.

Temporary return from an otherwise permanent absence does not affect the rule. Fonsick *v.* Agar, 6 Esp. 92. A deponent or an attesting witness who has left the country is considered beyond the jurisdiction, although for a temporary purpose, such as awaiting despatches (Fonsick *v.* Agar, 6 Esp. 92), or because driven back or detained by bad weather (Ward *v.* Wells, 1 Taunt. 461, 10 Rev. Rep. 581), the witness is at the time of trial actually within the country.

30. Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811; Monroe Bank *v.* Gifford, 79 Iowa 300, 44 N. W. 558; Wright *v.* Cumpsty, 41 Pa. St. 102. But removal to an adjoining parish has been held insufficient. State *v.* Laque, 41 La. Ann. 1070, 6 So. 787.

evidence is not universally conceded.[31] The more modern tendency is not only to require that the absence offered as a basis for admitting the former evidence should be permanent, but to require further that the party offering the evidence should show to the satisfaction of the court that he could not by the use of reasonable diligence have procured the deposition of the absent witness. Mere absence from the jurisdiction at the time of trial is a disability by no means equivalent to death, without affirmative evidence that a fruitless search has been conducted in good faith and with due diligence,[32] and that, from ignorance of the witness' whereabouts or other reason, his deposition could not have been taken.[33] In the absence of such evidence the testimony has been rejected,[34] especially in criminal

31. The rule in Alabama is that the residence outside the state should have been adopted by the witness "permanently or for such an indefinite time that his return is merely contingent or conjectural." Lett *v.* State, 124 Ala. 64, 27 So. 256; Wheat *v.* State, 110 Ala. 68, 20 So. 449; Pruitt *v.* State, 92 Ala. 41, 9 So. 406; Lowe *v.* State, 86 Ala. 47, 5 So. 435.

32. *Alabama.*— Mims *v.* Sturdevant, 36 Ala. 636.

Louisiana.— See State *v.* Wheat, 111 La. 860, 35 So. 955, where it appeared that the attendance of witness might have been procured at the next term and the prosecution abandoned a motion for a continuance on the ground of his absence.

Mississippi.— Gastrell *v.* Phillips, 64 Miss. 473, 1 So. 729.

Missouri.— State *v.* Riddle, 179 Mo. 287, 78 S. W. 606.

New Jersey.— Berney *v.* Mitchell, 34 N. J. L. 337, where the court points out evils that would flow from a contrary rule.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York.— Mutual L. Ins. Co. *v.* Anthony, 50 Hun 101, 4 N. Y. Suppl. 501; Weeks *v.* Lowerre, 8 Barb. 530; Wilbur *v.* Selden, 6 Cow. 162.

England.— Morley's Case, 6 How. St. Tr. 770.

See 14 Cent. Dig. tit. "Criminal Law," § 1232; 20 Cent. Dig. tit. "Evidence," §§ 2406, 2416.

What constitutes due diligence depends upon the view the court takes of what is reasonably necessary, under the facts of the particular case. Lucas *v.* State, 96 Ala. 51, 11 So. 216; People *v.* Witty, 138 Cal. 576, 72 Pac. 177; People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48; Gunn *v.* Wades, 65 Ga. 537; Edwards *v.* Edwards, 93 Iowa 127, 61 N. W. 413. To ascertain by writing to the postmaster of a certain town in a distant state that a former witness is not in the postmaster's town, but in another town of the postmaster's state (Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580), or to show that the witness is reputed to be out of the state (Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918), or for an officer charged with the service of a subpœna to report that he has made diligent search for a witness at the supposed residence and been informed by persons unknown to him that they had heard that the witness was dead (Augusta, etc., R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706), have been held under the facts of these particular cases not to be sufficient. Alleged absence from the jurisdiction must be established by the testimony of someone who knows the fact, or can testify to circumstances within his knowledge which will justify the inference of such fact. Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918; Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510. Statements by persons with peculiar means of knowledge may, together with lack of further opportunity for inquiry, suffice to admit the evidence. Thus in case of an attesting witness the reply of his parents that he was in America was considered by Mr. Justice Erle as "reasonable evidence that the witness is out of the jurisdiction of the court." Austin *v.* Rumsey, 2 C. & K. 736, 61 E. C. L. 736. The mere fact that a party who could have summoned a witness has preferred to rely on his promise to attend voluntarily is no reason for admitting the witness' former evidence. Provo City *v.* Shurtliff, 4 Utah 15, 5 Pac. 302. The action of the court in deciding what search is sufficient will not be revised, in the absence of evidence of gross abuse of discretion. Vaughan *v.* State, 58 Ark. 353, 371, 24 S. W. 885; Clinton *v.* Estes, 20 Ark. 216.

Independent relevancy of answers.— While answers to questions as to the whereabouts of a witness are hearsay in themselves and have no tendency to prove the facts stated (Robinson *v.* Markis, 2 M. & Rob. 375), they may be competent facts in themselves bearing on whether due diligence in search has been shown (Burt *v.* Walker, 4 B. & Ald. 697, 6 E. C. L. 659; Austin *v.* Rumsey, 2 C. & K. 736, 61 E. C. L. 736; Wyatt *v.* Bateman, 7 C. & P. 586, 32 E. C. L. 772).

33. *Illinois.*— Cassady *v.* School Trustees, 105 Ill. 560.

Massachusetts.— Le Baron *v.* Crombie, 14 Mass. 234.

Mississippi.— Gastrell *v.* Phillips, 64 Miss. 473, 1 So. 729.

New Jersey.— Berney *v.* Mitchell, 34 N. J. L. 337.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York.— Wilbur *v.* Selden, 6 Cow. 162.

See 20 Cent. Dig. tit. "Evidence," § 2416.

34. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512; Dufree *v.* State, 33 Ala. 380, 73 Am. Dec. 422.

cases.[35] The rules relating to evidence do not apply where a sufficient independent excuse for not producing the witness appears in favor of admitting the evidence. Inability to attend as a witness, owing to an official duty, admits his evidence as given on a former trial.[36]

b. By Procurement of Adverse Party. Where it appears probable that the party against whom the original evidence would operate is endeavoring to prevent the witness from testifying, the reported evidence is admitted almost as a matter of course,[37] unless the court shall see fit in its discretion to adjourn the trial or have the evidence of the witness taken on commission.[38]

3. Death. The death of a witness is sufficient ground for admitting evidence given by him on a former trial, and this is the rule not only in civil[39] but in

Arkansas.— See Clinton *v.* Estes, 20 Ark. 216.

Georgia.— Pittman *v.* State, 92 Ga. 480, 17 S. E. 856.

Illinois.— Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672.

Iowa.— Slusser *v.* Burlington, 47 Iowa 300.

Kentucky.— Collins *v.* Com., 12 Bush 271.

Louisiana.— State *v.* Wheat, 111 La. 860, 35 So. 955; State *v.* Oliver, 43 La. Ann. 1003, 10 So. 201.

Mississippi.— Owens *v.* State, 63 Miss. 450.

Missouri.— State *v.* Riddle, 179 Mo. 287, 78 S. W. 606.

Nevada.— Gerhauser *v.* North British, etc., Ins. Co., 7 Nev. 174.

New Hampshire.— State *v.* Staples, 47 N. H. 113, 90 Am. Dec. 565.

New York.— People *v.* Newman, 5 Hill 295.

North Carolina.— Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417.

Pennsylvania.— McLain *v.* Com., 99 Pa. St. 86.

South Carolina.—Bishop *v.* Tucker, 4 Rich. 178.

Texas.— Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580.

Virginia.— Brogy *v.* Com., 10 Gratt. 722; Finn *v.* Com., 5 Rand. 701.

United States.— U. S. *v.* Angell, 11 Fed. 34.

See 20 Cent. Dig. tit. "Evidence," § 2416.

35. See cases cited in the preceding note. "Whatever may be the rule as to the testimony given by an absent witness on a former trial in a civil action, it cannot be proved on a criminal trial. The courts allow proof of such testimony when the witness is dead, but we are not advised that the rule has ever been extended so far as to permit either the commonwealth or the accused to prove the statements of a witness upon the sole ground that he was absent from the state and beyond the territorial jurisdiction of the court." Collins *v.* Com., 12 Bush. (Ky.) 271, 273, per Lindsay, C. J. Even in jurisdictions not applying so strict a limit of excuse for non-production of the witness the same feeling of the importance of the consequences of error shows itself in requiring strict preliminary proof that the conditions of admissibility prevailing in the particular jurisdiction have been fully complied with. Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672; Sullivan *v.* State, 6 Tex. App. 319, 342, 32 Am. Rep. 580; Reg. *v.* Austen, 7 Cox C. C. 55, Dears. C. C. 612, 2 Jur. N. S. 95, 25 L. J. M. C. 48, 4 Wkly. Rep. 237. But an acknowledgment by defendant that the present residence of the witness whose evidence is offered is unknown and cannot be ascertained is sufficient to admit evidence of his former testimony, when coupled with a return of *non est inventus* in all counties where the former witness was supposed to have gone. Sneed *v.* State, 47 Ark. 180, 1 S. W. 68.

36. Noble *v.* Martin, 7 Mart. N. S. (La.) 282.

37. *Connecticut.*— Rex *v.* Barber, 1 Root 76.

Georgia.— Williams *v.* State, 19 Ga. 402.

Illinois.— Stout *v.* Cook, 47 Ill. 530.

Missouri.— State *v.* Houser, 26 Mo. 431.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

South Carolina.— Wells *v.* Drayton, 1 Nott & M. 409, 9 Am. Dec. 718; Yancey *v.* Stone, 9 Rich. Eq. 429.

Texas.— Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580.

Utah.— U. S. *v.* Reynolds, 1 Utah 319.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244.

England.— Reg. *v.* Scaife, 17 Q. B. 238, 5 Cox C. C. 243, 2 Den. C. C. 281, 15 Jur. 607, 20 L. J. M. C. 229, 79 E. C. L. 238; Morley's Case, 6 How. St. Tr. 770.

See 14 Cent. Dig. tit. "Criminal Law," § 1233; 20 Cent. Dig. tit "Evidence," § 2406.

38. Reg. *v.* Scaife, 17 Q. B. 238, 5 Cox C. C. 243, 2 Den. C. C. 281, 15 Jur. 607, 20 L. J. M. C. 229, 79 E. C. L. 238; Sutor *v.* McLean, 18 U. C. Q. B. 490.

What evidence of procurement will be sufficient is a matter addressed to the discretion of the court. Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145; Reg. *v.* Scaife, 17 Q. B. 238, 5 Cox C. C. 243, 2 Den. C. C. 281, 15 Jur. 607, 20 L. J. M. C. 229, 79 E. C. L. 238; Morley's Case, 16 How. St. Tr. 770. Under a code provision admitting testimony of a former witness "inaccessible for any cause" (Ga. Code, § 3782), it was held sufficient to show that the witness when last seen was accompanied by an agent of the other side who bought him a railroad ticket for a distant city outside the state, and that he had not been seen or heard of since (Eagle, etc., Mfg. Co. *v.* Welch, 61 Ga. 444).

39. *Alabama.*— Jeffries *v.* Castleman, 75 Ala. 262; Goodlett *v.* Kelly, 74 Ala. 213;

criminal[40] cases, provided the fact of death is affirmatively shown.[41] According

Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485.

Arkansas.— St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571.

California.— Fredericks *v.* Judah, (1886) 11 Pac. 133.

Colorado.— Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458.

Illinois.— Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263; Stout *v.* Cook, 47 Ill. 530; Letcher *v.* Norton, 5 Ill. 575.

Indiana.— Rooker *v.* Parsley, 72 Ind. 497; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Wabash R. Co. *v.* Miller, (App. 1901) 59 N. E. 485; Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510; Western Assur. Co. *v.* McAlpin, Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

Iowa.— Packard *v.* McCoy, 1 Iowa 530.

Kentucky.— Cave *v.* Cave, 13 Bush 452; Louisville, etc., R. Co. *v.* Whitley County Ct., 49 S. W. 332, 20 Ky. L. Rep. 1367.

Louisiana.— Conway *v.* Erwin, 1 La. Ann. 391; Wafer *v.* Hemken, 9 Rob. 203; Lopez *v.* Berghel, 15 La. 42; Lesassier *v.* Dashiell, 14 La. 467; Riordon *v.* Davis, 9 La. 239, 29 Am. Dec. 442.

Maine.— Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

Maryland.— Price *v.* Lawson, 74 Md. 499, 22 Atl. 206; Marshall *v.* Haney, 9 Gill 251; Calvert *v.* Coxe, 1 Gill 95.

Massachusetts.— Costigan *v.* Lunt, 127 Mass. 354.

Michigan.— Detroit Baseball Club *v.* Preston Nat. Bank, 113 Mich. 470, 71 N. W. 833; Lewis *v.* Roulo, 93 Mich. 475, 53 N. W. 622; Howard *v.* Patrick, 38 Mich. 795.

Nevada.— Gerhauser *v.* North British, etc., Ins. Co., 7 Nev. 174.

New Hampshire.— Orr *v.* Hodley, 36 N. H. 575.

New Jersey.— Berney *v.* Mitchell, 34 N. J. L. 337.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York.— Morehouse *v.* Morehouse, 41 Hun 146; Miller *v.* Zimer, 6 N. Y. St. 229; Odell *v.* Buckart, 6 N. Y. St. 45.

North Carolina.— Harper *v.* Burrow, 28 N. C. 30.

North Dakota.—Persons *v.* Persons, (1903) 97 N. W. 551.

Ohio.— Hoover *v.* Jennings, 11 Ohio St. 624.

Pennsylvania.— Pratt *v.* Patterson, 81 Pa. St. 114; Beers *v.* Cornelius, 1 Pittsb. 274; Hawk *v.* Greensweig, 7 Pa. L. J. 374.

South Carolina.— Yancey *v.* Stone, 9 Rich. Eq. 429; Wells *v.* Drayton, 1 Nott & M. 409, 9 Am. Dec. 718.

Tennessee.— McDonald *v.* Allen, 8 Baxt. 446.

Texas.— Black *v.* Black, 1 Tex. App. 368.

Vermont.— Earl *v.* Tupper, 45 Vt. 275; Johnson *v.* Powers, 40 Vt. 611; Mathewson *v.* Sargeant, 36 Vt. 142.

United States.— U. S. *v.* Macomb, 25 Fed. Cas. No. 15,702, 5 McLean 286.

England.— Fry *v.* Wood, 1 Atk. 445, 26 Eng. Reprint 284; Rex *v.* Jolliffe, 4 T. R. 285, 2 Lilly Proc. Reg. 705.

See 20 Cent. Dig. tit. "Evidence," § 2401.

40. *Alabama.*— Lucas *v.* State, 96 Ala. 51, 11 So. 216; Pruitt *v.* State, 92 Ala. 41, 9 So. 406.

Arkansas.— Redd *v.* State, 65 Ark. 475, 47 S. W. 119; Green *v.* State, 38 Ark. 304; Pope *v.* State, 22 Ark. 372.

California.— People *v.* Murphy, 45 Cal. 137.

Georgia.— Hardin *v.* State, 107 Ga. 718, 33 S. E. 700, testimony of a deceased accomplice.

Illinois.— Barnett *v.* People, 54 Ill. 325.

Kentucky.— Kean *v.* Com., 10 Bush 190, 19 Am. Rep. 63; Johnson *v.* Com., 70 S. W. 44, 24 Ky. L. Rep. 842.

Louisiana.— State *v.* Wheat, 111 La. 860, 35 So. 955.

Michigan.— People *v.* Sligh, 48 Mich. 54, 11 N. W. 782.

Mississippi.— Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

Missouri.—State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136; State *v.* Able, 65 Mo. 357; Garrett *v.* State, 6 Mo. 1.

Montana.— State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508.

Nevada.— State *v.* Johnson, 12 Nev. 121.

New York.— People *v.* Elliott, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318 [*affirming* 66 N. Y. App. Div. 179, 73 N. Y. Suppl. 279, and *construing* N. Y. Code Civ. Proc. §§ 830, 3333]; People *v.* Hill, 65 Hun 420, 20 N. Y. Suppl. 187.

North Carolina.— State *v.* King, 86 N. C. 603.

Ohio.— Simmons *v.* State, 5 Ohio St. 325.

Texas.— Johnson *v.* State, 1 Tex. App. 333. But see Stockholm *v.* State, 24 Tex. App. 598, 7 S. W. 338, where the affidavit of a deceased co-defendant, upon which a new trial was awarded, was held inadmissible on the subsequent trial.

See 14 Cent. Dig. tit. "Criminal Law," § 1232.

Contra.— Montgomery *v.* Com., 99 Va. 833, 37 S. E. 841; Brogg *v.* Com., 10 Gratt. (Va.) 722; U. S. *v.* Sterland, 27 Fed. Cas. No. 16,387.

41. Johnson *v.* Com., 70 S. W. 44, 24 Ky. L. Rep. 842. It is not sufficient that the reporting witness "understood" that the former witness was dead (State *v.* Wright, 70 Iowa 152, 30 N. W. 388; Tibbetts *v.* Flanders, 18 N. H. 284), or that such was the general report in the community (State *v.* Wright, 70 Iowa 152, 30 N. W. 388). While death must be affirmatively shown, the inference of fact arising from absence is competent evidence on this point. How far mere lapse of time is evidence of death cannot well be stated more definitely than that in each case the court is to exercise a sound discretion in requiring or dispensing with further proof. The English court of exchequer refused to admit in 1732 upon the assump-

to the earlier rule death was the sole condition of admissibility,[42] and in some jurisdictions this is still the rule in criminal cases.[43]

4. Disqualification of Witness. Inability to produce the witness because of some present legal prohibition against receiving his testimony, as that the witness is a party and the other party having died and the suit being against his representative the surviving party is not permitted to testify,[44] or that the witness has become disqualified by interest,[45] may render his former evidence competent. But it will not be made competent because the witness has become *civiliter mortuus* by reason of felony,[46] or has disqualified himself from testifying by claiming that his evidence might incriminate him.[47]

5. Incapacity of Witness. Where in a civil[48] or criminal[49] case a witness since the former trial has become insane or bereft of memory by senility,[50] his former evidence as a rule is admissible,[51] although the witness himself is in court.[52] Failure of memory not amounting to imbecility is insufficient.[53] It has also been held in many cases that sickness which prevents attendance as a witness,[54]

tion that the witness was dead a deposition of a witness examined in 1672. Benson *v.* Olive, 2 Str. 920. But in Llanover *v.* Homfray, 19 Ch. D. 224, Jessel, M. R., assumed that "of course aged witnesses, the youngest of whom in 1815 was sixty-seven years of age," were dead in 1871.

42. Le Baron *v.* Crombie, 14 Mass. 234; Crary *v.* Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110; Wilbur *v.* Selden, 6 Cow. (N. Y.) 162.

43. Collins *v.* Com., 12 Bush (Ky.) 271; Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389; Reg. *v.* Hagan, 8 C. & P. 167, 34 E. C. L. 670.

44. Walbridge *v.* Knipper, 96 Pa. St. 48; Pratt *v.* Patterson, 81 Pa. St. 114; Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666. See also Bowie *v.* Hume, 13 App. Cas. (D. C.) 286. So by statute in New York. Morehouse *v.* Morehouse, 41 Hun (N. Y.) 146; N. Y. Code Civ. Proc. § 830. But see *contra,* Barker *v.* Hebbard, 81 Mich. 267, 45 N. W. 964; Taylor *v.* Bunker, 68 Mich. 258, 36 N. W. 66. This rule excluding the testimony of the surviving party being based upon an idea of the unfairness of permitting him to testify against one who cannot reply does not apply where the evidence of the deceased at a former trial is produced at the hearing. O'Neill *v.* Brown, 61 Tex. 34. The evidence of the deceased party at the former trial is competent, even if the surviving party cannot testify. Hutchings *v.* Corgan, 59 Ill. 70; Costen *v.* McDowell, 107 N. C. 546, 12 S. E. 432.

45. Smithpeters *v.* Griffin, 10 B. Mon. (Ky.) 259; Wafer *v.* Hemken, 9 Rob. (La.) 203. But see Matter of Budlong, 54 Hun (N. Y.) 131, 7 N. Y. Suppl. 289, 18 N. Y. Civ. Proc. 18; Irwin *v.* Reed, 4 Yeates (Pa.) 512.

46. State *v.* Conway, 56 Kan. 682, 44 Pac. 627; Le Baron *v.* Crombie, 14 Mass. 234.

47. Hayward *v.* Barron, 38 N. H. 366.

48. *Illinois.*— Stout *v.* Cook, 47 Ill. 530.

Louisiana.—Wafer *v.* Hemken, 9 Rob. 203; Lopez *v.* Berghel, 15 La. 42; Williams *v.* Bethany, 1 La. 315; Noble *v.* Martin, 7 Mart. N. S. 282.

Michigan.— Howard *v.* Patrick, 38 Mich. 795.

New Jersey.— Berney *v.* Mitchell, 34 N. J. L. 337.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

Pennsylvania.— Emig *v.* Diehl, 76 Pa. St. 359, 373.

South Carolina.— Wells *v.* Drayton, 1 Nott & M. 409, 9 Am. Dec. 718.

Tennessee.— Louisville, etc., R. Co. *v.* Atkins, 2 Lea 248.

England.— Rex *v.* Eriswill, 3 T. R. 707.

See 20 Cent. Dig. tit. "Evidence," § 2402.

49. Lucas *v.* State, 96 Ala. 51, 11 So. 216; Pruitt *v.* State, 92 Ala. 41, 9 So. 406; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Walkup *v.* Com., 20 S. W. 221, 14 Ky. L. Rep. 337; State *v.* Wheat, 111 La. 860, 35 So. 955.

50. Whitaker *v.* Marsh, 62 N. H. 477; Rothrock *v.* Gallaher, 91 Pa. St. 108; Emig *v.* Diehl, 76 Pa. St. 359; Jack *v.* Woods, 29 Pa. St. 375. But see *contra,* Wells *v.* Drayton, 1 Nott & M. (S. C.) 409, 9 Am. Dec. 718.

51. See the cases cited in the preceding notes.

52. Rothrock *v.* Gallaher, 91 Pa. St. 108.

53. Stein *v.* Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234; Robinson *v.* Gilman, 43 N. H. 295; Wells *v.* Drayton, 1 Nott & M. (S. C.) 409, 9 Am. Dec. 718.

54. *Iowa.*— Edwards *v.* Edwards, 93 Iowa 127, 61 N. W. 413.

Louisiana.— State *v.* Wheat, 111 La. 860, 35 So. 955; Wafer *v.* Hemken, 9 Rob. 203; Miller *v.* Russell, 7 Mart. N. S. 266.

Michigan.— Siefert *v.* Siefert, 123 Mich. 604, 82 N. W. 511; Howard *v.* Patrick, 38 Mich. 795.

New Hampshire.— State *v.* Staples, 47 N. H. 113, 90 Am. Dec. 565.

New Jersey.— Berney *v.* Mitchell, 34 N. J. L. 337.

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York.— Morehouse *v.* Morehouse, 41 Hun 146.

Pennsylvania.— Perrin *v.* Wells, 155 Pa. St. 299, 26 Atl. 543; Molloy *v.* U. S. Express

extreme age,[55] or great bodily infirmity[56] suffice to admit the evidence, except in some jurisdictions where in criminal cases nothing but death relieves the prosecution from the necessity of producing the original witness.[57]

E. Scope of Proof Required — 1. Early Requirements. Originally it was required that the reporting witness should be able to state *ipsissimis verbis* the language of the former witness.[58] But at an early day the rigor of this requirement was relaxed and repetition of the essential words was deemed sufficient.[59]

2. Substance or Effect of Language. It is generally recognized that the early strictness of requirement practically amounted to nullifying the rule as to evidence given at a former trial.[60] To admit evidence of the former testimony it is

Co., 22 Pa. Super. Ct. 173; K. of P. Benev. Assoc. *v.* Leadbeter, 2 Pa. Super. Ct. 461.

England.— Fry *v.* Wood, 1 Atk. 445, 26 Eng. Reprint 284.

See 20 Cent. Dig. tit. "Evidence," § 2402.

Under this rule the former evidence of a witness delirious with typhoid fever a few days before (Chase *v.* Springvale Mills Co., 75 Me. 156), or of one "laboring with disease" (Miller *v.* Russell, 7 Mart. N. S. (La.) 266) has been admitted.

Under a code provision, Tex. Code Cr. Proc. art. 772, admitting prior evidence "when by reason of bodily infirmity, such witness cannot attend" the fact that a witness was confined to his room for several months by a severe attack of measles which had destroyed the sight of one eye and left him a chronic invalid with pains in the head and palpitation of the heart was deemed a sufficient excuse for failure to produce the witness in person. Collins *v.* State, 24 Tex. App. 141, 5 S. W. 848.

The practice of counsel in entering on the trial of a case knowing that an important witness is ill and may not be able to be present, and in the midst of the trial for the first time to present the fact of the absence of such witness, and then testify as to what such witness said on a former trial, reading from his own abstract of such testimony, was condemned in Chicago, etc., R. Co. *v.* Mayer, 91 Ill. App. 372.

55. Central R., etc., Co. *v.* Murray, 97 Ga. 326, 22 S. E. 972; Thornton *v.* Britton, 144 Pa. St. 126, 131, 22 Atl. 1048.

56. Scoville *v.* Hannibal, etc., R. Co., 94 Mo. 84, 87, 6 S. W. 654 (paralysis); Reg. *v.* Wilshaw, C. & M. 145, 41 E. C. L. 84.

57. In such courts production of the witness is not excused by sickness at the time of trial (Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389; State *v.* Staples, 47 N. H. 113, 119, 90 Am. Dec. 565), although it incapacitates him from attendance (Com. *v.* McKenna, *supra*), or even amounts to temporary insanity (State *v.* Canney, 9 L. Rep. 408).

58. *Delaware.*— Kinney *v.* Hosea, 3 Harr. 397.

Massachusetts.— Warren *v.* Nichols, 6 Metc. 261; Com. *v.* Richards, 18 Pick. 434, 29 Am. Dec. 608.

New York.— Wilbur *v.* Selden, 6 Cow. 162, the force of which is much weakened by the subsequent opinion in Clarke *v.* Vorce, 15 Wend. 193, 30 Am. Dec. 53, where the chief justice treats the question as still unsettled.

Ohio.— Smith *v.* Smith, Wright 643; Bliss *v.* Long, Wright 351.

Pennsylvania.— Foster *v.* Shaw, 7 Serg. & R. 156.

Virginia.— Caton *v.* Lenox, 5 Rand. 31, 36.

United States.— Bennett *v.* Adams, 3 Fed. Cas. No. 1,316, 2 Cranch C. C. 551.

England.— Rex *v.* Jolliffe, 4 T. R. 285, where Lord Kenyon mentioned a case where a witness undertaking to state the evidence of Lord Palmerston on a former trial was rejected because he "could not undertake to give his words, but merely to swear to the effect of them."

See 14 Cent. Dig. tit. "Criminal Law," § 1244; 20 Cent. Dig. tit. "Evidence," §§ 2417, 2420.

In a criminal case the ruling has been made that the evidence of a deceased witness at a former trial could be only admitted, "provided the witness can repeat the testimony which [deceased] . . . gave, and not merely what he conceives to be the substance and effect of it, of which the jury ought alone to judge." U. S. *v.* Wood, 28 Fed. Cas. No. 16,756, 3 Wash. 440.

Where the reporting witness was the judge before whom the former trial was held the rule was nevertheless applied in all its strictness. Bliss *v.* Long, Wright (Ohio) 351.

59. Marshall *v.* Adams, 11 Ill. 37; Ephraims *v.* Murdock, 7 Blackf. (Ind.) 10; Warren *v.* Nichols, 6 Metc. (Mass.) 261; Earl *v.* Tupper, 45 Vt. 275.

60. *Georgia.*— Trammell *v.* Hemphill, 27 Ga. 525.

Indiana.— The early rule of strict requirement laid down in Ephraims *v.* Murdock, 7 Blackf. 10, was changed in Horne *v.* Williams, 23 Ind. 37, and Elliott *v.* Adams, 8 Blackf. 103.

Massachusetts.— Costigan *v.* Lunt, 127 Mass. 354.

Nebraska.— Omaha St. R. Co. *v.* Elkins, 39 Nebr. 480, 58 N. W. 164.

Ohio.— Summons *v.* State, 5 Ohio St. 325, 346; Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467 [*overruling* Bliss *v.* Long, Wright 351].

Pennsylvania.— Moore *v.* Pearson, 6 Watts & S. 51; Chess *v.* Chess, 17 Serg. & R. 409; Wolf *v.* Wyeth, 11 Serg. & R. 149; Cornell *v.* Green, 10 Serg. & R. 14.

United States.— Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101.

now sufficient as a general rule if its substance,[61] or even its effect, either in civil[62] or in criminal[63] cases can be given. Some courts have gone further and held that the evidence will be received, although the reporting witness can give neither the language of the original testimony nor its substance, if he can state the substance of the facts covered.[64] Whatever the degree of strictness required by the law established in a particular jurisdiction, it must affirmatively appear to the satisfaction of the court that the reporting witness can comply with this degree of

See 14 Cent. Dig. tit. "Criminal Law," § 1244; 20 Cent. Dig. tit. "Evidence," §§ 2417, 2420.

In analogous cases, as the courts in the above cited cases argued, no such strictness is enforced. Thus on an indictment for perjury it is not necessary to prove with verbal exactness the testimony of defendant. Rex *v.* Munton, 3 C. & P. 498, 14 E. C. L. 682. The substance of dying declarations in a prosecution for homicide is sufficient. Montgomery *v.* State, 11 Ohio 424. Where a deed or other writing is lost and the exact contents cannot be shown the substance is sufficient. Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166. A verbal bargain may be proved by showing the substance of what was said. In such cases the witness if he does not recollect the language used may even say what he understood to be the effect and result of the conversation. Maxwell *v.* Warner, 11 N. H. 568; Eaton *v.* Rice, 8 N. H. 378.

61. Clealand *v.* Huey, 18 Ala. 343.

62. *Alabama.*— Clealand *v.* Huey, 18 Ala. 343; Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485.

Georgia.— Trammell *v.* Hemphill, 27 Ga. 525.

Illinois.— Hutchings *v.* Corgan, 59 Ill. 70.

Indiana.— Horne *v.* Williams, 23 Ind. 37.

Iowa.— Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437; Fell *v.* Burlington, etc., R. Co., 43 Iowa 177; Woods *v.* Gevecke, 28 Iowa 561; Rivereau *v.* St. Ament, 3 Greene 118.

Kansas.—Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730; Gannon *v.* Stevens, 13 Kan. 447.

Kentucky.— Bush *v.* Com., 80 Ky. 244, 3 Ky. L. Rep. 740; Thompson *v.* Blackwell, 17 B. Mon. 609, 623.

Maine.— Lime Rock Bank *v.* Hewett, 52 Me. 531; Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

Maryland.— Garrott *v.* Johnson, 11 Gill & J. 173, 35 Am. Dec. 272.

Michigan.—Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Mississippi.— Smith *v.* Natchez Steamboat Co., 1 How. 479.

Missouri.— Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78.

New Hampshire.— Young *v.* Dearborn, 22 N. H. 372.

New Jersey.— Sloan *v.* Somers, 20 N. J. L. 66.

North Carolina.— Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831; Ballenger *v.* Barnes, 14 N. C. 460.

Ohio.— Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467.

Pennsylvania.— Hepler *v.* Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813; Gould *v.* Crawford, 2 Pa. St. 89.

Tennessee.— Planters' Bank *v.* Massey, 2 Heisk. 360.

Texas.— Thurmond *v.* Trammell, 28 Tex. 371, 91 Am. Dec. 321; Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621.

Vermont.— Whitcher *v.* Morey, 39 Vt. 459.

Virginia.— Caton *v.* Lenox, 5 Rand. 31.

United States.— Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101 (giving "the main and principal points" held sufficient); U. S. *v.* Macomb, 26 Fed. Cas. No. 15,702, 5 McLean 286.

England.— Pyke *v.* Crouch, 1 Ld. Raym. 730.

See 20 Cent. Dig. tit. "Evidence," §§ 2417, 2420.

63. *Alabama.*— James *v.* State, 104 Ala. 20, 16 So. 94; Harris *v.* State, 73 Ala. 495; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Davis *v.* State, 17 Ala. 354.

Arkansas.— Shackelford *v.* State, 33 Ark. 539.

California.— People *v.* Murphy, 45 Cal. 137.

Georgia.— Puryear *v.* State, 63 Ga. 692.

Illinois.— Barnett *v.* People, 54 Ill. 325.

Iowa.— State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202.

Kentucky.— Bush *v.* Com., 80 Ky. 244, 3 Ky. L. Rep. 740.

Louisiana.— State *v.* Cook, 23 La. Ann. 247.

Missouri.— State *v.* Able, 65 Mo. 357.

North Carolina.— State *v.* Adair, 66 N. C. 298; State *v.* Parish, 44 N. C. 239.

Ohio.— Donald *v.* State, 21 Ohio Cir. Ct. 124, 11 Ohio Cir. Dec. 483.

South Carolina.— State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

Tennessee.— Wade *v.* State, 7 Baxt. 80; Kendrick *v.* State, 10 Humphr. 479.

Texas.— Bennett *v.* State, 32 Tex. Cr. 216, 22 S. W. 684; Simms *v.* State, 10 Tex. App. 131.

Vermont.— State *v.* Hooker, 17 Vt. 658.

Wisconsin.— Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

United States.— U. S. *v.* White, 28 Fed. Cas. No. 16,679, 5 Cranch C. C. 457; U. S. *v.* Macomb, 26 Fed. Cas. No. 15,702, 5 McLean 286.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1238–1244.

64. Helper *v.* Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813; Wolf *v.* Wyeth, 11 Serg. & R. (Pa.) 149; Kendrick *v.* State, 10 Humphr. (Tenn.) 479.

strictness.[65] If it appears that the witness cannot give the entire examination with the required certainty his evidence should be rejected.[66]

3. Special Rules. Rules of strictness intermediate between the earlier rule requiring a report of the exact language and the general modern rule that only its substance or effect need be given have been adopted by several courts. In Maryland it is sufficient for the reporting witness to prove that the former witness "in giving in his testimony deposed to certain facts."[67] In Massachusetts and several other states[68] it has been held with great inflexibility that the witness called to prove what a deceased witness testified on a former trial must be able to state the language in which the former testimony was given substantially and in all material particulars.[69] In New Jersey "it is sufficient if the witness is able to state the substance of what was sworn to on the former trial or what he believes to be substantially the words of the witness, not the conclusion to which the words of the deceased witness conducted the mind of the present witness";[70] and this seems to be the effect of the rule laid down in New York.[71] The limit of indulgence is reached in the Pennsylvania rule that "where the witness on the stand cannot recollect the very words of the deceased witness he may state in his own language the facts as related by the witness, as they were impressed upon his mind at the time; and this applies as well to the cross-examination as to the examination in chief."[72] A somewhat stricter rule is laid down in Wisconsin.[73]

65. *Alabama.*—Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Arkansas.— Clinton *v.* Estes, 20 Ark. 216.

Maine.— Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

Massachusetts.— Corey *v.* Janes, 15 Gray 543.

Missouri.— Scoville *v.* Hannibal, etc., R. Co., 94 Mo. 84, 6 S. W. 654.

See 20 Cent. Dig. tit. "Evidence," § 2417.

66. Bush *v.* Com., 80 Ky. 244; Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627. But where a witness swears to the testimony of a witness at a former trial he need not assert in terms his ability to give the substance of the whole of such testimony. It is enough that his testimony shows that it does give this substance. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

67. Garrott *v.* Johnson, 11 Gill & J. (Md.) 173. 35 Am. Dec. 272 [*distinguished* in Black *v.* Woodrow, 39 Md. 194].

68. The Massachusetts rule has been adopted in effect in Missouri (Scoville *v.* Hannibal, etc., R. Co., 94 Mo. 84, 6 S. W. 654) and Ohio (Summons *v.* State, 5 Ohio St. 325).

69. Com. *v.* McCarty, 152 Mass. 577, 26 N. E. 140; Costigan *v.* Lunt, 127 Mass. 354; Yale *v.* Comstock, 112 Mass. 267; Melvin *v.* Whiting, 7 Pick. (Mass.) 79. Where a witness stated that "he could give the substance of it, but not the precise language," although the court, as Shaw, C. J., said, "lay no stress upon the epithet 'precise,'" he was held properly rejected. Warren *v.* Nichols, 6 Metc. (Mass.) 261, the authority of which cases is much weakened by the strong dissenting opinion of Hubbard, J. The form of statement used in drawing the exceptions in Corey *v.* Janes, 15 Gray (Mass.) 543, would lead to an inference that it might be sufficient if *quoad* the matter affected the reporting witness could give the "language substantially as spoken at the former trial upon any particular point or subject-matter." Such an inference, however, must be regarded as doubtful in view of the subsequent decision in Woods *v.* Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 766, where the court said: "The rule is settled that where proof is offered of what a deceased witness has testified at a former hearing it must be not merely a part of it, or the substance of it, but the whole of the testimony touching the matter in controversy."

For purpose of impeachment.— Even in Massachusetts, however, a different rule is applied when the former evidence of a present witness is to be reproduced to affect his credibility; testimony to the substance suffices. Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50.

70. Sloan *v.* Somers, 20 N. J. L. 66. See also Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

71. Martin *v.* Cope, 28 N. Y. 180, 3 Abb. Dec. (N. Y.) 182 (where a witness was permitted to state "not substantially the meaning but substantially the language of the witness," although if the witness undertakes to state what words he regards as material it is sufficient even if he does not purport to give all the language); Clark *v.* Vorce, 15 Wend. (N. Y.) 193, 30 Am. Dec. 53.

72. Hepler *v.* Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813, per Gordon, J.

73. "Error is assigned because the court admitted in evidence that portion of the minutes of the justice on the trial before him which contained the testimony of Schultz. The only foundation laid for such admission was the testimony of the justice to the effect that perhaps he did not take down the entire testimony of Schultz; that he intended to get the main facts, that possibly he did not use the exact words of the witness; that he intended to get the facts, but may not have used

In Vermont it has been held sufficient to state "the substance of the testimony in the very words of the witness." [74]

4. ENTIRE EXAMINATION. While the exact language itself is no longer essential, the reporting witness must be able to recollect the substance of both direct and cross-examination; [75] but the other party may supplement the evidence as given.[76] It follows that where the substance of the evidence is required the testimony as reported must be the substance of the whole of the original evidence.[77] "Not only should the facts deposed to by the deceased witness be stated, but all the facts deposed to by him, as well upon the direct as the cross-examination"; [78] and where the substance of the language used is called for the requirement

the same words, that he probably missed some words, possibly a good many; that whether he got it all down depended upon circumstances, that when the witness went too rapidly to take it all down he always checked him; that he did not think he had left out any of the facts in the case; that, judging from the minutes, he should think that the testimony of Schultz was as contained in the minutes; that he should judge so, although he could not then remember, after having his mind refreshed by reading the minutes,—nothing else to go by. We are forced to the conclusion that the foundation thus laid was insufficient to justify the admission of such minutes, within the rule laid down by this court in Zitske *v.* Goldberg, 38 Wis. 216. It was there held that 'the minutes of a justice of the peace of testimony taken at a trial before him are not admissible at the trial of the same cause on appeal in the circuit court, either as evidence of the facts at issue or to impeach or sustain the credibility of a witness by showing what he testified before the justice.' Certainly incomplete and inaccurate minutes of such testimony are inadmissible." Elberfeldt *v.* Waite, 79 Wis. 284, 285, 48 N. W. 525, per Cassoday, J.

74. Williams *v.* Willard, 23 Vt. 369; Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67. Where the witness offered to prove the former testimony and testified that he took minutes of the same "with substantial accuracy . . . the exact words in many instances, although not in every particular," it was held sufficient. Earl *v.* Tupper, 45 Vt. 275 [*citing* with approval Whitcher *v.* Morey, 39 Vt. 459; State *v.* Hooker, 17 Vt. 658].

75. *Alabama.*— Magee *v.* Doe, 22 Ala. 699; Gildersleeve *v.* Caraway, 10 Ala. 260, 44 Am. Dec. 485.

Georgia.— Denson *v.* Denson, 111 Ga. 809, 35 S. E. 680; Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749; Waller *v.* State, 102 Ga. 684, 28 S. E. 284.

Illinois.—Aulger *v.* Smith, 34 Ill. 534.

Iowa.— Harrison *v.* Charlton, 42 Iowa 573.

Maine.— Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

Massachusetts.— Woods *v.* Keys, 14 Allen 236, 92 Am. Dec. 766; Warren *v.* Nichols, 6 Metc. 261, 266.

Michigan.— Campau *v.* Traub, 27 Mich. 215.

New York.— People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830; Parmenter *v.* Boston, etc., R. Co., 37 Hun 354.

Pennsylvania.— Com. *v.* House, 41 Wkly. Notes Cas. 246.

Tennessee.— Wade *v.* State, 7 Baxt. 80.

Vermont.— Johnson *v.* Powers, 40 Vt. 611.

See 14 Cent. Dig. tit. "Criminal Law," § 1245; 20 Cent. Dig. tit. "Evidence," § 2419.

Where a partially deaf witness admitted that he did not hear all that the original witness had said except upon a given point, the supreme court of North Carolina rejected the evidence, questioning whether the reporting witness could be sure that he had heard all that the first witness said on a certain point when he had not heard all of his evidence. Buie *v.* Carver, 73 N. C. 264.

The witness need not distinguish in his notes between the different stages of examination, that is between direct and cross-examination. Rhine *v.* Johnson, 27 Pa. St. 30.

Where the former evidence constitutes an admission it seems that plaintiff is entitled to introduce merely such part of the evidence as contains the admission. Schearer *v.* Harber, 36 Ind. 536; Johnson *v.* Powers, 40 Vt. 611.

76. Burnett *v.* State, 87 Ga. 622, 13 S. E. 552 [*following* Pound *v.* State, 43 Ga. 88]. For example, plaintiff having given in evidence the cross-examination of defendant in another suit against him in which the issues were identical, to show an admission, defendant is entitled to give the testimony in chief bearing thereon. Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185.

77. *Alabama.*—Davis *v.* State, 17 Ala. 354.

Iowa.— Harrison *v.* Charlton, 42 Iowa 573.

Kentucky.— Kean *v.* Com., 10 Bush 190, 19 Am. Rep. 63.

Mississippi.— Gamblin *v.* State, 82 Miss. 73, 33 So. 724.

New Hampshire.— Tibbetts *v.* Flanders, 18 N. H. 284.

Ohio.— Summons *v.* State, 5 Ohio St. 325 [*affirming* 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407].

Tennessee.— Hendrick *v.* State, 10 Humphr. 479.

Wyoming.— Foley *v.* State, 11 Wyo. 464, 72 Pac. 627.

See 14 Cent. Dig. tit. "Criminal Law," § 1245; 20 Cent. Dig. tit. "Evidence," § 2419.

78. Black *v.* Woodrow, 39 Md. 194, 220, per Alvey, J. See also Philadelphia, etc., R.

extends to the whole examination.[79] To reject the evidence where a witness is unable to recollect the cross-examination, it must affirmatively appear that there was a cross-examination,[80] and that it modified the direct examination.[81] If the reporting witness can state the entire examination of the original witness on the points to which the evidence is directed, no reason is perceived why his inability to state the testimony on other points in no way relevant should do more than affect his credibility.[82]

F. Media of Proof — 1. Memoranda — a. In General. A person who has taken contemporaneous notes of the testimony given at a former trial which he is attempting to report may use them to refresh his recollection.[83] It has been held that if the witness has no present recollection he cannot make the notes evidence by testifying to a secondary recollection that the notes were accurate when made,[84] but the weight of authority is to the contrary.[85] In respect to such minutes the "best evidence" rule applies, and, upon proof that the originals have been lost, a

Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

79. Puryear *v.* State, 63 Ga. 692; Woods *v.* Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 766.

80. Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544; Chess *v.* Chess, 17 Serg. & R. (Pa.) 409.

81. Chess *v.* Chess, 17 Serg. & R. (Pa.) 409. Therefore where the reporting witness testified from his minutes of the direct evidence and stated that he knew, from the fact that he had not taken down anything which had been said on cross-examination, that nothing had been stated by the witness "different from the testimony in chief," it was held by the supreme court of Vermont that the evidence was competent. Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67. And in the same state, where the witness testified that he recollected nothing as to the cross-examination, but would have recollected it had the cross-examination changed the effect of the direct, the testimony was held to be competent. Williams *v.* Willard, 23 Vt. 369.

82. Horne *v.* Williams, 23 Ind. 37; Black *v.* Woodrow, 39 Md. 194; Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740. See also Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360; Bennett *v.* State, 32 Tex. Cr. 216, 22 S. W. 684.

83. *Alabama.*— Torrey *v.* Burney, 113 Ala. 496, 21 So. 348.

California.— People *v.* Lem You, 97 Cal. 224, 32 Pac. 11.

District of Columbia.—Anderson *v.* Reid, 10 App. Cas. 426.

Illinois.— Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Indiana.— Fisher *v.* Fisher, 131 Ind. 462, 29 N. E. 31; Houk *v.* Branson, 17 Ind. App. 119, 45 N. E. 78.

Kentucky.— Wilson *v.* Com., 54 S. W. 946, 21 Ky. L. Rep. 1333.

Maine.— Lime Rock Bank *v.* Hewett, 52 Me. 531; Welcome *v.* Batchelder, 23 Me. 85.

Massachusetts.— Costigan *v.* Lunt, 127 Mass. 354.

Minnesota.— Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143.

Missouri.— State *v.* Able, 65 Mo. 357.

New Jersey.— Sloan *v.* Somers, 20 N. J. L. 66.

New York.— Grimm *v.* Hamel, 2 Hilt. 434.

North Carolina.— Carpenter *v.* Tucker, 98 N. C. 316, 8 S. E. 831.

Pennsylvania.— Mills *v.* O'Hara, 4 Binn. 108.

Washington.— Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237.

Wisconsin.— Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

United States.— Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101.

See 14 Cent. Dig. tit. "Criminal Law," § 1238; 20 Cent. Dig. tit. "Evidence," § 2421.

No independent recollection.— It is no objection that a witness cannot make such statement from his recollection and without reference to his minutes. Van Buren *v.* Cockburn, 14 Barb. (N. Y.) 118; Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600; Reg. *v.* Child, 5 Cox C. C. 197.

84. Yancey *v.* Stone, 9 Rich. Eq. (S. C.) 429; U. S. *v.* Woods, 27 Fed. Cas. No. 16,756, 3 Wash. 440.

85. *California.*— People *v.* Murphy, 45 Cal. 137.

Illinois.— Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 20, 74 Am. Dec. 124; Bredt *v.* Simpson, 95 Ill. App. 333; Chicago, etc., R. Co. *v.* Harmon, 17 Ill. App. 640; Chicago, etc., R. Co. *v.* Harmon, 16 Ill. App. 31.

Iowa.— Moore *v.* Moore, 39 Iowa 461.

Michigan.— Lucker *v.* Liske, 111 Mich. 683, 70 N. W. 421; People *v.* Sligh, 48 Mich. 54, 11 N. W. 782; Fisher *v.* Kyle, 27 Mich. 454.

Minnesota.—Amor *v.* Stoeckele, 76 Minn. 180, 78 N. W. 1046.

Montana.— State *v.* Byers, 16 Mont. 565, 41 Pac. 708.

Nebraska.— Hair *v.* State, 16 Nebr. 601, 21 N. W. 464.

New York.— Halsey *v.* Sinsebaugh, 15 N. Y. 485.

North Carolina.— Jones *v.* Ward, 48 N. C. 24, 64 Am. Dec. 590.

Pennsylvania.— Rothrock *v.* Gallaher, 91 Pa. St. 108; Pratt *v.* Patterson, 81 Pa. St. 114; Rhine *v.* Robinson, 27 Pa. St. 30.

copy should be used.[86] Where the original testimony was reduced to writing under the sanction of the court the writing is competent and the best evidence.[87]

b. By Attorney. Notes taken by counsel for the purpose of the trial are competent memoranda for proof of former evidence,[88] but are not evidence *per se*.[89]

c. By Judge. A judge's minutes properly verified are competent evidence of testimony given before him on a former trial or hearing,[90] but must be reinforced by some personal recollection, and are not evidence *per se*.[91] The judge's minutes

South Carolina.— State *v.* Rawls, 2 Nott & M. 331.

Texas.— Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. 487.

Vermont.— Whitcher *v.* Morey, 39 Vt. 459; Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67.

United States.— Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1238, 1239; 20 Cent. Dig. tit. "Evidence," §§ 2421, 2422.

86. *Alabama.*— Matthews *v.* State, 96 Ala. 62, 11 So. 203.

Georgia.— Leggett *v.* State, 97 Ga. 426, 24 S. E. 165; Oliver *v.* State, 94 Ga. 83, 21 S. E. 125.

Michigan.— People *v.* Hinchman, 75 Mich. 587, 42 N. W. 1006, 4 L. R. A. 707.

Texas.— Potts *v.* State, 26 Tex. App. 663, 14 S. W. 456; O'Connell *v.* State, 10 Tex. App. 567; Irving *v.* State, 9 Tex. App. 66.

Vermont.— Whitcher *v.* Morey, 39 Vt. 459.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1240, 1241; 20 Cent. Dig. tit. "Evidence," § 2421.

87. Walker *v.* Walker, 14 Ga. 242; Sullivan *v.* State, 6 Tex. App. 319, 32 Am. Rep. 580.

88. *Illinois.*—Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 20, 74 Am. Dec. 124.

New York.— Clark *v.* Vorce, 15 Wend. 193, 30 Am. Dec. 53.

North Carolina.— Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831 (the notes may be used to refresh his recollection); Ashe *v.* De Rossett, 50 N. C. 299, 72 Am. Dec. 552.

Pennsylvania.— Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740; Moore *v.* Pearson, 6 Watts *v.* S. 51; Flanagin *v.* Leibert, Brightly 61.

Vermont.— Earl *v.* Tupper, 45 Vt. 275.

England.— Reg. *v.* Bird, 5 Cox C. C. 11.

See 20 Cent. Dig. tit. "Evidence," § 2421.

Weight of evidence.— "When counsel for the plaintiff argue how imperfect this sort of second-hand evidence must be, particularly when coming from counsel, tinged by all their prejudices in favor of their own client, they say nothing but what I most fully concur in. It is evidence which has in it nothing like the sanctity of a deposition; it specially requires the good sense of a jury. Counsel may sometimes take notes, chiefly to assist their own arguments; they may set down part, and trust to memory for part. But if the notes on one side are not fully trusted, what more obvious correction than to have the notes on the other side produced and sworn to, if they can be sworn to, or the notes of the judge, or recourse had to the memory of jurors or other persons present, if it shall be insisted that memory is safer than writing?" Chess *v.* Chess, 17 Serg. & R. (Pa.) 409, 412.

89. *Illinois.*—Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Maryland.— Waters *v.* Waters, 35 Md. 531.

New York.— Green *v.* Brown, 3 Barb. 119.

Pennsylvania.— Lightner *v.* Wike, 4 Serg. & R. 203; Miles *v.* O'Hara, 4 Binn. 108.

United States.— U. S. *v.* Woods, 28 Fed. Cas. No. 16,756, 3 Wash. 440.

England.— Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600; Reg. *v.* Child, 5 Cox C. C. 197. See also Reg. *v.* Bird, 5 Cox C. C. 11, 17.

See 20 Cent. Dig. tit. "Evidence," § 2421.

"It is no part of the counsel's duty to take down the whole testimony of a witness, and in most cases it would be impracticable for him to do so; generally he does no more than note down those parts of the testimony which appear to him to be material, or most worthy to be noted, or tending to support his own side of the case, and to admit the notes thus taken to be read in evidence, as proof of the testimony which had been given, would be a very unsafe practice; and we do not find it sanctioned by any decided case." Waters *v.* Waters, 35 Md. 531, 539, per Bartol, J.

90. *Arkansas.*—Sneed *v.* State, 47 Ark. 180, 1 S. W. 68.

Nevada.— State *v.* Johnson, 12 Nev. 121.

New York.— Huff *v.* Bennett, 4 Sandf. 120.

Pennsylvania.— Rothrock *v.* Gallaher, 91 Pa. St. 108; Wright *v.* Cumpsty, 41 Pa. St. 102.

Rhode Island.— Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

Vermont.— Johnson *v.* Powers, 40 Vt. 611; Whitcher *v.* Morey, 39 Vt. 459.

England.— Doncaster *v.* Day, 3 Taunt. 262, 12 Rev. Rep. 650; Kelyng, p. 55 (4).

See 20 Cent. Dig. tit. "Evidence," §§ 2418, 2421.

Judges, like other lawyers, vary greatly as to their habit and capacity for taking notes. It is a matter of common observation that many judges take no notes whatever; others scantily and occasionally; still others, in a painstaking, full, and accurate manner. There is great difference between notes taken in such different ways; for example, between such notes as were said in Yale *v.* Comstock, 112 Mass. 267, to be the next best evidence to a deposition, and disconnected jottings merely intended to refresh memory for trial purposes.

91. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124; Huff *v.* Bennett, 4 Sandf.

do not constitute an official record and are of no higher grade of evidence than any other competent testimony.[92] The relative importance of a judge's notes is lessened by the fact that modern stenography has brought into use in court a method of reproducing testimony of recognized fulness and general accuracy.[93]

d. By Stenographer. Transcripts from stenographic notes are, subject to statutory restrictions, admissible as evidence of the former testimony of a witness and have in some cases been accorded a *prima facie* effect;[94] but unless a statute so provides they are not evidence *per se*,[95] although accompanied by the stenog-

(N. Y.) 120; Grimm *v.* Hamel, 2 Hilt. (N. Y.) 434; Livingston *v.* Cox, 8 Watts & S. (Pa.) 61; Foster *v.* Shaw, 7 Serg. & R. (Pa.) 156; *Ex p.* Learmouth, 6 Madd. 113.

Verification of notes.— As it is no part of the official duties of a judge to take minutes of evidence, his certificate of the correctness of his notes is not sufficient. The notes must be verified by the oath of the judge himself, however inconvenient it may be to require his attendance, and however convenient a contrary practice may be. Miles *v.* O'Hara, 4 Binn. (Pa.) 108; Whitcher *v.* Morey, 39 Vt. 459; Reg. *v.* Child, 5 Cox C. C. 197. While judges are amenable to process, the practical inconveniences of calling upon a presiding justice to state testimony taken before him are so marked that English courts have even advised grand jurors not to summon a chairman of quarter sessions to give evidence of what was testified to before him. Reg. *v.* Gazard, 8 C. & P. 595, 34 E. C. L. 911. It has also been decided in Canada that the presiding justice ought not to be examined. Savard *v.* Valle, 4 Decis. de Int. 85. And in England production of his minutes will not be compelled. Scougull *v.* Campbell, 1 Chit. 283, 18 E. C. L. 156. On the other hand the English court of exchequer, in refusing to allow a party to tax as costs transcripts of a stenographer's notes of the evidence, intimated that the proper practice would be to apply to the presiding judge or his clerk for a copy of his notes. Crease *v.* Barrett, 1 Tyrw. & G. 112. See also Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048; Jones *v.* Wood, 16 Pa. St. 25, 43. And a court in a proper case, on an issue out of chancery, will order that on a second trial the evidence of an absent or deceased witness on the first trial may be proved by the judge's notes. Hargrave *v.* Hargrave, 10 Jur. 957.

92. Loughry *v.* Mail, 34 Ill. App. 523; Grimm *v.* Hamel, 2 Hilt. (N. Y.) 434; Earl *v.* Tupper, 45 Vt. 275, 283.

93. Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

"Reporters acting under the sanction of an oath, and being required to take down in full the questions put to witnesses and the answers given by them,— the means are afforded to the parties and to the court to present in a case the testimony of witnesses more completely and accurately than it could ordinarily be done by the mere recollection of those who may have heard the testimony." Slingerland *v.* Slingerland, 46 Minn. 100, 103, 48 N. W. 605, per Dickinson, J.

No particular privilege attaches, in the absence of statute, to such notes, and they are not regarded as necessarily the "best evidence." People *v.* Qurise, 59 Cal. 343; Golden Georgia *v.* McManus, 113 Ga. 982, 39 S. E. 476; Barker *v.* Hebbard, 81 Mich. 267, 45 N. W. 964; Smith *v.* State, 42 Nebr. 356, 60 N. W. 585; German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107. But see State *v.* Maloy, 44 Iowa 104.

Parol explanation is competent to make clear the stenographer's notes. Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. But see People *v.* Ah Yute, 56 Cal. 119; People *v.* Lee Fat, 54 Cal. 527.

The court may order by consent that the stenographer's minutes be evidence of the testimony of dead or unavailable witnesses (State *v.* Foulk, 57 Kan. 255, 45 Pac. 603; Wright *v.* Doe, 1 A. & E. 3, 28 E. C. L. 28), and consent to such an order precludes a party from further objection to the evidence (Wright *v.* Doe, 1 A. & E. 3, 28 E. C. L. 28).

94. *Kentucky.*— Cantrell *v.* Hewlett, 2 Bush 311; Baylor *v.* Smithers, 1 T. B. Mon. 6.

Minnesota.— Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605.

Mississippi.— Mackmasters *v.* State, 83 Miss. 1, 35 So. 302.

Texas.— Smith *v.* State, (Cr. App. 1903) 73 S. W. 401.

Wisconsin.— Wilson *v.* Noonan, 35 Wis. 321.

In federal courts the stenographic report of former testimony is admissible, if the witness was fully examined and cross-examined and the report is correct and complete. Chicago, etc., R. Co. *v.* Myers, 80 Fed. 361, 25 C. C. A. 486. The rule holds true in criminal cases. Mattos *v.* U. S., 156 U. S. 237, 15 S. Ct. 337, 39 L. ed. 409.

A carbon copy of the original transcript of testimony filed in the court, but lost or mislaid, was held to have been properly admitted in connection with the stenographer's testimony to its correctness. Molloy *v.* U. S. Express Co., 22 Pa. Super. Ct. 173.

95. *Colorado.*—Cerrusite Min. Co. *v.* Steele, 18 Colo. App. 216, 70 Pac. 1091.

Illinois.— See Dady *v.* Condit, 104 Ill. App. 507.

Kansas.— Robbins *v.* Barton, 9 Kan. App. 558, 58 Pac. 279. See also Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249.

Missouri.— Byrd *v.* Hartman, 70 Mo. App. 57.

Montana.— Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510, holding that the stenographer's transcript of the evidence is not admissible without his testimony to its correctness.

rapher's formal certificate of their correctness.[96] There is a natural tendency, even without the aid of a statute, to recognize the accuracy and disinterestedness of the work of an official stenographer,[97] and by statute in some jurisdictions his notes are made evidence *per se*.[98] The stenographer who took the testimony on a former trial is competent to testify orally as to statements made by witnesses thereon.[99]

2. Record. According to the weight of authority the testimony of a witness on a former trial cannot be proved alone by a bill of exceptions containing the testimony.[1] But such bill of exceptions is admissible in aid of the memory of a

New Mexico.— Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

New York.— Odell *v.* Solomon, 55 N. Y. Super. Ct. 410, 4 N. Y. Suppl. 440.

Pennsylvania.— Smith *v.* Hine, 179 Pa. St. 203, 36 Atl. 222.

Utah.— State *v.* Morgan, 27 Utah 103, 74 Pac. 526, under statute.

See 20 Cent. Dig. tit. "Evidence," §§ 2418, 2422.

96. Jordan *v.* Howe, (Nebr. 1903) 95 N. W. 853.

97. Bass *v.* State, 136 Ind. 165, 36 N. E. 124; Sage *v.* State, 127 Ind. 15, 26 N. E. 667; Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059; Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444; Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 51 Minn. 304, 53 N. W. 639. See also Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

98. *California.*— Hicks *v.* Lovell, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 979. See also People *v.* Eslabe, 127 Cal. 243, 59 Pac. 577; People *v.* Ward, 105 Cal. 652, 39 Pac. 33.

Georgia.— Burnett *v.* State, 87 Ga. 622, 13 S. E. 552.

Iowa.— See Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918. In Iowa, by statute, the transcript of a shorthand reporter's notes of the testimony of a witness are now admissible in evidence only on a retrial of the case or proceeding in which the same were taken or for the purpose of impeachment. *In re* Wiltsey, 122 Iowa 423, 98 N. W. 294; Walker *v.* Walker, 117 Iowa 609, 91 N. W. 908.

Kentucky.— Sievers-Carson Hardware Co. *v.* Curd, 71 S. W. 506, 24 Ky. L. Rep. 1317.

Louisiana.— State *v.* Bolden, 109 La. 484, 33 So. 571.

South Dakota.— Merchants' Nat. Bank *v.* Stebbins, 10 S. D. 466, 74 N. W. 199.

Vermont.— Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273.

Contra.— State *v.* Morgan, 27 Utah 103, 74 Pac. 526.

Dumb witness.— Where a statute makes a stenographer's minutes evidence of the testimony of a former witness, it covers the evidence of a witness who being dumb could testify only by signs which the stenographer interpreted into words. Quinn *v.* Halbert, 57 Vt. 178.

In the federal courts these state statutes will not be held to authorize the receipt of this class of evidence unless permitted by the laws of the United States. Mulcahey *v.* Lake Erie, etc., R. Co., 69 Fed. 172.

Authentication of stenographer's notes.— Mackmasters *v.* State, 83 Miss. 1, 35 So. 302.

99. State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810, holding also that the weight and sufficiency of his evidence is for the jury.

1. *Florida.*— Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343.

Illinois.— Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; O'Connor *v.* Mahoney, 159 Ill. 69, 42 N. E. 378; Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621; Stern *v.* People, 102 Ill. 540; Roth *v.* Smith, 54 Ill. 431, 433 (where Lawrence, J., said: "The bill of exceptions has none of the safeguards that surround a deposition. It is not read or signed by the witness. It is not generally prepared at the trial, but subsequently, from the notes of counsel, and the certificate of the judge gives it no more authenticity, except for the purpose for which the law authorizes him to certify it, than would the certificate of the clerk"); Sargeant *v.* Marshall, 38 Ill. App. 642; Elgin *v.* Welch, 23 Ill. App. 185; Asher *v.* Mitchell, 9 Ill. App. 335. See also Pittsburgh, etc., R. Co. *v.* Story, 104 Ill. App. 132.

Mississippi.— Montgomery *v.* Handy, 63 Miss. 43; Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

Ohio.— Kirk *v.* Mowry, 24 Ohio St. 581.

Pennsylvania.— Edwards *v.* Gimbel, 202 Pa. St. 30, 51 Atl. 357.

See 20 Cent. Dig. tit. "Evidence," § 2423.

Contra.— Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79, 23 Pac. 458; Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059; Cantrell *v.* Hewlett, 2 Bush (Ky.) 311; Baylor *v.* Smithers, 1 T. B. Mon. (Ky.) 6, 7 (where Owsley, J., said: "The statements contained in a bill of exceptions must be supposed to have undergone, not only the inspection of each party or their counsel, but, moreover, the scrutiny and supervision of the court by whom the exceptions are signed. When enrolled, those statements in fact compose part of the record, and are entitled to as much verity, and are deserving as much credit, as would be the testimony of any witness who might prove what the witness whose statements are contained in the record, proved on a previous trial"); Louisville Water Co. *v.* Upton, 36 S. W. 520, 18 Ky. L. Rep. 326.

Containing entire testimony.— But a bill of exceptions taken and settled on a former trial and purporting to contain all the testimony given upon it, copied and extended from the minutes of a shorthand reporter was held to be "the very best evidence" of

witness who testifies to the former evidence.[2] It has been held that the former evidence of a witness may be proved by a certificate of evidence in a chancery case, signed by the judge and constituting part of the record,[3] a brief of testimony on a motion for a new trial,[4] a "case" settled and certified by the judge, pursuant to statute, and containing all the evidence,[5] or a statement agreed upon by counsel and approved by the court.[6]

3. Witnesses. The former evidence of a witness may be established by the testimony of any person who can swear to it from memory,[7] including a committing magistrate,[8] the stenographer,[9] the county clerk,[10] or a juryman.[11]

VII. Relevancy.*

A. General Rule — 1. Logical Relevancy. In legal evolution reason has supplanted all other methods of ascertaining the existence of disputed facts. Logic is therefore the controlling force in the modern law of evidence.[12] An offer by a party to prove a statement or other fact in evidence involves an assertion by him

the testimony given on the trial. Wilson *v.* Noonan, 35 Wis. 321. But see *contra*, Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

2. Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730; Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

In Missouri a bill of exceptions is admissible only when it is shown by other evidence that the testimony contained therein is substantially the same as that delivered by the witness. Scoville *v.* Hannibal, etc., R. Co., 94 Mo. 84, 6 S. W. 654. See also Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Jaccard *v.* Anderson, 37 Mo. 91. *Compare* Coughlin *v.* Haeussler, 50 Mo. 126; Bruce Lumber Co. *v.* Hoos, 67 Mo. App. 264; Franklin *v.* Gumersell, 11 Mo. App. 306; Corby *v.* Wright, 9 Mo. App. 5.

3. O'Connor *v.* Mahoney, 159 Ill. 69, 42 N. E. 378.

4. Riggins *v.* Brown, 12 Ga. 271 (in connection with testimony of a witness that it was correct); Central R., etc., Co. *v.* Murray, 97 Ga. 326, 22 S. E. 972. But see Sloan *v.* Somers, 20 N. J. L. 66.

5. Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605.

In the absence of statute it must affirmatively appear by evidence *aliunde* that the "case" contains all the former evidence of the witness correctly stated. Odell *v.* Solomon, 55 N. Y. Super. Ct. 410, 4 N. Y. Suppl. 440.

6. Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517; Jackson *v.* Jackson, 47 Ga. 99; Adair *v.* Adair. 39 Ga. 75; Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621 [*distinguishing* Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668]. But see Houston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1899) 51 S. W. 506.

7. *Alabama.*— Jeffries *v.* Castleman, 75 Ala. 262.

Arkansas.— Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521.

California.—People *v.* Murphy, 45 Cal. 137.

Georgia.— Riggins *v.* Brown, 12 Ga. 271.

Kansas.— Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730.

Massachusetts.— Costigan *v.* Lunt, 127 Mass. 354.

Missouri.— Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78.

Pennsylvania.— Cornell *v.* Green, 10 Serg. & R. 14.

Tennessee.—Hendrick *v.* State, 10 Humphr. 479, 488, where the court said: "As to the person by whom it may be proved, it is perfectly clear that any person who was present and heard the former *viva voce* testimony, the judge, counsel, juror, or a bystander, may state it, provided he will, on his oath, undertake to repeat it in such detail as the practice of the court may require."

Vermont.— Johnson *v.* Powers, 40 Vt. 611.

Wisconsin.— Fertig *v.* State, 100 Wis. 301, 75 N. W. 960; McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. 116.

England.— Pyke *v.* Crouch, 1 Ld. Raym. 730; Doncaster *v.* Day, 3 Taunt. 262, 12 Rev. Rep. 650.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1238, 1244; 20 Cent. Dig. tit. "Evidence," § 2420.

8. Hendrick *v.* State, 10 Humphr. (Tenn.) 479.

9. See *supra*, VI, F, 1, d.

10. State *v.* Johnson, 12 Nev. 121.

11. Hutchings *v.* Corgan, 59 Ill. 70; State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746.

12. This logic is inductive, in the sense in which that term is employed by John S. Mill (System Logic, bk. iii) as being an inference from the known to the unknown. It presents, however, some peculiar features. So far as reducible to syllogistic form the major premise presents a general proposition based on experience as gained from observation or experiment; the minor premise consists of the fact offered in evidence; the conclusion is the existence of a fact to be established. While the process is more apparent in case of circumstantial than in that of direct evidence, the difference is only in degree. Inference from experience remains constant in either case both on the part of a witness and of the tribunal he

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

that such a relation exists, in reason, as a matter of logic, between the fact offered and a fact in issue that the existence of the former renders probable or improbable the existence of the latter. The relation thus asserted has been termed relevancy.[13] The basic rule of the law of evidence, subject to the requirement of a clear connection stated hereafter,[14] is that whatever facts are logically relevant are legally admissible,[15] and that facts logically irrelevant to the issue are not admissible;[16] the onus of showing the relevancy, intrinsic or in connection with other

addresses. The probative force to a witness of any observation by him or to the tribunal of its narration by the observer lies in the fact that in accordance with the teachings of experience it suggests an inference, raises a presumption, directly or indirectly, as to the existence of a fact in issue. The induction is usually imperfect. It employs a major premise broader as a rule than the conclusion. The conclusion itself does not, except in the comparatively rare instances where the tribunal learns a fact by inspection (as to which see *infra*, XI) permit of demonstration, but is simply probable to a greater or less extent.

13. Relevancy is thus defined by Stephen in the earlier editions of the Digest: "A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events." Stephen Dig. L. Ev. Introduction. In the third edition the definition was so changed as to read: "The word 'relevant' means that any two facts to which it is applied are so related to each other, that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other." The definition gains in brevity; but the abandonment of the word "highly" as qualifying "probable" is of doubtful advantage. See *infra*, VII, A, 2.

"The law furnishes no test of relevancy. For this, it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers; just as a vast multitude of things are assumed as already sufficiently known." Thayer Prelim. Tr. 265. See also Plumb *v.* Curtis, 66 Conn. 154, 166, 33 Atl. 998.

14. See *infra*, VII, A, 2.

15. *Alabama.*— O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905; Bell *v.* Troy, 35 Ala. 184; Governor *v.* Campbell, 17 Ala. 566.

Arkansas.— Ward *v.* Young, 42 Ark. 542.

California.— Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299.

Connecticut.— Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998.

Georgia.— Walker *v.* Roberts, 20 Ga. 15; Sample *v.* Lipscomb, 18 Ga. 687.

Illinois.— Thomas Knapp Printing, etc., Co. *v.* Guthrie, 64 Ill. App. 523; Hunter *v.* Harris, 29 Ill. App. 200.

Indiana.— Newell *v.* Downs, 8 Blackf. 523.

Iowa.— Moline Plow Co. *v.* Braden, 71 Iowa 141, 32 N. W. 247.

Kansas.— Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52.

Maine.— Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86.

Minnesota.— Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554.

Missouri.— Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500.

Nebraska.— Darner *v.* Daggett, 35 Nebr. 695, 53 N. W. 608. And see Chamberlain *v.* Chamberlain Banking House, (1903) 93 N. W. 1021.

New Hampshire.— Reagan *v.* Manchester St. R. Co., 72 N. H. 298, 56 Atl. 314.

New York.— O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14; Freese *v.* Veith, 7 N. Y. Suppl. 134.

Ohio.— Findlay Brewing Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55; Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

Pennsylvania.— Atkins *v.* Payne, 190 Pa. St. 5, 42 Atl. 378; Rodgers *v.* Stophel, 32 Pa. St. 111, 72 Am. Dec. 775.

Tennessee.— Hudson *v.* State, 3 Coldw. 355.

Vermont.— Richardson *v.* Royalton, etc., Turnpike Co., 6 Vt. 496.

Wisconsin.— Kavanaugh *v.* Wausau, (1904) 98 N. W. 550.

United States.— Home Ins. Co. *v.* Weide, 11 Wall. 438, 20 L. ed. 197.

See 20 Cent. Dig. tit. "Evidence," § 123.

A witness' answer, if relevant, although not responsive, is admissible. Only the interrogating party can object for lack of responsiveness. O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905.

Immaterial issue.— Evidence is not made relevant by being directed to proof of an immaterial issue (Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116), although as in other cases of mere immateriality receiving evidence on such an issue is not prejudicial error (Smay *v.* Etnire, 99 Iowa 149, 68 N. W. 597). See *infra*, VII, A, 3.

16. *Alabama.*— Miller *v.* Boykin, 70 Ala. 469.

Arkansas.— Green *v.* State, 59 Ark. 246, 27 S. W. 5; St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; State *v.* Roper, 8 Ark. 491.

California.— Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

Colorado.— Hannan *v.* Anderson, 15 Colo. App. 433, 62 Pac. 961.

Georgia.— Claflin *v.* Briant, 58 Ga. 414.

facts, of a fact offered in evidence, being upon the party offering the evidence.[17] It follows from the existence of this broad and fundamental rule that the laws of evidence are largely those of exclusion; rejecting, for reasons partly practical and partly historical and arbitrary, the use of inferences logically to be drawn from certain facts or sets of facts.[18] The facts or set of facts rejected as bases for inferences are in the main four: (1) The existence of an unsworn statement as evidence of the fact which it asserts;[19] (2) the fact that a person is of a particular character on the question whether he did a certain act;[20] (3) the fact that a person has formed a particular opinion as evidence that the truth is in accordance with it;[21] and (4) the fact that a person has done a similar act at one time as evidence that he did a particular act at another.[22] To each of these four main exclusions — hearsay, character, opinion, and *res inter alios* — are excepted cases where the fundamental rule that all evidence logically relevant is legally admissible continues to apply.

2. Legal Relevancy. Not all facts, which are in some degree logically relevant, have sufficient probative force to justify the expenditure of the time necessarily consumed in proving, testing, and weighing them. The practical conditions under which causes are tried require a somewhat higher grade of probative force which may be called "legal relevancy," and do not permit the court to hear all facts which have a logical bearing on the issue.[23] Whenever the court feels that a fact is not of probative value commensurate with the time required for

And see Lenney *v.* Finley, 118 Ga. 427, 45 S. E. 317.

Illinois.— Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963; Doran *v.* Mullen, 78 Ill. 342.

Indiana.— Loomis *v.* Stevens, 18 Ind. App. 184, 47 N. E. 237.

Iowa.— Adams *v.* Chicago, etc., R. Co., 93 Iowa 565, 61 N. W. 1059.

Kansas.— Neosho Valley Invest. Co. *v.* Hannum, 63 Kan. 621, 66 Pac. 631.

Kentucky.— Nesbit *v.* Gregory, 7 J. J. Marsh. 270; Winlock *v.* Hardy, 4 Litt. 272; Mason *v.* Bruner, 10 Ky. L. Rep. 155.

Maryland.— Dorsey *v.* Whipps, 8 Gill 457; Maslin *v.* Thomas, 8 Gill 18.

Massachusetts.— Brooks *v.* Boston, 19 Pick. 174. And see Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60.

Missouri.— Gaskill *v.* Dodson Lead, etc., Co., 84 Mo. 521; Hartt *v.* McNeil, 47 Mo. 526.

Nebraska.— Gross *v.* Bunn, 10 Nebr. 217, 4 N. W. 1048. And see Arabian Horse Co. *v.* Bivens, (1903) 96 N. W. 621

New Jersey.— Peterson *v.* Christianson, 68 N. J. L. 392, 56 Atl. 288.

New York.— National Trust Co. *v.* Roberts, 42 N. Y. Super. Ct. 100. And see Deutschmann *v.* Third Ave. R. Co., 87 N. Y. App. Div. 503, 84 N. Y. Suppl. 887.

Pennsylvania.— Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347, 17 Atl. 608; Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661; Foster *v.* Shaw, 7 Serg. & R. 156.

Tennessee.— Heatherly *v.* Bridges, 1 Heisk. 220; Hudson *v.* State, 3 Coldw. 355.

Texas.— Leach *v.* Millard, 9 Tex. 551.

Utah.— Jensen *v.* McCornick, 26 Utah 142, 72 Pac. 630, private reason of party.

Vermont.— Lewis *v.* Barker, 55 Vt. 21.

Wisconsin.—Kavanaugh *v.* Wausau, (1904) 98 N. W. 550.

See 20 Cent. Dig. tit. "Evidence," § 123.

17. *Connecticut.*— Bristol *v.* Warner, 19 Conn. 7.

Illinois.— Williams *v.* Case, 79 Ill. 356.

Indiana.— Hall *v.* Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; Waterbury *v.* Miller, 13 Ind. App. 197, 41 N. E. 383.

Iowa.— Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190.

New York.— Ehrehart *v.* Wood, 71 Hun 609, 25 N. Y. Suppl. 31; Chapin *v.* Hollister, 7 Lans. 456.

Ohio.— Hutchinson *v.* Canal Bank, 3 Ohio St. 490.

Pennsylvania.—Marsh *v.* Nordyke, etc., Co., (1888) 15 Atl. 875; Tripner *v.* Abrahams, 47 Pa. St. 220; Yost *v.* Mensch, 27 Wkly. Notes Cas. 562.

Texas.— Compton *v.* Young, 26 Tex. 644; Osborne *v.* Ayers, (Civ. App. 1895) 32 S. W. 73.

West Virginia.— Hubbard *v.* Kelley, 8 W. Va. 46.

18. *In re* Berkeley, 4 Campb. 401.

19. See *infra*, IX.

20. See *infra*, X.

21. See *infra*, XI.

22. See *infra*, XII.

23. Wheeler *v.* Packer, 4 Conn. 102; Hawkins *v.* James, 69 Miss. 274, 13 So. 813; Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111; Golden Reward Min. Co. *v.* Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228. See also Philips *v.* Mo. (Minn. 190) 97 N. W. 969. "The trial to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense, but so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded, . . . on the ground that, as a matter of fact, it had so slight or remote a bearing on this case

its use as evidence,[24] either because too remote in time,[25] or too uncertain[26] or conjectural[27] in its nature, the fact may in the exercise of a sound discre-

that it would be unjust or unreasonable to prolong and complicate the trial by such an investigation of those cases as would be necessary for obtaining from them any useful information." Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332, 338.

24. *District of Columbia.*— Funk *v.* U. S., 16 App. Cas. 478.

Indiana.— Stinehouse *v.* State, 47 Ind. 17.

Iowa.— Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14.

Maryland.— Baltimore Chemical Mfg. Co. *v.* Dobbin, 23 Md. 210.

Pennsylvania.— Featherman *v.* Miller, 45 Pa. St. 96.

United States.— Moore *v.* U. S., 150 U. S. 57, 14 S. Ct. 26, 37 L. ed. 996.

25. *California.*—Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

Illinois.— Larminie *v.* Carley, 114 Ill. 196, 29 N. E. 382; Trude *v.* Meyer, 82 Ill. 535; Eureka Coal Co. *v.* Braidwood, 72 Ill. 625.

Indiana.— Goodwin *v.* State, 96 Ind. 550.

Iowa.— Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Jones *v.* Hopkins, 32 Iowa 503. See Evans *v.* Elwood, (1904) 98 N. W. 584.

Massachusetts.— Miner *v.* Connecticut R. Co., 153 Mass. 398, 26 N. E. 994; Com. *v.* Pomeroy, 117 Mass. 143; Morrissey *v.* Ingham, 111 Mass. 63. See also Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747.

Mississippi.— Jones *v.* State, 26 Miss. 247.

Nebraska.—Cutting *v.* Baker, 43 Nebr. 470, 61 N. W. 726.

Nevada.— Ferraris *v.* Kyle, 19 Nev. 435, 14 Pac. 529.

New Hampshire.— Cote *v.* Grand Trunk R. Co., 70 N. H. 620, 49 Atl. 567.

New Jersey.— Johnson *v.* Mason, (1903) 56 Atl. 137.

New York.— Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580; Maimone *v.* Dry-Dock, etc., R. Co., 58 N. Y. App. Div. 383, 68 N. Y. Suppl. 1073.

Pennsylvania— Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

Vermont.— Harris *v.* Holmes, 30 Vt. 352.

Wisconsin.— Kavanaugh *v.* Wausau, (1904) 98 N. W. 550.

See 20 Cent. Dig. tit. "Evidence," §§ 424, 434.

Evidence raising presumption.—A fact cannot reasonably be said to be too remote in time, either prior or subsequent, if its existence at that time raises a fair inference of its continued existence at the time involved in the inquiry. Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70; Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294; State Bank *v.* Southern Nat. Bank, 170 N. Y. 1, 62 N. E. 677; McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641 [*affirming* 15 N. Y. Suppl. 602]; Mason *v.* Raplee, 66 Barb. (N. Y.) 180; Dale *v.* Brooklyn City, etc., R. Co., 3 Thomps. & C. (N. Y.) 686; Ware *v.* Shafer, (Tex. Civ. App. 1894) 27 S. W. 764.

26. *Alabama.*— Watson *v.* Byers, 6 Ala. 393.

California.— People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896.

Indiana.— Central Union Telephone Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

Maryland.— Gunther *v.* Bennett, 72 Md. 384, 19 Atl. 1048.

Massachusetts.— Phillips *v.* Middlesex County, 127 Mass. 262.

Minnesota.— Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Thayer *v.* Barney, 12 Minn. 502.

New Hampshire.— State *v.* Flanders, 38 N. H. 324.

South Carolina.— Hopper *v.* Hopper, 61 S. C. 124, 39 S. E. 366.

Vermont.— Melvin *v.* Bullard, 35 Vt. 268.

Wisconsin.— Barney *v.* Douglass, 22 Wis. 464.

England.— Underwood *v.* Wing, 4 De G. M. & G. 633, 3 Eq. Rep. 794, 1 Jur. N. S. 159, 24 L. J. Ch. 293, 2 Wkly. Rep. 641, 53 Eng. Ch. 496, 43 Eng. Reprint 655.

See 20 Cent. Dig. tit. "Evidence," § 430.

Non-production of better evidence.—A party cannot complain that evidence is uncertain, if he fails to furnish more definite evidence within his power. Richmond *v.* Dubuque, etc., R. Co., 40 Iowa 264; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

Evidence is not uncertain merely because it will require other evidence to make it certain (Ashley *v.* Wilson, 61 Ga. 297), or because a witness has given his testimony in an uncertain or hesitating manner (Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620).

27. *California.*— Muller *v.* Southern Pac. R. Co., 83 Cal. 240, 23 Pac. 265.

District of Columbia.— Washington Second Nat. Bank *v.* Averell, 2 App. Cas. 470, 25 L. R. A. 761.

Illinois.— North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899 [*affirming* 41 Ill. App. 311]; Pioneer Fire Proof Constr. Co. *v.* Sandberg, 98 Ill. App. 36; Atchison, etc., R. Co. *v.* Alsdorf, 68 Ill. App. 149.

Maine.— Pike *v.* Crehore, 40 Me. 503.

Massachusetts.— Pond *v.* Pond, 132 Mass. 219; Tufts *v.* Charlestown, 4 Gray 537.

Michigan.— Van Beusen *v.* Cathcart, 43 Mich. 258, 5 N. W. 319.

Minnesota.— Briggs *v.* Minneapolis St. R. Co., 52 Minn. 36, 53 N. W. 1019.

Missouri.— Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38.

New Hampshire.— Smith *v.* New England Bank, 70 N. H. 187, 46 Atl. 230.

New York.— Newell *v.* Doty, 33 N. Y. 83; Elliott *v.* Gibbons, 31 N. Y. 67; Benedict *v.* Penfield, 42 Hun 176.

Pennsylvania.— Schuylkill River East Side R. Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399; Hart *v.* Evans, 8 Pa. St. 13.

tion[28] be rejected. Even where the evidence is legally relevant it may be excluded, in the court's discretion, if for any reason, as where it is merely cumulative;[29] or tends only to prove facts which are admitted,[30] sufficiently proven,[31] or not controverted,[32] the necessary time would not be judiciously expended in hearing it.

3. Prejudice From Irrelevant Testimony. It may fairly be doubted how far a party can be truly said to be prejudiced by the receipt of evidence which is objectionable only because irrelevant; and a growing tendency has been manifested by courts of last resort not to regard as prejudicial error the receipt of such evidence and even to sustain the action of the lower court in admitting it,[33] pro-

Texas.—Ragsdale *v.* Robinson, 48 Tex. 379; Dallas *v.* Kahn, 9 Tex. Civ. App. 19, 29 S. W. 98.

United States.— U. S. *v.* Ross, 92 U. S. 281, 23 L. ed. 707; Goodman *v.* Simonds, 20 How. 343, 15 L. ed. 934.

Canada.— Peacock *v.* Cooper, 27 Ont. App. 128.

See 20 Cent. Dig. tit. "Evidence," §§ 428, 430.

Where a witness swears positively to facts, it constitutes no exception to admissibility of his testimony that from the nature of the subject such facts could not be within his knowledge. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

"Guess," "impression," etc.— Testimony is not necessarily objectionable as conjectural because the witness has used a colloquial phrase, as "guess" (Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35), "presume" (People *v.* Soap, 127 Cal. 408, 59 Pac. 771), or "suppose" (Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074; Atlanta Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24), which under the circumstances may fairly be taken to indicate, as used by him, the exercise of judgment; or has testified to his "impression," provided the word implies a recollection, however faint (State *v.* Flanders, 38 N. H. 324; State *v.* Wilson, 9 Wash. 16, 36 Pac. 967).

28. An important consideration affecting the propriety of the court's action in excluding a fact is whether more direct or conclusive proof is already in the case or could have been obtained by a reasonable amount of diligence. Long *v.* Travellers' Ins. Co., 113 Iowa 259, 85 N. W. 24. It is, however, no ground for rejecting competent evidence that apparently the same fact can be shown in a more direct and simple way. Miller *v.* Shay, 142 Mass. 598, 8 N. E. 419; Walker *v.* Curtis, 116 Mass. 98. On the border line of relevancy it is natural to expect conflicting decisions. Facts which affect strongly the mind of one judge may seem entirely valueless to another. Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86.

29. *Arkansas.*— Olmstead *v.* Hill, 2 Ark. 346.

California.— Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98.

Connecticut.— Waller *v.* Graves, 20 Conn. 305.

Georgia.— White *v.* Columbus Iron Works Co., 113 Ga. 577, 38 S. E. 944.

Indiana.— Farmers', etc., Bldg., etc., Assoc. *v.* Rector, 22 Ind. App. 101, 53 N. E. 297.

Maine.— Glidden *v.* Dunlap, 28 Me. 379.

Massachusetts.— Parker *v.* Hardy, 24 Pick. 246.

Mississippi.— Wilson *v.* Williams, 52 Miss. 487.

Missouri.— Craighead *v.* Wells, 21 Mo. 404.

New York.— People *v.* New York Super. Ct., 10 Wend. 285.

See 20 Cent. Dig. tit. "Evidence," § 426.

30. *Connecticut.*—Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242; Henkel *v.* Trubee, (1887) 11 Atl. 722.

Illinois.— Batavia Mfg. Co. *v.* Newton Wagon Co., 91 Ill. 230.

Indiana.— Vogel *v.* Harris, 112 Ind. 494, 14 N. E. 385.

Michigan.— Scheibeck *v.* Van Derbeck, 122 Mich. 29, 80 N. W. 880.

Mississippi.— Richardson *v.* Issaquena County Bd. Levee Com'rs, 68 Miss. 539, 9 So. 351.

New York.—White *v.* Old Dominion Steamship Co., 102 N. Y. 660, 6 N. E. 289; Smith *v.* Satterlee, 12 N. Y. St. 626.

Pennsylvania.— Cunningham *v.* Smith, 70 Pa. St. 450, evidence the more readily excluded if its probable effect would be to prejudice and mislead the jury.

Texas.— Stallings *v.* Hullum, 79 Tex. 421, 15 S. W. 677.

Vermont.— Wait *v.* Brewater, 31 Vt. 516.

See 20 Cent. Dig. tit. "Evidence," § 426. And see Trial.

31. *Illinois.*— Russell *v.* Sycamore Marsh Harvester Mfg. Co., 65 Ill. 333; Lewiston *v.* Proctor, 27 Ill. 414.

Minnesota.— Norris *v.* Clarke, 33 Minn. 476, 24 N. W. 128.

Nebraska.— Arabian Horse Co. *v.* Bivens, (1903) 96 N. W. 621.

New York.— Allendorph *v.* Wheeler, 101 N. Y. 649, 5 N. E. 42; Durst *v.* Burton, 47 N. Y. 167, 7 Am. Rep. 428 [*affirming* 2 Lans. 137].

Texas.— Bartlett *v.* Hubert, 21 Tex. 8.

Virginia.— Triplett *v.* Goff, 83 Va. 784, 3 S. E. 525.

See 20 Cent. Dig. tit. "Evidence," § 426.

32. Cole *v.* Curtis, 16 Minn. 182; Austin *v.* Austin, 45 Wis. 523.

33. *Alabama.*— Ethridge *v.* State, 124 Ala. 106, 27 So. 320; Sanders *v.* Stokes, 30 Ala. 432; McCreary *v.* Turk, 29 Ala. 244.

Colorado.— Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195.

vided the jury were not misled[34] or confused.[35] When, however, the incidental effect of receiving immaterial evidence has been to injure a party by exciting sympathy for his adversary[36] or hostility to himself,[37] or in any other way, the admission constitutes reversible error.[38] Absence of prejudice from irrelevant evidence is clearer where the party objecting has previously introduced without objection immaterial evidence on the same point. In such cases it has been held that evidence of like immaterial nature may be received, in the discretion of the court, to rebut the evidence already offered;[39] and it has even been intimated

Connecticut.— Meriden Sav. Bank *v.* Wellington, 64 Conn. 553, 30 Atl. 774.

Indiana.— Harbor *v.* Morgan, 4 Ind. 158.

Iowa.— Hoadley *v.* Hammond, 63 Iowa 599, 19 N. W. 794.

Kentucky.— Jones *v.* Letcher, 13 B. Mon. 363; Shannon *v.* Kinney, 1 A. K. Marsh. 3, 10 Am. Dec. 705.

Louisiana.— Lazare *v.* Peytavin, 9 Mart. 566.

Maine.— Trull *v.* True, 33 Me. 367.

Maryland.— Richardson *v.* Milburn, 17 Md. 67.

Massachusetts.— Kellogg *v.* Kimball, 122 Mass. 163.

Michigan.— Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

Nevada.— State *v.* Rhoades, 6 Nev. 352.

New Hampshire.— Tucker *v.* Peaslee, 36 N. H. 167; Eaton *v.* Welton, 32 N. H. 352.

New York.— Lake Shore, etc., R. Co. *v.* Erie County, 2 N. Y. St. 317.

Pennsylvania.— Beates *v.* Retallick, 23 Pa. St. 288.

Washington.— Brown *v.* Porter, 7 Wash. 327, 34 Pac. 1105.

34. *Florida.*— Mizell *v.* Travelers' Ins. Co., (1902) 33 So. 454.

Illinois.— Hunter *v.* Harris, 131 Ill. 482, 23 N. E. 626.

Maine.— Grant *v.* Libby, 71 Me. 427.

Maryland.— Capron *v.* Adams, 28 Md. 529; Edelen *v.* Gough, 5 Gill 103.

Michigan.— Campau *v.* Moran, 31 Mich. 280.

Mississippi.— Lowenstein *v.* Aaron, 69 Miss. 341, 12 So. 269.

Missouri.— Ritter *v.* Springfield First Nat. Bank, 87 Mo. 574.

New Hampshire.— Gregg *v.* Northern R. Co., 67 N. H. 452, 41 Atl. 271.

Texas.— Scott *v.* Rhea, 5 Tex. 258.

See 20 Cent. Dig. tit. "Evidence." § 429.

35. Lucas *v.* Brooks, 18 Wall. (U. S.) 436, 21 L. ed. 779.

36. Hutchins *v.* Hutchins, 98 N. Y. 56; Mannion *v.* Hagan, 9 N. Y. App. Div. 98, 41 N. Y. Suppl. 86.

37. *California.*— Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878; Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1037.

Illinois.— Stearns *v.* Reidy, 135 Ill. 119, 25 N. E. 762.

Indiana.— Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Mississippi.—Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552.

New York.—Hoag *v.* Wright, 34 N. Y. App. Div. 260, 54 N. Y. Suppl. 658; Green *v.* Rochester Iron Mfg. Co., 1 Thomps. & C. 5; Jones *v.* Bacon, 19 N. Y. Suppl. 553; Fonda *v.* Lape, 8 N. Y. Suppl. 792; Smith *v.* Satterlee, 12 N. Y. St. 626.

North Carolina.— Deming *v.* Gainey, 95 N. C. 528.

Texas.— Gulf, etc., R. Co. *v.* Hepner, 83 Tex. 136, 18 S. W. 441; Planters' Oil Co. *v.* Mansell, (Civ. App. 1897) 43 S. W. 913; Galveston, etc., R. Co. *v.* Smith, (Civ. App. 1893) 24 S. W. 668.

Material evidence cannot be rejected on account of its tendency to prejudice the party in the eyes of the jury. Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Pease *v.* Smith, 61 N. Y. 477.

38. Where a judge tries the issue of fact, and there is consequently no jury, the probability of prejudice to the party by the receipt of immaterial evidence is so far diminished that no error is committed in admitting it for which judgment will be reversed. Andrews *v.* Johnston, 7 Colo. App. 551, 44 Pac. 73; Fruentes *v.* Gaines, 25 La. Ann. 87.

39. *Alabama.*— Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; McIntyre *v.* White, 124 Ala. 177, 26 So. 937; Winslow *v.* State, 92 Ala. 78, 9 So. 728; Flinn *v.* Barber, 59 Ala. 446. And see Curtis *v.* Parker, 136 Ala. 217, 33 So. 935.

Arkansas.— Little Rock, etc., R. Co. *v.* Tankersley, 54 Ark. 25, 14 S. W. 1099.

Colorado.— Farmers' High Line Canal, etc., Co. *v.* White, (Colo. Sup. 1903) 75 Pac. 415.

Illinois.— Illinois Steel Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101 [*affirming* 107 Ill. App. 69].

Indiana.— Brazil Block Coal Co. *v.* Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281.

Iowa.— Ingram *v.* Wackernagel, 83 Iowa 82, 48 N. W. 998, holding that while the proper course, when incompetent evidence is offered in rebuttal of equally incompetent evidence, is for the court to strike it out "on its own motion if necessary," the party originally offering the incompetent evidence is not prejudiced by the receipt of the evidence in rebuttal.

Kentucky.— Corley *v.* Lancaster, 81 Ky. 171, 5 Ky. L. Rep. 39. But see Norton *v.* Doe, 1 Dana 14.

Louisiana.— Mousseau *v.* Thebens, 19 La. Ann. 516; Patton *v.* Philadelphia, 1 La. Ann. 98.

Massachusetts.— Treat *v.* Curtis, 124 Mass. 348; Shaw *v.* Stone, 1 Cush. 228, 243.

Michigan.— Johnson *v.* Doon, 131 Mich. 452, 91 N. W. 742.

Missouri.— Baker *v.* Pulitzer Pub. Co., 103

that the party against whom the immaterial evidence was received has a right to insist upon rebutting it by the use of the same class of evidence.[40] On the contrary, it has been held that irrelevant evidence should be rejected whenever offered against objection, and that this right to object is not waived by having previously introduced similar evidence on the subject.[41]

4. Intrinsic Sufficiency Not Required. As indicated in the definition of relevancy,[42] a relevant fact will not be rejected because not sufficient in itself to establish the whole or any definite portion of a party's contention.[43] It is sufficient

Mo. App. 54, 77 S. W. 585; Hill *v.* Seneca Bank, 100 Mo. App. 230, 73 S. W. 307.

Montana.— Yank *v.* Bordeaux, 29 Mont. 74, 74 Pac. 77.

Nebraska.— Clasen *v.* Pruts, (1903) 95 N. W. 640. And see Gosnell *v.* Webster, (1904) 97 N. W. 1060.

New Hampshire.— Furbush *v.* Goodwin, 25 N. H. 425.

New York.— Waldron *v.* Romaine, 22 N. Y. 368; Keeler *v.* Delavan, 4 Barb. 317. And see Hornum *v.* McNeil, 80 N. Y. App. Div. 637, 80 N. Y. Suppl. 728; James *v.* Metropolitan St. R. Co., 80 N. Y. App. Div. 364, 80 N. Y. Suppl. 710; Littebrant *v.* Sidney, 77 N. Y. App. Div. 545, 78 N. Y. Suppl. 890.

North Carolina.— Cabiness *v.* Martin, 15 N. C. 106. And see Parker *v.* Atlantic Coast Line R. Co., 131 N. C. 827, 43 S. E. 1005, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827.

Ohio.— Krause *v.* Morgan, 53 Ohio St. 26, 40 N. E. 886.

Pennsylvania.— Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

South Dakota.—Aldous *v.* Olverson, (1903) 95 N. W. 917; Reynolds *v.* Hinrichs, 16 S. D. 602, 94 N. W. 602.

Texas.— Missouri, etc., R. Co. *v.* Criswell, (Tex. Civ. App. 1904) 78 S. W. 388; Ætna Ins. Co. *v.* Fitze, (Tex. Civ. App. 1904) 78 S. W. 370; Pecos, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1903) 78 S. W. 5; San Antonio, etc., R. Co. *v.* Griffith, (Tex. Civ. App. 1902) 70 S. W. 438; Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037.

Vermont.— Stevenson *v.* Gunning, 64 Vt. 601, 25 Atl. 697; Ellsworth *v.* Potter, 41 Vt. 685; Lytle *v.* Bond, 40 Vt. 618.

Washington.—McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

United States.— Evening Post Pub. Co. *v.* Voight, 72 Fed. 885, 19 C. C. A. 224; Watts *v.* Southern Bell Telephone, etc., Co., 66 Fed. 453 [*affirmed* in 66 Fed. 460, 13 C. C. A. 579]; Atchison, etc., R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768; Ward *v.* Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538. See also Hutter *v.* De Q. Bottle Stopper Co., 119 Fed. 190.

See 20 Cent. Dig. tit. "Evidence," §§ 450, 457, 458.

Illustrations.— Where defendant, against the objection of plaintiff, has introduced opinion evidence on a given point, he cannot object if plaintiff, in rebuttal, asks the same question of another expert. "Having thus established the law of the case, the defendant cannot be permitted to object that the court continued to apply it in every stage of the trial." Hollender *v.* New York Cent., etc., R. Co., 14 Daly (N. Y.) 219, 222, 6 N. Y. St. 352, 19 Abb. N. Cas. (N. Y.) 18. In the same way, where a party without objection has asked a question in a form calling for the conclusion of the witness, he cannot object when his antagonist asks the question in the same form. Kelley *v.* Detroit, etc., R. Co., 80 Mich. 237, 45 N. W. 90, 20 Am. St. Rep. 514; Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23; Taylor *v.* Penquite, 35 Mo. App. 389.

40. Havis *v.* Taylor, 13 Ala. 324; Richardson *v.* Hoole, 13 Nev. 492. See also Yank *v.* Bordeaux, 29 Mont. 74, 74 Pac. 77; Gosnell *v.* Webster, (Nebr. 1904) 97 N. W. 1060; Buedingen Mfg. Co. *v.* Royall Trust Co., 90 N. Y. App. Div. 267, 85 N. Y. Suppl. 621; Droege *v.* Baxter, 77 N. Y. App. Div. 78, 79 N. Y. Suppl. 29; Aldous *v.* Olverson, (S. D. 1903) 95 N. W. 917.

41. *California.*— San Diego Land, etc., Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

Connecticut.— Phelps *v.* Hunt, 43 Conn. 194.

Georgia.— Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. 428.

Illinois.— Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433; Wickenkamp *v.* Wickenkamp, 77 Ill. 92. See also Fitz Simons, etc., Co. *v.* Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421 [*affirming* 94 Ill. App. 533].

Indiana.— Shank *v.* State, 25 Ind. 207; Horne *v.* Williams, 12 Ind. 324.

Maryland.— Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76; Ruhl *v.* Corner, 63 Md. 179; Bannon *v.* Warfield, 42 Md. 22.

Nebraska.— Dodge *v.* Kiene, 28 Nebr. 216, 44 N. W. 191.

New York.— Farmers', etc., Bank *v.* Whinfield, 24 Wend. 419.

Pennsylvania.— See Swank *v.* Phillips, 113 Pa. St. 482, 6 Atl. 450.

Virginia.— Wilkinson *v.* Jett, 7 Leigh 115, 30 Am. Dec. 493.

United States.— Stringer *v.* Young, 3 Pet. 320, 7 L. ed. 693.

See 20 Cent. Dig. tit. "Evidence," § 450.

42. See *supra*, VII, A, 1.

43. *Alabama.*— McNeill *v.* Reynolds, 9 Ala. 313; Cuthbert *v.* Newell, 7 Ala. 457.

Connecticut.— Belden *v.* Lamb, 17 Conn. 441; Bartlett *v.* Evarts, 8 Conn. 523.

Georgia.— Walker *v.* Mitchell, 41 Ga. 102; Columbus Omnibus Co. *v.* Semmes, 27 Ga. 283; Mosely *v.* Gordon, 16 Ga. 384.

Illinois.— Slack *v.* McLagan, 15 Ill. 242; Hulick *v.* Scovil, 9 Ill. 159.

if it may be expected to become relevant in connection with other facts.[44] A fact otherwise incompetent may be admitted to render the testimony of a witness more definite, as by fixing a date,[45] or by stating facts referred to in an agreement established in evidence.[46] It is no objection to the admissibility of a party's testimony that it is competent only upon his own theory. He has a right to have the case submitted to the jury upon his theory if there is any testimony to support it.[47]

5. Preliminary and Explanatory Facts. Facts whose existence is a necessary preliminary to the relevancy of evidence, such as the accuracy of a photograph,[48] a set of books[49] or the identity of a cause of action,[50] these and similar facts, although often rather a matter of practice or procedure of the trial than of evi-

Indiana.— Indianapolis, etc., R. Co. *v.* Anthony, 43 Ind. 183.

Iowa.— Hatcher *v.* Dunn, 102 Iowa 411, 71 N. W. 343, 36 L. R. A. 689; Hancock *v.* Wilson, 39 Iowa 47; Hollenbeck *v.* Stanberry, 38 Iowa 325.

Kansas.— Musel *v.* Komarek, 7 Kan. App. 789, 54 Pac. 19. See also Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52.

Louisiana.— Brander *v.* Ferriday, 16 La. 296.

Maryland.— Townshend *v.* Towshend, 6 Md. 295; Lowes *v.* Holbrook, 1 Harr. & J. 153.

Minnesota.— Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554.

Mississippi.— Williams *v.* Newberry, 32 Miss. 256.

Missouri.— Gardner *v.* Crenshaw, 122 Mo. 79, 27 S. W. 612; Sugg *v.* Memphis, etc., Packet Co., 40 Mo. 442; Winston *v.* Wales, 13 Mo. 569. Where circumstantial evidence must be resorted to, objections to admissibility are not favored and the widest latitude must be allowed. Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500.

Nebraska.— Chamberlain *v.* Chamberlain Banking House, (1903) 93 N. W. 1021.

New York.— People *v.* Gonzalez, 35 N. Y. 49; Fitton *v.* Brooklyn City R. Co., 5 N. Y. Suppl. 641.

North Carolina.— Lockhart *v.* Bell, 86 N. C. 443.

Pennsylvania.—Garrigues *v.* Harris, 17 Pa. St. 344; Com. *v.* Leeds, 11 Phila. 296 [*affirmed* in 83 Pa. St. 453].

Texas.— Neill *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746.

Vermont.— Wason *v.* Rowe, 16 Vt. 525.

Washington.— Tolmie *v.* Dean, 1 Wash. Terr. 46.

Wisconsin.— Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342; Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

United States.— Deitsch *v.* Wiggins, 15 Wall. 539, 21 L. ed. 228; U. S. *v.* Searcey, 26 Fed. 435; U. S. *v.* Flowery, 25 Fed. Cas. No. 15,122, 1 Sprague 109.

See 14 Cent. Dig. tit. "Criminal Law," § 849; 20 Cent. Dig. tit. "Evidence," § 427.

"Evidence which is colorless taken by itself, which establishes neither a constituent nor a fact pointing by inference to a constituent of a crime, may be made significant by other evidence, and so may be made admissible. It need not be self-justifying without regard to the other circumstances proved. Com. *v.* O'Neil, 169 Mass. 394, 48 N. E. 134. What is true of any part of the evidence is true with regard to the whole of it." Com. *v.* Williams, 171 Mass. 461, 462, 50 N. E. 1035.

44. *Alabama.*— Aycock *v.* Johnson, 119 Ala. 405, 24 So. 543; Tuggle *v.* Barclay, 6 Ala. 407; Crenshaw *v.* Davenport, 6 Ala. 390, 41 Am. Dec. 56.

Arkansas.— Tucker *v.* West, 29 Ark. 386.

Kansas.— Ballou *v.* Humphrey, 8 Kan. 219.

Michigan.— Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62.

Missouri.— De Arman *v.* Taggart, 65 Mo. App. 82.

Pennsylvania.— Trego *v.* Lewis, 58 Pa. St. 463.

Texas.— Texas Tram, etc., Co. *v.* Gwin, (Civ. App. 1899) 52 S. W. 110.

See 20 Cent. Dig. tit. "Evidence," §§ 133, 136.

45. *Connecticut.*—Quintard *v.* Corcoran, 50 Conn. 34.

Iowa.— Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770.

Maine.— Rollins *v.* Bartlett, 21 Me. 565.

Maryland.— Goodhand *v.* Benton, 6 Gill & J. 481.

Massachusetts.— McDonald *v.* Savoy, 110 Mass. 49.

Missouri.— Ritter *v.* Springfield First Nat. Bank, 30 Mo. App. 652.

New York.— Artcher *v.* McDuffie, 5 Barb. 147.

Pennsylvania.— Selfridge *v.* Northampton Bank, 8 Watts & S. 320.

Vermont.— Cavendish *v.* Troy, 41 Vt. 99; Goodnow *v.* Parsons, 36 Vt. 46.

See 20 Cent. Dig. tit. "Evidence," § 127.

46. Krech *v.* Pacific R. Co., 64 Mo. 172.

47. Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52; Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765; Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W. 881.

48. Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416.

49. West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. 231, 22 Pac. 232.

50. Harris *v.* Miner, 28 Ill. 135; Dupuis *v.* Interior Constr., etc., Co., 88 Mich. 103, 50 N. W. 103.

dence itself, are competent. Of the same general nature are facts otherwise irrelevant which by explaining or unfolding a situation establish the relevancy of evidence.[51] Explanatory evidence is equally competent to diminish the force of unfavorable facts produced by an opponent.[52] It is not material that explanatory facts should precede or be contemporaneous with the facts they explain. In matters of contract for example acts done or settlements made by the parties under the contract are admissible in evidence to show the contemporaneous construction of the parties.[53]

6. Supplementary and Consistent Facts. To aid the tribunal in discharging the function of judgment, a party may enhance the weight of his evidence or minimize the weight of his opponent's evidence. In this connection a fact is relevant which tends to render probable the contention of the party producing it,[54] as by

51. *Alabama.*— David *v.* David, 66 Ala. 139 (existence of an indictment); Casey *v.* Holmes, 10 Ala. 776.

Connecticut.— Barnum *v.* Barnum, 9 Conn. 242.

Georgia.— Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48; Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13.

Illinois.— Overtoom *v.* Chicago, etc., R. Co., 181 Ill. 323, 54 N. E. 898; Peru Coal Co. *v.* Merrick, 79 Ill. 112; Thomas Knapp Printing, etc., Co. *v.* Guthrie, 64 Ill. App. 523.

Indiana.— Buckeye Mfg. Co. *v.* Woolley Foundry, etc., Works, 26 Ind. App. 7, 58 N. E. 1069.

Iowa.— Graves *v.* Merchants', etc., Ins. Co., 82 Iowa 637, 49 N. W. 65, 31 Am. St. Rep. 507; State *v.* Lyon, 10 Iowa 340.

Massachusetts.— Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620; Ford *v.* Tirrell, 9 Gray 401, 69 Am. Dec. 297.

Michigan.— Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531; Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015; Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

New Hampshire.— Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740; Dodge *v.* Carroll, 59 N. H. 237, motive.

New Jersey.— Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637.

New York.— Tracy *v.* McManus, 58 N. Y. 257, motive.

Pennsylvania.— Allen *v.* Willard, 57 Pa. St. 374; Holler *v.* Weiner, 15 Pa. St. 242; Brown *v.* Clark, 14 Pa. St. 469; Thommon *v.* Kalbach, 12 Serg. & R. 238.

South Carolina.— Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

Texas.— Jennings *v.* State, 42 Tex. Cr. 78, 57 S. W. 642; International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523, 57 S. W. 977; Stone *v.* Moore, (Civ. App. 1899) 48 S. W. 1097.

Virginia.— Parsons *v.* Harper, 16 Gratt. 64, motive.

Washington.— Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102, existence of an indictment.

West Virginia.— Sullivan *v.* Myers, 28 W. Va. 375.

United States.— Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. ed. 953.

See 20 Cent. Dig. tit. "Evidence," §§ 132, 134.

A conversation may be an explanatory fact, although otherwise objectionable as hearsay. Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48; Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13.

52. *Alabama.*— Edgar *v.* McArn, 22 Ala. 796. See also Curtis *v.* Parker, 136 Ala. 217, 33 So. 935.

California.— People *v.* Philbon, 138 Cal. 530, 71 Pac. 650; Herd *v.* Tuohy, 133 Cal. 55, 65 Pac. 139; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30. See also Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

Iowa.— State *v.* Perigo, 80 Iowa 37, 45 N. W. 399.

Kentucky.— Grimes *v.* Talbot, 1 A. K. Marsh. 205.

Missouri.— Blair *v.* Marks, 27 Mo. 579; Baker *v.* Pulitzer Pub. Co., 103 Mo. App. 54, 77 S. W. 585; Hill Bros. *v.* Seneca Bank, 100 Mo. App. 230, 73 S. W. 307.

New York.— Woodrick *v.* Woodrick, 141 N. Y. 457, 36 N. E. 395; Lewy *v.* Blumenthal, 83 N. Y. App. Div. 8, 82 N. Y. Suppl. 344.

South Dakota.— Reynolds *v.* Hinrichs, 16 S. D. 602, 94 N. W. 694. See also Aldous *v.* Olverson, (1903) 95 N. W. 917.

Tennessee.— Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

Texas.— Missouri, etc., R. Co. *v.* Criswell, (Civ. App. 1904) 78 S. W. 388; Pecos, etc., R. Co. *v.* Williams, (Civ. App. 1903) 78 S. W. 5.

Vermont.— Holbrook *v.* Murray, 20 Vt. 525.

United States.— Burley *v.* German-American Bank, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406; U. S. *v.* Lumsden, 28 Fed. Cas. No. 15,641, 1 Bond 5. See also Crane *v.* Fry, 126 Fed. 288, 61 C. C. A. 260.

53. Stone *v.* Clark, 1 Metc. (Mass.) 378, 35 Am. Dec. 370; Clark *v.* Munyan, 22 Pick. (Mass.) 410, 33 Am. Dec. 752; Cambridge *v.* Lexington, 17 Pick. (Mass.) 222.

54. Schwerin *v.* De Graff, 21 Minn. 354; Chamberlain *v.* Chamberlain Banking House, (Nebr. 1903) 93 N. W. 1021; Kavanaugh *v.* Wausau, (Wis. 1904) 98 N. W. 550.

showing good faith,[55] or explains facts reflecting unfavorably on it, as by suggesting reasons why witnesses have not been called[56] or books produced.[57] A fact is equally relevant if its probative effect is to show that an opponent's contention is probably unsound because maintained in bad faith.[58] Either party may prove facts tending to show what weight should be accorded the testimony on either side,[59] or the degree of credibility of their respective witnesses,[60] as affected by bias,[61] impeached by contradiction,[62] or otherwise;[63] and in general, especially where the testimony is conflicting, the court may receive evidence of all circumstances attending a transaction and the relations of the parties to aid the jury in judging as to the reasonableness[64] or unreasonableness[65] of their respective claims. While as a matter of evidence a fact does not become relevant merely because its existence is consistent with a party's claim,[66] the court may receive aid from evidence which in itself is not relevant to any issue in the case, but is corroborative of other testimony upon a disputed point.[67]

7. NEGATIVE EVIDENCE. Relevant testimony need not be presented in an

55. *Kansas.*— Schuster, etc., Co. *v.* Stout, 30 Kan. 529, 2 Pac. 642.

Maryland.— Divers *v.* Fulton, 8 Gill & J. 202.

Oregon.— Smitson *v.* Southern Pac. Co., 37 Oreg. 74, 60 Pac. 907.

Vermont.— Durgin *v.* Danville, 47 Vt. 95; Cross *v.* Willard, 46 Vt. 73.

United States.— Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416.

A conversation embodying statement of a claim may be relevant on an issue of good faith in making such a claim later. Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

56. *Georgia.*— Richmond, etc., R. Co. *v.* Garner, 91 Ga. 27, 16 S. E. 110.

Maine.— Penobscot Boom Corp. *v.* Brown, 16 Me. 237.

New York.— Pease *v.* Smith, 61 N. Y. 477; Stafford *v.* Morning Journal Assoc., 68 Hun 467, 22 N. Y. Suppl. 1008; McGuire *v.* Broadway, etc., R. Co., 16 N. Y. Suppl. 922.

Texas.— Weatherford, etc., R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878.

United States.— Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416.

See 20 Cent. Dig. tit. "Evidence," § 442.

The reason assigned must be an excuse if believed. Learned *v.* Hall, 133 Mass. 417; Hanson *v.* Carlton, 6 Allen (Mass.) 276.

57. Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881.

58. *Alabama.*— Rutherford *v.* McIvor, 21 Ala. 750, failure to advance a claim under proper circumstances.

Iowa.— Noble *v.* White, 103 Iowa 352, 72 N. W. 556.

Massachusetts.— Egan *v.* Bowker, 5 Allen 449, suborning witnesses.

Michigan.— Webster *v.* Sibley, 72 Mich. 630, 40 N. W. 772, failure to advance a claim.

New Hampshire.— Taylor *v.* Gilman, 60 N. H. 506, bribery.

New Jersey.— Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762, spoliation of documents.

New York.— McCarthy *v.* Gallagher, 4 Misc. 188, 23 N. Y. Suppl. 884 [*affirming* 2 Misc. 587, 23 N. Y. Suppl. 313], refusal to allow reasonable examinations.

Vermont.— Judevine *v.* Weaks, 57 Vt. 278 (failure to take deposition); Strong *v.* Slicer, 35 Vt. 40 (failure to advance a claim).

The wealth and resources of a party may be considered by the jury to enable them to judge whether or not he has been able to produce all the evidence in his favor. Daub *v.* Northern Pac. R. Co., 18 Fed. 625.

Facts offered to impugn good faith must be relevant on that question. Thornton *v.* Thornton, 39 Vt. 122.

59. Campbell *v.* Wright, 8 N. Y. St. 471. And see Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554.

60. Evansich *v.* Gulf, etc., R. Co., 61 Tex. 24. See also Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554; Reagan *v.* Manchester St. R. Co., 72 N. H. 298, 56 Atl. 314. And see, generally, WITNESSES.

61. Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Stolp *v.* Blair, 68 Ill. 541; Mertz *v.* Detweiler, 8 Watts & S. (Pa.) 376; Scott *v.* U. S., 172 U. S. 343, 19 S. Ct. 209, 43 L. ed. 471. And see, generally, WITNESSES.

62. Fordsville Banking Co. *v.* Thompson, 65 S. W. 6, 23 Ky. L. Rep. 1276. And see, generally, WITNESSES.

63. See, generally, WITNESSES.

64. Holman *v.* Raynesford, 3 Kan. App. 676, 44 Pac. 910; Dodge *v.* Weill, 158 N. Y. 346, 53 N. E. 33; Barney *v.* Fuller, 133 N. Y. 605, 30 N. E. 1007; Van Sciver Co. *v.* McPherson, 199 Pa. St. 331, 49 Atl. 73; Home Ins. Co. *v.* Weide, 11 Wall. (U. S.) 438, 20 L. ed. 197; J. S. Toppan Co. *v.* McLaughlin, 120 Fed. 705. See also Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500; Chamberlain *v.* Chamberlain Banking House, (Nebr. 1903) 93 N. W. 1021.

65. Dexter *v.* Collins, 21 Colo. 455, 42 Pac. 664.

66. Hawkins *v.* James, 69 Miss. 274, 13 So. 813.

67. Cook *v.* Malone, 128 Ala. 662, 29 So. 653; Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14; Houghton *v.* Clough, 30 Vt. 312. See also Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500.

affirmative form.[68] Thus it is well settled that evidence that a witness failed to see[69] or hear[70] is relevant, provided the circumstances are such as properly to lead to the inference that the alleged fact would have been seen or heard had it actually existed.[71] Likewise the circumstance that there is no entry,[72] record,[73]

68. Shannon *v.* Castner, 21 Pa. Super. Ct. 294. But see Treat *v.* Merchants' L. Assoc., 198 Ill. 431, 64 N. E. 992 [*reversing* 98 Ill. App. 59]; Vandyke *v.* Memphis, etc., Packet Co., 71 S. W. 441, 24 Ky. L. Rep. 1283; Pelly *v.* Denison, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. 542.

69. Whittaker *v.* New York, etc., R. Co., 51 N. Y. Super. Ct. 287; Gulf, etc., R. Co. *v.* Gross, (Tex. Civ. App. 1893) 21 S. W. 186.

70. *Alabama.*— Ward *v.* Reynolds, 32 Ala. 384.

Georgia.— Higgins *v.* Cherokee R. Co., 73 Ga. 149; Beall *v.* Beall, 10 Ga. 342.

Illinois.— West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996; Warren *v.* Wright, 103 Ill. 298.

Indiana.— Indianapolis *v.* Emmelman, 108 Ind. 530, 9 N. E. 155.

Massachusetts.— Hannefin *v.* Blake, 102 Mass. 297.

New Hampshire.— Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359.

New York.— Greany *v.* Long Island R. Co., 101 N. Y. 419, 5 N. E. 425; Ratcliffe *v.* Gray, 4 Abb. Dec. 4, 3 Keyes 510, 3 Transcr. App. 117; Bonelle *v.* Pennsylvania R. Co., 4 N. Y. Suppl. 127.

North Carolina.—Edwards *v.* Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730.

Pennsylvania.— Lyon *v.* Marclay, 1 Watts 271; Holden *v.* Pennsylvania R. Co., 7 Kulp 52.

Texas.— Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

Utah.— Haun *v.* Rio Grande Western R. Co., 22 Utah 346, 62 Pac. 908.

See 20 Cent. Dig. tit. "Evidence," §§ 435, 437.

Weight of positive and negative testimony see *infra*, XVII.

71. East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443; Lawson *v.* Hicks, 38 Ala. 279; Blakey *v.* Blakey, 33 Ala. 611; Thomas *v.* Degraffenreid, 17 Ala. 602; Chambers *v.* Hill, 34 Mich. 523; Dawson *v.* State, 38 Tex. Cr. 50, 41 S. W. 599. But *compare* Pelly *v.* Denison, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. 542.

Absence of knowledge.—When the situation of a witness is such that if a certain fact had existed he would probably have known it his want of knowledge is some evidence, although slight, that it did not exist; and in such case he will be allowed to state that if the fact existed he did not know it. Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442. One living in a community and well acquainted may testify that a certain named person does not live there. Dawson *v.* State, 38 Tex. Cr. 50, 41 S. W. 599. Absence of knowledge of a particular fact may be a relevant mental state. Alabama Great Southern R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862.

Possession of money.— Whether or not a person has money is not a fact so open to observation or patent to the senses as to render such testimony in relation thereto admissible. Killen *v.* Lide, 65 Ala. 505.

72. *California.*— People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; Santa Rosa City R. Co. *v.* Central St. R. Co., (1895) 38 Pac. 986; Ford *v.* Cunningham, 87 Cal. 209, 25 Pac. 403.

Connecticut.— Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524.

Georgia.— Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003.

Kansas.— Woods *v.* Hamilton, 39 Kan. 69, 17 Pac. 335.

Maryland.— Mudd *v.* Turton, 4 Gill 233.

South Dakota.— Union School-Furniture Co. *v.* Mason, 3 S. D. 147, 52 N. W. 671.

Texas.— McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

United States.— Polk *v.* Wendell, 5 Wheat. 293, 5 L. ed. 92; American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644.

See 20 Cent. Dig. tit. "Evidence," § 436.

73. *Colorado.*—Knapp *v.* Day, 4 Colo. App. 21, 34 Pac. 1008.

Kansas.— Marbourg *v.* McCormick, 23 Kan. 38.

Massachusetts.— Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298.

Michigan.— People *v.* Kemp, 76 Mich. 410, 43 N. W. 439; Doolittle *v.* Gavagan, 74 Mich. 11, 41 N. W. 846.

Minnesota.— Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614; Babcock *v.* Cobb, 11 Minn. 347.

New Hampshire.— Pembroke *v.* Allenstown, 41 N. H. 365.

Pennsylvania.— Struthers *v.* Reese, 4 Pa. St. 129.

Vermont.— Reed *v.* Field, 15 Vt. 672, record of deeds.

See 20 Cent. Dig. tit. "Evidence," § 436.

Mode of proof and rebuttal.— It is sometimes said that the fact of no entry is not admissible when what is meant is that the fact cannot be proved in that particular way. Thus it has been held that the certificate of a clerk of the circuit court that one in whose name land stood of record in his office had not transferred or mortgaged the same was not admissible. Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344. And it has been held that a witness other than an officer having charge of the public records is not competent to prove the negative fact that there was no record of a certain instrument. Edwards *v.* Barwise, 69 Tex. 84, 6 S. W. 677. The fact of no entry must itself be established by competent evidence. Bullock *v.* Wallingford, 55 N. H. 619; Myers *v.* Jones, 4 Tex. Civ. App. 330, 23 S. W. 562; Hill *v.* Bellows, 15 Vt. 727. It may be shown in rebuttal that there are other inaccessible records on which an entry might

or memorandum[74] of a fact where it would naturally be found if it existed may be relevant. Such relevancy, however, except in cases where the law requires that an instrument to be effective shall be recorded, is entirely dependent upon the inference arising from regularity and disinterestedness, that if the fact existed an entry of it would have been made in that particular place.[75]

B. Special Relaxation of Requirements of Legal Relevancy — 1. Ancient Facts. While the "best evidence rule," viewed as a principle of administration, and considered on its permissive side,[76] is by no means uniformly applied, it is still true that otherwise inadmissible evidence is frequently received if it is the best attainable. Where, on account of lapse of time, impossibility of employing direct observation, trivial general importance, or other peculiarity of the subject-matter, more probative evidence is practically beyond the power of the party, he will in general be permitted to present such evidence as is available; the rules of relevancy and exclusion being relaxed in aid of his contention. No adverse inference of suppression[77] arises, but on the contrary the court may properly invoke its administrative function of prescribing what constitutes a *prima facie* case, to assist an uncontroverted contention which cannot well be made stronger. Prominent among such connections is proof of facts *in pais*[78] which occurred at a time fairly beyond the period of personal memory.[79] Accordingly such facts of which no written evidence can be presumed to exist may be established by hearsay evidence, and this evidence may be either direct,[80] or in the composite form of

properly have been made. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

74. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13, indorsement.

75. Sumner *v.* Child, 2 Conn. 607; Estill *v.* Patrick, 4 T. B. Mon. (Ky.) 306; Corner *v.* Pendleton, 8 Md. 337; Roe *v.* Nichols, 5 N. Y. App. Div. 472, 38 N. Y. Suppl. 1100; Wilson *v.* Pope, 37 Barb. (N. Y.) 321; Boor *v.* Moschell, 8 N. Y. Suppl. 583.

Non-entry on books.— It has been held that non-entry of the receipt of goods on the books of a vendee of chattels is not relevant as to the delivery of the goods. Keim *v.* Rush, 5 Watts & S. (Pa.) 377. So in an action for the price of goods where defendant testified that he had paid to plaintiff's clerk, plaintiff's books were held not admissible to show that they contained no credit of the amount so claimed to have been paid. Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557. In an action on an oral contract of insurance defendant's book of entries of risks taken, in which the alleged contract was not entered, was inadmissible to prove that there was no contract. Sanborn *v.* Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419. And it has been broadly held that books of account can only be admitted as affirmative evidence and are never admissible to establish a negative proposition. Schwarze *v.* Roessler, 40 Ill. App. 474; Lawshorn *v.* Carter, 11 Bush (Ky.) 7; Morse *v.* Potter, 4 Gray (Mass.) 292; Winner *v.* Bauman, 28 Wis. 563. See also Hyde *v.* Lookabill, 66 Iowa 453, 23 N. W. 920; Burghardt *v.* Van Deusen, 4 Allen (Mass.) 374; Second Ward Sav. Bank *v.* Shakman, 30 Wis. 333. It is otherwise with respect to non-entries constituting admissions. Woodward *v.* Leavitt, 107 Mass. 453, 9 Am. Rep. 49; Mattocks *v.* Lyman, 18 Vt. 98, 46 Am. Dec. 138.

76. See *infra*, XV.

77. See *supra*, V, A, 6; XV.

78. For proof of ancient documents see *infra*, XIV, D.

79. "Direct and positive proof cannot always be obtained, and in matters especially which relate to remote periods it is necessary to resort to circumstantial evidence and presumption to supply the place of that testimony which is lost by the lapse of time and the imperfection of human memory. Such evidence in the strict legal sense is not collateral. It raises, it is true, a new and distinct inquiry; but if it affords a reasonable presumption or inference as to the principal fact or matter in issue, it is relevant and material and does not tend to distract or mislead the jury from the real point in controversy." North Brookfield *v.* Warren, 16 Gray (Mass.) 171, 173. "It is hard to prove ancient things." Hewlett *v.* Cock, 7 Wend. (N. Y.) 371. "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence." Malcomson *v.* O'Dea, 10 H. L. C. 593, 614, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155.

80. *Maryland.*—Casey *v.* Inloes, 1 Gill 430, 39 Am. Dec. 658.

Oregon.— McEwen *v.* Portland, 1 Oreg. 300.

Pennsylvania.— *In re* Pickens, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477.

South Carolina.— Jones *v.* Jones, 3 Strobh. 315, holding declarations of a deceased witness, made *ante litem motam*, admissible to aid the presumption of a remote transaction.

Texas.—Lewis *v.* Bergess, 22 Tex. Civ. App. 252, 54 S. W. 609.

England.— Roe *v.* Rawlings, 7 East 279, 3

reputation.[81] Thus documents over thirty years old,[82] produced from a proper custody,[83] and purporting to indicate the exercise of acts of ownership[84] or dominion[85] will be received as evidence that such transactions actually took place,[86] or of facts incidentally recited,[87] even in the absence of proof of actual possession under the particular document;[88] although corroboration by proof of actual possession under similar documents or by other facts[89] adds to the weight of the evidence,[90] and indeed has in some instances been deemed essential to admissibility. In like manner ancient proprietors' records bearing intrinsic evidence of genuineness, where verification by the proper custodian can no longer be obtained, are admissible evidence of facts contained in them.[91]

2. FACTS OF FAMILY HISTORY — a. General Rule. A necessary limitation on the number of witnesses who could have personal knowledge as to facts at once so precise and so personal as those of family history has required that these facts, especially when remote in point of time,[92] shall be provable under relaxed conditions.[93] Declarations concerning pedigree which are elsewhere discussed in this article[94] form a distinct class among possible evidentiary facts on matters of family history. The original and generally accepted admissibility of such declarations is where the issue in the case is distinctly one of pedigree, not extending to family history in other connections. When a fact of genealogy therefore is relevant to an inquiry other than one of pedigree, the rule has no application, and declarations,[95] oral or written,[96] by deceased members of the family,[97] or family

Smith K. B. 254, 8 Rev. Rep. 632; *In re* Lovat, 10 App. Cas. 763.

81. McEwen *v.* Portland, 1 Oreg. 300.

82. Hewlett *v.* Cock, 7 Wend. (N. Y.) 371; Plaxton *v.* Dare, 10 B. & C. 17, 8 L. J. K. B. O. S. 98, 5 M. & R. 1, 21 E. C. L. 18 (leases); Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155; Blandy-Jenkins *v.* Dunraven, [1899] 2 Ch. 121, 68 L. J. Ch. 589, 81 L. T. Rep. N. S. 209.

83. Harlan *v.* Howard, 79 Ky. 373, and cases cited in the preceding note.

84. Floyd *v.* Tewksbury, 129 Mass. 362 (partition); Hewlett *v.* Cock, 7 Wend. (N. Y.) 371 (leases); Blandy-Jenkins *v.* Dunraven, [1899] 2 Ch. 121, 68 L. J. Ch. 589, 81 L. T. Rep. N. S. 209 (bringing suit for trespass).

85. Boston *v.* Richardson, 105 Mass. 351, 371 (granting licenses); Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 614, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155 (granting licenses or leases).

86. Harlan *v.* Howard, 79 Ky. 373; Boston *v.* Richardson, 105 Mass. 351; Baeder *v.* Jennings, 40 Fed. 199; Blandy-Jenkins *v.* Dunraven, [1899] 2 Ch. 121, 68 L. J. Ch. 589, 81 L. T. Rep. N. S. 209.

87. Plaxton *v.* Dare, 10 B. & C. 17, 8 L. J. K. B. O. S. 98, 5 M. & R. 1, 21 E. C. L. 18, that land leased was in a particular parish.

88. Harlan *v.* Howard, 79 Ky. 373; Boston *v.* Richardson, 105 Mass. 351; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155. "Possession accompanying the deed is always sufficient, without other proof, but it is not indispensable." Hewlett *v.* Cock, 7 Wend. (N. Y.) 371, 373. Proof of possession has been required. Clarke *v.* Courtney, 5 Pet. (U. S.) 319, 8 L. ed. 140.

89. Boston *v.* Richardson, 105 Mass. 351 (subsequent occupation); Hewlett *v.* Cock, 7 Wend. (N. Y.) 371 (lessee treating land as leased).

90. Boston *v.* Richardson, 105 Mass. 351; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155.

91. Goodwin *v.* Jack, 62 Me. 414.

92. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

93. Shaw *v.* Tracy, 95 Mo. 531, 8 S. W. 434.

94. See *infra*, IX, C.

95. Carnes *v.* Crandall, 10 Iowa 377 (death); Bowen *v.* Preferred Acc. Ins. Co., 68 N. Y. App. Div. 342, 74 N. Y. Suppl. 101; People *v.* Miller, 30 Misc. (N. Y.) 355, 63 N. Y. Suppl. 949, 14 N. Y. Cr. 407; Haines *v.* Guthrie, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. N. S. 645, 33 Wkly. Rep. 99.

96. Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; Dinan *v.* Supreme Council Catholic Mut. Ben. Assoc., 201 Pa. St. 363, 50 Atl. 999; Campbell *v.* Wilson, 23 Tex. 253, 76 Am. Dec. 67.

97. Bowen *v.* Preferred Acc. Ins. Co., 68 N. Y. App. Div. 342, 74 N. Y. Suppl. 101; Haines *v.* Guthrie, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. N. S. 645, 33 Wkly. Rep. 99; Sturla *v.* Freccia, 5 App. Cas. 623, 44 J. P. 812, 50 L. J. Ch. 86, 43 L. T. Rep. N. S. 209, 29 Wkly. Rep. 217; Doe *v.* Ford, 3 U. C. Q. B. 352.

"A case is not necessarily [a case of pedigree] . . . because it may involve questions of birth, parentage, age or relationship. Where these questions are merely incidental and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper and things

reputation,[98] are equally incompetent. By some courts in the United States, however, the scope of the rules admitting declarations as to matters of genealogy or facts incidentally connected therewith has been extended by analogy, working through the best evidence principle of administration, from issues of pedigree to cover proof of such facts in any connection in which they are relevant.[99] These courts hold that declarations of a deceased[1] member of the family[2] made *ante litem motam*[3] are competent to establish the fact of age[4] and other facts of family history whenever these facts are relevant. The witness need not as a preliminary matter state the sources of his knowledge.[5]

b. Age. Although his testimony be confessedly based in part at least[6] on

of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired of." Eisenlord *v.* Clum, 126 N. Y. 552, 566, 27 N. E. 1024, 12 L. R. A. 836.

Declarations of a deceased testator as to his age at the time of executing his will are incompetent. Doe *v.* Ford, 3 U. C. Q. B. 352.

98. Palmer *v.* Palmer, 18 L. R. Ir. 192.

99. *Alabama.*— Bain *v.* State, 61 Ala. 75.

California.— Morrell *v.* Morgan, 65 Cal. 575, 4 Pac. 580.

Minnesota.— Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

North Carolina.— State *v.* Best, 108 N. C. 747, 12 S. E. 907.

Pennsylvania.— Watson *v.* Brewster, 1 Pa. St. 381.

Texas.— Primm *v.* Stewart, 7 Tex. 178; New York Mut. L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286; Schwarzhoff *v.* Necker, 1 Tex. Unrep. Cas. 325.

Vermont.— *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

The analogy is one easy to invoke because of the fact that the competent declarants are usually the same in the two cases and practically an identical difficulty of obtaining other evidence exists and is the foundation of the relaxation in each. Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247.

Dangerous character of evidence.— To admit evidence of declarations of deceased members of a family as to the facts which collectively make up pedigree, birth, death, and marriage wherever they are in dispute has been spoken of by eminent authority as "extremely dangerous" in many cases, especially instancing a case where the declarations are very commonly used in the American courts — statutory offenses against female children. Haines *v.* Guthrie, 13 Q. B. D. 818, 827, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. N. S. 645, 33 Wkly. Rep. 99, per Sir James FitzJames Stephen, J.

1. Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81; Cherry *v.* State, 68 Ala. 29; White *v.* Strother, 11 Ala. 720; People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256; Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364. Witness cannot testify as to the age of defendant from information received from the latter's sister who is not dead. State *v.* Parker, 106 N. C. 711, 11 S. E. 517.

2. Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541; New York Mut. L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286. The date of a person's birth may be testified to by himself or by members of his family, although they know the fact only by hearsay based on family tradition. Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

3. Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364.

4. See also *infra*, VII, B, 2, b.

In England it has been held that the defense of infancy cannot be established by declarations which would be competent if the issue were one of pedigree. Haines *v.* Guthrie, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. N. S. 645, 33 Wkly. Rep. 99; Plant *v.* Taylor, 7 H. & N. 211, 8 Jur. N. S. 140, 31 L. J. Exch. 289, 5 L. T. Rep. N. S. 318; Figg *v.* Wedderburne, 11 L. J. Q. B. 45. See also Sturla *v.* Freccia, 5 App. Cas. 623, 44 J. P. 812, 50 L. J. Ch. 86, 43 L. T. Rep. N. S. 209, 29 Wkly. Rep. 217, per Blackburn, J.

5. Central R. Co. *v.* Coggin, 73 Ga. 689.

On cross-examination the sources of knowledge may be ascertained. Central R. Co. *v.* Coggin, 73 Ga. 689; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

6. It has been suggested that testimony as to age based entirely upon hearsay would be rejected, especially when the mother is available as a witness. Johnson *v.* State, 42 Tex. Cr. 298, 59 S. W. 898. It has on the contrary been held that a person may testify to his own age, although his parents are living. Bain *v.* State, 61 Ala. 75; Pearce *v.* Kyzer, 16 Lea (Tenn.) 521, 57 Am. Rep. 240; State *v.* Cain, 9 W. Va. 559. While the element of hearsay is undoubted, many practical tests and attendant facts serve to correct any wide departure from the truth. Continued consciousness, family conduct (see *supra*, VII, B, 2, i, (II)), physical or mental development, the existence of fixed dates, lengths of various epochs or continuous occurrences and the order of their succession, fairly enable "persons of the age of discretion and many who are even of tender years" to speak approximately of age as a matter of personal knowledge (State *v.* Bowser, 21 Mont. 133, 53 Pac. 179), while they cannot, except from hearsay or facts based on hearsay, testify to the exact day of birth (Doe *v.* Ford, 3 U. C. Q. B. 352).

hearsay,[7] direct or composite,[8] a witness may testify to his own age;[9] and it has even been held that such is the best possible evidence.[10] Hearsay[11] and reputation[12] are not admissible to prove the age of another.[13] Age may be proved by circumstantial evidence,[14] shown to be relevant,[15] if the absence of better evidence is satisfactorily explained.[16] The statement of a witness not a member of the family, but acquainted with it, has been received as to age, although based on such circumstantial evidence.[17]

c. Birth. The fact, date, and place[18] of a person's birth may be shown by

7. Knowles *v.* State, 44 Tex. Cr. 322, 72 S. W. 398.

8. Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541; State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179 (reputation); State *v.* Best, 108 N. C. 747, 12 S. E. 907. A minor is competent to testify to his own age according to the reputation in the family. Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

9. *Alabama.*— Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81; Cherry *v.* State, 68 Ala. 29; Bain *v.* State, 61 Ala. 75.

Arkansas.— Edgar *v.* State, 37 Ark. 219.

California.— People *v.* Ratz, 115 Cal. 132, 46 Pac. 915; Morrell *v.* Morgan, 65 Cal. 575, 4 Pac. 580.

Georgia.— Central R. Co. *v.* Coggin, 73 Ga. 689. See also McCollum *v.* State, 119 Ga. 308, 46 S. E. 413, 100 Am. St. Rep. 171.

Kansas.— State *v.* McClain, 49 Kan. 730, 31 Pac. 790.

Maine.— Greenfield *v.* Camden, 74 Me. 56.

Massachusetts.— Com. *v.* Phillips, 162 Mass. 504, 39 N. E. 109; Hill *v.* Eldridge, 126 Mass. 234.

Michigan.— Morrison *v.* Emsley, 53 Mich. 564, 19 N. W. 187; Cheever *v.* Congdon, 34 Mich. 296.

Minnesota.— Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

Missouri.— State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

Montana.— State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

New York.— Stevenson *v.* Kaiser, 29 N. Y. Suppl. 1122.

Tennessee.— Pearce *v.* Kyzer, 16 Lea 521, 57 Am. Rep. 240.

Texas.— Reed *v.* State, (Cr. App. 1895) 29 S. W. 1074; New York Mut. L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286.

West Virginia.— State *v.* Cain, 9 W. Va. 559.

See 20 Cent. Dig. tit. "Evidence," § 1202.

10. Morrison *v.* Emsley, 53 Mich. 564, 19 N. W. 187.

11. *California.*— People *v.* Slater, 119 Cal. 620, 51 Pac. 957; People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256; People *v.* Ratz, 115 Cal. 132, 46 Pac. 915.

Georgia.— Roe *v.* Doe, Dudley 168.

Montana.— State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

New York.— People *v.* Sheppard, 44 Hun 565.

Pennsylvania.— Dinan *v.* Supreme Council Catholic Mut. Ben. Assoc., 201 Pa. St. 363, 50 Atl. 999; Houseal *v.* Musser, 1 Lanc. Bar, Feb. 12, 1870.

Texas.— Tull *v.* State, (Cr. App. 1900) 55 S. W. 61.

United States.— Connecticut Mut. L. Ins. Co. *v.* Schwenk, 94 U. S. 593, 24 L. ed. 294; Clara *v.* Ewell, 5 Fed. Cas. No. 2,790, 2 Cranch C. C. 208, of a witness.

Canada.— Doe *v.* Ford, 3 U. C. Q. B. 352.

12. Sims *v.* State, (Tex. Cr. App. 1902) 70 S. W. 90; Colclough *v.* Smith, 15 Ir. Ch. 347, 10 L. T. Rep. N. S. 918.

13. For relaxation as to declarations of members of the family following analogy of declarations concerning pedigree see *supra*, VII, B, 2, a.

14. *California.*— People *v.* Ratz, 115 Cal. 132, 46 Pac. 915, family bible.

Georgia.— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535.

North Carolina.— Wiseman *v.* Cornish, 53 N. C. 218.

Pennsylvania.— Carskadden *v.* Poorman, 10 Watts 82, 36 Am. Dec. 145.

Tennessee.— Pearce *v.* Kyzer, 16 Lea 521, 57 Am. Rep. 240, family bible.

See also *infra*, VII, B, 2, c.

15. Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449.

16. People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256; Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; Leggett *v.* Boyd, 3 Wend. (N. Y.) 376; Campbell *v.* Wilson, 23 Tex. 253, 76 Am. Dec. 67.

17. Eaton *v.* Tallmadge, 24 Wis. 217, 222, where the court said: "His knowledge upon these subjects was that which usually exists as to the fact of marriage, and the age of children, among those acquainted with families, but who were not actually present at the marriage of the parents or the birth of the children. General repute, the conduct of the members of the family toward each other, and the statements of relations, constitute the ground-work of such knowledge." See also Grand Lodge A. O. U. W. *v.* Bartes, (Nebr. 1904) 98 N. W. 715 [*overruling* on rehearing (Nebr. 1903) 96 N. W. 186].

18. Shearer *v.* Clay, 1 Litt. (Ky.) 260; Brooks *v.* Clay, 3 A. K. Marsh. (Ky.) 545; Wilmington *v.* Burlington, 4 Pick. (Mass.) 174; McCarty *v.* Terry, 7 Lans. (N. Y.) 236.

Birthplace.— Statements of a person as a witness as to his birthplace based entirely upon hearsay declarations of others are incompetent. McCarty *v.* Deming, 4 Lans. (N. Y.) 440; Jackson *v.* Etz, 5 Cow. (N. Y.)

hearsay, or by reputation in the family,[19] or it may be established circumstantially.[20]

d. Death.[21] When other evidence is unavailable[22] the fact of death may be proven by hearsay, direct[23] or in composite form, as in reputation,[24] especially where this reputation is among members of the family.[25] Its occurrence[26] or its

314, 320; Mima Queen *v.* Hepburn, 7 Cranch (U. S.) 290, 3 L. ed. 348; Rex *v.* Erith, 8 East 539, 542.

Family hearsay.— Hearsay statements must be those of members of the family to which the person in question belongs. Tyler *v.* Flanders, 57 N. H. 618.

19. Clark *v.* Owens, 18 N. Y. 434. See also Grand Lodge A. O. U. W. *v.* Bartes, (Nebr. 1904) 98 N. W. 715 [*overruling* on rehearing (Nebr. 1903) 96 N. W. 186].

20. Weaver *v.* Leiman, 52 Md. 708 (family bible); Jones *v.* Jones, 45 Md. 144; Beckham *v.* Nacke, 56 Mo. 546 (family records); Smith *v.* State, (Tex. Cr. App. 1903) 73 S. W. 401. See also *supra*, VII, B, 2, c. *Compare* Currie *v.* Stairs, 25 N. Brunsw. 4.

21. See DEATH, 13 Cyc. 305.

22. People *v.* Miller, 30 Misc. (N. Y.) 355, 63 N. Y. Suppl. 949, 14 N. Y. Cr. 407. Hearsay evidence is not admissible to show the death of a person, when it was of recent occurrence, and when it may be fairly supposed that other and more satisfactory evidence could be obtained, although it is admissible after a considerable lapse of time. Stouvenel *v.* Stephens, 26 How. Pr. (N. Y.) 244. See also Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352.

23. Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352; Stouvenel *v.* Stephens, 26 How. Pr. (N. Y.) 244; Jackson *v.* Boneham, 15 Johns. (N. Y.) 226; Primm *v.* Stewart, 7 Tex. 178; Scott *v.* Ratliffe, 5 Pet. (U. S.) 81, 8 L. ed. 54. The death of an individual, although disconnected with any question of pedigree, may be proved by hearsay, subject to the same restrictions as in cases where matters of pedigree are involved. Wilson *v.* Brownlee, 24 Ark. 586, 91 Am. Dec. 523.

Mere belief is not sufficient. Vought *v.* Williams, 46 Hun (N. Y.) 638.

Mortality tables, if of recognized authority (Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47), are said to be admissible to establish the facts therein stated (Mississippi, etc., R. Co. *v.* Ayres, 16 Lea (Tenn.) 725; McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298; Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 7 S. Ct. 1, 30 L. ed. 257). The office of such tabulations seems more properly to be that of refreshing the judicial knowledge of the tribunal. They are no more evidence than an almanac would be. See *supra*, II, D.

24. Ewing *v.* Savary, 3 Bibb (Ky.) 235. Indeed in many cases reputation may be the only evidence (Ringhouse *v.* Keever, 49 Ill. 470; Primm *v.* Stewart, 7 Tex. 178; Houston City St. R. Co. *v.* Richart, (Tex. Civ. App. 1894) 27 S. W. 920), since the deceased may have had no kindred whose declarations would be available as direct hearsay (Ringhouse *v.* Keever, 49 Ill. 470). On the other hand it has been held that death cannot be proved by reputation. Prout *v.* McNab, 6 Dem. Surr. (N. Y.) 152. Existence of the reputation itself cannot be proved by hearsay. People *v.* Miller, 30 Misc. (N. Y.) 355, 63 N. Y. Suppl. 949, 14 N. Y. Cr. 407. Vague, indefinite, or traditionary evidence is not legally sufficient to establish a person's death. Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883; Chelf *v.* Isaacs, 6 Ky. L. Rep. 739; Sprigg *v.* Moale, 28 Md. 497, 92 Am. Dec. 698; Blaisdell *v.* Bickum, 139 Mass. 250, 1 N. E. 281; People *v.* Miller, 30 Misc. (N. Y.) 355, 63 N. Y. Suppl. 949, 14 N. Y. Cr. 407. A mere rumor that an absent party is dead or living cannot be received in evidence either to aid or rebut the presumption of life. Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883. A report in the community as to the place and manner of a recent death "not shown to have been accepted by or known to" his family, is incompetent to prove these particular facts. Blaisdell *v.* Bickum, 139 Mass. 250, 1 N. E. 281.

25. "It is well settled that upon all questions of genealogy, and generally upon questions relating to births, marriages and deaths, in the absence of higher evidence, resort may be had to what is commonly said and understood to be true among the immediate relatives and family connections of the party to whom the inquiry relates." Clark *v.* Owens, 18 N. Y. 434, 442.

26. *Massachusetts.*— North Brookfield *v.* Warren, 16 Gray 171.

Missouri.— Smith *v.* Patterson, 95 Mo. 525, 8 S. W. 567.

North Carolina.— Wiseman *v.* Cornish, 53 N. C. 218.

Pennsylvania.— Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859.

England.— Palmer *v.* Palmer, 18 L. R. Ir. 192.

Seven years' absence.— Where proof of death is attempted by invoking the presumption arising from seven years' absence without being heard from (see DEATH, 13 Cyc. 290), the existence of an unsworn statement may be a relevant circumstance. Flynn *v.* Coffee, 12 Allen (Mass.) 133; Jackson *v.* Boneham, 15 Johns. (N. Y.) 226; Dowd *v.* Watson, 105 N. C. 476, 11 S. E. 589. 18 Am. St. Rep. 920; Moore *v.* Parker, 34 N. C. 123. But a letter purporting to have been written at the request of a person who is presumed to be dead, by reason of his absence from the state for seven successive years, is incompetent to rebut the presumption of death, being only the barest form of hearsay. Chelf *v.* Isaacs, 6 Ky. L. Rep. 739.

date[27] may also be proved circumstantially,[28] provided the evidence be clearly connected with the person whose death is in question,[29] identity of names not being sufficient.[30]

e. Marriage.[31] Marriage, as to the fact, date, and place of its occurrence, may be established as a fact in pedigree as an exception to the hearsay rule,[32] and on other issues than those of pedigree, by declarations of deceased members of the family,[33] or by reputation, either general[34] or in the family,[35] in all cases except those involving charges of adultery,[36] bigamy,[37] or criminal conversation.[38] General hearsay[39] or the inference of an observer[40] is incompetent. The same facts may be established circumstantially by acknowledgments,[41] declarations,[42] cohabitation,[43] or other conduct of persons having adequate knowledge of the facts.[44]

f. Name of Person or Place. While the fact that a certain name has been used to designate a particular individual may be established by the evidence of any person who knows it,[45] reputation is received to prove the same fact.[46] Reputation is also admissible to prove the designation of a house[47] or other place.[48]

g. Relationship. A witness may testify of his own knowledge,[49] or generally,

27. Smith *v.* Patterson, 95 Mo. 525, 8 S. W. 567, tombstone. See also Shaw *v.* Tracy, 95 Mo. 531, 8 S. W. 434.

28. See *infra*, VII, B, 3.

29. Wedgwood's Case, 8 Me. 75; Mooers *v.* Bunker, 29 N. H. 420; Jackson *v.* Christman, 4 Wend. (N. Y.) 277; American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; *In re* Berkeley, 4 Camph. 401.

30. Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859; Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207.

31. See also MARRIAGE.

32. See *infra*, IX, C.

33. See *supra*, VII, B, 2, a.

34. *Alabama.*— Davis *v.* Orme, 36 Ala. 540, evidence should be confined to reputation in the neighborhood.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Weaver *v.* Leiman, 52 Md. 708; Jones *v.* Jones, 48 Md. 391, 30 Am. Rep. 466; Jones *v.* Jones, 45 Md. 144; Barnum *v.* Barnum, 42 Md. 251; Boone *v.* Purnell, 28 Md. 607, 92 Am. Dec. 713.

New York.— Chamberlain *v.* Chamberlain, 71 N. Y. 423.

Pennsylvania.— *In re* Pickens, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477.

Wisconsin.— Eaton *v.* Tallmadge, 24 Wis. 217.

England.— Doe *v.* Fleming, 4 Bing. 266, 5 L. J. C. P. O. S. 169, 12 Moore C. P. 500, 29 Rev. Rep. 562, 13 E. C. L. 497; Evans *v.* Morgan, 2 Cromp. & J. 453, 2 Tyrw. 396; Goodman *v.* Goodman, 4 Jur. N. S. 1220; Shedden *v.* Atty.-Gen., 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285.

Character and proof of reputation.— "It is necessary that the reputation from which marriage is to be inferred should be general and not divided or singular." Jackson *v.* Jackson, 80 Md. 176, 189, 30 Atl. 752, per Bryan, J. See also Shedden *v.* Atty.-Gen., 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285. Existence of the reputation cannot be proved by hearsay. Boone *v.* Purnell, 28 Md. 607, 92 Am. Dec. 713; Shedden *v.* Atty.-Gen., *supra*.

35. Jackson *v.* Jackson, 80 Md. 176, 195, 30 Atl. 752; Henderson *v.* Cargill, 31 Miss. 367, 409; Clark *v.* Owens, 18 N. Y. 434.

36. Redgrave *v.* Redgrave, 38 Md. 93. See ADULTERY, 1 Cyc. 963.

37. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Henderson *v.* Cargill, 31 Miss. 367, 409. See BIGAMY, 5 Cyc. 700.

38. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Henderson *v.* Cargill, 31 Miss. 367, 409. See, generally, HUSBAND AND WIFE.

39. Stein *v.* Bowman, 13 Pet. (U. S.) 209, 10 L. ed. 129.

40. Jackson *v.* Jackson, 80 Md. 176, 195, 30 Atl. 752.

41. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Jones *v.* Jones, 45 Md. 144; Copes *v.* Pearce, 7 Gill (Md.) 247; Henderson *v.* Cargill, 31 Miss. 367.

42. Jackson *v.* Jackson, 80 Md. 176, 193, 30 Atl. 752; Henderson *v.* Cargill, 31 Miss. 367, 409.

43. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Henderson *v.* Cargill, 31 Miss. 367, 409.

44. Henderson *v.* Cargill, 31 Miss. 367, 409; Vincent's Appeal, 60 Pa. St. 228. The individual conduct of persons not connected with the family is incompetent. Jackson *v.* Jackson, 80 Md. 176, 195, 30 Atl. 752, recognition by a witness and his wife.

45. People *v.* Clark, 106 Cal. 32, 39 Pac. 53; May *v.* State, 43 Tex. Cr. 54, 63 S. W. 132, a woman's maiden name.

46. U. S. *v.* Dodge, 25 Fed. Cas. No. 14,974, Deady 186.

47. U. S. *v.* Dodge, 25 Fed. Cas. No. 14,974, Deady 186.

48. Harris *v.* Dub, 57 Ga. 77; Rench *v.* Beltzhoover, 3 Harr. & J. (Md.) 469; Toole *v.* Peterson, 31 N. C. 180; U. S. *v.* Dodge, 25 Fed. Cas. No. 14,974, Deady 186.

49. Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355.

wherever the fact is relevant, to the relationship, if any, existing between him and a designated person.[50] Parentage may be proved also by general reputation.[51]

h. Settlement Cases. Whether unsworn declarations of a deceased pauper or of a deceased member of his family regarding births, deaths, residence, and the like, are admissible as an exception to the hearsay rule was, at an early day, treated in England as a doubtful question.[52] The law has since been settled that no such exception exists.[53] Declarations of this nature, whether by a deceased pauper,[54] or by deceased members of his family,[55] are rejected as evidence of time[56] or place[57] of birth, or of the marriage[58] or residence[59] of a pauper or of any member of his family through whom a settlement is claimed; and this whether the statement be oral[60] or in writing.[61] No question of pedigree is involved in such an inquiry.[62] These facts may be proved by relevant circumstantial evidence; for example, birthplace by evidence of presence there very early in life,[63] or time of birth by the date of the subsequent death of an individual in no way related to the pauper.[64]

i. Circumstantial Evidence — (I) *In General.* Among inferences which general experience recognizes as relevant, is this: That a fact exists because a person possessing adequate knowledge and without motive to misrepresent would not have acted as he has done had he not believed it to exist. This conduct may take the form of: (1) Acts by such a person; (2) declarations by such a person; (3) acquiescence by such a person in the acts of others; and (4) acquiescence by such a person in the declarations of others. The English law of evidence presents peculiarity only in differentiating, in practical treatment, the second of the foregoing subdivisions from the other three.

(II) *Family Conduct* — (A) *In General.* Facts of family history may be circumstantially established by the conduct of its members.[65] For example

50. State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

51. Ford *v.* Ford, 7 Humphr. (Tenn.) 92. And see Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008. See, generally, Parent and Child.

52. Rex *v.* Eriswell, 3 T. R. 707.

53. Rex *v.* Erith, 8 East 539.

54. Braintree *v.* Hingham, 1 Pick. (Mass.) 245; Rex *v.* Ferry Frystone, 2 East 54.

55. Union *v.* Plainfield, 39 Conn. 563 (father); Independence Tp. *v.* Pompton Tp., 9 N. J. L. 209 (parents); Londonderry *v.* Andover, 28 Vt. 416; Reg. *v.* Rishworth, 2 Q. B. 476, 1 G. & D. 597, 11 L. J. M. C. 34, 42 E. C. L. 768; Reg. *v.* Lydeard St. Lawrence, 11 A. & E. 616, 1 G. & D. 191, 6 Jur. 32, 10 L. J. M. C. 147, 39 E. C. L. 333; Rex *v.* Chadderton, 2 East 27 (mother); Rider *v.* Malbon, 8 L. J. M. C. O. S. 127.

56. Union *v.* Plainfield, 39 Conn. 563.

In Maine evidence of the declarations of a deceased person is admissible to show when he was born. Greenfield *v.* Camden, 74 Me. 56.

57. *Connecticut.*— Union *v.* Plainfield, 39 Conn. 563.

Maine.— Greenfield *v.* Camden, 74 Me. 56.

Massachusetts.— Braintree *v.* Hingham, 1 Pick. 245.

New Jersey.— Independence Tp. *v.* Pompton Tp., 9 N. J. L. 209.

England.— Reg. *v.* Rishworth, 2 Q. B. 476, 1 G. & D. 597, 11 L. J. M. C. 34, 42 E. C. L. 768; Rider *v.* Malbon, 8 L. J. M. C. O. S. 127.

Hearsay is rejected as evidence of a pauper's birthplace. Wilmington *v.* Burlington, 4 Pick. (Mass.) 174. Consequently the pauper himself cannot testify as to the place of his birth upon information and belief. Reg. *v.* Rishworth, 2 Q. B. 476, 1 G. & D. 597, 11 L. J. M. C. 34, 42 E. C. L. 768; Reg. *v.* Lydeard St. Lawrence, 11 A. & E. 616, 1 G. & D. 191, 6 Jur. 32, 10 L. J. M. C. 147, 39 E. C. L. 333.

58. Westfield *v.* Warren, 8 N. J. L. 249.

59. Londonderry *v.* Andover, 28 Vt. 416, holding also that actual residence cannot be proved by reputation or family tradition for the purpose of creating a settlement.

60. Union *v.* Plainfield, 39 Conn. 563.

61. Union *v.* Plainfield, 39 Conn. 563; Reg. *v.* Lydeard St. Lawrence, 11 A. & E. 616, 1 G. & D. 191, 6 Jur. 32, 10 L. J. M. C. 147, 39 E. C. L. 333; Rex *v.* Ferry Frystone, 2 East 54.

62. Union *v.* Plainfield, 39 Conn. 563; Adams *v.* Swansea, 116 Mass. 591; Rex *v.* Erith, 8 East 539.

63. Independence Tp. *v.* Pompton Tp., 9 N. J. L. 209, 212. But this evidence has been deemed irrelevant. Union *v.* Plainfield, 39 Conn. 563.

64. North Brookfield *v.* Warren, 16 Gray (Mass.) 171.

In Connecticut the evidence furnished by entries in a family bible has been rejected. Union *v.* Plainfield, 39 Conn. 563.

65. Jones *v.* Jones, 45 Md. 144 (marriage); Parkhurst *v.* Krellinger, 69 Vt. 375, 38 Atl. 67; Hungate *v.* Gascoyne, 10 Jur. 625,

whether a certain person is a legitimate member of the family is evidenced by recognition[66] or failure to recognize[67] him as such by members of the family.[68]

(B) *Acquiescence.* For reasons analogous to those on which so called "admissions by conduct" by a party[69] are based, statements in any form,[70] made by any one,[71] are admissible as evidence of any facts of family history asserted; provided it affirmatively appears by direct or circumstantial[72] evidence that the statement was brought to the attention of a member of the family[73] who would be interested to correct a mistake, and that his conduct, in connection with such assertion, indicates acquiescence in the existence of the facts asserted.[74] It must also affirmatively appear that the declaration concerns the subject of the inquiry, and a mere identity of name is not sufficient.[75] Where a statement is not shown to have been either made by a competent declarant or assented to by the family or some member thereof it is inadmissible.[76]

15 L. J. Ch. 382, 2 Phil. 25, 22 Eng. Ch. 25, 41 Eng. Reprint 850.

66. *Alabama.*— White *v.* Strother, 11 Ala. 720.

District of Columbia.— Green *v.* Norment, 5 Mackey 80.

Indiana.— De Haven *v.* De Haven, 77 Ind. 236.

Massachusetts.—Wilmington *v.* Burlington, 4 Pick. 174.

Michigan.— Van Sickle *v.* Gibson, 40 Mich. 170.

Minnesota.— Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367, 409.

Nebraska.— Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355.

New Jersey.— Gaines *v.* Green Pond Iron Min. Co., 32 N. J. Eq. 86.

New York.— Chamberlain *v.* Chamberlain, 71 N. Y. 423; McCarty *v.* Hodges, 2 Edm. Sel. Cas. 433.

Rhode Island.— Viall *v.* Smith, 6 R. I. 417.

Wisconsin.— Eaton *v.* Tallmadge, 24 Wis. 217.

England.— Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694; *In re* Berkeley, 4 Campb. 401, 416, where the court said: "If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate." See also Goodright *v.* Moss, 2 Cowp. 591.

See also BASTARDS, 5 Cyc. 628.

67. Barnum *v.* Barnum, 42 Md. 251, 304 (holding that application to the legislature by a father for an act legitimizing one of his children is a competent fact); Chamberlain *v.* Chamberlain, 71 N. Y. 423; *In re* Aylesford Peerage, 11 App. Cas. 1; Goodright *v.* Moss, 2 Cowp. 591.

68. Family conduct, to be admissible on a question of pedigree, must be of those who, by recognizing the relationship, evince a belief and opinion on the subject. McCarty *v.* Hodges, 2 Edm. Sel. Cas. (N. Y.) 433.

69. See *supra*, IV, B, 7.

70. See *infra*, VII, B, 2, i, (II), (C).

71. People *v.* Ratz, 115 Cal. 132, 46 Pac. 915 (family bible); Jones *v.* Jones, 45 Md. 144; Eastman *v.* Martin, 19 N. H. 152; Hubbard *v.* Lees, L. R. 1 Exch. 255, 258, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694, where it is said: "To require evidence of the handwriting or authorship of the entries [in a family bible] is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been." Goodright *v.* Moss, 2 Cowp. 591; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350.

72. People *v.* Ratz, 115 Cal. 132, 46 Pac. 915; Slaney *v.* Wade, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404.

A town clerk's entry of a marriage cannot be presumed to be actually known to the family affected by it in such a way that its existence implies acquiescence on their part in the facts stated. Viall *v.* Smith, 6 R. I. 417.

73. Pedigree contrasted.— A statement good as a declaration regarding pedigree need not have been known to others. Eastman *v.* Martin, 19 N. H. 152. A similar statement made relevant by family conduct must be shown to have been known to the persons whose conduct in view of it is relevant. Goodright *v.* Moss, 2 Cowp. 594; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350.

74. Eastman *v.* Martin, 19 N. H. 152; Dinan *v.* Supreme Council Catholic Mut. Ben. Assoc., 201 Pa. St. 363, 50 Atl. 999; Goodright *v.* Moss, 2 Cowp. 591; Davies *v.* Lowndes, 6 M. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350.

75. Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859.

76. Eastman *v.* Martin, 19 N. H. 152; Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449; Dinan *v.* Supreme Council Catholic Mut. Ben. Assoc., 201 Pa. St. 363, 50 Atl. 999. A genealogical

(c) *Form of Statement.* A statement regarding a fact of family history to which assent is given, or made under the conditions regulating admissibility of declarations regarding pedigree[77] and therefore admissible *per se* without evidence of assent,[78] may be in any form capable of conveying thought,[79] provided the authenticity of the vehicle conveying the statement be established to the satisfaction of the court by evidence *dehors* itself,[80] as by recognition in the family[81] or production from proper custody.[82] A favorite form of statement touching a fact of family history consists of an entry in a family bible[83] or testament.[84] With equal propriety, however, the statement may take the form of an inscription on a gravestone,[85] a mourning ring,[86] or on mortuary monuments generally.[87]

table certified under the seal of a foreign officer is not evidence. Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243.

77. See *infra*, IX, C.

78. Eastman *v.* Martin, 19 N. H. 152.

79. *Maryland.*— Weaver *v.* Leiman, 52 Md. 708.

Massachusetts.— North Brookfield *v.* Warren, 16 Gray 171.

Missouri.— Beckham *v.* Nacke, 56 Mo. 546.

New Hampshire.— Eastman *v.* Martin, 19 N. H. 152.

North Carolina.— Wood *v.* Sawyer, 61 N. C. 251, genealogical table.

England.— Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

Canada.—Currie *v.* Stairs, 25 N. Brunsw. 4.

80. McClaskey *v.* Barr, 54 Fed. 781; Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

81. *Maryland.*— Jones *v.* Jones, 45 Md. 144.

Massachusetts.— North Brookfield *v.* Warren, 16 Gray 171.

New Hampshire.— Eastman *v.* Martin, 19 N. H. 152.

North Carolina.— Wood *v.* Sawyer, 61 N. C. 251.

United States.—McClaskey *v.* Barr, 54 Fed. 781.

England.— Doe *v.* Pembroke, 11 East 504, 11 Rev. Rep. 260; Slaney *v.* Wade, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404.

Circumstances affecting weight.— It is not necessary that the family should all concur as to the correctness, but this, and every other relevant circumstance, may be considered by the tribunal in determining the weight to be given to the evidence. Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535.

82. Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535; Douglass *v.* Sanderson, 2 Dall. (Pa.) 116, 1 L. ed. 317; Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271; Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

83. *California.*— People *v.* Slater, 119 Cal. 620, 51 Pac. 959; People *v.* Ratz, 115 Cal. 132, 46 Pac. 915.

Maryland.— Weaver *v.* Leiman, 52 Md. 708; Jones *v.* Jones, 45 Md. 144.

North Carolina.— Wiseman *v.* Cornish, 53 N. C. 218.

Pennsylvania.— Douglass *v.* Sanderson, 2 Dall. 116, 1 L. ed. 317.

England.— Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

Weight of evidence.— When the book is once shown to be the family bible or testament, the entries therein derive their weight as evidence not more from the fact that they were made by any particular person than that being in that place as a family registry they are to be taken as assented to by those in whose custody the book has been kept. Jones *v.* Jones, 45 Md. 144.

Family bible not admissible per se.— It must affirmatively appear that the entries were based upon adequate knowledge or assented to by a member of the family. Supreme Council G. S. F. *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659.

Contemporaneousness in the entry is essential to the weight, if not the admissibility, of declarations made by members of the family. Weaver *v.* Leiman, 52 Md. 708, 720.

84. Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

85. *Alabama.*— Boyett *v.* State, 130 Ala. 77, 30 So. 475.

Arkansas.— Kelly *v.* McGuire, 15 Ark. 555.

Maryland.— Barnum *v.* Barnum, 42 Md. 251, 306.

Massachusetts.— North Brookfield *v.* Warren, 16 Gray 171.

Missouri.— Smith *v.* Patterson, 95 Mo. 525, 8 S. W. 567.

New Hampshire.— Eastman *v.* Martin, 19 N. H. 152.

Pennsylvania.— Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859.

United States.— McClaskey *v.* Barr, 54 Fed. 781.

England.— Doe *v.* Sylbourn, 2 Esp. 496, 7 T. R. 2, 4 Rev. Rep. 363; Vowles *v.* Young, 9 Ves. Jr. 172, 32 Eng. Reprint 567.

86. Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247, "upon the presumption that a person would not wear a ring with an error upon it."

87. Davies *v.* Lowndes, 6 M. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471; Slaney *v.* Wade, 7 Sim. 595, 8 Eng. Ch. 595 [*affirmed* in 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng.

The statement itself, whether directly[88] or circumstantially[89] relevant, should be given in evidence, rather than the witness' deduction from it.[90] Examined copies of inscriptions are admissible for the sake of convenience;[91] and where monuments are decayed by time, or surreptitiously destroyed or removed, evidence of the recollections of witnesses respecting them and the inscriptions they bore has been admitted.[92]

(III) *Records or Their Absence.* Where a contention is necessarily based on a transaction which if it actually occurred would probably be recorded in some family or other repository of records, existence of the appropriate entry in a proper place is a fact circumstantially relevant.[93] Absence of such a record is equally relevant for the opposite purpose.[94]

3. Identity. In the absence of direct evidence by the conclusions of witnesses,[95] or by inspection of the court and jury,[96] identity may be established circumstantially not only by proving extrinsic facts which render its existence probable,[97] but by proof of indicative manifestations, such as declarations showing peculiar knowledge,[98] or by conduct, such as residence in a particular country, state,[99] or other place,[1] or service in the army at a certain time.[2] A family tradition may assist in identification;[3] and hearsay statements in the nature of declarations regarding pedigree are competent for the same purpose.[4]

4. Mental Condition.[5] Among facts usually provable only by observing their manifestations is that of the existence of a definite mental condition, sound or unsound. Not only may such a fact be proved by the inference of those who had satisfactory opportunities for observation,[6] the opinion of an expert,[7] the relevant declarations of the person in question,[8] or by his acts, so far as indicative of the condition of his mind;[9] but in seeking to prove mental condition, the individual relevancy of separate facts is of necessity less insisted upon by the court than would be the case in matters as to which more definite evidence might fairly be expected. Where insanity is offered as a defense, it cannot, however, be shown by hearsay, even of members of the family.[10] Nor can the fact of insanity be

Reprint 404] (mural tablet); Whitelocke *v.* Baker, 13 Ves. Jr. 511, 9 Rev. Rep. 216, 33 Eng. Reprint 385.

88. Harland *v.* Eastman, 107 Ill. 535; Jackson *v.* Browner, 18 Johns. (N. Y.) 36.

89. Eastman *v.* Martin, 19 N. H. 152 (genealogical table); Douglass *v.* Sanderson, 2 Dall. (Pa.) 116, 1 L. ed. 312 (inscription); Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

90. Jackson *v.* Browner, 18 Johns. (N. Y.) 36; Johns *v.* Northcutt, 49 Tex. 444; *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

91. Eastman *v.* Martin, 19 N. H. 152.

92. Eastman *v.* Martin, 19 N. H. 152.

93. Jackson *v.* King, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525, masonic lodge.

94. Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10.

95. See *infra*, XV.

96. See *infra*, XI.

97. State *v.* Ah Chuey, 14 Nev. 79, 33 Am. Rep. 330. See *infra*, XII.

98. *Georgia.*— Mullery *v.* Hamilton, 71 Ga. 720, 51 Am. Rep. 288.

Illinois.— Cuddy *v.* Brown, 78 Ill. 415.

Mississippi.— Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381.

Oregon.— Young *v.* State, 36 Oreg. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; Winder *v.* Little, 1 Yeates 152.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; McNeil *v.* O'Conner, 79 Tex. 227, 14 S. W. 1058.

England.— Rishton *v.* Nesbitt, 2 M. & R. 554; Shields *v.* Boucher, 1 De G. & Sm. 40.

99. Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

1. Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381; Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

2. Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

3. *In re* Lovat, 10 App. Cas. 763.

4. Walkup *v.* Pratt, 5 Harr. & J. (Md.) 51.

5. See, generally, Insane Persons.

6. Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183. See *infra*, XV.

7. See *infra*, XI.

8. See *infra*, VIII.

9. *In re* Mullin, 110 Cal. 252, 42 Pac. 645; Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; Waterman *v.* Whitney, 11 N. Y. 157, 62 Am. Dec. 71. Facts otherwise objectionable as *res inter alios actæ* are competent to establish the existence of mental condition. See *infra*, XII.

10. People *v.* Koerner, 154 N. Y. 355, 373, 48 N. E. 730.

established by reputation in the general community,[11] or in the family,[12] or by proof of family conduct.[13]

5. Mental State. Inherent difficulty in establishing the existence of a mental state or in tracing the operations of the human mind[14] authorizes, when the fact is relevant,[15] evidence to be given of other transactions,[16] and the inference of properly qualified observers,[17] and requires that the rules of strict relevancy be modified;[18] for unless, as he may do under laws enabling parties to testify,[19] the person whose mental state is of importance sees fit to testify to its existence, the

11. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; Choice *v.* State, 31 Ga. 424; Ashcraft *v.* De Armond, 44 Iowa 229; State *v.* Coley, 114 N. C. 879, 19 S. E. 705.

12. Snell *v.* U. S., 16 App. Cas. (D. C.) 501; Walker *v.* State, 102 Ind. 502, 1 N. E. 856; People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730. *Contra*, State *v.* Windsor, 5 Harr. (Del.) 512.

13. People *v.* Pico, 62 Cal. 50.

14. Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497; Com. *v.* Abbott, 130 Mass. 472; Moore *v.* State, 2 Ohio St. 500. See also Fisk *v.* Chester, 8 Gray (Mass.) 506.

By "mental state" in this connection is designated any definite state of consciousness, however created and regardless of duration. The phrase as here used is distinguished from the condition of the mind itself and involves no direct consideration of the accuracy of its working.

15. Birmingham R., etc., Co. *v.* Franscomb, 124 Ala. 621, 27 So. 508; Millspaugh *v.* Potter, 62 N. Y. App. Div. 521, 71 N. Y. Suppl. 134 (on question of damage); Patterson *v.* Smith, 73 Vt. 360, 50 Atl. 1106.

The clear legal purport of actual conduct cannot be affected by undisclosed intent, and evidence as to the existence of such a mental state is irrelevant.

Alabama.— Hamilton *v.* Maxwell, 119 Ala. 23, 24 So. 769; Lewis *v.* State, 96 Ala. 6, 11 So. 289, 38 Am. St. Rep. 75; Fonville *v.* State, 91 Ala. 39, 8 So. 688.

Colorado.— Bell *v.* Kaufman, 9 Colo. App. 259, 47 Pac. 1035.

Connecticut.— Fox *v.* Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871.

Georgia.— Southern R. Co. *v.* Kinchen, 103 Ga. 186, 29 S. E. 816.

Indiana.— Colborn *v.* Fry, 23 Ind. App. 485, 55 N. E. 621.

Massachusetts.— Tallant *v.* Stedman, 176 Mass. 460, 57 N. E. 683.

Michigan.— Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644.

New York.— Davis *v.* Marvine, 11 N. Y. App. Div. 440, 42 N. Y. Suppl. 322.

South Carolina.—Gillman *v.* Florida Cent., etc., R. Co., 53 S. C. 210, 31 S. E. 224.

Good faith.— Whether the existence of good faith is a relevant mental state or on the contrary an inference to be deduced from the facts in evidence under certain rules of law which leave the mental state immaterial is a question on which some difference of opinion exists. So far as the mental state is competent, that is, so far as the legal quality of acts done is affected by intent, it may be proved in any way, for example, the party himself may testify to its existence.

Colorado.— Brown *v.* Potter, 13 Colo. App. 512, 58 Pac. 785. *Compare* Curran *v.* Rothchild, 14 Colo. App. 497, 60 Pac. 1111.

Georgia.—Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494, 42 S. E. 8; Hale *v.* Robertson, 100 Ga. 168, 27 S. E. 937.

Indiana.— Sedgwick *v.* Tucker, 90 Ind. 271. *Compare* Pope *v.* Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835.

Massachusetts.— Thacher *v.* Phinney, 7 Allen 146.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Hiatt, (1903) 95 N. W. 627; Hackney *v.* Raymond Bros. Clarke Co., (1903) 94 N. W. 822.

New York.— Hubbell *v.* Alden, 4 Lans. 214.

Wisconsin.— Moore *v.* May, 117 Wis. 192, 94 N. W. 45.

But see McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 525; Anslyn *v.* Franke, 11 Mo. App. 597; Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231.

16. See *infra*, XII.

17. See *infra*, XI.

18. Cook *v.* Carr, 20 Md. 403. Although a wider scope is to be given on questions of fraud than in other cases, it is as to the relevancy of acts and declarations of the party, or of transactions traced to him, and not to the acts and declarations of strangers. Globe Ins. Co. *v.* Hazlett, 1 Phila. (Pa.) 347.

19. Linnehan *v.* State, 120 Ala. 293, 25 So. 6 (influence of motive); Wilson *v.* State, 110 Ala. 1, 20 So. 415, 55 Am. St. Rep. 17; Price *v.* State, 107 Ala. 161, 18 So. 130 (intent); Jones *v.* State, 104 Ala. 30, 16 So. 135 (consent); Partridge *v.* Cutler, 104 Ill. App. 89 (intention); Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833 (intent in action for deceit); McCormick Harvesting Mach. Co. *v.* Hiatt, (Nebr. 1903) 95 N. W. 627 (reason for acts where they are ambiguous and the effect depends upon the intent); Hackney *v.* Raymond Bros. Clarke Co., (Nebr. 1903) 94 N. W. 822 (good faith in selling stock while insolvent); Gray *v.* New York, etc., R. Co., 77 N. Y. App. Div. 1, 78 N. Y. Suppl. 653 (reason for not looking for train at crossing); Moore *v.* May, 117 Wis. 192, 94 N. W. 45 (purpose in signing name). But see Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497 (holding that evidence of a party as to his own mental state is excluded "because such testimony, in its nature, is insusceptible of contradiction"); Anderson *v.* State, 104 Ala. 83, 16 So. 108 (holding that the prosecuting witness in a statutory action for seduction

fact must be circumstantially shown — for example, by evidence of its manifestations, either by his declarations *in pais*, oral,[20] or in writing,[21] or by other

cannot testify that she had sexual intercourse with defendant because of a promise of marriage; but she should state all the facts and let the jury judge). See also the following cases:

California.— Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791, belief, intention, motive.

Colorado.— Taylor *v.* People, 21 Colo. 426, 42 Pac. 652, intent.

Connecticut.—Allen *v.* Hartford L. Ins. Co., 72 Conn. 693, 45 Atl. 955 (belief); State *v.* Lee, 69 Conn. 186, 37 Atl. 75 (purpose); Peck *v.* Bacon, 18 Conn. 377 (intent).

District of Columbia.— Browning *v.* National Capital Bank, 13 App. Cas. 1, reliance.

Florida.— Germania F. Ins. Co. *v.* Stone, 21 Fla. 555.

Georgia.— Toole *v.* State, 107 Ga. 472, 33 S. E. 686, intent.

Illinois.— Odin Coal Co. *v.* Denman, 84 Ill. App. 190 (intent); Kelly *v.* Shumway, 51 Ill. App. 634 (intent); Wallace *v.* Lodge, 5 Ill. App. 507 (intent).

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Bidinger *v.* Bishop, 76 Ind. 244; Shockey *v.* Mills, 71 Ind. 288, 36 Am. Rep. 196.

Iowa.— Tharp *v.* Thero, 112 Iowa 573, 84 N. W. 709 (expectation); Bartlett *v.* Falk, 110 Iowa 346, 81 N. W. 602 (reliance); Counselman *v.* Reichart, 103 Iowa 430, 72 N. W. 490 (intent); Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382 (belief).

Kansas.— State *v.* Lowe, 67 Kan. 183, 72 Pac. 524, intent.

Kentucky.— Eve *v.* Saylor, 44 S. W. 355, 19 Ky. L. Rep. 1697, influence of motive.

Louisiana.— State *v.* Wright, 40 La. Ann. 589, 4 So. 486, intention.

Maine.— Wheelden *v.* Wilson, 44 Me. 11; Edwards *v.* Currier, 43 Me. 474.

Maryland.— Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 62 L. R. A. 427 (intent); Phelps *v.* George's Creek, etc., R. Co., 60 Md. 536.

Massachusetts.— Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561 (belief); Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77 (reliance); Snow *v.* Paine, 114 Mass. 520; Hannefin *v.* Blake, 102 Mass. 297 (knowledge); Finn *v.* Clark, 12 Allen 522; Blanchard *v.* Mann, 1 Allen 433 (belief).

Michigan.— Bellows *v.* Crane Lumber Co., 129 Mich. 560, 89 N. W. 367 (intent); Watkins *v.* Wallace, 19 Mich. 57.

Minnesota.— State *v.* Ames, 90 Minn. 183, 96 N. W. 330 (purpose); Garrett *v.* Mannheimer, 24 Minn. 193; Berkey *v.* Judd, 22 Minn. 287.

Missouri.— Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689, purpose.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Hiatt, (1903) 95 N. W. 627, reasons assigned.

New Hampshire.— Pinkham *v.* Benton, 63 N. H. 226 (consent); Homans *v.* Corning, 60 N. H. 418 (intent); Hale *v.* Taylor, 45 N. H. 405 (intention); Graves *v.* Graves, 45 N. H. 323.

New York.— Davis *v.* Marvine, 160 N. Y. 269, 54 N. E. 704 (intent); Cortland County Supt. of Poor *v.* Herkimer County Supt. of Poor, 44 N. Y. 22; Thurston *v.* Cornell, 38 N. Y. 281; Seymour *v.* Wilson, 14 N. Y. 567; Francis *v.* Campbell, 68 N. Y. App. Div. 287, 74 N. Y. Suppl. 246 (intent; willingness); Thompson *v.* Vroman, 66 Hun 245, 21 N. Y. Suppl. 179 (consent); Pritchard *v.* Hirt, 39 Hun 378; More *v.* Deyoe, 22 Hun 208 (belief); Morris *v.* Wells, 4 Silv. Supreme 34, 7 N. Y. Suppl. 61. *Compare* Ballard *v.* Lockwood, 1 Daly 158.

Ohio.— Grever *v.* Taylor, 53 Ohio St. 621, 42 N. E. 829 (influence of motive); Ohio Coal Co. *v.* Davenport, 37 Ohio St. 194; Toledo Stove Co. *v.* Reep, 18 Ohio Cir. Ct. 58, 9 Ohio Cir. Dec. 467 (intent).

Pennsylvania.— Com. *v.* Julius, 173 Pa. St. 322, 34 Atl. 21 (reliance); Cummings *v.* Glass, 162 Pa. St. 241, 29 Atl. 848 (intent); Cullmans *v.* Lindsay, 114 Pa. St. 166, 6 Atl. 332 (intention); Phillips *v.* Phillips, 8 Watts 195 (intent). But see Com. *v.* Daniels, 2 Pars. Eq. Cas. 332, where the court held that the prosecutor on an indictment for obtaining property by false pretenses cannot testify that he relied on the representation in giving credit.

Texas.— Peightal *v.* Cotton States Bldg. Co., 25 Tex. Civ. App. 390, 61 S. W. 428 (intent); Wade *v.* Odle, 21 Tex. Civ. App. 656, 54 S. W. 786 (intent); Aultman *v.* Allen, 12 Tex. Civ. App. 227, 33 S. W. 679; Glasscock *v.* Stringer, (Civ. App. 1895) 32 S. W. 920 (intention not to abandon); Johnson *v.* Stratton, 6 Tex. Civ. App. 431, 25 S. W. 683 (reliance); International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236 (influence of motive).

Utah.— Conway *v.* Clinton, 1 Utah 215.

Wisconsin.— Moore *v.* May, 117 Wis. 192, 94 N. W. 45 (purpose); Commercial Bank *v.* Firemen's Ins. Co., 87 Wis. 297, 58 N. W. 391.

United States.— Great Northern R. Co. *v.* McLaughlin, 70 Fed. 669, 17 C. C. A. 330.

See 20 Cent. Dig. tit. "Evidence," § 440.

The intent of others is not within the scope of a witness's testimony. Spaulding *v.* Strang, 36 Barb. (N. Y.) 310.

20. *Georgia.*— Perry *v.* State, 110 Ga. 234, 36 S. E. 781.

Massachusetts.— Jacobs *v.* Whitcomb, 10 Cush. 255.

Michigan.— Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501.

Pennsylvania.— Duncan *v.* McCullough, 4 Serg. & R. 483.

England.— Du Bost *v.* Beresford, 2 Campb. 511.

21. Long *v.* Booe, 106 Ala. 570, 17 So. 716. See *infra*, VIII.

acts fairly indicative of the existence of the mental state in question.[22] As in other cases of circumstantial evidence, such manifestations may often have but slight individual weight and must derive cogency from the difficulty of explaining the existence of many uniform indications upon any other theory than the one on which they are offered. The testimony, however, by which it is sought to prove a mental state must be itself competent under the rules of evidence,[23] and not too remote in point of time to be revelant.[24]

6. Moral Qualities. Proof of moral qualities presents the same practical difficulties as proof of mental states, with which they are much involved and frequently blend.[25] Except where proof of character is permitted in case of a party[26] or a witness,[27] general reputation cannot establish the existence of moral qualities,[28] such as chastity[29] or loyalty.[30]

7. Pedigree of Animals. It has been held that the pedigree of an animal may be proved by reputation,[31] but not by hearsay.[32]

8. Race and Status. General reputation is competent to show that a person is a member of a particular race.[33] It has also been held admissible to establish a status; as whether a given individual is bond or free,[34] or whether an association of persons is incorporated.[35]

9. Value — a. In General. Value, whether intrinsic or as regulated by the "market," is a quality so subtle and intangible; is a function of so many variables and these, frequently, of such a trivial nature; where intrinsic, it is so largely a matter of individual estimate or opinion, and when judged by the market its standards so largely consist of the opinion not under oath of a large and usually indefinite number of persons as indicated by trade lists, prices current, and other publications more or less official, that relaxation of strict rules of evidence is necessary, and use must be made of such probative methods as are available.[36]

b. Real Estate — (i) *Intrinsic Value* — (a) *In General.* In most instances

22. Motte *v.* Alger, 15 Gray (Mass.) 322 (belief); Moore *v.* State, 2 Ohio St. 500.

23. Miller *v.* Hottenstein, 1 Woodw. (Pa.) 236, hearsay excluded. A party is not at liberty to quote himself as to previous declarations in his own favor. Hazelton *v.* Allen, 3 Allen (Mass.) 114.

24. Com. *v.* Abbott, 130 Mass. 472; White *v.* Graves, 107 Mass. 325, 9 Am. Rep. 38. The discretion of the court in rejecting, as too remote, declarations indicative of mental state is not absolute, but subject to revision if the necessary facts are before the appellate court. Com. *v.* Trefethen, 157 Mass. 180, 183, 31 N. E. 961, 24 L. R. A. 235.

25. Com. *v.* Abbott, 130 Mass. 472.

26. See *infra*, X.

27. As to proof of character of witness for truth and veracity see, generally, Witnesses.

28. Boies *v.* McAllister, 12 Me. 308; Hart *v.* Reynolds, 1 Heisk. (Tenn.) 208.

Carelessness in a particular instance cannot be proved by general reputation. Baldwin *v.* Western R. Corp., 4 Gray (Mass.) 333. But the fact that a person has no reputation for skill or carefulness in his employment may be competent on the question whether a person was negligent in employing him. Cook *v.* Parham, 24 Ala. 21.

29. Boies *v.* McAllister, 12 Me. 308.

30. Hart *v.* Reynolds, 1 Heisk. (Tenn.) 208.

31. Jones *v.* Memphis, etc., Packet Co., (Miss. 1902) 31 So. 201, pedigree of a jack, in action for negligently causing his death provable by reputation.

32. N. N. & M. V. R. Co. *v.* Simcoe, 14 Ky. L. Rep. 526.

33. Reed *v.* State, 16 Ark. 499 (Indian); White *v.* Clements, 39 Ga. 232 (negro). And see Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008, negro. "The evidence is good for what it is worth. As a matter of course, it is worth hardly anything in a doubtful case." White *v.* Clements, *supra*.

34. Bryan *v.* Walton, 20 Ga. 480, 509 (negro); Shorter *v.* Boswell, 2 Harr. & J. (Md.) 359. *Contra*, Walkup *v.* Pratt, 5 Harr. & J. (Md.) 51; Walls *v.* Hemsley, 4 Harr. & J. (Md.) 243; Charlton *v.* Unis, 4 Gratt. (Va.) 58; Mima Queen *v.* Hepburn, 7 Cranch (U. S.) 290, 3 L. ed. 348. A belief current in the community is not admissible. Gregory *v.* Baugh, 4 Rand. (Va.) 611. Direct hearsay was admitted in an early case (Shorter *v.* Boswell, 2 Harr. & J. (Md.) 359), but rejected in later cases (Walkup *v.* Pratt, 5 Harr. & J. (Md.) 51; Charlton *v.* Unis, 4 Gratt. (Va.) 58).

35. Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; People *v.* Ah Sam, 41 Cal. 645; State *v.* Thompson, 23 Kan. 338, 33 Am. Rep. 165; People *v.* Davis, 21 Wend. (N. Y.) 309; Dennis *v.* People, 1 Park. Cr. (N. Y.) 469. *Contra*, under a statute. Trice *v.* State, 2 Head (Tenn.) 591. See also Corporations, 10 Cyc. 241.

36. See the cases in the following notes.

one piece of land is not the equivalent of another; each as a rule presents peculiar features affecting a value which is to a large extent intrinsic. In seeking to establish such intrinsic value, its existence may be proved at any time sufficiently near the time in question to be relevant, whether before or after the time involved in the issue.[37] The physical condition of the real estate may be placed before the jury,[38] and evidence is admissible to show any probable use to which the land could reasonably be put, as for manufacturing,[39] railroad,[40] residential,[41] or other purposes.[42] The use or lack of it which any individual witness would have for a tract of land is no test of value, and is consequently irrelevant on such an inquiry;[43] but evidence that such tracts as those in suit are or are not in demand is competent.[44] In general any elements of value[45] not merely speculative[46] may be shown. Conversely any facts tending to depreciate intrinsic value may be placed before the jury, such as flaws in the title,[47] or restrictions on the use of the premises.[48]

(B) *Improvements.* When there are improvements on the land, these may be placed in detail before the jury, for example, the cost of constructing buildings.[49] Cost of constructing similar buildings is irrelevant.[50]

(C) *Opinions of Observers or Experts.* As is more fully stated hereinafter,[51] especial importance is attached to the inference of observers or the opinion of experts on questions of value.[52]

37. *Georgia.*— Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254.

Kansas.— Constant *v.* Lehman, 52 Kan. 227, 34 Pac. 745.

Michigan.— Abell *v.* Munson, 18 Mich. 306, 100 Am. Dec. 165.

Missouri.— Hosher *v.* Kansas City, etc., R. Co., 60 Mo. 303.

New York.— Hadden *v.* Metropolitan El. R. Co., 75 Hun 63, 26 N. Y. Suppl. 995.

Texas.— Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

38. Cheeves *v.* Danielly, 74 Ga. 712; Kingsland *v.* New York, 60 Hun (N. Y.) 489, 15 N. Y. Suppl. 232; Harris *v.* Schuylkill River East Side R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

39. Clagett *v.* Easterday, 42 Md. 617; King *v.* Minneapolis Union R. Co., 32 Minn. 224, 20 N. W. 135.

40. Russell *v.* St. Paul, etc., R. Co., 33 Minn. 210, 22 N. W. 379.

41. Ohio Valley R., etc., Co. *v.* Kerth, 130 Ind. 314, 30 N. E. 298; Forsyth *v.* Doolittle, 120 U. S. 73, 7 S. Ct. 408, 30 L. ed. 586.

42. Chandler *v.* Geraty, 10 S. C. 304. The inquiry is, not to what use the land may properly be put, but to what use it is adapted and peculiarly suited. Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

43. Hochstrasser *v.* Martin, 62 Hun (N. Y.) 165, 16 N. Y. Suppl. 558.

44. St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. 399.

45. *Massachusetts.*— Providence, etc., R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56; Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544; Whitman *v.* Boston, etc., R. Co., 3 Allen 133; Brown *v.* Providence, etc., R. Co., 5 Gray 35.

Minnesota.— Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239; Rippe *v.* Chicago, etc., R. Co., 23 Minn. 18.

Missouri.— Webster *v.* Kansas City, etc., R. Co., 116 Mo. 114, 22 S. W. 474.

Ohio.— Schaible *v.* Lake Shore, etc., R. Co., 10 Ohio Cir. Ct. 334, 6 Ohio Cir. Dec. 505.

Pennsylvania.— Reading, etc., R. Co. *v.* Balthaser, 119 Pa. St. 472, 13 Atl. 294; Pittsburg, etc., R. Co. *v.* Patterson, 32 Pittsb. Leg. J. 257.

See 20 Cent. Dig. tit. "Evidence," § 259 *et seq.*

46. Gardner *v.* Brookline, 127 Mass. 358; Fairbanks *v.* Fitchburg, 110 Mass. 224; Russell *v.* St. Paul, etc., R. Co., 33 Minn. 210, 22 N. W. 379; Schaible *v.* Lake Shore, etc., R. Co., 10 Ohio Cir. Ct. 334, 6 Ohio Cir. Dec. 505. And see Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880.

47. Norris *v.* Badger, 6 Cow. (N. Y.) 449; Norvell *v.* Phillips, 46 Tex. 161.

48. Allen *v.* Boston, 137 Mass. 319.

49. *Iowa.*— Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58; Scott *v.* Security F. Ins. Co., 98 Iowa 67, 66 N. W. 1054; Richmond *v.* Dubuque, etc., Co., 40 Iowa 264.

Missouri.— Markowitz *v.* Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498.

New York.— Sheldon *v.* Wood, 2 Bosw. 267.

Pennsylvania.— Campe *v.* Horne, 158 Pa. St. 508, 27 Atl. 1106; Minnequa Springs Imp. Co. *v.* Coon, 10 Wkly. Notes Cas. 502.

United States.— Patterson *v.* Kingsland, 18 Fed. Cas. No. 10,827, 8 Blatchf. 278.

But see Governor *v.* Justices Talbot County Inferior Ct., 20 Ga. 359.

50. Gouge *v.* Roberts, 53 N. Y. 619.

51. See *infra*, XI.

52. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227. The value of lands is to be determined by testimony of competent witnesses to what it is worth as a whole, and not by evidence of the worth of its constituent parts, as the trees, the gravel, the clay, the cultivable soil, etc., although the witnesses

(II) *Tests of Value* — (A) *Appraisals.* Estimate of value made by appraisers acting under appointment of one party cannot affect the other, unless the latter coöperates in or subsequently ratifies the appointment.[53]

(B) *Assessments.* Valuations made by public officials for purposes of taxation are not relevant to aid a jury in assessing the value of land[54] or buildings,[55] especially where the valuation is remote in point of time.[56] The rule is the same in the case of betterment assessments.[57]

(C) *Auction Sales.* The price obtained at an auction sale of land,[58] or of an undivided interest therein,[59] is admissible as some evidence of the value of the land, in the absence of proof of imposition or mistake.[60]

(D) *Offers and Willingness to Buy or Sell.* Little probative value can be attached to the mere fact of offers to sell the land in question,[61] and still less to

can take these facts into consideration in fixing their estimates. Page *v.* Wells, 37 Mich. 415. An instruction that "the best evidence of market value is the price paid for land in that neighborhood, making allowance for difference in position and improvements," is properly refused; the true test being the opinion of the witnesses in view of location, productiveness, and general selling price in the vicinity. Pittsburg, etc., R. Co. *v.* Rose, 74 Pa. St. 362. See also East Pennsylvania R. Co. *v.* Hiester, 40 Pa. St. 53.

Irrelevant facts excluded.— The expert's opinion is not competent if based upon irrelevant facts. Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544. And he is not at liberty to detail, as evidence, the irrelevant basis of his opinion. Hunt *v.* Boston, 152 Mass. 168, 25 N. E. 82. The opinion of the expert, moreover, must be confined to the land in question; his opinion as to other land in the neighborhood is irrelevant. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029; Quincy *v.* Boston, 148 Mass. 389, 19 N. E. 519; Thompson *v.* Boston, 148 Mass. 387, 19 N. E. 406.

53. Moorman *v.* Seattle, etc., R. Co., 8 Wash. 98, 35 Pac. 596. On the other hand the report of appraisers appointed by a party may affect himself. Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630.

54. *Alabama.*— Savannah, etc., R. Co. *v.* Buford, 106 Ala. 303, 17 So. 395.

Arkansas.— Texas, etc., R. Co. *v.* Eddy, 42 Ark. 527.

Connecticut.— Storrs *v.* Robinson, 74 Conn. 443, 51 Atl. 135; Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239.

Massachusetts.— Kenerson *v.* Henry, 101 Mass. 152; Flint *v.* Flint, 6 Allen 34, 83 Am. Dec. 615; Brown *v.* Providence, etc., R. Co., 5 Gray 35.

North Carolina.— Ridley *v.* Seaboard, etc., Co., 124 N. C. 37, 32 S. E. 379.

Pennsylvania.— Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279.

See 20 Cent. Dig. tit. "Evidence," § 286.

Assessments of condemned land by official commissioners are equally irrelevant. San Luis Obispo *v.* Brizzolara, 100 Cal. 434, 34 Pac. 1083.

55. Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780.

56. Miller *v.* Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132.

As against the owner such assessments have been held competent, particularly when verified by oath (Tolleson *v.* Posey, 32 Ga. 372), but they work no estoppel against him (New Orleans Pac. R. Co. *v.* Murrell, 36 La. Ann. 344).

57. Nelson *v.* West Duluth, 55 Minn. 497, 57 N. W. 149.

58. Brady *v.* Finn, 162 Mass. 260, 38 N. E. 506; Thornton *v.* Campton, 18 N. H. 20 (good evidence that it is worth as much as was paid); Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544; Knickerbocker L. Ins. Co. *v.* Nelson, 78 N. Y. 137, 7 Abb. N. Cas. (N. Y.) 170. *Compare* Clowes *v.* Dickenson, 9 Cow. (N. Y.) 403. It should be accompanied by evidence of the relative condition of the property at the time of sale and at the time in dispute. Brady *v.* Finn, *supra.*

Bid without sale.— "If, in any case what was bid for land when it was offered for sale [but not sold] can be received as evidence of its value, it can only be when the circumstances and conditions attending the transaction are explained so that the court may have the means of estimating the weight of the testimony." Chaney *v.* Coleman, 77 Tex. 100, 104, 13 S. W. 850, per Henry, J.

A sheriff sued for the value of property sold by him on execution is not entitled to show the amount realized at the sale. Sweigert *v.* Finley, 144 Pa. St. 266, 22 Atl. 702.

59. March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

60. Thornton *v.* Campton, 18 N. H. 20; Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544. But it has been held that the amount for which land sold on execution was not evidence of its value where it was shown that the bid was made by a young employee of the purchaser, and that, if its attorney had been present, the property would not have been bid to the amount that it was. Rickards *v.* Bemis, (Tex. Civ. App. 1903) 78 S. W. 239.

61. *California.*— Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Kansas.— St. Joseph, etc., R. Co. *v.* Orr, 8 Kan. 419.

Massachusetts.— Wood *v.* Firemen's F. Ins. Co., 126 Mass. 316; Winnisimmet County *v.* Grueby, 111 Mass. 543; Davis *v.* Charles River Branch R. Co., 11 Cush. 506.

Michigan.— Perkins *v.* People, 27 Mich. 386.

sell neighboring land,[62] except as a fact involving an estimate by the owner.[63] But it is said that *bona fide* offers to purchase land which the owner has declined are competent.[64] Willingness to pay a certain sum, not ripening into an offer, is irrelevant.[65] And the amount for which an owner would have sold his property is influenced by too many fortuitous circumstances to be relevant on an inquiry as to value.[66] The valuation of the owner is, however, always competent evidence for the adverse party as an admission,[67] except where the fact is offered as it existed at a period too long before[68] or too long after[69] the time when the owner's estimate is of importance to have any probative value.

(E) *Price Paid.* It has been held that taken alone the price paid for land furnishes no evidence of value,[70] even when the *bona fides* of the transaction is shown,[71] and in no case is such a test conclusive.[72] In connection with other evidence, however, it may have a logical bearing.[73] As between persons at liberty to contract on equal terms, agreement on a price not only operates to affect the

Minnesota.— Minnesota Belt-Line R., etc., Co. *v.* Gluek, 45 Minn. 463, 48 N. W. 194; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

New York.— Hine *v.* Manhattan R. Co., 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Springer, (1888) 13 Atl. 76.

Washington.— Parke *v.* Seattle, 8 Wash. 78, 35 Pac. 594.

Wisconsin.— Atkinson *v.* Chicago, etc., R. Co., 93 Wis. 362, 67 N. W. 703.

United States.— Sharpe *v.* U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932.

See 20 Cent. Dig. tit. "Evidence," § 1216.

62. *Illinois.*— Sherlock *v.* Chicago, etc., R. Co., 130 Ill. 403, 22 N. E. 844. But see Chicago, etc., R. Co. *v.* Maroney, 95 Ill. 179.

Massachusetts.— Winnisimmet County *v.* Grueby, 111 Mass. 543.

Minnesota.— Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464.

New Jersey.— Montclair R. Co. *v.* Benson, 36 N. J. L. 557.

New York.— Leale *v.* Metropolitan El. R. Co., 61 Hun 613, 16 N. Y. Suppl. 419.

See 20 Cent. Dig. tit. "Evidence," § 416.

63. Houston *v.* Western Washington R. Co., 204 Pa. St. 321, 54 Atl. 166; Daniels *v.* Conrad, 4 Leigh (Va.) 401; Findlay *v.* Pertz, 74 Fed. 681, 20 C. C. A. 662.

64. Muller *v.* Southern Pac. Branch R. Co., 83 Cal. 240, 23 Pac. 265; Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58; Cottrell *v.* Rogers, 99 Tenn. 488, 42 S. W. 445; Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757. *Contra*, Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468; Sharpe *v.* U. S., 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 [*affirming* 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932].

65. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668; Harvard First Nat. Bank *v.* Hockett, 2 Nebr. (Unoff.) 512, 89 N. W. 412.

66. *Indiana.*— Crouse *v.* Holman, 19 Ind. 30.

Maryland.— Shidy *v.* Cutter, 54 Md. 674.

Nevada.— Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

Pennsylvania.— Auman *v.* Philadelphia, etc., R. Co., 133 Pa. St. 93, 20 Atl. 1059. *Compare* Houston *v.* Western Washington R. Co., 204 Pa. St. 321, 54 Atl. 166.

Texas.— Haney *v.* Clark, 65 Tex. 93.

67. Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635; Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745. But it was held that the testimony of a person who had agreed with the owner of land taken by a railroad corporation for a purchase of land adjoining thereto at a certain price was inadmissible, on a hearing before a sheriff's jury, to show the value of the land so taken. Chapin *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 422.

68. Tate *v.* Pensacola, etc., Co., 37 Fla. 439, 20 So. 542, 53 Am. St. Rep. 251; Palmer Co. *v.* Ferrill, 17 Pick. (Mass.) 58.

69. Central Branch Union Pac. R. Co. *v.* Andrews, 37 Kan. 162, 14 Pac. 509.

70. Anderson *v.* Knox, 20 Ala. 156.

71. People *v.* Rushford, 81 N. Y. App. Div. 298, 80 N. Y. Suppl. 891.

72. St. Louis, etc., R. Co. *v.* Smith, 42 Ark. 265; Pate *v.* Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289; Moore *v.* Harvey, 50 Vt. 297.

73. *Iowa.*— Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304, 89 N. W. 1088.

Maryland.— Baltimore *v.* Smith, etc., Brick Co., 80 Md. 458, 31 Atl. 423.

New York.— Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137; Robinson *v.* Lewis, 7 Misc. 536, 27 N. Y. Suppl. 989.

Tennessee.— Humphreys *v.* Holtsinger, 3 Sneed 228.

Vermont.— Rawson *v.* Prior, 57 Vt. 612.

Wyoming.— Johnson *v.* McMullin, 3 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670, where it is said that the prices at which city lots were being bought and sold in the market at a given time are their proper market value at such time, and it is immaterial that there was then an unusual flurry in real estate in the city, and that hence the prices were "fictitious."

Price paid has been applied as a test in dealing with the inferences of a skilled observer or the opinion of an expert (Kentucky, etc., Bridge Co. *v.* Held, 16 Ky. L. Rep. 160), and even accorded great weight (Watson *v.*

parties contractually, but itself constitutes some evidence of value.[74] But forced sales lack the element of relevancy and are inadmissible as a test of market value. Accordingly prices paid in settlement of claims for damage caused to property by a common injury or taking are the resultant of too many variable considerations to be competent on the question as to what damage has been suffered by similar property from the same cause;[75] although the amount to be paid was reached by agreement,[76] arbitration,[77] or the verdict of a jury.[78] This is still more clearly the rule where the two pieces of property are in different conditions.[79]

(F) *Rental Value.* Changes in rental value may indicate the measure of damages occasioned by an injury to or taking of property. General decrease in rental value of premises along the line of an elevated railroad and near the premises in question is therefore competent in determining damage caused by its construction and operation,[80] provided it appears that the land has in fact been injured, either absolutely[81] or relatively, as by failure to share in a general enhancement of values.[82] But a decrease in the rental value of adjacent property not shown to be general is irrelevant.[83]

Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468).

74. Ferguson *v.* Clifford, 37 N. H. 86. See Houston *v.* Western Washington R. Co., 204 Pa. St. 321, 54 Atl. 166. But it was held in condemnation proceedings that evidence of what the owner paid for the two lots sought to be taken was inadmissible where he purchased them and an adjoining lot for a total sum, so that there was no way of estimating how much he gave for the two lots in controversy and how much for the third lot. Lanquist *v.* Chicago, 200 Ill. 69, 65 N. E. 681.

Time of purchase.— The time when the property was purchased must not be too remote. Lanquist *v.* Chicago, 200 Ill. 69, 65 N. E. 681. See also *infra*, VII, B, 9, b, (II), (G).

Sale must be bona fide.— People *v.* Rushford, 81 N. Y. App. Div. 298, 80 N. Y. Suppl. 891, holding that where it was not shown that a sale referred to in a conveyance was a *bona fide* sale, and that the consideration named therein was the actual one between vendor and vendee, such conveyance was not competent evidence of the value of the property described in certiorari to review an assessment thereon.

75. *California.*— Spring Valley Waterworks *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

Idaho.— Spokane, etc., R. Co. *v.* Lieuallen, 2 Ida. 1101, 29 Pac. 854.

Illinois.— Peoria Gaslight, etc., Co. *v.* Peoria Terminal R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373.

Massachusetts.— Fall River Print Works *v.* Fall River, 110 Mass. 428; Kelliher *v.* Miller, 97 Mass. 71.

Missouri.— Springfield *v.* Schmook, 68 Mo. 394.

New Hampshire.— Amoskeag Mfg. Co. *v.* Worcester, 60 N. H. 522; Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332.

Pennsylvania.— Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187; Pennsylvania, etc., Canal, etc., Co. *v.* Bunnell, 2 Wkly. Notes Cas. 633.

Rhode Island.— Howard *v.* Providence, 6 R. I. 514.

See 20 Cent. Dig. tit. "Evidence," § 416 *et seq.*

76. Providence, etc., R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56; Cobb *v.* Boston, 112 Mass. 181; U. S. *v.* Freeman, 113 Fed. 370.

Sale in part payment of debt.— It has been held that evidence of the price paid for land purchased from an insolvent in part payment of an existing debt is not admissible on the question of value and damages in proceedings to condemn the land. Lanquist *v.* Chicago, 200 Ill. 69, 65 N. E. 681.

77. White *v.* Fitchburg R. Corp., 4 Cush. (Mass.) 440.

78. Howe *v.* Howard, 158 Mass. 278, 33 N. E. 528.

79. *In re* Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52 [*affirming* 1 Silv. Supreme 389, 5 N. Y. Suppl. 370].

80. Golden *v.* Metropolitan El. R. Co., 1 Misc. (N. Y.) 142, 20 N. Y. Suppl. 630; Bischoff *v.* New York El. R. Co., 61 N. Y. Super. Ct. 211, 18 N. Y. Suppl. 865.

81. Brush *v.* Manhattan R. Co., 17 N. Y. Suppl. 540. Dissimilarity between the adjacent premises and the premises in question in respect of structures and kind of occupation is not an insuperable objection to the evidence. Bischoff *v.* New York El. R. Co., 61 N. Y. Super. Ct. 211, 18 N. Y. Suppl. 865.

82. Hitchings *v.* Brooklyn El. R. Co., 6 Misc. (N. Y.) 430, 27 N. Y. Suppl. 132.

83. Soper *v.* McClout, (Iowa 1901) 87 N. W. 724; Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78; Stuyvesant *v.* New York El. R. Co., 4 N. Y. App. Div. 159, 38 N. Y. Suppl. 595; Hart *v.* Brooklyn El. R. Co., 89 Hun (N. Y.) 82, 35 N. Y. Suppl. 41; Winters *v.* Manhattan R. Co., 15 Misc. (N. Y.) 8, 36 N. Y. Suppl. 772.

Rent paid for other premises.—In an action for breach of a lessor's agreement to give possession, evidence of the rent paid by the lessee for other premises claimed to be of a similar character has been held incompetent. Rosenblum *v.* Riley, 84 N. Y. Suppl. 884. See, generally, LANDLORD AND TENANT.

(G) *Sales of Similar Land.* Whether, among facts from which an inference as to the market value of a particular piece of real estate may be drawn, are prices obtained on sales of adjacent lands is a question on which the authorities are discordant. In some jurisdictions the evidence is admissible,[84] and even highly regarded,[85] although by no means established as an unerring test,[86] provided it is shown to the reasonable satisfaction of the court[87] that such sales were made sufficiently near the time at which the value of the land in question is to be determined to give them weight,[88] and that the lands present such general similarity of

84. *Illinois.*— Culbertson, etc., Packing, etc., Co. *v.* Chicago, 111 Ill. 651; St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208.

Iowa.— Cherokee *v.* Sioux City, etc., Town Lot, etc., Co., 52 Iowa 279, 3 N. W. 42.

Louisiana.— New Orleans *v.* Manfre, 111 La. 927, 35 So. 981.

Maine.— Norton *v.* Willis, 73 Me. 580; Warren *v.* Wheeler, 21 Me. 484.

Maryland.— Baltimore *v.* Smith, etc., Brick Co., 80 Md. 458, 31 Atl. 423.

Massachusetts.— Hunt *v.* Boston, 152 Mass. 168, 25 N. E. 82; Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668; Gardner *v.* Brookline, 127 Mass. 358; Paine *v.* Boston, 4 Allen 168. See also O'Malley *v.* Com., 182 Mass. 196, 65 N. E. 30.

Missouri.— Matter of Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188; Markowitz *v.* Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498.

New Hampshire.— Hoit *v.* Russell, 56 N. H. 559; White *v.* Concord R. Co., 30 N. H. 188; Concord R. Co. *v.* Greely, 23 N. H. 242; Thornton *v.* Campton, 18 N. H. 20.

New York.— Hart *v.* Langan, 144 N. Y. 563, 39 N. E. 643; Langdon *v.* New York, 133 N. Y. 628, 31 N. E. 98; Rondout, etc., R. Co. *v.* Deyo, 5 Lans. 298. See also People *v.* Rusford, 81 N. Y. App. Div. 298, 80 N. Y. Suppl. 891.

Pennsylvania.— See Houston *v.* Western Washington R. Co., 204 Pa. St. 321, 54 Atl. 166.

Washington.— Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

Wisconsin.— Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

See 20 Cent. Dig. tit. "Evidence," § 416 *et seq.*

Confined to actual sales.— Whether certain property is worth more than plaintiff's (Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920), and ineffectual efforts to sell (Wiley *v.* West Jersey R. Co., 44 N. J. L. 247) are irrelevant.

Proof of price.— The price at which neighboring property has been selling cannot be proved by the recitals of the instruments evidencing such sales. New Orleans *v.* Manfre, 111 La. 927, 35 So. 981.

Compulsory settlement.— The fact that a sale was made to a water or other municipal board does not of itself show that it was a compulsory settlement rather than a fair transaction in the market, so as to make it inadmissible on the question of value of neighboring land, where the board had statutory power to purchase as well as to condemn. O'Malley *v.* Com., 182 Mass. 196, 65 N. E. 30. See *supra*, VII, B, 9, b, (II), (E).

85. St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; Thornton *v.* Campton, 18 N. H. 20.

86. Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276. See also Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880.

87. Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536; Stinson *v.* Chicago, etc., R. Co., 27 Minn. 284, 6 N. W. 784; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Bruner *v.* Threadgill, 88 N. C. 361. The discretion of the court is not absolute, and exclusion of clearly relevant (Paine *v.* Boston, 4 Allen (Mass.) 168), or admission of clearly irrelevant (Kansas City, etc., R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202) evidence may constitute error. A circumstance considered in determining the propriety of the court's exercise of discretion in this particular, as in other cases of relevancy as affected by remoteness, is whether it is reasonably within the power of the party presenting the evidence to produce evidence more probative. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227.

88. Patch *v.* Boston, 146 Mass. 55, 14 N. E. 770 (a few months); Green *v.* Fall River, 113 Mass. 262; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115. Length of time suggests dissimilarity of conditions. Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328. A considerable intervening period has sufficed to exclude the evidence under circumstances, where the probability of change in conditions was not negatived. Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109 (twelve years); May *v.* Boston, 158 Mass. 21, 32 N. E. 902 (nineteen months); Hunt *v.* Boston, 152 Mass. 168, 25 N. E. 82 (three and one-half years); Chandler *v.* Jamaica Pond Aqueduct Corp., 122 Mass. 305 (three years). On the other hand, it has not sufficed to exclude the evidence where it was necessary or still relevant by reason of the presumable non-existence of a change in condition. Montgomery *v.* Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271 (a few months); Bowditch *v.* Boston, 164 Mass. 107, 41 N. E. 132 (two and one-half years); Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668 (twenty months).

On cross-examination to test the accuracy of a witness as to value, the court may permit a wide range of inquiry as to sales of similar property. The period may extend

condition[89] in all essential particulars,[90] including location,[91] as to raise a logical inference that practically the same elements of value are present in both cases,[92] or that any difference in value can be determined with approximate accuracy.[93] In other jurisdictions the evidence is not admissible.[94]

c. Personal Property — (i) *Intrinsic Value* — (a) *In General.* Where an article has no market value the jury may consider what would have contributed to make the market price if there had been one. The condition of the property as it existed sufficiently near the time embraced in the issue to afford a reasonable ground for belief that it remains the same,[95] or has changed only to an extent

even to four or five years. Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

89. O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923; Dady *v.* Condit, 104 Ill. App. 507; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268; Quincy *v.* Boston, 148 Mass. 389, 19 N. E. 519; Thompson *v.* Boston, 148 Mass. 387, 19 N. E. 406; Lawton *v.* Chase, 108 Mass. 238; Laing *v.* United New Jersey R., etc., Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682. See also Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880.

90. Laing *v.* United New Jersey R., etc., Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682. Proof of the value of lands presenting peculiar conditions of situation or in other particulars requires relaxation of the strict requirements as to similarity of conditions attending probative instances of sale, in respect both to closeness of time and proximity in locality. Benham *v.* Dunbar, 103 Mass. 365, island in Boston harbor. Sales of high land are not as a rule relevant as to the value of low (Daigneault *v.* Woonsocket, 18 R. I. 378, 28 Atl. 346), or of improved land on the value of wild (Fox *v.* Robbins, (Tex. Civ. App. 1902) 70 S. W. 597. But see O'Malley *v.* Com., 182 Mass. 196, 65 N. E. 30). Sales of wild or timber land in other localities are incompetent as evidence of the value of similar lands in the absence of evidence of the existence of a market value. Bradshaw *v.* Rome, etc., R. Co., 1 N. Y. Suppl. 691. Similarity in a subordinate particular does not make the testimony relevant. It is not enough, for example, that a lot is similar to the land in question only in being low and traversed by a brook. Chandler *v.* Jamaica Pond Aqueduct Corp., 122 Mass. 305.

91. Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328. And see Dallas *v.* Boise, 44 Oreg. 302, 75 Pac. 208 (excluding evidence of the value of waterpowers two miles distant from those in controversy, where it was not shown that the conditions surrounding them were similar, so as to make their value equal); Newbold *v.* International, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. 1079 (excluding evidence of the price of a lot at a greater distance from a railroad than the lot in question).

Considerable distance from the locus does not disqualify evidence of sales, provided it does not otherwise connote such dissimilarity of conditions as to affect relevancy. Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536; Gardner *v.* Brookline, 127 Mass. 358. This is especially true in case of wild lands. Mains *v.* Haight, 14 Barb. (N. Y.) 76. Distance is, however, a circumstance impairing the force of such evidence. Ham *v.* Salem, 100 Mass. 350; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; *In re* Thompson, 1 Silv. Supreme (N. Y.) 389, 5 N. Y. Suppl. 370.

92. Relevancy of evidence of sales of similar land is based on the theory that the value of such similar lands is relevant to the value of the land in question. Paine *v.* Boston, 4 Allen (Mass.) 168; Galway *v.* Metropolitan El. R. Co., 13 N. Y. Suppl. 47; Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800.

93. A party is entitled to show points of difference in favor of his own land over the land sold. Chicago, etc., R. Co. *v.* Emery, 51 Kan. 16, 32 Pac. 631. And circumstances enhancing the prices realized at the collateral sale may be shown. Wyman *v.* Lexington, etc., R. Co., 13 Metc. (Mass.) 316. Difference in size (Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711), class of buildings (Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227), or nature of restrictions (Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127) is not fatal to the evidence if substantial similarity is shown. But it is essential to relevancy that the effect of similarity should not be nullified by the presence of peculiar circumstances attending the sale and tending to prevent the fair operation on the price of the elements possessed in common by the two estates. Pittsburgh, etc., R. Co. *v.* Patterson, 32 Pittsb. Leg. J. (Pa.) 257.

94. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Selma, etc., R. Co. *v.* Keith, 53 Ga. 178; Montclair R. Co. *v.* Benson, 36 N. J. L. 557; Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Pittsburgh, etc., R. Co. *v.* Patterson, 107 Pa. St. 461; Pennsylvania, etc., R., etc., Co. *v.* Bunnell, 81 Pa. St. 414; East Pennsylvania R. Co. *v.* Hiester, 40 Pa. St. 53. See also Union Pac. R. Co. *v.* Stanwood, (Nebr. 1904) 98 N. W. 656 [*overruling* on rehearing (Nebr. 1902) 91 N. W. 191].

95. Waterson *v.* Seat, 10 Fla. 326; Hunt *v.* Hardwick, 68 Ga. 100; McLaren *v.* Birdsong, 24 Ga. 265; McAvoy *v.* Wright, 137 Mass. 207; White *v.* Springfield Mut. F. Assur. Co., 8 Gray (Mass.) 566; McLennan *v.* Minneapolis, etc., Elevator Co., 57 Minn.

which can be definitely estimated,[96] and actual elements of its value,[97] including proof of its cost,[98] and of the uses to which it is naturally adapted[99] may be laid before the jury, although the purpose for which goods are to be used is not ordinarily the best test of their value.[1] Value of specific property may be shown by proving the value of similar property,[2] provided the nature and amount of the differentiation, if any, can be shown with reasonable certainty.[3] The jury may under like conditions gain information from inspection of similar articles.[4]

(B) *Second-Hand Property.* The value of second-hand property is established in the same way as that of other property without market value.[5] Evidence of its cost, market price when new, and its usefulness and present condition, is admissible.[6]

(C) *Tests of Value* — (1) APPRAISALS. Speaking generally evidence of estimates in an appraisal of property made by one whose action does not legally

317, 59 N. W. 628. See also Oxford *v.* Ellis, 117 Ga. 817, 45 S. E. 67; Johnson *v.* Mason, (N. J. 1903) 56 Atl. 137.

96. Yater *v.* Mullen, 23 Ind. 562.

97. *Florida.*— Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

Illinois.— Ohio, etc., R. Co. *v.* Stribling, 38 Ill. App. 17.

Iowa.— Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850.

Mississippi.— Richmond, etc., R. Co. *v.* Chandler, (1893) 13 So. 267.

Missouri.— Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

New Jersey.— Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 474.

Texas.— Gulf, etc., R. Co. *v.* Maetze, 2 Tex. App. Civ. Cas. § 631; Galveston, etc., R. Co. *v.* Watson, 1 Tex. App. Civ. Cas. § 813. And see Wells, etc., Express Co. *v.* Williams, (Civ. App. 1902) 71 S. W. 314.

See 20 Cent. Dig. tit. "Evidence," § 259 *et seq.*

A witness as to the value of a growing crop at the time of its destruction may give in detail the cost of planting, cultivating, harvesting, and marketing, and the probable yield, and its market value. Galveston, etc., R. Co. *v.* Parr, 8 Tex. Civ. App. 280, 28 S. W. 264. In an action for damages for the destruction of growing crops, evidence as to the probable cost, including that of the use of the land to bring the crops to the condition in which they were at the time of their destruction, and as to what the reasonable probability was as to the maturity of such crops and the amount of the same that would be matured, is admissible as tending to show what the value of the crops was when destroyed. Chicago *v.* Dickman, 105 Ill. App. 209.

In determining the value of corporate stock which is without ascertainable market value the value of the corporate assets, the dividends paid, the character and permanency of the business, the control of the stock, and other circumstances of like nature may be taken into consideration. Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

98. Jacksonville, etc., R. Co. *v.* Jones, 34 Fla. 286, 15 So. 924; Whipple *v.* Walpole, 10 N. H. 130; Todd *v.* Gamble, 67 Hun (N. Y.) 38, 21 N. Y. Suppl. 739; Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133. See also Wells, etc., Express Co. *v.* Williams, (Tex. Civ. App. 1902) 71 S. W. 314.

99. Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850.

1. Stevens *v.* Springer, 23 Mo. App. 375.

2. Dean *v.* Van Nostraud, 101 N. Y. 621, 4 N. E. 134.

Places at a distance.— General similarity in conditions being shown, the value of personal property without definite market value may be proved as it existed in property of the same kind about the time in question, although at a considerable distance. Foster *v.* Ward, 75 Ind. 594 (twelve miles); Cross *v.* Wilkins, 43 N. H. 332 (ten miles).

Substitutionary evidence rejected.— The inquiry being as to the value of an identified chattel, direct evidence of such value is considered primary; while evidence of the value of similar articles is in a sense secondary; and if in the opinion of the court secondary evidence is being offered by a party for primary evidence which it is in his power to produce it may properly be rejected. Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529.

3. Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342; Blanchard *v.* New Jersey Steamboat Co., 59 N. Y. 292; Denver Onyx, etc., Mfg. Co. *v.* Reynolds, 72 Fed. 464, 18 C. C. A. 638.

4. Cuebas *v.* Klein, 61 N. Y. Suppl. 923. See also *infra*, XIII.

5. Hawver *v.* Bell, 141 N. Y. 140, 36 N. E. 6; Bird *v.* Everard, 4 Misc. (N. Y.) 104, 23 N. Y. Suppl. 1008. In an action against a sheriff for the wrongful sale, under an execution against a third person, of a shopworn stock of miscellaneous school-books and stationery owned by plaintiff, evidence of what the purchasers at the execution sale obtained for the stock at *bona fide* private sales in cities some miles distant from the place of conversion, and nearly a year afterward, was held competent as tending to prove the market price of the goods at the time of the conversion; the stock being of a staple character, and its value not liable to fluctuations. Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032.

6. Luse *v.* Jones, 39 N. J. L. 707; Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131. And see Wells, etc., Express Co. *v.* Williams, (Tex. Civ. App. 1902) 71 S. W. 314.

affect the party against whom the evidence is offered is incompetent,[7] even if the appraisal is officially made.[8] On the other hand, where an appraisal can be deemed the act of a party, its results are admissible against him.[9]

(2) Auction Sales. As tests of value of personal property special importance is attached to prices obtained at auction sales, where the sales are fairly conducted with suitable effort to attract bidders[10] and are made sufficiently near the time involved in the issue, whether before or after,[11] to be relevant. The prices are not conclusive on the parties,[12] even when realized at an official sale, as by a sheriff on execution.[13]

(3) Offers. Offers of a price for personal property made in good faith and rejected by the owner are competent as evidence of value.[14]

(4) Prices Paid. That a party has placed a certain value on chattels[15] or services[16] is competent against him as an admission,[17] but cannot be used by him on his own behalf.[18] What a party paid for property furnishes by itself no test of value,[19] although it constitutes a circumstance to be weighed in connection with other evidence;[20] provided that the time of sale is sufficiently near to sustain a satisfactory inference on the question of value at the time involved in the inquiry.[21] The evidence is more readily received when other evidence of value is apparently unavailable.[22]

(5) Sales of Similar Articles. Where it becomes necessary to ascertain the value of articles having no market value, evidence of prices realized at sales of such articles held under conditions calculated to secure adequate returns[23]

7. *Alabama.*— Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23; O'Neal *v.* Brown, 20 Ala. 510.

Arkansas.— Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

Iowa.— Flannigan *v.* Althouse, 56 Iowa 513, 9 N. W. 381.

New York.— Brewster *v.* Wooster, 8 Misc. 29, 28 N. Y. Suppl. 654.

Wisconsin.— Watkins *v.* Page, 2 Wis. 92.

See 20 Cent. Dig. tit. "Evidence," § 261½.

8. Wright *v.* Quirk, 105 Mass. 44.

9. An appraisal made by agreement is sufficient. Brigham *v.* Evans, 113 Mass. 538.

10. Sanford *v.* Peck, 63 Conn. 486, 27 Atl. 1057; Brigham *v.* Evans, 113 Mass. 538; Kent *v.* Whitney, 9 Allen (Mass.) 62, 85 Am. Dec. 739; Jennings *v.* Prentice, 39 Mich. 421; Guiterman *v.* Liverpool, etc., Steamship Co., 83 N. Y. 358; Campbell *v.* Woodworth, 20 N. Y. 499; Jacob *v.* Watkins, 3 N. Y. App. Div. 422, 38 N. Y. Suppl. 763; Dixon *v.* Buck, 42 Barb. (N. Y.) 70; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267. *Contra*, McCracken *v.* West, 17 Ohio 16.

11. Smith *v.* Mitchell, 12 Mich. 180.

12. Gray *v.* Walton, 107 N. Y. 254, 14 N. E. 191; Renaud *v.* Peck, 2 Hilt. (N. Y.) 137.

13. Roberts *v.* Dunn, 71 Ill. 46; Gill *v.* McNamee, 42 N. Y. 44; Heinmuller *v.* Abbott, 34 N. Y. Super. Ct. 228.

14. Gatling *v.* Newell, 9 Ind. 572.

15. Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425; Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; Banks *v.* Gidrot, 19 Ga. 421; Wright *v.* Quirk, 105 Mass. 44.

16. Pope *v.* Randolph, 13 Ala. 214.

17. As to admissions by conduct see, generally, *supra*, IV, B, 6.

18. Gingles *v.* Caldwell, 21 Ala. 444; Sweetser *v.* McCrea, 97 Ind. 404; Chapin *v.* Hollister, 7 Lans. (N. Y.) 456.

19. Miller *v.* Bryden, 34 Mo. App. 602; Peyser *v.* Lund, 89 N. Y. App. Div. 195, 85 N. Y. Suppl. 881, holding that proof that plaintiff paid a certain sum to the owners for loss of goods stolen while in his possession was not proof of their value. See also Gresham *v.* Harcourt, (Tex. Civ. App. 1903) 75 S. W. 808, holding, in an action by the administratrix of a deceased partner for an accounting, that a contract by which defendant sold to a third person an undivided half interest in the partnership property was not admissible on the question of the value of the property when the contract was made.

20. Boggan *v.* Horne, 97 N. C. 268, 2 S. E. 224. See Goodman *v.* Baumann, 43 Misc. (N. Y.) 83, 86 N. Y. Suppl. 287.

On an exchange the value of the property received may be shown as evidence of the value of the property given. Carr *v.* Moore, 41 N. H. 131. *Compare* Galliers *v.* Chicago, etc., R. Co., 116 Iowa 319, 89 N. W. 1109.

Lump price.— Where certain articles were bought with other articles at a lump price, the value of the latter articles is not relevant in order to establish the value of the former in issue by deduction. Wells *v.* Kelsey, 15 Abb. Pr. (N. Y.) 53.

21. Miner *v.* Connecticut River R. Co., 153 Mass. 398, 26 N. E. 994; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 570.

22. State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

23. Where peculiar circumstances attended the sale which probably affected the price the evidence may be excluded. Brindle *v.* Adams, 33 Leg. Int. (Pa.) 322 [*affirmed* in 3 Wkly. Notes Cas. 5].

is admissible,[24] provided that the time of sale is not too remote[25] to raise a logical inference.

(11) *Market Value*—(A) *In General.* Market value, when shown to exist,[26] may be proved as it existed at any time at which it is relevant.[27] Value of ordinary commodities having a market value may be proved by showing the value of articles of the same kind in the market, without showing that those in controversy are of the same quality.[28]

(B) *How Proved*—(1) In General. Where the statement as to market value is identified as that of a particular individual,[29] as where the opinion of persons not witnesses, including editors of newspapers,[30] is offered, it is to be rejected. Hearsay, to be admissible, must be of a concurrent or composite type.[31] What an owner would take for a chattel,[32] or what a particular person would be willing to give for it, embraces too many variable contingencies to constitute evidence of market value. In case of articles having a market value, cost of production is irrelevant.[33]

(2) Opinion Evidence—(a) In General. A common method of proving market value is by the inference of competent observers[34] or the opinion of

24. *Indiana.*— Gatling *v.* Newell, 9 Ind. 572.

Iowa.— Galliers *v.* Chicago, etc., R. Co., 116 Iowa 319, 89 N. W. 1109; Thompson *v.* Anderson, 94 Iowa 554, 63 N. W. 355.

Kansas.— Truitt *v.* Baird, 12 Kan. 420.

Kentucky.— Home Constr. Co. *v.* Church, 14 Ky. L. Rep. 807.

Massachusetts.— Newsome *v.* Davis, 133 Mass. 343.

Michigan.— Kendrick *v.* Beard, 90 Mich. 589, 51 N. W. 645.

Mississippi.— Alabama, etc., R. Co. *v.* Searles, 71 Miss. 744, 16 So. 255.

New York.— De Groot *v.* Fulton F. Ins. Co., 4 Rob. 504.

Texas.— Reeves *v.* Texas, etc., R. Co., 11 Tex. Civ. App. 514, 32 S. W. 920.

See 20 Cent. Dig. tit. "Evidence," § 416 *et seq.*

25. *Massachusetts.*— Croak *v.* Owens, 121 Mass. 28; Eaton *v.* Mellus, 7 Gray 566.

Minnesota.— Stearns *v.* Johnson, 17 Minn. 142.

New Hampshire.— Kelsea *v.* Fletcher, 48 N. H. 282; Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Carr *v.* Moore, 41 N. H. 131, in case of horses evidence of sales a year after date in question was held admissible.

New York.— Belden *v.* Nicolay, 4 E. D. Smith 14.

Texas.— Pitt *v.* Texas Storage Co., (App. 1892) 18 S. W. 465.

Vermont.— Melvin *v.* Bullard, 35 Vt. 268.

See 20 Cent. Dig. tit. "Evidence," § 416 *et seq.*

Nature of property.— Where property is subject to violent and sudden fluctuations in value, a comparatively short interval will render evidence of other sales irrelevant. Cleghorn *v.* Love, 24 Ga. 590, negroes. Otherwise of property less subject to fluctuation. Carr *v.* Moore, 41 N. H. 131, horses.

Discretion of court.— The test is, can the value at the time of sale be assumed to continue to the time involved in the inquiry; and while this question is within the discretion of the court, the ruling therein may be reviewed for abuse of discretion. Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

The adverse party is entitled to show any change in value between the two periods. Crounse *v.* Fitch, 1 Abb. Dec. (N. Y.) 475, 6 Abb. Pr. N. S. (N. Y.) 185. The presence of circumstances materially affecting the price will be relevant. Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252; Randall *v.* Albany City Nat. Bank, 1 N. Y. St. 592.

26. Where it is not first shown that an article has a market value, the answer of a witness when asked what is the market value is merely his opinion of value and is inadmissible. Smith *v.* Griswold, 15 Hun (N. Y.) 273.

27. Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132, 8 Pac. 218; Park *v.* Chateaugay Iron Co., 8 N. Y. St. 507; McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753; Boyd *v.* Gunnison, 14 W. Va. 1.

28. Ebenreiter *v.* Dahlman, 19 Misc. (N. Y.) 9, 42 N. Y. Suppl. 867.

29. Cobb *v.* Whitsett, 51 Mo. App. 146; Hess *v.* Missouri Pac. R. Co., 40 Mo. App. 202; Hoskins *v.* Missouri Pac. R. Co., 19 Mo. App. 315; Flynn *v.* Wokl, 10 Mo. App. 582.

30. Kent *v.* Miltenberger, 15 Mo. App. 480.

31. Harrison *v.* Glover, 72 N. Y. 451; Lush *v.* Druse, 4 Wend. (N. Y.) 313; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116.

32. Ward *v.* Kadel, 38 Ark. 174.

33. Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675.

34. *Alabama.*— Burks *v.* Hubbard, 69 Ala. 379.

Georgia.— Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

Maine.— Washington Ice Co. *v.* Webster, 68 Me. 449.

Maryland.— Morris *v.* Columbian Ironworks, etc., Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851.

Michigan.— Cleveland, etc., R. Co. *v.* Perkins, 17 Mich. 296.

North Carolina.— Smith *v.* North Carolina R. Co., 68 N. C. 107.

experts[35] personally acquainted with the market in question.[36] The testimony is valuable in proportion as personal familiarity with the market is demonstrated.[37]

(b) Hearsay as a Basis. A witness may testify as to market value, although his sole knowledge be derived from commercial circulars,[38] correspondence,[39] market quotations,[40] newspaper market reports,[41] price lists,[42] prices current,[43] or telegrams.[44]

(3) Proof of Sales — (a) In General. A fundamental test of market value is the price realized on actual sales[45] or stated in *bona fide* offers by dealers having the articles for sale,[46] or in bidding for their purchase at a time near enough to be relevant.[47] Evidence of even a single occasion is admissible, provided that any variation in conditions is not such as to confuse rather than assist the tribunal.[48] Prices obtained at an auction sale held under fair conditions are competent evidence of market value.[49]

(b) Records of Trade Sales. The usual records of sales[50] or of offers to purchase or sell, such as newspaper market reports[51] or prices current,[52] are deemed competent evidence of market value, especially when accredited by the party against whom they are offered.[53] But prices current of dealers or in newspapers must be shown to represent actual or proposed transactions[54] and it ought to

Texas.— Texas, etc., R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10; Houston, etc., R. Co. *v.* Williams, (Civ. App. 1895) 31 S. W. 556; Ft. Worth, etc., R. Co. *v.* Daggett, (Civ. App. 1894) 27 S. W. 186; Gulf, etc., R. Co. *v.* Patterson, 5 Tex. Civ. App. 523, 24 S. W. 349.

See also *infra*, XI.

35. See *infra*, XI.

36. Hoskins *v.* Missouri Pac. R. Co., 19 Mo. App. 315. It has been held that for the purpose of proving the market value of an article in one place, admitted or proved to be determinable by its market value at other places, the testimony of dealers in the article at the place in question, as to the contents of market quotations, read by them in newspapers published at the controlling points, and telegraph despatches therefrom printed in newspapers published at the place in question is mere hearsay and inadmissible. Ferris *v.* Sutcliff, 1 Alb. L. J. (N. Y.) 238. A witness cannot testify in North Carolina to market values at Boston, when his knowledge is exclusively derived from market reports in a North Carolina newspaper. Fairley *v.* Smith, 87 N. C. 367, 42 Am. Rep. 522.

37. Suttle *v.* Falls, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338.

38. Smith *v.* North Carolina R. Co., 68 N. C. 107.

39. Smith *v.* North Carolina R. Co., 68 N. C. 107.

40. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Texas, etc., R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10; Houston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 556; Gulf, etc., R. Co. *v.* Patterson, 5 Tex. Civ. App. 523, 24 S. W. 349.

41. Cleveland, etc., R. Co. *v.* Perkins, 17 Mich. 296; Ft. Worth, etc., R. Co. *v.* Daggett, (Tex. Civ. App. 1894) 27 S. W. 186.

42. Morris *v.* Columbian Iron-Works, etc., Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851.

43. Smith *v.* North Carolina R. Co., 68 N. C. 107.

44. Smith *v.* North Carolina R. Co., 68 N. C. 107.

45. Home Constr. Co. *v.* Church, 14 Ky. L. Rep. 807; Northwestern Fuel Coal Co. *v.* Mahler, 36 Minn. 166, 30 N. W. 756. See also Garlington *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. 368; St. Louis, etc., R. Co. *v.* White, (Tex. Civ. App. 1903) 76 S. W. 947 [*reversed* on other points in (Tex. Sup. 1904) 80 S. W. 77].

46. Statements of dealers in reply to inquiries are competent evidence of the prices of a marketable commodity. Harrison *v.* Glover, 72 N. Y. 451.

47. Rickey *v.* Tenbroeck, 63 Mo. 563.

48. Blanchard *v.* New Jersey Steamboat Co., 59 N. Y. 292; Gulf, etc., R. Co. *v.* Lowe, 2 Tex. App. Civ. Cas. § 648.

49. Bigelow *v.* Legg, 102 N. Y. 652, 6 N. E. 107. See also St. Louis, etc., R. Co. *v.* White, (Tex. Civ. App. 1903) 76 S. W. 947 [*reversed* on other points in (Tex. Sup. 1904) 80 S. W. 77].

50. *Illinois.*— Cook County *v.* Harms, 10 Ill. App. 24.

Massachusetts.— Whitney *v.* Thacher, 117 Mass. 523.

Michigan.— Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68.

New York.— Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202.

North Carolina.— Fairley *v.* Smith, 87 N. C. 367, 42 Am. Rep. 522.

Single sale.— A market quotation is none the less competent that it is the record of a single sale if made in a market regularly attended by buyers and sellers of the article in question. Whitney *v.* Thacher, 117 Mass. 523.

51. Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68; Fairley *v.* Smith, 87 N. C. 367, 42 Am. Rep. 522.

52. Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116.

53. Western Wool Commission Co. *v.* Hart, (Tex. Sup. 1892) 20 S. W. 131.

54. Cook County *v.* Harms, 10 Ill. App. 24; Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202.

appear that the prices were promulgated from authoritative sources in good faith in the usual course of business.[55]

(c) Place at Which Market Value Is Relevant. If property has a market value at the place involved in the inquiry, evidence is properly directed to establishing it at that place,[56] although in case any ambiguity arises evidence of market value at other places may be received to aid the jury. Only where the evidence is clear and explicit as to the value of the article at the place of delivery is evidence at other places rejected as inadmissible.[57] Where it is affirmatively shown[58] that no market value for a commodity exists at the place involved in the inquiry, market value at other places may be shown, if these are sufficiently near to show, in connection with cost of transportation, etc., the value at the place in question,[59] and if this market is one legally open to the parties.[60] The question as to what places are sufficiently near is addressed to the sound discretion of the court,[61] the determining consideration being what evidence is practically available to the litigants.[62] The nearest market, if it be fairly illustrative, is usually demanded by the court.[63] But nearness is not conclusive where circumstances of variation render the market value at such place misleading.[64] Market value in the controlling market may always be shown, whatever its distance.[65] It is always open to a party for the purpose of impairing the weight of evidence introduced by the opposite party to

55. Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116. It is no ground for rejecting such evidence that it comes from an interested source. Morris *v.* Columbian Iron Works, etc., Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851.

56. *Alabama.*— Alabama Iron Works *v.* Hurley, 86 Ala. 217, 5 So. 418.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Maryland.— Capron *v.* Adams, 28 Md. 529.

New York.— Hoffman *v.* Ætna F. Ins. Co., 1 Rob. 501.

Texas.— Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291, holding that the rule is applied with especial strictness where the value in the home market is the same.

See 20 Cent. Dig. tit. "Evidence," § 259 *et seq.*

57. Wemple *v.* Stewart, 22 Barb. (N. Y.) 154; Gordon *v.* Bowers, 16 Pa. St. 226; Siegbert *v.* Stiles, 39 Wis. 533.

58. Jones *v.* St. Louis, etc., R. Co., 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175.

59. *Alabama.*— Berry *v.* Nall, 54 Ala. 446.

Colorado.— Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

Connecticut.— Abbott *v.* Wyse, 15 Conn. 254.

Maryland.— Williamson *v.* Dillon, 1 Harr. & G. 444.

Michigan.— Savercool *v.* Farwell, 17 Mich. 308.

New York.— Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30; Tierney *v.* New York Cent., etc., R. Co., 67 Barb. 538; Deifendorff *v.* Gage, 7 Barb. 18.

North Carolina.— Suttle *v.* Falls, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338.

Oregon.— Bump *v.* Cooper, 20 Oreg. 527, 26 Pac. 848.

Texas.—Gulf, etc., R. Co. *v.* Dunman, (App. 1890) 16 S. W. 421.

Wisconsin.— Gregory *v.* Rosenkrans, 78 Wis. 451, 47 N. W. 832; Lathers *v.* Wyman, 76 Wis. 616, 45 N. W. 669.

See 20 Cent. Dig. tit. "Evidence," § 259 *et seq.*

60. Moye *v.* Pope, 64 N. C. 543.

61. Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93.

62. Kansas Stock Yard Co. *v.* Couch, 12 Kan. 612; McCarty *v.* Quimby, 12 Kan. 494; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203; New York, etc., Granite Pav. Co. *v.* Howell, 7 N. Y. St. 494.

63. *Colorado.*— Sellar *v.* Clelland, 2 Colo. 532.

Kansas.— Le Roy, etc., R. Co. *v.* Butts, 40 Kan. 159, 19 Pac. 625; Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Hanson *v.* Lawson, 19 Kan. 201.

Minnesota.— Porter *v.* Chandler, 27 Minn. 301, 7 N. W. 142, 38 Am. Rep. 293.

Tennessee.— McDonald *v.* Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420.

Texas.— St. Louis, etc., R. Co. *v.* Pickens, 3 Tex. App. Civ. Cas. § 398.

See 20 Cent. Dig. tit. "Evidence," § 260.

64. Simpson *v.* Cincinnati, etc., R. Co., 81 Ga. 495, 8 S. E. 524; Fessler *v.* Love, 48 Pa. St. 407. But, *ceteris paribus*, relevancy decreases as distance increases. Thus the value of lumber in an adjoining town would be competent (Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628), while the value in an adjoining state would be irrelevant (Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513).

65. *Illinois.*— Hogan *v.* Donohue, 49 Ill. App. 432.

Michigan.— Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119.

New Hampshire.— French *v.* Piper, 43 N. H. 439.

New York.— Ferris *v.* Sutcliff, 1 Alb. L. J. 238.

Tennessee.— Fort *v.* Saunders, 5 Heisk. 487.

See 20 Cent. Dig. tit. "Evidence," § 261.

assign and substantiate reasons why the market price proved by his antagonist is unduly enhanced or unduly depressed.[66]

d. Personal Services. In addition to a detailed statement of what was done, the value of personal services may be established circumstantially by proof of relevant facts calculated to show the real value of the services as charged,[67] their beneficial result,[68] their dangerous[69] or disgusting[70] character, and the degree of physical strength,[71] acquired skill,[72] or other qualification required for success.[73] The opinion of competent witnesses may also be given to the jury together with the basis of their estimate.[74] Collateral inquiry, such as the customary charge for similar services,[75] or what another,[76] or even plaintiff,[77] has charged or received

66. Hogan *v.* Donohue, 49 Ill. App. 432.

67. Miles *v.* Brown, 11 Ky. L. Rep. 368; Rainsford *v.* Rainsford, McMull. Eq. (S. C.) 16.

68. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107; State *v.* Elliott, 82 Mo. App. 458; Plattsburg First Nat. Bank *v.* Post, 66 Vt. 237, 28 Atl. 989.

Lack of beneficial result is equally competent (Barnes *v.* Sisson, 44 Ill. App. 327), although such a test is not conclusive (Jersey Co. *v.* Davison, 29 N. J. L. 415).

69. Thompson *v.* Stevens, 71 Pa. St. 161.

70. Reynolds *v.* Robinson, 64 N. Y. 589, nursing patient afflicted with loathsome disease.

71. Hall *v.* Stanley, 86 Ind. 219.

72. Millener *v.* Driggs, 10 N. Y. St. 237. Skill cannot be proved (Cohen *v.* Stein, 61 Wis. 508, 21 N. W. 514) or disproved (Jeffries *v.* Harris, 10 N. C. 105) by evidence of reputation.

73. Johnson *v.* Myers, 103 N. Y. 663, 9 N. E. 52, best business ability. A record of previous success is revelant. Low *v.* Connecticut, etc., R. Co., 45 N. H. 370. The claimant must show that he possessed the necessary qualifications at the time in question or so near thereto as to render probable their existence at that time. Evans *v.* Horton, 93 Ala. 379, 9 So. 534; Graves *v.* Jacobs, 8 Allen (Mass.) 141.

74. Holiday *v.* Watson, 6 Ky. L. Rep. 590; Thomas *v.* Caulkett, 67 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369; Hulst *v.* Benevolent Hall Assoc., 9 S. D. 144, 68 N. W. 200; Pfeil *v.* Kemper, 3 Wis. 315. A witness cannot testify as to what he would have charged for the services. Hull *v.* Gallup, 49 Conn. 279.

75. *Alabama.*— Harris *v.* Russell, 93 Ala. 59, 9 So. 541.

California.— Trenor *v.* Central Pac. R. Co., 50 Cal. 222.

Connecticut.— Robbins *v.* Harvey, 5 Conn. 335.

Iowa.— Forey *v.* Western Stage Co., 19 Iowa 535.

Kentucky.— French *v.* Frazier, 7 J. J. Marsh. 425; Holiday *v.* Watson, 6 Ky. L. Rep. 590.

Nebraska.— Thompson *v.* Gaffey, 52 Nebr. 317, 72 N. W. 314.

New Hampshire.— Low *v.* Connecticut, etc., R. Co., 45 N. H. 370.

Vermont.— Noyes *v.* Fitzgerald, 55 Vt. 49.

76. Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283; McKnight *v.* Detroit, etc., R. Co., (Mich. 1904) 97 N. W. 772; Allen *v.* Lowe, 19 Ohio Cir. Ct. 353, 10 Ohio Cir. Dec. 353. But it has been held that a defendant may introduce evidence of the general and common price of work like that in question, at the time the contract was entered into or the work done. Murray *v.* Ware, 1 Bibb (Ky.) 325, 4 Am. Dec. 637; Cornelius *v.* Grant, 8 Mo. 59.

In dealing with professional services, resort may be had to the general value belonging to services of a given class, in order to infer the value of a particular instance of such class. Eggleston *v.* Boardman, 37 Mich. 14; State *v.* Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469; Thompson *v.* Boyle, 85 Pa. St. 477.

77. Collins *v.* Fowler, 4 Ala. 647; Haish *v.* *v.* Payson, 107 Ill. 365; Evans *v.* Koons, 10 Ind. App. 603, 38 N. E. 350; Maney *v.* Hart, 11 Wash. 67, 39 Pac. 268. *Contra*, Holman *v.* Fesler, 7 Watts & S. (Pa.) 313.

Admissions distinguished.— Statements of a party or his predecessors in title involving an estimate of the value of services rendered, if made at a time not too remote to be relevant, are admissible. Holiday *v.* Watson, 6 Ky. L. Rep. 590. But it was held, on an issue as to the value of a son's services as clerk in his father's store, that evidence of the amount of the salary paid by the latter to the former in the same store was inadmissible. Cohen *v.* Cohen, 2 Mackey (D. C.) 227.

Relevancy on question of intention.— In certain instances the fact of what others or plaintiff have charged at another time for the services may be admissible as throwing light on the probable intention of the contracting parties, especially where it can be shown or inferred that the scale of charges was known to the defendant before engaging the services. Paige *v.* Morgan, 28 Vt. 565. For example, where the parties in an action for services rendered under a special contract differ as to the compensation agreed upon, evidence of the value of like services, as bearing on the reasonableness of conflicting evidence, is admissible, where the jury are properly instructed as to the manner in which such evidence should be considered. Tarrant *v.* Gittelson, 16 S. C. 231.

What a predecessor in a salaried office received is competent in an action by his successor, the duties being the same. Cumberland Tel., etc., Co. *v.* Weaver, 13 Ky. L. Rep.

for similar services on other occasions, or what others would have charged for the same work,[78] is obnoxious to the rule of *res inter alios*[79] and inadmissible.

VIII. UNSWORN STATEMENTS; INDEPENDENT RELEVANCY.*

A. In General — 1. RULE STATED. Only when offered as evidence of the existence of the fact asserted by it does the law of evidence exclude statements not made under oath. In other words the first of the four principal exclusionary rules of evidence — that against hearsay[80] — applies only to the inference that a fact exists because a person not a witness has stated it to be so. Accordingly, whenever the object is not to prove the truth of the statement, but to show that it existed — where the fact that a statement has been made is relevant, regardless of its truth or falsity — the rule against hearsay has no application.[81] An unsworn statement intrinsically relevant, written or oral,[82] is primary[83] evidence, and may constitute a fact in issue,[84] or be circumstantially[85] relevant as to the existence of such a fact. Whether facts are in issue or relevant to the issue, the statements are not evidence of the facts directly asserted,[86] although in many instances, as for

207. See also Meislahn *v.* Irving Nat. Bank, 62 N. Y. App. Div. 231, 70 N. Y. Suppl. 988.

78. State *v.* Elliott, 82 Mo. App. 458.

79. See *infra*, XII.

80. See *infra*, IX, A.

81. People *v.* Lem You, 97 Cal. 224, 32 Pac. 11; Stainbrook *v.* Drawyer, 25 Kan. 383; Shaw *v.* People, 3 Hun (N. Y.) 272, 5 Thomps. & C. (N. Y.) 439. See Jennings *v.* Rooney, 183 Mass. 577, 67 N. E. 665.

On an indictment for perjury the giving of the original evidence is an independent fact. People *v.* Lem You, 97 Cal. 224, 32 Pac. 11. See, generally, PERJURY.

82. See *infra*, VIII, A, 3.

83. *Connecticut.*— Wilcox *v.* Green, 28 Conn. 572.

Indiana.— Pulaski County *v.* Shields, 130 Ind. 6, 29 N. E. 385.

Maine.— Baring *v.* Calais, 11 Me. 463.

Maryland.— Wolfe *v.* Hauver, 1 Gill 84.

Massachusetts.— Fitzgerald *v.* Williams, 148 Mass. 462, 20 N. E. 100.

New Hampshire.— Badger *v.* Story, 16 N. H. 168.

New York.— Dodge *v.* Weill, 158 N. Y. 346, 53 N. E. 33.

Pennsylvania.— Brolaskey *v.* McClain, 61 Pa. St. 146; Sheaffer *v.* Eakman, 56 Pa. St. 144.

Information.— Where a witness proved the admission of a debt by defendant in a conversation with him, he cannot, in reply to the question why he called on defendant, be permitted to testify to information which he had received from other persons, strangers to the action. Although it constituted the inducement to call on defendant, still it is hearsay. Wolfe *v.* Hauver, 1 Gill (Md.) 84; Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437.

Declaration relevant as an act.— In an action for compensation under an alleged contract of employment to purchase land, evidence that plaintiff attempted to buy land, stating that he represented defendant, is not inadmissible as being plaintiff's declaration, and hence self-serving, since what he said while trying to buy the lands is an act rather than a declaration. Dodge *v.* Weill, 158 N. Y. 346, 53 N. E. 33. But see Tilk *v.* Parsons, 2 C. & P. 201, 12 E. C. L. 527.

84. See *infra*, VIII, C.

85. See *infra*, VIII, B.

86. *Alabama.*— Thompson *v.* State, 122 Ala. 12, 26 So. 141; Morris Min., etc., Co. *v.* Knox, 96 Ala. 320, 11 So. 207; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710 (notice); Hodges *v.* Coleman, 76 Ala. 103 (notice); Glaze *v.* Blake, 56 Ala. 379 (intention); Jordan *v.* Roney, 23 Ala. 758; Gayle *v.* Bishop, 14 Ala. 552 (contradictory statements); Stringfellow *v.* Mariott, 1 Ala. 573.

Arkansas.— Tatum *v.* Mohr, 21 Ark. 349.

California.— People *v.* Hill, 123 Cal. 571, 56 Pac. 443; People *v.* Johnson, 91 Cal. 265, 27 Pac. 663; People *v.* McCrea, 32 Cal. 98.

Colorado.— Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612, effect of influence.

Connecticut.— Sears *v.* Hayt, 37 Conn. 406.

Delaware.— Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418, exclamations of pain.

Georgia.— Mallery *v.* Young, 94 Ga. 804, 22 S. E. 142 (intention); Kuglar *v.* Garner, 74 Ga. 765 (notice).

Indiana.— Allen *v.* Davis, 101 Ind. 187, contradictory statements.

Kentucky.— Louisville, etc., R. Co. *v.* Carothers, 65 S. W. 833, 66 S. W. 385, 23 Ky. L. Rep. 1673 (exclamations indicating effect on the mind); French *v.* Com., 7 Ky. L. Rep. 747 (remarks of bystanders); Dozier *v.* Barnett, 13 Bush 457 (contradictory statements); Cave *v.* Cave, 13 Bush 452 (contradictory statements); Tumey *v.* Knox, 7 T. B. Mon. 88 (exclamations of pain).

Maine.— State *v.* Benner, 64 Me. 267 (contradictory statements); Gilbert *v.* Woodbury, 22 Me. 246 (contradictory statements).

Massachusetts.— Com. *v.* Fagan, 108 Mass. 471; Wesson *v.* Washburn Iron Co., 13 Allen

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

example in direct statements as to the existence of a bodily condition,[87] or mental state,[88] the line of distinction is evidently one which is hard to draw. Unless so affected by suspicion as to be irrelevant,[89] statements are competent in favor of the declarant;[90] and, except so far as excluded by the discretion of the court in dealing with the matter of remoteness,[91] the making of a statement relevant to a

95, 90 Am. Dec. 181 (reasons assigned); Nutting *v.* Page, 4 Gray 581 (reasons assigned).

Michigan.— Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196. But see People *v.* Stanley, 101 Mich. 93, 59 N. W. 498.

Minnesota.— Faribault *v.* Sater, 13 Minn. 223, reasons assigned.

Missouri.— Gordon *v.* Ritenour, 87 Mo. 54; State *v.* Holcomb, 86 Mo. 371 (purpose); O'Neil *v.* Crain, 67 Mo. 250 (reasons assigned); State *v.* Shermer, 55 Mo. 83 (motive); Birge *v.* Bock, 44 Mo. App. 69 (reasons assigned).

New Hampshire.— Wiggin *v.* Plumer, 31 N. H. 251.

New York.— West *v.* Manhattan R. Co., 56 N. Y. Super. Ct. 590, 1 N. Y. Suppl. 519; Mooney *v.* New York El. R. Co., 16 Daly 145, 9 N. Y. Suppl. 522 (reasons assigned); Lewis *v.* Andrews, 3 Silv. Supreme (N. Y.) 165, 6 N. Y. Suppl. 247 [*affirmed* in 127 N. Y. 673, 27 N. E. 1044]; Webber *v.* Hoag, 8 N. Y. Suppl. 76.

North Carolina.— State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

Ohio.— Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397, reasons assigned.

Oregon.— Garrison *v.* Goodale, 23 Oreg. 307, 31 Pac. 704, purpose.

South Carolina.—Walker *v.* Meetze, 2 Rich. 570, reasons assigned.

Tennessee.— Grigsby *v.* State, 4 Baxt. 19; Kirby *v.* State, 9 Yerg. 383, 30 Am. Dec. 420, corroborative statements.

Texas.— Hicks *v.* Galveston, etc., R. Co., 96 Tex. 355, 72 S. W. 835 (exclamations of pain); Yeary *v.* State, (Cr. App. 1902) 66 S. W. 1106 (motive); Murphy *v.* State, 41 Tex. Cr. 120, 51 S. W. 940; Mallory *v.* State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. Rep. 808; Tillman *v.* Wetsel, (Civ. App. 1895) 31 S. W. 433 (reasons assigned); Felder *v.* State, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145 (remarks of bystanders).

Vermont.— State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 609, purpose.

Washington.— State *v.* Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902 (intention); State *v.* Coella, 3 Wash. 99, 28 Pac. 28 (contradictory statements).

Wisconsin.— O'Toole *v.* State, 105 Wis. 18, 80 N. W. 915.

United States.— Hand *v.* Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60, contradictory statements.

England.— Thomas *v.* Connell, 1 H. & H. 189, 7 L. J. Exch. 306, 4 M. & W. 267, knowledge.

A document is not in this connection received as evidence of what it states, and therefore the fact that it is itself inoperative is not material. State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

87. See *infra*, VIII, B, 2.

88. Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; State *v.* Hawley, 63 Conn. 47, 27 Atl. 417; Thompson *v.* Stewart, 5 Litt. (Ky.) 5 (intention); State *v.* Dotson, 26 Mont. 305, 67 Pac. 938 (intention); Gale *v.* Halfknight, 3 Stark. 56, 3 E. C. L. 592 (intention). But *compare* Com. *v.* Fetch, 132 Mass. 22, where the court entirely misapprehend the possible bearing of the evidence. See *infra*, VIII, B, 10.

89. *Alabama.*— Powell *v.* Henry, 96 Ala. 412, 11 So. 311; Mahone *v.* Reeves, 11 Ala. 345.

Iowa.— Van Sandt *v.* Cramer, 60 Iowa 424, 15 N. W. 259; Wadsworth *v.* Harrison, 14 Iowa 272.

Maryland.— Baptiste *v.* De Volunbrun, 5 Harr. & J. 86.

Massachusetts.— Nourse *v.* Nourse, 116 Mass. 101.

Mississippi.— Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274; Young *v.* Power, 41 Miss. 197.

New York.— Crounse *v.* Fitch, 1 Abb. Dec. 475, 6 Abb. Pr. N. S. 185; Howard *v.* Upton, 9 Hun 434.

90. *Alabama.*— Rogers *v.* Wilson, Minor 407, 12 Am. Dec. 61.

California.— Fette *v.* Lane, (1894) 37 Pac. 914.

Indiana.— Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22.

Kentucky.—Thompson *v.* Stewart, 5 Litt. 5.

Louisiana.— State *v.* Thomas, 30 La. Ann. 600.

Maryland.— Cross *v.* Black, 9 Gill & J. 198.

Massachusetts.— Walker *v.* Worcester, 6 Gray 548.

New York.— People *v.* De Graff, 6 N. Y. St. 412; Robetaille's Case, 5 City Hall Rec. 171.

Pennsylvania.—Ellis *v.* Guggenheim, 20 Pa. St. 287.

South Carolina.— Martin *v.* Simpson, 4 McCord 262.

Texas.— Phillips *v.* State, 19 Tex. App. 158; Brunet *v.* State, 12 Tex. App. 521; McPhail *v.* State, 9 Tex. App. 164.

United States.— Emma Silver Min. Co. *v.* Park, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411.

See 20 Cent. Dig. tit. "Evidence," § 1080.

If the act is one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible, as where the tendency is to show the criminality of the act; and it may be given in evidence by the defendant as well as by the state. Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22.

91. See *supra*, VII, A, 2.

fact in issue may precede,[92] be contemporaneous with, or follow[93] the time at which the existence of the fact sought to be proved is material. Declarations gain in force if made *ante litem motam.*[94] The making of the statement must itself be proved by competent evidence; hearsay for example will be excluded.[95]

2. THE "RES GESTÆ" — a. In General. In any particular case submitted to judicial investigation, the nature of the right or liability asserted involves consideration by the tribunal of a certain number of principal facts, the happening of which extends over a definite period of time and directly determines the existence of the right or liability. This collection of primary facts constituting the necessary and immediate field of a judicial inquiry has been designated as the *res gestæ.*[96] Within this field of immediate inquiry the court will receive evidence of all the facts.[97] The phrase "*res gestæ,*" however, has frequently — especially in the United States — been given a greatly extended application. It has been made to embrace all facts which are relevant to the principal fact in any

92. Reel *v.* Reel, 8 N. C. 248, 268, 9 Am. Dec. 632; Gould *v.* Lakes, 6 P. D. 1, 44 J. P. 698, 49 L. J. P. 59, 43 L. T. Rep. N. S. 382, 29 Wkly. Rep. 155. But see Brookfield *v.* Warren, 128 Mass. 287 (intention as to domicile); Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816.

93. *Connecticut.*— *In re* Johnson, 40 Conn. 587.

Georgia.— Thomas *v.* State, 67 Ga. 460.

Iowa.— Hannabalson *v.* Sessions, 116 Iowa 457, 90 N. W. 93, 93 Am. St. Rep. 250.

Maine.— Barug *v.* Colais, 11 Me. 463.

Massachusetts.— Wilson *v.* Terry, 9 Allen 214.

New York.— *Compare* Betts *v.* Jackson, 6 Wend. 173; Jackson *v.* Kniffen, 2 Johns. 31, 3 Am. Dec. 390.

North Carolina.— Reel *v.* Reel, 8 N. C. 248, 268, 9 Am. Dec. 632.

Pennsylvania.— Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527, willingness.

United States.— Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,070, McAll. 186. But see Smith *v.* Fenner, 22 Fed. Cas. No. 13,046, 1 Gall. 170.

England.— Gould *v.* Lakes, 6 P. D. 1, 44 J. P. 698, 49 L. J. P. 59, 43 L. T. Rep. N. S. 382, 29 Wkly. Rep. 155; Doe *v.* Allen, 12 A. & E. 451, 9 L. J. Q. B. 395, 4 P. & D. 320, 40 E. C. L. 227; Nelson *v.* Oldfield, 2 Vern. Ch. 76, 23 Eng. Reprint 659. But see Provis *v.* Reed, 5 Bing. 435, 15 E. C. L. 658.

Narrative statements, however, are excluded under the rule which prevents a party from using declarations independently relevant as evidence of the facts alleged in them.

Alabama.— Bradford *v.* Haggerthy, 11 Ala. 698, declarations as to the domicile.

Connecticut.— Ladd *v.* Abel, 18 Conn. 513, reasons assigned.

Louisiana.— Duperrier *v.* Dautrive, 12 La. Ann. 664.

Maine.—Atkinson *v.* Orneville, 96 Me. 311, 52 Atl. 796 (intention as to domicile); Bangor *v.* Brewer, 47 Me. 97 (intention as to domicile); Corinth *v.* Lincoln, 34 Me. 310 (declarations as to domicile).

Maryland.— Leffler *v.* Allard, 18 Md. 545.

Massachusetts.— Salem *v.* Lynn, 13 Metc. 544.

New York.— Osborn *v.* Robbins, 37 Barb. 481.

Utah.— Moyle *v.* Salt Lake City Cong. Soc., 16 Utah 69, 50 Pac. 806.

United States.— Brannen *v.* U. S., 20 Ct. Cl. 219, holding that official contemporaneous certificates made to superior officers concerning the loss of a horse in battle were admissible in evidence on the hearing of a claim against the United States for the value of the horse; but not reports made long afterward or on facts not within the knowledge or observation of those making them.

94. Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,745, 1 Woodb. & M. 290.

95. State *v.* Leavitt, 87 Me. 72, 32 Atl. 787; State *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696, "fresh complaint."

96. Fonville *v.* State, 91 Ala. 39, 8 So. 688; Reese *v.* State, 7 Ga. 373; Haynes *v.* Com., 28 Gratt. (Va.) 942. "Facts which constitute the *res gestæ* must be such as are connected with the very transaction or fact under investigation as to constitute a part of it." Haynes *v.* Com., 28 Gratt. (Va.) 942, 946. See also Wright *v.* Tatham, 7 A. & E. 313, 353, 34 E. C. L. 178, where the doctrine of "*res gestæ*" was much discussed. In the course of the argument, Bosanquet, J., observed: "How do you translate '*res gestæ*?' —'*Gestæ,*' by whom?" Parke, B., afterward observed: "The acts, by whomsoever done, are *res gestæ,* if relevant to the matter in issue. But the question remains, what are relevant?" In delivering his opinion to the house of lords (Wright *v.* Tatham, 4 Bing. N. Cas. 489, 548, 33 E. C. L. 821), Vaughan, J., laid down the rule thus: "Where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts may be received in evidence."

97. Reese *v.* State, 7 Ga. 373; Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004; State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030. "Anything . . . uttered . . . at the time the act was being done would be admissible, as for instance, if the [deceased] had been heard to say something, as "Don't, Harry." Reg. *v.* Bedingfield, 14 Cox C. C. 341, 342, per Cockburn, C. J.

degree[98] as tending to establish the existence of the claim or liability in dispute between the parties which directly arises if at all from the primary facts,[99] although the facts covered by this extended definition of the phrase may be attendant[1]

98. *Alabama.*— Evans *v.* State, 62 Ala. 6; Masterson *v.* Phinizy, 56 Ala. 336.

Arkansas.— Carr *v.* State, 43 Ark. 99.

California.— Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Connecticut.— Hall *v.* Connecticut River Steamboat Co., 13 Conn. 319.

Georgia.— Barrow *v.* State, 80 Ga. 191, 5 S. E. 64; Thorpe *v.* Wray, 68 Ga. 359; Monroe *v.* State, 5 Ga. 85.

Illinois.— Baird *v.* Jackson, 98 Ill. 78; Haskins *v.* Haskins, 67 Ill. 446; Stark *v.* Corey, 45 Ill. 431; Brennan *v.* People, 15 Ill. 511 (intent); Bohrer *v.* Stumpff, 31 Ill. App. 139.

Indiana.— Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

Iowa.— State *v.* Gainor, 84 Iowa 209, 50 N. W. 947; State *v.* Struble, 71 Iowa 11, 33 N. W. 1.

Kansas.— Haskett *v.* Auhl, 3 Kan. App. 744, 45 Pac. 608.

Kentucky.— Petrie *v.* Cartwright, 114 Ky. 103, 70 S. W. 297, 24 Ky. L. Rep. 954, 59 L. R. A. 720.

Louisiana.— State *v.* Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259.

Maryland.— Waters *v.* Riggin, 19 Md. 536.

Michigan.— Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362; Davidson *v.* Kolb, 95 Mich. 469, 55 N. W. 373; McKeown *v.* Harvey, 40 Mich. 226.

Mississippi.— Newcomb *v.* State, 37 Miss. 383.

Missouri.— State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; State *v.* Ramsey, 82 Mo. 133; Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609.

New Hampshire.—Willey *v.* Portsmouth, 64 N. H. 214, 9 Atl. 220; Hersom *v.* Henderson, 23 N. H. 498; Simonds *v.* Clapp, 16 N. H. 222.

New York.— Nugent *v.* Breuchard, 91 Hun 12, 36 N. Y. Suppl. 102; Trimmer *v.* Trimmer, 13 Hun 182; Casey *v.* New York Cent., etc., R. Co., 6 Abb. N. Cas. 104.

North Carolina.— Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

Pennsylvania.— Crooks *v.* Bunn, 136 Pa. St. 368, 20 Atl. 529.

South Carolina.— Blakely *v.* Frazier, 20 S. C. 144.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147.

Vermont.— Aiken *v.* Kennison, 58 Vt. 665, 5 Atl. 757.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364; Mendum *v.* Com., 6 Rand. 704.

West Virginia.— Corder *v.* Talbott, 14 W. Va. 277.

Wisconsin.— Prentiss *v.* Strand, 116 Wis. 647, 93 N. W. 816; Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182.

United States.— Kerr *v.* M. W. of A., 117 Fed. 593, 54 C. C. A. 655. And see Chicago Terminal Transfer R. Co. *v.* Stone, 118 Fed. 19, 55 C. C. A. 187.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

In an action for false imprisonment evidence of the circumstances attending the arrest and imprisonment and the efforts of plaintiff to procure bail are admissible as a part of the *res gestæ*. Thorpe *v.* Wray, 68 Ga. 359. See, generally, FALSE IMPRISONMENT.

Res gestæ in burglary.—Evidence that some of several defendants jointly indicted for burglary were seen about two hours after the burglary driving in the vicinity of the place where the stolen property was afterward found hidden is admissible against another of the defendants, such acts being a part of the *res gestæ*. State *v.* Struble, 71 Iowa 11, 32 N. W. 1.

99. It follows that all unsworn statements independently relevant, to establish intent, motive, etc., when these facts may be proved, may be spoken of as part of the *res gestæ*. Smith *v.* State, 88 Ala. 73, 7 So. 52 (hostility); McManus *v.* State, 36 Ala. 285 (intention); People *v.* Roach, 17 Cal. 297 (motive); State *v.* Gainor, 84 Iowa 209, 50 N. W. 947 (hostility).

1. *Alabama.*— Hainsworth *v.* State, 136 Ala. 13, 34 So. 203 (appearance); Hereford *v.* Combs, 126 Ala. 369, 28 So. 582 (appearance); Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17 (appearance of deceased); Goodwin *v.* State, 102 Ala. 87, 15 So. 571 (physical conditions); Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28 (appearance). See also Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504, 33 So. 482.

California.— People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295, condition of body and clothing of deceased.

Georgia.— Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18 (appearance); Moughon *v.* State, 57 Ga. 102 (appearance).

Illinois.— Citizens' Gas-Light, etc., Co. *v.* O'Brien, 118 Ill. 174, 8 N. E. 310 (lack of repair of certain premises); Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394 (speed of a train). See also Hoffman *v.* Chicago Title, etc., Co., 198 Ill. 452, 64 N. E. 1027.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972, physical conditions around body of deceased.

Maine.— State *v.* Wagner, 61 Me. 178, outcries of a person injured in same burglary.

Massachusetts.—Com. *v.* Holmes, 157 Mass. 233, 3 N. E. 6, 34 Am. St. Rep. 270, condition of body of deceased.

Michigan.— Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333 (intoxica-

or explanatory[2] circumstances involving no idea of action, or are preliminary[3] or

tion); People *v.* Foley, 64 Mich. 148, 31 N. W. 94 (appearance of body of deceased).

Mississippi.— Brown *v.* State, 72 Miss. 997, 17 So. 278, appearance.

Missouri.— State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (condition of *locus* and clothing of deceased); State *v.* Ramsey, 82 Mo. 133 (deceased "looked scared").

Montana.— State *v.* Donyes, 14 Mont. 70, 35 Pac. 455, physical features of the *locus* of a crime.

Nebraska.— Clough *v.* State, 7 Nebr. 320, appearance of accused on discovery of homicide.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Willey *v.* Portsmouth, 64 N. H. 214, 9 Atl. 220; Wyman *v.* Perkins, 39 N. H. 218; Tucker *v.* Peaslee, 36 N. H. 167, 181; Willis *v.* Quimby, 31 N. H. 485.

New York.— McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. 1, 3 Abb. Pr. N. S. 216, 34 How. Pr. 230; People *v.* Fitzgerald, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020 (appearance); De Long *v.* Delaware, etc., R. Co., 37 Hun 282 (appearance); People *v.* Minisci, 12 N. Y. St. 719 (blood on ground); People *v.* Robinson, 2 Park. Cr. 235 (condition of a third person partaking of same liquor as deceased).

Pennsylvania.—Com. *v.* Twitchell, 1 Brewst. 551, appearance.

Texas.— Gray *v.* State, (Cr. App. 1903) 72 S. W. 169 (presence of other minors at a sale of liquor to an alleged minor); Garner *v.* State, (Cr. App. 1901) 64 S. W. 1044 (intoxication); Martinez *v.* State, (Cr. App. 1900) 57 S. W. 838 (appearance); Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314 (*locus* of crime); Miller *v.* State, 18 Tex. App. 232 (appearance); Jeffries *v.* State, 9 Tex. App. 598; Williams *v.* State, 4 Tex. App. 5.

Utah.— State *v.* Hayes, 14 Utah 118, 46 Pac. 752.

Vermont.— State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

Virginia.— Tilley *v.* Com., 89 Va. 136, 15 S. E. 526 (*locus* of crime); Barbour *v.* Com., 80 Va. 287 (blood on hands, etc.).

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

Conversations between defendant and deceased, before starting out on a journey which according to the state's theory was planned by defendant to entice deceased to his death, were held admissible as a part of the *res gestæ*, notwithstanding they had no apparent significance. State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

Surrounding circumstances constituting parts of the *res gestæ* in a criminal case are competent evidence. The relation which they bear to the principal facts furnishes the test of their admissibility. Williams *v.* State, 4 Tex. App. 5. See also State *v.* Hayes, 14 Utah 118, 46 Pac. 752. And see, generally, CRIMINAL LAW.

2. *Arkansas.*— Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066.

Georgia.— Barrow *v.* State, 80 Ga. 191, 5 S. E. 64 (fixing time by a remark); Doyal *v.* State, 70 Ga. 134.

Iowa.— State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

Maryland.— State *v.* Ridgely, 2 Harr. & M. 120, 1 Am. Dec. 372.

Minnesota.— State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Missouri.— Thomas *v.* Macon County, 175 Mo. 68, 74 S. W. 999.

New York.— Hoffman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437.

Pennsylvania.— Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

Tennessee.— Garber *v.* State, 4 Coldw. 161.

Texas.— Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314; Harrison *v.* State, 20 Tex. App. 387, 54 Am. Rep. 529.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*

An explanation is not relevant where the meaning of the undisputed facts is entirely clear. Oder *v.* Com., 4 Ky. L. Rep. 18.

3. *Alabama.*— Viberg *v.* State, 138 Ala. 100, 35 So. 53; Hainsworth *v.* State, 136 Ala. 13, 34 So. 203; Ryan *v.* State, 100 Ala. 105, 14 So. 766; Evans *v.* State, 62 Ala. 6.

Arkansas.— Trulock *v.* State, 70 Ark. 558, 69 S. W. 677; Carr *v.* State, 43 Ark. 99.

California.— Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Georgia.— Williams *v.* State, 72 Ga. 180.

Illinois.— Brand *v.* Henderson, 107 Ill. 141; Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394.

Iowa.— State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; State *v.* Bigelow, 101 Iowa 430, 70 N. W. 600; State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; State *v.* Porter, 34 Iowa 131.

Kentucky.— Petrie *v.* Cartwright, 114 Ky. 103, 70 S. W. 297, 24 Ky. L. Rep. 903, 59 L. R. A. 720; Robinson *v.* Com., 16 B. Mon. 609; Howard *v.* Com., 69 S. W. 721, 24 Ky. L. Rep. 612; Shotwell *v.* Com., 68 S. W. 403, 24 Ky. L. Rep. 255; Renfro *v.* Com., 11 S. W. 815, 11 Ky. L. Rep. 246; Louisville, etc., R. Co. *v.* Pilkerton, 15 Ky. L. Rep. 607.

Massachusetts.— Com. *v.* Hayes, 140 Mass. 366, 5 N. E. 264.

Michigan.— People *v.* Hughes, 116 Mich. 80, 74 N. W. 309; People *v.* Marble, 38 Mich. 117; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Missouri.— State *v.* Kennade, 121 Mo. 405, 26 S. W. 347; Shaefer *v.* Missouri, etc., R. Co., 98 Mo. App. 445, 72 S. W. 154.

Nebraska.— McCormick *v.* State, 66 Nebr. 337, 92 N. W. 606.

subsequent[4] to the time of the happening of the primary facts, as above defined, even by a considerable length of time,[5] and although the facts may have happened at a different place from that at which the primary occurrence took place,[6] or the acts have been done by others than the principal partici-

New York.— Campbell *v.* Wright, 8 N. Y. St. 471.

Pennsylvania.— Kehoe *v.* Com., 85 Pa. St. 127.

Texas.— Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Civ. App. 1903) 72 S. W. 232; Thomas *v.* State, (Cr. App. 1902) 72 S. W. 178; Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647.

Wisconsin.— Mack *v.* State, 48 Wis. 271, 4 N. W. 449.

United States.— Chicago Terminal Transfer R. Co. *v.* Stone, 118 Fed. 19; 55 C. C. A. 187; Choctaw, etc., Nations *v.* U. S., 34 Ct. Cl. 17 [*reversed* in 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291].

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

4. *Alabama.*— Domingus *v.* State, 94 Ala. 9, 11 So. 190; Jordan *v.* State, 81 Ala. 20, 1 So. 577; Armor *v.* State, 63 Ala. 173.

California.— People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295. *Compare* Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35.

Georgia.— Mitchell *v.* State, 71 Ga. 128; Stiles *v.* State, 57 Ga. 183.

Indiana.— State *v.* Lusk, 68 Ind. 264.

Kansas.— Ott *v.* Cunningham, 9 Kan. App. 886, 58 Pac. 126.

Louisiana.— State *v.* Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259; State *v.* Horton, 33 La. Ann. 289.

Maine.— State *v.* Pike, 65 Me. 111.

Michigan.— People *v.* Stewart, 75 Mich. 21, 42 N. W. 662; People *v.* Bemis, 51 Mich. 422, 16 N. W. 794; People *v.* Long, 44 Mich. 296, 6 N. W. 673 (result of search of accused); People *v.* Marble, 38 Mich. 117; People *v.* Potter, 5 Mich. 1, 71 Am. Dec. 763.

Missouri.— State *v.* Gabriel, 88 Mo. 631.

New York.— People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846 (gratification at decease of wife); Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636 (indifference to wife's death); Lindsay *v.* People, 63 N. Y. 143; People *v.* Gonzalez, 35 N. Y. 49; People *v.* Kief, 38 Hun 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896.

North Carolina.— State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; State *v.* Brabham, 108 N. C. 793, 13 S. E. 217 (result of search of prisoner's premises); State *v.* Davis, 87 N. C. 514; State *v.* Adair, 66 N. C. 298 (surprise).

Oregon.— State *v.* Moran, 15 Oreg. 262, 14 Pac. 419.

Pennsylvania.— Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588 (results of search for murdered persons); Kehoe *v.* Com., 85 Pa. St. 127.

Texas.— Martin *v.* State, 44 Tex. Cr. 538, 72 S. W. 386; Willingham *v.* State, (Cr. App. 1894) 26 S. W. 834; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Jump *v.* State, 29 Tex. App. 459, 11 S. W. 461, collecting money due deceased.

Virginia.— Williams *v.* Com., 85 Va. 607, 8 S. E. 470; Briggs *v.* Com., 82 Va. 554.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

In criminal cases the finding of tools in the house which has been robbed (People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390), taking from the person of the accused burglar's nippers and a pistol of the same caliber as that of the fatal bullet (Williams *v.* Com., 85 Va. 607, 8 S. E. 470), the appearance presented by the body and clothing of deceased (People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588), the fact that accused attempted to escape (State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; State *v.* Sanders, 76 Mo. 35), but was captured (State *v.* Phillips, *supra*); that his conduct was peculiar (People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (threatening identifiers); Jones *v.* State, 64 Ind. 473 (threatening persons with same interest as deceased); State *v.* Mace, 118 N. C. 1244, 24 S. E. 798; State *v.* Brabham, 108 N. C. 793, 13 S. E. 217 (unnatural behavior); State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109; Tooney *v.* State, 8 Tex. App. 452), that he resisted arrest (State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; Willingham *v.* State, (Tex. Cr. App. 1894) 26 S. W. 834), and failed to deny a charge of guilt (State *v.* Horton, 33 La. Ann. 289; State *v.* McCourry, 128 N. C. 594, 38 S. E. 883), these facts and the like are said to be admissible as part of the *res gestæ*.

In cases involving the use of poison a peculiarly extended scope of examination has been accorded. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31. See *infra*, IX, F, 2, a, (III). See, generally, HOMICIDE.

5. Stiles *v.* State, 57 Ga. 183.

6. State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; Com. *v.* Eaton, 8 Phila. (Pa.) 428.

Declarations of several persons made when they heard the firing of a revolver, which was the instrument of murder, are admissible as a part of the *res gestæ*, although they were in a house at some distance from the place of the murder. State *v.* Sexton, 147 Mo. 89, 48 S. W. 452.

The extent of time or territory which is covered by the "transaction" in any particular instance is determined merely by the rules of relevancy, as interpreted by the court.

Alabama.— Webb *v.* State, 135 Ala. 36, 33 So. 487; Armor *v.* State, 63 Ala. 173; Steele *v.* State, 61 Ala. 213; Jackson *v.* State, 52 Ala. 305.

pants.[7] Conversely irrevelant evidence is said to be "inadmissible as *res gestæ*."[8] However the limits of the *res gestæ* are fixed, it may be said broadly that within these limits a tribunal will hear everything which is relevant that has been said or done. In considering the fact, so segregated, no distinction can be or indeed usually is drawn between statements and acts. In reality, except so far as relates to the truth of the assertion, a verbal act does not essentially differ from any other.[9] It is a well settled rule of the modern law of evidence as applied to civil cases that where the making of a statement assists to constitute the transaction or

California.— People *v.* Henderson, 28 Cal. 465.

Georgia.— Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Indiana.— Wood *v.* State, 92 Ind. 269.

Kentucky.— Powers *v.* Com., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, 24 Ky. L. Rep. 1007, 1186, 1350; Terrell *v.* Com., 13 Bush 246.

Maryland.— State *v.* Ridgely, 2 Harr. & M. 120, 1 Am. Dec. 372.

Missouri.— State *v.* Hoffman, 78 Mo. 256; State *v.* Umfried, 76 Mo. 404; State *v.* Swain, 68 Mo. 605; State *v.* Evans, 65 Mo. 574; Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

Montana.— State *v.* Tighe, 27 Mont. 327, 71 Pac. 3; State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709; State *v.* King, 9 Mont. 445, 24 Pac. 265.

Ohio.— Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426.

Pennsylvania.— Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Texas.— Williamson *v.* State, 36 Tex. Cr. 225, 36 S. W. 444.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

Discretion of court in matter of remoteness see *supra*, VII, A, 2.

7. Oakley *v.* State, 135 Ala. 15, 33 So. 23; Beckham *v.* State, (Tex. Cr. App. 1902) 69 S. W. 534; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749.

8. *Alabama.*— Allen *v.* State, 111 Ala. 80; 20 So. 490; Fonville *v.* State, 91 Ala. 39, 8 So. 688; Cleveland *v.* State, 86 Ala. 1, 5 So. 426 (subsequent assault as motive for prior); Shelton *v.* State, 73 Ala. 5.

California.— People *v.* Lane, 100 Cal. 379, 34 Pac. 856.

Colorado.— Murphy *v.* People, 9 Colo. 435, 13 Pac. 528, repentance and forgiveness.

Connecticut.— Townsend *v.* Ward, 27 Conn. 610.

Georgia.— Harrell *v.* State, 75 Ga. 842, that person assaulted declined to prosecute.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Montag *v.* People, 141 Ill. 75, 30 N. E. 337 (not admissible even when nearly contemporaneous with the principal events); Davison *v.* People, 90 Ill. 221; Perteet *v.* People, 70 Ill. 171 (uncommunicated threats).

Indiana.— Hampton *v.* State, 160 Ind. 575, 67 N. E. 442; Huntington First Nat. Bank *v.* Arnold, 156 Ind. 487, 60 N. E. 134; Wood *v.* State, 92 Ind. 269.

Iowa.— Laird *v.* Equitable L. Assur. Soc., 98 Iowa 495, 67 N. W. 385; State *v.* Dillon, 74 Iowa 653, 38 N. W. 525 (subsequent information); Shuck *v.* Vanderventer, 4 Greene 264.

Kansas.— Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942.

Kentucky.— Eversole *v.* Com., 95 Ky. 623, 26 S. W. 816, 16 Ky. L. Rep. 143 (subsequent conduct); Messer *v.* Com., 20 S. W. 702, 14 Ky. L. Rep. 492 (subsequent criminal intimacy with deceased's wife).

Louisiana.— State *v.* Madison, 47 La. Ann. 30, 16 So. 566 (admitting to bail in murder); State *v.* Johnson, 41 La. Ann. 574, 7 So. 670 (admitting to bail co-defendants on indictment for murder); State *v.* Baker, 30 La. Ann. 1134.

Michigan.— People *v.* McBride, 120 Mich. 166, 78 N. W. 1076; Tolbert *v.* Burke, 89 Mich. 132, 50 N. W. 803.

Minnesota.— Hathaway *v.* Brown, 18 Minn. 414.

Missouri.— State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136; State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483; State *v.* Punshon, 133 Mo. 44, 34 S. W. 25; State *v.* Umfried, 76 Mo. 404.

Montana.— Territory *v.* Drennan, 1 Mont. 41.

Nebraska.— Caw *v.* People, 3 Nebr. 357, subsequent threats.

New Hampshire.— Judd *v.* Brentwood, 46 N. H. 430.

North Carolina.— State *v.* Moore, 104 N. C. 743, 10 S. E. 183; State *v.* Mathews, 78 N. C. 523.

Pennsylvania.— Lyon *v.* Lyon, 197 Pa. St. 212, 47 Atl. 193.

Texas.— Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591; Brooks *v.* State, 26 Tex. App. 184, 9 S. W. 562; Rye *v.* State, 8 Tex. App. 153; Carlson *v.* State, 5 Tex. App. 194, subsequent information.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

9. *Alabama.*— Viberg *v.* State, 138 Ala. 100, 35 So. 53.

California.— People *v.* Murphy, 45 Cal. 137. See Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Kentucky.— Combs *v.* Com., 25 S. W. 592, 15 Ky. L. Rep. 659.

Maine.— State *v.* Walker, 77 Me. 488, 1 Atl. 357.

Missouri.— Matthews *v.* Coalter, 9 Mo. 705.

to prove *per se* a relevant fact, the declaration is competent;[10] and the law is

New Hampshire.— Morrill *v.* Foster, 32 N. H. 358; Wiggin *v.* Plumer, 31 N. H. 251; Tenney *v.* Evans, 14 N. H. 343, 350, 40 Am. Dec. 194; Mahurin *v.* Bellows, 14 N. H. 209.

Oregon.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042.

Pennsylvania.— Potts *v.* Everhart, 26 Pa. St. 493.

South Carolina.— State *v.* Belcher, 13 S. C. 459.

Texas.— Martin *v.* State, 44 Tex. Cr. 538, 72 S. W. 386; Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Civ. App. 1903) 72 S. W. 232; Brin *v.* McGregor, (Civ. App. 1901) 64 S. W. 78.

Washington.— Seattle *v.* L. H. Griffith Realty, etc., Co., 28 Wash. 605, 68 Pac. 1036.

United States.— New Jersey Steam-Boat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049.

Canada.—Clowser *v.* Samuel, 15 N. Brunsw. 58.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

Elements of confusion with the rule regulating the receipt of unsworn statements, part of a fact in the *res gestæ* (see *infra*, IX, E). are introduced when a statement, part of the *res gestæ*, as thus broadly defined, is spoken of as "contemporaneous" with it. State *v.* Abbott, 8 W. Va. 741.

Not evidence of fact.— Where the statement of a bystander is offered as evidence of the fact asserted it has been rejected as not part of the *res gestæ*. Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724; Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293; Bradshaw *v.* Com., 10 Bush (Ky.) 576; State *v.* Brown, 64 Mo. 367; Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777.

10. *Alabama.*— Hudson *v.* Crow, 26 Ala. 515; Jones *v.* Nirdlinger, 20 Ala. 488; Spence *v.* McMillan, 10 Ala. 583. See also Birmingham R. Light, etc., Co. *v.* Mullen, 138 Ala. 614, 35 So. 701; Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504, 33 So. 482.

California.— Cross *v.* Zellerbach, (1885) 8 Pac. 714; Gillam *v.* Sigman, 29 Cal. 637. See also Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Colorado.— Davis *v.* Hopkins, 18 Colo. 153, 32 Pac. 70; Farrer *v.* Caster, 17 Colo. App. 41, 67 Pac. 171.

Connecticut.— Russell *v.* Frisbie, 19 Conn. 205.

Delaware.— Redden *v.* Spruance, 4 Harr. 217.

Georgia.— Batton *v.* Watson, 13 Ga. 63, 58 Am. Dec. 504.

Illinois.— Bushnell *v.* Wood, 85 Ill. 88; Harding *v.* Harding, 79 Ill. App. 590; Pope *v.* Western Union Tel. Co., 14 Ill. App. 531. See also Hoffman *v.* Chicago Title, etc., Co., 198 Ill. 452, 64 N. E. 1027; Tri-City R. Co. *v.* Brennan, 108 Ill. App. 471.

Indiana.— Mitchell *v.* Colglazier, 106 Ind. 464, 7 N. E. 199; Keesling *v.* Watson, 91 Ind. 578; Maxwell *v.* Ratliff, 26 Ind. 157; Orth *v.* Sharkey, 4 Ind. 642. See also Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852.

Kentucky.— Sherley *v.* Billings, 8 Bush 147, 8 Am. Rep. 451. See also Petrie *v.* Cartwright, 114 Ky. 103, 70 S. W. 297, 24 Ky. L. Rep. 903, 954, 59 L. R. A. 720.

Louisiana.—Butler *v.* Murison, 18 La. Ann. 363; Pope *v.* Hall, 14 La. Ann. 324; Lockhart *v.* Jones, 9 Rob. 381.

Maryland.— Miller *v.* Williamson, 5 Md. 219.

Massachusetts.— Deveney *v.* Baxter, 157 Mass. 9, 31 N. E. 690; Blake *v.* Damon, 103 Mass. 199; Moody *v.* Sabin, 9 Cush. 505.

Michigan.— Wilcox *v.* Ney, 47 Mich. 421, 11 N. W. 225. And see People *v.* Sharp, 133 Mich. 378, 94 N. W. 1074.

Mississippi.—Hall *v.* Clopton, 56 Miss. 555.

Missouri.— Brooks *v.* Jameson, 55 Mo. 505; Griffith *v.* Judge, 49 Mo. 536; Metropolis Nat. Bank *v.* Williams, 46 Mo. 17; Crowther *v.* Gibson, 19 Mo. 365. And see Thomas *v.* Macon County, 175 Mo. 68, 74 S. W. 999; Strode *v.* Conkey, 105 Mo. App. 12, 78 S. W. 678.

Montana.— Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

New Jersey.—Castner *v.* Sliker, 33 N. J. L. 95.

New York.— Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Fox *v.* Parker, 44 Barb. 541; Piper *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 290; Cremore *v.* Huber, 18 N. Y. App. Div. 231, 45 N. Y. Suppl. 947; Thorp *v.* Carvalho, 14 Misc. 554, 36 N. Y. Suppl. 1; Koetter *v.* Manhattan R. Co., 13 N. Y. Suppl. 458; Higgins *v.* Soloman, 2 Hall 482; Brumfield *v.* Potter, etc., Mfg. Co., 4 Misc. 194, 23 N. Y. Suppl. 1025 [*reversing* 1 Misc. 92, 20 N. Y. Suppl. 615]. See also Hoffman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437.

North Carolina.— Means *v.* Carolina Cent. R. Co., 124 N. C. 574, 32 S. E. 960, 45 L. R. A. 164; Roberts *v.* Preston, 100 N. C. 243, 6 S. E. 574; McLurd *v.* Clark, 92 N. C. 312; Grandy *v.* McPherson, 52 N. C. 347.

North Dakota.— Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305.

Ohio.— Kilbourn *v.* Fury, 26 Ohio St. 153.

Pennsylvania.— Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514; Devling *v.* Little, 26 Pa. St. 502; Koch *v.* Howell, 6 Watts & S. 350 (conversations at time of transaction part of *res gestæ*); Postens *v.* Postens, 3 Watts & S. 127; Reed *v.* Dick, 8 Watts 479; Arnold *v.* Gorr, 1 Rawle 223. And see Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

Tennessee.— Baird *v.* Vaughn, (Sup. 1890) 15 S. W. 734. See also Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. 713.

Texas.— Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551; George *v.* Thomas, 16 Tex. 74. 67 Am. Dec. 612; Smith *v.* Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119. And see St. Louis Southwestern R. Co. *v.* Patterson, (Civ. App.

established with equal clearness in criminal cases.[11] Such declarations are said to

1903) 73 S. W. 987; Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Civ. App. 1903) 72 S. W. 232.

Vermont.— Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Danforth *v.* Streeter, 28 Vt. 490; Marsh *v.* Davis, 24 Vt. 363; White *v.* Morton, 22 Vt. 15, 52 Am. Dec. 75. See also Terrill *v.* Tillison, 75 Vt. 193, 54 Atl. 187.

Washington.— Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138.

Wisconsin.— McCord *v.* McSpaden, 34 Wis. 541; Eastman *v.* Bennett, 6 Wis. 232; McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

United States.— Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. 414, 58 C. C. A. 648; Chicago Terminal Transfer R. Co. *v.* Stone, 118 Fed. 19, 55 C. C. A. 187.

Canada.— Commercial Bank *v.* Great Western R. Co., 22 U. C. Q. B. 233, 2 Grant Err. & App. (U. C.) 285.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

Action for assault.— Remarks made during and immediately after an assault are essentially a part of the *res gestæ*, and should be admitted as evidence in a civil action to recover damages for the assault. Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

Any act or declaration of either party connected with a transaction, whether prior or subsequent thereto, may be given in evidence to show what the agreement was. Murray *v.* Bethune, 1 Wend. (N. Y.) 191.

If existence of a conversation be a relevant fact, for any purpose, the statements then made are competent.

California.— Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791.

Colorado.— Denver, etc., R. Co. *v.* Spencer, 25 Colo. 9, 52 Pac. 211.

Massachusetts.— Green *v.* Crapo, 181 Mass. 55, 62 N. E. 956.

Michigan.— Pinney *v.* Cahill, 48 Mich. 584, 12 N. W. 862.

New Hampshire.— Wason *v.* Burnham, 68 N. H. 553, 44 Atl. 693.

11. *Alabama.*— Hall *v.* State, 130 Ala. 45, 30 So. 422; Wood *v.* State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71; Bankhead *v.* State, 124 Ala. 14, 26 So. 979; Evans *v.* State, 62 Ala. 6.

Arkansas.— Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066.

California.— People *v.* Daily, 135 Cal. 104, 67 Pac. 16; People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; People *v.* Roach, 17 Cal. 297.

District of Columbia.— U. S. *v.* Nardello, 4 Mackey 503.

Florida.— Antony *v.* State, 44 Fla. 1, 32 So. 818.

Georgia.— Barrow *v.* State, 80 Ga. 191, 5 S. E. 64; Mitchell *v.* State, 71 Ga. 128; Monroe *v.* State, 5 Ga. 85.

Idaho.— State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252.

Illinois.— Wilson *v.* People, 94 Ill. 299; Comfort *v.* People, 54 Ill. 404.

Indiana.— Wood *v.* State, 92 Ind. 269; Baker *v.* Gausin, 76 Ind. 317.

Iowa.— State *v.* Bone, 114 Iowa 537, 87 N. W. 507; State *v.* Peffers, 80 Iowa 580, 46 N. W. 662; State *v.* Porter, 34 Iowa 131.

Kentucky.— Ross *v.* Com., 55 S. W. 4, 21 Ky. L. Rep. 1344; Renfro *v.* Com., 11 S. W. 815, 11 Ky. L. Rep. 246.

Louisiana.— State *v.* Horton, 33 La. Ann. 289.

Maine.— State *v.* Walker, 77 Me. 488, 1 Atl. 357; State *v.* Wagner, 61 Me. 178.

Michigan.— People *v.* Palmer, 105 Mich. 568, 63 N. W. 656.

Mississippi.— Newcomb *v.* State, 37 Miss. 383; Mask *v.* State, 32 Miss. 405.

Missouri.— State *v.* Moore, 117 Mo. 395, 22 S. W. 1086; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

Montana.— State *v.* Biggerstaf, 17 Mont. 510, 43 Pac. 709; State *v.* King, 9 Mont. 445, 24 Pac. 265.

Nebraska.—Lamb *v.* State, (1903) 95 N. W. 1050.

New York.— McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. 1, 3 Abb. Pr. N. S. 216, 34 How. Pr. 230.

North Carolina.—State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

Oregon.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042; State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030.

South Carolina.— State *v.* Belcher, 13 S. C. 459.

South Dakota.— State *v.* Mulch, (1903) 96 N. W. 101.

Texas.— Colquitt *v.* State, 34 Tex. 550; Shumate *v.* State, 38 Tex. Cr. 266, 42 S. W. 600; Jeffries *v.* State, 9 Tex. App. 598.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

Washington.— State *v.* Webster, 21 Wash. 63, 57 Pac. 361.

West Virginia.— State *v.* Abbott, 8 W. Va. 741.

United States.— Turner *v.* U. S., 24 Fed. Cas. No. 14,262*a*, 2 Hayw. & H. 343.

England.— Reg. *v.* Bedingfield, 14 Cox C. C. 341; Atty.-Gen. *v.* Good, McClel. & Y. 286.

Canada.— Reg. *v.* Troop, 30 Nova Scotia 339.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; and CRIMINAL LAW, 12 Cyc. 429, 432.

Conversations.— Evidence, in a prosecution for murder, of a conversation between defendant and deceased shortly before the homicide, is not inadmissible because there were prior conversations which the witness had not heard. People *v.* Daily, 135 Cal. 104, 67 Pac. 16. An irrelevant conversation is inadmissible. People *v.* Kalkman, 72 Cal. 212, 13 Pac. 500.

"**The truth or falsity** thereof is not the question, and the testimony is only applicable to *rem ipsam*, as a contemporaneous fact

be part of the *res gestæ*, although made by a mere bystander.[12] For reasons stated hereinafter,[13] however, the expression is misleading. The term "*res gestæ*" has been extended to cover the admissions of a party[14] or his agent;[15] and also facts including statements which tend to establish liability by showing acts done on distinctly other occasions, as part of a consistent plan of operations,[16] or the existence of a relevant mental state.[17]

b. Evidence Showing Distinct Offense. It has been deemed no objection to receiving evidence of facts within this extended scope of the *res gestæ* that the evidence resulted in proving the existence of a distinct offense.[18] "It is all a part

forming part of the *res gestæ*, and as such is admissible, just as any other contemporaneous physical occurrence could be proven." State *v.* Horton, 33 La. Ann. 289, 290, per Levy, J.

Outcries of the deceased, made during the assault, or upon the approach of the assailant, as well as the outcries of another person murdered by the accused during the perpetration of the same burglary, but on another part of the premises, were held to be part of the *res gestæ*. State *v.* Wagner, 61 Me. 178. See also as to declarations made by deceased State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030.

12. *Alabama.*— Caddell *v.* State, 136 Ala. 9, 34 So. 191; Hall *v.* State, 130 Ala. 45, 30 So. 422.

California.— People *v.* Murphy, 45 Cal. 137.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Georgia.— Flanegan *v.* State, 64 Ga. 52. But see Harris *v.* State, 53 Ga. 640.

Kentucky.— Collins *v.* Com., 70 S. W. 187, 24 Ky. L. Rep. 884; Combs *v.* Com., 25 S. W. 592, 15 Ky. L. Rep. 659; Ferrel *v.* Com., 23 S. W. 344, 15 Ky. L. Rep. 321.

Louisiana.— State *v.* Corcoran, 38 La. Ann. 947; State *v.* Moore, 38 La. Ann. 66. But see State *v.* Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am. St. Rep. 461.

Massachusetts.— Hartnett *v.* McMahan, 168 Mass. 3, 46 N. E. 392.

Michigan.— People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

Missouri.— State *v.* Kaisar, 124 Mo. 651, 28 S. W. 182; State *v.* Walker, 78 Mo. 380.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 95.

South Carolina.— Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Tennessee.— Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

See 14 Cent. Dig. tit. "Criminal Law," § 804 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

Statements made by persons who examined the body immediately after the killing, and at the place where the killing occurred, is admissible as *res gestæ*. State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

Relevancy is essential to the admissibility of statements of a third person as part of the *res gestæ* where the scope of the primary facts is transcended. Lack of relevancy in this connection is frequently indicated by the court by saying that the statement is not part of the *res gestæ*. State *v.* Riley, 42 La. Ann. 995, 8 So. 469; State *v.* Walker, 78 Mo. 380; State *v.* Swain, 68 Mo. 605; Cortez *v.* State, 44 Tex. Cr. 169, 69 S. W. 536; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749; Holt *v.* State, 9 Tex. App. 571. Cries or exclamations of bystanders who are in no way acting in concert with either of the parties to a homicide constitute no part of the *res gestæ*. Bradshaw *v.* Com., 10 Bush (Ky.) 576. A statement of a third person is relevant if it merely connects or explains other facts or statements. State *v.* Walker, 78 Mo. 380.

13. See *infra*, IX, E.

14. Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; O'Mara *v.* Com., 75 Pa. St. 424; Gantier *v.* State, (Tex. Cr. App. 1893) 21 S. W. 255; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823. See also *infra*, IX, E, 3, a.

In a criminal case such a statement is not a confession. See *infra*, IX, E, 2, d.

15. Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504, 33 So. 482; Haggart *v.* California Borough, 21 Pa. Super. Ct. 210. See *infra*, IX, E, 3, b.

16. State *v.* Halpin, 16 S. D. 170, 91 N. W. 605.

17. See *infra*, VIII, B, 9.

18. *Alabama.*— Hawes *v.* State, 88 Ala. 37, 7 So. 302; Hobbs *v.* State, 75 Ala. 1; Gassenheimer *v.* State, 52 Ala. 313; Mason *v.* State, 42 Ala. 532.

Arkansas.— Doghead Glory *v.* State, 13 Ark. 236.

California.— People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006; People *v.* Chin Bing Quong, 79 Cal. 553, 21 Pac. 951; People *v.* Rogers, 71 Cal. 565, 12 Pac. 679.

Colorado.— Piela *v.* People, 6 Colo. 343.

Georgia.— Pritchett *v.* State, 92 Ga. 65, 18 S. E. 536.

Illinois.— Lyons *v.* People, 137 Ill. 602, 27 N. E. 677; Hickam *v.* People, 137 Ill. 75, 27 N. E. 88; Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Indiana.— Starr *v.* State, 160 Ind. 661, 67 N. E. 527; Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; Gallaher *v.* State, 101 Ind. 411; Harding *v.* State, 54 Ind. 359.

Iowa.— State *v.* Dooley, 89 Iowa 584, 57 N. W. 414; State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Kansas.— State *v.* Labertew, 55 Kan. 674, 41 Pac. 945.

Kentucky.— Renfro *v.* Com., 11 S. W. 815,

of the history of the case." [19] Then too offenses must be connected in some logical way; connection in point of time merely is not sufficient.[20] Among the combinations of distinct offenses received as relevant facts, said to be part of the

11 Ky. L. Rep. 246; Smart *v.* Com., 11 S. W. 431, 10 Ky. L. Rep. 1035.

Louisiana.—State *v.* Desroches, 48 La. Ann. 428, 19 So. 250.

Maine.— State *v.* Wagner, 61 Me. 178.

Maryland.— Kernan *v.* State, 65 Md. 253, 4 Atl. 124.

Massachusetts.— Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan.— People *v.* Foley, 64 Mich. 148, 31 N. W. 94; People *v.* Marble, 38 Mich. 117.

Mississippi.— Mask *v.* State, 32 Miss. 405.

Missouri.— State *v.* Taylor, 118 Mo. 153, 24 S. W. 449; State *v.* Sanders, 76 Mo. 35.

Nebraska.— Neal *v.* State, 32 Nebr. 120, 49 N. W. 174.

New York.— People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741; People *v.* Parker, 137 N. Y. 535, 32 N. E. 1013; Haskins *v.* People, 16 N. Y. 344.

North Carolina.— State *v.* Gooch, 94 N. C. 987; State *v.* White, 89 N. C. 462.

Oregon.— State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

Pennsylvania.— Brown *v.* Com., 76 Pa. St. 319.

South Carolina.— State *v.* Nathan, 5 Rich. 219.

Tennessee.— Knoxville, etc., R. Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434; Logston *v.* State, 3 Heisk. 414; Powers *v.* State, 4 Humphr. 274.

Texas.—Weaver *v.* State, 24 Tex. 387; Mott *v.* State, (Cr. App. 1899) 51 S. W. 368; Hargrove *v.* State, 33 Tex. Cr. 431, 26 S. W. 993; Willingham *v.* State, (Cr. App. 1894) 26 S. W. 834; Wilkerson *v.* State, 31 Tex. Cr. 86, 19 S. W. 903; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Fernandez *v.* State, 4 Tex. App. 419; Richards *v.* State, 3 Tex. App. 423.

See 14 Cent. Dig. tit. "Criminal Law," § 807; and CRIMINAL LAW, 12 Cyc. 407.

19. Knoxville, etc., R. Co. *v.* Wyrick, 99 Tenn. 500, 42 S. W. 434. See also State *v.* Sanders, 76 Mo. 35; Links *v.* State, 13 Lea (Tenn.) 701; Bonners *v.* State, (Tex. Cr. App. 1896) 35 S. W. 650; Crews *v.* State, 34 Tex. Cr. 533, 31 S. W. 373; Hargrove *v.* State, 33 Tex. Cr. 431, 26 S. W. 993; Wilkerson *v.* State, 31 Tex. Cr. 86, 19 S. W. 903; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398; People *v.* Coughlin, 13 Utah 58, 44 Pac. 94; Reed *v.* Com., 98 Va. 817, 36 S. E. 399; Heath *v.* Com., 1 Rob. (Va.) 735; State *v.* Craemer, 12 Wash. 217, 40 Pac. 944. "It frequently happens, however, that as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offence charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases, it is proper, that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances, which tend to prove that the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence, that they cannot be departed from with propriety; and there is no reason why the criminality of such intimate and connected circumstances, should exclude them, more than other facts apparently innocent." Walker *v.* Com., 1 Leigh (Va.) 574, 576. See also Rex *v.* Wylie, 1 B. & P. N. R. 92, 94, where Lord Ellenborough, in delivering the opinion of the court, said: "If crimes do so intermix the court must go through the detail. I remember a case where a man committed three burglaries in one night; he took a shirt at one place and left it at another; and they were all so connected that the court went through the history of the three different burglaries."

20. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23; Smith *v.* State, 88 Ala. 73, 7 So. 52.

California.— People *v.* Lane, 100 Cal. 379, 34 Pac. 856; People *v.* Rogers, 71 Cal. 565, 12 Pac. 679.

Illinois.— Farris *v.* People, 129 Ill. 521, 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582.

Indiana.— Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

Iowa.— State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Kentucky.— Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390, 17 Ky. L. Rep. 100; Green *v.* Com., 33 S. W. 100, 17 Ky. L. Rep. 943.

Mississippi.— McGee *v.* State, (1898) 22 So. 890.

Nebraska.— Neal *v.* State, 32 Nebr. 120, 49 N. W. 174.

Pennsylvania.— Brown *v.* Com., 76 Pa. St. 319.

Texas.— Crews *v.* State, 34 Tex. Cr. 533, 31 S. W. 373; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398; Fernandez *v.* State, 4 Tex. App. 419.

Virginia.— Joyce *v.* Com., 78 Va. 287; Heath *v.* Com., 1 Rob. 735.

See 14 Cent. Dig. tit. "Criminal Law," § 897.

Reason for exclusion.— Other offenses not specifically connected with the one under consideration are rejected, it is said, as *res inter alios.* See *infra,* XII. The real objection seems lack of relevancy, coupled with liability to prejudice. See *supra,* VII, A, 3. Where, however, two offenses are so intimately connected that proof of the additional offense is necessarily involved in a complete description of the offense charged, a satisfactory reason is shown why evidence of the additional offense should be received. State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

res gestæ, are in the case of additional assaults,[21] duress,[22] homicides,[23] assaults with intent to kill,[24] larcenies,[25] burglaries,[26] robberies,[27] embezzlements,[28] obtaining property by false pretenses,[29] receiving stolen goods,[30] forgeries,[31] utterings of forged instruments,[32] carrying of weapons,[33] resisting arrests,[34] obstructions of railroads,[35] arson and robbery,[36] burglary and arson,[37] burglary and larceny,[38] burglary and

21. *Arkansas.*— Byrd *v.* State, 69 Ark. 537, 64 S. W. 270.

California.— People *v.* Chin Bing Quong, 79 Cal. 553, 21 Pac. 951.

Colorado.— Piela *v.* People, 6 Colo. 343.

Iowa.— State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Kentucky.— Burton *v.* Com., 60 S. W. 526, 22 Ky. L. Rep. 1315.

Texas.— Hamilton *v.* State, 41 Tex. Cr. 644, 56 S. W. 926; Richards *v.* State, 34 Tex. Cr. 277, 30 S. W. 229; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398; Thompson *v.* State, 11 Tex. App. 51.

See 14 Cent. Dig. tit. "Criminal Law," § 807; and ASSAULT AND BATTERY, 3 Cyc. 1054.

22. Britt *v.* State, 9 Humphr. (Tenn.) 31.

23. *Alabama.*— Hawes *v.* State, 88 Ala. 37, 7 So. 302.

Arkansas.— Dog Head Glory *v.* State, 13 Ark. 236.

Illinois.— Lyons *v.* People, 137 Ill. 602, 27 N. E. 677; Hickam *v.* People, 137 Ill. 75, 27 S. E. 88.

Kentucky.— Smart *v.* Com., 11 S. W. 431, 10 Ky. L. Rep. 1035.

Massachusetts.— Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan.— People *v.* Foley, 64 Mich. 148, 31 N. W. 94; People *v.* Marble, 38 Mich. 117.

Nebraska.— Neal *v.* State, 32 Nebr. 120, 49 N. W. 174.

Pennsylvania.— Brown *v.* Com., 76 Pa. St. 319.

Texas.— Crews *v.* State, 34 Tex. Cr. 533, 31 S. W. 373; Hargrove *v.* State, 33 Tex. Cr. 431, 26 S. W. 993; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Fernandez *v.* State, 4 Tex. App. 419.

Utah.— People *v.* Coughlin, 13 Utah 58, 44 Pac. 94.

Virginia.— Heath *v.* Com., 1 Rob. 735.

Washington.— State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

See 14 Cent. Dig. tit. "Criminal Law," § 807; and, generally, HOMICIDE.

The finding of other dead bodies is competent to negative the theory that three persons committed the homicide under instigation. Smart *v.* Com., 11 S. W. 431, 10 Ky. L. Rep. 1035; Logston *v.* State, 3 Heisk. (Tenn.) 414.

24. State *v.* Sanders, 76 Mo. 35, holding that upon a trial for homicide, where it appeared that immediately after the killing the prisoner was seized by a bystander, whom he attempted to stab in order to escape. the evidence of the attempt to stab was admissible. See, generally, HOMICIDE.

25. *Indiana.*— Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

Massachusetts.— Com. *v.* Hayes, 140 Mass. 366, 5 N. E. 264.

New York.— Haskins *v.* People, 16 N. Y. 344.

North Carolina.— State *v.* White, 89 N. C. 462.

South Carolina.— State *v.* Robinson, 35 S. C. 340, 14 S. E. 766.

Tennessee.— Links *v.* State, 13 Lea 701; Sartin *v.* State, 7 Lea 679.

Texas.— Kelley *v.* State, 31 Tex. Cr. 211, 20 S. W. 365; Thompson *v.* State, 42 Tex. Cr. 140, 57 S. W. 805; Davis *v.* State, 32 Tex. Cr. 377, 23 S. W. 794; Bonners *v.* State, (Cr. App. 1896) 35 S. W. 650; Mayfield *v.* State, 23 Tex. App. 645, 5 S. W. 161.

See 14 Cent. Dig. tit. "Criminal Law," § 807; and, generally, LARCENY.

26. State *v.* Robinson, 35 S. C. 340, 14 S. E. 766; Kelley *v.* State, 31 Tex. Cr. 211, 20 S. W. 365. See BURGLARY, 6 Cyc. 235.

27. People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006; Britt *v.* State, 9 Humphr. (Tenn.) 31. See, generally, ROBBERY.

28. People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520. See EMBEZZLEMENT, 15 Cyc. 486.

29. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Daniels, 2 Pars. Eq. Cas. (Pa.) 332. See, generally, FALSE PRETENSES.

30. Copperman *v.* People, 56 N. Y. 591. See, generally, RECEIVING STOLEN GOODS.

31. Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474; Harding *v.* State, 54 Ind. 359; People *v.* Kemp, 76 Mich. 410, 43 N. W. 439. See, generally, FORGERY.

32. Steele *v.* People, 45 Ill. 152; People *v.* Kemp, 76 Mich. 410, 43 N. W. 439. See, generally, FORGERY.

33. O'Neal *v.* State, 32 Tex. Cr. 42, 22 S. W. 25, holding that on a prosecution of defendant for carrying a pistol evidence that during a dispute with a person he presented a pistol at him was admissible as *res gestæ*, where it was a part of the same transaction, and occurred at the same time. See, generally, WEAPONS.

34. Pritchett *v.* State, 92 Ga. 65, 18 S. E. 536. See, generally, OBSTRUCTING JUSTICE.

35. State *v.* Wentworth, 37 N. H. 196. See, generally, RAILROADS.

36. Mixon *v.* State, (Tex. Cr. App. 1895) 31 S. W. 408; Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597. See also ARSON, 3 Cyc. 1007; and, generally, ROBBERY.

37. Mixon *v.* State, (Tex. Cr. App. 1895) 31 S. W. 408. See ARSON, 3 Cyc. 1007; BURGLARY, 6 Cyc. 235.

38. State *v.* Robinson, 35 S. C. 340, 14 S. E. 766; Mixon *v.* State, (Tex. Cr. App. 1895) 31 S. W. 408. See BURGLARY, 6 Cyc. 236; and, generally, LARCENY.

assault,[39] burglary and homicide or assault,[40] homicide and assault on the deceased or on third persons,[41] homicide and larceny,[42] homicide and conspiracy in connection with a strike,[43] rape and robbery[44] or assaults on the prosecutrix or on third persons,[45] robbery and assault and battery[46] or assault with intent to kill,[47] assault with intent to kill and resisting an officer,[48] riot and malicious mischief,[49] fornication, adultery, and rape,[50] and passing counterfeit money and gambling.[51] Evidence of a distinct felony may be given in reëxamination where it will serve to explain an apparently contradictory fact elicited by cross-examination,[52] or to contradict[53] or corroborate[54] a witness.

3. Form of Statement. An unsworn statement independently relevant may be oral,[55] or may appear in various written forms,[56] such as book entries,[57] letters,[58]

39. Adams *v.* State, (Tex. Cr. App. 1901) 62 S. W. 1058; Williams *v.* State, 42 Tex. Cr. 602, 61 S. W. 395, 62 S. W. 1057. See also other authorities cited in Burglary, 6 Cyc. 235.

40. People *v.* Rogers, 71 Cal. 565, 12 Pac. 679; State *v.* Desroches, 48 La. Ann. 428, 19 So. 250; State *v.* Wagner, 61 Me. 178. See Burglary, 6 Cyc. 235; and, generally, Homicide.

41. *Alabama.*— Seams *v.* State, 84 Ala. 410, 4 So. 521.

Maine.— State *v.* Pike, 65 Me. 111.

Missouri.— State *v.* Sanders, 76 Mo. 35.

New York.— People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741; People *v.* Parkes, 137 N. Y. 535, 32 N. E. 1013.

North Carolina.— State *v.* Gooch, 94 N. C. 987.

Texas.— Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398.

See 14 Cent. Dig. tit. "Criminal Law," § 807; and, generally, Homicide.

42. Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; Mask *v.* State, 32 Miss. 405. See, generally, Homicide; Larceny.

43. State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599. See, generally, Homicide.

44. State *v.* Taylor, 118 Mo. 153, 22 S. W. 806, 24 S. W. 449; Harris *v.* State, 32 Tex. Cr. 279, 22 S. W. 1037; Davis *v.* State, (Tex. Cr. App. 1893) 23 S. W. 684. See, generally, Rape; Robbery.

45. Thompson *v.* State, 11 Tex. App. 51. See, generally, Rape.

46. State *v.* Nathan, 5 Rich. (S. C.) 219. See, generally, Robbery.

47. Richards *v.* State, 34 Tex. Cr. 277, 30 S. W. 229. See, generally, Robbery.

48. State *v.* Guy, 46 La. Ann. 1441, 16 So. 404. See, generally, Homicide; Obstructing Justice.

49. Gallaher *v.* State, 101 Ind. 411. See, generally, Malicious Mischief; Riot.

50. State *v.* Summers, 98 N. C. 702, 4 S. E. 120. See Adultery, 1 Cyc. 961; and, generally, Fornication; Rape.

51. Powers *v.* State, 4 Humphr. (Tenn.) 274.

52. Reg. *v.* Chambers, 3 Cox C. C. 92; Reg. *v.* Briggs, 2 M. & Rob. 199. See, generally, Witnesses.

53. Bryant *v.* State, 97 Ga. 103, 25 S. E. 450; State *v.* Harris, 100 Iowa 188, 69 N. W. 413; Gilmore *v.* State, 37 Tex. Cr. 178, 39 S. W. 105. See, generally, Witnesses.

54. Toll *v.* State, 40 Fla. 169, 23 So. 942; Callison *v.* State, 37 Tex. Cr. 211, 39 S. W. 300. See, generally, Witnesses.

55. Banks *v.* State, 157 Ind. 190, 60 N. E. 1087; Dodge *v.* Weill, 158 N. Y. 346, 53 N. E. 33; Hunt *v.* People, 3 Park. Cr. (N. Y.) 569.

56. *Iowa.*— Kocher *v.* Palmetier, 112 Iowa 84, 83 N. W. 816.

New York.— People *v.* Coombs, 36 N. Y. App. Div. 284, 55 N. Y. Suppl. 276.

Pennsylvania.— Helser *v.* Pott, 3 Pa. St. 179.

United States.— Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200.

England.— Pike *v.* Crouch, 1 Ld. Raym. 730, 8 Wm. 3.

Existence of a copy at a certain time may be a fact relevant in itself, for example, to show that the original is an ancient document. Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

57. *Georgia.*— Cody *v.* Gainsville First Nat. Bank, 103 Ga. 789, 30 S. E. 281.

Illinois.— Chicago, etc., R. Co. *v.* Ingersoll, 65 Ill. 399.

Louisiana.— Doubrere *v.* Grillier, 2 Mart. N. S. 171.

Missouri.— Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

New Hampshire.— Newbury Bank *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307.

Pennsylvania.— Crooks *v.* Bunn, 136 Pa. St. 368, 20 Atl. 529; Coxe *v.* Deringer, 78 Pa. St. 271.

United States.— Beaver *v.* Taylor, 1 Wall. 637, 17 L. ed. 601. But see Goff *v.* Stoughton State Bank, 78 Wis. 106, 47 N. W. 190, 9 L. R. A. 859.

See *infra*, XIV.

Relevancy.— The existence of the entry must be relevant. Spellman *v.* Muehlfeld, 48 N. Y. App. Div. 262, 62 N. Y. Suppl. 749.

58. *Alabama.*— Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140, 1 So. 773.

California.— Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Illinois.— Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 [*affirming* 37 Ill. App. 219].

Kentucky.— Murray *v.* East End Imp. Co., 60 S. W. 648, 22 Ky. L. Rep. 1477.

Maryland.— Roberts *v.* Woven Wire Mat-

memoranda,[59] newspaper,[60] and other[61] notices, promissory notes,[62] receipts,[63] records,[64] telegrams,[65] or other documents.[66]

B. Circumstantial Evidence — 1. Basis of Opinion. Statements made to an expert, skilled observer,[67] or other witness are competent, regardless of their truth, as forming the basis of his opinion, in any case where the existence of that

tress Co., 46 Md. 374; Burckmyer *v.* Whiteford, 6 Gill 1.

Massachusetts.— New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56.

Michigan.— Schaub *v.* Welded-Barrel Co., 125 Mich. 591, 84 N. W. 1095.

Mississippi.— Spivey *v.* State, 58 Miss. 858.

New York.— People *v.* Lewis, 136 N. Y. 633, 32 N. E. 1014; Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Scott *v.* Middletown, etc., R. Co., 86 N. Y. 200; Conde *v.* Hall, 92 Hun 335, 37 N. Y. Suppl. 411; People *v.* Lewis, 16 N. Y. Suppl. 881; Winters *v.* Judd, 59 Hun 32, 12 N. Y. Suppl. 411; Foster *v.* Newbrough, 66 Barb. 645; Felter *v.* Claffy, 12 N. Y. St. 625.

Pennsylvania.— Hannis *v.* Hazlett, 54 Pa. St. 133; Albrecht *v.* Breder, 12 Wkly. Notes Cas. 170; Com. *v.* Gentry, 5 Pa. Dist. 703; Wakeman *v.* Thomas, 3 Lack. Leg. N. 377.

South Carolina.— Charleston, etc., R. Co. *v.* Blake. 12 Rich. 66.

Vermont.— May *v.* Brownell, 3 Vt. 463.

Virginia.— Cluverius *v.* Com., 81 Va. 787.

United States.—Wilkes *v.* Dinsman, 7 How. 89, 12 L. ed. 618.

See 20 Cent. Dig. tit. "Evidence," § 1097; and *infra*, XIV.

Contents otherwise proved.— The judge is not required to admit a letter in evidence where its contents are fully covered by other testimony. Livingston's Appeal, 63 Conn. 68, 26 Atl. 470.

A correspondence is admissible if relevant. Walker *v.* Pue, 57 Md. 155; Oelrichs *v.* Ford, 21 Md. 489; Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 503; Newman *v.* Bean, 21 N. H. 93; Felter *v.* Claffy, 12 N. Y. St. 625; Boyden *v.* Burke, 14 How. (U. S.) 575, 14 L. ed. 548. Correspondence between the parties to a contract after its execution is not admissible in an action thereon. Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

The history of the case may be shown in part by statements contained in letters. Brown *v.* Bowe, 7 N. Y. St. 387. But prior letters not connected with the case are not admissible. Coxe *v.* Milbrath, 110 Wis. 499, 86 N. W. 174.

59. *Illinois.*— Ewing *v.* Bailey, 36 Ill. App. 191.

Indiana.— St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995.

Michigan.— Bennett *v.* Smith, 40 Mich. 211.

New York.— Bigelow *v.* Hall, 91 N. Y. 145; Wolf *v.* Di Lorenzo, 22 Misc. 323, 49 N. Y. Suppl. 191.

Oregon.—Humphrey *v.* Chilcat Canning Co., 20 Oreg. 209, 25 Pac. 389.

Pennsylvania.— Vincent *v.* Huff, 8 Serg. & R. 381.

Texas.—Henry *v.* Bounds, (Civ. App. 1898) 46 S. W. 120; Watson *v.* Winston, (Civ. App. 1897) 43 S. W. 852.

See *infra*, XIV.

60. Jewell *v.* Jewell, 1 How. (U. S.) 219, 11 L. ed. 108.

61. Fox *v.* Foster, 4 Pa. St. 119.

62. McCann *v.* Preston, 79 Md. 223, 28 Atl. 1102.

63. Singer Mfg. Co. *v.* Coon, 9 Misc. (N. Y.) 465, 30 N. Y. Suppl. 232; Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281.

64. Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

65. Chrisman *v.* Carney, 33 Ark. 316; Com. *v.* Gentry, 5 Pa. Dist. 703.

66. *Alabama.*— Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237; Manaway *v.* State, 44 Ala. 375; Jennings *v.* Blocker, 25 Ala. 415.

Arkansas.— Ryburn *v.* Pryor, 14 Ark. 505.

Louisiana.— Swift *v.* Williams, 1 La. 165.

Michigan.— Bond *v.* McMahon, 94 Mich. 557, 54 N. W. 281; Daniels *v.* Dayton, 49 Mich. 137, 13 N. W. 392, mortgages.

Mississippi.— Baldwin *v.* Flash, 58 Miss. 593; Wildey *v.* Bonney, 31 Miss. 644; Wells *v.* Shipp, 1 Walk. 353.

Missouri.— Mann *v.* Best, 62 Mo. 491; Salmons *v.* Davis, 29 Mo. 176.

New York.— Brooks *v.* Conner, 10 Daly 183.

Pennsylvania.— Jordan *v.* Wilson, 25 Pa. St. 390 (bill of lading); Sergeant *v.* Ingersoll, 15 Pa. St. 343; Evans *v.* Mengel, 3 Pa. St. 239.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

United States.— Marks *v.* Fox, 18 Fed. 713.

See 20 Cent. Dig. tit. "Evidence," § 1096 *et seq.*; and *infra*, XIV.

67. *Alabama.*— Smith *v.* State, 53 Ala. 486; Eckles *v.* Bates, 26 Ala. 655.

Illinois.— Slaem *v.* Webster, 95 Ill. App. 120.

Massachusetts.— Barber *v.* Merriam, 11 Allen 322.

New Hampshire.— Plummer *v.* Ossipee, 59 N. H. 55.

New Jersey.— State *v.* Gedicke, 43 N. J. L. 86.

New York.— Matteson *v.* New York Cent. R. Co., 62 Barb. 364, physician.

United States.— Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

See *infra*, XI.

Doubt has been expressed as to whether an injured person may state to his expert witness the record of the past sufferings due to the injury. That such evidence is incompetent see Lake Shore, etc., R. Co. *v.* Yokes, 12 Ohio Cir. Ct. 499, 5 Ohio Cir. Dec. 599.

opinion is relevant; the opinion of a medical practitioner for example is competent, although formed in part at least on statements of an injured party as to his symptoms,[68] provided such statements are corroborated.[69]

2. Bodily Condition — a. In General — (I) *Rule Stated.* An unsworn statement of a third person cannot be direct evidence of the existence of a particular bodily condition in men[70] or in animals,[71] although the declarant be intimately acquainted with the facts,[72] or the declaration be made in the presence of the person to whose bodily condition it relates.[73] Statements of fact,[74] fairly indicative of the existence of a relevant bodily condition[75] of the declarant at the time of the declaration, will be received as circumstantial evidence of the existence of

68. Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100.

69. Consolidated Traction Co. *v.* Lambertson, 60 N. J. L. 452, 38 Atl. 683.

70. St. Kevin Min. Co. *v.* Isaacs, 18 Colo. 400, 32 Pac. 322; Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201.

71. Welch *v.* Norton, 73 Iowa 721, 36 N. W. 758.

72. Heald *v.* Thing, 45 Me. 392 (wife); Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894 (mother); Wilt *v.* Vickers, 8 Watts (Pa.) 227 (mother).

73. Wilt *v.* Vickers, 8 Watts (Pa.) 227; Missouri, etc., R. Co. *v.* Dawson, (Tex. Civ. App. 1895) 29 S. W. 1106.

74. Although it is said that a declarant's opinion of his bodily condition (Firkins *v.* Chicago Great Western R. Co., 61 Minn. 31, 63 N. W. 172; Louisville, etc., R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840), or the result of his injuries is not relevant (Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199; Corbett *v.* St. Louis, etc., R. Co., 26 Mo. App. 621), no reason is perceived, in point of principle, why the existence of an opinion on the part of the sufferer may not be a relevant fact where it shows the effect of the accident on his mind (Marr *v.* Hill, 10 Mo. 320; Plummer *v.* Ossipee, 59 N. H. 55; Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366).

75. *Alabama.*— Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500; Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276; Stone *v.* Watson, 37 Ala. 279; Stein *v.* State, 37 Ala. 123; Barker *v.* Coleman, 35 Ala. 221.

Arkansas.— Edmonds *v.* State, 34 Ark. 720.

California.— Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

Connecticut.— Kelsey *v.* Universal L. Ins. Co., 35 Conn. 225.

Georgia.— Tilman *v.* Stringer, 26 Ga. 171.

Idaho.— State *v.* Gilbert, 8 Ida. 346, 69 Pac. 62.

Illinois.— Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. 884.

Indiana.— Indiana R. Co. *v.* Thaurer, 160 Ind. 25, 66 N. E. 156; Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53; De Pew *v.* Robinson, 95 Ind. 109; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415; Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109; Anderson *v.* Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550.

Iowa.— Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; Crippen *v.* Des Moines, (1899) 78 N. W. 688; McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427; Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093. See also Hamilton *v.* Mendota Coal, etc., Co., 120 Iowa 147, 94 N. W. 282.

Kansas.— St. Louis, etc., R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439; Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Kentucky.— Shotwell *v.* Com., 68 S. W. 403, 24 Ky. L. Rep. 255.

Maine.— Asbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

Michigan.— Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622; Burleson *v.* Reading, 110 Mich. 512, 68 N. W. 294; Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Minnesota.— Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199.

Mississippi.— Field *v.* State, 57 Miss. 474, 34 Am. Rep. 476, effect of poison.

Missouri.— State *v.* Thompson, 132 Mo. 301, 34 S. W. 31 (sufferings from poison); Marr *v.* Hill, 10 Mo. 320; King *v.* King, 42 Mo. App. 454.

New Hampshire.— Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Howe *v.* Plainfield, 41 N. H. 135.

New Jersey.— State *v.* Gedicke, 43 N. J. L. 86.

New York.— People *v.* Williams, 3 Park. Cr. 84.

North Carolina.— State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; Henderson *v.* Crouse, 52 N. C. 623; Bell *v.* Morrisett, 51 N. C. 178; Biles *v.* Holmes, 33 N. C. 16; Roulhac *v.* White, 31 N. C. 63.

Ohio.— Cleveland City R. Co. *v.* Roebuck, 22 Ohio Cir. Ct. 99, 12 Ohio Cir. Dec. 262.

Oregon.— State *v.* Mackey, 12 Oreg. 154, 6 Pac. 648.

Pennsylvania.— Howe *v.* Howe, 16 Pa. Super. Ct. 193.

South Carolina.— Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307; Welch *v.* Brooks, 10 Rich. 123; Young *v.* Grey, Harp.

that condition, although made a considerable time after an injury was received,[76] length of interval merely affecting the weight of the evidence.[77] Such statements gain in probative force in proportion as they are involuntary[78] and exclude the suspicion of being in whole or in part feigned;[79] as where they are made to a physician[80] for purposes of treatment[81] and *ante litem motam*.[82] In the absence of a suspicion of fabrication, however, it is not essential that the statements should

38. See also Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810.

Tennessee.— Lewis *v.* Moses, 6 Coldw. 193; Denton *v.* State, 1 Swan 279.

Texas.— Arrington *v.* Texas, etc., R. Co., (Civ. App. 1902) 70 S. W. 551; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614; St. Louis, etc., R. Co. *v.* Gill, (Civ. App. 1900) 55 S. W. 386. See also Ft. Worth, etc., R. Co. *v.* Partin, (Civ. App. 1903) 76 S. W. 236; Hicks *v.* Galveston, etc., R. Co., (Civ. App. 1902) 71 S. W. 322 [*reversed* on other points in 96 Tex. 355, 72 S. W. 835]; St. Louis, etc., R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010.

Vermont.— State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 605.

Washington.— Bothell *v.* Seattle, 17 Wash. 263, 49 Pac. 491.

Wisconsin.— McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

United States.— Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 19 L. ed. 437; Travelers' Protective Assoc. *v.* West, 102 Fed. 226, 42 C. C. A. 284.

England.— Aveson *v.* Kinnaird, 6 East 188, 2 Smith K. B. 286, 8 Rev. Rep. 455.

See 14 Cent. Dig. tit. "Criminal Law," § 937 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 377 *et seq.*, 1061 *et seq.*

Whenever the bodily or mental feelings of an individual at a particular time are material to be proved, the usual expressions of such feelings made at the time in question are admissible as evidence of the existence of such feelings. They are classed with natural evidence, and whether they were real or feigned is for the jury to determine. Phillips *v.* Kelly, 29 Ala. 628. To the same effect see People *v.* Murphy, 3 N. Y. Cr. 338; Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437.

Peculiar tooth.— In a murder trial, where it was material to prove that the deceased had a peculiar tooth in his mouth, his declarations about it, made when there could have been no *lis mota*, were held admissible in evidence as *res gestæ*. Edmonds *v.* State, 34 Ark. 720.

Comprehensiveness of rule.— "The declarations of a party are received to prove his condition, ills, pains, and symptoms, whether arising from sickness, or an injury by accident or violence." State *v.* Mackey, 12 Oreg. 154, 158, 6 Pac. 648.

In Georgia the evidence has been treated as secondary and no longer admissible where the primary evidence of the declarant is available. Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48.

Res gestæ.— The attempt has been made to treat such exclamations as governed by the rules affecting declarations, part of the *res gestæ*. Wilkinson *v.* Moseley, 30 Ala. 562; Jones *v.* White, 11 Humphr. (Tenn.) 268; Dowlen *v.* State, 14 Tex. App. 61.

76. Bacon *v.* Charlton, 7 Cush. (Mass.) 581. See also Bredlau *v.* York, 115 Wis. 554, 92 N. W. 261. *Compare*, however, Lake St. El. R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374 [*reversing* 103 Ill. App. 662].

77. Central R. Co. *v.* Smith, 76 Ga. 209, 2 Am. St. Rep. 31; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550. When the statements as to bodily condition are made soon after the injury (Werely *v.* Persons, 28 N. Y. 344, 84 Am. Dec. 346; Baker *v.* Griffen, 10 Bosw. (N. Y.) 140) or "immediately after" (Topeka *v.* High, 6 Kan. App. 162, 51 Pac. 306; Mulliken *v.* Corunna, 110 Mich. 212, 68 N. W. 141; Lewke *v.* Dry Dock, etc., R. Co., 46 Hun (N. Y.) 283; Powers *v.* West Troy, 25 Hun (N. Y.) 561) they not only connect the occurrence with the condition but are less exposed to a suggestion of fabrication (Thomas *v.* Herrall, 18 Oreg. 546, 23 Pac. 497; Texas, etc., R. Co. *v.* Barron, 78 Tex. 421, 14 S. W. 698; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287).

78. It has even been held that the admissible statements should be limited to such as are involuntary. West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996; Hewitt *v.* Eisenhart, 36 Nebr. 794, 55 N. W. 252; Kennedy *v.* Rochester City, etc., R. Co., 130 N. Y. 654, 29 N. E. 141; Olp *v.* Gardner, 48 Hun (N. Y.) 169; Smith *v.* Dittman, 16 Daly (N. Y.) 427, 11 N. Y. Suppl. 769; Schuler *v.* Third Ave. R. Co., 1 Misc. (N. Y.) 351, 20 N. Y. Suppl. 683; Texas State Fair *v.* Marti, 30 Tex. Civ. App. 132, 69 S. W. 432.

79. Butts *v.* Eaton Rapids, 116 Mich. 539, 74 N. W. 872; Delaware, etc., R. Co. *v.* Ashley, 67 Fed. 209, 14 C. C. A. 368.

Whether the statements are feigned is a question for the jury. Lange *v.* Schoeltter, 115 Cal. 388, 47 Pac. 139; People *v.* Lowen, 109 Cal. 381, 42 Pac. 32; Chapin *v.* Marlborough, 9 Gray (Mass.) 244, 69 Am. Dec. 281; Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641.

80. Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747; East Tennessee, etc., R. Co. *v.* Smith, 94 Ga. 580, 20 S. E. 127; Perkins *v.* Concord R. Co., 44 N. H. 223; Tobin *v.* Fairport, 12 N. Y. Suppl. 224; Meigs *v.* Buffalo, 7 N. Y. St. 855.

81. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389. See *infra*, VIII, B, 2, c, (II).

82. Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109; Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; International, etc.,

have been made *ante litem motam*.[83] They have been received, although made *post litem motam*[84] or even after suit has been brought,[85] or during the trial.[86]

(II) *Narrative Statements.* As the statements are circumstantially probative of a present bodily condition, not evidence of the facts asserted, statements of a narrative nature as to the causes,[87] attendant circumstances,[88] or effect[89] of the sickness or injuries, or the manner in which,[90] or the time at which,[91] an injury was inflicted, or the nature of its former symptoms,[92] or in general as to bodily condition at another time,[93] are incompetent; even when made to a physician as a

R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

83. Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

84. Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102.

85. Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85; Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Towle *v.* Blake, 48 N. H. 92; Jackson *v.* Missouri, etc., R. Co., 23 Tex. Civ. App. 319, 55 S. W. 376.

86. Fleming *v.* Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268.

87. *Arkansas.*— Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

Georgia.— Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976.

Illinois.— Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486.

Iowa.— Gray *v.* McLaughlin, 26 Iowa 279.

Kansas.—Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463.

Massachusetts.— Roosa *v.* Boston Loan Co., 132 Mass. 439; Morrissey *v.* Ingham, 111 Mass. 63; Chapin *v.* Marlborough, 9 Gray 244, 69 Am. Dec. 281; Bacon *v.* Charlton, 7 Cush. 581.

Mississippi.— Scaggs *v.* State, 8 Sm. & M. 722.

New York.— People *v.* Williams, 3 Park. Cr. 84.

Ohio.— Lake Shore, etc., R. Co. *v.* Yokes, 12 Ohio Cir. Ct. 499, 5 Ohio Cir. Dec. 599.

Oregon.— Sullivan *v.* Oregon R., etc., Co., 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364.

South Dakota.—Fallon *v.* Rapid City, (1904) 97 N. W. 1009.

Tennessee.— Nored *v.* Adams, 2 Head 449.

Texas.— Newman *v.* Dodson, 61 Tex. 91; Missouri, etc., R. Co. *v.* Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245; Gulf, etc., R. Co. *v.* Ross, 11 Tex. Civ. App. 201, 32 S. W. 730.

United States.— National Masonic Acc. Assoc. *v.* Shryock, 73 Fed. 774, 20 C. C. A. 3.

But see Wadlow *v.* Perryman, 27 Mo. 279. And it has been said that in the case of bodily injury the *res gestæ* comprise the statements by the injured party of the cause, made at or near the time of the occurrence of the injury, and those relating to the consequences made while the latter subsisted and were in progress. Stiles *v.* Danville, 42 Vt. 282. *Compare* Elmer *v.* Fessenden, 151 Mass. 359, 362, 24 N. E. 208, 5 L. R. A. 724 [*criticizing* Com. *v.* Hackett, 2 Allen (Mass.) 136; Com. *v.* McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437, cases admitting declarations of an injured person to show the cause of a wound or injury, when the declarations were made at the time or immediately after the event, to the effect that such cases "if not exceptions to the general rule, at least mark the limit of admissibility"].

88. Equitable Mut. Acc. Assoc. *v.* McCluskey, 1 Colo. App. 473, 29 Pac. 383.

89. Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102; Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199; Boston, etc., R. Co. *v.* O'Reilly, 158 U. S. 334, 15 S. Ct. 830, 39 L. ed. 1006. See also Chicago, etc., R. Co. *v.* Donworth, 203 Ill. 192, 67 N. E. 797 [*reversing* 105 Ill. App. 400]; Lake St. El. R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374 [*reversing* 103 Ill. App. 662]; Kennedy *v.* Kennedy, (Nev. 1903) 74 Pac. 7; International, etc., R. Co. *v.* Boykin, (Tex. Civ. App. 1903) 74 S. W. 93; Hicks *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1902) 71 S. W. 322 [*reversed* on other points in 96 Tex. 355, 72 S. W. 835]; Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

90. Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53. See also Fallon *v.* Rapid City, (S. D. 1904) 97 N. W. 1009.

91. Ashland *v.* Marlborough, 99 Mass. 47; Hunter *v.* McClintock, Dudley (S. C.) 327.

92. *Alabama.*— Smith *v.* State, 53 Ala. 486; Eckles *v.* Bates, 26 Ala. 655.

Connecticut.— Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102.

Illinois.— Winnebago County *v.* Rockford, 61 Ill. App. 656.

Maine.— Heald *v.* Thing, 45 Me. 392.

Massachusetts.— Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; Barber *v.* Merriam, 11 Allen 322.

Minnesota.— Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199.

Missouri.— Reid *v.* Piedmont, etc., L. Ins. Co., 58 Mo. 421.

New Hampshire.— Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

New York.— Donohue *v.* Brooklyn, etc., R. Co., 53 N. Y. App. Div. 348, 65 N. Y. Suppl. 634; Page *v.* New York Cent. R. Co., 6 Duer 523.

North Carolina.— Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 556.

Texas.— Gulf, etc., R. Co. *v.* Bruce, (Civ. App. 1893) 24 S. W. 927.

Wisconsin.— Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

93. *Alabama.*— Kelly *v.* Cunningham, 36

basis for treatment,[94] especially where the patient has been removed from the scene of the accident.[95]

b. Form of Declaration — (i) *In General.* The representation may take any form, inarticulate, as in groanings,[96] articulate, as in exclamations[97] or more detailed statements summarized as "complaints."[98]

Ala. 78; Barker *v.* Coleman, 35 Ala. 221; Holloway *v.* Cotten, 33 Ala. 529.

California.— Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

Indiana.— Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53.

Maryland.— McCeney *v.* Duvall, 21 Md. 166.

New York.— Kennedy *v.* Rochester City, etc., R. Co., 130 N. Y. 654, 29 N. E. 141; Roche *v.* Brooklyn City, etc., R. Co., 105 N. Y. 294, 11 N. E. 630, 59 Am. Rep. 506; Olp *v.* Gardner, 48 Hun 169.

North Carolina.— Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 566.

Wisconsin.— Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

Condition during previous night.— In an action for personal injuries evidence as to what plaintiff told witness each morning, for weeks after the injury, about having been unable to rest during the night, because of pain in consequence of it, does not come within the rule as to exclamations and expressions of present bodily pain, and is incompetent as hearsay. Kelley *v.* Detroit, etc., R. Co., 80 Mich. 237, 45 N. W. 90, 20 Am. St. Rep. 514.

A comparison of present condition with one past is not narrative and is competent. Fleming *v.* Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268.

"Res gestae" a test.— The exclusion of narrative statements has been expressed in saying that "unless such complaints form a part of the *res gestæ* they cannot be admitted." Kennedy *v.* Rochester City, etc., R. Co., 130 N. Y. 654, 656, 29 N. E. 141.

94. *Alabama.*— Kelly *v.* Cunningham, 36 Ala. 78; Blackman *v.* Johnson, 35 Ala. 252.

Arkansas.— Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

California.— Jenkin *v.* Pacific Mut. L. Ins. Co., 131 Cal. 121, 63 Pac. 180.

Connecticut.— Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102.

Georgia.— East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941.

Indiana.— Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723.

Kentucky.— Allen *v.* Vancleave, 15 B. Mon. 236, 61 Am. Dec. 184. But see Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 303, 309, 40 S. W. 909, 19 Ky. L. Rep. 462, 72 Am. St. Rep. 413, where the court said: "We are of the opinion, also, that the declaration of a patient to his attending physician, to the effect that the injury was the result of a [mosquito] bite, was competent. A narrative of the events attending the mishap would not be competent, but the patient may tell what the injury is, if he knows; he is suffering and is seeking relief; to get it he must tell the truth; any other course would mislead his physician and might result disastrously; he knows whether he has bruised the inflamed parts or whether he has been bitten by an insect. Such statements are part of the description of the wound, and inseparable from the patient's complaint with respect thereto."

Louisiana.— Marler *v.* Texas, etc., R. Co., 52 La. Ann. 727, 27 So. 176.

Maine.— Asbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

Massachusetts.— Emerson *v.* Lowell Gaslight Co., 6 Allen 146, 83 Am. Dec. 621.

Michigan.— People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84; Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143; Merkle *v.* Bennington Tp., 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666.

Minnesota.— Weber *v.* St. Paul City R. Co., 66 Minn. 155, 69 N. W. 716.

South Carolina.— Hunter *v.* McClintock, Dudley 327.

Texas.— Ft. Worth, etc., R. Co. *v.* Stone, (Civ. App. 1894) 25 S. W. 808. But see Missouri, etc., R. Co. *v.* Rose, 19 Tex. Civ. App. 470, 49 S. W. 133.

In New York complaints not made actually or substantially contemporaneous with the injury itself are incompetent, except when made to a physician, although in form indicative of present suffering. It is considered that in reality such declarations are rather in the nature of narratives as to the effects of a past injury than evidentiary of a present condition. Kennedy *v.* Rochester City, etc., R. Co., 130 N. Y. 654, 29 N. E. 141; Grant *v.* Groton, 77 Hun (N. Y.) 497, 28 N. Y. Suppl. 1014; Ryan *v.* Porter Mfg. Co., 57 Hun (N. Y.) 253, 10 N. Y. Suppl. 774; Olp *v.* Gardner, 48 Hun 169; Barrelle *v.* Pennsylvania R. Co., 4 N. Y. Suppl. 127.

Correspondence to a physician has been excluded. Witt *v.* Witt, 32 L. J. P. & M. 179, 8 L. T. Rep. N. S. 175, 3 Swab. & Tr. 143, 11 Wkly. Rep. 154.

Independent facts as contradiction of present testimony may be shown by narrative statements. Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543.

95. Merkle *v.* Bennington Tp., 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666.

96. Cicero, etc., R. Co. *v.* Priest, 190 Ill. 592, 60 N. E. 814.

97. See *infra*, VIII, B, 2, b, (II).

98. *Indiana.*— Elkhart *v.* Ritter, 66 Ind. 136.

Maine.— Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Michigan.— Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

Minnesota.— Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199.

(11) *Exclamations of Pain.* Where the bodily condition of a person is a relevant fact, exclamations of present pain[99] or distress[1] are competent circumstantial evidence of the existence of the particular bodily condition.

c. To Whom Made — (1) *In General.* Relevant statements as to bodily condition are competent when made in the hearing of any person.[2] Thus

Missouri.— Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588.

New Hampshire.— Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Towle *v.* Blake, 48 N. H. 92.

New York.— Caldwell *v.* Murphy, 11 N. Y. 416; De Long *v.* Delaware, etc., R. Co., 37 Hun 282; Uransky *v.* Dry Dock, etc., R. Co., 7 N. Y. St. 395.

Texas.— Missouri, etc., R. Co. *v.* Johnson, (Sup. 1902) 67 S. W. 768; Missouri, etc., R. Co. *v.* Zwiener, (Civ. App. 1896) 38 S. W. 375; Missouri, etc., R. Co. *v.* Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245; International, etc., R. Co. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58. See also Hicks *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1902) 71 S. W. 322 [*reversed* on other points in 96 Tex. 355, 72 S. W. 835]; St. Louis, etc., R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010.

99. *Alabama.*— Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276; Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Phillips *v.* Kelly, 29 Ala. 628.

Dakota.— Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680.

Georgia.— Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

Illinois.— West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996.

Indiana.— Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53; Porter County *v.* Dombke, 94 Ind. 72; Peirce *v.* Jones, 22 Ind. App. 163, 53 N. E. 431. See also Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550.

Iowa.— Hamilton *v.* Mendota Coal, etc., Co., 120 Iowa 147, 94 N. W. 282; Gray *v.* McLaughlin, 26 Iowa 279; Frink *v.* Coe, 4 Greene 555, 61 Am. Dec. 141.

Massachusetts.— Barber *v.* Merriam, 11 Allen 322; Bacon *v.* Charlton, 7 Cush 581. See also Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 S. E. 249, conscious suffering.

Michigan.— Heddle *v.* City Electric R. Co., 112 Mich. 547, 70 N. W. 1096; People *v.* Meservey, 76 Mich. 223, 42 N. W. 1133; Hyatt *v.* Adams, 16 Mich. 180. See also Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

New Hampshire.— Plummer *v.* Ossipee, 59 N. H. 55.

New York.— Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; Kennedy *v.* Rochester City, etc., R. Co., 130 N. Y. 654, 29 N. E. 141; Hagenlocher *v.* Coney Island, etc., R. Co., 99 N. Y. 136, 1 N. E. 536; People *v.* Murphy, 3 N. Y. Cr. 338. See also Scheir *v.* Guirin, 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956.

North Carolina.— Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 566.

South Carolina.— Welch *v.* Brooks, 10 Rich. 123. See also Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810; Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Texas.— Texas, etc., R. Co. *v.* Barron, 78 Tex. 421, 14 S. W. 698; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; St. Louis Southwestern R. Co. *v.* Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089; Tyler Southeastern R. Co. *v.* Wheeler, (Civ. App. 1897) 41 S. W. 517. See also Ft. Worth, etc., R. Co. *v.* Partin, (Tex. Civ. App. 1903) 76 S. W. 236; Hicks *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1902) 71 S. W. 322 [*reversed* on other points in 96 Tex. 355, 72 S. W. 835]; Arrington *v.* Texas, etc., R. Co., (Tex. Civ. App. 1902) 70 S. W. 551.

Wisconsin.— Bredlau *v.* York, 115 Wis. 554, 92 N. W. 261; McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

United States.— Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977; Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 19 L. ed. 439.

1. *Alabama.*— Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276.

California.— Lange *v.* Schoeltter, 115 Cal. 388, 47 Pac. 139.

Indiana.— Peirce *v.* Jones, 22 Ind. App. 163, 53 N. E. 431.

Massachusetts.— Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; Com. *v.* Fenno, 134 Mass. 217.

Michigan.— Ellicott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

New York.— Kennedy *v.* Rochester City, etc., R. Co., 130 N. Y. 654, 29 N. E. 141.

Oregon.— Thomas *v.* Herrall, 18 Oreg. 546, 28 Pac. 497.

Wisconsin.— Bredlau *v.* York, 115 Wis. 554, 92 N. W. 261; Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366; McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

Canada.— Reg. *v.* Bérubé, 3 L. C. Rep. 212, 4 R. J. R. Q. 10.

2. *Alabama.*— Stein *v.* State, 37 Ala. 123; Eckles *v.* Bates, 26 Ala. 655.

Iowa.— Rupp *v.* Howard, 114 Iowa 65, 86 N. W. 38.

Kansas.— St. Louis, etc., R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439; Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Kentucky.— Allen *v.* Vancleave, 15 B. Mon. 236, 61 Am. Dec. 184.

Minnesota.— Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199.

New York.— Matteson *v.* New York Cent. R. Co., 35 N. Y. 487, 91 Am. Dec. 67.

Tennessee.— Jones *v.* White, 11 Humphr. 268.

they are competent when made in the hearing of a nurse,[3] or other attendant,[4] or even an ordinary bystander.[5]

(II) *Physicians.* Statements to a physician of the location and nature of symptoms, made for the purpose of diagnosis and treatment,[6] are not only received as evidence of the existence of the bodily conditions stated,[7] but in many jurisdictions if made to a medical attendant they are of more weight than if made to another person.[8] Statements as to facts unconnected with diagnosis[9] as to the

The declarant himself may testify to his own statements. Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109.

3. Brown *v.* Mt. Holly, 69 Vt. 364, 38 Atl. 69; Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

4. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287; Drew *v.* Sutton, 55 Vt. 586, 45 Am. Rep. 644.

5. Fondren *v.* Durfee, 39 Miss. 324; Perkins *v.* Concord R. Co., 44 N. H. 223; Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977.

6. It is not, however, essential that the physician should be attending in his professional capacity. Newman *v.* Dodson, 61 Tex. 91.

7. *Alabama.*— Johnson *v.* State, 17 Ala. 618.

California.— People *v.* Lowen, 109 Cal. 381, 42 Pac. 32.

Connecticut.— Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51.

Georgia.— Feagin *v.* Beasley, 23 Ga. 17.

Illinois.— Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323; Collins *v.* Waters, 54 Ill. 485; Salem *v.* Webster, 95 Ill. App. 120; Globe Acc. Ins. Co. *v.* Gerisch, 61 Ill. App. 140.

Iowa.— Townsend *v.* Des Moines, 42 Iowa 657.

Kansas.— Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463.

Massachusetts.— Fay *v.* Harlan, 128 Mass. 244, 35 Am. Rep. 372; Morrissey *v.* Ingham, 111 Mass. 63; Barber *v.* Merriam, 11 Allen 322; Chapin *v.* Marlborough, 9 Gray 244, 69 Am. Dec. 281.

Michigan.— Heddle *v.* City Electric R. Co., 112 Mich. 547, 70 N. W. 1096.

Minnesota.—Edlund *v.* St. Paul City R. Co., 78 Minn. 434, 81 N. W. 214.

New Hampshire.— Craig *v.* Gerrish, 58 N. H. 513; Towle *v.* Blake, 48 N. H. 92; Perkins *v.* Concord R. Co., 44 N. H. 223.

New Jersey.— State *v.* Gedicke, 43 N. J. L. 86.

New York.— Matteson *v.* New York Cent. R. Co., 35 N. Y. 487, 91 Am. Rep. 67; Cleveland *v.* New Jersey Steamboat Co., 5 Hun 523; Matteson *v.* New York Cent. R. Co., 62 Barb. 364; Martin *v.* Wood, 5 N. Y. Suppl. 274.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. St. 519, 6 Atl. 545.

South Carolina.— State *v.* Belcher, 13 S. C. 459; Hunter *v.* McClintock, Dudley 327.

Tennessee.— Yeatman *v.* Hart, 6 Humphr. 375.

Texas.— Wheeler *v.* Tyler South Eastern R. Co., 91 Tex. 356, 43 S. W. 876; Newman *v.* Dodson, 61 Tex. 91; Rogers *v.* Crain, 30 Tex. 284; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608; Missouri, etc., R. Co. *v.* Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245.

Vermont.— Knox *v.* Wheelock, 54 Vt. 150; Earl *v.* Tupper, 45 Vt. 275.

Wisconsin.— Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

United States.— Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 30 L. ed. 977.

The rule expounded.— "It is well settled, that what a patient has said of his own feelings, pains, &c., while afflicted with a disease which is the subject of judicial decision, may be told by the witness, and is competent evidence. Such expressions are the indications or symptoms of the disease itself; and cannot be separated from it. A dumb patient would write and point to the seat of his pain; while one, who spoke, would indicate the same thing in words. In such cases, the words or gestures, are equally the signs of the disease felt by the patient." Hunter *v.* McClintock, Dudley (S. C.) 327, 328. The admissibility of these declarations may be said to mark the limit to which the rule of independent relevancy has been carried. Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724.

Mental condition.— The statements are equally competent as to the mental condition of the declarant. Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

8. Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 275, 15 S. Ct. 840, 30 L. ed. 977, per Shiras, J. To the same effect see Stone *v.* Watson, 37 Ala. 279; Looper *v.* Bell, 1 Head (Tenn.) 373; Yeatman *v.* Hart, 6 Humphr. (Tenn.) 375; Rogers *v.* Crain, 30 Tex. 284.

The guaranty for truth lies not so much in spontaneity, as in the hope of relief which may be expected to follow only on a full and accurate disclosure of present symptoms. Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 203, 40 S. W. 909, 19 Ky. L. Rep. 462, 72 Am. St. Rep. 413; Barber *v.* Merriam, 11 Allen (Mass.) 322.

In New York statements to a physician are secondary and substitutionary evidence, unavailable to a party so long as he can testify personally. Bonelle *v.* Pennsylvania R. Co., 4 N. Y. Suppl. 127.

9. Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296; Heald *v.* Thing, 45 Me. 392; Morrissey *v.* Ingham, 111 Mass. 63; Barber *v.* Merriam, 11 Allen (Mass.) 322; Tyler, etc., R. Co. *v.* Wheeler, (Tex. Civ. App. 1897) 41 S. W. 517.

cause of an injury[10] or the instrument with which it was inflicted[11] are to be rejected.[12] Entirely different considerations are suggested when the statements to a physician are not for purposes of treatment, but to enable the physician to testify as a witness. The interest of the declarant may seem to him to consist in intensifying actual symptoms or evolving new ones, and the statements have accordingly been rejected.[13] There is, however, authority to the effect that these considerations go merely to the weight of the evidence, and do not suffice to exclude it; and that statements indicative of present suffering,[14] or as to its locality,[15] are competent, although the declarant expects that the physician will testify for him in part on the basis of the truth of these statements.[16]

3. Claim by One in Possession — a. In General — (I) *Rule Stated.* The claim under which real or personal property is being held by a declarant,[17] and

10. Illinois, etc., R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81; Roosa *v.* Boston Loan Co., 132 Mass. 439; Morrissey *v.* Ingham, 111 Mass. 63; Chapin *v.* Marlborough, 9 Gray (Mass.) 244, 69 Am. Dec. 281; Denton *v.* State, 1 Swan (Tenn.) 279. See also Fallon *v.* Rapid City, (S. D. 1904) 97 N. W. 1009.

11. Collins *v.* Waters, 54 Ill. 485.

12. See *supra*, VIII, B, 2, a, (II).

13. *Connecticut.*—Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102.

Illinois.— Salem *v.* Webster, 95 Ill. App. 120. See also Chicago, etc., R. Co. *v.* Donworth, 203 Ill. 192, 67 N. E. 797 [*reversing* 105 Ill. App. 400].

Michigan.— McKormick *v.* West Bay City, 110 Mich. 265, 68 N. W. 148; Jones *v.* Portland, 88 Mich. 598, 50 N. W. 73, 16 L. R. A. 437.

New Jersey.— Consolidated Traction Co. *v.* Lambertson, 60 N. J. L. 452, 38 Atl. 683.

Ohio.— Pennsylvania Co. *v.* Files, 65 Ohio St. 403, 62 N. E. 1047.

Texas.— Tyler South Eastern R. Co. *v.* Wheeler, (Civ. App. 1897) 41 S. W. 517. See also International, etc., R. Co. *v.* Boykin, (Tex. Civ. App. 1903) 74 S. W. 93; Hicks *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1902) 71 S. W. 322 [*reversed* on other points in 96 Tex. 355, 72 S. W. 835].

Wisconsin.— Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

United States.— Delaware, etc., R. Co. *v.* Roalefs, 70 Fed. 21, 16 C. C. A. 601.

"It has all the evils of manufactured testimony, without any possible means of detecting the falsity of it." Jones *v.* Portland, 88 Mich. 598, 604, 50 N. W. 731, 16 L. R. A. 437.

Narrative.— An injured person cannot get his narrative statements of past sufferings in evidence by stating these facts to a medical expert and having the expert testify to the narrative. St. Louis Southwestern R. Co. *v.* Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089.

Exclamations, etc.— While the mere declarations of a plaintiff, in an action for injuries, that he was suffering pain, made while being examined by a physician solely for the purpose of qualifying such physician to testify in the case, are inadmissible, evidence of exclamations, shrinkings, and other expressions of plaintiff during such examination, which appear to be spontaneous indications of pain, are admissible. Missouri, etc., R. Co. *v.* Johnson, 95 Tex. 409, 67 S. W. 768.

14. Jones *v.* Niagara Junction R. Co., 63 N. Y. App. Div. 607, 71 N. Y. Suppl. 647; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287; Kent *v.* Lincoln, 32 Vt. 591.

15. Kent *v.* Lincoln, 32 Vt. 591.

16. This is clearly so as to involuntary conduct, wincing from pressure, etc., developed by the examination. Exclamations or complaints made by a person undergoing physical examination by a physician, with a view to ascertaining the extent of his alleged injuries, and apparently made in response to manipulations of the person's body or members by the physician, are admissible in evidence, although such person was not under the treatment of this particular physician, and the examination was being made solely for the purpose indicated. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769 [*affirmed* in 95 Tex. 409, 67 S. W. 768].

17. *Alabama.*— Nelson *v.* Howison, 122 Ala. 573, 25 So. 211; Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; Wisdom *v.* Reese, 110 Ala. 418, 18 So. 13; Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Smith *v.* State, 103 Ala. 40, 16 So. 12.

Arkansas.— Sharp *v.* Johnson, 22 Ark. 79.

California.— Hayne *v.* Hermann, 97 Cal. 259, 32 Pac. 171; Phelps *v.* McGloan, 42 Cal. 298; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Colorado.— Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792.

Florida.— Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Georgia.— Ogden *v.* Dodge County, 97 Ga. 461, 25 S. E. 321; Knorr *v.* Raymond, 73 Ga. 749.

Illinois.— Fyffe *v.* Fyffe, 106 Ill. 646; Amick *v.* Young, 69 Ill. 542.

Indiana.— McDaneld *v.* McDaneld, 136 Ind. 603, 36 N. E. 286; Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345; Remy *v.* Lilly, 22 Ind. App. 109, 53 N. E. 387.

Iowa.— Ohde *v.* Hoffman, (1902) 90 N. W. 750; Allbright *v.* Hannah, 103 Iowa 98, 72 N. W. 421; Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511; Blake *v.* Graves, 18 Iowa 312.

Kansas.— Reiley *v.* Haynes, 38 Kan. 259,

the intent with which he may make an entry on land,[18] may be shown by declarations indicative of a relevant *animus*. The declarations are incompetent as direct evidence of the facts asserted,[19] for, as to the general history of the

16 Pac. 440, 5 Am. St. Rep. 737; State *v.* Gurnee, 14 Kan. 111.

Kentucky.— Young *v.* Adams, 14 B. Mon. 127, 58 Am. Dec. 654; West *v.* Price, 2 J. J. Marsh. 380; Smith *v.* Morrow, 7 T. B. Mon. 234.

Louisiana.— Davidson *v.* Matthews, 3 La. Ann. 316.

Maine.— Harriman *v.* Hill, 14 Me. 127.

Massachusetts.— Marcy *v.* Stone, 8 Cush. 4, 54 Am. Dec. 736.

Minnesota.— Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248.

Missouri.— Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917; Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517; Thomas *v.* Wheeler, 47 Mo. 363; State *v.* Schneider, 35 Mo. 533; Bagnell *v.* Sweet Springs Chemical Bank, 76 Mo. App. 121; Sutton *v.* Casselleggi, 5 Mo. App. 111.

Nevada.— Hanson *v.* Chiatovich, 13 Nev. 395; Rollins *v.* Strout, 6 Nev. 150.

New Hampshire.— Hunt *v.* Havan, 56 N. H. 87; Bell *v.* Woodward, 46 N. H. 315; Hodgdon *v.* Shannon, 44 N. H. 572.

New Jersey.— Lindsley *v.* McGrath, 62 N. J. Eq. 478, 50 Atl. 236.

New York.— Howell *v.* Huyck, 2 Abb. Dec. 423, 4 Transcr. App. 202; Swettenham *v.* Leary, 18 Hun 284; Sheldon *v.* Van Slyke, 16 Barb. 26.

North Carolina.— Holliday *v.* McMillan, 83 N. C. 270; Roberts *v.* Roberts, 82 N. C. 29; Yates *v.* Yates, 76 N. C. 142; Kirby *v.* Masten, 70 N. C. 540.

Pennsylvania.— Duffey *v.* Bellefonte Presb. Congregation, 48 Pa. St. 46; Sample *v.* Robb, 16 Pa. St. 305; Crawford *v.* Ritter, 1 Pennyp. 29.

South Carolina.— Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551.

Tennessee.— Phœnix F. & M. Ins. Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270; Carnahan *v.* Wood, 2 Swan 500; Marley *v.* Rodgers, 5 Yerg. 217.

Texas.— Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370; Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339; Gunn *v.* Wynne, (Civ. App. 1897) 43 S. W. 290; Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

Vermont.— Bennett *v.* Camp, 54 Vt. 36.

West Virginia.—High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

Wisconsin.— Lamoreux *v.* Huntley, 68 Wis. 24, 31 N. W. 331; Roebke *v.* Andrews, 26 Wis. 311.

United States.— Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920; Ward *v.* Cochran, 71 Fed. 127, 18 C. C. A. 1; Holmead *v.* Chesapeake, etc., Canal Co., 12 Fed. Cas. No. 6,626, 1 Hayw. & H. 77.

See 20 Cent. Dig. tit. "Evidence," § 1108 *et seq.*

Use of an easement claimed to be adverse may be proved by declarations of persons in possession to have been merely permissive. Wisdom *v.* Reese, 110 Ala. 418, 18 So. 13.

18. Rowley *v.* Hughes, 40 Ill. 316; Hardisty *v.* Glenn, 32 Ill. 62; Stephens *v.* McCloy, 36 Iowa 659; Davis *v.* Campbell, 23 N. C. 482; Hood *v.* Hood, 2 Grant (Pa.) 229; Miles *v.* Miles, 8 Watts & S. (Pa.) 135; Bennett *v.* Hethington, 16 Serg. & R. (Pa.) 193.

Res gestæ.— Such declarations have been treated as coming within the rule regulating declarations, part of the *res gestæ*. For example it has been said that declarations by a defendant in ejectment relative to the fact and objects of his taking possession are only competent because and when they are contemporaneous with the act itself, and so immediately connected with it as to illustrate its true character with reasonable certainty. Hood *v.* Hood, 2 Grant (Pa.) 229.

The statements themselves rather than the understanding of others or the conclusion of the witness alone are admissible. Hale *v.* Silloway, 1 Allen (Mass.) 21.

19. *Alabama.*— Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 339; Humes *v.* O'Bryan, 74 Ala. 64; McLemore *v.* Pinkston, 31 Ala. 266, 68 Am. Dec. 167.

Colorado.— Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792.

Connecticut.— Sears *v.* Hayt, 37 Conn. 406; Avery *v.* Clemons, 18 Conn. 306, 46 Am. Dec. 323.

Georgia.— Hendricks *v.* McDaniel, 80 Ga. 102, 5 S. E. 194.

Indiana.— Shirts *v.* Irons, 37 Ind. 98.

Iowa.— Pond *v.* Okey, 70 Iowa 244, 30 N. W. 500.

Massachusetts.— Morrill *v.* Titcomb, 8 Allen 100; McGough *v.* Wellington, 4 Allen 502.

Missouri.— Kansas City, etc., R. Co. *v.* Smith, 156 Mo. 608, 57 S. W. 555; Turner *v.* Belden, 9 Mo. 797; Bagnell *v.* Sweet Springs Chemical Bank, 76 Mo. App. 121; Sutton *v.* Casselleggi, 5 Mo. App. 111.

New Hampshire.— Smith *v.* Powers, 15 N. H. 546.

New York.— Skinner *v.* Odenbach, 85 Hun 595, 33 N. Y. Suppl. 282.

North Carolina.— Roberts *v.* Roberts, 82 N. C. 29; Swindell *v.* Warden, 52 N. C. 575.

Ohio.— Cheeseman *v.* Kyle, 15 Ohio St. 15.

Oregon.— Besser *v.* Joyce, 9 Oreg. 310.

Texas.— Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339; Mooring *v.* McBride, 62 Tex. 309.

United States.— Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920.

Canada.— Doe *v.* Murray, 5 N. Brunsw. 335.

See 20 Cent. Dig. tit. "Evidence," § 1111 *et seq.*

That the declarant cannot testify does not affect the admissibility of the fact that he has made a particular statement. The only credibility relied on is that of the reporting witness. State *v.* Emory, 51 N. C. 133.

declarant's possession[20] or title,[21] either in favor of the declarant,[22] his privies,[23] or representatives,[24] although they be made when the declarant is *in articulo mortis*,[25] or are offered in evidence after his decease,[26] as to the facts asserted the declarations are hearsay.[27]

(II) *Possession Essential.* The declarations are competent only when made

Consequently title by prescription cannot be proved by the existence of a reputation that the property belongs to the claimant. Howland *v.* Crocker, 7 Allen (Mass.) 153. *Contra,* Davis *v.* Butterbach, 2 Yeates (Pa.) 211. But the fact may have a bearing on the question whether a user was open. Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

20. Ray *v.* Jackson, 90 Ala. 513, 7 So. 747; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Dothard *v.* Denson, 72 Ala. 541; Hannibal, etc., R. Co. *v.* Clark, 68 Mo. 371; Collins *v.* Lynch, 167 Pa. St. 635, 31 Atl. 921; Feig *v.* Meyers, 102 Pa. St. 10.

Narrative account of past transactions, even when made during a present possession, is not as a rule admissible. Allen *v.* Prater, 30 Ala. 458; Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773; Collins *v.* Lynch, 167 Pa. St. 635, 31 Atl. 921; Hood *v.* Hood, 2 Grant (Pa.) 229; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113. In forcible detainer proceedings, declarations of tenants whom defendant succeeded as to the manner in which they entered and held, made while they were in possession, but not when they entered, are not competent in favor of defendant. Brubaker *v.* Poage, 1 T. B. Mon. (Ky.) 123. Declarations of one in possession of land are not admissible to show that he paid for it. Feig *v.* Meyers, 102 Pa. St. 10.

21. Doe *v.* Clayton, 81 Ala. 391, 2 So. 24; Vincent *v.* State, 74 Ala. 274; Dothard *v.* Denson, 72 Ala. 541; Carter *v.* Feland, 17 Mo. 383; Feig *v.* Meyers, 102 Pa. St. 10; Hood *v.* Hood, 2 Grant (Pa.) 229; Roebke *v.* Andrews, 26 Wis. 311.

Various inadmissible declarations.— Declarations of claim cannot properly be used as evidence of the existence of a record title. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536. The tenant's opinion of the validity of the title under which he claims (Smith *v.* Martin, 17 Conn. 399; Crane *v.* Marshall, 16 Me. 27, 33 Am. Dec. 631; Morgan *v.* Larned, 10 Metc. (Mass.) 50; Watson *v.* Bissell, 27 Mo. 220; Carter *v.* Feland, 17 Mo. 383; State *v.* Groschke, 16 Mo. App. 557; Roberts *v.* Roberts, 82 N. C. 29; Low *v.* Schaffer, 24 Oreg. 239, 33 Pac. 678; Colt *v.* Selden, 5 Watts (Pa.) 525; McDow *v.* Rabb, 56 Tex. 154), its nature (Wardlaw *v.* Hammond, 9 Rich. (S. C.) 454), or territorial extent (Bynum *v.* Thompson, 25 N. C. 578), his declarations as to changes in the title of those for whom he holds (Bell *v.* Adams, 81 N. C. 118), or as to the nature of an opposing claim (Sharp *v.* Johnson, 22 Ark. 79; Colt *v.* Selden, 5 Watts (Pa.) 525), or as to the adverse nature of his own possession (Crane *v.* Marshall, 16 Me. 27, 33 Am. Dec. 631; Alden *v.* Gilmore, 13 Me. 178; Bynum *v.* Thompson, 25 N. C. 578; McDow *v.* Rabb, 56 Tex. 154), are inadmissible, as self-serving hearsay.

22. McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130; Smith *v.* Martin, 17 Conn. 399.

23. *Connecticut.*— Smith *v.* Martin, 17 Conn. 399.

Massachusetts.— Osgood *v.* Coates, 1 Allen 77.

Missouri.— State *v.* Groschke, 16 Mo. App. 557.

New Hampshire.— Smith *v.* Powers, 15 N. H. 546.

New York.— Jackson *v.* Vredenbergh, 1 Johns. 159.

Pennsylvania.—Hood *v.* Hood, 2 Grant 229.

Texas.— Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510.

24. Holmes *v.* Sawtelle, 53 Me. 179; Cheeseman *v.* Kyle, 15 Ohio St. 15; Curtis *v.* Wilson, 2 Tex. Civ. App. 646, 21 S. W. 787.

25. Jackson *v.* Vredenburgh, 1 Johns. (N. Y.) 159.

26. Watson *v.* Bissell, 27 Mo. 220; Smith *v.* Powers, 15 N. H. 546; McSween *v.* McCown, 23 S. C. 342.

27. Saugatuck Cong. Soc. *v.* East Saugatuck School-Dist., 53 Conn. 478, 2 Atl. 751; Pleasanton *v.* Simmons, 2 Pennew. (Del.) 477, 47 Atl. 697; Jaffray *v.* Brown, 91 Ga. 57, 16 S. E. 223; Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895; Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 658. See *infra,* IX.

It is within the discretion of the court to reject declarations not limited to indicating the claim under which or the intention with which possession is being held, but involving proof of other facts as to which they are merely hearsay. Sharp *v.* Johnson, 22 Ark. 79; Wickliffe *v.* Ensor, 9 B. Mon. (Ky.) 253.

"Principle of the res gestæ."— Certain courts show an inclination to treat declarations indicating the existence of a particular claim as relevant only when the declarations would be evidence of the facts asserted; that is, when part of some fact in itself relevant. It has been held, following the analogy of declarations as evidence of facts, that in cases of statements regarding boundaries that the declaration must be made while the declarant is in the act of establishing or pointing out the bounds (Noyes *v.* Ward, 19 Conn. 250) and while on the land itself (Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854, 23 Ky. L. Rep. 238; Long *v.* Colton, 116 Mass. 414; Bartlett *v.* Emerson, 7 Gray (Mass.) 174; Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Bender *v.* Pitzer, 27 Pa. St. 333; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113.

while the declarant is in actual[28] or constructive[29] possession of the premises;[30] although it is not necessary that this possession should be exclusive, or that the declarant should be on the land while making his statement.[31] The fact of possession must be shown by evidence apart from the declarations themselves,[32] or the admissions of the real owner.[33] Since declarations of claim therefore accompany the fact of possession, they are, for reasons hereinbefore referred to,[34] frequently spoken of as "part of the *res gestæ*";[35] and it has been said to be under the same rule that narrative declarations as to the existence of past events,[36] or

28. *Alabama.*— Gillespie *v.* Burleson, 28 Ala. 551; Rowan *v.* Hutchisson, 27 Ala. 328.
California.— Sneed *v.* Osborn, 25 Cal. 619; Ellis *v.* Janes, 10 Cal. 456.
Connecticut.— Comins *v.* Comins, 21 Conn. 413.
Florida.— Long *v.* State, 44 Fla. 134, 32 So. 870.
Georgia.— Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068.
Illinois.—Abend *v.* Mueller, 11 Ill. App. 257.
Kentucky.— Wickliffe *v.* Ensor, 9 B. Mon. 253.
New Hampshire.— Spence *v.* Smith, 18 N. H. 587.
New York.— McDuffie *v.* Clark, 39 Hun 166; Jackson *v.* Anderson, 4 Wend. 474.
North Carolina.— Ray *v.* Pearce, 84 N. C. 485.
South Carolina.— Gilchrist *v.* Martin, 1 Bailey Eq. 492.
Tennessee.—Alexander *v.* Jennings, 10 Lea 419.
Texas.—Lochausen *v.* Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513.
Virginia.— Garnett *v.* Sam, 5 Munf. 542.
West Virginia.— High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.
Wisconsin.— Roebke *v.* Andrews, 26 Wis. 311.
See 20 Cent. Dig. tit. "Evidence," § 1111 *et seq.*

29. Abeel *v.* Van Gelder, 36 N. Y. 513.

30. Remy *v.* Lilly, 22 Ind. App. 109, 53 N. E. 387; Doe *v.* Jauncey, 8 C. & P. 99, 34 E. C. L. 631.

31. Abeel *v.* Van Gelder, 36 N. Y. 513; Swettenham *v.* Leary, 18 Hun (N. Y.) 284.
Time.— It is not material whether the declarations are made before or after the expiration of the statutory period of limitation. Cannon *v.* Stockmon, 36 Cal. 535, 93 Am. Dec. 205.

32. *Alabama.*— Thomas *v.* Degraffenreid, 17 Ala. 602.
Arkansas.— Sharp *v.* Johnson, 22 Ark. 79.
Georgia.— Jaffray *v.* Brown, 91 Ga. 57, 16 S. E. 223; Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912.
Massachusetts.— Niles *v.* Patch, 13 Gray 254.
Minnesota.— Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602, 87 Am. St. Rep. 351; Rollofson *v.* Nash, 75 Minn. 237, 77 N. W. 954.
Missouri.— McCune *v.* McCune, 29 Mo. 117.
Tennessee.— Stranahan *v.* Terry, 9 Lea 560.
See 20 Cent. Dig. tit. "Evidence," § 1108 *et seq.*

33. McDuffie *v.* Clark, 39 Hun (N. Y.) 166; Jackson *v.* Anderson, 4 Wend. (N. Y.) 474; Ray *v.* Pearce, 84 N. C. 485. But see Shrader *v.* Bonker, 65 Barb. (N. Y.) 608.

34. See *supra*, VIII, A, 2.

35. *Alabama.*— Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483; Daffron *v.* Crump, 69 Ala. 77.
Arkansas.— Yarbrough *v.* Arnold, 20 Ark. 592.
California.— Ellis *v.* Janes, 10 Cal. 456.
Colorado.— Doane *v.* Glenn, 1 Colo. 495.
Connecticut.— Saugatuck Cong. Soc. *v.* East Saugatuck School-Dist., 53 Conn. 478, 2 Atl. 751; Comins *v.* Comins, 21 Conn. 413.
Georgia.— Fraser *v.* State, 112 Ga. 13, 37 S. E. 114; Brown *v.* Cantrell, 62 Ga. 257; Dawson *v.* Callaway, 18 Ga. 573.
Illinois.—Amick *v.* Young, 69 Ill. 542.
Indiana.— Gaar, etc., Co. *v.* Shaffer, 139 Ind. 191, 38 N. E. 811; Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784.
Iowa.— Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Stephens *v.* Williams, 46 Iowa 540.
Kansas.—Reiley *v.* Haynes, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737; Stone *v.* Bird, 16 Kan. 488; State *v.* Gurnee, 14 Kan. 111.
Minnesota.— Elwood *v.* Saterlie, 68 Minn. 173, 71 N. W. 13.
Mississippi.— McMullen *v.* Mayo, 8 Sm. & M. 298.
Nevada.— Rollins *v.* Strout, 6 Nev. 150.
New York.— Waring *v.* Warren, 1 Johns. 340.
Oregon.— Low *v.* Schaffer, 24 Oreg. 239, 33 Pac. 678.
Pennsylvania.— Brolaskey *v.* McClain, 61 Pa. St. 146.
Tennessee.—Alexander *v.* Jennings, 10 Lea 419.
Wisconsin.— Roebke *v.* Andrews, 26 Wis. 311.
Statements as to independent facts.— Declarations of a party in possession are admissible as part of the *res gestæ* to prove the character of his possession, as that he claims the property as his own, or holds it in subordination to the claim of another, but not to show that he had not given it to a third person, or that what he said about such gift was in jest, or that he only loaned it. Nelson *v.* Iverson, 17 Ala. 216.

36. Comins *v.* Comins, 21 Conn. 413; Broughan *v.* Broughan, (Kan. App. 1900) 61 Pac. 874; Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153.

statements of intention as to the future,[37] are incompetent and inadmissible in evidence.[38]

(III) *Statements by Tenants or Holders.* While possession is necessary for relevancy of a declaration as to claim, it is not in all instances sufficient. Whenever the rules of the substantive law of real property require, in addition to possession by the declarant, that facts should exist which amount to an ouster, evidence of declarations as to claim are incompetent, in the absence of proof of these additional facts. Thus, where the declarant in possession is a tenant holding under a lease,[39] or by possession,[40] or is a tenant by the curtesy,[41] or in dower,[42] or is a cotenant,[43] or where his claim is that of a mortgagee,[44] or other holder of an equitable title in possession, since his possession may well be under his actual rights and does not in itself put the owner upon an inquiry as to the *animus* with which it is being held, the declaration of adverse claim is not relevant, unless shown to have been brought to the attention of the owner,[45] or unless facts are proved from which the jury might reasonably infer the existence of an ouster by the tenant. But the statements of a tenant to the effect that he is a tenant of real[46] or personal[47] property, and as to who is the particular person under whom he claims to hold such real estate,[48] or personal property,[49] and even as to what lands are embraced in the holding,[50] are competent circumstantial evidence, in favor of the person named as owner, of the existence of a relevant fact.[51]

b. Real Property — (I) *In General.* In case of real estate declarations by

37. Comins *v.* Comins, 21 Conn. 413.

38. As stated substantially *supra*, VIII, A, 2, this is overworking a phrase which is needed in its proper connection of indicating a definite exception to the hearsay rule, where an equivalent for the sanction of an oath has been found in the circumstance that the declaration is a necessary part of some fact relevant in itself. As the hearsay rule operates merely upon statements which are offered as evidence of the facts asserted, no exception is presented where a declaration is independently relevant. There is no distinction between verbal and other acts in such a connection. The fact of possession in these cases is complete in itself. To establish prescription, however, another element — the existence of a particular *animus*, for a definite time — is necessary. This *animus* may be shown circumstantially by any relevant acts, including declarations. See the cases above cited.

39. *Alabama.*— Butler *v.* Butler, 133 Ala. 377, 32 So. 579; Jones *v.* Pelham, 84 Ala. 208, 4 So. 22.

Georgia.— Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549.

Maine.— Mann *v.* Edson, 39 Me. 25; Russell *v.* Clark, 38 Me. 332.

Michigan.— Hogsett *v.* Ellis, 17 Mich. 351.

Missouri.— Salmons *v.* Davis, 29 Mo. 176.

40. Crawford *v.* Crawford, 60 Kan. 126, 55 Pac. 842. See Ward *v.* Ward, 37 Mich. 253.

41. Morgan *v.* Larned, 10 Metc. (Mass.) 50.

42. Salmons *v.* Davis, 29 Mo. 176.

43. Harral *v.* Wright, 57 Ga. 484; Sewall *v.* Sewall, 8 Me. 194.

44. Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895.

45. *Alabama.*— Butler *v.* Butler, 133 Ala. 377, 32 So. 579; Jones *v.* Pelham, 84 Ala. 208, 4 So. 22.

Georgia.— Harral *v.* Wright, 57 Ga. 484; Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549. See also Whelchel *v.* Gainesville, etc., Electric R. Co., 116 Ga. 431, 42 S. E. 776.

Massachusetts.— Morgan *v.* Larned, 10 Metc. 50.

Michigan.— Hogsett *v.* Ellis, 17 Mich. 351.

Canada.— Earnshaw *v.* Tomlinson, 26 U. C. Q. B. 610.

46. Doe *v.* Rickarby, 5 Esp. 4.

47. King *v.* Frost, 28 Minn. 417, 10 N. W. 423.

48. *Alabama.*— Beasley *v.* Howell, 117 Ala. 499, 22 So. 989.

Maryland.— Webster *v.* Saunders, 4 Harr. & J. 287.

Massachusetts.— Marcy *v.* Stone, 8 Cush. 4, 54 Am. Dec. 736.

Minnesota.— Elwood *v.* Saterlie, 68 Minn. 173, 71 N. W. 13.

Missouri.—Bagnell *v.* Sweet Springs Chemical Bank, 76 Mo. App. 121.

New Hampshire.— South Hampton *v.* Fowler, 54 N. H. 197.

Texas.— Wallace *v.* Wilcox, 27 Tex. 60.

England.— De Bode's Case, 8 Q. B. 208, 55 E. C. L. 208; Doe *v.* Jauncey, 8 C. & P. 99, 34 E. C. L. 631; Peaceable *v.* Watson, 4 Taunt. 16, 13 Rev. Rep. 552; Holloway *v.* Rakes [*cited* in Davies *v.* Pierce, 2 T. R. 53, 55, 1 Rev. Rep. 419].

49. Barnes *v.* Mobley, 21 Ala. 232; Rosenberg *v.* Burnstein, 60 Minn. 18, 61 N. W. 684; Bradley *v.* Spofford, 23 N. H. 444, 55 Am. Dec. 205; Woods *v.* Blodgett, 18 N. H. 249.

50. Sheaffer *v.* Eakman, 56 Pa. St. 144; Davies *v.* Pierce, 2 T. R. 53, 1 Rev. Rep. 419.

51. Davies *v.* Pierce, 2 T. R. 53, 1 Rev. Rep. 419.

one in possession of land are competent, where his user is claimed to be adverse or a title is said to have been gained by prescription, to show that the user[52] or possession was adverse on the part of the declarant;[53] that the person to be affected by the user or possession knew of its nature;[54] to determine its extent territorially[55] and the source of the title relied on,[56] so far as that fact may have legitimate incidental bearing on the good faith and nature of the claim[57] or its extent;[58] and in general to show the *animus* with which possession is held; for

52. Sears *v.* Hayt, 37 Conn. 406; Bennison *v.* Cartwright, 5 B. & S. 1, 117 E. C. L. 1.

53. *Alabama.*— Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Doe *v.* Clayton, 81 Ala. 391, 2 So. 24; Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281; Dothard *v.* Denson, 72 Ala. 541.

California.— Stockton Sav. Bank *v.* Staples, 98 Cal. 189, 32 Pac. 936.

Connecticut.— Comins *v.* Comins, 21 Conn. 413.

Florida.—Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Georgia.— Ogden *v.* Dodge County, 97 Ga. 461, 25 S. E. 321; Walker *v.* Hughes, 90 Ga. 92, 15 S. E. 912; Wood *v.* Crawford, 75 Ga. 733; Huggins *v.* Huggins, 71 Ga. 66; Clements *v.* Wheeler, 62 Ga. 53.

Illinois.— Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367; Fyffe *v.* Fyffe, 106 Ill. 646; Amick *v.* Young, 69 Ill. 542; Abend *v.* Mueller, 11 Ill. App. 257.

Iowa.— Dougherty *v.* McManus, 36 Iowa 657.

Kentucky.— Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854, 23 Ky. L. Rep. 238.

Maryland.— New Windsor *v.* Stockdale, 95 Md. 196, 52 Atl. 596.

Massachusetts.— O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580; Kingsford *v.* Hood, 105 Mass. 495.

Michigan.— Youngs *v.* Cunningham, 57 Mich. 153, 23 N. W. 626.

Minnesota.— Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248.

Missouri.— Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517; Mississippi County *v.* Vowels, 101 Mo. 225, 14 S. W. 282. See also Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1029.

New Hampshire.— Smith *v.* Putnam, 62 N. H. 369; Hunt *v.* Haven, 56 N. H. 87.

New Jersey.— Lindsley *v.* McGrath, 62 N. J. Eq. 436, 50 Atl. 236.

New York.— Morss *v.* Salisbury, 48 N. Y. 636 [*affirmed* in 35 How. Pr. 90]; Edmonston *v.* Edmonston, 13 Hun 133; Jackson *v.* Vredenburgh, 1 Johns. 159. See also Kellum *v.* Mission of Immaculate Virgin, 82 N. Y. App. Div. 523, 81 N. Y. Suppl. 603.

North Carolina.— Bunch *v.* Bridgers, 101 N. C. 58, 7 S. E. 584; Phipps *v.* Pierce, 94 N. C. 514; Yates *v.* Yates, 76 N. C. 142. See Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

Pennsylvania.— Kennedy *v.* Wible, (1887) 11 Atl. 98; Sheaffer *v.* Eakman, 56 Pa. St. 144; Potts *v.* Everhart, 26 Pa. St. 493; Sample *v.* Robb, 16 Pa. St. 305; Crawford *v.* Ritter, 1 Pennyp. 29.

Tennessee.—Carnahan *v.* Wood, 2 Swan 500.

Texas.— Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370; Lochausen *v.* Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513; Curtis *v.* Wilson, 2 Tex. Civ. App. 646, 21 S. W. 787.

Vermont.— Bennett *v.* Camp, 54 Vt. 36.

West Virginia.— High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

Wisconsin.— Lamoreux *v.* Meyers, 68 Wis. 34, 31 N. W. 331; Roebke *v.* Andrews, 26 Wis. 311.

United States.— Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920; Ward *v.* Cochran, 71 Fed. 127, 18 C. C. A. 1.

See 20 Cent. Dig. tit. "Evidence," § 1111 *et seq.*

54. Dodge *v.* Stacy, 39 Vt. 558.

55. *Connecticut.*— Reading *v.* Weston, 7 Conn. 143, 18 Am. Dec. 89.

Kentucky.— Smith *v.* Morrow, 7 T. B. Mon. 234.

Michigan.— Bower *v.* Earl, 18 Mich. 367.

New York.—Donahue *v.* Case, 61 N. Y. 631; Skinner *v.* Odenbach, 85 Hun 595, 33 N. Y. Suppl. 282.

South Carolina.— Forrest *v.* Trammell, 1 Bailey 77.

See *infra*, VIII, B, 3, b, (II).

56. *Alabama.*— Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281, parol grant.

Connecticut.— Comins *v.* Comins, 21 Conn. 413, parol gift.

Kentucky.— Com. *v.* Fletcher, 6 Bush 171.

Missouri.— Mississippi County *v.* Vowles, 101 Mo. 225, 14 S. W. 282, purchase.

New Hampshire.— Blake *v.* White, 13 N. H. 267.

New York.— Edmonston *v.* Edmonston, 13 Hun 133 (parol gift); Corbin *v.* Jackson, 14 Wend. 619, 28 Am. Dec. 550 (power of attorney); Jackson *v.* Van Dusen, 5 Johns. 144, 4 Am. Dec. 330 (ancient will).

North Carolina.— Foust *v.* Trice, 53 N. C. 290.

Pennsylvania.—Sheaffer *v.* Eakman, 56 Pa. St. 144.

South Carolina.— Smythe *v.* Tolbert, 22 S. C. 133, common source.

Texas.— Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370 (descent); Wells *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419 (lost deed).

West Virginia.— Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 253.

See 20 Cent. Dig. tit. "Evidence," § 1111 *et seq.*

57. Pomeroy *v.* Bailey, 43 N. H. 118.

58. Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824; Smith *v.* Heyser, 115 Ala. 455, 22 So. 149.

example, to negative an intent to abandon the ownership.[59] It is not ground for rejecting the declarations that they are self-serving,[60] if they are made in apparent good faith; and the benefit of them in such case inures not only to the declarant, but to those in privity with him,[61] including creditors,[62] or his representatives.[63]

(11) *Declarations as to Private Boundaries.* While a declaration of one in actual [64] possession of premises as to the line of his boundary is not evidence that such is in fact the true line, it is primary evidence of the extent of his claim in that particular, including the position of landmarks.[65] An anomalous rule as to declarations concerning private boundaries, said to be based upon the "principle of the *res gestæ*," but presenting certain features of both the rule under consideration and that regulating the admissibility of declarations of deceased third persons as to matters of private boundary,[66] is prevalent in some of the United States, to the effect that declarations of a deceased owner or tenant, in possession of lands and on the premises, made while in the act of pointing out his own boundaries [67] and their marks,[68] are competent evidence, even to contradict the effect of a deed,[69] not only of the declarant's claim as to the extent of his possession, but of the fact that the boundaries and landmarks are as stated;[70] pro-

59. Holliday *v.* McMillan, 83 N. C. 270.

60. Clealand *v.* Huey, 18 Ala. 343; Gary *v.* Terrill, 9 Ala. 206; Stone *v.* Bird, 16 Kan. 488; Wallace *v.* Wilcox, 27 Tex. 60; Bennett *v.* Camp, 54 Vt. 36.

61. *Indiana.*— Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345.

Minnesota.— Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248.

Missouri.— Mississippi County *v.* Vowles, 101 Mo. 225, 14 S. W. 282.

New York.— Morss *v.* Salisbury, 48 N. Y. 636 [*affirming* 35 How. Pr. 90]; Edmonston *v.* Edmonston, 13 Hun 133.

Tennessee.— Wheaton *v.* Weld, 9 Humphr. 773.

Texas.— Wells *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419.

62. Merrill *v.* Gould, 16 N. H. 347.

63. Fyffe *v.* Fyffe, 106 Ill. 646; Abend *v.* Mueller, 11 Ill. App. 257; Walls *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419.

64. Bynum *v.* Thompson, 25 N. C. 578; Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 657.

65. *California.*— Sneed *v.* Osborn, 25 Cal. 619.

Illinois.— Yates *v.* Shaw, 24 Ill. 367.

Kentucky.— Crutchlow *v.* Beatty, 23 S. W. 960, 15 Ky. L. Rep. 464.

Maryland.— Redding *v.* McCubbin, 1 Harr. & M. 368.

Massachusetts.—Niles *v.* Patch, 13 Gray 254.

Michigan.— Bower *v.* Earl, 18 Mich. 367.

New York.— Donahue *v.* Case, 61 N. Y. 631; Smith *v.* McNamara, 4 Lans. 169.

North Carolina.— See Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823.

Pennsylvania.— Dawson *v.* Mills, 32 Pa. St. 302.

Tennessee.— Davis *v.* Jones, 3 Head 603.

Vermont.— Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153; Kimball *v.* Ladd, 42 Vt. 747; Perkins *v.* Blood, 36 Vt. 273.

United States.— Shutte *v.* Thompson, 15 Wall. 151, 21 L. ed. 123.

See 20 Cent. Dig. tit. "Evidence," § 1121 *et seq.*

Declarations of deceased persons as to facts of public or private boundary should be distinguished from the statements under consideration. The former declarations furnish an inference that the facts are as they are stated to be. In other words they tend to establish the boundary. See *infra*, IX, E. The present declarations are mere circumstantial evidence of the *animus* and extent of a claim under which possession is being held. The circumstance that a rule of substantive law, regulating the effect of adverse possession, under certain conditions turns a claim of ownership into the fact of ownership does not obliterate the distinction. Davis *v.* Jones, 3 Head (Tenn.) 603; Shutte *v.* Thompson, 15 Wall. (U. S.) 151, 21 L. ed. 123.

66. See *infra*, IX, D, 4.

67. *Maine.*— Wilson *v.* Rowe, 93 Me. 205, 44 Atl. 615; Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842; Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

Massachusetts.— Wood *v.* Foster, 8 Allen 24, 85 Am. Dec. 681; Daggett *v.* Shaw, 5 Metc. 223.

New Hampshire.— Wood *v.* Fiske, 62 N. H. 173; Hobbs *v.* Cram, 22 N. H. 130.

New Jersey.— Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584.

North Carolina.— Price *v.* Price, 133 N. C. 494, 45 S. E. 855.

Texas.— Matthews *v.* Thatcher, (Civ. App. 1903) 76 S. W. 61.

United States.— Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113.

See 20 Cent. Dig. tit. "Evidence," § 1121 *et seq.*

68. Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842; Long *v.* Colton, 116 Mass. 414; Whitney *v.* Bacon, 9 Gray (Mass.) 206, 69 Am. Dec. 281; Flagg *v.* Mason, 8 Gray (Mass.) 556; Bender *v.* Pitzer, 27 Pa. St. 333; Hunnicutt *v.* Peyton, 102 U. S. 333, 363, 26 L. ed. 113. See Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823.

69. Hobbs *v.* Cram, 22 N. H. 130.

70. *Maine.*— Wilson *v.* Rowe, 93 Me. 205,

vided there is no interest to misrepresent;[71] and provided further that the declarant had adequate means of knowledge.[72] If the declarant has never occupied, as owner[73] or otherwise,[74] the premises to which his declaration relates, or has ceased to do so;[75] or if the declaration is made in any other connection than that of pointing out boundaries,[76] or if the declarant is not shown to be dead,[77] the declaration is hearsay. The declaration cannot be used to prove other facts; for example that a line of trees was a "known division line."[78]

(III) *Form of Declaration.* The declaration may be oral[79] or in writing.[80] For certain purposes reputation is competent evidence.[81]

c. Personal Property — (I) *In General.* Claim as to ownership or rights by one in possession of personal property[82] may be shown by relevant delarations,

44 Atl. 615; Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842.

Massachusetts.— Holmes *v.* Turners Falls Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; Bartlett *v.* Emerson, 7 Gray 174; Daggett *v.* Shaw, 5 Metc. 223.

New Hampshire.— Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

New Jersey.— Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584.

Vermont.— Child *v.* Kingsbury, 46 Vt. 47.

United States.— Hunnicutt *v.* Payton, 102 U. S. 333, 363, 26 L. ed. 113.

In Wisconsin it has been held that declarations accompanying the act of parting with the title and possession of land as to the boundaries thereof are not within the rule that declarations accompanying the act of possession, and explanatory thereof, if made in good faith, are admissible. Lampe *v.* Kennedy, 60 Wis. 110, 18 N. W. 730.

71. Holmes *v.* Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Smith *v.* Forrest, 49 N. H. 230; Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584; Child *v.* Kingsbury, 46 Vt. 47.

The declaration may well be self-serving. Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584. See also Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842. *Contra*, Hedrick *v.* Gobble, 63 N. C. 48; Evarts *v.* Young, 52 Vt. 329.

72. Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584; Hunnicutt *v.* Payton, 102 U. S. 333, 26 L. ed. 113.

73. Sullivan Granite Co. *v.* Gordon, 57 Me. 520; Long *v.* Colton, 116 Mass. 414; Bartlett *v.* Emerson, 7 Gray (Mass.) 174. See also Matthews *v.* Thatcher, (Tex. Civ. App. 1903) 76 S. W. 61.

Possession as agent.— The general rule that the declarations of a vendor in possession of land are competent for the purpose of explaining, qualifying, or characterizing his possession cannot be extended to the declarations of an agent in possession in disparagement of the title and boundaries of his principal. Perkins *v.* Brinkley, 133 N. C. 348, 45 S. E. 652, holding that where a husband is in possession of land as agent of his wife, his declarations to strangers in regard to the boundaries of her land are not admissible against her.

74. Bartlett *v.* Emerson, 7 Gray (Mass.) 174.

75. O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580; Whitney *v.* Bacon, 9 Gray (Mass.) 206, 69 Am. Dec. 281; Nutter *v.* Tucker, 67 N. H. 185, 30 Atl. 352, 68 Am. St. Rep. 647; Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333.

76. Peck *v.* Clark, 142 Mass. 436, 8 N. E. 335; Long *v.* Colton, 116 Mass. 414.

In Vermont a more general application of this so-called principle of *res gestæ* requires that a declaration of claim to be admissible should be made while the declarant is exercising some right or easement, and should tend to show that the declarant claimed to exercise the same in his own right. Kimball *v.* Ladd, 42 Vt. 747; Noble *v.* Sylvester, 42 Vt. 146; Perkins *v.* Blood, 36 Vt. 273.

77. O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580; Flagg *v.* Mason, 8 Gray (Mass.) 556; Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584. See also Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824.

78. Van Deusen *v.* Turner, 12 Pick. (Mass.) 532.

79. Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912; Nodle *v.* Hawthorne, 107 Iowa 380, 77 N. W. 1062.

80. Harral *v.* Wright, 57 Ga. 484; Nodle *v.* Hawthorne, 107 Iowa 380, 77 N. W. 1062. A tax return is a sufficient declaration. Smith *v.* Haire, 58 Ga. 446.

81. Sanscrainte *v.* Toronto, 87 Mich. 69, 49 N. W. 497; Kennedy *v.* Wible, (Pa. 1887) 11 Atl. 98; Davis *v.* Butterbach, 2 Yeates (Pa.) 211; Forrest *v.* Trammell, 1 Bailey (S. C.) 77; Kimball *v.* Ladd, 42 Vt. 747.

82. *Alabama.*—Nelson *v.* Howison, 122 Ala. 573, 25 So. 211; Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; Smith *v.* State, 103 Ala. 40, 16 So. 12, necklace.

Arkansas.— Yarbrough *v.* Arnold, 20 Ark. 592.

Colorado.— Doane *v.* Glenn, 1 Colo. 495.

Connecticut.— Avery *v.* Clemons, 18 Conn. 306, 46 Am. Dec. 323.

Florida.— Long *v.* State, 44 Fla. 134, 32 So. 870; McDougall *v.* Van Brunt, 6 Fla. 570.

Georgia.— Belcher *v.* Black, 68 Ga. 93, money.

Indiana.— Gaar, etc., Co. *v.* Shaffer, 139

although they were not made under the declarant's oath; and the rule applies to choses in action.[83] The declarant must have been in possession.[84]

(II) *Explanation of Possession.* Explanations of the possession of stolen goods are admissible, if made while the goods continue in the declarant's possession,[85] especially when made immediately on the declarant being found in possession and made aware that his right to possession is questioned.[86]

4. Constraint. Whether a person is acting under constraint may be shown by his relevant declarations.[87]

5. Indicating Nature of Phenomena. A logical and in some cases a necessary method of conveying to the tribunal an adequate impression of certain phenomena is by showing their effect on the mind of an observer. Exclamations and other relevant unsworn statements, therefore, are competent circumstantial evidence, where they fairly indicate the effect on the declarant of observed appearance,[88]

Ind. 191, 38 N. E. 811; Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345; McConnell *v.* Hannah, 96 Ind. 102; Remy *v.* Lilly, 22 Ind. App. 109, 53 N. E. 387.

Iowa.— Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Stephens *v.* Williams, 46 Iowa 540; Blake *v.* Graves, 18 Iowa 312.

Kansas.— Reiley *v.* Haynes, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737; Stone *v.* Bird, 16 Kan. 488; Wiggins *v.* Foster, 8 Kan. App. 579, 55 Pac. 350.

Massachusetts.— Boyden *v.* Moore, 11 Pick. 362.

Michigan.— Davis *v.* Zimmerman, 40 Mich. 24.

New Hampshire.— Bradley *v.* Spofford, 23 N. H. 444, 55 Am. Dec. 205.

South Carolina.—Adams *v.* Lathan, 14 Rich. Eq. 304.

Tennessee.—Brooks *v.* Lowenstein, 95 Tenn. 262, 35 S. W. 89; Carnahan *v.* Wood, 2 Swan 500; Wheaton *v.* Weld, 9 Humphr. 773.

Vermont.— Eddy *v.* Davis, 34 Vt. 209.

Wisconsin.— Roebke *v.* Andrews, 26 Wis. 311.

United States.—Evans *v.* Hettich, 7 Wheat. 453, 5 L. ed. 496, patent.

See 20 Cent. Dig. tit. "Evidence," § 1117 *et seq.*

Privity.— The declaration is incompetent if neither party to the action stands in privity to the declarant. Oberholtzer *v.* Hazen, 101 Iowa 340, 70 N. W. 207.

On a trial for larceny statements by defendant while in possession of the property explanatory of that possession are admissible. Allen *v.* State, 73 Ala. 23.

83. Harriman *v.* Hill, 14 Me. 127. See also New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867. But see Enneking *v.* Woebkenberg, 88 Minn. 259, 92 N. W. 932.

84. *Alabama.*— Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; Wright *v.* Smith, 66 Ala. 514.

Colorado.— Doane *v.* Glenn, 1 Colo. 495.

Connecticut.— Sears *v.* Hoyt, 37 Conn. 406.

Georgia.— Morgan *v.* Sims, 26 Ga. 283; Hansell *v.* Bryan, 19 Ga. 167.

New Hampshire.— Smith *v.* Putnam, 62 N. H. 369.

New York.— Howe *v.* Brundage, 1 Thomps. & C. 429.

Pennsylvania.— Woodwell *v.* Brown, 44 Pa. St. 121.

See 20 Cent. Dig. tit. "Evidence," § 1117 *et seq.*

85. Williams *v.* State, 105 Ala. 96, 17 So. 86; Moore *v.* State, (Tex. Cr. App. 1894) 24 S. W. 950; Childress *v.* State, 10 Tex. App. 698.

86. *Alabama.*— Allen *v.* State, 73 Ala. 23. *Compare* Maynard *v.* State, 46 Ala. 85; Taylor *v.* State, 42 Ala. 529; Spivey *v.* State, 26 Ala. 90.

Georgia.— Walker *v.* State, 28 Ga. 254.

Illinois.— Bennett *v.* People, 96 Ill. 602.

Kansas.— State *v.* Gillespie, 62 Kan. 469, 63 Pac. 742, 84 Am. St. Rep. 411.

New York.—Atwood's Case, 4 City Hall Rec. 91.

Oklahoma.— Mitchell *v.* Territory, 7 Okla. 527, 54 Pac. 782.

Texas.— Cameron *v.* State, 44 Tex. 652; Ward *v.* State, 41 Tex. 611; Perry *v.* State, 41 Tex. 483; Radford *v.* State, 33 Tex. Cr. 520, 27 S. W. 143; Eastland *v.* State, (Cr. App. 1900) 59 S. W. 267; Hampton *v.* State, 5 Tex. App. 463; Allen *v.* State, 4 Tex. App. 581.

United States.— Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 384.

England.— Reg. *v.* Abraham, 2 C. & K. 550, 61 E. C. L. 550.

Canada.— Reg. *v.* Ferguson, 16 N. Brunsw. 612.

See, generally, Larceny.

Self-serving statements, embodying an explanation, given after an interval for reflection, may not be sufficiently evidentiary to be relevant. Allen *v.* State, 73 Ala. 23; Cooper *v.* State, 63 Ala. 80; State *v.* Pettis, 63 Me. 124; State *v.* Slack, 1 Bailey (S. C.) 330; Powell *v.* State, 44 Tex. 63; Foster *v.* State, 4 Tex. App. 246; Williams *v.* State, 4 Tex. App. 5; Harmon *v.* State, 3 Tex. App. 51.

87. Bennett *v.* Smith, 21 Barb. (N. Y.) 439.

88. Chase *v.* Lowell, 151 Mass. 422, 22 N. E. 212; Du Bost *v.* Beresford, 2 Campb. 511.

Apparent imminence of peril may be proved in this way.

Georgia.—Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191.

conduct,[89] or sensations.[90] The effect of influence upon the mind of the declarant may be shown in the same way.[91]

6. Fraud and Good Faith. A relevant[92] statement may furnish circumstantial evidence of fraud[93] or good faith.[94] The fact which it is sought to prove by the statement must itself be relevant. When the clear legal effect of conceded facts is that a transaction is fraudulent, the actual intention of a party is immaterial, and evidence of it is accordingly rejected.[95]

7. Identification. A statement, although it may not be otherwise competent, may be relevant for the purpose of identifying a date,[96] or to identify a

Illinois.— Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

Indiana.— Baker *v.* Gausin, 76 Ind. 317, 321, 322.

Kentucky.— Stroud *v.* Com., 19 S. W. 976, 14 Ky. L. Rep. 179.

Missouri.— Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613.

North Carolina.— State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

89. *Georgia.*—Monday *v.* State, 32 Ga. 672, 72 Am. Dec. 314.

Michigan.— Hitchcock *v.* Burgett, 38 Mich. 501.

Missouri.— Stewart *v.* Severance, 43 Mo. 322, 97 Am. Dec. 392.

New York.— Hallahan *v.* New York, etc., R. Co., 102 N. Y. 194, 6 N. E. 287.

Pennsylvania.— Walter *v.* Gernant, 13 Pa. St. 515, 53 Am. Dec. 491.

Tennessee.— O'Rourke *v.* Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614.

Texas.— McAdoo *v.* State, (Cr. App. 1896) 35 S. W. 966; Ft. Worth, etc., R. Co. *v.* Stingle, 2 Tex. App. Civ. Cas. § 704.

The effect which the occurrence of an accident produces on the mind of one familiar with standards of due care has been deemed relevant and provable by the spontaneous exclamations of such a person. Omaha, etc., R. Co. *v.* Chollette, 41 Nebr. 578, 59 N. W. 921.

Expression of opinion on the part of a declarant as to the propriety of certain conduct is an entirely different matter and is not relevant. All that is competent is the effect on the mind of the observer of the appearances presented. The conclusion which his judgment reaches is not provable in this way. Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293; Seipp *v.* Dry-Dock, etc., R. Co., 45 N. Y. App. Div. 489, 61 N. Y. Suppl. 409; Carlisle *v.* State, (Tex. Cr. App. 1900) 56 S. W. 365; Eddy *v.* Lowry. (Tex. Civ. App. 1894) 24 S. W. 1076. So other declarations of opinion from observation are not admissible. Carr *v.* State, 76 Ga. 592; Beck *v.* State, 76 Ga. 452; Hughes *v.* Louisville, etc., R. Co., 104 Ky. 774, 48 S. W. 671, 20 Ky. L. Rep. 1029.

90. Kearney *v.* Farrell, 28 Conn. 317, 73 Am. Dec. 677, complaints of odors in an action for a nuisance.

91. Ball *v.* Kane, 1 Pennew. (Del.) 90, 39 Atl. 778; Sheehan *v.* Kearney, (Miss. 1896) 21 So. 41; Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

92. The only limit which can be fixed to the range of such statements is that of relevancy. Banfield *v.* Parker, 36 N. H. 353; Smith *v.* Betty, 11 Gratt. (Va.) 752.

93. *California.*— Davis *v.* Drew, 58 Cal. 152.

Georgia.— Pearson *v.* Forsyth, 61 Ga. 537.

Iowa.— Goldstein *v.* Morgan, 122 Iowa 27, 96 N. W. 897, fraud in execution of bill of sale.

Maine.— Smith *v.* Tarbox, 70 Me. 127.

Maryland.— Sanborn *v.* Lang, 41 Md. 107; Powles *v.* Dilley, 9 Gill 222.

Missouri.— Potter *v.* McDowell, 31 Mo. 62.

New Hampshire.— Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

New Jersey.— See Cowen *v.* Bloomberg, 69 N. J. L. 462, 55 Atl. 36.

North Carolina.— Black *v.* Baylees, 86 N. C. 527; Rollins *v.* Henry, 84 N. C. 569.

Pennsylvania.— York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

Vermont.— Spaulding *v.* Albin, 63 Vt. 148, 21 Atl. 530.

Wisconsin.— Gillet *v.* Phelps, 12 Wis. 392.

United States.— Klein *v.* Hoffheimer, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373; Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90.

94. *Colorado.*—Wilcoxen *v.* Morgan, 2 Colo. 473.

Indian Territory.— Dorrance *v.* McAlester, 1 Indian Terr. 473, 45 S. W. 141.

New York.— Tompkins County *v.* Bristol, 99 N. Y. 316, 1 N. E. 878; Vilas Nat. Bank *v.* Newton, 25 N. Y. App. Div. 62, 48 N. Y. Suppl. 1009; Crary *v.* Sprague, 12 Wend. 41, 27 Am. Dec. 110.

Oregon.— Robson *v.* Hamilton, 41 Oreg. 239, 69 Pac. 651; Bergman *v.* Twilight, 10 Oreg. 337.

Pennsylvania.— Kenyon *v.* Ashbridge, 35 Pa. St. 157.

Wisconsin.— Bates *v.* Ableman, 13 Wis. 644.

United States.— U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; Barreda *v.* Silsbee, 21 How. 146, 16 L. ed. 86.

A statement circumstantially tending to establish the existence of good faith may be relevant and admissible. Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705.

95. Gruber *v.* Boyles, 1 Brev. (S. C.) 266, 2 Am. Dec. 665.

96. *Alabama.*— Jordan *v.* Roney, 23 Ala. 758.

payment,[97] person,[98] place,[99] property, real[1] or personal,[2] or a transaction;[3] provided that no better or more conclusive evidence can be produced on the point,[4] and that the fact of identity is shown to be in issue or relevant to the issue.[5]

8. Knowledge — a. Statements by Person. The existence of knowledge[6] or its absence[7] may be shown by declarations of the person whose knowledge is of

Georgia.— Harris *v.* Central R. Co., 78 Ga. 525, 3 S. E. 355.

Michigan.— Grosvenor *v.* Ellis, 44 Mich. 452, 7 N. W. 59.

New Jersey.— Browning *v.* Skillman, 24 N. J. L. 351.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483; Westmore *v.* Sheffield, 56 Vt. 239; Hill *v.* North, 34 Vt. 604.

97. Mitchell *v.* Dall, 2 Harr. & G. (Md.) 159; Bewley *v.* Atkinson, 13 Ch. D. 283, 49 L. J. Ch. 153, 41 L. T. Rep. N. S. 603, 28 Wkly. Rep. 638.

98. *Connecticut.*— Loomis *v.* Smith, 17 Conn. 115.

New Hampshire.— Willis *v.* Quimby, 31 N. H. 485.

Ohio.— Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181.

Pennsylvania.— Winder *v.* Little, 1 Yeates 152.

Rhode Island.— State *v.* McAndrews, 15 R. I. 30, 23 Atl. 304.

South Carolina.— Horry *v.* Glover, 2 Hill Eq. 515.

Texas.— Morgan *v.* Butler, 23 Tex. Civ. App. 470, 56 S. W. 689; Schott *v.* Pellerim, (Civ. App. 1897) 43 S. W. 944; Cook *v.* Carroll Land, etc., Co., (Civ. App. 1897) 39 S. W. 1006; Nix *v.* Cole, (Civ. App. 1895) 29 S. W. 561; Carter *v.* State, 23 Tex. App. 508, 5 S. W. 128; McCall *v.* State, 14 Tex. App. 353.

United States.— J. S. Toppan Co. *v.* McLaughlin, 120 Fed. 705, holding correspondence admissible to show person on whose behalf a contract was made.

99. Fairfield *v.* Amherst, 57 N. H. 479.

1. *Louisiana.*— Patterson *v.* Behan, 12 La. 227.

Maine.— Simpson *v.* Blaisdell, 85 Me. 199, 27 Atl. 101, 35 Am. St. Rep. 348.

Maryland.— Mitchell *v.* Dall, 2 Harr. & G. 159.

Pennsylvania.— Russel *v.* Werntz, 24 Pa. St. 337; Rossiter's Appeal, 2 Pa. St. 371.

South Carolina.— Baynard *v.* Eddings, 2 Strobh. 374.

2. Patterson *v.* Behan, 12 La. 227; Pool *v.* Bridges, 4 Pick. (Mass.) 378; People *v.* Dowling, 84 N. Y. 478; Parrott *v.* Watts, 47 L. J. C. P. 79, 37 L. T. Rep. N. S. 755.

3. Earle *v.* Earle, 11 Allen (Mass.) 1; State *v.* Ward, 61 Vt. 153, 17 Atl. 483; Hill *v.* North, 34 Vt. 604.

4. Martin *v.* Atkinson, 7 Ga. 228, 50 Am. Dec. 403. It has even been required that the original declarant should be shown to be dead. Nehring *v.* McMurrian, (Tex. Civ. App. 1898) 46 S. W. 369.

5. Perry *v.* Smith, 22 Vt. 301.

6. *Alabama.*— Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684; Jones *v.* State, 103 Ala. 1, 15 So. 891; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; Bell *v.* Troy, 35 Ala. 184.

California.— Elledge *v.* National City, etc., R. Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290.

Connecticut.— Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521.

Georgia.— Sanders *v.* State, 113 Ga. 267, 38 S. E. 841; Jones *v.* State, 63 Ga. 395; Tumlin *v.* Crawford, 61 Ga. 128.

Kentucky.— McLeod *v.* Ginther, 80 Ky. 399.

Maine.— Robinson *v.* Sweet, 3 Me. 316.

Massachusetts.— Roberts *v.* Spencer, 123 Mass. 397; Com. *v.* Roberts, 108 Mass. 296.

Nebraska.— Seyfer *v.* Otoe County, 66 Nebr. 566, 92 N. W. 756.

New York.— Swift *v.* Massachusetts Mut. L. Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522; Chapman *v.* Erie R. Co., 55 N. Y. 579; Merrill *v.* Grinnell, 30 N. Y. 594; Lake Shore, etc., Southern R. Co. *v.* Erie County, 2 N. Y. St. 317.

Ohio.— Baird *v.* Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846; Corbett *v.* State, 5 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 79.

Pennsylvania.— Kreiter *v.* Bomberger, 82 Pa. St. 59, 22 Am. Rep. 750.

Tennessee.— Maxwell *v.* Hill, 89 Tenn. 584, 15 S. W. 253.

Texas.— Cortez *v.* State, 43 Tex. Cr. 375, 66 S. W. 453; Clay *v.* State, 40 Tex. Cr. 556, 51 S. W. 212; Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669.

Vermont.— State *v.* Marsh, 70 Vt. 288, 40 Atl. 836; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

Virginia.— Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

United States.— Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. 448, 10 L. ed. 535; Slavens *v.* Northern Pac. R. Co., 97 Fed. 255, 38 C. C. A. 151; Gibbs *v.* Johnson, 10 Fed. Cas. No. 5,384; Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,070, McAll. 186.

England.— Thomas *v.* Connell, 1 H. & H. 189, 7 L. J. Exch. 306, 4 M. & W. 267.

By "knowledge" in this connection, it is not necessarily implied that the knowledge is accurate. The fact to be proved is rather the mental state of a given person as to knowledge on a particular point; and the statement is equally admissible, if relevant, although shown to be false. Jones *v.* State, 103 Ala. 1, 15 So. 891, on a question whether defendant intended to shoot deceased, his declarations shortly before that the gun was not loaded is competent.

7. Taylor *v.* Crowninshield, 5 N. Y. Leg. Obs. 209.

importance, although made long before the time involved in the inquiry.[8] Statements indicating the possession of knowledge may be admissible, although made subsequent to the time at which the knowledge was important; provided the time at which the declaration was made is not too remote to be relevant.[9]

b. Statements to Person. Where knowledge of a particular fact is relevant,[10] it may be shown that an unsworn statement as to its existence was brought to the person's attention,[11] in the same way that any other relevant statement may be shown to have been made to him.[12] The statements may be direct and specific, as

8. Kidd *v.* American Pill, etc., Co., 91 Iowa 261, 59 N. W. 41.

9. Armitage *v.* Snowden, 41 Md. 119.

10. State *v.* Grote, 109 Mo. 345, 19 S. W. 93; State *v.* Estis, 70 Mo. 427; State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; Darling *v.* Klock, 165 N. Y. 623, 59 N. E. 1121; Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246.

11. *Alabama.*— Naugher *v.* State, 116 Ala. 463, 23 So. 26; Abbett *v.* Page, 92 Ala. 571, 9 So. 332; Jones *v.* Hatchett, 14 Ala. 743.

California.— Kneeland *v.* Wilson, 12 Cal. 241.

Colorado.— Denver, etc., Rapid Transit Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106.

Connecticut.— Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Ely *v.* Tweedy, 18 Conn. 458.

Georgia.— Chattanooga, etc., R. Co. *v.* Clowdis, 90 Ga. 258, 17 S. E. 88; Black *v.* Thornton, 31 Ga. 641.

Illinois.— Allen *v.* Millison, 72 Ill. 201; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

Indiana.— Pape *v.* Hartwig, 23 Ind. App. 333, 55 N. E. 271.

Maine.— Walker *v.* Thompson, 61 Me. 347.

Massachusetts.— Beach *v.* Bemis, 107 Mass. 498; Stiles *v.* Allen, 5 Allen 320.

Michigan.— Sleight *v.* Henning, 12 Mich. 371.

Minnesota.— Riggs *v.* Thorpe, 67 Minn. 217, 69 N. W. 891.

Missouri.— State *v.* Loebr, 93 Mo. 103, 5 S. W. 696; Conover *v.* Berdine, 69 Mo. 125, 33 Am. Rep. 496.

New Hampshire.— Sumner *v.* Dalton, 58 N. H. 295.

New York.— People *v.* Wood, 126 N. Y. 249, 27 N. E. 362; Cassidy *v.* Uhlmann, 54 N. Y. App. Div. 205, 66 N. Y. Suppl. 670; Seckel *v.* Frauenthal, 9 Bosw. 350; Goodrich *v.* People, 3 Park. Cr. 622.

Pennsylvania.— Huntzinger *v.* Jones, 60 Pa. St. 170.

Texas.— Hornberger *v.* Giddings, 31 Tex. Civ. App. 283, 71 S. W. 989; Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669; Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

Wisconsin.— Cadden *v.* American Steel Barge Co., 88 Wis. 409, 60 N. W. 800.

United States.— St. Louis, etc., R. Co. *v.* Greenthal, 77 Fed. 150, 23 C. C. A. 100; Young *v.* Mahoning County, 51 Fed. 585; Emma Silver Min. Co. *v.* Park, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411.

Official telegraphic reports of conductors and train despatchers as to the reckless running of an engineer are not hearsay evidence. Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520.

12. *Alabama.*— Parsons *v.* Boyd, 20 Ala. 112.

Maine.— Walker *v.* Thompson, 61 Me. 347.

Massachusetts.— Boston Woven Hose, etc., Co. *v.* Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781; Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

Michigan.— Robinson *v.* Worden, 33 Mich. 316.

Missouri.— St. Louis Nat. Bank *v.* Ross, 9 Mo. App. 399.

New York.— New York *v.* Exchange F. Ins. Co., 3 Abb. Dec. 261, 3 Keyes 436, 3 Transcr. App. 206, 34 How. Pr. 103.

Pennsylvania.— Wissler *v.* Hershey, 23 Pa. St. 333.

South Carolina.— Girardeau *v.* Southern Express Co., 48 S. C. 421, 26 S. E. 711.

Texas.— Davis *v.* Van Wie, (Civ. App. 1894) 30 S. W. 492.

Knowledge in the family.— Facts known to certain members of a family are not necessarily known to all; even to those standing in the relation of husband or wife to the person possessing knowledge. Oden *v.* Stubblefield, 4 Ala. 40. But proof of the wife's knowledge of a work of excavation on property owned by her jointly with her husband was held competent, as conducing with other circumstances to show knowledge on the part of her husband. Covington *v.* Geyler, 12 Ky. L. Rep. 466; Hart *v.* Newland, 10 N. C. 122.

General knowledge of a particular fact in a community (Crane *v.* Missouri Pac. R. Co., 87 Mo. 588; Benoist *v.* Darby, 12 Mo. 196), or newspaper (Roberts *v.* Spencer, 123 Mass. 397; Com. *v.* Robinson, 1 Gray (Mass.) 555) or other (Putnam *v.* Gunning, 162 Mass. 552, 39 N. E. 347) publication of the fact raises an inference that a person likely to have learned of the statement (Clark *v.* Ricker, 14 N. H. 44; Milbank *v.* Dennistoun, 10 Bosw. (N. Y.) 382; Gaskell *v.* Morris, 7 Watts & S. (Pa.) 32) did so learn. But it has been held that where it becomes necessary to prove that a party had knowledge of a particular fact, proof that such fact was "generally known" is not competent for the purpose. Tucker *v.* Constable, 16 Oreg. 407, 19 Pac. 13. Mere conversation among neighbors not in presence of the party to be affected with knowledge of it is not competent. Clark *v.* Ricker, 14 N. H. 44. And evidence of general knowledge in the community has

in case of advice,[13] information,[14] or instructions.[15] In like manner knowledge of a particular fact, when relevant, may be proved by evidence of notice[16]

been rejected in a criminal case. Tucker *v.* Constable, 16 Oreg. 407, 19 Pac. 13.

Relevancy required.— The evidence offered must in all cases have a logical tendency to establish the fact of knowledge. Briggs *v.* Briggs, 135 Mass. 306; Carpenter *v.* Leonard, 3 Allen (Mass.) 32; Dunbar *v.* Mulry, 8 Gray (Mass.) 163; Fenno *v.* Chapin, 27 Minn. 519, 8 N. W. 762; Finch *v.* Green, 16 Minn. 355; Woods *v.* Buffalo R. Co., 35 N. Y. App. Div. 203, 54 N. Y. Suppl. 735. In an action by a bank against the sureties of its cashier to recover for peculations, the bank's books are inadmissible to show its knowledge of them; for the mere fact that the books showed the cashier to be a defaulter does not show knowledge on the part of the bank itself. Bowne *v.* Mt. Holly Nat. Bank, 45 N. J. L. 360. Accordingly, where reputation is relied on as evidence of knowledge it must be shown to have been established in such places and to such an extent as to raise a reasonable inference that the party to be affected knew of it. Sowden *v.* Idaho Quartz Min. Co., 55 Cal. 443.

13. Fisher *v.* State, 77 Ind. 42; Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

14. *Alabama.*— Inman *v.* Schloss, 122 Ala. 461, 25 So. 739; Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Edy *v.* McCoy, 20 Ala. 403.

California.— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529; People *v.* Shea, 8 Cal. 538.

Connecticut.— Phelps *v.* Foot, 1 Conn. 387.

Florida.— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Georgia.— O'Connell *v.* State, 55 Ga. 296; Parsons *v.* State, 43 Ga. 197.

Illinois.— Merwin *v.* Arbuckle, 81 Ill. 501.

Indiana.— Jones *v.* State, 71 Ind. 66; Knowlton *v.* Clark, 25 Ind. 395.

Iowa.— State *v.* Gainor, 84 Iowa 209, 50 N. W. 947; Van Tuyl *v.* Quinton, 45 Iowa 459.

Kansas.— State *v.* Earnest, 56 Kan. 31, 42 Pac. 359.

Kentucky.— Werner *v.* Com., 80 Ky. 387; Johnson *v.* Com., 61 S. W. 1005, 22 Ky. L. Rep. 1885; Louisville, etc., Packet Co. *v.* Samuels, 59 S. W. 3, 22 Ky. L. Rep. 979; Com. *v.* Stout, 14 Ky. L. Rep. 576; Kearnes *v.* Caldwell, 7 Ky. L. Rep. 450.

Louisiana.— State *v.* West, 43 La. Ann. 1006, 10 So. 364; Sanders *v.* Huey, 4 La. Ann. 518.

Maine.— Thompson *v.* Thompson, 79 Me. 286, 9 Atl. 888.

Massachusetts.— Mange *v.* Holmes, 7 Allen 136; Com. *v.* Moulton, 4 Gray 39; Bacon *v.* Towne, 4 Cush. 217; Robinson *v.* Wadsworth, 8 Metc. 67.

Michigan.— People *v.* Palmer, 105 Mich. 568, 63 N. W. 656; Gordon *v.* Grand Rapids, etc., R. Co., 103 Mich. 379, 61 N. W. 549; McCreery *v.* Green, 38 Mich. 172.

Mississippi.— Penn *v.* State, 62 Miss. 450.

Missouri.— Spohn *v.* Missouri Pac. R. Co., 122 Mo. 1, 26 S. W. 663; Alexander *v.* Harrison, 38 Mo. 258, 90 Am. Dec. 431.

New Hampshire.— Carter *v.* Beals, 44 N. H. 408. See also Badger *v.* Story, 16 N. H. 168.

New York.— Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492; McNair *v.* U. S. National L. Ins. Co., 13 Hun 144; Robbins *v.* Richardson, 2 Bosw. 248; People *v.* De Graff, 6 N. Y. St. 412.

North Carolina.— Green *v.* Cawthorn, 15 N. C. 409.

Ohio.— Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052.

Pennsylvania.— Perry *v.* Jensen, 142 Pa. St. 125, 21 Atl. 866, 12 L. R. A. 393.

South Carolina.— Parris *v.* Jenkins, 2 Rich. 106.

South Dakota.— State *v.* Mulch, (1903) 96 N. W. 101.

Texas.— Reeves *v.* State, 34 Tex. Cr. 483, 31 S. W. 382; Miller *v.* State, 32 Tex. Cr. 319, 20 S. W. 1103.

Vermont.— Miller *v.* Wood, 44 Vt. 378.

Virginia.— O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

Wisconsin.— Hall *v.* Stevens, 89 Wis. 447, 62 N. W. 81; Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823; Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705.

United States.— Norwich, etc., Transp. Co. *v.* Flint, 13 Wall. 3, 20 L. ed. 556 [*affirming* 9 Fed. Cas. No. 4,874, 7 Blatchf. 536]; Farnsworth *v.* Nevada Co., 102 Fed. 578, 42 C. C. A. 509.

England.— *In re* Metropolitan Coal Consumers' Assoc., [1892] 3 Ch. 1, 61 L. J. Ch. 741, 66 L. T. Rep. N. S. 700.

Canada.— Deveber *v.* Roop, 16 N. Brunsw. 295.

Replies to inquiries may be relevant on the question as to whether suitable search has been made for a witness or the original of a document. Sanborn *v.* Cunningham, (Cal. 1893) 33 Pac. 894.

15. *Alabama.*— Ward *v.* Winston, 20 Ala. 167.

Florida.— Porter *v.* Ferguson, 4 Fla. 102.

Georgia.— Columbus, etc., R. Co. *v.* Kennedy, 78 Ga. 646, 3 S. E. 267.

Illinois.— Nelson *v.* Smith, 28 Ill. 495.

Iowa.— Welch *v.* Spies, 103 Iowa 389, 72 N. W. 548.

Massachusetts.— Corcoran *v.* Batchelder, 147 Mass. 541, 18 N. E. 420.

Michigan.— Bellows *v.* Crane Lumber Co., 129 Mich. 560, 89 N. W. 367; Ribble *v.* Starrat, 79 Mich. 204, 44 N. W. 594.

Mississippi.— McCleary *v.* Anthony, 54 Miss. 708.

Rhode Island.— Anthony *v.* Wheatons, 7 R. I. 490.

Texas.— Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699.

16. *Alabama.*— Louisville, etc., R. Co. *v.*

or representations,[17] and in criminal cases is frequently established by proof of threats;[18] or knowledge may be proved inferentially by a composite blending of unsworn statements in general notoriety[19] or reputation in the community of which the person is a member.[20] If not too remote to be relevant, declarations

Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Black *v.* Hightower, 30 Ala. 317; Stringfellow *v.* Mariott, 1 Ala. 573.

Arkansas.— Blagg *v.* Hunter, 15 Ark. 246.

California.— Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529; Malone *v.* Hawley, 46 Cal. 409; McKinney *v.* Smith, 21 Cal. 374.

Colorado.— Denver, etc., Rapid Transit Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106.

Georgia.— Kuglar *v.* Garner, 74 Ga. 765.

Louisiana.— Benton *v.* Roberts, 1 Rob. 101; Grayson *v.* Wooldridge, 2 La. 94.

Maine.— Palmer *v.* Penobscot Lumbering Assoc., 90 Me. 193, 38 Atl. 108.

Massachusetts.— Brady *v.* Norcross, 174 Mass. 442, 54 N. E. 874; Kilburn *v.* Bennett, 3 Metc. 199.

Oregon.— Ladd *v.* Hawkes, 41 Oreg. 247, 68 Pac. 422.

17. *Illinois.*— Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 33 Am. Rep. 628.

Iowa.— Hannawalt *v.* U. S. Equitable L. Assur. Soc., 102 Iowa 667, 72 N. W. 284.

Maine.— Shaw *v.* Emery, 42 Me. 59.

Maryland.— Frederick Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Massachusetts.— Baxter *v.* Abbott, 7 Gray 71.

New Hampshire.— Whitehouse *v.* Hansom, 42 N. H. 9.

New York.— Higby *v.* New York, etc., R. Co., 3 Bosw. 497, 7 Abb. Pr. 259; Jones *v.* Jones, 6 N. Y. St. 736.

North Carolina.— Ware *v.* Nesbit, 94 N. C. 664.

Pennsylvania.— Wanner *v.* Landis, 137 Pa. St. 61, 20 Atl. 950; Detwiller *v.* Graham, 17 Phila. 300.

Tennessee.— Mitchell *v.* Planters' Bank, 8 Humphr. 216.

Texas.— Austin, etc., R. Co. *v.* Duty, (Civ. App. 1894) 28 S. W. 463.

18. *Georgia.*— Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Indiana.— Wood *v.* State, 92 Ind. 269.

Kentucky.— Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167; Rapp *v.* Com., 14 B. Mon. 614.

Maine.— State *v.* Reed, 62 Me. 129.

Massachusetts.— Com. *v.* Wilson, 1 Gray 337.

Mississippi.— Gibson *v.* State, (1894) 16 So. 298.

Missouri.— State *v.* Evans, 65 Mo. 574; State *v.* Sloan, 47 Mo. 604.

Texas.— Gerick *v.* State, (Cr. App. 1898) 45 S. W. 717; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826.

United States.— Alexander *v.* U. S., 138 U. S. 353, 11 S. Ct. 350, 35 L. ed. 954.

See also CRIMINAL LAW, 12 Cyc. 70; and, generally, HOMICIDE.

19. Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393; Stallings *v.* State, 33 Ala. 425; Ward *v.* Herndon, 5 Port. (Ala.) 382; Chase *v.* Lowell, 151 Mass. 422, 24 N. E. 212; Browning *v.* Skillman, 24 N. J. L. 351; Adams *v.* State, 25 Ohio St. 584.

20. *Alabama.*— Hays *v.* State, 110 Ala. 60, 20 So. 322; Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105; Humes *v.* O'Bryan, 74 Ala. 64; Jones *v.* Hatchett, 14 Ala. 743; Ward *v.* Herndon, 5 Port. 382, solvency.

Florida.— Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Georgia.— Kuglar *v.* Garner, 74 Ga. 765.

Louisiana.— Brander *v.* Ferriday, 16 La. 296.

Maryland.— Brooks *v.* Thomas, 8 Md. 367; Bernard *v.* Torrance, 5 Gill & J. 383.

Massachusetts.—Monahan *v.* Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226; Whitcher *v.* Shattuck, 3 Allen 319; Dunbar *v.* Mulry, 8 Gray 163; Heywood *v.* Reed, 4 Gray 574 (solvency); Bartlett *v.* Decreet, 4 Gray 111; Lee *v.* Kilburn, 3 Gray 594.

Minnesota.— Hahn *v.* Penney, 62 Minn. 116, 63 N. W. 843.

Missouri.— Crane *v.* Missouri Pac. R. Co., 87 Mo. 588; Gordan *v.* Ritenour, 87 Mo. 54; Conover *v.* Berdine, 69 Mo. 125, 33 Am. Rep. 496 (solvency); Benoist *v.* Darby, 12 Mo. 196.

New Jersey.— Browning *v.* Skillman, 24 N. J. L. 351.

New York.— Hoffman *v.* New York Cent., etc., R. Co., 46 N. Y. Super. Ct. 526.

Ohio.— Roberts *v.* Briscoe, 44 Ohio St. 596, 10 N. E. 61.

Oregon.— Tucker *v.* Constable, 16 Oreg. 407, 19 Pac. 13.

Pennsylvania.— Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597 (solvency); Matter of Contested Election, 1 Brewst. 140; Pittfield *v.* Ewing, 6 Phila. 455.

Texas.— New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294; Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325; Gulf, etc., R. Co. *v.* Frost, (Civ. App. 1896) 34 S. W. 167; Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520 (solvency). See also Downtain *v.* Connellee, 2 Tex. Civ. App. 95, 21 S. W. 56.

Vermont.— Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273; Larkin *v.* Hapgood, 56 Vt. 597 (solvency); Stanton *v.* Simpson, 48 Vt. 628.

Washington.— Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

Wisconsin.— Cadden *v.* American Steel Barge Co., 88 Wis. 409, 60 N. W. 800.

United States.— Smith *v.* U. S., 161 U. S. 85, 16 S. Ct. 483, 40 L. ed. 626; Patrick *v.* Graham, 132 U. S. 627, 10 S. Ct. 194, 33 L. ed. 460.

Distinction supporting admissibility.— Existence of a fact cannot be proved by general reputation or notoriety; but when the exist-

offered for the purpose of showing knowledge may precede the happening of the principal event.[21]

9. Mental Conditions — a. In General. Statements by a person may constitute relevant evidence as to the condition of the declarant's mind.[22] As direct evidence of the fact asserted such declarations are incompetent.[23] The same is true of statements as to mental condition made by persons not called as witnesses;[24] and even where an intimate acquaintance with the person in question as in case of a father,[25] legal adviser,[26] or wife,[27] is shown to exist, their declarations are hearsay. On issues involving mental condition competent declarations may precede[28] or accompany[29] a principal event; and subsequent declarations are also admitted,[30] unless in the opinion of the court in the particular case the time is

ence of the fact has been shown such evidence is admissible to charge a person in the neighborhood with knowledge of it. Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393.

On an issue of self-defense in a prosecution for homicide reputation of the deceased as being a quarrelsome man is competent. Smith *v.* U. S., 161 U. S. 85, 16 S. Ct. 483, 40 L. ed. 626.

Insolvency or insanity.— In an action to recover money paid out by an insolvent, evidence of a common knowledge of his insolvency in the neighborhood is admissible to show that defendant must have had knowledge of that fact, since it is to be presumed that members of a community must know what is of common knowledge in such community. Larkin *v.* Hapgood, 56 Vt. 597. Absence of reputation prejudicial to solvency is relevant on the proposition that the person whose conduct is in question acted in ignorance of any financial embarrassment. Heywood *v.* Reed, 4 Gray (Mass.) 574; Bartlett *v.* Decreet, 4 Gray (Mass.) 111. But it has been held that evidence of general reputation of the insanity of a person in the neighborhood in which he resided is inadmissible to prove that a person was cognizant of that fact. Greenslade *v.* Dare, 20 Beav. 284.

Adverse user.— Reputation, in connection with proof of acts of ownership, is admissible on the issue of notice, to establish a private right by prescription. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Hodges *v.* Coleman, 76 Ala. 103; Russell *v.* Stocking, 8 Conn. 236; Kuglar *v.* Garner, 7 Ga. 765; Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325. See also Adverse Possession, 1 Cyc. 1148.

21. Davids *v.* People, 192 Ill. 176, 61 N. E. 537; Schwartz *v.* Berkshire L. Ins. Co., 91 Ill. App. 494.

22. *In re* Mullin, 110 Cal. 252, 42 Pac. 645; Mooney *v.* Olsen, 22 Kan. 69; Shailer *v.* Bumstead, 99 Mass. 112; Sargent *v.* Burton, 74 Vt. 24, 52 Atl. 72. "A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry, his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence." Mooney *v.* Olsen, 22 Kan. 69, 77, per Brewer, J. See also Thorn *v.* Cosand, 166 Ind. 566, 67 N. E. 256.

23. Consequently mere narrative, not circumstantially relevant, is excluded. Steel *v.* Shafer, 39 Ill. App. 185; Church of Jesus Christ, etc. *v.* Watson, 25 Utah 45, 69 Pac. 531.

24. People *v.* Pico, 62 Cal. 50; Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664; Barker *v.* Pope, 91 N. C. 165.

25. Gray *v.* Obear, 59 Ga. 675.

26. Renaud *v.* Pageot, 102 Mich. 568, 61 N. W. 3.

27. Cook *v.* Osborn, 2 Root (Conn.) 31; Kimball *v.* Currier, 5 Gray (Mass.) 458; Heald *v.* Thing, 45 Me. 392.

28. *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Pickens *v.* Davis, 134 Mass. 252, 45 Am. Rep. 322; Dinges *v.* Branson, 14 W. Va. 100.

29. Pickens *v.* Davis, 134 Mass. 252, 45 Am. Rep. 322.

30. *Georgia.*— Dennis *v.* Weekes, 51 Ga. 24; Howell *v.* Howell, 47 Ga. 492.

Iowa.— *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

Kansas.— Mooney *v.* Olsen, 22 Kan. 69.

Massachusetts.— Pickens *v.* Davis, 134 Mass. 252, 45 Am. Rep. 322; Shailer *v.* Bumstead, 99 Mass. 112.

Minnesota.— Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

New York.— Waterman *v.* Whitney, 11 N. Y. 157, 62 Am. Dec. 71.

Pennsylvania.— Herster *v.* Herster, 116 Pa. St. 612, 11 Atl. 410; McTaggart *v.* Thompson, 14 Pa. St. 149.

West Virginia.— Dinges *v.* Branson, 14 W. Va. 100.

Res gestæ distinguished.— The fact that the statements under consideration are not used to establish the existence of the matters directly asserted removes them from the class of declarations which can with propriety be

too remote to be relevant, even under the liberal rule applying to proof of this class of facts.[31]

b. Capacity For Resistance to Suggestions. The mental strength of a person may be a fact of great importance in estimating the effect of pressure upon him in the form of fraud[32] or undue influence;[33] in which cases much assistance is gained by considering the declarations,[34] written[35] or oral,[36] of the person in question, including declarations of a testator evincing fixed intention to make a disposition of property different from the provisions in his will.[37]

c. Mental Weakness and Insanity. Declarations of a person are admissible as evidence not only of weakness of his mental faculties,[38] but of insanity.[39]

d. Power of Memory. Declarations involving the use of memory are competent evidence of ability to recollect,[40] and conversely are admissible to show absence or impairment of memory.[41]

10. MENTAL STATE — a. In General. Where the existence of a particular mental state is a relevant[42] fact, declarations which indicate its existence are competent circumstantial evidence,[43] and are consequently primary evidence, compe-

said to be part of the *res gestæ*. Linch *v.* Linch, 1 Lea (Tenn.) 526. In some cases, however, it has been held, following the *res gestæ* rule, that statements subsequent to the principal event are inadmissible. Comstock *v.* Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 110; Waterman *v.* Whitney, 11 N. Y. 157, 62 Am. Dec. 71.

31. See *supra*, VII, B, 1.

32. Shailer *v.* Bumstead, 99 Mass. 112; Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95; Quick *v.* Quick, 10 Jur. N. S. 682, 33 L. J. P. 146, 10 L. T. Rep. N. S. 619, 3 Swab. & Tr. 442, 12 Wkly. Rep. 1119; Doe *v.* Hardy, 1 M. & Rob. 525.

33. *Connecticut.*— Canada's Appeal, 47 Conn. 450.

Iowa.— *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072.

Kentucky.— Milton *v.* Hunter, 13 Bush 163.

Massachusetts.— Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; Shailer *v.* Bumstead, 99 Mass. 112.

Mississippi.— Sheehan *v.* Kearney, (1896) 21 So. 41.

Missouri.— Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552.

New York.— Waterman *v.* Whitney, 11 N. Y. 157, 62 Am. Dec. 71.

Pennsylvania.— Smith *v.* Loafman, 145 Pa. St. 628, 23 Atl. 395; Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95.

Rhode Island.— Gardner *v.* Frieze, 16 R. I. 640, 19 Atl. 113.

South Carolina.— Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

Tennessee.— Linch *v.* Linch, 1 Lea 526.

Utah.— Church of Jesus Christ, etc. *v.* Watson, 25 Utah 45, 69 Pac. 531.

West Virginia.— Dinges *v.* Branson, 14 W. Va. 100.

34. See the cases cited in the two preceding notes.

35. Such as letters (Bulger *v.* Ross, 98 Ala. 267, 12 So. 803; Dow *v.* Clark, 3 Adams 79; Wheeler *v.* Alderson, 3 Hagg. Eccl. 574; Tatham *v.* Wright, 2 Russ. & M. 1, 11 Eng. Ch. 1, 39 Eng. Reprint 295; Eagleton *v.* Kingston, 8 Ves. Jr. 438, 32 Eng. Reprint 425) or diaries (Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90).

Letters of correspondent.— If letters written by a person are competent as indicating mental condition, the letters to which they are in reply may be received to explain the action of his mind while conducting the correspondence. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

36. *California.*— Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; *In re* Mullin, 110 Cal. 252, 42 Pac. 645.

Iowa.— *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664.

Kentucky.— Milton *v.* Hunter, 13 Bush 163.

Massachusetts.— Shailer *v.* Bumstead, 99 Mass. 112.

Pennsylvania.— Smith *v.* Loafman, 145 Pa. St. 628, 23 Atl. 395.

37. Cawthorn *v.* Haynes, 24 Mo. 236; Cudney *v.* Cudney, 68 N. Y. 148. See also WILLS.

38. Wilkinson *v.* Pearson, 23 Pa. St. 117. See also Thorn *v.* Cosand, 166 Ind. 566, 67 N. E. 257.

39. Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473; Fitzgerald *v.* Shelton, 95 N. C. 519; Vance *v.* Upson, 66 Tex. 476, 1 S. W. 179; Hathaway *v.* National L. Ins. Co., 48 Vt. 335. See also Thorn *v.* Cosand, 166 Ind. 566, 67 N. E. 257. And see INSANE PERSONS; WILLS.

40. Donnelly *v.* State, 26 N. J. L. 463, 495.

41. McRae *v.* Malloy, 93 N. C. 154; Rouch *v.* Zehring, 59 Pa. St. 74; Chess *v.* Chess, 1 Penr. & W. (Pa.) 32, 21 Am. Dec. 350.

42. Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Louisville, etc., R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. L. Rep. 258; Brewer *v.* Com., 8 S. W. 339, 10 Ky. L. Rep. 122; Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49; Newcomb *v.* State, 37 Miss. 383.

43. *Alabama.*— Jacobi *v.* State, 133 Ala. 1, 32 So. 158.

tent, notwithstanding that the declarant is available as a witness.[44] Such declarations have been said to be part of the *res gestæ*,[45] although the definition of *res gestæ* can hardly be extended to cover them without including all relevant statements whatever. Within the bounds of relevancy the declarations may precede,[46] accompany,[47] or follow[48] the occurrence of the principal act.

Arkansas.— Edmonds *v.* State, 34 Ark. 720, 732, "harsh, passionate and inhuman."

Connecticut.— Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350; Dunham's Appeal, 27 Conn. 192.

Florida.— Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

Georgia.— Murphy *v.* Griggs, 41 Ga. 464.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Anderson *v.* Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109.

Kansas.— Nevins *v.* Nevins, (Sup. 1904) 75 Pac. 492.

Maine.— Smith *v.* Tarbox, 70 Me. 127.

Massachusetts.— Marsh *v.* Austin, 1 Allen 235. In an action for damages for conscious suffering before decedent's death, alleged to have been caused by defendant's negligence, statements of the deceased made in conversation at various times after the accident are admissible to show his consciousness. Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249.

Michigan.— People *v.* Flynn, 96 Mich. 276, 55 N. W. 834.

Mississippi.— Ward *v.* Yazoo, etc., R. Co., 79 Miss. 145, 29 So. 829; Stovall *v.* Farmers', etc., Bank, 8 Sm. & M. 305, 47 Am. Dec. 85.

North Carolina.— State *v.* Utley, 132 N. C. 1022, 43 S. E. 820, intelligence notwithstanding intoxication. But see State *v.* Dula, 61 N. C. 211.

Ohio.— Moore *v.* State, 2 Ohio St. 500.

Tennessee.— Nashville, etc., R. Co. *v.* Messino, 1 Sneed 220.

Texas.— Ezell *v.* State, (Cr. App. 1902) 71 S. W. 283; Denson *v.* State, (Cr. App. 1896) 35 S. W. 150; Black *v.* State, 8 Tex. App. 329.

Vermont.— State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 609.

United States.— New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049.

44. Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

45. *Alabama.*— Worthington *v.* Gwin, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382.

California.— People *v.* Costello, 15 Cal. 350. See also Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Georgia.— Johnson *v.* State, 88 Ga. 203, 14 S. E. 208.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Iowa.— Piles *v.* Hughes, 10 Iowa 579.

Maryland.— Robinson *v.* State, 57 Md. 14.

Massachusetts.— Stevens *v.* Miles, 142 Mass. 571, 8 N. E. 426.

Missouri.— State *v.* Smith, 125 Mo. 2, 28 S. W. 181.

New York.— People *v.* Murphy, 3 N. Y. Cr. 338.

Oregon.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042.

Tennessee.— Nashville, etc., R. Co. *v.* Messino, 1 Sneed 220.

Texas.— Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

United States.— Wrought-Iron Range Co. *v.* Graham, 80 Fed. 474, 25 C. C. A. 570; Lightcap *v.* Philadelphia Traction Co., 60 Fed. 212.

46. *Georgia.*— Small *v.* Williams, 87 Ga. 681, 13 S. E. 589.

Louisiana.— Marigny *v.* Union Bank, 5 Rob. 354.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517.

Pennsylvania.— Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527, 27 Pa. St. 22, 67 Am. Dec. 442.

Wisconsin.— Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22.

United States.— Miller *v.* Clark, 40 Fed. 15.

47. Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; Duling *v.* Johnson, 32 Ind. 155; Jones *v.* Brownfield, 2 Pa. St. 55; Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085.

48. *Connecticut.*— Bartram *v.* Stone, 31 Conn. 159.

Georgia.— Meeks *v.* State, 51 Ga. 479; McLean *v.* Clark, 47 Ga. 24.

Massachusetts.— Scott *v.* Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925. See also Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249, consciousness after injury.

Missouri.— State *v.* Smith, 125 Mo. 2, 28 S. W. 181.

New York.— People *v.* Sherry, 2 Edm. Sel. Cas. 52.

Ohio.— Moore *v.* State, 2 Ohio St. 500.

Pennsylvania.— Kutz's Appeal, 100 Pa. St. 75. See also Knabb's Estate, 2 Woodw. 386.

Texas.— Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Clampitt *v.* State, 9 Tex. App. 27.

England.— Sugden *v.* St. Leonards, 1 P. D. 154, 45 L. J. P. 49, 34 L. T. Rep. N. S. 372, 24 Wkly. Rep. 860.

Subsequent threats have, however, been excluded. Gaw *v.* People, 3 Nebr. 357; Newman *v.* Goddard, 5 Thomps. & C. (N. Y.) 299.

A narrative statement is not directly evidentiary of the existence of a past state of feeling.

Alabama.— McPherson *v.* Foust, 81 Ala. 295, 8 So. 193; McAdams *v.* Beard, 34 Ala. 478.

Arkansas.— Martin *v.* Tucker, 35 Ark. 279.

Connecticut.— State *v.* Bradnack, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620; Ford *v.* Haskell, 32 Conn. 489; Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152.

Illinois.— See Steurer *v.* Ried, 56 Ill. App. 245.

b. Assent. That a person's mental state at a given time was one of assent may be shown by proving his statement indicative of such a feeling.[49]

c. Belief. The belief of a person, when it is a relevant fact, may be proved circumstantially by his declarations;[50] and statements brought to his attention may be independently relevant as showing the grounds of belief.[51]

d. Dissent. A person's dissent may be shown by his relevant declarations.[52]

e. Fear. A person's mental state of fear is provable by his declarations.[53]

f. Friendship. Declarations of a person are competent to show the friendly nature of his feelings,[54] but not to establish the truth of facts directly asserted in

Indiana.— New York Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

Kentucky.— Gano *v.* McCarthy, 79 Ky. 409; Heft *v.* Masden, 51 S. W. 574, 21 Ky. L. Rep. 390.

Maine.— Battles *v.* Batchelder, 39 Me. 19.

Maryland.— Groff *v.* Rohrer, 35 Md. 327.

Massachusetts.— Fiske *v.* Cole, 152 Mass. 335, 25 N. E. 608; Com. *v.* Felch, 132 Mass. 22; Merrill *v.* Sawyer, 8 Pick. 397.

Missouri.— Merchants' Bank *v.* Berthold, 45 Mo. 527.

New York.— Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. 393. See also Whitman *v.* Egbert, 27 N. Y. App. Div. 374, 50 N. Y. Suppl. 3.

Pennsylvania.— Oller *v.* Bonebrake, 65 Pa. St. 338; Duvall *v.* Darby, 38 Pa. St. 56; Light *v.* Light, 21 Pa. St. 407; Lester *v.* McDowell, 18 Pa. St. 91; Kidder *v.* Lovell, 14 Pa. St. 214; Taylor *v.* Adams, 2 Serg. & R. 534, 7 Am. Dec. 665.

Tennessee.— Mayfield *v.* State, 101 Tenn. 673, 49 S. W. 742; Hollingsworth *v.* Miller, 5 Sneed 472.

Texas.— Gulf, etc., R. Co. *v.* Southwick, (Civ. App. 1895) 30 S. W. 592.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

Virginia.— Wright *v.* Rambo, 21 Gratt. 158.

United States.—Fidelity, etc., Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379.

Declaration by testator.— "A declaration after he [the testator] has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule, that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before, and may never happen again, for you then establish an exception which more or less throws a doubt on the law." Sugden *v.* St. Leonards, 1 P. D. 154, 251, 45 L. J. P. 49, 34 L. T. Rep. N. S. 372, 24 Wkly. Rep. 860, per Mellish, L. J.

Self-serving narrative statements are incompetent (Colquitt *v.* Thomas, 8 Ga. 258; Pinner *v.* Pinner, 47 N. C. 398; McGee *v.* McGee, 26 N. C. 105; Corder *v.* Talbott, 14 W. Va. 277; Blakeslee *v.* Rossman, 44 Wis. 553; Felt *v.* Amidon, 43 Wis. 467), especially when made *post litem motam* (Eldredge *v.* Sherman, 79 Mich. 484, 44 N. W. 948; Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867; Tucker *v.* Tucker, 32 Mo. 464).

The narrative statement of a party stands on a different footing and is competent as an admission. Kershner *v.* Kershner, 36 Md. 309. But such evidence is only open when offered by the adverse party. Proprietary *v.* Ralston, 1 Dall. (Pa.) 18, 1 L. ed. 18.

49. Cook *v.* Lawson, 63 Kan. 854, 66 Pac. 1028; King *v.* Com., 20 S. W. 224, 14 Ky. L. Rep. 254; March *v.* Austin, 1 Allen (Mass.) 235.

50. Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 751; Motte *v.* Alger, 15 Gray (Mass.) 322; Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143.

51. Jones *v.* State, 103 Ala. 1, 15 So. 891; Ponsony *v.* Debaillon, 6 Mart. N. S. (La.) 238; Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129; Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724.

52. Wood *v.* Fiske, 62 N. H. 173; Brown *v.* State, (Tex. Cr. App. 1894) 28 S. W. 536; Evarts *v.* Young, 52 Vt. 329.

53. Regan's Succession, 9 La. Ann. 364; Com. *v.* Crowley, 165 Mass. 569, 43 N. E. 509. But *compare* Evans *v.* Elwood, (Iowa 1904) 98 N. W. 584, where declarations were held inadmissible because too remote.

54. *Arkansas.*— Casat *v.* State, 40 Ark. 511.

Iowa.— Howe *v.* Richards, 112 Iowa 220, 83 N. W. 909.

Maine.— Collagan *v.* Burns, 57 Me. 449.

Massachusetts.— Jacobs *v.* Whitcomb, 10 Cush. 255.

Michigan.—Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

North Carolina.— State *v.* Hargrave, 97 N. C. 457, 1 S. E. 774.

Ohio.— Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

United States.— Gaines *v.* Relf, 12 How. 472, 534, 13 L. ed. 1071.

England.— Trelawney *v.* Colman, 1 B. & Ald. 90, 2 Stark. 191, 18 Rev. Rep. 438, 3 E. C. L. 372; Willis *v.* Bernard, 8 Bing. 376, 21 E. C. L. 584, 5 C. & P. 342, 24 E. C. L. 597, 1 L. J. C. P. 118, 1 Moore & S. 584, letter.

Contra.— State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111, where, however, the evidence excluded seems to have been in fact irrelevant.

such statements;[55] provided satisfactory reason be shown for failing to produce the declarant as a witness,[56] and that the state of his mind is relevant to the inquiry.[57]

g. Indifference. Declarations *in pais* may be admissible as tending to show that the mental state of the declarant is one of indifference.[58]

h. Intent and Intention — (i) *Rule Stated.* Declarations may be relevant evidence as to the existence of a particular intent[59] or intention[60] in the mind of

55. State *v.* Swift, 57 Conn. 496, 18 Atl. 664; Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

56. White *v.* Ross, 47 Mich. 172, 10 N. W. 188.

57. Fuller *v.* State, 30 Tex. App. 559, 17 S. W. 1108.

Res gestæ.— Declarations tending to show the existence of a feeling of affection have been rejected when made subsequent to the period at which the existence of the feeling is relevant. This is said to be done under the rules as to the *res gestæ*. State *v.* Yanz, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780.

58. Perry *v.* State, 110 Ga. 234, 36 S. E. 781. In an action by a wife against her father-in-law for alienation of her husband's affection, declarations of the husband, though not a party, as to his estrangement, are competent to show the effect of the wrongful interference of the defendant and the attempt to induce a separation. Nevins *v.* Nevins, (Kan. Sup. 1904) 75 Pac. 482.

59. *Alabama.*— Campbell *v.* State, 133 Ala. 81, 31 So. 802; Burton *v.* State, 115 Ala. 1, 22 So. 585; Prater *v.* State, 107 Ala. 26, 18 So. 238; Harris *v.* State, 96 Ala. 24, 11 So. 255; David *v.* David, 66 Ala. 139.

Arkansas.— Pitman *v.* State, 22 Ark. 354.

California.— Harp *v.* Harp, 136 Cal. 421, 69 Pac. 28; People *v.* Roach, 17 Cal. 297.

Connecticut.— Mills *v.* Swords Lumber Co., 63 Conn. 103, 26 Atl. 689; State *v.* Hawley, 63 Conn. 47, 27 Atl. 417; Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350; *In re* Johnson, 40 Conn. 587.

Florida.— Anthony *v.* State, 44 Fla. 1, 32 So. 818; Hardee *v.* Langford, 6 Fla. 13.

Georgia.— Mallerey *v.* Young, 94 Ga. 804, 22 S. E. 142; Price *v.* State, 72 Ga. 441; Southwestern R. Co. *v.* Rowan, 43 Ga. 411; Patterson *v.* Hickey, 32 Ga. 156.

Illinois.— People *v.* Alton, 179 Ill. 615, 54 N. E. 421; Quinn *v.* Eagleston, 108 Ill. 248.

Indiana.— Boyd *v.* Jackson, 82 Ind. 525.

Iowa.— State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

Louisiana.—Ray *v.* Harris, 7 La. Ann. 138; Harkins' Succession, 2 La. Ann. 923.

Maine.— Collagan *v.* Burns, 57 Me. 449; Corinth *v.* Lincoln, 34 Me. 310; Baring *v.* Calais, 11 Me. 463; Gorham *v.* Canton, 5 Me. 266, 17 Am. Dec. 231.

Massachusetts.— Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Pickens *v.* Davis, 134 Mass. 252, 45 Am. Rep. 322; Wilson *v.* Terry, 9 Allen 214; Kilburn *v.* Bennett, 3 Metc. 199.

Michigan.— Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311; Lawyer *v.* Smith, 8 Mich. 411, 77 Am. Dec. 460; Dawson *v.* Hall, 2 Mich. 390.

Mississippi.— Archer *v.* Helm, 70 Miss. 874, 12 So. 702; Wilson *v.* Beauchamp, 50 Miss. 24; Block *v.* Cross, 36 Miss. 549.

Missouri.— Seibold *v.* Christman, 75 Mo. 308; Colt *v.* La Due, 54 Mo. 486; McDonald *v.* McDonald, 86 Mo. App. 122 (gift); State *v.* Brandau, 76 Mo. App. 305; Folks *v.* Burnett, 47 Mo. App. 564.

New Jersey.— Frome *v.* Dennis, 45 N. J. L. 515; Speer *v.* Speer, 14 N. J. Eq. 240.

New York.—McGraw *v.* Tatham, 84 N. Y. 677; People *v.* Doyle, 58 Hun 535, 12 N. Y. Suppl. 836 (gift); Crary *v.* Crary, 18 N. Y. Suppl. 753; Davis *v.* Newkirk, 5 Den. 92.

North Carolina.— Moore *v.* Gwyn, 26 N. C. 275.

Ohio.— Larimore *v.* Wells, 29 Ohio St. 13; Harris *v.* Protection Ins. Co., Wright 548.

Pennsylvania.— Oller *v.* Bonehrake, 65 Pa. St. 338; Jones *v.* Brownfield, 2 Pa. St. 55; Huntington *v.* Fairmount, 2 Kulp 441; Real Estate Title Ins., etc., Co. *v.* Maguire, 17 Montg. Co. Rep. 25.

Tennessee.— Kirby *v.* State, 7 Yerg. 259.

Texas.— Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204; Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

Utah.— State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 663.

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335; State *v.* Goodrich, 19 Vt. 116, 47 Am. Dec. 676.

Wisconsin.— Kelley *v.* Kelley, 20 Wis. 443.

United States.— U. S. *v.* Lee, 26 Fed. Cas. No. 15,584, 2 Cranch C. C. 104; U. S. *v.* Omeara, 27 Fed. Cas. No. 15,919, 1 Cranch C. C. 165.

See 14 Cent. Dig. tit. "Criminal Law," § 944 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 1063 *et seq.*

60. *Alabama.*— Harris *v.* State, 96 Ala. 24, 11 So. 255; Martin *v.* State, 77 Ala. 1.

Arkansas.— Carr *v.* State, 43 Ark. 99; Cornelius *v.* State, 12 Ark. 782.

California.— Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Connecticut.— Meriden Sav. Bank *v.* Willington, 64 Conn. 553, 30 Atl. 774; Mills *v.* Swords Lumber Co., 63 Conn. 103, 26 Atl. 689.

District of Columbia.— U. S. *v.* Nardello, 4 Mackey 503. In an action by a daughter against the administrator of her deceased father to recover for services rendered him while living with him after she attained her majority, where it is shown that meritorious services were rendered, declarations of the

the declarant. They are admissible in those cases and only in those cases where

decedent of his purpose and intention to provide for his daughter, and to save her from want, and of his great desire to keep her with him, afford proof which is proper to be submitted to the jury for their consideration. Tuohy *v.* Trail, 10 App. Cas. 79.

Georgia.— Jackson *v.* Du Bose, 87 Ga. 761, 13 S. E. 916; Johnson *v.* State, 72 Ga. 679; Thomas *v.* State, 67 Ga. 460; Oliver *v.* Wilson, 29 Ga. 642.

Illinois.— Towne *v.* Towne, 191 Ill. 478, 61 N. E. 426; Quinn *v.* Eagleston, 108 Ill. 248.

Indiana.— Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263.

Iowa.— Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; State *v.* Shelledy, 8 Iowa 477.

Kansas.— State *v.* Winner, 17 Kan. 298.

Kentucky.— Steele *v.* Logan, 3 A. K. Marsh. 394; State *v.* Hayden, 1 Ky. L. Rep. 71.

Louisiana.— State *v.* Vallery, 47 La. Ann. 182, 16 So. 745, 49 Am. St. Rep. 363.

Maryland.— Curtis *v.* Moore, 20 Md. 93; Smith *v.* Morgan, 8 Gill 133; Kolb *v.* Whitely, 3 Gill & J. 188.

Massachusetts.— Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; Kilburn *v.* Bennett, 3 Metc. 199.

Minnesota.— Matthews *v.* Great Northern R. Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383.

Mississippi.— Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274.

Missouri.— Seibold *v.* Christman, 75 Mo. 308; Folks *v.* Burnett, 47 Mo. App. 564.

Montana.— State *v.* Dotson, 26 Mont. 305, 67 Pac. 938.

New Hampshire.—Hadley *v.* Carter, 8 N. H. 40.

New Jersey.— Hunter *v.* State, 40 N. J. L. 495.

New York.— Landon *v.* Preferred Acc. Ins. Co., 167 N. Y. 577, 60 N. E. 1114; Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030; Hoffman *v.* Hoffman, 6 N. Y. App. Div. 84, 39 N. Y. Suppl. 494.

Pennsylvania.— Jones *v.* Brownfield, 2 Pa. St. 55.

Tennessee.— Kirby *v.* State, 7 Yerg. 259.

Texas.— Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258; Martin *v.* State, 44 Tex. Cr. 538, 72 S. W. 386.

Vermont.— Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230; Perkins *v.* Blood, 36 Vt. 273.

West Virginia.— Beckwith *v.* Mollohan, 2 W. Va. 477.

Wisconsin.— State *v.* Dickinson, 41 Wis. 299.

United States.— Mutual L. Ins. Co. *v.* Hillnon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706. letters.

England.— Doe *v.* Palmer, 16 Q. B. 747, 15 Jur. 836, 20 L. J. Q. B. 367, 71 E. C. L. 747; Sugden *v.* St. Leonards, 1 P. D. 154, 45 L. J. P. 49, 34 L. T. Rep. N. S. 372, 24 Wkly. Rep. 860; Ridley *v.* Gyde, 9 Bing. 349, 23 E. C. L. 611; Rawson *v.* Haigh, 2 Bing. 99, 9 E. C. L. 499, 1 C. & P. 77, 12 E. C. L. 55, 9 Moore C. P. 217; Smith *v.* Cramer, 1 Bing. N. Cas. 585, 1 Hodges 124, 1 Scott 541, 27 E. C. L. 774; Reg. *v.* Buckley, 13 Cox C. C. 293; Shilling *v.* Accidental Death Co., 4 Jur. N. S. 244; Gale *v.* Half Knight, 3 Stark. 56, 3 E. C. L. 592; Bateman *v.* Bailey, 5 T. R. 512.

See 14 Cent. Dig. tit. "Criminal Law," § 944 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 1063 *et seq.* And see *infra*, VIII, B, 9, j.

"Intent" and "intention."— While it will frequently be found that "intention" is employed as equivalent to "intent," there is little advantage in confusing a mental state and a mental operation. The inquiry, for example, whether an act was done accidentally or intentionally evidently involves a different mental function from that involved in the inquiry whether the same act was done innocently or with felonious intent.

Suicidal intention.— Declarations of an insured person tending to show that he contemplated suicide, not accompanying nor explanatory of any act, were held incompetent evidence in favor of defendant insurance company against the beneficiary and the assignee. Jenkin *v.* Pacific Mut. L. Ins. Co., 131 Cal. 121, 63 Pac. 180. See LIFE INSURANCE. But previous declarations of deceased threatening to take his own life were admitted on an issue as to whether deceased was murdered or committed suicide. People *v.* Gebmele, Sheld. (N. Y.) 251.

Letters.— Intention may be shown by contemporaneous declarations in letters written under circumstances excluding suspicion. Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348; Thorndike *v.* Boston, 1 Metc. (Mass.) 242; Hunter *v.* State, 40 N. J. L. 495; Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

Passengers.— A person's declarations that he intended to take a train are competent to prove that fact. Matthews *v.* Great Northern R. Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383; Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052. But *compare* Chicago, etc., R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269.

Res gestæ distinguished.— It is frequently said that such declarations of intention are admitted as part of the *res gestæ* (Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Church *v.* Rowell, 49 Me. 367; Gorham *v.* Canton, 5 Me. 266, 17 Am. Dec. 231; Wright *v.* Boston, 126 Mass. 161; Salem *v.* Lynn, 13 Metc. (Mass.) 544; Kilburn *v.* Bennett, 3 Metc. (Mass.) 199; Hunter *v.* State, 40 N. J. L. 495; Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052; Doyle *v.* Clark, 7 Fed. Cas. No. 4,053, 1 Flipp. 536. *Contra*, People *v.* Williams, 3 Park. Cr. (N. Y.) 84), and, in accordance with that rule, it has been held that a narrative of a past intention is

the existence of the particular mental state is a relevant fact[61] at the time to which the declarations relate.[62] They are not direct evidence of the facts asserted,[63] but merely probative in and of themselves as to the existence of a material fact;[64] and the admissibility of such declarations therefore is not determined by the rules regulating declarations, part of the *res gestæ*, as an exception to the hearsay rule.[65] A declaration of intent or intention is not necessarily admissible because made contemporaneously with relevant acts; existence of the particular mental state at that time must itself be a relevant fact.[66] On the other hand, no requirement exists that the making of a declaration indicating intent or intention should be contemporaneous with the time when its existence is relevant. The test is logic, rather than time. Within limits prescribed by the rules as to remoteness,[67] prior,[68] or subsequent,[69] as well as accompanying,[70] statements, are competent. If a declaration of intent or intention is relevant, the declarant is entitled to the benefit of it, even though it be in his favor.[71] An otherwise relevant declaration is not rendered incompetent by reason of the fact that the declarant is dead.[72]

incompetent (Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274). This is misleading for reasons stated *supra*, VIII, A, 2. See also *In re* Olmsted, 122 Cal. 224, 54 Pac. 745; McDonald *v.* McDonald, 86 Mo. App. 122; Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258.

61. *Alabama.*— Cowan *v.* State, 136 Ala. 101, 34 So. 193; Domingus *v.* State, 94 Ala. 9, 11 So. 190.

California.— Rice *v.* Cunningham, 29 Cal. 492; People *v.* Henderson, 28 Cal. 465; People *v.* Wyman, 15 Cal. 70.

Georgia.— Sanders *v.* State, 113 Ga. 267, 38 S. E. 841.

Iowa.— West *v.* Beck, 95 Iowa 520, 64 N. W. 599. See also Moss *v.* Dearing, 45 Iowa 530.

Maryland.— Cross *v.* Black, 9 Gill & J. 198.

Massachusetts.— Com. *v.* Felch, 132 Mass. 22; Shrewsbury *v.* Smith, 12 Cush. 177; Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209.

Michigan.— Stockton *v.* Williams, 1 Dougl. 546.

Missouri.— State *v.* Gabriel, 88 Mo. 631.

New Hampshire.— Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

Oregon.— State *v.* Ching Ling, 16 Oreg. 419, 18 Pac. 844.

Tennessee.— Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845.

Texas.— Rector *v.* Hudson, 20 Tex. 234; Young *v.* State, 41 Tex. Cr. 442, 55 S. W. 331.

62. *Iowa.*— Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Maryland.— Adams Express Co. *v.* Trego, 35 Md. 47.

Minnesota.— Finch *v.* Green, 16 Minn. 355.

Oregon.— State *v.* Anderson, 10 Oreg. 448.

Texas.— Johnson *v.* State, 22 Tex. App. 206, 2 S. W. 609.

England.— Hyde *v.* Palmer, 3 B. & S. 657, 32 L. J. Q. B. 126, 7 L. T. Rep. N. S. 823, 11 Wkly. Rep. 433, 113 E. C. L. 657.

Canada.— Basterach *v.* Atkinson, 7 N. Brunsw. 439.

63. See *supra*, VIII, A.

64. While declarations by a person are competent circumstantial evidence as to the existence of intent, facts involved incidentally in the inquiry cannot necessarily be proved in the same way. Thus, while a parent's declarations are admissible to show whether property given to a child was intended as an advancement, they are not admissible to prove the fact that money was given. This fact must be shown, like other facts, by the ordinary rules of evidence. Dilley *v.* Love, 61 Md. 603.

65. See *infra*, IX, E.

66. Brand *v.* Abbott, 42 Ala. 499.

67. Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946; McKinnon *v.* Meston, 104 Mich. 642, 62 N. W. 1014.

68. *Alabama.*— Harris *v.* State, 96 Ala. 24, 11 So. 255; Martin *v.* State, 77 Ala. 1.

District of Columbia.— U. S. *v.* Nardello, 4 Mackey 503.

Kentucky.— State *v.* Hayden, 1 Ky. L. Rep. 71.

New York.— Tuttle *v.* People, 36 N. Y. 431.

Tennessee.— Garber *v.* State, 4 Coldw. 161.

Texas.— Merritt *v.* State, 39 Tex. Cr. 70, 45 S. W. 21; Williams *v.* State, 4 Tex. App. 5.

Wisconsin.— State *v.* Dickinson, 41 Wis. 299.

But see Com. *v.* Felch, 132 Mass. 22.

69. P. Cox Shoe Mfg. Co. *v.* Gorsline, 63 N. Y. App. Div. 517, 71 N. Y. Suppl. 619; Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258. Declarations subsequent to an event are competent to show that the happening of such event has not had the effect to change the intent or intention (Towne *v.* Towne, 191 Ill. 478, 61 N. E. 426; Bell *v.* Fothergill, L. R. 2 P. 148, 23 L. T. Rep. N. S. 323, 18 Wkly. Rep. 1040), although such declaration might not control the effect of unequivocal conduct (Bell *v.* Fothergill, *supra*).

70. Koller *v.* State, 36 Tex. Cr. 496, 38 S. W. 44.

71. Wilson *v.* State, 33 Ark. 557, 34 Am. Rep. 52; State *v.* Abbott, 8 W. Va. 741.

72. Evans *v.* Lipscomb, 31 Ga. 71; Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482 [*affirming* 46 Ill. App. 75]; Howell *v.* Taylor, 11 Hun (N. Y.) 214.

(II) *Application of Rule.* Declarations evincing a particular intent or intention are relevant in very many connections when the legal effect of an act or the *animus* with which it is done is to be determined;[73] for example, to establish the intention with which goods,[74] money,[75] or negotiable instruments[76] are received, or with which goods,[77] written instruments,[78] or money[79] are delivered to another; or to show on whose account money is delivered[80] or received.[81]

i. Malice. Declarations may be admissible as evidence of malice[82] in cases,

73. Fossion *v.* Landry, 123 Ind. 136, 24 N. E. 96; State *v.* Cross, 68 Iowa 180, 26 N. W. 62; State *v.* Shelledy, 8 Iowa 477. Where intent does not affect the legal result of the transaction (Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500; Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644; Phillips *v.* Higgins, 7 Lans. (N. Y.) 314; Phœnix Mills *v.* Miller, 4 N. Y. St. 787; Patterson *v.* Smith, 73 Vt. 360, 50 Atl. 1106), or throw light upon the statements made orally (Zimmerman *v.* Brannon, 103 Iowa 144, 72 N. W. 439; Haywood *v.* Foster, 16 Ohio 88; Cullmans *v.* Lindsay, 114 Pa. St. 166, 6 Atl. 332) or in writing (Willingham *v.* Sterling Cycle Works, 113 Ga. 953, 39 S. E. 314; Sutter *v.* Rose, 169 Ill. 66, 48 N. E. 411; Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103; Kingsford *v.* Hood, 105 Mass. 495; Raymond *v.* Richmond, 88 N. Y. 671; Allen *v.* McMasters, 3 Watts (Pa.) 181; Young *v.* Mahoning County, 51 Fed. 585), declarations of intention are irrelevant.

Intention to abandon or not to abandon the ownership of property (Sweasey *v.* Sweasey, 126 Cal. 123, 58 Pac. 456; Welch *v.* Louis, 31 Ill. 446; Thompson *v.* Stewart, 5 Litt. (Ky.) 5; State *v.* Mertz, 14 Mo. App. 55; McMillan *v.* Warner, 38 Tex. 410; Kimball *v.* Ladd, 42 Vt. 747; Noble *v.* Sylvester, 42 Vt. 146. See also Abandonment, 1 Cyc. 8), or a present domicile (See Domicile, 14 Cyc. 857), may be proved circumstantially by declarations of the person whose intention is involved.

Dedication.— As to admissibility of declarations of intention in determining questions of dedication see Dedication, 13 Cyc. 472.

Testamentary intentions when provable by declarations of testator see Wills.

74. Whittemore *v.* Wentworth, 76 Me. 20.

75. Dillard *v.* Scruggs, 36 Ala. 670; Medley *v.* People, 49 Ill. App. 218.

76. Higby *v.* New York, etc., R. Co., 3 Bosw. (N. Y.) 497.

77. Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Jennings *v.* Blocker, 25 Ala. 415; Hale *v.* Stone, 14 Ala. 803; Rembert *v.* Brown, 14 Ala. 360; Milford *v.* Bellingham, 16 Mass. 108; Hatton *v.* Banks, 1 Nott & M. (S. C.) 221; Wambold *v.* Vick, 50 Wis. 456, 7 N. W. 438. See also, generally, Gifts.

Where there is no change of possession, the statements may show the changed character of a subsequent holding. Jones *v.* Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211; Clark *v.* Rush, 19 Cal. 393.

78. *Alabama.*— Guntersville Bank *v.* Webb, 108 Ala. 132, 19 So. 14.

Massachusetts.— Akers *v.* Demond, 103 Mass. 318.

New York.— Bouck *v.* Gleason, 6 N. Y. St. 382.

Ohio.— Oldham *v.* Broom, 28 Ohio St. 41.

Vermont.— Lawrence *v.* Graves, 60 Vt. 657, 15 Atl. 342.

79. *Alabama.*— Hart *v.* Freeman, 42 Ala. 567.

Florida.— Hood *v.* French, 37 Fla. 117, 19 So. 165.

Illinois.— Thorp *v.* Goewey, 85 Ill. 611; Richerson *v.* Sternburg, 65 Ill. 272; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462.

New York.— Holcomb *v.* Campbell, 4 N. Y. St. 799.

North Carolina.— Harper *v.* Dail, 92 N. C. 394.

Tennessee.— Planters' Bank *v.* Massey, 2 Heisk. 360.

As to payments.— To constitute, however, a portion of a transaction of payment the statement must necessarily have been made during that transaction. Tabor *v.* Hardin, 9 Ky. L. Rep. 491; Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136. It may then determine what the application of a payment shall be. Gay *v.* Gay, 5 Allen (Mass.) 157; Blood *v.* Rideout, 13 Metc. (Mass.) 237; Shelley *v.* Lash, 14 Minn. 498. See also, generally, Payments. Where declarations regarding the application of payments are made to an alleged agent, they must be shown to have been communicated to the principal, unless an adequate agency is shown to make notice to the agent notice to the principal. Slevin *v.* Wallace, 64 Hun (N. Y.) 288, 19 N. Y. Suppl. 87; Woodstock Bank *v.* Clark, 25 Vt. 308. A declaration regarding the object of a payment is not rendered competent merely because contemporaneous. It must also be relevant to some issue raised in the case. Mueller's Estate, 159 Pa. St. 590, 28 Atl. 491. It has been held, however, that such statements are evidence of what they assert and that what a creditor said, either verbally or in writing, at the time of payment of an account, as to who paid the same, is admissible as a part of the *res gestæ*. Harrison *v.* Harrison, 9 Ala. 73. They are also competent to negative the fact of payment. Kelly *v.* Forty-Second St., etc., R. Co., 48 N. Y. App. Div. 627, 62 N. Y. Suppl. 650.

80. Carter *v.* Beals, 44 N. H. 408; Lee *v.* Kennedy, 25 Misc. (N. Y.) 140, 54 N. Y. Suppl. 155.

81. Hall *v.* Young, 37 N. H. 134.

82. *Arkansas.*— Carr *v.* State, 43 Ark. 99.

Georgia.— Perry *v.* State, 110 Ga. 234, 36 S. E. 781; Meek *v.* State, 51 Ga. 429.

whether criminal or civil, in which the question of malice is in issue. In like manner they may be admissible to show the absence of malice.[83]

j. Motive or Purpose. Declarations are admissible to prove the influence of a particular motive upon the mind of the declarant,[84] provided the fact of such influence is relevant,[85] or to prove his purpose.[86]

11. Readiness, Willingness, or Unwillingness. Readiness may be shown by declarations reasonably probative of its existence.[87] That a person was willing[88] or unwilling[89] may likewise be shown by his declarations.

12. Provocation. An unsworn declaration is admissible as proving or constituting provocation.[90]

13. Reasons Assigned. When the reasons for conduct are relevant,[91] statements

Missouri.— State *v.* Smith, 125 Mo. 2, 28 S. W. 181.

Texas.— Jennings *v.* State, 42 Tex. Cr. 78, 57 S. W. 642; Black *v.* State, 9 Tex. App. 328.

Vermont.— Knapp *v.* Wing, 72 Vt. 334, 47 Atl. 1075.

See also Criminal Law, 12 Cyc. 70; and, generally, Homicide.

On a charge of manslaughter it has been held that declarations of defendant are inadmissible to show malice. Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505. See also, generally, Homicide.

Uncommunicated threats may be evidence of hostile intention. Pitman *v.* State, 22 Ark. 354; People *v.* Scoggins, 37 Cal. 676; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Stokes *v.* State, 53 N. Y. 164, 13 Am. Rep. 492; Dickson *v.* State, 39 Ohio St. 73; Wiggins *v.* Utah, 93 U. S. 465, 23 L. ed. 941. But see State *v.* Gregor, 21 La. Ann. 473, where the rule as to declarations, part of the *res gestæ*, is applied. See also, generally, Homicide.

83. Leach *v.* Wilbur, 9 Allen (Mass.) 212. But see Moore *v.* Sauborin, 42 Mo. 490.

84. *Alabama.*— Hudson *v.* State, 61 Ala. 333.

California.— People *v.* Brown, 130 Cal. 591, 62 Pac. 1072; Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; People *v.* Roach, 17 Cal. 297.

Georgia.— White *v.* East Lake Land Co., 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141; Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294; Odom *v.* Odom, 36 Ga. 286.

Illinois.— Croff *v.* Ballinger, 18 Ill. 200, 65 Am. Dec. 735.

Indiana.— Strange *v.* Donohue, 4 Ind. 327.

Maine.— State *v.* Walker, 77 Me. 488, 1 Atl. 357.

Maryland.— Cook *v.* Carr, 20 Md. 403.

Missouri.— State *v.* Gabriel, 88 Mo. 631.

Tennessee.— Planters' Bank *v.* Massey, 2 Heisk. 360.

85. Williams *v.* Fletcher, 30 Ill. App. 219 [*affirmed* in 129 Ill. 356, 21 N. E. 783].

86. *Alabama.*— Harris *v.* State, 96 Ala. 24, 11 So. 255; Myers *v.* State, 62 Ala. 599.

California.— Tait *v.* Hall, 71 Cal. 149, 12 Pac. 391; People *v.* Roach, 17 Cal. 297.

Iowa.— Sheldon *v.* Bigelow, 118 Iowa 586, 92 N. W. 701.

Massachusetts.— Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 206; Heyward *v.* Reed, 4 Gray 574.

Mississippi.— Archer *v.* Helm, 70 Miss. 874, 12 So. 702.

Nebraska.— Painter *v.* Ives, 4 Nebr. 122.

Tennessee.— Carroll *v.* State, 3 Humphr. 315; Kirby *v.* State, 2 Yerg. 259.

Texas.— Burns *v.* State, 23 Tex. App. 641, 5 S. W. 140.

Vermont.— State *v.* Daley, 53 Vt. 442, 38 Am. Rep. 694; State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 609.

Wisconsin.— State *v.* Dickinson, 41 Wis. 299.

But *compare* Schultz *v.* Schultz, 113 Mich. 502, 71 N. W. 854.

And see *supra*, VIII, B, 10, h, (I).

87. On the question of readiness and ability of a lessee, demanding to be put into possession, to pay a quarter's rent in advance, it was held that his statement that if he had heard the demand for payment in advance he would have so paid was some evidence for the jury. Cronly *v.* Murphy, 64 N. C. 489.

88. Long *v.* Rogers, 17 Ala. 540; Walter *v.* Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433; Evans *v.* Jones, 8 Yerg. (Tenn.) 461.

89. Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442.

90. People *v.* Lewis, 3 Abb. Dec. (N. Y.) 535, 3 Transcr. App. (N. Y.) 1, 6 Abb. Pr. N. S. (N. Y.) 190; Green *v.* Cawthorn, 15 N. C. 409. See, generally, Homicide.

91. *Alabama.*— Rich *v.* McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; Nixon *v.* State, 55 Ala. 120; Wood *v.* Barker, 37 Ala. 60, 76 Am. Dec. 346.

Arkansas.— Martin *v.* Tucker, 35 Ark. 279; Gracie *v.* Robinson, 14 Ark. 438.

California.— Draper *v.* Dougless, 23 Cal. 347.

Georgia.— Stewart *v.* Lanier House Co., 75 Ga. 582; McNabb *v.* Lockhart, 18 Ga. 495.

Illinois.— Caldwell *v.* Evans, 85 Ill. 170.

Indiana.— Higham *v.* Vanosdol, 101 Ind. 160.

Louisiana.— State *v.* Gessner, 44 La. Ann. 93, 10 So. 404; Marcy *v.* Merchants Mut. Ins. Co., 19 La. Ann. 388.

Maine.— Segars *v.* Segars, 71 Me. 530.

Massachusetts.— Elwer *v.* Fessenden, 151 Mass. 361, 24 N. E. 208, 5 L. R. A. 724. But see Wesson *v.* Washburn Iron Co., 13 Allen 95, 90 Am. Dec. 181.

indicating the existence of such reasons may be competent;[92] but complaints not distinctly assigning reasons for conduct are not within the rule.[93]

14. Recognition. That a person is recognized by another may be shown by declarations of the latter circumstantially probative of the fact.[94]

15. Fortifying or Refreshing Memory. An unsworn statement which was calculated to fix the attention[95] or refresh the memory[96] of a person may be admissible for that reason.

C. Statements Constituent of Legal Results — 1. In General. An unsworn statement may not only furnish circumstantial evidence of relevant facts; it may constitute part of a transaction or occurrence,[97] or it may go farther and in itself achieve a legal result.[98] Where statements constitute or assist to

Mississippi.— Lampley *v.* Scott, 24 Miss. 528.

Missouri.— Webster *v.* Canmann, 40 Mo. 156.

New Hampshire.— Hadley *v.* Carter, 8 N. H. 40; Downs *v.* Lyman, 3 N. H. 486.

New York.— Hine *v.* New York El. R. Co., 149 N. Y. 154, 43 N. E. 414; Tibbits *v.* Phipps, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954; Wilcox *v.* Green, 23 Barb. 639.

Ohio.— Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48.

Pennsylvania.— Cattison *v.* Cattison, 22 Pa. St. 275; Gilchrist *v.* Bale, 8 Watts 355, 34 Am. Dec. 469; Tompkins *v.* Saltmarsh, 14 Serg. & R. 275.

Tennessee.— Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085.

Texas.— McGowen *v.* McGowen, 52 Tex. 657; Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720; Stockman *v.* State, 24 Tex. App. 387, 6 S. W. 298, 5 Am. St. Rep. 894.

Vermont.— Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438; Ross *v.* White, 60 Vt. 558, 15 Atl. 184.

See 20 Cent. Dig. tit. "Evidence," § 1063 *et seq.*

By confusion with the "res gestæ rule," it has been held that such declarations must accompany the act for which they assign the reason. Snover *v.* Blair, 25 N. J. L. 94; Wiel *v.* Stewart, 19 Hun (N. Y.) 272; Cattison *v.* Cattison, 22 Pa. St. 275), and that the statement is evidence of the truth, in point of fact, of the reason given (Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614; Anderson *v.* New York, etc., Steamship Co., 47 Fed. 38 [*affirmed* in 50 Fed. 462, 1 C. C. A. 529]).

In an action for enticement of a wife against her father, her declarations on leaving home, and on arriving at her father's house "explanatory of her troubled mental condition and of her reasons for going to her father's house" were held competent "as parts of the *res gestæ*." Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085.

When the reasons for a refusal to a demand to pay over moneys are an essential part of the refusal itself, they are admissible in evidence in favor of the party making the refusal; but this rule does not apply to a long series of facts sought to be made evidence on the ground that they are an answer to the demand. If any part of such facts is admissible under the rule, there should be an offer to prove such part by itself. Walrod *v.* Ball, 9 Barb. (N. Y.) 271.

The reasons for a particular occurrence may be indicated by declarations. People *v.* O'Neil, 112 N. Y. 355, 19 N. E. 796, 6 N. Y. Cr. 274; Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 28 C. C. A. 250.

92. *Illinois.*— Mackie *v.* Heywood, etc., Rattan Co., 88 Ill. App. 119.

Kansas.— Missouri Pac. R. Co. *v.* Nevin, 31 Kan. 385, 2 Pac. 795.

Massachusetts.— Greene *v.* Washburn, 7 Allen 390.

New York.— Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030.

South Carolina.— Murdock *v.* Courtenay Mfg. Co., 52 S. C. 428, 29 S. E. 856, 30 S. E. 142.

United States.— Gaines *v.* Relf, 12 How. 472, 13 L. ed. 1071.

See 20 Cent. Dig. tit. "Evidence," § 1063 *et seq.*

93. Saxton *v.* New York El. R. Co., 60 N. Y. Super. Ct. 421, 18 N. Y. Suppl. 188.

94. *Alabama.*—Wesley *v.* State, 52 Ala. 182.

Illinois.— Lander *v.* People, 104 Ill. 248.

Iowa.— State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Louisiana.— State *v.* Hamilton, 27 La. Ann. 400.

Michigan.— People *v.* Wallin, 55 Mich. 497, 22 N. W. 15.

Texas.— Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640.

95. *Florida.*— Kirby *v.* State, 44 Fla. 81, 32 So. 836.

Georgia.— Barrow *v.* State, 80 Ga. 191, 5 S. E. 64.

New Hampshire.— Wiggin *v.* Plumer, 31 N. H. 251.

New Jersey.— State *v.* Fox, 25 N. J. L. 566.

Washington.— State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

96. Howser *v.* Com., 51 Pa. St. 332.

97. For a consideration of unsworn statements, independently relevant, which assist to constitute a transaction see *supra*, VIII, A, 2.

98. The distinction, however, between statements used in these several ways, that is, statements which on the one hand are competent because found as it were within the zone of facts which immediately constitute a transaction or occurrence (usually spoken of as the *res gestæ*) and on the other hand statements which *per se* establish a legal result, or fur-

constitute a legal result, proof of what was said is relevant *per se*.[99] The statements may be those of one acting in a representative capacity as an agent,[1] or as a public official,[2] and are also spoken of as being part of the *res gestæ*.

2. AGENCY, BAILMENT, SALE, OR CONTRACT. Statements to a person may be admissible because they create the relation of agency,[3] or constitute the incidents of a bailment,[4] or assist to constitute a sale of real[5] or personal[6] property, or affect

nish evidence from which the existence of such a legal result or some other relevant fact may be inferred, is one which, although clear in extreme cases, becomes shadowy as the border line between them is approached. It is fortunate therefore that however valuable for purposes of classification the distinction may be, it is, like the analogous distinction between direct and circumstantial evidence, of no especial importance; and indeed is frequently one merely of degree in directness of the relation of the evidence offered to the fact sought to be proved by it. See the cases in the notes following.

99. *Alabama.*— Burt *v.* Henry, 10 Ala. 874.
Arkansas.— Wallace *v.* Bernheim, 63 Ark. 108, 37 S. W. 712.
Massachusetts.— Blanchard *v.* Child, 7 Gray 155.
Michigan.— Passmore *v.* Passmore, 60 Mich. 463, 27 N. W. 601.
New Jersey.— Cowen *v.* Bloomberg, 69 N. J. L. 462, 55 Atl. 36, statements to commercial agency to show fraud of purchaser on credit.
North Carolina.— Molyneux *v.* Huey, 81 N. C. 106.
Pennsylvania.— Depew *v.* Depew, (1886) 4 Atl. 728.
South Carolina.— Peoples *v.* Smith, 8 Rich. 90.
Texas.— Aetna Ins. Co. *v.* Fitze, (Civ. App. 1904) 78 S. W. 370, letter to insurance company to show denial of liability rendering proof of loss unnecessary.

1. Hoffman *v.* Chicago Title, etc., Co., 198 Ill. 452, 64 N. E. 1027; Haggart *v.* California Borough, 21 Pa. Super. Ct. 210; Terrill *v.* Tillison, 75 Vt. 193, 54 Atl. 187.

2. Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91.

3. *Alabama.*— Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Powers *v.* Harris, 68 Ala. 409; Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516.
Florida.— Porter *v.* Ferguson, 4 Fla. 102.
Georgia.— Dunlap *v.* Hooper, 66 Ga. 211.
Kansas.— Stainbrook *v.* Drawyer, 25 Kan. 383.
Louisiana.— State *v.* Duncan, 8 Rob. 562.
Massachusetts.— Porter *v.* Merrill, 124 Mass. 534; Brown *v.* Leach, 107 Mass. 364.
Michigan.— Moore *v.* Machen, 124 Mich. 216, 82 N. W. 892.
Mississippi.— McCleary *v.* Anthony, 54 Miss. 708.
New York.— Lennon *v.* Stiles, 2 Silv. Supreme 145, 4 N. Y. Suppl. 487, 5 N. Y. Suppl. 870.
North Carolina.— Harper *v.* Dail, 92 N. C. 394.
Pennsylvania.— Featherman *v.* Miller, 45 Pa. St. 96.
United States.— Law *v.* Cross, 1 Black 533, 17 L. ed. 185.

The relevancy of instructions to an agent is determined by the rules of substantive law. For example the competency of undisclosed instructions from a principal to his agent limiting his ostensible authority is a question in the law of agency. Jackson *v.* Emmens, 119 Pa. St. 356, 13 Atl. 210. See, generally, PRINCIPAL AND AGENT.

4. *Alabama.*— Leffler *v.* Lehman, 57 Ala. 433; Hooper *v.* Edwards, 25 Ala. 528; Donnell *v.* Thompson, 13 Ala. 440; Yarborough *v.* Moss, 9 Ala. 382.
Georgia.— Myers *v.* Bernstein, 102 Ga. 579, 27 S. E. 681.
Illinois.— Comfort *v.* People, 54 Ill. 404.
Iowa.— Golden *v.* Vyse, 115 Iowa 726, 87 N. W. 691.
Kentucky.— Weil *v.* Silverstone, 6 Bush 698.
Massachusetts.— Davis *v.* Spooner, 3 Pick. 284.
Missouri.— Polston *v.* See, 54 Mo. 291.
North Carolina.— Evans *v.* Howell, 84 N. C. 460.
Pennsylvania.— Grim *v.* Bonnell, 78 Pa. St. 152; Knauss *v.* Shiffert, 58 Pa. St. 152.
Wisconsin.—Allen *v.* Seyfried, 43 Wis. 414; Resch *v.* Senn, 28 Wis. 286.

Contents of sealed package.— It has even been held that the bailor's contemporaneous statement of what a sealed package contained is competent evidence of the fact, as part of the *res gestæ*, if made under such circumstances as to preclude suspicion of fabrication. Ross *v.* Burlington Bank, 1 Aik. (Vt.) 43, 15 Am. Dec. 664.

5. *Alabama.*— Bethea *v.* McCall, 3 Ala. 449.
California.— Tevis *v.* Hicks, 41 Cal. 123.
Illinois.— Brush *v.* Blanchard, 19 Ill. 31.
Indiana.— Kenney *v.* Phillipy, 91 Ind. 511.
Missouri.— Gamble *v.* Johnson, 9 Mo. 605; Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181.
New Hampshire.— Badger *v.* Story, 16 N. H. 168.
New York.— Kent *v.* Harcourt, 33 Barb. 491.
Pennsylvania.— York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Layton *v.* Brightfield, 3 Pennyp. 181.
Texas.— Lunn *v.* Scarborough, (Civ. App. 1896) 35 S. W. 508.
Virginia.— Land *v.* Jeffries, 5 Rand. 211.
West Virginia.— State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884.

6. *Alabama.*— Heflin *v.* Slay, 78 Ala. 180.

the legal result of a sale.[7] A contract[8] or its rescission[9] may be established by proof of unsworn statements oral or in writing.[10] An offer,[11] its acceptance,[12] or its repudiation,[13] may be so established by statements of the parties, or their representatives, made while something still remains to be done for the achievement of the legal result in question, and the parties have not separated.[14] It follows

Georgia.— Cook *v.* Pinkerton, 81 Ga. 89, 7 S. E. 171, 12 Am. St. Rep. 297.

Indiana.— Fox *v.* Fox, 20 Ind. App. 61, 50 N. E. 92.

Maine.— Dale *v.* Gower, 24 Me. 563.

Massachusetts.— Elliott *v.* Stoddard, 98 Mass. 145.

Missouri.— Patchin *v.* Biggerstaff, 25 Mo. App. 534.

North Carolina.— Fain *v.* Edwards, 44 N. C. 64.

Ohio.— Leggett *v.* State, 15 Ohio 283.

Pennsylvania.— Rees *v.* Livingston, 41 Pa. St. 113.

Texas.— Fellman *v.* Smith, 20 Tex. 99.

7. Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509; Smith *v.* T. M. Richardson Lumber Co., 92 Tex. 448, 49 S. W. 574. Declarations offered to affect a sale, on the ground that they are part of the *res gestæ*, must appear to have been made at the time of the sale. Miles *v.* Knott, 12 Gill & J. (Md.) 442.

8. *Alabama.*—Vincent *v.* State, 74 Ala. 274; Hooper *v.* Edwards, 25 Ala. 528.

District of Columbia.— Tuohy *v.* Trail, 19 App. Cas. 79, contract by father to pay daughter for services.

Illinois.— Hurd *v.* Haggerty, 24 Ill. 171.

Indiana.— State *v.* Gregory, 132 Ind. 387, 31 N. E. 952; Porter *v.* Waltz, 108 Ind. 40, 8 N. E. 705; Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933.

Indian Territory.— Long-Bell Lumber Co. *v.* Thomas, 1 Indian Terr. 225, 40 S. W. 773.

Iowa.— Sheldon *v.* Bigelow, 118 Iowa 586, 92 N. W. 701, to show that declarant was a partner.

Massachusetts.— Blanchard *v.* Child, 7 Gray 155. See Jennings *v.* Rooney, 183 Mass. 577, 67 N. E. 665.

Michigan.— Chick *v.* Sisson, 95 Mich. 412, 54 N. W. 895; Brush-Swan Light, etc., Co. *v.* Gardner, 59 Mich. 424, 26 N. W. 661; Owen *v.* Union Match Co., 48 Mich. 348, 12 N. W. 175.

Montana.— Frank *v.* Murray, 7 Mont. 4, 14 Pac. 654.

New Hampshire.— Delano *v.* Goodwin, 48 N. H. 203, 97 Am. Dec. 601; Johnson *v.* Elliot, 26 N. H. 67.

New York.— Lennon *v.* Stiles, 2 Silv. Supreme 145, 4 N. Y. Suppl. 487, 5 N. Y. Suppl. 870; Sickles *v.* Richardson, 23 Hun 559; Robinson *v.* Lyle, 10 Barb. 512; Murray *v.* Bethune, 1 Wend. 191.

Pennsylvania.—Ellis *v.* Guggenheim, 20 Pa. St. 287.

Texas.— Itasca First Nat. Bank *v.* Watson, (Civ. App. 1902) 66 S. W. 232.

Vermont.— Fifield *v.* Richardson, 34 Vt. 410.

Virginia.— Steptoe *v.* Pollard, 30 Gratt. 689.

United States.— Metropolis Nat. Bank *v.* Kennedy, 17 Wall. 19, 21 L. ed. 554; Marks *v.* Fox, 18 Fed. 713; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168. See also Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584.

Where a principal ratifies the unauthorized act of an agent, the information and knowledge upon which he did so, as shown by a conversation between him and the agent, is competent evidence. Davenport Sav. Fund, etc., Assoc. *v.* North American F. Ins. Co., 16 Iowa 74.

Statements by or to third person.— In an action upon a verbal contract the testimony of plaintiff as to what his clerk told him defendant had said to him (the clerk) in orally making the promise sued upon is competent, and is not hearsay. Frank *v.* Murray, 7 Mont. 4, 14 Pac. 654. In assumpsit for the services of plaintiff's wife, plaintiff may testify as to his understanding of the oral contract under which she was employed, although it was made with her in plaintiff's absence, and all that he knows about it is what his wife told him. Delano *v.* Goodwin, 48 N. H. 203, 97 Am. Dec. 601. In an action by a woman on a promise of marriage, her answer, when informed by one who had been a confidant and messenger of defendant of his intention to marry her, is evidence on her behalf as part of the *res gestæ*. Ellis *v.* Guggenheim, 20 Pa. St. 287.

9. Babcock *v.* Huntington, 9 Ala. 869; Leas *v.* Grubbs, Wils. (Ind.) 301.

10. **Conversation through interpreter.**— In reproducing a conversation as a fact, where two persons who cannot understand each other converse through an interpreter, a bystander who understands one of the languages may testify to the conversation as he understands it. Com. *v.* Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

11. Sayre *v.* Durwood, 35 Ala. 247.

12. A letter written by an officer of a trust company stating that an application for a loan made to it in defendant's behalf had been accepted by the company is in itself an acceptance of the loan, and not merely hearsay evidence of that fact. Peet *v.* Sherwood, 47 Minn. 347, 50 N. W. 241, 929.

13. Bee *v.* San Francisco, etc., R. Co., 46 Cal. 248; Parry *v.* Arnold, 33 Ill. App. 622 (letters); Largent *v.* Beard, (Tex. Civ. App. 1899) 53 S. W. 90.

14. Fifield *v.* Richardson, 34 Vt. 410.

Unilateral statements, not assented to by the other party, made even shortly after the formation of an oral contract, are no part of the *res gestæ* and are inadmissible. Woods *v.* Clark, 24 Pick. (Mass.) 35.

that where the making of a contract extends over several interviews a relevant statement on any such occasion is competent.[15]

3. DEMAND OR REFUSAL. Unsworn statements may be admissible as constituting a demand[16] or refusal.[17]

4. DENIAL OR DISCLAIMER. The fact of denial may consist of unsworn statements admissible for that reason.[18] Disclaimer of ownership, total or partial, may be a relevant fact, properly constituted by statements of persons not witnesses.[19]

5. CONSPIRACY. Declarations may be admissible because they constitute a criminal agreement or conspiracy.[20]

IX. UNSWORN STATEMENTS — HEARSAY.*

A. Rule Excluding Hearsay — 1. IN GENERAL — a. Rule Stated. Prominent among logical inferences which the law of evidence rejects is that a fact exists because a person not called as a witness has stated its existence.[21] Such an

15. Porter *v.* Hannibal, etc., R. Co., 60 Mo. 160; Ahern *v.* Goodspeed, 72 N. Y. 108.

16. Wallace *v.* Bernheim, 63 Ark. 108, 37 S. W. 712; Gracie *v.* Robinson, 14 Ark. 438.

17. Pickel *v.* Luetgert, 59 Ill. App. 378; Merrill *v.* Cahill, 8 Mich. 55.

18. *Arkansas.*— Tatum *v.* Mohr, 21 Ark. 349.

Kansas.— Kaufman *v.* Springer, 38 Kan. 730, 17 Pac. 475.

Michigan.— Passmore *v.* Passmore, 60 Mich. 463, 27 N. W. 601.

Mississippi.— Bonner *v.* Marx, 51 Miss. 141.

New Hampshire.— Clark *v.* Wood, 34 N. H. 447.

South Carolina.— Charles *v.* Jacobs, 6 S. C. 69.

19. Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Vincent *v.* State, 74 Ala. 274; Place *v.* Gould, 123 Mass. 347; Davis *v.* Campbell, 23 N. C. 482.

20. Banks *v.* State, 157 Ind. 190, 60 N. E. 1087, conversation. See also CONSPIRACY, 8 Cyc. 679 *et seq.*

21. It is essential to the application of the "hearsay" or other exclusionary rule of evidence that the fact offered should be relevant. It is not until that test is successfully passed that a question of rules applicable to evidence arises. An irrelevant fact is not evidence. For some consideration of the conditions of relevancy under the hearsay rule see *infra*, IX, A, 2.

In support of the text see the following cases:

Alabama.— Brown *v.* Prude, 97 Ala. 639, 11 So. 838; Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387; Downing *v.* Woodstock Iron Co., 93 Ala. 262, 9 So. 177; Moore *v.* Robinson, 62 Ala. 537; Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538. See also Ramsey *v.* Smith, 138 Ala. 333, 35 So. 325.

Arkansas.— Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296; McNeill *v.* Arnold, 22 Ark. 477.

California.— Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381; Amann *v.* Lowell, 66 Cal. 306, 5 Pac. 363; Poorman *v.* Miller, 44 Cal. 269; Bornheimer *v.* Baldwin, 42 Cal. 27. See also Baily *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104; Bell *v.* Staacke, 141 Cal. 186, 70 Pac. 472, 74 Pac. 774; *In re* Wickes, 139 Cal. 195, 72 Pac. 902; Williams *v.* Long, 139 Cal. 186, 72 Pac. 911.

Colorado.— Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Connecticut.— Chapin *v.* Pease, 10 Conn. 69, 25 Am. Dec. 56. See also Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778.

Dakota.— Knapp *v.* Sioux Falls Nat. Bank, 5 Dak. 378, 40 N. W. 587.

Florida.— Mizell *v.* Travelers' Ins. Co., (1902) 33 So. 454.

Georgia.— Mondon *v.* Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853; Baker *v.* Goldsmith, 91 Ga. 173, 16 S. E. 988; Johns *v.* Johns, 29 Ga. 718. See also Dozier *v.* McWhorter, 117 Ga. 786, 45 S. E. 61; Whilchel *v.* Gainesville, etc., Electric R. Co., 116 Ga. 431, 42 S. E. 776.

Illinois.— Grubey *v.* National Bank, 133 Ill. 79, 24 N. E. 575; Kent *v.* Mason, 79 Ill. 540; Huling *v.* Huling, 32 Ill. App. 519; Valliquette *v.* McMahon, 30 Ill. App. 181. See also Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; Chicago *v.* McKethney, 205 Ill. 372, 68 N. E. 954 [*reversing* 91 Ill. App. 442]; Hlasatel *v.* Hoffman, 204 Ill. 532, 68 N. E. 400 [*affirming* 105 Ill. App. 170]; Treat *v.* Merchants' L. Assoc., 198 Ill. 431, 64 N. E. 992 [*reversing* 98 Ill. App. 59]; Helbig *v.* Citizens' Ins. Co., 108 Ill. App. 624; Chicago City R. Co. *v.* Douglas, 104 Ill. App. 41.

Indiana.— Pulaski County *v.* Shields, 130 Ind. 6, 29 N. E. 385; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; De Pew *v.* Robinson, 95 Ind. 109; American Express Co. *v.* Patterson, 73 Ind. 430; Reynolds *v.* Copeland, 71 Ind. 422; Salem Gravel Road Co. *v.* Pennington, 62 Ind. 175. See also Goode *v.* Elwood Lodge, No. 166, K. of P., 160 Ind. 251, 66 N. E. 742; George *v.* Hurst, 31 Ind. App. 660, 68 N. E. 1031; Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

Iowa.— Garretson *v.* Merchants', etc., Ins. Co., 92 Iowa 293, 60 N. W. 540; Monroe Bank *v.* Gifford, 72 Iowa 750, 32 N. W. 669; Huff *v.* Aultman, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213; Hurd *v.* Gallaher, 14 Iowa 394.

*By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

unsworn statement offered as evidence of the fact asserted will be rejected,

Kansas.— Myers *v.* Knabe, 51 Kan. 720, 33 Pac. 602. See also Ft. Scott *v.* Elliott, (Sup. 1903) 74 Pac. 609.

Kentucky.— Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L. R. A. 63; Dozier *v.* Barnett, 13 Bush 457; Shackelford *v.* Purket, 1 A. K. Marsh. 425; McKinney *v.* McConnel, 1 Bibb 239. See also Alexander *v.* Harrodsburg First Nat. Bank, 114 Ky. 683, 71 S. W. 883, 24 Ky. L. Rep. 1486; Hays *v.* Earls, 77 S. W. 706, 25 Ky. L. Rep. 1299; New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438.

Louisiana.— State *v.* Thomas, 28 La. Ann. 827; Janney *v.* Ober, 28 La. Ann. 281; Spears *v.* Spears, 27 La. Ann. 537; Quartreveaux *v.* Caboche, 14 La. 365; Perillat *v.* Puech, 8 Mart. N. S. 671. See also New Orleans *v.* Manfre, 111 La. 927, 35 So. 981.

Maine.— Gains *v.* Hasty, 63 Me. 361; Penobscot R. Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257. See also Smith *v.* Lawrence, 98 Me. 92, 56 Atl. 455.

Maryland.— Trensch *v.* Shryock, 51 Md. 162; Forrester *v.* State, 46 Md. 154; Whiteford *v.* Burckmyer, 1 Gill 127, 39 Am. Dec. 640; Walkup *v.* Pratt, 5 Harr. & J. 51. See also Duvall *v.* Hambleton, (1903) 55 Atl. 431; Black *v.* Westminster First Nat. Bank, 96 Md. 399, 54 Atl. 88; Johnson *v.* Johnson, 96 Md. 144, 53 Atl. 792.

Massachusetts.— Blaisdell *v.* Bickum, 139 Mass. 250, 1 N. E. 281; Walker *v.* Moors, 122 Mass. 501; Filley *v.* Angell, 102 Mass. 67; McMahon *v.* Tyng, 14 Allen 167; Ryan *v.* Merriam, 4 Allen 77.

Michigan.— Merritt *v.* Stebbins, 86 Mich. 342, 48 N. W. 1084; Dikeman *v.* Arnold, 83 Mich. 218, 47 N. W. 113; Carter *v.* Hill, 81 Mich. 275, 45 N. W. 988; Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501; Huizega *v.* Cutler, etc., Lumber Co., 51 Mich. 272, 16 N. W. 643. See also Log Owners' Booming Co. *v.* Hubbell, (1903) 97 N. W. 157; National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623; Culver *v.* Smith, 131 Mich. 359, 91 N. W. 608.

Minnesota.— Little *v.* Cook, 55 Minn. 265, 56 N. W. 750. And see Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903; Enneking *v.* Woebkenberg, 88 Minn. 259, 92 N. W. 932.

Mississippi.— Illinois Cent. R. Co. *v.* Langdon, 71 Miss. 146, 14 So. 452; Hall *v.* Clopton, 56 Miss. 555; Rothschild *v.* Hatch, 54 Miss. 554; Allen *v.* Lenoir, 53 Miss. 321; Herron *v.* Bondurant, 45 Miss. 683; Melius *v.* Houston, 41 Miss. 59.

Missouri.— Fougue *v.* Burgess, 71 Mo. 389; Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19; Hamilton *v.* Wabash, etc., R. Co., 21 Mo. App. 152. See also Strode *v.* Meyers Bros. Drug Co., 101 Mo. App. 627, 74 S. W. 379; Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255.

Montana.— State *v.* Welch, 22 Mont. 92, 55 Pac. 927; State *v.* Shafer, 22 Mont. 17, 55 Pac. 526. And see Stagg *v.* St. Jean, 29 Mont. 288, 74 Pac. 740; Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319; Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

Nebraska.— Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365. See also Clancy *v.* Barker, (1904) 98 N. W. 440.

Nevada.— Kennedy *v.* Kennedy, (1903) 74 Pac. 7.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Dearborn *v.* Sawyer, 59 N. H. 95; Heywood *v.* Brooks, 47 N. H. 231; Page *v.* Parker, 40 N. H. 47.

New Jersey.— Demoney *v.* Walker, 1 N. J. L. 37.

New York.— Doyle *v.* Trinity Church Corp., 118 N. Y. 678, 23 N. E. 928; Waldele *v.* New York Cent. R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Manwarren *v.* Mason, 79 Hun 592, 29 N. Y. Suppl. 915; Gross *v.* Moore, 68 Hun 412, 22 N. Y. Suppl. 1019; Murtha *v.* Metropolitan El. R. Co., 14 Misc. 284, 35 N. Y. Suppl. 708; *In re* Bliss, 7 Hill 187. See also Adams *v.* Elwood, 176 N. Y. 106, 68 N. E. 126; Weigley *v.* Kneeland, 172 N. Y. 625, 65 N. E. 1123 [*affirming* 60 N. Y. App. Div. 614, 69 N. Y. Suppl. 657]; Platt *v.* Hollands, 85 N. Y. App. Div. 231, 83 N. Y. Suppl. 556; Woarms *v.* Becker, 84 N. Y. App. Div. 491, 82 N. Y. Suppl. 1086; Diamond *v.* Wheeler, 80 N. Y. App. Div. 58, 80 N. Y. Suppl. 416; Kramer *v.* Kramer, 80 N. Y. App. Div. 20, 80 N. Y. Suppl. 184; Johnson *v.* Cole, 76 N. Y. App. Div. 606, 78 N. Y. Suppl. 489.

North Carolina.— Spencer *v.* Fortescue, 112 N. C. 268, 16 S. E. 898; Hunsucker *v.* Farmer, 72 N. C. 372. See also Perkins *v.* Brinkley, 133 N. C. 348, 45 S. E. 652; Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506.

Ohio.— Adams *v.* Brown, 16 Ohio St. 75; Benster *v.* Powell, 11 Ohio Cir. Ct. 491, 5 Ohio Cir. Dec. 206.

Oregon.— Haase *v.* Oregon R., etc., Co., 19 Oreg. 354, 24 Pac. 238; White *v.* Rayburn, 11 Oreg. 450, 5 Pac. 345.

Pennsylvania.— Corser *v.* Hale, 149 Pa. St. 274, 24 Atl. 285; Shaw *v.* Susquehanna Boom Co., 125 Pa. St. 324, 17 Atl. 426; Johnston *v.* Patterson, 114 Pa. St. 398, 6 Atl. 746; Hipps *v.* Wardle, (1885) 1 Atl. 727.

South Carolina.— Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679; Orr *v.* Orr, 34 S. C. 275, 13 S. E. 467; Bridger *v.* Asheville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653. And see Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

South Dakota.— Fallon *v.* Rapid City, (1904) 97 N. W. 1009; Tenney *v.* Rapid City, (1903) 96 N. W. 96.

Tennessee.— Brazelton *v.* Turney, 7 Coldw. 267; Dement *v.* Scott, 2 Head 367, 75 Am. Dec. 747. See also Kolb *v.* Knoxville, (Sup. 1903) 76 S. W. 823.

Texas.— Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318; Wash *v.* State, (Cr. App. 1898) 47 S. W. 469; Blum *v.* Goff, (Civ. App. 1895) 29 S. W. 1110; Downtain *v.* Connellee, 2 Tex. Civ. App. 95, 21 S. W. 56. See also

although embodied in a question to a witness,[22] or made part of his answer,[23] or although it take the form of an opinion,[24] or was made by a physician,[25] or while the declarant was acting in the course of official duty.[26] In civil cases, if hearsay

International, etc., R. Co. *v.* Startz, (Sup. 1903) 77 S. W. 1 [*reversing* (Civ. App. 1903) 74 S. W. 1118]; McElroy *v.* Phink, (Sup. 1903) 76 S. W. 753, 77 S. W. 1025 [*reversing* (Civ. App. 1903) 74 S. W. 61]; League *v.* Williamson, (Civ. App. 1903) 77 S. W. 435; International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93; Hicks *v.* Galveston, etc., R. Co., 71 S. W. 322 [*reversed* on other grounds in 96 Tex. 355, 72 S. W. 835]; Wells, etc., Express Co. *v.* Williams, (Civ. App. 1902) 71 S. W. 314.

Utah.— Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432; Marks *v.* Sullivan, 9 Utah 12, 33 Pac. 224.

Vermont.— Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850; St. Johnsbury *v.* Waterford, 15 Vt. 692. See also Wilmington Sav. Bank *v.* Waste, (1904) 57 Atl. 241.

Virginia.— Hopper *v.* Com., 6 Gratt. 684; Claiborne *v.* Parrish, 2 Wash. 146.

Washington.— McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

West Virginia.— Thompson *v.* Updegraff, 3 W. Va. 629.

Wisconsin.— Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121; Anderson *v.* Fetzer, 75 Wis. 562, 44 N. W. 838; Shirland *v.* Monitor Iron Works Co., 41 Wis. 162.

United States.— Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250; Atchison, etc., R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220; Van Vleet *v.* Sledge, 45 Fed. 743. See also Atchison, etc., R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314.

England.— Rex *v.* Eriswell, 3 T. R. 707.

See 20 Cent. Dig. tit. "Evidence," § 1168 *et seq.*

Former statement of witness.— A witness is not at liberty to testify as to his former statements. Murphy *v.* State, (Tex. Cr. App. 1897) 40 S. W. 978.

A statement in part hearsay is incompetent. Harvey *v.* State, 35 Tex. Cr. 545, 34 S. W. 623.

The verbal admission of a party can only be testified to by the person who heard it. Evidence of what the witness heard the hearer report about it is merely hearsay. State *v.* Thomas, 28 La. Ann. 827; St. Louis *v.* Arnot, 94 Mo. 275, 7 S. W. 15.

Remote or collateral fact.— It has been intimated that hearsay may be received as proof of remote or collateral facts. Justus' Succession, 47 La. Ann. 302, 16 So. 841.

22. The opinion of an expert not used as a witness cannot be introduced in evidence by incorporating it in a question to another expert. Sullivan *v.* Hugly, 32 Ga. 316.

23. Cornish *v.* Chicago, etc., R. Co., 49 Iowa 378. And see Ramsey *v.* Smith, 138 Ala. 333, 35 So. 325.

24. *Alabama.*— Gordon *v.* State, 123 Ala. 113, 30 So. 30; Stewart *v.* Conner, 13 Ala. 94; Powell *v.* Governor, 9 Ala. 36.

California.— People *v.* Altmeyer, 135 Cal. 80, 66 Pac. 974.

Illinois.— Lake Erie, etc., R. Co. *v.* Zoffinger, 107 Ill. 199.

Massachusetts.— Com. *v.* Mooney, 110 Mass. 99; Sheldon *v.* Root, 16 Pick. 567, 28 Am. Dec. 266; Phelps *v.* Hartwell, 1 Mass. 71.

Missouri.— State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104.

Nebraska.— Johnson *v.* Plum Creek First Nat. Bank, 28 Nebr. 792, 45 N. W. 161; Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365.

New Jersey.— Collins *v.* Langan, 58 N. J. L. 6, 32 Atl. 258.

New York.— People *v.* Dorthy, 156 N. Y. 237, 50 N. E. 800; Shipman *v.* Frech, 15 Daly 151, 3 N. Y. Suppl. 932.

Ohio.— Jones *v.* State, 54 Ohio St. 1, 42 N. E. 699.

Pennsylvania.— Com. *v.* Hazlett, 16 Pa. Super. Ct. 534.

Tennessee.— Owens *v.* State, 16 Lea 1.

Texas.— Mercer *v.* State, (Cr. App. 1902) 66 S. W. 555; Bass *v.* State, (Cr. App. 1901) 65 S. W. 919; Hurst *v.* State, (Cr. App. 1897) 40 S. W. 264.

The limit of admissibility was apparently reached in a case where on an issue of the execution of a promissory note for legal services the opinion of the deceased maker as to the professional ability of the payee (who was an attorney) was permitted to go to the jury as bearing upon the probability of the employment relied on as the consideration of the note. Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142.

25. *Alabama.*— Hussey *v.* State, 87 Ala. 121, 6 So. 420; Alabama Great Southern R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337; Blackman *v.* Johnson, 35 Ala. 252.

Georgia.— Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Indiana.— Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

Maine.— Heald *v.* Thing, 45 Me. 392.

New York.— Platt *v.* Hollands, 85 N. Y. App. Div. 231, 83 N. Y. Suppl. 556; Mellwitz *v.* Manhattan R. Co., 17 N. Y. Suppl. 112.

Ohio.— New York L. Ins. Co. *v.* La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 1.

Tennessee.—Kolb *v.* Knoxville, (Sup. 1903) 76 S. W. 823, statement made to a physician as to cause of illness.

Texas.— Missouri, etc., R. Co. *v.* Criswell, (Civ. App. 1904) 78 S. W. 388.

United States.— Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99, 7 S. Ct. 118, 30 L. ed. 299.

26. *Alabama.*— Jackson *v.* State, 106 Ala. 12, 17 So. 333.

District of Columbia.— Moore *v.* Langdon, 2 Mackey 127, 47 Am. Rep. 262.

is admitted without objection, the evidence is competent, although any inherent weakness still attaches.[27] In criminal cases hearsay evidence is inadmissible against a defendant unless he assents.[28]

b. Impossibility of Obtaining Other Evidence. However valuable in practice or logical in principle[29] would be the establishment of a well guarded rule that a relevant unsworn statement should be treated as secondary evidence of the fact asserted, and however inconsistent to consider it such, in case of declarations against interest, as to pedigree, and in other instances, and not treat it so wherever relevant, it is stated by the great weight of authority that, except in certain well established connections, the impossibility, practical or absolute, of procuring other evidence of the fact asserted by an absent declarant, does not modify the application of the rule respecting the inference.[30] Relevant declarations of third persons, objectionable as hearsay, are not rendered competent by the fact that such third persons have since died.[31] Nor are such declarations competent because

Georgia.— Baker *v.* Goldsmith, 91 Ga. 173, 16 S. E. 988; Owsley *v.* Woolhopter, 14 Ga. 124.

Illinois.— Chicago Protection L. Ins. Co. *v.* Foote, 79 Ill. 361.

New York.— Woodgate *v.* Fleet, 44 N. Y. 1, 11 Abb. Pr. N. S. 41.

Ohio.— Roberts *v.* Briscoe, 44 Ohio St. 596, 10 N. E. 61.

Tennessee.— Elliot *v.* Shultz, 10 Humphr. 234.

Wisconsin.— Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

United States.— Cook *v.* U. S., 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906.

See 20 Cent. Dig. tit. "Evidence," § 1168 *et seq.*

On the contrary official conduct may be competent, although its only probative force consists in the fact that it implies a declaration to a particular effect which would not be competent evidence of the fact asserted. Thus evidence that plaintiff was not allowed to vote in the town where he claimed residence was not hearsay, as calling for the action taken by the authorities. Meserve *v.* Folsom, 62 Vt. 504, 20 Atl. 926. See, however, Stallings *v.* State, (Tex. Cr. App. 1901) 63 S. W. 127, presentation of bills not evidence that they have not been paid.

27. State Bank *v.* Wooddy, 10 Ark. 638. See Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124.

28. Phillips *v.* State, 29 Ga. 105. See CRIMINAL LAW, 12 Cyc. 429 *et seq.*, 432 *et seq.*

29. "If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence." Sugden *v.* St. Leonards, 1 P. D. 154, 250, 45 L. J. P. 49, 34 L. T. Rep. N. S. 372, 24 Wkly. Rep. 860, per Mellish, L. J.

30. Johnson *v.* State, 59 Ala. 37; Reeves *v.* State, 7 Tex. App. 276.

31. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

California.— *In re* Welch, 110 Cal. 605, 42 Pac. 1089.

Connecticut.— Abel *v.* Fitch, 20 Conn. 90.

Georgia.— Dozier *v.* McWhorter, 117 Ga. 786, 45 S. E. 61.

Illinois.— Chicago, etc., R. Co. *v.* Foster, 46 Ill. App. 621.

Indiana.— Salem Gravel Road Co. *v.* Pennington, 62 Ind. 175; Hamlyn *v.* Nesbit, 37 Ind. 284; Doe *v.* Cunningham, 6 Blackf. 430.

Kentucky.—Alexander *v.* Harrodsburg First Nat. Bank, 114 Ky. 683, 71 S. W. 883, 24 Ky. L. Rep. 1486; Cherry *v.* Boyd, Litt. Sel. Cas. 7. See also New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438.

Maryland.— Duvall *v.* Hambleton, (1903) 55 Atl. 431.

Massachusetts.— Com. *v.* Felch, 132 Mass. 22; Lund *v.* Tyngsborough, 9 Cush. 36. *Contra*, under express statutory provision. Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726.

Michigan.— Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74.

Missouri.—Strode *v.* Meyer Bros. Drug Co., 101 Mo. App. 627, 74 S. W. 379.

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

New Hampshire.— Wendell *v.* Abbott, 45 N. H. 349.

New Jersey.— Collins *v.* Langan, 58 N. J. L. 6, 32 Atl. 258.

New York.— Farmer *v.* Emigrant Industrial Sav. Bank, 124 N. Y. 646, 27 N. E. 412; Carney *v.* Downey, 2 N. Y. St. 707; Gray *v.* Goodrich, 7 Johns. 95.

Pennsylvania.— Hogg *v.* Wilkins, 1 Grant 67; Bonnet *v.* Devebaugh, 3 Binn. 175; Galloway *v.* Ogle, 2 Binn. 468.

South Carolina.— State *v.* Allen, 56 S. C. 495, 35 S. E. 204; Lynn *v.* Thompson, 17 S. C. 129; State *v.* Easterling, 1 Rich. 310.

Tennessee.— Day *v.* McGinnis, 1 Heisk. 310.

Texas.— Johnson *v.* State, (Cr. App. 1900) 55 S. W. 576; Anglin *v.* Barlow, (Civ. App. 1898) 45 S. W. 827; Brown *v.* Brown, (Civ. App. 1896) 36 S. W. 918; Nix *v.* Cole, (Civ. App. 1895) 29 S. W. 561.

the declarant has left the state[32] or country,[33] or is sick,[34] or cannot be examined,[35] or compelled[36] or permitted[37] to testify.

c. Second-Hand Hearsay — (I) *General Rule.* As a corollary to rejection of the inference itself, a witness is not at liberty to testify to facts from knowledge derived from unsworn statements of others, in whole[38] or in part,[39] or from reputation in that community;[40] and testimony so founded should be excluded, although based on a written or even an official statement.[41] The rule applies to proof of the contents of a lost document.[42] Hearsay, although repeated by a party to the suit as such, continues to be merely hearsay.[43] Knowledge acquired in the line of official duty or employment[44] is not objectionable as based on hearsay.[45]

England.—Garnons *v.* Barnard, 1 Anstr. 296.

See 20 Cent. Dig. tit. "Evidence," § 1168 *et seq.*

32. Johnson *v.* State, 59 Ala. 37.

33. Pearson *v.* Darrington, 32 Ala. 227; Brown *v.* Steele, 14 Ala. 63.

34. The fact that a witness was taken sick the day previous to the trial is not a circumstance sufficient to warrant the admission of his declarations on the ground of necessity. Gaither *v.* Martin, 3 Md. 146.

35. Churchill *v.* Smith, 16 Vt. 560.

36. State *v.* Yanz, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780; Braddon *v.* Speke, 9 How. St. Tr. 1127.

37. Blann *v.* Beal, 5 Ala. 357.

38. *Alabama.*— McDonald *v.* Wood, 118 Ala. 589, 24 So. 86; Payne *v.* Crawford, 102 Ala. 387, 14 So. 854; Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834.

Arkansas.— Little Rock, etc., R. Co. *v.* Allister, 62 Ark. 1, 34 S. W. 82; Sangster *v.* Dalton, (1889) 12 S. W. 202.

California.— Russell *v.* Brosseau, 65 Cal. 605, 4 Pac. 643. See also Baily *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104; *In re* Wickes, 139 Cal. 195, 72 Pac. 902; Williams *v.* Long, 139 Cal. 186, 72 Pac. 911.

Colorado.— Persse *v.* Atlantic-Pacific R. Tunnel Co., 5 Colo. App. 117, 37 Pac. 951.

Georgia.— Myers *v.* State, 97 Ga. 76, 25 S. E. 252; Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Thomas *v.* Whitehead, 48 Ga. 587.

Illinois.— Chicago Protection L. Ins. Co. *v.* Foote, 79 Ill. 361; Chicago City R. Co. *v.* Douglas, 104 Ill. App. 41.

Iowa.— Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

Kentucky.—Alexander *v.* Harrodsburg First Nat. Bank, 114 Ky. 683, 71 S. W. 883, 24 Ky. L. Rep. 1486; New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438.

Maryland.— Chelton *v.* State, 45 Md. 564; Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534; Green *v.* Caulk, 16 Md. 556.

Michigan.— Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

Mississippi.— Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446; Melius *v.* Houston, 41 Miss. 59.

Missouri.— State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

New York.— Evans *v.* Deming, 2 N. Y. St. 349. See also White Mfg. Co. *v.* De la Vergne Refrigerating Mach. Co., 84 N. Y. Suppl. 192.

Pennsylvania.— Scull *v.* Wallace, 15 Serg. & R. 231.

Texas.— Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946; Tippens *v.* State, (Cr. App. 1898) 43 S. W. 1000. See also Pelly *v.* Denison, etc., R. Co., (Civ. App. 1904) 78 S. W. 542; Texas, etc., R. Co. *v.* Dougherty, (Civ. App. 1903) 76 S. W. 605; International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93.

See 20 Cent. Dig. tit. "Evidence," § 1168 *et seq.*

Testimony as to location of lines if based entirely on what the witness' surveyor tells him is mere hearsay and incompetent. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86.

A present conviction of the existence of a fact produced by hearsay is not competent. Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

Telephone conversation.— While a third person who conducts a telephone conversation may testify to what was said to him (Sullivan *v.* Kuykendall, 4 Ky. L. Rep. 908), and, if he recognizes the voice (Vaughn *v.* State, 130 Ala. 18, 30 So. 669), may state who said it, a person whom he informs of these facts cannot himself testify to them (Sullivan *v.* Kuykendall, *supra*).

39. Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71; Robeson *v.* Schuylkill Nav. Co., 3 Grant (Pa.) 186; Monk *v.* State, 27 Tex. App. 450, 11 S. W. 460. But *compare* Hornum *v.* McNeil, 80 N. Y. App. Div. 637, 80 N. Y. Suppl. 728.

40. Ramsey *v.* Smith, 138 Ala. 333, 35 So. 325; Munford *v.* Miller, 7 Ill. App. 62; Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506; White *v.* Whaley, 1 Tex. App. Civ. Cas. § 101; Hicks *v.* Cram, 17 Vt. 449.

41. Cook *v.* U. S., 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906.

42. Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618; Propst *v.* Mathis, 115 N. C. 526, 20 S. E. 710; New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294; Paige *v.* Loring, 18 Fed. Cas. No. 10,672, Holmes 275.

43. Stephens *v.* Vroman, 16 N. Y. 381.

44. State *v.* Powell, 7 N. J. L. 244; Scull *v.* Wallace, 15 Serg. & R. (Pa.) 231.

45. Knowledge, acquired in the discharge of one's duty as administrator, that a certain claim or demand belonged to or was set up by the estate, although not sufficient to prove the claim, is not hearsay evidence, and is admissible. Stewart *v.* Chadwick, 8 Iowa 463. Experts in cattle diseases, employed by the

(II) *Preliminary Proof.* What proof that his evidence is not hearsay the proponent is called upon to make, as a preliminary to hearing it, is a matter in dispute. On the one hand, it has been held that, unless it affirmatively appears that evidence is hearsay, it is not to be excluded if of such a nature that it may be based on the personal knowledge of the witness;[46] the evidence is accordingly received, and is stricken out later, if discovered to have been based upon hearsay.[47] On the contrary it has been decided that no evidence should be received unless it shall first appear that the witness is prepared to testify from his own knowledge.[48]

(III) *Memoranda to Refresh Memory of Witness.* A witness cannot refresh his memory by reference to a memorandum containing statements which he does not know, or has not at some time known to be true.[49] The rule applies to statements based upon books of account,[50] even where the witness knows the general correctness with which the accounts are kept.[51]

department of agriculture, may state what districts of Texas are infected with the cattle fever, although they have never visited those districts, the knowledge gained by them in the correspondence of the department and in the investigation of such diseases as to the places of their origin or prevalence not being properly hearsay. Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230.

46. Russell *v.* Brosseau, 65 Cal. 605, 4 Pac. 643; Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Atlanta Glass Co. *v.* Noizet, 88 Ga. 43, 13 S. E. 833; People *v.* Abbott, 116 Mich. 263, 74 N. W. 529; Rosenthal *v.* Middlebrook, 63 Tex. 333; Tippens *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1000; Short *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1072. And see Texas, etc., R. Co. *v.* Daugherty, (Tex. Civ. App. 1903) 76 S. W. 605; Gresham *v.* Harcourt, (Tex. Civ. App. 1903) 75 S. W. 808.

Hearsay quality of the witness' "knowledge" may sufficiently appear from the statement itself. Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92. A person who can neither read nor write cannot testify to the contents of a lost instrument, as his evidence is necessarily hearsay. Russell *v.* Brosseau, 65 Cal. 605, 4 Pac. 643. A witness cannot state what he "found out" (Rosenthal *v.* Middlebrook, 63 Tex. 333) or "understood from some source" (Scales *v.* Desha, 16 Ala. 308). But the form of the answer must unequivocally show that the statement does rest on hearsay. It is not sufficient ground for exclusion that it may so rest (admission of the answer of a witness in a murder case, when asked to give his opinion as to the cause of a reddish stain on defendant's knife is not ground for reversal, because showing by its form — "We thought" — that another examined the knife with him).

47. Chicago, etc., R. Co. *v.* Fietsam, 123 Ill. 518, 15 N. E. 169; Rooker *v.* Rooker, 83 Ind. 226.

48. Peck *v.* Parchen, 52 Iowa 46, 54, 2 N. W. 597. But see Overman *v.* Hibbard, 30 Iowa 115.

The claim of the witness to possess such knowledge is not sufficient if it affirmatively appears that he could not have had it. Field *v.* Tenny, 47 N. H. 513.

49. *Illinois.*— Cleveland, etc., R. Co. *v.* Brown, 53 Ill. App. 227.

Maryland.— Green *v.* Caulk, 16 Md. 556; Lewis *v.* Kramer, 3 Md. 265.

Massachusetts.— L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

Michigan.— Radley *v.* Seider, 99 Mich. 431, 58 N. W. 366.

Missouri.— Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145.

New York.— Thomas *v.* Woodruff, 53 N. Y. Super. Ct. 327 (tradesmen's bills); Matter of Drinker, 9 N. Y. St. 254 (stenographic minutes).

Oregon.— Keller *v.* Bley, 15 Oreg. 429, 15 Pac. 705.

Pennsylvania.— Robeson *v.* Schuylkill Nav. Co., 3 Grant 186.

Texas.— Gulf, etc., R. Co. *v.* Frost, (Civ. App. 1896) 34 S. W. 167, account of sales.

Utah.— McCornick *v.* Sadler, 10 Utah 210, 37 Pac. 332, tradesmen's bills.

Washington.— Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

See also, generally, WITNESSES.

50. *Alabama.*— Crawford *v.* Mobile Branch Bank, 8 Ala. 79.

Iowa.— Hopley *v.* Wakefield, 54 Iowa 711, 7 N. W. 136.

Maine.— Bradley *v.* Davis, 26 Me. 45.

Michigan.— Hamilton Provident, etc., Soc. *v.* Northwood, 86 Mich. 315, 49 N. W. 37.

North Dakota.— Keith *v.* Haggart, 2 N. D. 18, 48 N. W. 432.

Vermont.— Hibbard *v.* Mills, 46 Vt. 243.

Washington.— Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

And see, generally, WITNESSES.

Books in custody of witness.— A witness cannot testify as to the state of an account, where all his knowledge is derived from certain books, unless he first shows that he made the entries in the books, or had knowledge of their correctness, even though said books are in his custody and possession. Memphis, etc., R. Co. *v.* Maples, 63 Ala. 601; L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354; Young *v.* Miles, 20 Wis. 615.

51. Bradley *v.* Davis, 26 Me. 45; L'Her-

(iv) *Results of Examination.* While a witness cannot testify to the existence of a fact of which he has no personal knowledge, he is not necessarily precluded from stating what certain unsworn statements show, and, assuming them to be correct, what they prove.[52]

(v) *Verified Statements.* Where a witness testifies that he has truly stated to a third person of his own knowledge a fact which he has since forgotten, he thereby renders competent the testimony of that party as to what the forgotten statement actually was.[53]

2. Evidence Must Be Relevant — a. Rule Stated. A feeling runs through many decisions on the subject of unsworn statements when used as evidence of the facts asserted that, since such statements, when so used, are frequently rejected under the "rule against hearsay" all unsworn statements are inadmissible because of the hearsay rule. In many, perhaps the greater number, of instances the unsworn statement is excluded because it has no logical connection with the case; in other words, because it is irrelevant. Nothing but confusion can arise from assigning hearsay, character, opinion, or *res inter alios* as specific ground for the rejection of irrelevant testimony. The rules so designated have a distinct value only as applied to evidence otherwise relevant. It perhaps suffices for the purposes of a particular case to say of an unsworn irrelevant statement that it is rejected "as hearsay." But no specific rule can be said to apply to an unsworn statement while the same thing can be said of a statement under oath; and the latter would be rejected if irrelevant. Any statement, sworn or unsworn, is relevant only when it fulfils two conditions: (1) Bears on the issue; and (2) is made by a trustworthy person. The first condition — that the statement should bear on the issue — may, as in case of admissions, involve application of the rules of procedure, or, as in most cases, require the use of the rules of reasoning. The second condition — of trustworthiness in the declarant — implies at least two general requirements: (1) That it shall have been made by a person possessing adequate knowledge of the subject-matter;[54] and (2) that the declarant should be so far free from bias, or other motive to misrepresent, as to lead to a reasonable inference that he is not, consciously or unconsciously, misstating the fact.[55] While the possibility of applying the test of cross-examination introduces, especially as to the second of these requirements, a certain relaxation in favor of the sworn statement, the essential conditions of sworn and unsworn statements are so far identical that it is only to unsworn statements which fulfil these conditions that the hearsay rule of exclusion applies, and by consequence it is only unsworn

bette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

52. San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410; State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693; Masonic Mut. Ben. Soc. *v.* Lackland, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298. But see Kelley *v.* Stevens, 58 Kan. 569, 50 Pac. 595.

Practical convenience.— Where evidence states the result of voluminous facts, or of an inspection of books and papers which cannot conveniently take place in court, the objection of hearsay does not apply. Masonic Mut. Ben. Soc. *v.* Lackland, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298.

53. Where, on the trial of an action in which the number of loads of hay delivered at a particular time was in issue, a witness had stated that he could not remember the number of loads, but that he knew at the time and had told plaintiff, evidence of plaintiff of the number that witness had at the time told him was admissible. Shear *v.* Van Dyke, 10 Hun (N. Y.) 528. For the application of this rule as related to proof of book entries and other documents see *infra*, XIV, B, 1.

Statements by an interpreter.— The course is the same in other cases where the testimony of two witnesses is necessary to a complete statement. For example where an interpreter swears that he truly translated certain evidence to a court stenographer; the stenographer may then swear that he has truly reproduced the statements made to him by the interpreter and such minutes may be read to refresh the stenographer's recollection. Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021. The interpreter is a necessary witness. Evidence of what was said in its translated form, standing alone, is based upon hearsay. State *v.* Noyes, 36 Conn. 80, 4 Am. Rep. 37; State *v.* Terline, 23 R. I. 530, 51 Atl. 204, 91 Am. St. Rep. 650.

54. See *infra*, IX, A, 2, b, (II), (A).

55. See *infra*, IX, A, 2, b, (II), (B).

statements that are relevant, as above defined, which can be embraced in recognized exceptions to the hearsay rule; such as declarations against interest,[56] declarations in course of business,[57] declarations as to pedigree,[58] declarations as to matters of public and general interest,[59] and declarations which are part of the *res gestæ*.[60]

b. Conditions of Relevancy — (I) *Statement Must Bear on the Issue* — (A) *In General.* Where it appears that the statement can have no bearing upon the existence of any disputed fact,[61] in the absence of additional facts, which are not furnished,[62] the declaration is rejected as irrelevant. The rule is the same in criminal cases; in the absence of evidence of conspiracy or other agency, statements or conversations by third persons, out of defendant's presence, and not otherwise connected with him, are irrelevant as evidence of the facts stated.[63]

(B) *Confession or Admission of Third Person.* Confessions or criminal admissions by a third person are irrelevant on the issue as to whether the party

56. See *infra*, IX, B.
57. See *infra*, IX, E.
58. See *infra*, IX, C.
59. See *infra*, IX, D.
60. See *infra*, IX, E.
61. *Alabama.*— Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Motes *v.* Bates, 80 Ala. 382.
California.— Riley *v.* Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33.
Illinois.— Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669.
Indiana.— Allen County *v.* Bacon, 96 Ind. 31.
Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558.
Maine.— Rice *v.* Perry, 61 Me. 145.
Maryland.— Oelrichs *v.* Artz, 21 Md. 524.
Massachusetts.—Linnehan *v.* Matthews, 149 Mass. 29, 20 N. E. 453; Framingham Mfg. Co. *v.* Barnard, 2 Pick. 532. See also Prescott *v.* Ward, 10 Allen 203.
Minnesota.— St. Paul Nat. German-American Bank *v.* Lawrence, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363; Finch *v.* Green, 16 Minn. 355.
Mississippi.— Goodall *v.* Stewart, 65 Miss. 157, 3 So. 257.
Missouri.— Mulford *v.* Caesar, 53 Mo. App. 263.
Nebraska.— Farmers' L. & T. Co. *v.* Montgomery, 30 Nebr. 33, 46 N. W. 214.
New Jersey.— Peterson *v.* Christianson, 68 N. J. L. 392, 56 Atl. 288.
New York.— Milbank *v.* Dennistoun, 10 Bosw. 382; Shipman *v.* Frech, 15 Daly 151, 3 N. Y. Suppl. 932.
Pennsylvania.— D'Homergue *v.* Morgan, 3 Whart. 26; Davis *v.* Collins, 4 Yeates 100.
South Carolina.— Cathart *v.* Gibson, 2 Speers 661.
Texas.— Olive *v.* Hester, 63 Tex. 190; Thompson *v.* Comstock, 59 Tex. 318.
Vermont.— Gates *v.* Moore, 51 Vt. 222.
Wisconsin.— Saveland *v.* Green, 40 Wis. 431.
United States.— Sutherland *v.* Round, 57 Fed. 467, 6 C. C. A. 428.
62. *Alabama.*— Rivers *v.* State, 97 Ala. 72, 12 So. 434.
Florida.— Lee *v.* Walker, 25 Fla. 149, 6 So. 57.
Kentucky.— Wright *v.* Haddock, 7 Dana 253; Pence *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500.
Massachusetts.— Prescott *v.* Ward, 10 Allen 203.
Michigan.— White *v.* Ross, 47 Mich. 172, 10 N. W. 188.
Mississippi.— Hairston *v.* State, (1891) 10 So. 479.
New York.— Hard *v.* Ashley, 18 N. Y. Suppl. 413.
Texas.— Johnson *v.* State, (Cr. App. 1900) 55 S. W. 576.
Canada.— Phelps *v.* Wilson, 13 U. C. C. P. 38.
Non-residence.— A party, on the trial of an issue on the allegation that he is a non-resident, offered evidence of his statements that he resided at a certain place, where there was no other evidence of his being there. It was held that the evidence was not admissible. Wright *v.* Haddock, 7 Dana (Ky.) 253.
Estoppel to object.— A party cannot complain that evidence is irrelevant, if he has himself opened up the inquiry. Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. (N. Y.) 326, 35 N. Y. Suppl. 838, where counsel opened the inquiry on cross-examination.
Closely analogous to irrelevant unsworn statements are facts whose relevancy is based upon the existence of an implied statement not resting on personal knowledge. Howley *v.* Whipple, 48 N. H. 487.
63. *Alabama.*— Evans *v.* State, 109 Ala. 11, 19 So. 535; Tolbert *v.* State, 87 Ala. 27, 6 So. 284.
California.— People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; People *v.* Griffin, 52 Cal. 616.
Indiana.— Good *v.* State, 61 Ind. 69; Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.
Kentucky.— Twyman *v.* Com., 33 S. W. 409, 17 Ky. L. Rep. 1038.
South Carolina.— State *v.* Dukes, 40 S. C. 481, 19 S. E. 134.
Tennessee.— Britton *v.* State, 4 Coldw. 173.
Texas.— Aud *v.* State, 36 Tex. Cr. 76, 35 S. W. 671.

on trial committed the crime to which such confessions or admissions refer,[64] in the absence of conspiracy,[65] or other established relation of agency; and the same rule applies to statements[66] or other acts of the third person which tend to establish circumstantially the guilt of the latter.

(c) *Connection With Party* — (1) ADMISSIONS. Statements are frequently rejected as hearsay when the real ground is that the declaration has not been sufficiently connected with the party to affect him and is consequently irrelevant;[67] as where statements constituting so-called admissions by conduct[68] — bribing witnesses,[69] compounding crime,[70] or suppressing evidence[71] — are not sufficiently connected with the party to be affected by them to be relevant, or where a statement alleged to have been made in his presence is not shown to have been heard by him,[72] or to have been made in his presence at all.[73]

United States.— U. S. *v.* Burr, 25 Fed. Cas. No. 14,694.

See 14 Cent. Dig. tit. "Criminal Law," § 973 *et seq.* And see CRIMINAL LAW, 12 Cyc. 432 *et seq.*

64. *Alabama.*— Owensby *v.* State, 82 Ala. 63, 2 So. 764; Alston *v.* State, 63 Ala. 178; Snow *v.* State, 54 Ala. 138.

Georgia.— Robinson *v.* State, 114 Ga. 445, 40 S. E. 253; Howard *v.* State, 109 Ga. 137, 34 S. E. 330; Brooks *v.* State, 96 Ga. 353, 23 S. E. 413; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Indiana.— Green *v.* State, 154 Ind. 655, 57 N. E. 637; Siple *v.* State, 154 Ind. 647, 57 N. E. 544.

Iowa.— State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

Kansas.— State *v.* Smith, 35 Kan. 618, 11 Pac. 908.

Louisiana.— State *v.* West, 45 La. Ann. 928, 13 So. 173.

Maryland.— Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Massachusetts.— Com. *v.* Chabbock, 1 Mass. 144.

Missouri.— State *v.* Terry, 172 Mo. 213, 72 S. W. 513; State *v.* Hack, 118 Mo. 92, 23 S. W. 1089; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

New York.— People *v.* Schooley, 149 N. Y. 99, 43 N. E. 536; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636 [*affirming* 23 Hun 454].

North Carolina.— State *v.* Beverly, 88 N. C. 632; State *v.* Baxter, 82 N. C. 602; State *v.* Haynes, 71 N. C. 79.

Oregon.— State *v.* Fletcher, 24 Oreg. 295, 33 Pac. 575.

South Carolina.— State *v.* Rice, 49 S. C. 418, 27 S. E. 452, 61 Am. St. Rep. 816.

Tennessee.— Peck *v.* State, 86 Tenn. 259, 6 S. W. 389; Rhea *v.* State, 10 Yerg. 258.

Texas.— Hodge *v.* State, (Cr. App. 1901) 64 S. W. 242; Woods *v.* State, (Cr. App. 1900) 60 S. W. 244; Wood *v.* State, (Cr. App. 1894) 26 S. W. 625.

Vermont.— State *v.* Totten, 72 Vt. 73, 47 Atl. 105; St. Johnsbury *v.* Waterford, 15 Vt. 692.

Washington.— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

United States.— U. S. *v.* Miller, 26 Fed. Cas. No. 15,773, 4 Cranch C. C. 104.

Canada.— Rose *v.* Cuyler, 27 U. C. Q. B. 270.

See 14 Cent. Dig. tit. "Criminal Law," § 978. See also CRIMINAL LAW, 12 Cyc. 434.

Limit of rule.— It is entirely open to the accused to prove if he can that a third person committed the offense with which he is himself charged. Snow *v.* State, 58 Ala. 372. See CRIMINAL LAW, 12 Cyc. 399. The exclusion applies merely to offering as evidence of it the statements of such a person. Smith *v.* State, 9 Ala. 990.

65. Howard *v.* State, 109 Ga. 137, 34 S. E. 330.

66. Wilson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 489; Buel *v.* State, 104 Wis. 132, 80 N. W. 78, threats.

67. *Florida.*— Mizell *v.* Travelers' Ins. Co., 44 Fla. 799, 33 So. 454.

Massachusetts.— Linnehan *v.* Matthews, 149 Mass. 29, 20 N. E. 453.

Minnesota.— Enneking *v.* Woebkenberg, 88 Minn. 259, 92 N. W. 932.

Nebraska.— Bedford *v.* State, 36 Nebr. 702, 55 N. W. 263.

New York.— Adams *v.* Elwood, 176 N. Y. 106, 68 N. E. 126; Platt *v.* Hollands, 85 N. Y. App. Div. 231, 83 N. Y. Suppl. 556; Shidlonsky *v.* Gorman, 51 N. Y. App. Div. 253, 64 N. Y. Suppl. 993.

North Carolina.— Perkins *v.* Brinkley, 133 N. C. 345, 45 S. E. 652; Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923.

68. Leach *v.* Hill, 97 Iowa 81, 66 N. W. 69; Ehrhard *v.* McKee, 44 Kan. 715, 25 Pac. 193; Johnson *v.* State, 42 Tex. Cr. 298, 59 S. W. 898; Newton *v.* State, 41 Tex. Cr. 610, 56 S. W. 64; Sanders *v.* State, 31 Tex. Cr. 525, 21 S. W. 258; Maines *v.* State, 23 Tex. App. 568, 5 S. W. 123; State *v.* Barron, 37 Vt. 57.

69. Newton *v.* State, 41 Tex. Cr. 610, 56 S. W. 64.

70. Mixon *v.* State, 28 Tex. App. 347, 13 S. W. 143; Barbee *v.* State, 23 Tex. App. 199, 4 S. W. 584.

71. Maines *v.* State, 23 Tex. App. 568, 5 S. W. 123; State *v.* Barron, 37 Vt. 57.

72. Munzer *v.* Stern, 105 Mich. 523, 63 N. W. 513, 55 Am. St. Rep. 468, 29 L. R. A. 859; McCormick Harvesting Mach. Co. *v.* Cochran, 64 Mich. 636, 31 N. W. 561.

73. *Alabama.*— Barker *v.* Coleman, 35 Ala. 321.

(2) AGENCY. Not only in connection with proof of admissions by conduct,[74] or otherwise, but generally an unsworn statement may be irrelevant because made by a third person whose agency to the party[75] — as by reason of the relationship of father,[76] mother,[77] husband,[78] wife,[79] son,[80] daughter,[81] or grandchild;[82] or because the declarant is acting as an employee[83] — has not been satisfactorily

California.— Bell *v.* Staacke, 141 Cal. 186, 74 Pac. 774 [*reversing* on rehearing 70 Pac. 472].

Indiana.— Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

Kansas.— Holman *v.* Raynesford, 3 Kan. App. 676, 44 Pac. 910.

Kentucky.— New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438.

Michigan.— National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623.

Missouri.— Fougue *v.* Burgess, 71 Mo. 389; Coble *v.* McDaniel, 33 Mo. 363.

Washington.— McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

United States.— Southern Express Co. *v.* Todd, 56 Fed. 104, 5 C. C. A. 432.

74. See *supra*, IX, A, 2, b, (I), (C), (1).

75. *Florida.*— Mizell *v.* Travelers' Ins. Co., 44 Fla. 799, 33 So. 454.

Georgia.— Brooks *v.* State, 96 Ga. 353, 23 S. E. 413.

Illinois.— U. S. Express Co. *v.* Hutchins, 67 Ill. 348; Reed *v.* Noxon, 48 Ill. 323; La Salle Pressed Brick Co. *v.* Coe, 53 Ill. App. 506; Hyde *v.* Howes, 2 Ill. App. 140.

Iowa.— Shillito *v.* Sampson, 61 Iowa 40, 15 N. W. 572.

Louisiana.— Waples *v.* Layton, 24 La. Ann. 624.

Michigan.— People *v.* Lyons, 49 Mich. 78, 13 N. W. 365.

Minnesota.— Minster *v.* Holbert, 32 Minn. 533, 21 N. W. 718.

New York.— Garnsey *v.* Rhodes, 138 N. Y. 461, 34 N. E. 199; Howe Mach. Co. *v.* Farrington, 82 N. Y. 121 [*affirming* 16 Hun 591]; O'Neil *v.* Hudson Valley Ice Co., 74 Hun 163, 26 N. Y. Suppl. 598; Strong *v.* Union Transfer, etc., Co., 11 Misc. 430, 32 N. Y. Suppl. 124. See also Courtney *v.* New York El. R. Co., 10 Misc. 115, 30 N. Y. Suppl. 932.

Oregon.— Du Bois *v.* Perkins, 21 Oreg. 189, 27 Pac. 1044.

South Carolina.— Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687.

Texas.— Blum *v.* Gaines, 57 Tex. 135; Chicago, etc., R. Co. *v.* Yarbrough, (Civ. App. 1896) 35 S. W. 422.

United States.— Beale *v.* Pettit, 2 Fed. Cas. No. 1,158, 1 Wash. 241.

England.— Papendick *v.* Bridgwater, 5 E. & B. 166, 1 Jur. N. S. 657, 24 L. J. Q. B. 289, 3 Wkly. Rep. 490, 85 E. C. L. 166; Scholes *v.* Chadwick, 2 M. & Rob. 507.

A person referred to is within the rule. Cohn *v.* Goldman, 76 N. Y. 284 (statement made prior to reference to declarant inadmissible); People *v.* Clauson, 2 Utah 502. See, generally, as to admissibility of statements by persons referred to, *supra*, IV, D, 4, c, (II).

76. Benziger *v.* Miller, 50 Ala. 206; Robinson *v.* Stevens, 93 Ga. 535, 21 S. E. 96; Evans *v.* McKee, 152 Pa. St. 89, 25 Atl. 148; Thomas *v.* Maddan, 50 Pa. St. 261; Montgomery *v.* State, 23 Tex. App. 650, 5 S. W. 165.

In party's presence.— It is not material that the statement was made in the party's presence. Benziger *v.* Miller, 50 Ala. 206; McConnell *v.* Caldwell, 73 N. C. 338.

77. Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443; French *v.* Chapman, 88 Va. 317, 13 S. E. 479.

78. Coldwater Nat. Bank *v.* Buggie, 117 Mich. 416, 75 N. W. 1057; Rothschild *v.* Hatch, 54 Miss. 554; Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90; Ladue *v.* Warner, 3 Hun (N. Y.) 547.

79. Canaday *v.* Johnson, 40 Iowa 587; Eddy *v.* McCall, 71 Mich. 497, 39 N. W. 734; McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711; Davis *v.* Davis, 49 Vt. 464.

80. *Kentucky.*— Utterback *v.* Com., 59 S. W. 515, 60 S. W. 15, 22 Ky. L. Rep. 1011.

Michigan.— McCormick Harvesting Mach. Co. *v.* Cochran, 64 Mich. 636, 31 N. W. 561.

Missouri.— Wright *v.* Richmond, 21 Mo. App. 76.

Pennsylvania.— McCormick *v.* Robb, 24 Pa. St. 44.

Texas.— Lankster *v.* State, 42 Tex. Cr. 360, 59 S. W. 888.

81. Treat *v.* Merchants' L. Assoc., 198 Ill. 431, 64 N. E. 992; Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

82. O'Kelly *v.* O'Kelly, 8 Metc. (Mass.) 436.

83. *Connecticut.*— Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778.

Florida.— Pensacola, etc., R. Co. *v.* Atkinson, 20 Fla. 450.

Georgia.— Lockett *v.* Pittman, 72 Ga. 815; East Tennessee, etc., R. Co. *v.* Duggan, 51 Ga. 212.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Maryland.— Baltimore, etc., R. Co. *v.* State, 62 Md. 479, 50 Am. Rep. 233.

Massachusetts.— McKinnon *v.* Norcross, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320.

Texas.— Houston, etc., R. Co. *v.* Hicks, 2 Tex. Unrep. Cas. 437.

Irrelevant statement.—In an action against a railroad company for causing the death of a man, a switchman testified that it was the engineer's duty to inform him of any obstructions on the track, that he might hold the following train till the obstruction was removed. It was held that this witness might testify that the engineer told him there was a man killed, but that no statements of the engineer as to how he was killed

established. The same is true where it is not satisfactorily established that the declarant occupied the relation of agent as interpreter,[84] or servant.[85]

(3) PRIVITY. The statements of one not satisfactorily shown to have been in privity with a party are irrelevant when offered against him as declarations of a privy.[86]

(II) *DECLARANT MUST BE TRUSTWORTHY* — (A) *Adequate Knowledge.* If the statement, when offered in evidence, is found to possess no probative quality, because the declarant was unable to state the truth of the matter from lack of sufficient opportunities for acquiring knowledge, it should be rejected.[87]

(B) *Lack of Motive to Misrepresent* — (1) IN GENERAL. An unsworn statement to be relevant should not have been made under the influence of bias[88] or self-interest,[89] or under the influence of a controversive spirit as having been made *post litem motam.*[90]

(2) SELF-SERVING DECLARATIONS — (a) DECLARATIONS OF AN INDIVIDUAL. A party's own statements, oral or written,[91] *a fortiori*, those distinctly self-serv-

or how he looked were admissible. Baltimore, etc., R. Co. *v.* State, 62 Md. 479, 50 Am. Rep. 233.

84. Territory *v.* Big Knot on Head, 6 Mont. 242, 11 Pac. 670. The result is the same, although the statements of the interpreter are made in the presence of the declarant, unless it appears that he understood what the interpreter was saying. Territory *v.* Big Knot on Head, *supra.* But see Wise *v.* Newatney, 26 Nebr. 88, 42 N. W. 339 [*citing* Fabrigas *v.* Mostyn, 20 How. St. Tr. 82, 122, 123]; Blazinski *v.* Perkins, 77 Wis. 9, 45 N. W. 947.

85. Lahey *v.* Ottmann, 73 Hun (N. Y.) 61, 25 N. Y. Suppl. 897. See also Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778.

86. *Colorado.*— Webber *v.* Emmerson, 3 Colo. 248.

Connecticut.— Chapin *v.* Pease, 10 Conn. 69, 25 Am. Dec. 56.

Georgia.— Foster *v.* Thrasher, 45 Ga. 517; Gill *v.* Strozier, 32 Ga. 688; Dollner *v.* Williams, 29 Ga. 743; Bailey *v.* Wood, 24 Ga. 164.

Illinois.— Reed *v.* Noxon, 48 Ill. 323.

Kentucky.— Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482.

Maine.— Hatch *v.* Bates, 54 Me. 136.

Minnesota.— Little *v.* Cook, 55 Minn. 265, 56 N. W. 750. See also Enneking *v.* Woebkenberg, 88 Minn. 259, 92 N. W. 932.

New York.— Hoguet *v.* Berkman, 6 N. Y. Suppl. 214.

North Carolina.— Yount *v.* Morrison, 109 N. C. 520, 13 S. E. 892.

Pennsylvania.— Evans *v.* McKee, 152 Pa. St. 89, 25 Atl. 148.

Texas.— Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643.

Vermont.— Paris *v.* Hilliard, 63 Vt. 316, 21 Atl. 528.

Virginia.— Vaughan *v.* Winckler, 4 Munf. 136.

See 20 Cent. Dig. tit. "Evidence," § 822 *et seq.*

87. Stockton *v.* Williams, Walk. (Mich.) 120; Doyle *v.* Trinity Church Corp., 118 N. Y. 678, 23 N. E. 928; Sugden *v.* St. Leonards, 1 P. D. 154, 240, 45 L. J. P. & Adm. 49, 34 L. T. Rep. N. S. 372, 24 Wkly. Rep. 860.

The law of Scotland, which admits hearsay, also requires adequate knowledge on the part of the declarant. Lovat Peerage Case, 10 App. Cas. 763.

88. Lavender *v.* Hall, 60 Ala. 214.

89. See *infra*, IX, A, 2, b, (II), (B), (2).

90. Abel *v.* Fitch, 20 Conn. 90.

91. *Alabama.*— Alexander *v.* Handley, 96 Ala. 220, 11 So. 390; Smith *v.* Flagg, 46 Ala. 624; Gordon *v.* Clapp, 38 Ala. 357.

California.— Rogers *v.* Schulenburg, 111 Cal. 281, 43 Pac. 899; Bedell *v.* Scoggins, (1895) 40 Pac. 954; Nicholson *v.* Tarpey, 70 Cal. 608, 12 Pac. 778.

Florida.— Mills *v.* Joiner, 20 Fla. 479.

Georgia.— Williams *v.* English, 64 Ga. 546; Alston *v.* Grantham, 26 Ga. 374.

Illinois.—Adams Express Co. *v.* Boskowitz, 107 Ill. 660; Aiken *v.* Hodge, 61 Ill. 436; Boeker *v.* Hess, 34 Ill. App. 332; Sullivan *v.* Niehoff, 27 Ill. App. 421. See also Chicago *v.* McKechney, 205 Ill. 372, 68 N. E. 954 [*reversing* 91 Ill. App. 442]; West Chicago St. R. Co. *v.* Lieserowitz, 197 Ill. 607, 64 N. E. 718 [*affirming* 99 Ill. App. 591].

Indiana.— Scobey *v.* Armington, 5 Ind. 514.

Iowa.— Corbel *v.* Beard, 92 Iowa 360, 60 N. W. 636; Ross *v.* Loomis, 64 Iowa 432, 20 N. W. 749; State *v.* Elliott, 15 Iowa 72.

Kentucky.— Talbot *v.* Talbot, 2 J. J. Marsh. 3; Hart *v.* Smith, 2 A. K. Marsh. 301; Howard *v.* Dietrick, 9 Ky. L. Rep. 441.

Louisiana.— Drake *v.* Hays, 27 La. Ann. 256; Flower *v.* O'Connor, 7 La. 198; Morton *v.* Rils, 5 La. 413.

Maine.— Handly *v.* Call, 30 Me. 9; Emerson *v.* Harmon, 14 Me. 271.

Maryland.— Knight *v.* House, 29 Md. 194, 96 Am. Dec. 515; Hagan *v.* Hendry, 18 Md. 177; Green *v.* Sprogle, 16 Md. 579. See also Duvall *v.* Hambleton, (1903) 55 Atl. 431.

Massachusetts.— Wallace *v.* Story, 139 Mass. 115, 29 N. E. 224; Holmes *v.* Flanders, 134 Mass. 147; Whitney *v.* Houghton, 125 Mass. 451.

Michigan.— Radley *v.* Seider, 99 Mich. 431, 58 N. W. 366; Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801. See also National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623.

ing,[92] although the declarant was disinterested at the time of making his state-

Minnesota.— Griffin *v.* Bristle, 39 Minn. 456, 40 N. W. 523.

Mississippi.— Presley *v.* Quarles, 31 Miss. 151.

Missouri.— North Missouri R. Co. *v.* Wheatley, 49 Mo. 136; McLean *v.* Rutherford, 8 Mo. 109; Crockett *v.* Althouse, 35 Mo. App. 404.

New Hampshire.— Howard *v.* Hunt, 57 N. H. 467; Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753; Bailey *v.* Woods, 17 N. H. 365; Gordon *v.* Shurtliff, 8 N. H. 260.

New York.— Eggleston *v.* Columbia Turnpike Road, 82 N. Y. 278; Mason *v.* Corbin, 88 Hun 540, 34 N. Y. Suppl. 773; McMaster *v.* Smith, 3 N. Y. St. 481. See also Mowbray *v.* Gould, 83 N. Y. App. Div. 255, 82 N. Y. Suppl. 102; Havens *v.* Gilmour, 83 N. Y. App. Div. 84, 82 N. Y. Suppl. 511; Simmon *v.* Bloomingdale, 39 Misc. (N. Y.) 847, 81 N. Y. Suppl. 499.

North Carolina.— Ward *v.* Hatch, 26 N. C. 282; Green *v.* Harris, 25 N. C. 210; Jenkins *v.* Cockerham, 23 N. C. 309. See also Newberry *v.* Norfolk, etc., R. Co., 133 N. C. 45, 45 S. E. 356.

Pennsylvania.— Smith *v.* Eyre, 161 Pa. St. 115, 28 Atl. 1005; Tisch *v.* Utz, 142 Pa. St. 186, 21 Atl. 808; Cain *v.* Cain, 140 Pa. St. 144, 21 Atl. 309.

South Carolina.— Ring *v.* Huntington, Mill 162.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Moody *v.* Gardner, 42 Tex. 411; Schwarzhoff *v.* Necker, 1 Tex. Unrep. Cas. 325.

Vermont.— Penniman *v.* Patchin, 6 Vt. 325.

Virginia.— Witz *v.* Osburn, 83 Va. 227, 2 S. E. 33; Scott *v.* Shelor, 28 Gratt. 891; Fulton *v.* Gracey, 15 Gratt. 314.

Washington.— McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

Wisconsin.— Cohn *v.* Heimbauch, 86 Wis. 176, 56 N. W. 638; McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200; Carlyle *v.* Plumer, 11 Wis. 96.

United States.— Teller *v.* Patten, 20 How. 125, 15 L. ed. 831; Edwards *v.* Bates County, 117 Fed. 526.

See 20 Cent. Dig. tit. "Evidence," § 1068 *et seq.*

92. *California.*— Fischer *v.* Bergson, 49 Cal. 294; Poorman *v.* Miller, 44 Cal. 269; Rice *v.* Cunningham, 29 Cal. 492. See also Rulofson *v.* Billings, 140 Cal. 252, 74 Pac. 35.

Georgia.— Lewis *v.* Adams, 61 Ga. 559; Royston *v.* Royston, 29 Ga. 82; Straffin *v.* Newell, T. U. P. Charlt. 172.

Idaho.— Work *v.* Kinney, 8 Ida. 771, 71 Pac. 477.

Illinois.— Tewkesbury *v.* Beckwith, 46 Ill. App. 323; Avery *v.* Moore, 34 Ill. App. 115 [*affirmed* in 133 Ill. 74, 24 N. E. 606]; Gibson *v.* Gibson, 15 Ill. App. 328.

Indiana.— Brown *v.* Kenyon, 108 Ind. 283, 9 N. E. 283; Harcourt *v.* Harcourt, 89 Ind. 104; Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

Iowa.— Luke *v.* Koenen, 120 Iowa 103, 94 N. W. 278; Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558; Wilson *v.* Patrick, 34 Iowa 362.

Kansas.— Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878.

Kentucky.— Continental Tobacco Co. *v.* Campbell, 76 S. W. 125, 25 Ky. L. Rep. 569; New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438; Penn *v.* Fightmaster, 17 S. W. 334, 13 Ky. L. Rep. 449.

Maine.— Scribner *v.* Adams, 73 Me. 541.

Maryland.— Blackburn *v.* Beall, 21 Md. 208; Edelin *v.* Sanders, 8 Md. 118; Brooks *v.* Dent, 1 Md. Ch. 523.

Massachusetts.— Fellows *v.* Smith, 130 Mass. 378; Baxter *v.* Knowles, 12 Allen 114; Ware *v.* Brookhouse, 7 Gray 454. See also Hutchinson *v.* Nay, 183 Mass. 355, 67 N. E. 601.

Michigan.— Ward *v.* Ward, 37 Mich. 253; Wilson *v.* Wilson, 6 Mich. 9. See also Lord *v.* Detroit Sav. Bank, 132 Mich. 510, 93 N. W. 1063, holding that the sale of part of a building pending foreclosure was inadmissible as a self-serving declaration.

Minnesota.— Hathaway *v.* Brown, 18 Minn. 414.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri.— State *v.* Moore, 156 Mo. 204, 56 S. W. 883; Criddle *v.* Criddle, 21 Mo. 522; Perry *v.* Roberts, 17 Mo. 36. See also Johnson *v.* Burks, 103 Mo. App. 221, 77 S. W. 133.

Nebraska.— Bennett *v.* Taylor, (1903) 96 N. W. 669.

New Hampshire.— South Hampton *v.* Fowler, 54 N. H. 197.

New Jersey.— Duysters *v.* Crawford, 69 N. J. L. 614, 55 Atl. 823.

New York.— Root *v.* Borst, 142 N. Y. 62, 36 N. E. 814; Lowery *v.* Erskine, 113 N. Y. 52, 20 N. E. 588; Hayden *v.* Pierce, 71 Hun 593, 25 N. Y. Suppl. 55. See also Griffin *v.* Train, 90 N. Y. App. Div. 16, 85 N. Y. Suppl. 686 [*affirming* 40 Misc. 290, 81 N. Y. Suppl. 977]; Grant *v.* Pratt, 87 N. Y. App. Div. 490, 84 N. Y. Suppl. 983; Diamond *v.* Wheeler, 80 N. Y. App. Div. 58, 80 N. Y. Suppl. 416; Healy *v.* Malcolm, 77 N. Y. App. Div. 69, 78 N. Y. Suppl. 1043; Thyll *v.* New York, etc., R. Co., 84 N. Y. Suppl. 175 [*modified* in 92 N. Y. App. Div. 513, 87 N. Y. Suppl. 345, on the ground that, since the evidence was admitted without objection, it could not afterward be objected to as incompetent].

North Carolina.— Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963, holding that declarations of a person in his own favor tending to show that he had a fee simple title to land were not rendered admissible by the fact that his declarations to the contrary had been admitted.

Pennsylvania.— Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394; Stewart's Estate,

ment,[93] are irrelevant when offered in favor of the declarant; and they are not rendered admissible by being part of a conversation or correspondence with the declarant's witness,[94] or with one sent by the opposite party,[95] or with the adverse party himself or his agent,[96] or by being brought to the attention of the other party or his agent and commented upon by him,[97] or by being entered upon a book of account or other record,[98] or brought out on cross-examination.[99] But such evidence has been received where no better proof could be had.[1] Such declarations are equally irrelevant when offered by the declarant's representatives.[2] The

3 Pa. Dist. 747, 15 Pa. Co. Ct. 380; Serfass *v.* Serfass, 14 Pa. Co. Ct. 97. See also Wonsetler *v.* Wonsetler, 23 Pa. Super. Ct. 321; Price *v.* Beach, 20 Pa. Super. Ct. 291.

Texas.— Schmidt *v.* Huff, (Sup. 1892) 19 S. W. 131; Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510; Slocum *v.* Putnam, (Civ. App. 1894) 25 S. W. 52; Solomon *v.* Huey, 1 Tex. Unrep. Cas. 265. See also Over *v.* Missouri, etc., R. Co., (Civ. App. 1903) 73 S. W. 535.

Utah.— Salt Lake City Brewing Co. *v.* Hawke, 24 Utah 199, 66 Pac. 1058. See also Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432.

Vermont.— Barber *v.* Bennett, 62 Vt. 50, 19 Atl. 978.

Washington.— Reese *v.* Murnan, 5 Wash. 373, 31 Pac. 1027.

West Virginia.— Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927.

Wisconsin.— Jilsum *v.* Stebbins, 41 Wis. 235.

United States.— Stockley *v.* Cissna, 119 Fed. 812, 5 C. C. A. 324, holding that recitals in a deed of recent origin that the makers were the heirs of a former owner, without circumstances in support, were not evidence against a stranger.

See 20 Cent. Dig. tit. "Evidence," § 1068 *et seq.*

Criminal cases.— As a general rule the declarations of an accused are not admissible in his favor. U. S. *v.* Neverson, 1 Mackey (D. C.) 152. See CRIMINAL LAW, 12 Cyc. 426.

Declarations otherwise relevant.—Self-serving declarations may be relevant. See Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740, holding that, in an action to correct a mutual mistake as to the amount of mortgage notes given for the purchase of land, evidence of declarations by plaintiff before the papers were drawn, as to the price agreed on, was competent to corroborate his testimony as to the same. See also Ætna Ins. Co. *v.* Fitze, (Tex. Civ. App. 1904) 78 S. W. 370 (letter by plaintiff's attorney to an insurance company to show denial of liability by the company rendering proofs of loss unnecessary); Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584 (holding that in an action for breach of an oral contract a letter written by plaintiff, not replied to, the day after the contract was made, purporting to be a memorandum of the terms of the contract as understood by plaintiff's agent, which did not differ from his evidence as to the terms of the contract, was not objectionable as a self-serving declaration).

Res gestæ.— The fact that declarations are self-serving does not render them inadmissible if they are otherwise admissible as part of the *res gestæ*. Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348; Missouri, etc., R. Co. *v.* Schilling, (Tex. Civ. App. 1903) 75 S. W. 64. See *supra*, VIII, A, 2, a; *infra*, IX, E.

93. White *v.* Green, 50 N. C. 47.

94. State *v.* Elliott, 15 Iowa 72. See also Chicago, etc., R. Co. *v.* Donworth, 203 Ill. 192, 67 N. E. 797 [*reversing* 105 Ill. App. 400] (holding inadmissible testimony of a physician as to what an injured person had told him of his injuries); McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

95. Artcher *v.* McDuffie, 5 Barb. (N. Y.) 147.

96. Collins *v.* Todd, 17 Mo. 537; Grant *v.* Pratt, 87 N. Y. App. Div. 490, 84 N. Y. Suppl. 983; Havens *v.* Gilmour, 83 N. Y. App. Div. 84, 82 N. Y. Suppl. 511.

97. Braley *v.* Bralcy, 16 N. H. 426; Duysters *v.* Crawford, 69 N. J. L. 614, 55 Atl. 823.

98. Hodges *v.* Detroit Electric Light, etc., Co., 109 Mich. 547, 67 N. W. 564 (book of account); Edwards *v.* Bates County, 117 Fed. 526 (entry in minute book of railroad company purporting to be a certified copy of the record of a county court).

99. Dickson *v.* Grissom, 4 La. Ann. 538.

Where one party offers evidence of part of a conversation, the other may give the balance, so far as relevant, even if statements in his own favor are included. Crosbie *v.* Leary, 6 Bosw. (N. Y.) 312.

1. Applegate *v.* McClung, 3 A. K. Marsh. (Ky.) 304; Willis *v.* Mackey, 15 Ky. L. Rep. 815; Darby *v.* Rice, 2 Nott & M. (S. C.) 596; Jones *v.* Robertson, 2 Munf. (Va.) 187.

2. *California.*— Bedell *v.* Scoggins, (1895) 40 Pac. 954; Stephenson *v.* Hawkins, 67 Cal. 106, 7 Pac. 198; Fischer *v.* Bergson, 49 Cal. 294. And see Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35.

Connecticut.— Ramsbottom *v.* Phelps, 18 Conn. 278.

District of Columbia.— Nieman *v.* Mitchell, 2 App. Cas. 195.

Georgia.— Lewis *v.* Adams, 61 Ga. 559; Royston *v.* Royston, 29 Ga. 82; Straffin *v.* Newell, T. U. P. Charlt. 172.

Illinois.— Tewkesbury *v.* Beckwith, 46 Ill. App. 323; Avery *v.* Moore, 34 Ill. App. 115 [*affirmed* in 133 Ill. 74, 24 N. E. 606]; Gibson *v.* Gibson, 15 Ill. App. 328.

Indiana.— Harcourt *v.* Harcourt, 89 Ind. 104; Bristor *v.* Bristor, 82 Ind. 276; Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

Iowa.— Luke *v.* Koenen, 120 Iowa 103, 94

rule of exclusion also applies when such declarations are offered in evidence by third persons on their own behalf.[3]

(b) Declarations of an Agent. A principal cannot offer the unsworn statements of an agent made in his favor,[4] either before or after the death of the

N. W. 278; Wilson *v.* Patrick, 34 Iowa 362.

Kentucky.— Penn *v.* Fightmaster, 17 S. W. 334, 13 Ky. L. Rep. 449.

Maine.— Scribner *v.* Adams, 73 Me. 541.

Maryland.— Blackburn *v.* Beall, 21 Md. 208; Edelin *v.* Sanders, 8 Md. 118; Brooks *v.* Dent, 1 Md. Ch. 523. See also Duvall *v.* Hambleton, (1903) 55 Atl. 431.

Massachusetts.— Fellows *v.* Smith, 130 Mass. 378; Baxter *v.* Knowles, 12 Allen 114.

Michigan.— Van Fleet *v.* Van Fleet, 50 Mich. 1, 14 N. W. 671; Ward *v.* Ward, 37 Mich. 253; Wilson *v.* Wilson, 6 Mich. 9.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri.— Criddle *v.* Criddle, 21 Mo. 522; Perry *v.* Roberts, 17 Mo. 36.

Nebraska.— Bennett *v.* Taylor, (1903) 96 N. W. 669.

New York.— Root *v.* Borst, 142 N. Y. 62, 36 N. E. 814; Lowery *v.* Erskine, 113 N. Y. 52, 20 N. E. 588; Hayden *v.* Pierce, 71 Hun 593, 25 N. Y. Suppl. 55. See also Griffin *v.* Train, 90 N. Y. App. Div. 16, 85 N. Y. Suppl. 686 [*affirming* 40 Misc. 290, 81 N. Y. Suppl. 977].

Pennsylvania.— Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394; Stewart's Estate, 3 Pa. Dist. 747, 15 Pa. Co. Ct. 380; Serfass *v.* Serfass, 14 Pa. Co. Ct. 97.

Texas.— Schmidt *v.* Huff, (Sup. 1892) 19 S. W. 131; Solomon *v.* Huey, 1 Tex. Unrep. Cas. 265.

Vermont.— Barber *v.* Bennett, 62 Vt. 50, 19 Atl. 978.

Virginia.— Masters *v.* Varner, 5 Gratt. 168, 50 Am. Dec. 114.

Washington.— Reese *v.* Murnan, 5 Wash. 373, 31 Pac. 1027.

West Virginia.— Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927.

Wisconsin.— Jilsun *v.* Stebbins, 41 Wis. 235.

See 20 Cent. Dig. tit. "Evidence," § 1068 *et seq.*

3. *California.*— Poorman *v.* Miller, 44 Cal. 269.

Massachusetts.— Ware *v.* Brookhouse, 7 Gray 454.

New Hampshire.— South Hampton *v.* Fowler, 54 N. H. 197.

New York.— Dewey *v.* Goodenough, 56 Barb. 54.

Texas.— Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510.

Wisconsin.— Lehman *v.* Sherger, 68 Wis. 145, 31 N. W. 733.

England.— Stothert *v.* James, 1 C. & K. 121, 47 E. C. L. 121.

See 20 Cent. Dig. tit. "Evidence," § 1068 *et seq.*

4. *Alabama.*— Warten *v.* Strane, 82 Ala. 311, 8 So. 231; Dickerson *v.* Hodges, 1 Port. 99.

Georgia.— Gray *v.* Phillips, 88 Ga. 199, 14 S. E. 205.

Illinois.— Chicago *v.* McKechney, 205 Ill. 372, 68 N. E. 954 [*reversing* 91 Ill. App. 442].

Indiana.— Franklin County *v.* Bunting, 111 Ind. 143, 12 N. E. 151; Ricketts *v.* Harvey, 78 Ind. 152.

Louisiana.— Peytavin *v.* Maurin, 2 La. 480.

Massachusetts.— Hutchinson *v.* Nay, 183 Mass. 355, 67 N. E. 601, holding that a letter from plaintiff's attorney to defendant offering a compromise was properly excluded as a self-serving statement.

Mississippi.— Nye *v.* Grubbs, 8 Sm. & M. 643.

Missouri.— Sira *v.* Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386; Proctor *v.* Loomis, 35 Mo. App. 482.

New Hampshire.— Low *v.* Connecticut, etc., R. Co., 46 N. H. 284.

New York.— Garnsey *v.* Rhodes, 138 N. Y. 461, 34 N. E. 199 [*affirming* 63 Hun 632, 18 N. Y. Suppl. 484]. See also Mowbray *v.* Gould, 83 N. Y. App. Div. 255, 82 N. Y. Suppl. 102 (advice of attorney); Havens *v.* Gilmour, 83 N. Y. App. Div. 84, 82 N. Y. Suppl. 511; Simmon *v.* Bloomingdale, 39 Misc. 847, 81 N. Y. Suppl. 499; Thyll *v.* New York, etc., R. Co., 84 N. Y. Suppl. 175 [*modified*, because of want of objection, in 92 N. Y. App. Div. 513, 87 N. Y. Suppl. 345].

Oregon.— Jones *v.* Kearns, 11 Oreg. 280, 3 Pac. 685.

Pennsylvania.— Harrington *v.* Bronson, 161 Pa. St. 296, 29 Atl. 30; Moulton *v.* O'Bryan, 17 Pa. Super. Ct. 593.

South Carolina.— Wardlaw *v.* Hammond, 9 Rich. 454.

Tennessee.— Jenkins *v.* Picket, 9 Yerg. 480.

Texas.— Shiner *v.* Abbey, 77 Tex. 1, 13 S. W. 613; Morris *v.* Balkham, 75 Tex. 111, 12 S. W. 970, 16 Am. St. Rep. 874; Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451.

Vermont.— Upham *v.* Wheelock, 36 Vt. 27.

See 20 Cent. Dig. tit. "Evidence," § 1068 *et seq.*

Declarations as to contracts.— The terms of a contract made by a deceased agent cannot be proved by his report of the transaction to his principal. Warten *v.* Strane, 82 Ala. 311, 8 So. 231. And the declarations of an agent who is dead as to the rescission of a contract made by him as such agent are not admissible in evidence in an action on that contract. Dickerson *v.* Hodges, 1 Port. (Ala.) 99.

Letters of an agent to his principal cannot be read in evidence against a third person. U. S. *v.* Barker, 24 Fed. Cas. No. 14,520, 4 Wash. 464.

agent.[5] Accordingly the favorable, unsworn statements of one co-defendant[6] or copartner[7] for the other, of a guardian for his ward,[8] a principal for the surety,[9] or a husband for his wife or *vice versa*,[10] are rejected.

(c) Declarations of Employee. The favorable, unsworn statement of an employee is not evidence for his employer.[11]

(d) Declarations of Officer of Corporation. A corporation cannot as a party introduce as evidence the unsworn declaration in its favor of one of its officers.[12]

(e) Declarations of Privies. An owner of property cannot use as evidence in his favor the self-serving declarations of his predecessors in title,[13] although the declarations have been brought to the attention of the opposite party.[14]

3. Reasons For the Rule. The hearsay rule is founded upon two principal considerations: (1) Distrust of the jury; and (2) the inherent weakness of the evidence itself. Distrust of the ability of the jury to give proper weight to an unsworn, untested statement furnishes a controlling reason for the existence of this very characteristic rule of the English law of evidence.[15] Where this consideration is removed and the judge decides matters of fact[16] or matters of discre-

5. Hall *v.* Hall, 34 Ind. 314; Havens *v.* Gilmour, 83 N. Y. App. Div. 84, 82 N. Y. Suppl. 511.

6. Hutchins *v.* Childress, 4 Stew. & P. (Ala.) 34; Brainerd *v.* Brackett, 33 Me. 580; Nye *v.* Grubbs, 8 Sm. & M. (Miss.) 643; Willis *v.* Gay, 48 Tex. 463, 26 Am. Rep. 328.

7. Graham *v.* Henderson, 35 Ind. 195; Bird *v.* Lanius, 7 Ind. 615.

8. Keele *v.* Cunningham, 2 Heisk. (Tenn.) 288.

9. Williams *v.* State, 89 Ind. 570; Ricketts *v.* Harvey, 78 Ind. 152.

10. Saunders *v.* Ferrill, 23 N. C. 97; Conley *v.* Bentley, 87 Pa. St. 40; Musser *v.* Gardner, 66 Pa. St. 242; Parvin *v.* Capewell, 45 Pa. St. 89; Kline's Appeal, 39 Pa. St. 463; Torrey *v.* Cameron, 73 Tex. 583, 11 S. W. 840. See also National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623; Griffin *v.* Train, 90 N. Y. App. Div. 16, 85 N. Y. Suppl. 686 [*affirming* 40 Misc. 290, 81 N. Y. Suppl. 977].

11. Dennis *v.* Belt, 30 Cal. 247; West Chicago St. R. Co. *v.* Lieserowitz, 197 Ill. 607, 64 N. E. 718 [*affirming* 99 Ill. App. 591]; American Merchants' Union Express Co. *v.* Gilbert, 57 Ill. 468; Henderson *v.* Miller, 36 Ill. App. 232; Jackson *v.* Walsh, 3 Johns. (N. Y.) 226.

12. Low *v.* Connecticut, etc., R. Co., 46 N. H. 284.

13. *Georgia.*— Turner *v.* Tubersing, 67 Ga. 161; Shaw *v.* McDonald, 21 Ga. 395.

Illinois.— Gullett *v.* Otey, 19 Ill. App. 182.

Indiana.— Tobin *v.* Young, 124 Ind. 507, 24 N. E. 121.

Iowa.— Neeb *v.* McMillan, 92 Iowa 200, 60 N. W. 612.

Maryland.— Johnson *v.* Frisbie, 29 Md. 76, 96 Am. Dec. 508.

Massachusetts.— Lawrence *v.* Wilson, 160 Mass. 304, 35 N. E. 858; Blake *v.* Everett, 1 Allen 248.

Mississippi.— Coppage *v.* Barnett, 34 Miss. 621.

New York.— Garrigue *v.* Loescher, 3 Bosw. 578. See also Healy *v.* Malcolm, 77 N. Y. App. Div. 69, 78 N. Y. Suppl. 1043, assignor of contract.

North Carolina.— Griffin *v.* Tripp, 53 N. C. 64. See also Newberry *v.* Norfolk, etc., R. Co., 133 N. C. 45, 45 S. E. 356, declaration of assignor.

Texas.— Weaver *v.* Ashcroft, 50 Tex. 427.

Utah.— Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432, vendor of personal property.

Vermont.— Putnam *v.* Fisher, 52 Vt. 191, 36 Am. Rep. 746.

Virginia.— Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

United States.—See Stockley *v.* Cissna, 119 Fed. 812, 5 C. C. A. 324.

England.— Stothert *v.* James, 1 C. & K. 121, 47 E. C. L. 121.

14. Manwaring *v.* Griffing, 5 Day (Conn.) 561.

15. Wright *v.* Doe, 7 A. & E. 313, 375, 2 N. & P. 305, 34 E. C. L. 178 (per Bosanquet, J.); Berkeley's Case, 4 Campb. 401 (per Mansfield, C. J.).

16. "It is not the province of this Court to consider whether such evidence is properly receivable in the Ecclesiastical Courts. Those Courts are constituted upon principles very different from those which regulate the Courts of common law. Where the judges are authorized to deal both with the facts and the law, a much larger discretion with respect to the reception of evidence may not unreasonably be allowed than in Courts of common law, where the evidence, if received by the judge, must necessarily be submitted entire to the jury. By the rules of evidence established in the Courts of law, circumstances of great moral weight are often excluded, from which much assistance might, in particular cases, be afforded, in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose. This is matter of daily experience, and requires no illustration by examples." Wright *v.* Doe, 7 A. & E. 313, 2 N. & P. 305, 34 E. C. L. 178, per Bosanquet, J. "In Scotland, and most of the Continental

tion,[17] the stringency of the rule is much relaxed, although the evidence is no more admissible at preliminary than on final hearings,[18] and where there is a jury the admission of hearsay is none the less objectionable because the questions eliciting it were asked by the judge.[19] The natural danger that a jury will overestimate the effect of a reported statement is intensified by the inherent weakness of the evidence itself; weakness inhering in the facts that the statement has not been subjected to the tests of an oath and of cross-examination.[20] It has been assumed that only a well-trained mind can give it any, without giving it undue, weight.[21]

4. "BEST EVIDENCE RULE." Where the conditions of relevancy[22] exist, and the evidence of the declarant is rendered unattainable by death or equivalent disability, and no other evidence is attainable, a case of hardship is presented by the strict operation of the hearsay rule, which has resulted not only in the establishment of certain recognized exceptions, as declarations as to pedigree, in course of business, etc.,[23] but in an effort to extend the "best evidence rule," in its broad application, to unsworn statements. In the modern law of evidence this "best evidence rule"[24] is not only a rule regulating the receipt of secondary evidence of the contents of certain written instruments, but also a general principle of administration recognized or employed by the courts in handling all the rules of evidence, especially within the realm of judicial discretion. In this latter aspect the principle as usually stated — the best evidence of which the case admits should be given — may operate either, as (1) a rule of requirement, or (2) a rule of indulgence. In other words, the principle, generally applied, not only requires that the best evidence should be offered, but that, when offered, it should be deemed sufficient. As a rule of requirement, the "best evidence" principle, where the declarant is alive and accessible,[25] or the fact to be shown is one which is in its nature susceptible of being proved by witnesses who can speak

States, the Judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the Jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." Berkeley's Case, 4 Campb. 401, 415, per Mansfield, C. J.

17. The court in deciding whether sufficient evidence of search has been offered to admit secondary evidence of the contents of a document may rely upon hearsay. Bridges *v.* Hyatt, 2 Abb. Pr. (N. Y.) 449. Where a defendant has pleaded guilty, and is introducing evidence in mitigation of sentence, it is proper to admit hearsay evidence as to his intentions in regard to the commission of the crime. Granger *v.* Com., 78 Va. 212.

18. Early *v.* Oliver, 63 Ga. 11.

19. Bornheimer *v.* Baldwin, 42 Cal. 27.

20. State Bank *v.* Wooddy, 10 Ark. 638; Stouvenel *v.* Stephens, 26 How. Pr. (N. Y.) 244; Mima Queen *v.* Hepburn, 7 Cranch (U. S.) 290, 3 L. ed. 348; Southern Express Co. *v.* Todd, 56 Fed. 104, 5 C. C. A. 432. "A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely upon his dead or absent author." Coleman *v.* Southwick, 9 Johns. (N. Y.) 45, 50, 6 Am. Dec. 253.

21. Mima Queen *v.* Hepburn, 7 Cranch (U. S.) 290, 3 L. ed. 348.

22. See *supra*, IX, A, 2.

23. See *infra*, IX, B, C, D, E.

24. See *infra*, XV.

25. *Alabama.*— State Bank *v.* McDade, 4 Port. 252.

Colorado.— Sloan Sawmill, etc., Co. *v.* Guttshall, 3 Colo. 8.

Georgia.— Wallace *v.* Spullock, 32 Ga. 488.

Illinois.— Grubey *v.* National Bank, 133 Ill. 79, 24 N. E. 575; Dorland *v.* Bradley, 66 Ill. 412.

Indiana.— Kendall *v.* Hall, 6 Blackf. 507; Fuller *v.* Wilson, 6 Blackf. 403.

Iowa.— Hutchinson *v.* Watkins, 17 Iowa 475.

Mississippi.— Carmichael *v.* Pennsylvania Bank, 4 How. 567, 35 Am. Dec. 408.

Missouri.— Bain *v.* Clark, 39 Mo. 252; Langsdorf *v.* Field, 36 Mo. 440; Truesdail *v.* Sanderson, 33 Mo. 532.

New Hampshire.— Ross *v.* Knight, 4 N. H. 236.

New York.—Stouvenel *v.* Stephens, 26 How. Pr. 244; Woodward *v.* Paine, 15 Johns. 493; Alexander *v.* Mahon, 11 Johns. 185.

Pennsylvania.— Hummel *v.* Brown, 24 Pa. St. 310.

Tennessee.— Arnett *v.* Weeks, 8 Humphr. 547.

from their own knowledge,[26] evidently accords with the hearsay rules. On the other hand, considered as a rule of indulgence, where the declarant is dead or otherwise unavailable, and no further evidence of the fact can be had, the report of his statement would be the best evidence of the fact and be receivable as such. The state of the authorities indicates that in certain jurisdictions this principle of receiving secondary evidence where the primary cannot be obtained has been applied to the use of unsworn statements in other cases than the generally recognized exceptions above referred to. The testimony of the declarant in court as a witness is in these jurisdictions regarded as the primary evidence of the fact,[27] and it is held that, while primary evidence of the fact can be procured, the secondary evidence of unsworn statements should be rejected;[28] but that when the court is satisfied that the primary evidence is unattainable[29] because the declarant is dead[30] or out of the jurisdiction,[31] or is physically[32] or mentally incapacitated to testify, or could not have testified before,[33] secondary evidence of

Vermont.— Deming *v.* Lull, 17 Vt. 398; Low *v.* Perkins, 10 Vt. 532, 33 Am. Dec. 217.

Wisconsin.— Persons *v.* Burdick, 6 Wis. 63.

United States.— Reid *v.* Hodgson, 20 Fed. Cas. No. 11,667, 1 Cranch C. C. 491.

Evidence of what certain persons told witness is inadmissible, where such persons can he produced, since the hest evidence of which the case is susceptible must be produced. Sloan Sawmill, etc., Co. *v.* Guttshall, 3 Colo. 8.

26. *Iowa.*— Carnas *v.* Crandall, 10 Iowa 377.

Kentucky.— Bradshaw *v.* Com., 10 Bush 576.

Maine.— Gould *v.* Smith, 35 Me. 513.

Massachusetts.— Crouch *v.* Eveleth, 15 Mass. 305, 306, where the court said: "The cases in which hearsay, declarations of parties, and reputation, have been allowed in evidence, are where no better evidence can be supposed to exist."

Missouri.— Chouteau *v.* Searcy, 8 Mo. 733.

New Hampshire.— Page *v.* Parker, 40 N. H. 47.

New York.— Jackson *v.* Etz, 5 Cow. 314.

United States.— Hopt *v.* Utah, 110 U. S. 574, 26 L. ed. 873; Mima Queen *v.* Hepburn, 7 Cranch 290, 3 L. ed. 348 [*affirming* 20 Fed. Cas. No. 11,503, 2 Cranch C. C. 3].

27. *Alabama.*— Powell *v.* Governor, 9 Ala. 36; Glover *v.* Millings, 2 Stew. & P. 28.

Georgia.— Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Martin *v.* Atkinson, 7 Ga. 228, 50 Am. Dec. 403.

Illinois.— Jameson *v.* Conway, 10 Ill. 227.

Massachusetts.— Brown *v.* Mooers, 6 Gray 451; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271.

Missouri.— Patterson *v.* Fagan, 38 Mo. 70.

New York.— Jones *v.* East Soc. Rochester M. E. Church, 21 Barb. 161.

North Carolina.— Rowland *v.* Rowland, 24 N. C. 61.

Texas.— Tillman *v.* Wetsel, (Civ. App. 1895) 31 S. W. 433.

Wisconsin.— McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

28. Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Earle *v.* Clute, 2 Abb. Dec. (N. Y.) 1, 1 Keyes (N. Y.) 36.

29. Peterson *v.* Ankrom, 25 W. Va. 56.

30. *Maryland.*— Smith *v.* Wood, 31 Md. 293.

Massachusetts.— Townsend *v.* Pepperell, 99 Mass. 40; Barrett *v.* Wright, 13 Pick. 45.

Michigan.— Stockton *v.* Williams, Walk. 120.

Texas.— Primm *v.* Stewart, 7 Tex. 178.

Canada.— Lyons *v.* Laskey, 5 Montreal Q. B. 5.

Statement that person was insane.— On the trial of the issue of the insanity of a certain person during a certain period, evidence of declarations of her parents and others, since deceased, made during such period, that she was then insane were held admissible. Townsend *v.* Pepperell, 99 Mass. 40.

Identity of donee by treaty.— Where two Indians of the same name claimed, under the treaty of Saginaw, a particular reservation made by the Cherokee nation to individuals, evidence of what a person had said before such controversy arose, who was present at the treaty, and would be likely from the circumstances to know as to whom the donation was intended was held admissible, where such person was dead. Stockton *v.* Williams, Walk. (Mich.) 120.

It has been provided by statute in some jurisdictions that the statements of a deceased person may be received in actions for or against his estate. Pixley *v.* Eddy, 56 Conn. 336, 15 Atl. 758; Hamilton *v.* Lamphear, 54 Conn. 237, 7 Atl. 19.

31. Udall's Case, 1 How. St. Tr. 1271.

32. Declarations which would be admissible if the party making them were dead are equally admissible when he is in such physical condition as to be unable to testify either in court or by deposition. Griffith *v.* Sauls, 77 Tex. 630, 14 S. W. 230.

33. Where it was clearly proved that a trustee was robbed of part of the trust money, it was held, in a suit by his executor after his death, that his declarations as to the amount, made at the time of the loss, were evidence thereof, although not under oath, it having been impossible for him to swear to the same in any legal way. Furman *v.* Coe, 1 Cai. Cas. (N. Y.) 96.

unsworn statements, more particularly in case of ancient facts,[34] or those of genealogy,[35] has been received as the best attainable.[36] It is difficult to detect any logical or administrative principle on which the exceptions to the hearsay rule could have been established that would not go so far as the guarded general rule announced in the foregoing cases.[37]

5. Forms of Hearsay — a. Composite Hearsay — (I) *Reputation* — (A) *When Admissible.* Like hearsay in other forms,[38] reputation furnishes a logical inference of the existence of a fact asserted only when the reputation is sufficiently probative to be relevant; and this logical inference is considered only when its use is not substitutionary, that is, when original and primary evidence to the same effect is not attainable.[39] Reputation is relevant when it arises in a community acquainted with the facts upon subjects in which the general community is interested, and concerning which it has no motive to misrepresent. Where these two conditions are fulfilled, reputation may be more probative than a mere unsworn statement. The fact that the statements on a matter of general interest have been so uniform, reiterated, and dominant against all counter statements as to create a general reputation throughout the community may well give rise to an

34. See *supra*, VII, B, 1.

35. See *supra*, VII, B, 2.

36. This is what is meant by saying that while hearsay as a general rule is not evidence, yet, when no better evidence can be supposed to exist, it is admitted. Gould *v.* Smith, 35 Me. 513.

37. "Now, it might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule. I will consider, first, what the exceptions are, and what is the principle which guides the Court in making exceptions. The exceptions are generally considered to be three principal and three subordinate exceptions. It does not matter in what order I take them. First, there is an exception of a declaration accompanying an act; secondly, of a declaration against interest; and, thirdly, of a declaration made by a person in the course of business, one which it was his duty to make. Those are three large exceptions. There are then some smaller exceptions; the first is the proof of matters of public and general interest, one might say of quasi-historical interest, not actually historical, where we admit the declarations of persons who may from their positions be fairly presumed to have had knowledge on the subject. In the next place, we admit evidence which is in its nature very weak indeed, that is in matters of pedigree, where we admit declarations of deceased members of a family, on its being shown that the persons were members of the family. Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases." Sugden *v.* St. Leonards, 1 P. D. 154, 240, 45 L. J. P. & Adm. 49, 34 L. T. Rep. N. S. 372, 24 Wkly. Rep. 860, per Jessel, M. R. See, however, *supra*, IX, A, 1, b.

38. It has been suggested, with some force, that reputation is not a form of hearsay but a fact in itself circumstantially relevant. Boone *v.* Purnell, 28 Md. 607, 626, 92 Am. Dec. 713. Fundamentally considered, the probative force of any statement, sworn or unsworn, probably consists in an inference that it would not have been made if it were not true. Classing reputation as a form of hearsay, when used as proof of facts asserted, seems in accordance with the entirely illogical importance which the English law of evidence attached to the administration of an oath.

39. Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165. Testimony of a witness that it was the reputation in the community that a man was boarding at a certain place is inadmissible as hearsay, since the fact admits of direct proof. Abel *v.* State, 90 Ala. 631, 8 So. 760. But evidence of reputation has been held admissible to corroborate

inference that the fact is as asserted.[40] Among subjects in which the community is interested, and concerning which reputation has been held admissible, are its general rights or liabilities as a whole in bridges,[41] ferries,[42] highways,[43] public landings,[44] *profits à prendre*,[45] and free warrens;[46] the existence of general customs[47] — ecclesiastical,[48] manorial,[49] parish,[50] or town[51] — or rights of common;[52] liability to pay tolls;[53] the fact of municipal incorporation;[54] the location of public[55]

a witness as to the existence of a partnership. Rizer *v.* James, 26 Kan. 221.

40. *Connecticut.*— Noyes *v.* Ward, 19 Conn. 250; Wooster *v.* Butler, 13 Conn. 309.

New Hampshire.— Jaquith *v.* Scott, 63 N. H. 5, 56 Am. Rep. 476.

Texas.— Nelson *v.* State, 1 Tex. App. 41.

Virginia.— Ralston *v.* Miller, 3 Rand. 44, 15 Am. Dec. 704.

England.— Barraclough *v.* Johnson, 8 A. & E. 99, 2 Jur. 839, 7 L. J. Q. B. 172, 3 N. & P. 233, 35 E. C. L. 499; Drinkwater *v.* Porter, 7 C. & P. 181, 32 E. C. L. 562; Reg. *v.* Bedfordshire, 3 C. L. R. 442, 6 Cox C. C. 505, 4 E. & B. 535, 1 Jur. N. S. 208, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535; Carr *v.* Mostyn, 5 Exch. 69, 19 L. J. Exch. 249; Brett *v.* Beales, M. & M. 416, 22 E. C. L. 553; Pim *v.* Curell, 6 M. & W. 234. "I confess myself at a loss fully to understand upon what principle, even in matters of public right, reputation was ever deemed admissible evidence. It is said, indeed, that upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights: but I must confess I have not been able to see the force of the principle on which that distinction is founded so clearly as others have done, though I must admit its existence; and it has not been controverted in argument to-day, that in the case of public rights reputation is to be received in evidence." Weeks *v.* Sparke, 1 M. & S. 679, 686, 14 Rev. Rep. 546, per Lord Ellenborough.

Individual expressions of opinion, however numerous or harmonious, do not constitute reputation. Mattice *v.* Wilcox, 71 Hun (N. Y.) 485, 24 N. Y. Suppl. 1060.

How a person "understood" a fact to be is not sufficient evidence of reputation. Williams *v.* Taylor, 1 Bibb (Ky.) 41.

Private interests involved do not operate to exclude evidence of reputation otherwise competent. Reg. *v.* Bedfordshire, 3 C. L. R. 442, 6 Cox C. C. 505, 4 E. & B. 535, 1 Jur. N. S. 203, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535; Morewood *v.* Wood, 14 East 327 note, 12 Rev. Rep. 537. Traditionary reputation is evidence of boundary between two parishes or manors, and this although the old persons deceased making the declarations claimed rights of common on the respective wastes which might be enlarged by such evidence. Nicholls *v.* Parker, 14 East 331 note, 12 Rev. Rep. 542. And see Freeman *v.* Phillipps, 4 M. & S. 486, 16 Rev. Rep. 524.

41. Reg. *v.* Bedfordshire, 3 C. L. R. 442, 6 Cox C. C. 505, 4 E. & B. 535, 1 Jur. N. S. 208, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535.

42. Pim *v.* Curell, 6 M. & W. 234.

43. *Connecticut.*— Noyes *v.* Ward, 19 Conn. 250.

New Hampshire.— Jaquith *v.* Scott, 63 N. H. 5, 56 Am. Rep. 476.

Rhode Island.— Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

Virginia.— Ralston *v.* Miller, 3 Rand. 44, 15 Am. Dec. 704.

England.— Barraclough *v.* Johnson, 8 A. & E. 99, 2 Jur. 839, 7 L. J. Q. B. 172, 3 N. & P. 233, 35 E. C. L. 499.

44. Drinkwater *v.* Porter, 7 C. & P. 181, 32 E. C. L. 562.

45. Morewood *v.* Wood, 14 East 327 note, 12 Rev. Rep. 537; Barnes *v.* Mawson, 1 M. & S. 77, 14 Rev. Rep. 397. *Profit à prendre* in allodial lands cannot be shown by reputation. Blackett *v.* Lowes, 2 M. & S. 494, 15 Rev. Rep. 324, wood.

46. Carnarvon *v.* Villebois, 13 M. & W. 313, 14 L. J. Exch. 233.

47. As to evidence of customs see CUSTOMS AND USAGES, 12 Cyc. 1099.

48. Carr *v.* Mostyn, 5 Exch. 69, 19 L. J. Exch. 249.

49. Doe *v.* Sisson, 12 East 62 (descent); Carnarvon *v.* Villebois, 14 L. J. Exch. 233, 13 M. & W. 313 (free warren); Barnes *v.* Mawson, 1 M. & S. 77, 14 Rev. Rep. 397 (minerals).

50. Stead *v.* Heaton, 4 T. R. 669.

51. Stead *v.* Heaton, 4 T. R. 669.

52. Dunraven *v.* Llewellyn, 15 Q. B. 791, 14 Jur. 1089, 19 L. J. Q. B. 388, 69 E. C. L. 791; Davies *v.* Lewis, 2 Chit. 535, 18 E. C. L. 774; Pritchard *v.* Powell, 10 Jur. 154, 15 L. J. Q. B. 166; Weeks *v.* Sparke, 1 M. & S. 679, 14 Rev. Rep. 546.

53. Brett *v.* Beales, M. & M. 416, 22 E. C. L. 553.

54. Dillingham *v.* Snow, 5 Mass. 547 (parish); Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; New Boston *v.* Dunbarton, 15 N. H. 201; Londonderry *v.* Andover, 28 Vt. 416, town.

55. *California.*— Lay *v.* Neville, 25 Cal. 545, county.

Dakota.— McCall *v.* U. S., 1 Dak. 320, 46 N. W. 608, territory.

Massachusetts.— Drury *v.* Midland R. Co., 127 Mass. 571, county.

Texas.— Cox *v.* State, 41 Tex. 1 (county); Nelson *v.* State, 1 Tex. App. 41 (county).

England.— Doe *v.* Sleeman, 9 Q. B. 298, 10 Jur. 568, 15 L. J. Q. B. 338, 58 E. C. L. 298 (manor); Plaxton *v.* Dare, 10 B. & C. 17, 5 M. & R. 1, 8 L. J. K. B. O. S. 98, 21 E. C. L.

and, in many jurisdictions of the United States, of private[56] boundaries, especially where the latter are of ancient origin,[57] or where the reputation has arisen among persons possessed of particularly accurate knowledge on the subject.[58] The general community is not only interested in its legal rights, but also in its moral standards, and matters affecting them, as the sobriety of its citizens,[59] or their moral qualities,[60] including truthfulness and veracity,[61] may be proved by reputation. The relation of certain public or quasi-public services is a matter of importance to the community. That a designated person discharges the duties of such an office or occupation of general concern[62] or of popular interest[63] may be shown by reputation. Facts of genealogy stand in a peculiar position as a matter of quasi-public concern.[64] While no better evidence is as a rule procurable, the extent to which such facts may fairly be regarded as of public interest is doubtful. In connection with those genealogical facts which are directly concerned with pedigree, the prevailing rule limits the persons who may be assumed to be interested in the matter to certain families, and provides that, while reputation in the general community is incompetent, reputation in the family itself is relevant.[65] Marriage has been treated as a matter of public interest, provable in part by general reputation.[66] In order to be admissible reputation must be current before a controversy has arisen on the point, that is, while the community is fairly disinterested.[67]

(B) *When Not Admissible.* Since the elements of relevancy and necessity are prerequisites to the admissibility of reputation as evidence of fact,[68] it follows that specific facts of limited general interest cannot be established in this way.[69] Among the facts which are within this rule are the habits or idiosyncrasies of

18 (parish); Nicholls *v.* Parker, 14 East 331 note, 12 Rev. Rep. 542 (parish or manor. See also Freeman *v.* Phillipps, 4 M. & S. 486, 16 Rev. Rep. 524); Beaufort *v.* Swansea, 3 Exch. 413 (manor); Ford *v.* Lacy, 2 F. & F. 354 (county); Doe *v.* Richards, Peake Add. Cas. 180, 4 Rev. Rep. 901 (manor).

Where a large watercourse, such as a river, forms part of the boundary, its location may be shown by reputation. Ford *v.* Lacy, 2 F. & F. 354.

56. Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306, tree. See also BOUNDARIES, 5 Cyc. 957, 958.

57. Clark *v.* Hills, 67 Tex. 141, 152, 2 S. W. 356. The ground assigned is the supposed necessity of the case. Daggett *v.* Willey, 6 Fla. 482; McCausland *v.* Fleming, 63 Pa. St. 36. See also BOUNDARIES, 5 Cyc. 958.

58. Shutte *v.* Thompson, 15 Wall. (U. S.) 151, 21 L. ed. 123.

59. Neudeck *v.* Grand Lodge A. O. U. W., 61 Mo. App. 97. On the other hand, it has been held that habitual lack of sobriety cannot be proved by reputation. Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165.

60. See *infra*, X. As to admissibility of reputation to prove that a house is a bawdy-house see 14 Cyc. 503.

61. See, generally, WITNESSES.

62. Smay *v.* Smith, 1 Penr. & W. (Pa.) 1 (surveyor); Holt *v.* Jarvis, Draper (U. C.) 190 (deputy sheriff).

63. Taylor *v.* Horsey, 5 Harr. (Del.) 131, negro trader.

64. See *supra*, VII, B, 2.

65. See *infra*, IX, C.

66. Boone *v.* Purnell, 28 Md. 607, 626, 92 Am. Dec. 684. See, generally, MARRIAGE.

67. Reid *v.* Reid, 17 N. J. Eq. 101.

68. See *supra*, IX, A, 5, a, (I), (A).

69. *Alabama.*— Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105. See also Ramsey *v.* Smith, 138 Ala. 333, 35 So. 325.

Georgia.— Carrie *v.* Cumming, 26 Ga. 690; Foster *v.* Brooks, 6 Ga. 287.

Iowa.— Cobleigh *v.* McBride, 45 Iowa 116.

Maine.— Boies *v.* McAllister, 12 Me. 308.

Massachusetts.— Goddard *v.* Pratt, 16 Pick. 412.

Missouri.— Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552.

New Hampshire.— Heath *v.* West, 26 N. H. 191.

New York.— Long *v.* Taylor, 29 Hun 127; Eastman *v.* Caswell, 8 How. Pr. 75.

North Carolina.— Cox *v.* Brookshire, 76 N. C. 314.

Pennsylvania.— Pidcock *v.* Potter, 68 Pa. St. 342, 8 Am. Rep. 181; McCullough *v.* Montgomery, 7 Serg. & R. 17.

Tennessee.— Hart *v.* Reynolds, 1 Heisk. 208.

Texas.— McKinney *v.* Bradbury, Dall. 441; Nations *v.* Love, (Civ. App. 1894) 26 S. W. 232.

United States.— Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231; Bennett *v.* Adams, 3 Fed. Cas. No. 1,316, 2 Cranch C. C. 551.

See 20 Cent. Dig. tit. "Evidence," § 1203 *et seq.*

Reputation of a quarry from which certain slate was taken was held incompetent evidence of its quality. Chalmers *v.* Whittemore, 22 Minn. 305.

individual members of the community in business or social life;[70] their position in the community;[71] their financial,[72] mental,[73] or physical[74] condition; facts of personal history,[75] even where, as in case of the ownership[76]

70. *Alabama.*— Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Mosser *v.* Mosser, 32 Ala. 551.

Connecticut.—Bradbury *v.* Bardin, 34 Conn. 452, unprofessional conduct of a doctor.

Georgia.— Carrie *v.* Cumming, 26 Ga. 690, living in concubinage.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029, that a physician is unskilful.

Maryland.— Medley *v.* Williams, 7 Gill & J. 61.

Michigan.— Campau *v.* Dewey, 9 Mich. 381; Stockton *v.* Williams, 1 Dougl. 546.

New Hampshire.— Wendell *v.* Ahbott, 45 N. H. 349.

New York.— Long *v.* Taylor, 29 Hun 127, good housekeeper.

North Carolina.— Cox *v.* Brookshire, 76 N. C. 314, taking of usury.

West Virginia.— State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

Wisconsin.— McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

United States.— Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231.

See 20 Cent. Dig. tit. "Evidence," § 1203 *et seq.*

71. Eastman *v.* Caswell, 8 How. Pr. (N. Y.) 75 (householder); Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597 (householder); Middlebury Bank *v.* Rutland, 33 Vt. 414 (householder).

72. *Alabama.*— Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47; Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Lawson *v.* Orear, 7 Ala. 784; Montgomery Branch Bank *v.* Parker, 5 Ala. 731.

Georgia.— Phillips *v.* Bullard, 58 Ga. 256.

Illinois.— Graff *v.* Brown, 85 Ill. 89.

Indiana.— Reed *v.* Thayer, 9 Ind. 157.

Massachusetts.— Bliss *v.* Johnson, 162 Mass. 323, 38 N. E. 446.

Michigan.— Bodine *v.* Simmons, 38 Mich. 682.

Minnesota.— Hahn *v.* Penney, 62 Minn. 116, 63 N. W. 843.

Missouri.— Conover *v.* Berdine, 69 Mo. 125, 33 Am. Rep. 496.

Pennsylvania.—Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597.

Vermont.—Middlebury Bank *v.* Rutland, 33 Vt. 414.

United States.— Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231.

England.— Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235.

See 20 Cent. Dig. tit. "Evidence," § 1213.

Impairment of rule.— It has been held that the insolvency of a guardian may be proved by parol evidence of his general reputation as to insolvency in the community in which he resides and is known. Downs *v.* Rickards, 4 Del. Ch. 416; Griffith *v.* Parks, 32 Md. 1. And a distinction has been attempted to the effect that while the rule is that when insolvency or other financial condition is directly in issue evidence of reputation is inadmissible, where the fact is simply relevant the evidence is competent. Graff *v.* Brown, 85 Ill. 89; Holten *v.* Lake County, 55 Ind. 194. To the contrary see Bodine *v.* Simmons, 38 Mich. 682; Angell *v.* Rosenbury, 12 Mich. 241; Burr *v.* Willson, 22 Minn. 206; Nininger *v.* Knox, 8 Minn. 140. See also Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241, direct evidence being first produced.

73. *Connecticut.*— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89, insane.

Georgia.— Brinkley *v.* State, 58 Ga. 296 (insane); Choice *v.* State, 31 Ga. 424 (insane); Foster *v.* Brooks, 6 Ga. 287 (insane).

Indiana.— Walker *v.* State, 102 Ind. 502, 1 N. E. 856, insane.

Massachusetts.— Townsend *v.* Pepperell, 99 Mass. 40, insane.

Missouri.— Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552, strong-minded.

North Carolina.— State *v.* Coley, 114 N. C. 879, 19 S. E. 705, insane.

Pennsylvania.— Pidcock *v.* Potter, 68 Pa. St. 342, 8 Am. Rep. 181, sane.

Texas.— Womble *v.* State, 39 Tex. Cr. 24, 44 S. W. 827 (insane); Ellis *v.* State, 33 Tex. Cr. 86, 24 S. W. 894 (insane).

See 20 Cent. Dig. tit. "Evidence," § 1211.

74. Mosser *v.* Mosser, 32 Ala. 551 (very ill); Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381 (permanently injured).

75. Middlesworth *v.* Nixon, 2 Mich. 425, 57 Am. Dec. 136 (elected to office); Litchfield Iron Co. *v.* Bennett, 7 Cow. (N. Y.) 234 (elected to office); Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691 (residence).

76. *Alabama.*— Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443 (real); Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Rawles *v.* James, 49 Ala. 183 (personal); Corley *v.* State, 28 Ala. 22 (personal); Whitsett *v.* Slater, 23 Ala. 626 (personal); McCoy *v.* Odom, 20 Ala. 502 (personal); Moore *v.* Jones, 13 Ala. 296 (real).

California.— Berniaud *v.* Beecher, 76 Cal. 394, 18 Pac. 598.

Connecticut.— South School Dist. *v.* Blakeslee, 13 Conn. 227.

Georgia.— Berry *v.* Osborne, 15 Ga. 194, real.

Indiana.— Schooler *v.* State, 57 Ind. 127, personal.

Maryland.— Johnson *v.* Turner, (1891) 22 Atl. 1103; Medley *v.* Williams, 7 Gill & J. 61, real.

Massachusetts.— Green *v.* Chelsea, 24 Pick. 71, real.

Michigan.— Campau *v.* Dewey, 9 Mich. 381 (real); Stockton *v.* Williams, 1 Dougl. 546 (real).

or possession[77] of property, or a modus concerning it,[78] the matter is one in which the community has a degree of interest; or the relation, as of agency[79] or partnership,[80] in which members of the community stand to each other. Residence in a particular place or community cannot be shown by reputation, where the fact of residence is important in the case.[81]

(II) *RUMORS.* Rumor is as much inferior in probative quality to hearsay as reputation is above it; consequently as a rule it is not relevant evidence to prove a particular fact.[82]

(III) *TRADITION.* Although tradition has a probative value superior to rumor, it is not deemed sufficiently probative to warrant an inference of the truth of the fact asserted;[83] but the evidence is competent as to matters of public and general interest.[84]

b. Printed Hearsay. A hearsay statement is equally incompetent when printed; whether the statement is contained in a newspaper or catalogue, etc.,[85]

New Hampshire.— Wendell *v.* Abbott, 45 N. H. 349.

Pennsylvania.— Sample *v.* Robb, 16 Pa. St. 305 (real); Urket *v.* Coryell, 5 Watts & S. 60 (inadmissible where offered to be given by a witness who never was on the land or lived near it).

South Carolina.— Hiers *v.* Risher, 54 S. C. 405, 32 S. E. 509 (real); Sexton *v.* Hollis, 26 S. C. 231, 1 S. E. 893.

South Dakota.— Stevens *v.* Deering, 6 S. D. 200, 60 N. W. 739, personal.

Tennessee.— Jones *v.* Jennings, 10 Humphr. 428, personal.

Vermont.— Canfield *v.* Hard, 58 Vt. 217, 2 Atl. 136.

Virginia.—Taliaferro *v.* Pryor, 12 Gratt. 277.

Wisconsin.— Fowler *v.* Schafer, 69 Wis. 23, 32 N. W. 292, real.

England.— Doe *v.* Thomas, 14 East 323, 12 Rev. Rep. 533, real.

See 20 Cent. Dig. tit. "Evidence," § 1220.

In Oregon such evidence is admissible by statute. Wilson *v.* Maddock, 5 Oreg. 480.

77. Benje *v.* Creagh, 21 Ala. 151; Moore *v.* Jones, 13 Ala. 296; Wendell *v.* Abbott, 45 N. H. 349.

78. Lonsdale *v.* Heaton, Younge 58.

79. Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Trowbridge *v.* Wheeler, 1 Allen (Mass.) 162; McGregor *v.* Hudson, (Tex. Civ. App. 1895) 30 S. W. 489.

80. Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Humes *v.* O'Bryan, 74 Ala. 64; Goddard *v.* Pratt, 16 Pick. (Mass.) 412; White *v.* Whaley, 1 Tex. App. Civ. Cas. § 101; Hicks *v.* Cram, 17 Vt. 449.

81. East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280; State Bank *v.* Seawell, 18 Ala. 616; Pitts *v.* Burroughs, 6 Ala. 733; Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691.

82. *Alabama.*— Whitsett *v.* Slater, 23 Ala. 626. See also Ramsey *v.* Smith, 138 Ala. 333, 35 So. 325.

Illinois.— Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883.

Indiana.— Milford School Town *v.* Powner, 126 Ind. 528, 26 N. E. 484, but admission of the evidence was held to be harmless error.

Iowa.— Welch *v.* Norton, 73 Iowa 721, 36 N. W. 758; Ashcraft *v.* De Armond, 44 Iowa 229, insanity.

Kansas.— Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

Kentucky.— Powers *v.* Com., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, 24 Ky. L. Rep. 1007, 1086, 1350.

Maryland.— Sprigg *v.* Moale, 28 Md. 497, 92 Am. Dec. 698.

Massachusetts.— Blaisdell *v.* Bickum, 139 Mass. 250, 1 N. E. 281.

New Hampshire.— Prescott *v.* Hayes, 43 N. H. 593.

North Carolina.— Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506.

Pennsylvania.—Lancaster County Nat. Bank *v.* Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

Texas.— McLane *v.* Elder, (Civ. App. 1893) 23 S. W. 757, insanity.

Vermont.— Dodge *v.* Stacy, 39 Vt. 558.

See 20 Cent. Dig. tit. "Evidence," § 1203 *et seq.*

A reason for doing an act, when the reason is founded on a rumor, has been held inadmissible. Governor *v.* Campbell, 17 Ala. 566.

Fact itself irrelevant.— In an action for fraudulently misrepresenting the quantity of land in a parcel sold by defendant to plaintiff by the acre, evidence of common rumors concerning the quantity of the land, and of street talk about the size of the farm, was held incompetent and inadmissible to rebut the conclusions of fraud arising from the positive misrepresentations of defendant. Starkweather *v.* Benjamin, 32 Mich. 305.

83. Coughlin *v.* Poulson, 2 MacArthur (D. C.) 308 (mental state); McKinnon *v.* Bliss, 21 N. Y. 206; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808. Family tradition as to ownership of land is inadmissible to establish title to such land. Cline *v.* Catron, 22 Gratt. (Va.) 378. For use of tradition as proof of pedigree see *infra*, IX, C, 4, a, (II). As to admissibility of tradition to establish boundaries, see BOUNDARIES, 5 Cyc. 957, 958.

84. Wooster *v.* Butler, 13 Conn. 309; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; McKinnon *v.* Bliss, 21 N. Y. 206.

85. Stagg *v.* St. Jean, 29 Mont. 288, 74 Pac. 740 (catalogue); Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26 (newspaper).

the more personal and responsible form of a book,[86] or even in the treatise of an author of standard authority writing upon a medical[87] or other scientific subject.[88]

c. Written Hearsay. A statement otherwise objectionable as hearsay does not become competent by being reduced to writing.[89] *A fortiori* this is true where the declaration is self-serving;[90] and such a statement continues to be

86. *Georgia.*— Myers *v.* State, 97 Ga. 76, 25 S. E. 252.

Indiana.— Hamilton *v.* Shoaff, 99 Ind. 63.

Kansas.— Maier *v.* Randolph, 33 Kan. 340, 6 Pac. 625, stock-book.

Michigan.— Hamilton Provident, etc., Soc. *v.* Northwood, 86 Mich. 315, 49 N. W. 37.

Texas.— Aldenhoven *v.* State, 42 Tex. Cr. 6, 56 S. W. 914, medical directory.

87. *California.*— Gallagher *v.* Market St. R. Co., 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680 note. And see Baily *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104.

Illinois.— Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 679; Chicago City R. Co. *v.* Douglas, 104 Ill. App. 41.

Massachusetts.— Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203.

Mississippi.— Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416.

Rhode Island.— State *v.* O'Brien, 7 R. I. 336.

Texas.— Wright *v.* State, (Cr. App. 1898) 44 S. W. 513, "materia medica and therapeutics."

Wisconsin.— Kreuziger *v.* Chicago, etc., R. Co., 73 Wis. 158, 40 N. W. 657.

Canada.— Brown *v.* Sheppard, 13 U. C. Q. B. 178.

The "United States medical dispensary" has been excluded for like reasons. Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284, 29 S. W. 508.

Admission cannot be secured indirectly by asking a medical expert whether extracts read to him from such a treatise are accurate statements of the facts (Davis *v.* State, 38 Md. 15; Marshall *v.* Brown, 50 Mich. 148, 15 N. W. 55), nor by way of corroborating a medical witness by showing that such a treatise sustains his position (Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203; Huffman *v.* Click, 77 N. C. 55). But where a certain medical treatise constitutes the basis of an expert's opinion, it may be shown that the treatise does not sustain him. Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 679. See *infra*, XI.

88. Kreuziger *v.* Chicago, etc., R. Co., 73 Wis. 158, 40 N. W. 657.

Independent relevancy.— The statements of a standard treatise, as any other declaration, are competent when the relevant fact is the existence of the statement itself. Brown *v.* Piper, 91 U. S. 37, 23 L. ed. 200, state of the art on an issue as to the validity of a patent for an invention.

89. *Alabama.*— Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

California.— Bell *v.* Staacke, 141 Cal. 186, 74 Pac. 774.

Connecticut.—Abel *v.* Fitch, 20 Conn. 90.

Georgia.— Myers *v.* State, 97 Ga. 76, 25 S. E. 252. See also Anderson *v.* Brown, 72 Ga. 713.

Illinois.— Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515 (consideration stated in deed); Fisher *v.* Meek, 38 Ill. 92.

Louisiana.— Morgan *v.* Yarborough, 13 La. 74, 33 Am. Dec. 553. See also New Orleans *v.* Manfre, 111 La. 927, 35 So. 981.

Maine.— Capen *v.* Crowell, 63 Me. 455.

Massachusetts.— Prescott *v.* Ward, 10 Allen 203.

Mississippi.— Illinois Cent. R. Co. *v.* Langdon, 71 Miss. 146, 14 So. 452.

Missouri.— Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145; Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 474, letters.

New York.— McIlhargy *v.* Chambers, 117 N. Y. 532, 23 N. E. 561; Phillips *v.* Lindner, 61 Hun 488, 16 N. Y. Suppl. 367; Davis *v.* Willis, 57 Hun 200, 10 N. Y. Suppl. 883; Macauley *v.* Palmer, 3 Silv. Supreme 245, 6 N. Y. Suppl. 402; Smith *v.* McArthur, 1 Silv. Supreme 354, 5 N. Y. Suppl. 303 (letters); Milbank *v.* Dennistoun, 10 Bosw. 382 (letters); Garrigue *v.* Loescher, 3 Bosw. 578; Carney *v.* Downey, 2 N. Y. St. 707.

Ohio.— Roberts *v.* Bristoe, 44 Ohio St. 596, 10 N. E. 61; Pugh *v.* Holliday, 3 Ohio St. 284.

Oregon.— Keller *v.* Bley, 15 Oreg. 429, 15 Pac. 705.

Pennsylvania.—Bowser *v.* Cravener, 56 Pa. St. 132; Beach *v.* Wheeler, 24 Pa. St. 212 (letters); Galloway *v.* Ogle, 2 Binn. 468.

South Carolina.— State *v.* Easterling, 1 Rich. 310.

Texas.— Gaither *v.* Hanrick, 69 Tex. 92, 6 S. W. 619; Trevino *v.* Trevino, 54 Tex. 261 (letters); Moke *v.* Fellman, 17 Tex. 367, 67 Am. Dec. 656 (letters); Western Union Tel. Co. *v.* McMillan, (Civ. App. 1894) 25 S. W. 821. See also League *v.* Williamson, (Civ. App. 1903) 77 S. W. 435, recitals in deed.

Vermont.— Stannard *v.* Smith, 40 Vt. 513.

Date of writing.— A document is not evidence as to the correctness of the date on which it purports to be executed. Pugh *v.* Holliday, 3 Ohio St. 284.

90. *Alabama.*—Boring *v.* Williams, 17 Ala. 510 (pleading); Sorrell *v.* Craig, 15 Ala. 789; Gayle *v.* Bishop, 14 Ala. 552; Cawsey *v.* Driver, 13 Ala. 818 (pleading).

Florida.— Belote *v.* O'Brien, 20 Fla. 126, pleading.

Georgia.— Howard *v.* Savannah, etc., R. Co., 84 Ga. 711, 11 S. E. 452; Daniel *v.* Johnson, 29 Ga. 207, pleading.

Illinois.—Hunter *v.* Harris, 131 Ill. 482, 23

incompetent either in favor of the declarant[91] or his estate,[92] even where the written statement has been filed in an official registry.[93] An unsworn written statement is equally inadmissible under the rule excluding hearsay evidence, although the form be judicial, as in affidavits,[94] answers to interrogatories,[95] certificates,[96]

N. E. 626 (affidavit); Mestling *v.* Hughes, 89 Ill. 389 (affidavit); Dobbins *v.* Hanchett, 20 Ill. App. 396 (affidavit).

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197 (affidavit); Indiana Cent. R. Co. *v.* Gulick, 19 Ind. 83 (affidavit).

Kansas.—Johnson *v.* Johnson, 44 Kan. 666, 24 Pac. 1098, affidavit.

Kentucky.— Clarke *v.* Robinson, 5 B. Mon. 55, pleading.

Louisiana.—Merritt *v.* Wright, 19 La. Ann. 91.

Maryland.— Mitchell *v.* Dall, 2 Harr. & G. 159.

Massachusetts.— Corcoran *v.* Batchelder, 147 Mass. 541, 18 N. E. 420; Stevens *v.* Beals, 10 Cush. 291, 57 Am. Dec. 108, pleading.

Mississippi.— Johnson *v.* Stone, 69 Miss. 826, 13 So. 858, pleading.

Missouri.— Davidson *v.* Peck, 4 Mo. 438, pleading.

Nebraska.— Green *v.* Morse, 57 Nebr. 391, 77 N. W. 925, 73 Am. St. Rep. 518 (pleading); Johnson *v.* Plum Creek First Nat. Bank, 28 Nebr. 792, 45 N. W. 161 (affidavit).

New Hampshire.— Howley *v.* Whipple, 48 N. H. 487, pleading.

New York.— Lieberman *v.* Third Ave. R. Co., 25 Misc. 704, 55 N. Y. Suppl. 677, pleading.

Ohio.— Cincinnati M. E. Church *v.* Wood, 5 Ohio 283, pleading.

Pennsylvania.— Bellas *v.* Lloyd, 2 Watts 401.

South Carolina.—Thomasson *v.* Kennedy, 3 Rich. Eq. 440, pleading.

Tennessee.— Jones *v.* Davidson, 2 Sneed 447, pleading.

Texas.— Masterson *v.* Jordan, (Civ. App. 1893) 24 S. W. 549 (affidavit); Howard *v.* Parks, 1 Tex. Civ. App. 603, 21 S. W. 269 (pleading).

See 20 Cent. Dig. tit. "Evidence," § 1068 *et seq.*

91. *Georgia.*— Howard *v.* Savannah, etc., R. Co., 84 Ga. 711, 11 S. E. 452; Dickinson *v.* Solomons, 26 Ga. 684.

Illinois.— St. Louis, etc., R. Co. *v.* Thomas, 85 Ill. 464.

Indiana.— Schenck *v.* Sithoff, 75 Ind. 485.

Kentucky.— Mississippi Valley L. Ins. Co. *v.* Neyland, 9 Bush 430; Miller *v.* Wilson, 3 Ky. L. Rep. 688.

New York.—Newhall *v.* Appleton, 102 N. Y. 133, 6 N. E. 120; La Farge *v.* Kneeland, 7 Cow. 456.

92. *Connecticut.*—Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102.

Maryland.—Drury *v.* Conner, 6 Harr. & J. 288, pleading.

New York.— McKinnon *v.* Bliss, 21 N. Y. 206.

North Carolina.— Austin *v.* King, 91 N. C. 286.

South Carolina.— Thomason *v.* Kennedy, 3 Rich. Eq. 440, pleading.

Texas.— Masterson *v.* Jordan, (Civ. App. 1893) 24 S. W. 549, affidavit.

Under exceptional circumstances, the declarant being dead and no other evidence being available, such evidence, when verified by oath, has been received. Culbertson *v.* Matson, 11 Mo. 493.

93. Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510. See also Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; New Orleans *v.* Manfre, 111 La. 927, 35 So. 981; League *v.* Williamson, (Tex. Civ. App. 1903) 77 S. W. 435; Stockley *v.* Cissna, 119 Fed. 812, 5 C. C. A. 324.

94. *Alabama.*— Owen *v.* Peebles, 42 Ala. 338; Brown *v.* Steele, 14 Ala. 63.

Arkansas.— Smith *v.* Feltz, 42 Ark. 355.

Georgia.— Fleming *v.* Shepherd, 83 Ga. 338, 9 S. E. 789.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Iowa.— Jones *v.* Jones, 20 Iowa 388.

Kansas.— Ft. Scott *v.* Elliott, (Sup. 1903) 74 Pac. 609.

Kentucky.— Grayble *v.* Froman, 1 A. K. Marsh. 191.

Louisiana.— Poutz *v.* Jones, 21 La. Ann. 726.

Mississippi.— Hyatt *v.* Leslie, (1891) 10 So. 672.

Missouri.— Patterson *v.* Fagan, 38 Mo. 70.

New Jersey.— Dare *v.* Ogden, 1 N. J. L. 91.

New York.— Forrest *v.* Forrest, 6 Duer 102.

Rhode Island.— Tucker *v.* South Kingstown, 5 R. I. 558.

South Carolina.— Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426.

West Virginia.— Peterson *v.* Ankrom, 25 W. Va. 56.

See 20 Cent. Dig. tit. "Evidence," § 1199.

Although part of the files in the case the affidavit is still incompetent. Manny *v.* Stockton, 34 Ill. 306; Quinn *v.* Rawson, 5 Ill. App. 130.

A party may be bound by his adversary's self-serving affidavit, if he agrees in advance to be so bound. Hurd *v.* Pendrigh, 2 Hill (N. Y.) 502.

95. Barry *v.* Galvin, 37 How. Pr. (N. Y.) 310; *In re* Barnett, 2 Fed. Cas. No. 1,024.

96. *Iowa.*— Sypher *v.* Savery, 39 Iowa 258.

Maine.— Sutherland *v.* Kittridge, 19 Me. 424.

Ohio.— Gaylord *v.* Case, 5 Ohio Dec. (Reprint) 413, 5 Am. L. Rep. 494, 1 Cinc. L. Bul. 382.

Pennsylvania.— D'Homergue *v.* Morgan, 3 Whart. 26. See also Paull *v.* Mackey, 3 Watts 110.

depositions,[97] or pleadings;[98] official, as in records kept by municipal officers[99] or by private associations,[1] the reports of public boards,[2] bodies,[3] or officials;[4] or of officers of private corporations;[5] or mercantile, as an account of sales,[6] or a receipt,[7] or books of account;[8] or the more fugitive form of letters,[9] memo-

Texas.— Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

United States.—Beale *v.* Pettit, 3 Fed. Cas. No. 1,158, 1 Wash. 241.

See 20 Cent. Dig. tit. "Evidence," § 1199.

97. Thomas *v.* Whitehead, 48 Ga. 587; Harrison Wire Co. *v.* Moore, 55 Mich. 610, 22 N. W. 62; Withers *v.* The El Paso, 24 Mo. 204; Page *v.* Parker, 40 N. H. 47; Puffer *v.* Graves, 26 N. H. 256. Admissibility of such statements is determined as of the time at which the evidence is offered. It does not suffice to admit the statement that it may become relevant in a certain given contingency, for example if a particular witness be called. Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180.

98. Gould *v.* Tatum, 21 Ark. 329; Belote *v.* O'Brian, 20 Fla. 126 (bill of particulars); Hart *v.* Smith, 2 A. K. Marsh. (Ky.) 301; Quinn *v.* Neeson, 21 N. Y. Suppl. 106. The rule applies equally to pleadings filed in proceedings at law (Hays *v.* Earls, 77 S. W. 706, 25 Ky. L. Rep. 1299; Davidson *v.* Peck, 4 Mo. 438; Ames *v.* Hurlbut, 17 How. Pr. (N. Y.) 185; Payne *v.* Bennet, 2 Watts (Pa.) 427; Thomasson *v.* Kennedy, 3 Rich. Eq. (S. C.) 440; Jones *v.* Davidson, 2 Sneed (Tenn.) 447; Oppenheimer *v.* Edney, 9 Humphr. (Tenn.) 385), in equity (Drury *v.* Conner, 6 Harr. & J. (Md.) 288; Newell *v.* Newell, 34 Miss. 385; Bien *v.* Weatherspoon, 1 How. (Miss.) 28; Culbertson *v.* Matson, 11 Mo. 493; Blair *v.* Caldwell, 3 Mo. 353; Cincinnati M. E. Church *v.* Wood, 5 Ohio 283), or in special proceedings (Jordan *v.* Thompson, 67 Ala. 469), such as an application for administration (Jordan *v.* Thompson, *supra*). Reading a pleading to the jury, as a pleading, does not make it evidence. Coles *v.* Perry, 7 Tex. 109.

A petition is not evidence of the self-serving declarations made in it. Francis *v.* Hazlerigg, 1 A. K. Marsh. (Ky.) 93; McDowell *v.* Turney, 5 Sneed (Tenn.) 225.

To explain alleged admissions in an adversary's pleading, self-serving declarations in a pleading may be competent, without thereby becoming evidence for other purposes. Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55.

Conditional admission.— If the competency of a statement in the pleadings is dependent upon the decision of a question of construction, it is proper to receive the statement and permit the jury to deal with it in accordance with the construction they may adopt. Thompson *v.* Wright, 22 Ga. 607.

99. Shumway *v.* Leakey, 67 Cal. 458, 8 Pac. 12; Lynn *v.* Troy, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 594; Hoffman *v.* New York Cent., etc., R. Co., 46 N. Y. Super. Ct. 526. Municipal records are hearsay as to collateral statements therein. New York Metropolitan L. Ins. Co. *v.* Anderson, 79 Md. 375, 29 Atl. 606; Morrow *v.* Vernon Tp., 35 N. J. L. 490. The rule does not apply where the statement has been authorized by the party against whom it is offered (Shumway *v.* Leakey, *supra*), or he is otherwise connected with the making of it (Lynn *v.* Troy, 57 Hun (N. Y.) 590).

1. Connecticut Mut. L. Ins. Co. *v.* Schwenk, 94 U. S. 593, 24 L. ed. 294.

2. Montezuma *v.* Minor, 73 Ga. 484, health.

3. Gatling *v.* Newell, 9 Ind. 572, committee on agriculture.

4. Cook *v.* U. S., 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906.

5. St. Louis, etc., R. Co. *v.* Maddox, 18 Kan. 546; Glenn *v.* Liggett, 47 Fed. 472, treasurer.

6. Illinois Cent. R. Co. *v.* Langdon, 71 Miss. 146, 14 So. 452; McIlhargy *v.* Chambers, 117 N. Y. 532, 23 N. E. 561; Crease *v.* Parker, 6 Fed. Cas. No. 3,376, 1 Cranch C. C. 448. See also International, etc., R. Co. *v.* Startz, (Tex. 1903) 77 S. W. 1 [*reversing* (Tex. Civ. App. 1903) 74 S. W. 1118].

7. *Georgia.*— Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Illinois.— Central Warehouse Co. *v.* Sargeant, 40 Ill. App. 438.

Kentucky.— Bryan *v.* Buford, 7 J. J. Marsh. 335; Combs *v.* Brashears, 6 J. J. Marsh. 631.

Louisiana.— Farias *v.* De Lizardi, 4 Rob. 407. But see Malchaux *v.* Lefebvre, 4 Mart. N. S. 489.

Massachusetts.—Silverstein *v.* O'Brien, 165 Mass. 512, 43 N. E. 496.

Pennsylvania.— Cutbush *v.* Gilbert, 4 Serg. & R. 551.

West Virginia.— Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

See 20 Cent. Dig. tit. "Evidence," § 1197.

8. *Connecticut.*— Bucknam *v.* Barnum, 15 Conn. 67.

Illinois.— Boyd *v.* Yerkes, 25 Ill. App. 527.

Iowa.—Boulton *v.* Goshen First Nat. Bank, 46 Iowa 273; Sypher *v.* Savery, 39 Iowa 258.

Pennsylvania.— Juniata Bank *v.* Brown, 5 Serg. & R. 226.

Wisconsin.— Minton *v.* Underwood Lumber Co., 79 Wis. 646, 48 N. W. 857.

See 20 Cent. Dig. tit. "Evidence," § 1198.

9. *Alabama.*—Mobile, etc., R. Co. *v.* Worthington, 95 Ala. 598, 10 So. 839; David *v.* David, 66 Ala. 139; Pearson *v.* Darrington, 32 Ala. 227.

Arkansas.— Owen *v.* Jones, 14 Ark. 502.

California.— Bell *v.* Staacke, 141 Cal. 186, 74 Pac. 774.

District of Columbia.— Moore *v.* Langdon, 2 Mackey 127, 47 Am. Rep. 262.

Georgia.— Hickson *v.* Bryan, 75 Ga. 392.

Illinois.— Capen *v.* De Steiger Glass Co., 105 Ill. 185; Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Hardin *v.* Gouveneur, 69 Ill. 140;

randa,[10] or telegrams.[11] In other words the rule of exclusion applies generally to all forms of written hearsay.

B. Declarations Against Interest — 1. In General — a. Rule Stated. Among cases in which, primary evidence being unavailable, unsworn statements give rise to an inference of their truth are declarations of third persons, not witnesses, which are opposed to the pecuniary and proprietary interest of the declarant.[12]

U. S. Express Co. *v.* Hutchins, 67 Ill. 348; Fisher *v.* Meek, 38 Ill. 92. See also Chicago *v.* McKechney, 205 Ill. 372, 68 N. E. 954 [*reversing* 91 Ill. App. 442].

Indiana.— George *v.* Hurst, 31 Ind. App. 660, 68 N. E. 1031.

Kansas.— Simpson *v.* Smith, 27 Kan. 565.

Kentucky.— Morton *v.* Smith, 4 T. B. Mon. 313; Chelf *v.* Isaac, 6 Ky. L. Rep. 739.

Louisiana.— Garrett *v.* Morgan, 11 Rob. 447; Crocker *v.* Ainslie, 5 Mart. 524.

Maine.— Hunter *v.* Randall, 69 Me. 183; Capen *v.* Crowell, 63 Me. 455; Sargent *v.* Wording, 46 Me. 464. But see Roach *v.* Learned, 37 Me. 110.

Maryland.— Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125. See also Black *v.* Westminster First Nat. Bank, 96 Md. 399, 54 Atl. 88.

Massachusetts.— Brooks *v.* Acton, 117 Mass. 204; Prescott *v.* Ward, 10 Allen 203; Jones *v.* Stevens, 5 Metc. 373. See also Hutchinson *v.* Nay, 183 Mass. 355, 67 N. E. 601.

Michigan.—Culver *v.* Smith, 131 Mich. 359, 91 N. W. 608; Ziegler *v.* Henry, 77 Mich. 480, 43 N. W. 1018.

Minnesota.— Peck *v.* Snow, 47 Minn. 398, 50 N. W. 470.

Montana.— Davis *v.* Blume, 1 Mont. 463.

New Jersey.— Duysters *v.* Crawford, 69 N. J. L. 614, 55 Atl. 823.

New York.—People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846; Wolstenholme *v.* Wolstenholme File Mfg. Co., 3 Lans. 457; Hildreth *v.* Shepard, 65 Barb. 265; Darling *v.* Miller, 54 Barb. 149; Burnham *v.* Thurman, 34 N. Y. Super. Ct. 536; Goldberg *v.* Wolff, 10 N. Y. Suppl. 544; Clarkson *v.* Dunning, 4 N. Y. Suppl. 430. See also Havens *v.* Gilmour, 83 N. Y. App. Div. 84, 82 N. Y. Suppl. 511; Healy *v.* Malcolm, 77 N. Y. App. Div. 69, 78 N. Y. Suppl. 1043.

North Carolina.— Simmons *v.* Mann, 92 N. C. 12; Churchill *v.* Lee, 77 N. C. 341.

Pennsylvania.— Morris *v.* Vanderen, 1 Dall. 64, 1 L. ed. 38; Longenecker *v.* Hyde, 6 Binn. 1.

South Carolina.—Graff *v.* Caldwell, 8 Rich. 129.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Hanrick *v.* Dodd, 62 Tex. 75.

Wisconsin.—Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121; Anderson *v.* Fetzer, 75 Wis. 562, 44 N. W. 838.

United States.— Conard *v.* New York Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189; Southern Express Co. *v.* Todd, 56 Fed. 104, 5 C. C. A. 432.

See 20 Cent. Dig. tit. "Evidence," § 1194.

An agent's letter to a principal in the interest of the latter is a self-serving declaration within the rule of exclusion. Porter *v.* Parks, 2 Hun (N. Y.) 654. See *supra*, IX, A, 2, b, (II), (B), (2), (b).

10. Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145; Ridgeley *v.* Johnson, 11 Barb. (N. Y.) 527; Keller *v.* Bley, 15 Oreg. 429, 15 Pac. 705; Galloway *v.* Ogle, 2 Binn. (Pa.) 468. See also Griffin *v.* Train, 90 N. Y. App. Div. 16, 85 N. Y. Suppl. 686 [*affirming* 40 Misc. 290, 81 N. Y. Suppl. 977]; Diamond *v.* Wheeler, 80 N. Y. App. Div. 58, 80 N. Y. Suppl. 416.

11. East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280; Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296; International, etc., R. Co. *v.* Startz, (Tex. Sup. 1903) 77 S. W. 1 [*reversing* (Tex. Civ. App. 1903) 74 S. W. 1118].

12. *Alabama.*— Hart *v.* Kendall, 82 Ala. 144, 3 So. 41.

California.— Donnelly *v.* Rees, 141 Cal. 56, 74 Pac. 433.

Idaho.— Work *v.* Kinney, 8 Ida. 771, 71 Pac. 477.

Illinois.— Denterman *v.* Ruppel, 103 Ill. App. 106.

Indiana.— Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394.

Maine.— Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305.

Minnesota.— Dixon *v.* Union Iron Works, 90 Minn. 492, 97 N. W. 375.

Missouri.— Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209. See also Obuchon *v.* Boyd, 92 Mo. App. 412.

Nebraska.— Quimby *v.* Ayres, (1901) 95 N. W. 464; Seyfer *v.* Otoe County Bank, 66 Nebr. 566, 92 N. W. 756.

New Hampshire.— Perkins *v.* Towle, 59 N. H. 583.

New York.— Card *v.* Moore, 173 N. Y. 598, 66 N. E. 1105 [*affirming* 68 N. Y. App. Div. 327, 74 N. Y. Suppl. 18]; Kellum *v.* Mission of Immaculate Virgin, 82 N. Y. App. Div. 523, 81 N. Y. Suppl. 603. *Compare* Putnam *v.* Lincoln Safe Deposit Co., 39 Misc. 738, 80 N. Y. Suppl. 961 [*reversed* in 83 N. Y. Suppl. 1091].

North Carolina.— Ellis *v.* Harris, 106 N. C. 395, 11 S. E. 248; Magee *v.* Blankenship, 95 N. C. 563. See also Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.

Pennsylvania.— Roberts' Appeal, 126 Pa. St. 102, 17 Atl. 538.

South Carolina.— Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505.

Texas.— Wilson *v.* Simpson, 80 Tex. 279, 16 S. W. 40. See also Smith *v.* International, etc., R. Co. (Tex. Civ. App. 1904) 78 S. W. 556.

It is said that "this species of evidence being somewhat anomalous in its character, and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least to require the evidence to be brought clearly within all the conditions requisite for its reception."[13]

b. Incidental Facts. Declarations against interest are not only received as evidence of the fact directly asserted, but of incidental facts fairly embraced within the scope of the declaration.[14]

2. Requisites For Relevancy — a. Adequate Knowledge. It is essential to relevancy in the declaration that the declarant should have adequate knowledge on the subject covered by his statement.[15] Hence, in case of a written statement,

West Virginia.— Bartlett *v.* Patton, 33 W. Va. 72, 10 S. E. 21, 5 L. R. A. 523.

England.— Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235; Ford *v.* Hopkins, 1 Salk. 283; Harper *v.* Brock, 3 Wooddeson's Lect. 331–333.

Canada.— Ganton *v.* Size, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. C.) 368.

See 20 Cent. Dig. tit. "Evidence," § 1135 *et seq.*

Admissions distinguished.— A declaration against interest has been spoken of as an admission. There are, however, points of essential difference. The admission is a matter of procedure, is primary evidence of the fact stated, is competent only when the declarant or someone identified in legal interest is a party and need not have been, when made, considered by the declarant as being opposed to his interest. The declaration against interest is entirely a matter of evidence, is admissible only when the primary evidence is inaccessible, is competent in suits between third persons (Rand *v.* Dodge, 17 N. H. 343), or in favor of the party offering it (Currier *v.* Gale, 14 Gray (Mass.) 504, 77 Am. Dec. 343), or of one standing in privity to the declarant (Rand *v.* Dodge, *supra*; Turner *v.* Dewan, 41 U. C. Q. B. 361), and must have been, when made, to the knowledge of the declarant, against his obvious and real interest. Admissions by contract have been treated as within this rule where the declarant has deceased. Rand *v.* Dodge, 17 N. H. 343.

In a criminal case the declarations against interest of an owner of property do not affect the prosecution. Com. *v.* Sanders, 14 Gray (Mass.) 394, 77 Am. Dec. 335, embezzlement.

Res gestæ distinguished.— A declaration against interest need not accompany or explain a relevant act, although its probative weight will be increased where such happens to be the case. White *v.* Choteau, 1 E. D. Smith (N. Y.) 493; Ivat *v.* Finch, 1 Taunt. 141, 9 Rev. Rep. 716.

Such declarations are not conclusive against the party making them, but may be explained (Phipps *v.* Martin, 33 Ark. 207; Raymond *v.* Cummings, 17 N. Brunsw. 544), and are even said to have but slight weight as against documentary evidence (Pargoud *v.* Amberson, 10 La. 352).

13. Mahaska County *v.* Ingalls, 16 Iowa 81, 95, per Dillon, J.

14. Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; McDonald *v.* Wesendonck, 30 Misc. (N. Y.) 601, 62 N. Y. Suppl. 764; Taylor *v.* Gould, 57 Pa. St. 152; Lowry *v.* Moss, 1 Strobh. (S. C.) 63. And see Obuchon *v.* Boyd, 92 Mo. App. 412.

**A written receipt for money not only furnishes evidence of that fact in a suit between third persons, but also tends to establish the date at which it was executed or the money received (Taylor *v.* Gould, 57 Pa. St. 152; Lowry *v.* Moss, 1 Strobh. (S. C.) 63); from whom it was received (Thompson *v.* Stevens, 2 Nott & M. (S. C.) 493); the nature of the claim on which it was paid (Taylor *v.* Witham, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877; Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235; Davies *v.* Humphreys, 6 M. & W. 153; Harper *v.* Brock, 3 Wooddeson's Lect. 331–333); the special circumstances attending the transaction (Fawkner *v.* Watts, 1 Atk. 406, 26 Eng. Reprint 257; Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235); and in case of a tenant the amount of the rental at which he holds (Reg. *v.* Exeter, L. R. 4 Q. B. 341, 10 B. & S. 433, 38 L. J. M. C. 126, 20 L. T. Rep. N. S. 693, 17 Wkly. Rep. 850; Reg. *v.* Birmingham Parish, 1 B. & S. 763, 8 Jur. N. S. 37, 31 L. J. M. C. 63, 5 L. T. Rep. N. S. 309, 10 Wkly. Rep. 41, 101 E. C. L. 763), or the source of a title (Sly *v.* Sly, 2 P. D. 91, 46 L. J. P. & Adm. 63, 25 Wkly. Rep. 463).

Ancient facts.— It has been suggested that the declarations under consideration should be limited to those relating to ancient facts. Gilchrist *v.* Martin, Bailey Eq. (S. C.) 492; Reg. *v.* Birmingham Parish, 1 B. & S. 763, 8 Jur. N. S. 37, 31 L. J. M. C. 63, 5 L. T. Rep. N. S. 309, 10 Wkly. Rep. 41, 101 E. C. L. 763.

15. *Illinois.*— Friberg *v.* Donovan, 23 Ill. App. 58.

Iowa.— Mahaska County *v.* Ingalls, 16 Iowa 81.

Minnesota.— Halvorsen *v.* Moon, etc., Lumber Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669.

New York.— White *v.* Chouteau, 1 E. D. Smith 493; McDonald *v.* Wesendonck, 30 Misc. 601, 62 N. Y. Suppl. 764.

Ohio.— Bird *v.* Hueston, 10 Ohio St. 418.

South Carolina.—Cruger *v.* Daniel, McMull. Eq. 157.

Texas.— Long *v.* Moore, 19 Tex. Civ. App. 363, 48 S. W. 43.

its mere production from the custody of an alleged declarant is not sufficient; it must be shown that the declarant actually made the statement.[16]

b. Absence of Motive to Misrepresent — (I) *In General.* In the average declaration against proprietary or pecuniary interest there is not only no motive to misrepresent,[17] but a strong guaranty of truth is furnished.[18] It has been held that the declaration need not be made *ante litem motam.*[19]

(II) *Nature of Adverse Interest* — (A) *Pecuniary Interest.* Where the declarant had adequate knowledge of the facts stated, and primary evidence cannot be procured, the declaration is admissible if made against his pecuniary interest;[20] as by acknowledgment of his indebtedness to others,[21] or that nothing is due him on a particular account;[22] by concession of the receipt[23] or misappropriation[24] of money, or of the fact that he is liable for an increased share of a common obligation,[25] or is individually liable for the whole claim.[26]

(B) *Proprietary Interest.* An unsworn statement otherwise relevant is competent, the primary evidence being unattainable, if made against the proprietary interest of the declarant;[27] as where one in possession of a chattel or chose in

England.— Goss *v.* Watlington, 3 B. & B. 132, 7 E. C. L. 645; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

See 20 Cent. Dig. tit. "Evidence," § 1139 *et seq.*

16. Devonshire *v.* Neill, 2 L. R. Ir. 132.

17. McDonald *v.* Wesendonck, 30 Misc. (N. Y.) 601, 62 N. Y. Suppl. 764; Gilchrist *v.* Martin, Bailey Eq. (S. C.) 492.

18. Humes *v.* O'Bryan, 74 Ala. 64; Swan *v.* Morgan, 88 Hun (N. Y.) 378, 34 N. Y. Suppl. 829; Peace *v.* Jenkins, 32 N. C. 355.

19. Halvorsen *v.* Moon, etc., Lumber Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669.

20. *Alabama.*— Bondurant *v.* State Bank, 7 Ala. 830.

Louisiana.— Malchaux *v.* Lefebvre, 4 Mart. N. S. 489.

Minnesota.— Halvorsen *v.* Moon, etc., Lumber Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669.

Ohio.— Bird *v.* Hueston, 10 Ohio St. 418.

Vermont.— Chase *v.* Smith, 5 Vt. 556.

Virginia.— Burton *v.* Scott, 3 Rand. 399.

England.— Goss *v.* Watlington, 3 B. & B. 132, 7 E. C. L. 645; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Roe *v.* Raulings, 7 East 279.

21. *Illinois.*— Deuterman *v.* Ruppel, 103 Ill. App. 106.

Indiana.— Parker *v.* State, 8 Blackf. 292.

Kentucky.— Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731.

New York.— Swan *v.* Morgan, 88 Hun 378, 34 N. Y. Suppl. 829.

North Carolina.— Peace *v.* Jenkins, 32 N. C. 355.

West Virginia.— Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

22. Scammon *v.* Scammon, 33 N. H. 52; Sparling *v.* Wells, 24 N. Y. App. Div. 584, 49 N. Y. Suppl. 321; Scott *v.* Crouch, (Utah 1902) 67 Pac. 1068.

23. *Alabama.*— Hart *v.* Kendall, 82 Ala. 144, 3 So. 41.

Georgia.— Field *v.* Boynton, 33 Ga. 239.

Illinois.— Deuterman *v.* Ruppel, 103 Ill. App. 106.

Indiana.— Keesling *v.* Powell, 149 Ind. 372, 49 N. E. 265.

Massachusetts.— Jones *v.* Howard, 3 Allen 223; Shearman *v.* Akins, 4 Pick. 282.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343.

New York.— Livingston *v.* Arnoux, 56 N. Y. 507; Sherman *v.* Crosby, 11 Johns. 70.

Pennsylvania.— Taylor *v.* Gould, 57 Pa. St. 152.

South Carolina.— Lowry *v.* Moss, 1 Strobh. 63.

Tennessee.— Nichol *v.* Ridley, 5 Yerg. 63, 26 Am. Dec. 254.

Texas.— Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

Virginia.— Holladay *v.* Littlepage, 2 Munf. 316.

Canada.— Mechanics' Whale Fishing Co. *v.* Kirby, 6 N. Brunsw. 223; Turner *v.* Dewan, 41 U. C. Q. B. 361.

England.— Giffard *v.* Williams, L. R. 8 Eq. 494, 38 L. J. Ch. 597, 21 L. T. Rep. N. S. 575, 17 Wkly. Rep. 56; Fawkner *v.* Watts, 1 Atk. 406, 26 Eng. Reprint 257; Middleton *v.* Melton, 10 B. & C. 317, 21 E. C. L. 139; Taylor *v.* Witham, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877; Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235; Bright *v.* Legerton, 6 Jur. N. S. 1179, 29 L. J. Ch. 852, 8 Wkly. Rep. 678; Davies *v.* Humphreys, 6 M. & W. 153; Ford *v.* Hopkins, 1 Salk. 283; Glynn *v.* Bank of England, 2 Ves. 38, 28 Eng. Reprint 26.

See 20 Cent. Dig. tit. "Evidence," § 1135 *et seq.*

Receipt of other property than money may be shown by such a declaration. Wardhope *v.* Canadian Pac. R. Co., 7 Ont. 321, 329, writ.

24. Scott County *v.* Fluke, 34 Iowa 317; Mahaska County *v.* Ingalls, 16 Iowa 81.

25. Humes *v.* O'Bryan, 74 Ala. 64; Card *v.* Moore, 68 N. Y. App. Div. 327, 74 N. Y. Suppl. 18; Duncan *v.* Seaborn, Rice (S. C.) 27; Overton *v.* Hardin, 6 Coldw. (Tenn.) 375.

26. Humes *v.* O'Bryan, 74 Ala. 64; Raines *v.* Raines, 30 Ala. 425.

27. Helm *v.* State, 67 Miss. 562, 7 So. 487;

action declares that he is not its absolute owner,[28] that he has made a gift[29] or other transfer[30] of it, or holds it in trust;[31] or where an heir at law states the existence of a will;[32] or where a person being in actual[33] possession under an apparent claim of ownership concedes that he holds in trust,[34] as a tenant for life,[35] or under another person,[36] or for less than the entire interest,[37] or states that he has never received a deed of the land,[38] or has conveyed it by deed,[39] or has canceled a document conferring on him additional interest in the land,[40] or that someone other than himself owns the property.[41]

(c) *Actual Interest.* The declarant must have possessed an actual interest, real or apparent, at the time when his declaration was made.[42] The interest of a former partner[43] or owner,[44] or of a prospective heir,[45] is not present and actual so as to render his declarations competent.

(d) *Obvious Interest.* The interest of the declarant must have been so obvious

Powers *v.* Silsby, 41 Vt. 288; Bowen *v.* Chase, 98 U. S. 254, 25 L. ed. 47; Carr *v.* Mostyn, 5 Exch. 69, 19 L. J. Exch. 249; De Whelpdale *v.* Milburn, 5 Price 485.

28. Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Friberg *v.* Donovan, 23 Ill. App. 58; Dean *v.* Wilkerson, 126 Ind. 338, 26 N. E. 55; Hall *v.* Insurance Co., 3 Phila. (Pa.) 331; Goodson *v.* Johnson, 35 Tex. 622. See also Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.

29. Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Dean *v.* Wilkerson, 126 Ind. 338, 26 N. E. 55; Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699; Smith *v.* Smith, 3 Bing. N. Cas. 29, 2 Hodges 130, 5 L. J. C. P. 305, 3 Scott 352, 32 E. C. L. 24. See also Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.

A declaration by an alleged donee of personal property that no gift has been made to him is competent. Abend *v.* Mueller, 11 Ill. App. 257.

30. Ivat *v.* Finch, 1 Taunt. 141, 9 Rev. Rep. 716. See also Wonsetler *v.* Wonsetler, 23 Pa. Super. Ct. 321.

31. Swan *v.* Morgan, 88 Hun (N. Y.) 378, 34 N. Y. Suppl. 829; Stair *v.* York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759; Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373; Goodson *v.* Johnson, 35 Tex. 622.

32. Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599; Flood *v.* Russell, 29 L. R. Ir. 91.

33. Doe *v.* Arkwright, 5 C. & P. 575, 24 E. C. L. 715; Doe *v.* Langfield, 16 M. & W. 497; La Touche *v.* Hutton, Ir. R. 9 Eq. 166.

34. Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Leary *v.* Corvin, 63 N. Y. App. Div. 151, 71 N. Y. Suppl. 335; Houser *v.* Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Sergeant *v.* Ingersoll, 15 Pa. St. 343.

35. Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Doe *v.* Langfield, 16 M. & W. 497.

36. *Illinois.*— Crain *v.* Wright, 46 Ill. 107.

Indiana.— Chandler *v.* Evans, 8 Blackf. 322.

Massachusetts.— Currier *v.* Gale, 14 Gray 504, 77 Am. Dec. 343.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343.

New York.—Jackson *v.* Murray, Anth. N. P. 143.

England.— Reg. *v.* Exeter, L. R. 4 Q. B. 341, 10 B. & S. 433, 38 L. J. M. C. 126, 20 L. T. Rep. N. S. 693, 17 Wkly. Rep. 850; Doe *v.* Austin, 9 Bing. 41, 1 L. J. C. P. 152, 2 M. & S. 107, 23 E. C. L. 477; Crane *v.* Nicoll, 1 Bing. N. Cas. 430, 4 L. J. C. P. 89, 1 Scott 466, 27 E. C. L. 707; Reg. *v.* Birmingham Parish, 1 B. & S. 763, 8 Jur. N. S. 37, 31 L. J. M. C. 63, 5 L. T. Rep. N. S. 309, 10 Wkly. Rep. 41, 101 E. C. L. 763; Doe *v.* Jones, 1 Campb. 367; Doe *v.* Arkwright, 5 C. & P. 575, 24 E. C. L. 715.

37. Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; McLeod *v.* Swain, 87 Ga. 156, 13 S. E. 315, 27 Am. St. Rep. 229; Doe *v.* Coulthred, 7 A. & E. 235, 7 L. J. Q. B. 52, 2 N. & P. 165, W. W. & D. 477, 34 E. C. L. 140.

38. West Cambridge *v.* Lexington, 2 Pick. (Mass.) 536; Saffold *v.* Horne, 72 Miss. 470, 18 So. 433.

39. *Massachusetts.*— Bosworth *v.* Sturtevant, 2 Cush. 392.

Missouri.— Wynn *v.* Cory, 48 Mo. 346.

New York.— Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189.

Utah.— Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068.

United States.— Bowen *v.* Chase, 98 U. S. 254, 25 L. ed. 47.

40. Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018, antenuptial contract.

41. Walker *v.* Marseilles, 70 Miss. 283, 12 So. 211; Doe *v.* Arkwright, 5 C. & P. 575, 24 E. C. L. 715; Powell *v.* Wathen, 10 N. Brunsw. 258.

42. Thaxter *v.* Inglis, 121 Cal. 593, 54 Pac. 86; Clason *v.* Baldwin, 56 Hun (N. Y.) 326, 9 N. Y. Suppl. 609; Wilson *v.* Simpson, 68 Tex. 306, 4 S. W. 839; Outram *v.* Morewood, 5 T. R. 121, 12 Rev. Rep. 542. The entire weight of the evidence may be destroyed by showing *aliunde* that the declaration is actually in accordance with what the declarant regarded as his interest. Taylor *v.* Witham, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877.

43. Jeffries *v.* Castleman, 75 Ala. 262.

44. Moehn *v.* Moehn, 105 Iowa 710, 75 N. W. 521; Hutchins *v.* Hutchins, 98 N. Y. 56; Johnson *v.* Cole, 76 N. Y. App. Div. 606, 78 N. Y. Suppl. 489; Bullock *v.* Smith, 72 Tex. 545, 10 S. W. 687; Wilson *v.* Simpson, 68 Tex. 306, 4 S. W. 839. See also Ellis *v.* Newell, 120 Iowa 171, 94 N. W. 463.

45. Morton *v.* Massie, 3 Mo. 482.

and direct as presumably to have been present in his mind at the time of the declaration.[46] A declaration which would be against interest only in certain remote and improbable contingencies[47] is not competent.

(E) *Real Interest Regarded.* A declaration *prima facie* against the interest of the declarant when made does not become incompetent, although it should appear that the declaration was in reality beneficial to him.[48] It may appear, however, that a declaration, although in part against an obvious interest of the declarant, was, when made, beneficial to him to a still greater extent. Thus declarations of a husband against his proprietary interest may be in favor of his wife and designed to secure an advantage to her at the expense of his creditors,[49] or the receipt of a sum of money may be the basis of a claim to a much larger amount, either directly,[50] or by reviving a liability barred by a statute of limitations.[51] In such a case if the portion ostensibly against interest can be separated from the self-serving portion, the latter is rejected.[52] If it cannot be so separated, the entire declaration must be rejected.[53]

(F) *Interest Other Than Pecuniary or Proprietary.* An unsworn statement of a third person is not admissible merely because it appears to have been against the interest of the declarant by subjecting him to a successful civil suit[54] or criminal prosecution.[55]

3. Primary Evidence Unattainable. Evidence of the unsworn statement must

46. White *v.* Chouteau, 1 E. D. Smith (N. Y.) 493; Brain *v.* Preece, 11 M. & W. 773.

47. Tate *v.* Tate, 75 Va. 522; Smith *v.* Blakey, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492.

48. Taylor *v.* Witham, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877; Turner *v.* Crisp, 2 Ld. Raym. 1320; Reg. *v.* Inhab. Lower Heyford, 2 Sm. L. C. (7th ed.) p. 333.

49. The law views with jealousy all his admissions of the receipt of money in her favor, and they are no evidence against persons not parties to them, unless supported by other proof. Dimitry *v.* Pollock, 12 La. 296.

50. Haines *v.* Christie, 28 Colo. 502, 66 Pac. 883; Confederation L. Assoc. *v.* O'Donnell, 13 Can. Supreme Ct. 218; Ganton *v.* Size, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. C.) 368.

51. Glynn *v.* Bank of England, 2 Ves. 38, 28 Eng. Reprint 26, bond.

When receipt of interest is indorsed upon an instrument with the apparent effect of removing the bar of the statute of limitations, the evidence of such a statement will not be received unless affirmative and satisfactory evidence is offered to the effect that the indorsement was made when it was against the real interest of the person making it. Beatty *v.* Clement, 12 La. Ann. 82; Coffin *v.* Bucknam, 12 Me. 471; Roseboom *v.* Billington, 17 Johns. (N. Y.) 182; Gupton *v.* Hawkins, 126 N. C. 81, 35 S. E. 229 (bond); Addams *v.* Seitzinger, 1 Watts & S. (Pa.) 243. See also Libby *v.* Brown, 78 Me. 492, 7 Atl. 114; Hancock *v.* Cook, 18 Pick. (Mass.) 30; Searle *v.* Barrington, 2 Str. 826.

52. Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444.

53. Beatty *v.* Clement, 12 La. Ann. 82; Coffin *v.* Bucknam, 12 Me. 471; Addams *v.* Seitzinger, 1 Watts & S. (Pa.) 243. If on all the facts the declaration is really in declarant's favor it will be rejected. Ganton *v.* Size, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. C.) 368.

54. Ayer *v.* Colgrove, 81 Hun (N. Y.) 322, 30 N. Y. Suppl. 788 (seduction); Penner *v.* Cooper, 4 Munf. (Va.) 458 (trespass); Smith *v.* Blakey, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492. Declarations involving exposure to a contractual liability are not within the meaning of the rule admitting declarations against interest. Perchard *v.* Benyon, 1 Cox Ch. 214, 29 Eng. Reprint 1134. *Contra*, Halvorsen *v.* Moon, etc., Lumber Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669.

55. *Alabama.*— West *v.* State, 76 Ala. 98.

Iowa.— Ibbitson *v.* Brown, 5 Iowa 532.

Kentucky.— Davis *v.* Com., 95 Ky. 19, 23 S. W. 585, 15 Ky. L. Rep. 396, 44 Am. St. Rep. 201.

Louisiana.— State *v.* West, 45 La. Ann. 14, 12 So. 7.

Massachusetts.—Com. *v.* Chabbock, 1 Mass. 144.

Mississippi.— Helm *v.* State, 67 Miss. 562, 7 So. 487.

United States.— U. S. *v.* Mulholland, 50 Fed. 413.

England.— Davis *v.* Lloyd, 1 C. & K. 275, 47 E. C. L. 275; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

Conflicting authorities.— In case of an attesting witness a dying declaration of forgery has been received. Clymer *v.* Littler, 1 W. Bl. 345. See also Doe *v.* Ridgway, 4 B. & Ald. 53, 6 E. C. L. 387; Aveson *v.* Kinnaird, 6 East 188, 2 Smith K. B. 286, 8 Rev. Rep. 455. A *dictum* in Coleman *v.* Frazier, 4 Rich. (S. C.) 146, 53 Am. Dec. 727, based on the authority of Clymer *v.* Littler, 1 W. Bl. 345, above cited, is to the effect that a confession of larceny by a deceased person is admissible in a suit against third persons.

be not only relevant but necessary.[56] Being an inferior grade of evidence there must be affirmative proof[57] that it is the best attainable; in other words that the testimony of the original declarant cannot be procured because he is absent from the jurisdiction of the court,[58] cannot be compelled to testify,[59] is dead,[60] or is incapacitated, physically or mentally,[61] from attendance.

4. Form of Declaration. The declaration against interest may be oral[62] or it

56. Lord Hardwicke suggested that the reason of the rule is that "no other [evidence] can be had." Manning *v.* Lechmere, 1 Atk. 453, 26 Eng. Reprint 288. See also Warren *v.* Greenville, 2 Str. 1129.

57. *Alabama.*— Trammell *v.* Hudmon, 78 Ala. 222; Moore *v.* Andrews, 5 Port. 107.

Connecticut.—Fitch *v.* Chapman, 10 Conn. 8.

Massachusetts.— Currier *v.* Gale, 14 Gray 504, 77 Am. Dec. 343.

New York.— Brewster *v.* Doane, 2 Hill 537.

South Carolina.— Lowry *v.* Moss, 1 Strobh. 63.

United States.— Wilson *v.* Simpson, 9 How. 109, 13 L. ed. 66.

England.— Harrison *v.* Blades, 3 Campb. 457.

58. Alter *v.* Berghaus, 8 Watts (Pa.) 77.

59. Harriman *v.* Brown, 8 Leigh (Va.) 697.

60. *Alabama.*— Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; Trammell *v.* Hudmon, 78 Ala. 222; Humes *v.* O'Bryan, 74 Ala. 64.

Connecticut.—Fitch *v.* Chapman, 10 Conn. 8.

Georgia.— Cunningham *v.* Schley, 41 Ga. 426.

Indiana.— Doe *v.* Evans, 8 Blackf. 322.

Iowa.— Mahaska County *v.* Ingalls, 16 Iowa 81.

Massachusetts.— Currier *v.* Gale, 14 Gray 504, 77 Am. Dec. 343.

Missouri.— Howell *v.* Howell, 37 Mo. 124.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343.

New York.— Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189; Swan *v.* Morgan, 88 Hun 378, 34 N. Y. Suppl. 829; McDonald *v.* Wesendonck, 30 Misc. 601, 62 N. Y. Suppl. 764.

Ohio.— Bird *v.* Hueston, 10 Ohio St. 418.

South Carolina.— Lowry *v.* Moss, 1 Strobh. 63.

Utah.— Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068.

Vermont.— Davis *v.* Fuller, 12 Vt. 178, 36 Am. Dec. 334.

West Virginia.— Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

England.—Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

See 20 Cent. Dig. tit. "Evidence," § 1135 *et seq.*

A declaration by a firm, the only partner who had personal knowledge being dead, is competent, in the absence of specific objection. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

61. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181. But see Harrison *v.* Blades, 3 Campb. 457.

62. *Alabama.*— Humes *v.* O'Bryan, 74 Ala. 64.

Georgia.— Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

Iowa.— Mahaska County *v.* Ingalls, 16 Iowa 81.

Maryland.— Prather *v.* Johnson, 3 Harr. & J. 487.

Minnesota.— Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343; Hinkley *v.* Davis, 6 N. H. 210, 25 Am. Dec. 457.

New York.— White *v.* Choteau, 1 E. D. Smith 493; People *v.* Blakeley, 4 Park. Cr. 176.

Pennsylvania.— Huzzard *v.* Trego, 35 Pa. St. 9; Trego *v.* Huzzard, 19 Pa. St. 441.

South Carolina.— Coleman *v.* Frazier, 4 Rich. 146, 53 Am. Dec. 727; Gilchrist *v.* Martin, Bailey Eq. 492.

Virginia.— Holladay *v.* Littlepage, 2 Munf. 316.

United States.— Bowen *v.* Chase, 98 U. S. 254, 25 L. ed. 47.

England.— Fawkner *v.* Watts, 1 Atk. 406, 26 Eng. Reprint 257; Doe *v.* Pettett, 5 B. & Ald. 223, 7 E. C. L. 129 (per Lord Eldon); Reg. *v.* Birmingham Parish, 1 B. & S. 763, 8 Jur. N. S. 37, 31 L. J. M. C. 63, 5 L. T. Rep. N. S. 309, 10 Wkly. Rep. 41, 101 E. C. L. 793; Doe *v.* Jones, 1 Camph. 367; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Barker *v.* Ray, 2 Russ. 63, 3 Eng. Ch. 63, 38 Eng. Reprint 259 (per Lord Eldon); Ivat *v.* Finch, 1 Taunt. 141, 9 Rev. Rep. 716 (per Mansfield, C. J.); Davies *v.* Pierce, 2 T. R. 53, 1 Rev. Rep. 419; Flood *v.* Russell, 29 L. R. Pr. 91.

See 20 Cent. Dig. tit. "Evidence," § 1135 *et seq.*

When oral declarations inadmissible.— There is no general distinction in admissibility between oral and written declarations against interest. Reg. *v.* Birmingham Parish, 1 B. & S. 763, 8 Jur. N. S. 37, 31 L. J. M. C. 63, 5 L. T. Rep. N. S. 309, 10 Wkly. Rep. 41, 101 E. C. L. 763; Bewley *v.* Atkinson, 13 Ch. D. 283, 49 L. J. Ch. 153, 41 L. T. Rep. N. S. 603, 28 Wkly. Rep. 638; Ganton *v.* Size, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. C.) 368. But where a rule of substantive law requires a written instrument to effect a particular legal result, an oral declaration against interest is said to be inadmissible for the purpose. For example, declarations by a decedent that he had sold certain lands, no deed being produced or accounted for, are insufficient to prove a conveyance by him of such lands. Marsh *v.* Ne-ha-sa-ne Park Assoc., 18 Misc. (N. Y.) 314, 42 N. Y. Suppl. 996. In Massachusetts declarations against pecuniary interest must be in writing. Jones *v.* Howard, 3

may be in writing.[63] Thus admissible declarations against interest may appear in accounts,[64] deeds,[65] memoranda,[66] receipts,[67] and the like.

C. Declarations as to Pedigree — 1. In General — a. Rule Stated. An unsworn statement[68] concerning matters of genealogy[69] may, if relevant,[70] furnish, upon an issue of pedigree,[71] a probative inference of the truth of the facts directly[72]

Allen (Mass.) 223; Lawrence *v.* Kimball, 1 Metc. (Mass.) 524; Framingham Mfg. Co. *v.* Barnard, 2 Pick. (Mass.) 532. See also Furdson *v.* Clogg, 10 M. & W. 572. Declarations against proprietary interest may, however, be oral. Marcy *v.* Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736.

63. *Alabama.*— Hart *v.* Kendall, 82 Ala. 144, 3 So. 41, entry.

California.— Donnelly *v.* Rees, 141 Cal. 56, 74 Pac. 433.

Georgia.— Field *v.* Boynton, 33 Ga. 239.

Massachusetts.— Jones *v.* Howard, 3 Allen 223 (entry); Shearman *v.* Akins, 4 Pick. 283, 293.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343.

New York.—Livingston *v.* Arnoux, 56 N. Y. 507, 519; Sherman *v.* Crosby, 11 Johns. 70.

Pennsylvania.— Hall *v.* Insurance Co., 3 Phila. 331, enrolment of vessel.

South Carolina.— Cruger *v.* Daniel, McMull. Eq. 157.

Texas.— Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46, entry.

England.— Doe *v.* Coulthred, 7 A. & E. 235, 7 L. J. Q. B. 52, 2 N. & P. 165, W. W. & D. 477, 34 E. C. L. 140; Goss *v.* Watlington, 3 B. & B. 132, 7 E. C. L. 645; Reg. *v.* Birmingham Parish, 1 B. & S. 763, 31 L. J. M. C. 63, 8 Jur. N. S. 37, 5 L. T. Rep. N. S. 309, 10 Wkly. Rep. 41, 101 E. C. L. 763; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235; Sly *v.* Sly, 2 P. D. 91, 46 L. J. P. & Adm. 63, 25 Wkly. Rep. 463.

Canada.— Turner *v.* Dewan, 41 U. C. Q. B. 361 (entry); Wardrope *v.* Canadian Pac. R. Co., 7 Ont. 321, 329.

See 20 Cent. Dig. tit. "Evidence," § 1135 *et seq.*

64. Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; Cunningham *v.* Schley, 41 Ga. 426; Bright *v.* Legerton, 6 Jur. N. S. 1179, 29 L. J. Ch. 852, 8 Wkly. Rep. 678.

65. Doe *v.* Coulthred, 7 A. & E. 235, 7 L. J. Q. B. 52, 2 N. & P. 165, W. W. & D. 477, 34 E. C. L. 140; Sly *v.* Sly, 2 P. D. 91, 46 L. J. P. & Adm. 63, 25 Wkly. Rep. 463.

66. Middleton *v.* Walton, 10 B. & C. 317, 21 E. C. L. 139, that the memorandum is unintelligible to the average observer as when made by private marks is immaterial.

67. *Georgia.*— Field *v.* Boynton, 33 Ga. 239.

Massachusetts.—Shearman *v.* Akins, 4 Pick. 282.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343.

New York.— Livingston *v.* Arnoux, 56 N. Y. 507; Sherman *v.* Crosby, 11 Johns. 70.

England.— Giffard *v.* Williams, L. R. 8 Eq. 494, 38 L. J. Ch. 597, 21 L. T. Rep. N. S. 575, 17 Wkly. Rep. 56.

68. As to the use of circumstantial evidence touching matters of genealogy see *supra*, VII, B, 2.

69. As to what facts are regarded as within the scope of the definition see *infra*, IX, C, 1, c.

70. For conditions of relevancy see *infra*, IX, C, 2.

71. Whalen *v.* Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52; Washington *v.* New York Sav. Bank, 65 N. Y. App. Div. 338, 72 N. Y. Suppl. 752. As to proof of genealogy on issues other than that of pedigree see *supra*, VII, B, 2.

An erroneous tendency.— Owing largely to a careless statement in the first edition of Greenleaf Ev. § 104 (corrected in the second edition of 1844), the courts of this country have acquired a tendency to admit hearsay evidence of any facts of family history without regard to the nature of the inquiry in which this evidence is offered. Morrill *v.* Foster, 33 N. H. 379; Du Pont *v.* Davis, 30 Wis. 170.

72. *Alabama.*— Elder *v.* State, 123 Ala. 35, 26 So. 213; Rowland *v.* Ladiga, 21 Ala. 9. See Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008.

Arkansas.— Kelly *v.* McGuire, 15 Ark. 555.

California.— Anderson *v.* Parker, 6 Cal. 197.

Georgia.— Malone *v.* Adams, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259.

Illinois.— Harland *v.* Eastman, 107 Ill. 535; Cuddy *v.* Brown, 78 Ill. 415.

Indiana.— De Haven *v.* De Haven, 77 Ind. 236.

Kentucky.— Whalen *v.* Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Jones *v.* Jones, 36 Md. 447; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323; Walkup *v.* Pratt, 5 Harr. & J. 51.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

New Hampshire.— Morrill *v.* Foster, 33 N. H. 379.

New York.— Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Chamberlain *v.* Chamberlain, 71 N. Y. 423; People *v.* Fulton F. Ins. Co., 25 Wend. 205.

Pennsylvania.— Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859; Strickland *v.* Poole, 1 Dall. 14, 1 L. ed. 17.

South Carolina.— Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

Texas.— Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030; Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370;

or incidentally and inferentially[73] asserted; and in the necessary absence of evidence of a higher grade,[74] the statement is admissible[75] and may be testified to by any one who heard it.[76] The evidence is admitted on account of the necessity of the case,[77] and will not be received, it is said, when other evidence of the fact is attainable.[78] The statement moreover must purport to be one of fact; the existence of an opinion, however general among members of a family, is not competent.[79]

b. Incidental or Inferential Facts. On an inquiry as to pedigree the admissible unsworn statement is evidence not only of facts directly asserted by it,[80] but of such relevant facts as may be incidentally[81] or inferentially[82] stated; as the dates[83]

Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; Wren *v.* Howland, (Civ. App. 1903) 75 S. W. 894.

Vermont.— Mason *v.* Fuller, 45 Vt. 29.

Wisconsin.— Du Pont *v.* Davis, 30 Wis. 170; Eaton *v.* Tallmadge, 24 Wis. 217.

United States.— Blackburn *v.* Crawford, 3 Wall. 175, 18 L. ed. 186; Elliott *v.* Peirsol, 1 Pet. 328, 7 L. ed. 164.

England.— Rex *v.* Erith, 8 East 539.

Canada.— Wallbridge *v.* Jones, 33 U. C. Q. B. 613.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

73. See *infra*, IX, C, 1, b.

74. See *infra*, IX, C, 3.

75. Cases cited in the preceding notes.

76. *Alabama.*— Elder *v.* State, 124 Ala. 69, 27 So. 305.

California.—Anderson *v.* Parker, 6 Cal. 197.

Kentucky.— Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. L. Rep. 392.

New Hampshire.— Waldron *v.* Tuttle, 4 N. H. 371.

New York.— Arents *v.* Long Island R. Co., 156 N. Y. 1, 50 N. E. 422.

Texas.— Nunn *v.* Mayes, 9 Tex. Civ. App. 366, 30 S. W. 479.

Vermont.— Mason *v.* Fuller, 45 Vt. 29.

Wisconsin.— Du Pont *v.* Davis, 30 Wis. 170.

England.—Essex *v.* Hodgson, 15 Wkly. Rep. 960.

See 20 Cent. Dig. tit. "Evidence," § 1143.

77. Copes *v.* Pearce, 7 Gill (Md.) 247; Denoyer *v.* Ryan, 24 Fed. 77; Berkeley's Case, 4 Camph. 401; Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247. "This exception [pedigree] has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice." Fulkerson *v.* Holmes, 117 U. S. 389, 397, 6 S. Ct. 780, 29 L. ed. 915, per Woods, J. See also Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323, where it was held that the declarations of deceased members of the family are primary evidence on questions of pedigree turning on a question of marriage, and that they are not admitted as evidence in its nature secondary, but taken because it is the best attainable. The necessity arises from the essentially perishable nature of the probative facts and the very limited number of persons who can be assumed to have either interest in or knowledge of facts of such slight general importance and of a nature at once so exact and so trivial; and the evidence has been rejected where the facts are not ancient. Birney *v.* Hann, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167; Covert *v.* Hertzog, 4 Pa. St. 145. See also *supra*, VII, B, 2.

78. Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81; Covert *v.* Hertzog, 4 Pa. St. 145. On a question of pedigree witnesses cannot be received to prove the declarations of a relative whose deposition is read. Gordon *v.* Gordon, 3 Swanst. 400, 19 Rev. Rep. 230.

79. It is incompetent, in order to establish the death of a person who disappeared, to show the general opinion of his family on the subject. Vought *v.* Williams, 46 Hun (N. Y.) 638.

80. See *supra*, IX, C, 1, a.

81. Kelly *v.* McGuire, 15 Ark. 555; Morrill *v.* Foster, 33 N. H. 379; Clements *v.* Hunt, 46 N. C. 400.

Facts not of pedigree.— Such declarations are not, however, evidence of every fact the declarant sees fit to state. State *v.* Watters, 25 N. C. 455, color of a child's father. But see U. S. *v.* Sanders, 27 Fed. Cas. No. 16,220, Hempst. 483; Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075 (army service); Watts *v.* Owens, 62 Wis. 512, 22 N. W. 720 (non-access of husband); Davis *v.* Wood, 1 Wheat. (U. S.) 6, 4 L. ed. 22 (freedom).

82. Wood *v.* Sawyer, 61 N. C. 251 (knowledge); Viall *v.* Smith, 6 R. I. 417.

83. *Arkansas.*— Kelly *v.* McGuire, 15 Ark. 555.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Copes *v.* Pearce, 7 Gill 247.

Michigan.— Van Sickle *v.* Gibson, 40 Mich. 170.

New Hampshire.— Morrill *v.* Foster, 33 N. H. 379.

North Carolina.— Clements *v.* Hunt, 46 N. C. 400.

Tennessee.— Swink *v.* French, 11 Lea 78, 47 Am. Rep. 277; Saunders *v.* Fuller, 4 Humphr. 516.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W.

at which, or the localities in which[84] events of genealogical importance took place, the general condition,[85] names,[86] nationality,[87] number,[88] or residence,[89] of a particular branch of the family, their ownership of property,[90] and similar facts.[91]

c. Instances of Application of Rule. The facts regarded as those of genealogy take a wide range, embracing, under suitable conditions, age,[92] birth,[93] death,[94]

699; De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038.

United States.— Lewis *v.* Marshall, 5 Pet. 470, 8 L. ed. 195.

England.— Haines *v.* Guthrie, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. N. S. 645, 33 Wkly. Rep. 99; *In re* Turner, 29 Ch. D. 985, 53 L. T. Rep. N. S. 528; Goodright *v.* Moss, Cowp. 591; Shields *v.* Boucher, 1 De G. & Sm. 40; Vulliamy *v.* Huskisson, 2 Jur. 656, 3 Y. & Coll. 80.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

84. Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381; Tyler *v.* Flanders, 57 N. H. 618 (birthplace); Shields *v.* Boucher, 1 De G. & Sm. 40.

85. Shrewsbury Peerage Case, 7 H. L. Cas. 1, 11 Eng. Reprint 1; Crawford, etc., Peerage Case, 2 H. L. Cas. 534, 9 Eng. Reprint 1196.

86. McClaskey *v.* Barr, 47 Fed. 154.

87. Currie *v.* Stairs, 25 N. Brunsw. 4.

88. De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038.

89. *Illinois.*— Stumpf *v.* Osterhage, 111 Ill. 82.

Mississippi.— Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 1060.

England.— Rishton *v.* Nesbitt, 2 M. & Rob. 554.

Canada.— Currie *v.* Stairs, 25 N. Brunsw. 4.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

90. Maslin *v.* Thomas, 8 Gill (Md.) 18; Pancoast *v.* Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520.

91. "Declarations of the nature of pedigree, that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died, or whether they are actually dead — everything in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by evidence *de hors* those declarations, have been previously connected with the family respecting which their declarations are tendered." Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 156, 11 Eng. Ch. 147, per Brougham, Ch.

92. *Georgia.*— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535.

Indiana.— Collins *v.* Grantham, 12 Ind. 440.

Kentucky.— Woodard *v.* Spiller, 1 Dana 179, 25 Am. Dec. 139.

Louisiana.— David *v.* Sittig, 1 Mart. N. S. 147, 14 Am. Dec. 179.

Michigan.— Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576.

Nebraska.— Grand Lodge A. O. U. W. *v.* Bartes, (1904) 98 N. W. 715 [*vacating* on rehearing (1903) 96 N. W. 186].

New Jersey.— Hancock *v.* Supreme Council Catholic Benev. Legion, 67 N. J. L. 308, 55 Atl. 246.

New York.— Fox's Estate, 9 Misc. 661, 30 N. Y. Suppl. 835. *Compare* Bowen *v.* Preferred Acc. Ins. Co., 82 N. Y. App. Div. 458, 81 N. Y. Suppl. 840.

Pennsylvania.— Watson *v.* Brewster, 1 Pa. St. 381.

Texas.— Smith *v.* State, (Cr. App. 1903) 73 S. W. 401.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

93. *Kansas.*— Smith *v.* Brown, 8 Kan. 608.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Copes *v.* Pearce, 7 Gill 247.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

Nebraska.— Grand Lodge A. O. U. W. *v.* Bartes, (1904) 98 N. W. 715 [*vacating* on rehearing (1903) 96 N. W. 186].

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507.

Tennessee.— Swink *v.* French, 11 Lea 78, 42 Am. Rep. 277.

Texas.— Smith *v.* State, (Cr. App. 1903) 73 S. W. 401.

Vermont.— Derby *v.* Salem, 30 Vt. 722.

United States.— Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92. But see Albertson *v.* Robeson, 1 Dall. (Pa.) 9, 1 L. ed. 14.

England.— Haines *v.* Guthrie, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. N. S. 646, 33 Wkly. Rep. 99; Vulliamy *v.* Huskisson, 2 Jur. 656, 3 Y. & Coll. 80; *In re* Thompson, 12 P. D. 100, 56 L. J. P. & Adm. 46, 57 L. T. Rep. N. S. 373, 35 Wkly. Rep. 384.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

94. *California.*—Anderson *v.* Parker, 6 Cal. 197.

Illinois.— Stumpf *v.* Osterhage, 111 Ill. 82.

Kansas.— Smith *v.* Brown, 8 Kan. 608.

Maryland.— Copes *v.* Pearce, 7 Gill 247; Raborg *v.* Hammond, 2 Harr. & G. 42.

Michigan.— Van Sickle *v.* Gibson, 40 Mich. 170.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

Mississippi.— Spears *v.* Burton, 31 Miss. 547.

New Hampshire.— Morrill *v.* Foster, 33 N. H. 379.

New York.— Hunt *v.* Johnson, 19 N. Y. 279.

descent,[95] failure of heirs,[96] illegitimacy,[97] legitimacy,[98] marriage,[99] parentage,[1] or other relationship.[2] The scope of declarations regarding relationship which are admissible as declarations as to pedigree covers direct and collateral lines.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507.

Texas.— Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030; Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699.

Vermont.— Mason *v.* Fuller, 45 Vt. 29.

Wisconsin.—Du Pont *v.* Davis, 30 Wis. 170.

United States.— Lewis *v.* Marshall, 5 Pet. 470, 8 L. ed. 195; Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92.

England.— *In re* Thompson, 12 P. D. 100, 56 L. J. P. & Adm. 46, 57 L. T. Rep. N. S. 373, 35 Wkly. Rep. 384.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

95. *Alabama.*— Rowland *v.* Ladiga, 21 Ala. 9.

Kansas.— Smith *v.* Brown, 8 Kan. 608.

Maryland.— Copes *v.* Pearce, 7 Gill 247.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

New York.— Arents *v.* Long Island R. Co., 156 N. Y. 1, 50 N. E. 422.

Texas.— Wren *v.* Howland, (Civ. App. 1903) 75 S. W. 894.

United States.— Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

96. Thomas *v.* Frederick County School, 7 Gill & J. (Md.) 369; Washington *v.* New York Sav. Bank, 171 N. Y. 166, 63 N. E. 831, 89 Am. St. Rep. 800; People *v.* Fulton F. Ins. Co., 25 Wend. (N. Y.) 205; Roscommon's Claim, 6 Cl. & F. 97, 7 Eng. Reprint 634.

97. *Maine.*— Northrop *v.* Hale, 76 Me. 306, 45 Am. Rep. 615.

Maryland.— Barnum *v.* Barnum, 42 Md. 251; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

Massachusetts.— Haddock *v.* Boston, etc., R. Co., 3 Allen 298, 81 Am. Dec. 656.

Rhode Island.— Viall *v.* Smith, 6 R. I. 417.

England.— Murray *v.* Milner, 12 Ch. D. 845, 48 L. J. Ch. 775, 41 L. T. Rep. N. S. 213, 27 Wkly. Rep. 881; *Re* Perton, 53 L. T. Rep. N. S. 707; Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

Declarations of illegitimate births in the family have on the other hand been rejected as not forming a subject of sufficiently general family discussion as to furnish the necessary guaranty of accuracy. Orthwein *v.* Thomas, (Ill. 1887) 13 N. E. 564; Crispin *v.* Doglioni, 32 L. J. P. & M. 109, 8 L. T. Rep. N. S. 91, 3 Swab. & Tr. 44, 11 Wkly. Rep. 500; Goodright *v.* Moss, Cowp. 591; Doe *v.* Barton, 2 M. & Rob. 28.

Declarations as to his own illegitimacy made by a deceased person are admissible in evidence. *Re* Perton, 53 L. T. Rep. N. S. 707.

98. *California.*— Pearson *v.* Pearson, 46 Cal. 609.

Kentucky.— Dannelli *v.* Dannelli, 4 Bush 51.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

New York.— Caujolle *v.* Ferrie, 26 Barb. 177.

Rhode Island.— Viall *v.* Smith, 6 R. I. 417.

England.— *In re* Turner, 29 Ch. D. 985, 53 L. T. Rep. N. S. 528; Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

99. *California.*— Pearson *v.* Pearson, 46 Cal. 609.

Colorado.— Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

District of Columbia.— Jennings *v.* Webb, 8 App. Cas. 43.

Kansas.— Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587; Smith *v.* Brown, 8 Kan. 608.

Kentucky.— Dannelli *v.* Dannelli, 4 Bush 51.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Barnum *v.* Barnum, 42 Md. 251; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

Mississippi.— Spears *v.* Burton, 31 Miss. 547; Henderson *v.* Cargill, 31 Miss. 367.

New Jersey.— Westfield *v.* Warren, 8 N. J. L. 249.

New York.— Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Chamberlain *v.* Chamberlain, 71 N. Y. 423; Alexander *v.* Chamberlin, 1 Thomps. & C. (N. Y.) 600.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507.

Texas.— Summerhill *v.* Darrow, 94 Tex. 71, 57 S. W. 942.

United States.— Jewell *v.* Jewell, 1 How. 219, 11 L. ed. 108.

England.— Doe *v.* Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314.

Canada.— Walker *v.* Murray, 5 Ont. 638.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

1. Elder *v.* State, 124 Ala. 69, 27 So. 305; Rowland *v.* Ladiga, 21 Ala. 9; Chilvers *v.* Race, 196 Ill. 71, 63 N. E. 701.

2. *Arkansas.*— Kelly *v.* McGuire, 15 Ark. 555.

California.— *In re* Heaton, 135 Cal. 385, 67 Pac. 321; Woolsey *v.* Williams, 128 Cal. 552, 61 Pac. 670.

Connecticut.— Chapman *v.* Chapman, 2 Conn. 347, 7 Am. Dec. 277.

Among the relationships stated by the declarant may be that of father,[3] father-in-law,[4] mother,[5] mother-in-law,[6] brother or sister,[7] husband,[8] wife,[9] child,[10]

District of Columbia.— Jennings *v.* Webb, 8 App. Cas. 43.

Iowa.— Alston *v.* Alston, 114 Iowa 29, 86 N. W. 55.

Kansas.— Smith *v.* Brown, 8 Kan. 608.

Maryland.— Jones *v.* Jones, 36 Md. 447, 11 Am. Rep. 505; Copes *v.* Pearce, 7 Gill 247; State *v.* Greenwall, 4 Gill & J. 407.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

Texas.— Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; Sheppard *v.* Avery, 28 Tex. Civ. App. 479, 69 S. W. 82.

United States.— Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915.

England.— Gee *v.* Ward, 7 E. & B. 509, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509; Doe *v.* Tarver, R. & M. 141, 21 E. C. L. 719; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

Any branch of the family may be made the subject of competent statements as to relationship.

Maryland.— Barnum *v.* Barnum, 42 Md. 251; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

Massachusetts.— Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088.

New York.— Chamberlain *v.* Chamberlain, 71 N. Y. 423; Caujolle *v.* Ferrie, 26 Barb. 177; People *v.* Fulton F. Ins. Co., 25 Wend. 205.

Pennsylvania.— Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207.

United States.— Blackburn *v.* Crawford, 3 Wall. 175, 18 L. ed. 186.

England.— Gee *v.* Ward, 7 E. & B. 509, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147.

Canada.— Walker *v.* Murray, 5 Ont. 638.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

3. Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Derby *v.* Salem, 30 Vt. 722; Brown *v.* Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71; Walker *v.* Murray, 5 Ont. 638.

4. Jewell *v.* Jewell, 1 How. (U. S.) 219, 11 L. ed. 108.

5. Wren *v.* Howland, (Tex. Civ. App. 1903) 75 S. W. 894; Doe *v.* Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314; Walker *v.* Murray, 5 Ont. 638.

6. Jewell *v.* Jewell, 1 How. (U. S.) 219, 11 L. ed. 108.

7. *Maine.*— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Raborg *v.* Hammond, 2 Harr. & G. 42.

Mississippi.— Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381.

Texas.— Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699.

England.— Crispin *v.* Doglioni, 32 L. J. P. & M. 109, 8 L. T. Rep. N. S. 91, 3 Swab. & Tr. 44, 11 Wkly. Rep. 500.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

8. *District of Columbia.*— Green *v.* Norment, 5 Mackey 80.

Mississippi.— Spears *v.* Burton, 31 Miss. 547.

New York.— Chamberlain *v.* Chamberlain, 71 N. Y. 423.

Pennsylvania.— Watson *v.* Brewster, 1 Pa. St. 381.

Canada.— Walker *v.* Murray, 5 Ont. 638.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

9. *California.*— Pearson *v.* Pearson, 46 Cal. 609.

Kansas.— Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

Maryland.— Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

New York.— Matter of Fox, 9 Misc. 661, 30 N. Y. Suppl. 835.

United States.— Blackburn *v.* Crawford, 3 Wall. 175, 18 L. ed. 186.

England.— Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

10. *Alabama.*— Elder *v.* State, 124 Ala. 69, 27 So. 305.

California.— *In re* Heaton, 135 Cal. 385, 67 Pac. 321; Pearson *v.* Pearson, 46 Cal. 609.

District of Columbia.— Green *v.* Normant, 5 Mackey 80.

Georgia.— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535.

Illinois.— Chilvers *v.* Race, 196 Ill. 71, 63 N. E. 701.

Indiana.— Collins *v.* Grantham, 12 Ind. 440.

Kentucky.— Dannelli *v.* Dannelli, 4 Bush 51; Woodard *v.* Spiller, 1 Dana 179, 25 Am. Dec. 139.

Louisiana.— David *v.* Sittig, 1 Mart. N. S. 147, 14 Am. Dec. 179.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Barnum *v.* Barnum, 42 Md. 251; Raborg *v.* Hammond, 2 Harr. & G. 42.

Massachusetts.— Haddock *v.* Boston, etc., R. Co., 3 Allen 298, 81 Am. Dec. 656.

Michigan.— Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855.

New York.— Arents *v.* Long Island R. Co., 156 N. Y. 1, 50 N. E. 422; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Caujolle *v.* Ferrie, 26 Barb. 177.

Pennsylvania.— Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207; Watson *v.* Brewster, 1 Pa. St. 381.

Rhode Island.— Viall *v.* Smith, 6 R. I. 417.

Texas.— Wren *v.* Howland, (Civ. App. 1903) 75 S. W. 894.

grandchild,[11] grandfather,[12] uncle,[13] nephew,[14] and niece.[15] And the declarant may state his own relationship to the family.[16]

2. Requirements For Relevancy — a. Adequate Knowledge — (i) *Who Are Competent Declarants.* Any person shown by admission[17] or evidence,[18] direct[19] or circumstantial,[20] apart from his own statements,[21] to be connected

United States.— U. S. *v.* Sanders, 27 Fed. Cas. No. 16,220, Hempst. 483.

England.— *In re* Thompson, 12 P. D. 100, 56 L. J. P. & Adm. 46, 57 L. T. Rep. N. S. 373, 35 Wkly. Rep. 384; *In re* Turner, 29 Ch. D. 985, 53 L. T. Rep. N. S. 528; Murray *v.* Milner, 12 Ch. D. 845, 48 L. J. Ch. 775, 41 L. T. Rep. N. S. 213, 27 Wkly. Rep. 881; Goodright *v.* Moss, Cowp. 591.

Canada.— Walker *v.* Murray, 5 Ont. 638; Wallbridge *v.* Jones, 33 U. C. Q. B. 613.

See 20 Cent. Dig. tit. "Evidence," § 1143 *et seq.*

Godson.— Reilly *v.* Fitzgerald, 1 Drew. 122, 6 Ir. Eq. 335.

11. Green *v.* Norment, 5 Mackey (D. C.) 80; Barnum *v.* Barnum, 42 Md. 251, 304; Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92; Gee *v.* Ward, 7 E. & B. 509, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509; Wallbridge *v.* Jones, 33 U. C. Q. B. 613.

12. South Hampton *v.* Fowler, 54 N. H. 197; Brown *v.* Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71.

13. Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882.

14. Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615; Moffit *v.* Witherspoon, 32 N. C. 185; Jamieson *v.* Mill, 1 Jur. 790.

15. Malone *v.* Adams, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259; Moffit *v.* Witherspoon, 32 N. C. 185.

16. Russell *v.* Langford, 135 Cal. 356, 67 Pac. 331; Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370; *Re* Perton, 53 L. T. Rep. N. S. 707.

17. Wren *v.* Howland, (Tex. Civ. App. 1903) 75 S. W. 894.

18. Relationsbip of the declarant to the family must be established *prima facie* to the satisfaction of the court (Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615; State *v.* Greenwell, 4 Gill & J. (Md.) 407; Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207; Brown *v.* Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71; Hitchins *v.* Eardley, L. R. 2 P. 248, 40 L. J. P. & Adm. 70, 25 L. T. Rep. N. S. 163); but the evidence need go no further than to establish *prima facie* the relationship by blood or marriage of the declarant to the person as to whom the declaration relates (Williams' Estate, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67; Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859).

"Slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy." Fulkerson *v.* Holmes, 117 U. S. 389, 397, 6 S. Ct. 780, 29 L. ed. 915, per Woods, J.

19. Wallbridge *v.* Jones, 33 U. C. Q. B. 613. A witness with competent means of knowledge (Pierce *v.* Jacobs, 7 Mackey (D. C.) 498; Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454) may testify either to his own relationship to a particular family (Pierce *v.* Jacobs, 7 Mackey (D. C.) 498; Smith *v.* Kenney, (Tex. Civ. App. 1899) 54 S. W. 801) or to the relationship of the declarant (Backdahl *v.* Grand Lodge A. O. U. W., *supra*).

20. Among facts tending circumstantially to establish the relationship of the declarant to the family are: The possession of special knowledge on his part (Wallbridge *v.* Jones, 33 U. C. Q. B. 613); bearing the family name (Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615; Brown *v.* Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71; Wallbridge *v.* Jones, 33 U. C. Q. B. 613), or even a name identical with that of the subject of the declaration (Williams' Estate, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67); recognition by the family (Green *v.* Norment, 5 Mackey (D. C.) 80) or mention in family conveyances (De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038) and other dispositions of property (Williams' Estate, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67). Identity of names in certificates of births, haptisms, marriages, and burials, with the persons to whom they are alleged to refer, is a question for the jury. Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

21. *California.*— Woolsey *v.* Williams, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67.

District of Columbia.— Jennings *v.* Webb, 8 App. Cas. 43; Green *v.* Norment, 5 Mackey 80; Anderson *v.* Smith, 2 Mackey 275.

Georgia.— Greene *v.* Almand, 111 Ga. 735, 36 S. E. 957.

Illinois.— Cuddy *v.* Brown, 78 Ill. 415.

Kentucky.— Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. L. Rep. 392.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

Michigan.— Lamoreaux *v.* Atty.-Gen., 89 Mich. 146, 50 N. W. 812.

Mississippi.— Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381.

New Hampshire.— Emerson *v.* White, 29 N. H. 482.

Oregon.— Thompson *v.* Woolf, 8 Oreg. 454.

Texas.— Wallace *v.* Howard, (Civ. App. 1895) 30 S. W. 711; Nunn *v.* Mayes, 9 Tex. Civ. App. 366, 30 S. W. 479.

United States.— Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915; Blackburn *v.* Crawfords, 3 Wall. 175, 18 L. ed. 186.

England.— Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147; Doe *v.* Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314; Smith *v.* Tebbitt, L. R. 1 P. 354, 36 L. J. P. & M. 35, 15 L. T. Rep. N. S.

de jure[22] with the family in question by birth[23] or by being the husband[24] or wife[25] of a person connected by birth, is a competent declarant, provided it be made to appear affirmatively[26] that he had actual knowledge[27] as to the facts stated by him, or that he had such opportunity for acquiring knowledge as leads to a reasonable inference of its possession.[28]

(II) *Who Are Not Competent Declarants.* Notwithstanding an early tendency to regard intimate acquaintance with the family as a sufficient basis for

594, 15 Wkly. Rep. 562; Berkeley Peerage Case, 4 Campb. 401; Davies *v.* Lowndes, 12 L. J. Exch. 506, 6 M. & G. 471, 7 Scott N. R. 141, 188, 46 E. C. L. 471.

Canada.— Doe *v.* Servos, 5 U. C. Q. B. 284.

See 20 Cent. Dig. tit. "Evidence," § 1152.

Operation of rule.— Where the object is to connect A with C, after proving that B, a deceased person, was related to A, it is competent to give in evidence declarations by B, in which he claimed relationship with C. Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147.

Admissions distinguished.— The effect of a declaration as one of pedigree must be distinguished from its effect as an admission. Viewed as an admission, the declaration is sufficient in itself. Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381.

22. *Alabama.*— White *v.* Strother, 11 Ala. 720.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

Massachusetts.— Haddock *v.* Boston, etc., R. Co., 3 Allen 298, 81 Am. Dec. 656.

United States.— Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915; Blackburn *v.* Crawford, 3 Wall. 175, 18 L. ed. 186; Jewell *v.* Jewell, 1 How. 219, 11 L. ed. 108; Flora *v.* Anderson, 75 Fed. 217.

England.— Johnson *v.* Lawson, 2 Bing. 86, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493; Doe *v.* Barton, 2 M. & Rob. 28; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 159, 11 Eng. Ch. 147; Vowles *v.* Young, 13 Ves. Jr. 140, 147, 9 Rev. Rep. 154, 33 Eng. Reprint 247.

See 20 Cent. Dig. tit. "Evidence," § 1152.

Preliminary proof of a legitimate connection with the family is not essential to receiving declarations of members of the family as to the legitimacy of one of its members. Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323; Copes *v.* Pearce, 7 Gill (Md.) 247; Crawford *v.* Blackburn, 3 Wall. (U. S.) 175, 18 L. ed. 186; Flora *v.* Anderson, 75 Fed. 217. Legitimacy of connection may be assumed if it is not disputed. Wallbridge *v.* Jones, 33 U. C. Q. B. 613.

The mother of a bastard may by statute be a member of his family. Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

23. *Illinois.*— Greenwood *v.* Spiller, 3 Ill. 502.

Indiana.— De Haven *v.* De Haven, 77 Ind. 236.

New Hampshire.— Tyler *v.* Flanders, 57 N. H. 618.

New York.— McCarty *v.* Hodges, 2 Edm. Sel. Cas. 433.

Pennsylvania.— Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207.

Texas.— Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370.

United States.— Connecticut Mut. L. Ins. Co. *v.* Schwenck, 94 U. S. 593, 24 L. ed. 294; Stein *v.* Bowman, 13 Pet. 209, 10 L. ed. 129; Flora *v.* Anderson, 75 Fed. 217.

England.— Doe *v.* Ridgway, 4 B. & Ald. 53, 6 E. C. L. 387; Doe *v.* Randall, 2 M. & P. 20, 17 E. C. L. 622.

See 20 Cent. Dig. tit. "Evidence," § 1152.

Adoption is equivalent to a connection by birth. Alston *v.* Alston, 114 Iowa 29, 86 N. W. 55.

24. Harland *v.* Eastman, 107 Ill. 535; Jewell *v.* Jewell, 1 How. (U. S.) 219, 11 L. ed. 108; Shrewsbury Peerage Case, 7 H. L. Cas. 1, 11 Eng. Reprint 1; Davies *v.* Lowndes, 12 L. J. Exch. 506, 6 M. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471; Doe *v.* Harvey, R. & M. 297, 21 E. C. L. 756; Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247.

25. Wren *v.* Howland, (Tex. Civ. App. 1903) 75 S. W. 894; Shrewsbury Peerage Case, 7 H. L. Cas. 1, 11 Eng. Reprint 1.

Wife's relatives.— The declarations of a father (Shrewsbury Peerage Case, 7 H. L. Cas. 1, 11 Eng. Reprint 1) or sister (Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186) of a wife are not competent as to the pedigree of the husband's family.

26. Kaywood *v.* Barnett, 20 N. C. 91.

27. *Illinois.*—Harland *v.* Eastman, 107 Ill. 535; Greenwood *v.* Spiller, 3 Ill. 502.

New Hampshire.— Eastman *v.* Martin, 19 N. H. 152.

New York.— McCarty *v.* Hodges, 2 Edm. Sel. Cas. 433.

United States.— Stein *v.* Bowman, 13 Pet. 209, 10 L. ed. 129.

England.— Lovat Peerage Case, 10 App. Cas. 763; Crawford, etc., Peerage Case, 2 H. L. Cas. 534, 9 Eng. Reprint 1196.

See 20 Cent. Dig. tit. "Evidence," § 1152.

Source of information required.— Accordingly a third person who testifies from information furnished by a member of the family must disclose the source of his knowledge. Nunn *v.* Mayes, 9 Tex. Civ. App. 366, 30 S. W. 479.

28. McCarty *v.* Hodges, 2 Edm. Sel. Cas. (N. Y.) 433. The reliance placed upon this kind of evidence depends upon the circumstances attending the declarations as well as

knowledge as to facts of pedigree, and so to receive the declarations of family physicians,[29] intimate friends,[30] persons living in the family,[31] or servants[32] and other persons having adequate knowledge of facts of family genealogy or opportunities for acquiring it,[33] the rule is now settled that, both in cases of reputation[34] and of direct statements, the only competent declarants are those related to the family;[35] and that consequently the declarations as to pedigree made by intimate friends,[36] neighbors,[37] or even by persons living in the family,[38] or by servants,[39] however trustworthy[40] or long employed in the family,[41] are incompetent.

b. Absence of Motive to Misrepresent. A second condition of relevancy is that the declarant should be disinterested[42] to the extent of having no motive which can fairly be assumed to be such as would induce him to state the fact otherwise than as he understood it.[43] The statement therefore must be shown to have been made *ante litem motam;*[44] *a fortiori*, before commencement of a suit

the knowledge that the declarant is supposed to have possessed of the matters spoken of. Denoyer *v.* Ryan, 24 Fed. 77.

29. Walker *v.* Wingfield, 18 Ves. Jr. 443, 11 Rev. Rep. 232, 34 Eng. Reprint 384.

30. Bridger *v.* Huett, 2 F. & F. 35.

31. Chapman *v.* Chapman, 2 Conn. 347, 7 Am. Dec. 277; Jackson *v.* Cooley, 8 Johns. (N. Y.) 128; Rex *v.* Eriswell, 3 T. R. 707.

32. Walker *v.* Wingfield, 18 Ves. Jr. 443, 11 Rev. Rep. 232, 34 Eng. Reprint 384.

33. Greenwood *v.* Spiller, 3 Ill. 502.

34. See *infra*, IX, C, 4, a, (I).

35. Tyler *v.* Flanders, 57 N. H. 618; Flora *v.* Anderson, 75 Fed. 217; Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92; Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243; Johnson *v.* Lawson, 2 Bing. 86, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493. See also Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35.

36. Johnson *v.* Lawson, 2 Bing. 86, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493.

37. De Haven *v.* De Haven, 77 Ind. 236; Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615; Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92.

38 Flora *v.* Anderson, 75 Fed. 217; Johnson *v.* Lawson, 2 Bing. 86, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493.

39. Flora *v.* Anderson, 75 Fed. 217; Johnson *v.* Lawson, 2 Bing. 86, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493; Doe *v.* Auldjo, 5 U. C. Q. B. 171.

40. Johnson *v.* Lawson, 2 Bing. 86, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493; Doe *v.* Servos, 5 U. C. Q. B. 284.

41. Johnson *v.* Lawson, 2 Bing. 86, 92, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (where Burroughs, J., said: "If we go beyond [members of the family] where are we to stop? Is the declaration of a groom to be admitted? of a steward? of a chambermaid? of a nurse? may it be admitted if made a week after they have joined the family? If not, at what time after?"); Doe *v.* Auldjo, 5 U. C. Q. B. 171.

42. *District of Columbia.*— Green *v.* Norment, 5 Mackey 80.

Kentucky.—Speed *v.* Brooks, 7 J. J. Marsh. 119.

New Hampshire.— Emerson *v.* White, 29 N. H. 482; Waldron *v.* Tuttle, 4 N. H. 371.

New York.— People *v.* Fulton F. Ins. Co., 25 Wend. 205.

England.— Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147.

43. *Connecticut.*—Chapman *v.* Chapman, 2 Conn. 347, 7 Am. Dec. 277.

Indiana.— De Haven *v.* De Haven, 77 Ind. 236.

Louisiana.— David *v.* Sittig, 1 Mart. N. S. 147, 14 Am. Dec. 179.

North Carolina.— Brady *v.* Wilson, 11 N. C. 93.

England.— Doe *v.* Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314.

Answer to inquiries.— It is not material that what was said was in answer to inquiries of a person interested to obtain a particular answer (Hurst *v.* Jones, 12 Fed. Cas. No. 6,934, 1 Wall. Jr. appendix iii), although such a circumstance may affect the probative weight of the statement (Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10).

A self-serving declaration is not necessarily inadmissible. De Haven *v.* De Haven, 77 Ind. 236; Doe *v.* Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314; Webb *v.* Haycock, 19 Beav. 342; Doe *v.* Tarver, R. & M. 141, 21 E. C. L. 719.

44. *Connecticut.*—Chapman *v.* Chapman, 2 Conn. 347, 7 Am. Dec. 277.

Indiana.— Collins *v.* Grantham, 12 Ind. 440.

Louisiana.— David *v.* Sittig, 1 Mart. N. S. 147, 14 Am. Dec. 179.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

New York.— Caujolle *v.* Ferrie, 26 Barb. 177; People *v.* Fulton F. Ins. Co., 25 Wend. 205.

North Carolina.—Brady *v.* Wilson, 11 N. C. 93.

Texas.— Summerhill *v.* Darrow, 94 Tex. 71, 57 S. W. 942; Schott *v.* Pellerim, (Civ. App. 1897) 43 S. W. 944.

involving the issue to which the declaration relates.[45] It is not material, however, that a controversy has arisen regarding a cognate matter,[46] unless indeed it clearly foreshadows one on the precise subject-matter of the declaration;[47] that a controversy, since entirely abated, once existed;[48] or that a state of affairs is known to exist out of which a controversy may at any time arise.[49] On the other hand the declaration is inadmissible if a controversy in fact exists, although the declarant be ignorant of it,[50] or it has not reached the stage of litigation.[51] A declaration made expressly with a view to a probable future contest is admissible *quantum valeat*;[52] but declarations made in the process of collecting evidence to substantiate the claim involved in a subsequent *lis* are incompetent.[53]

3. Primary Evidence Unattainable. It is universally held that declarations in pedigree cases are not admissible unless the declarant is dead.[54]

Vermont.— *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

United States.— Elliott *v.* Peirsol, 1 Pet. 328, 7 L. ed. 164; Hall's Deposition, 11 Fed. Cas. No. 5,924, 1 Wall. Jr. 85.

England.— Frederick *v.* Atty.-Gen., L. R. 3 P. 270, 44 L. J. P. & M. 1, 32 L. T. Rep. N. S. 39; Smith *v.* Tebbitt, L. R. 1 P. 354, 36 L. J. P. & M. 35, 15 L. T. Rep. N. S. 594, 15 Wkly. Rep. 562; Webb *v.* Haycock, 19 Beav. 342; Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10; Doe *v.* Tarver, R. & M. 141, 21 E. C. L. 719; Hill *v.* Hibbit, 19 Wkly. Rep. 250.

See 20 Cent. Dig. tit. "Evidence," § 1153.

45. Nehring *v.* McMurrian, 94 Tex. 45, 57 S. W. 943; Stein *v.* Bowman, 13 Pet. (U. S.) 209, 10 L. ed. 129; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

46. Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164; Gee *v.* Ward, 7 E. & B. 509, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509. A prior cause carried on between the same parties will not be a *lis* so as to exclude declarations, unless the very point subsequently in dispute, upon which it is sought to bring such declaration to bar, was then in litigation. Shedden *v.* Atty.-Gen., 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285.

47. Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164; Reilly *v.* Fitzgerald, 1 Drew. 122, 6 Ir. Eq. 335; Gee *v.* Ward, 7 E. & B. 509, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509.

48. Gregory *v.* Baugh, 2 Leigh (Va.) 665, thirty years.

49. Doe *v.* Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314; Berkeley's Peerage Case, 4 Campb. 401. The commencement of the controversy, and not of the situation from which it springs, is the commencement of the *lis mota* and terminates the admissibility of family declarations. Shedden *v.* Atty.-Gen., 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285. But see Walker *v.* Beauchamp, 6 C. & P. 552, 25 E. C. L. 571.

50. Berkeley's Peerage Case, 4 Campb. 401, 417 (where Mansfield, C. J., said: "If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced"); Shedden *v.* Atty.-Gen., 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285.

51. Dysart Peerage Case, 6 App. Cas. 489; Butler *v.* Mountgarret, 7 H. L. Cas. 633, 11 Eng. Reprint 252.

52. Shedden *v.* Atty.-Gen., 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285.

53. Lovat Peerage Case, 10 App. Cas. 763; Dysart Peerage Case, 6 App. Cas. 489.

54. *Alabama.*— Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81; White *v.* Strother, 11 Ala. 720.

Illinois.—Harland *v.* Eastman, 107 Ill. 535.

Iowa.— Greenleaf *v.* Dubuque, etc., R. Co., 30 Iowa 301.

Kentucky.— Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. L. Rep. 392. See also Jones *v.* Letcher, 13 B. Mon. 363.

Maine.— Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Massachusetts.— Haddock *v.* Boston, etc., R. Co., 3 Allen 298, 81 Am. Dec. 656.

New Hampshire.— Mooers *v.* Bunker, 29 N. H. 420.

New York.— Nolan *v.* Nolan, 35 N. Y. App. Div. 339, 54 N. Y. Suppl. 975; McCarty *v.* Hodges, 2 Edm. Sel. Cas. 433.

North Carolina.— Kaywood *v.* Barnett, 20 N. C. 88.

South Carolina.— Robinson *v.* Blakely, 4 Rich. 586, 55 Am. Dec. 703.

Texas.— Summerhill *v.* Darrow, 94 Tex. 71, 57 S. W. 942. See also Wallace *v.* Howard, (Civ. App. 1895) 30 S. W. 711.

United States.— Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92.

England.— Smith *v.* Tebbitt, L. R. 1 P. 354, 36 L. J. P. & M. 35, 15 L. T. Rep. N. S. 594, 15 Wkly. Rep. 562; Butler *v.* Mountgarret, 7 H. L. Cas. 633, 11 Eng. Reprint 252.

Canada.— Doe *v.* Servos, 5 U. C. Q. B. 284.

See 20 Cent. Dig. tit. "Evidence," § 1151.

Death may be presumed from lapse of time. Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854, 23 Ky. L. Rep. 238.

If the declarant testifies (Smith *v.* Geer, 10 Tex. Civ. App. 252, 30 S. W. 1108), or is within reach of process of the court (Campbell *v.* Wilson, 23 Tex. 252, 76 Am. Dec. 67),

4. Force of Declaration — a. Composite Statements — (1) *Reputation.* Reputation among those who would when deceased have been competent declarants,[55] gives rise to an inference of the existence of facts of family genealogy,[56] or facts incidentally connected with genealogy,[57] asserted therein; and evidence of such reputation will be received on an issue of pedigree[58] concerning any member of any branch of the family.[59] The conditions of relevancy are the same in the case

his unsworn declarations are of course inadmissible.

55. Who are and who are not competent declarants see *supra*, IX, C, 2, a.

56. Age.— Watson *v.* Brewster, 1 Pa. St. 381.

Birth.— *Kentucky.*— Chancellor *v.* Milly, 9 Dana 23, 33 Am. Dec. 521.

Maryland.— Pancoast *v.* Addison, 1 Harr. & J. 350, 2 Am. Dec. 520.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507.

Tennessee.— Swink *v.* French, 11 Lea 78, 47 Am. Rep. 277; Morris *v.* Swaney, 7 Heisk. 591; Flowers *v.* Haralson, 6 Yerg. 494.

Vermont.— *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

See 20 Cent. Dig. tit. "Evidence," § 1147.

Death.— *Kentucky.*— Ewing *v.* Savary, 3 Bibb 235.

Maryland.— Pancoast *v.* Addison, 1 Harr. & J. 350, 2 Am. Dec. 520.

New York.— Clark *v.* Owens, 18 N. Y. 434.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507.

Tennessee.— Flowers *v.* Haralson, 6 Yerg. 494.

Vermont.— *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794; Webb *v.* Richardson, 42 Vt. 465.

England.— Roscommon's Claim, 6 Cl. & F. 97, 7 Eng. Reprint 634; Doe *v.* Griffin, 15 East 293, 13 Rev. Rep. 474.

Canada.— Doe *v.* Auldjo, 5 U. C. Q. B. 171.

See 20 Cent. Dig. tit. "Evidence," § 1147.

Marriage.— *Maryland.*— Barnum *v.* Barnum, 42 Md. 251.

North Carolina.— Morgan *v.* Purnell, 11 N. C. 95.

Pennsylvania.— *In re* Pickens, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477; American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507.

Vermont.— *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

England.— Doe *v.* Griffin, 15 East 293, 13 Rev. Rep. 474.

See 20 Cent. Dig. tit. "Evidence," § 1147.

Relationship.— Lamar *v.* Allen, 108 Ga. 158, 33 S. E. 958; Flowers *v.* Haralson, 6 Yerg. (Tenn.) 494; Ewell *v.* State, 6 Yerg. (Tenn.) 364, 27 Am. Dec. 480. Family repute is admissible to show that a legatee was a godson of the testator. *Re* Gregory, 34 Beav. 600.

Descent.— Eastman *v.* Martin, 19 N. H. 152.

Failure of issue.— Flowers *v.* Haralson, 6 Yerg. (Tenn.) 494; Roscommon's Claim, 6 Cl. & F. 97, 7 Eng. Reprint 634; Doe *v.* Griffin, 15 East 293, 13 Rev. Rep. 474.

Which of two trustees was the survivor cannot be shown by evidence of reputation. Smith *v.* Smith, Ir. R. 10 Eq. 273.

57. Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882 (residence); American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507 (dates); Swink *v.* French, 11 Lea (Tenn.) 78, 47 Am. Rep. 277 (dates); Webb *v.* Richardson, 42 Vt. 465 (dates). Reputation is not competent as to facts other than those of pedigree or incidental thereto. Odom *v.* Woodward, 74 Tex. 41, 11 S. W. 925, location of a land certificate.

58. *Arkansas.*— Kelly *v.* McGuire, 15 Ark. 555, 605.

California.— *In re* Heaton, 135 Cal. 385, 67 Pac. 321.

Georgia.— Lamar *v.* Allen, 108 Ga. 158, 33 S. E. 958.

Illinois.— Harland *v.* Eastman, 107 Ill. 535.

Kentucky.— Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. L. Rep. 392; Chancellor *v.* Milly, 9 Dana 23, 33 Am. Dec. 521; Ewing *v.* Savary, 3 Bibb 235.

Maryland.— Barnum *v.* Barnum, 42 Md. 251; Copes *v.* Pearce, 7 Gill 247.

Massachusetts.— Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088.

Michigan.— Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367, 409.

New Hampshire.— Eastman *v.* Martin, 19 N. H. 152.

New York.— Clark *v.* Owens, 18 N. Y. 434; People *v.* Fulton F. Ins. Co., 25 Wend. 205; Jackson *v.* King, 5 Cow. 237, 15 Am. Dec. 468; McCarty *v.* Hodges, 2 Edm. Sel. Cas. 433.

North Carolina.— Morgan *v.* Purnell, 11 N. C. 95.

Rhode Island.— Viall *v.* Smith, 6 R. I. 417.

Tennessee.— Morris *v.* Swaney, 7 Heisk. 591; Ewell *v.* State, 6 Yerg. 364, 27 Am. Dec. 480.

Vermont.— Webb *v.* Richardson, 42 Vt. 485.

England.— Roscommon's Claim, 6 Cl. & F. 97, 7 Eng. Reprint 634.

Canada.— Doe *v.* Auldjo, 5 U. C. Q. B. 171.

See 20 Cent. Dig. tit. "Evidence," § 1147.

History in the family is in no substantial particular different from reputation in the family. Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Cook *v.* Carroll Land, etc., Co., (Tex. Civ. App. 1897) 39 S. W. 1006; *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794; Doe *v.* Griffin, 15 East 293, 13 Rev. Rep. 474.

"Understanding in the family" is not the equivalent of reputation. Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81, age.

59. Butrick *v.* Tilton, 155 Mass. 461, 29

of composite as in that of direct statements hereinbefore considered.[60] First, the declarant must have possessed adequate knowledge. Not only is the reputation confined to those whose declarations would be competent in the event of their decease,[61] but the reporting witness must be a member of the family by birth or marriage.[62] Neighbors,[63] and *a fortiori* the community at large,[64] are not competent witnesses as to the existence of a reputation. Secondly, the reputation must have arisen among disinterested persons. Consequently reputation is competent only as it existed *ante litem motam*.[65] But the rule in case of direct statements that the declarant must be dead[66] does not apply to composite statements.[67] Relationship to the family may be established by testimony of the witness himself.[68]

(II) *Tradition.* Tradition in the family[69] is a form of family history[70] or

N. E. 1088 (grandfather's cousin); Webb *v.* Richardson, 42 Vt. 465 (grandfather).

60. See *supra*, IX, B, 2.

61. Reputation outside of family is inadmissible.

Alabama.— Elder *v.* State, 123 Ala. 35, 26 So. 213.

California.— *In re* Heaton, 135 Cal. 385, 67 Pac. 321, rule not changed by Code Civ. Proc. § 1852, and § 1870, subd. 11. "It is the general repute, the common reputation in the family, and not the common reputation in the community, that is a material element of evidence going to establish pedigree. To hold otherwise would countenance a rule which could easily be turned to the accomplishment of great wrong and injustice." *In re* Heaton, *supra*.

Illinois.— Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380. See also Greenwood *v.* Spiller, 3 Ill. 502.

Iowa.— Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407; Ross *v.* Loomis, 64 Iowa 432, 20 N. W. 749.

Vermont.— *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

See 20 Cent. Dig. tit. "Evidence." § 1147.

Apparently contrary authorities are Chancellor *v.* Milly, 9 Dana (Ky.) 23, 33 Am. Dec. 521 (but see Kentucky cases cited in the next note); McCarty *v.* Hodges, 2 Edm. Sel. Cas. (N. Y.) 433; Morris *v.* Swaney, 7 Heisk. (Tenn.) 591; Flowers *v.* Haralson, 6 Yerg. (Tenn.) 494; Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243. But see Dussert *v.* Roe, 8 Fed. Cas. No. 4,200, 1 Wall. Jr. 39. See also Johnson *v.* Howard, 1 Harr. & M. (Md.) 281; Goodright *v.* Moss, Cowp. 591; Morewood *v.* Wood, 14 East 327 note, 12 Rev. Rep. 537; Craig *v.* Anglesea, 17 How. St. Tr. 1139, 1166, 1179, 1181; Rex *v.* Eriswell, 3 T. R. 707. But "upon careful examination, much that is said in many of them upon this subject, will be found to be wholly *obiter dictum*." *In re* Hurlburt, 68 Vt. 366, 369, 35 Atl. 77, 35 L. R. A. 794, per Thompson, J. "Cases are few where it has been held that pedigree may be established by common reputation in the neighborhood." *In re* Heaton, 135 Cal. 385, 388, 67 Pac. 321.

62. *Kentucky.*— Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. L. Rep. 392; Brooks *v.* Clay, 3 A. K. Marsh. 545, 550.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

Massachusetts.— Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367.

North Carolina.— Morgan *v.* Purnell, 11 N. C. 95.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; Wolf *v.* Borngresser, 8 Pa. Dist. 411, 7 Del. Co. 338.

Texas.— Smith *v.* Kenney, (Civ. App. 1899) 54 S. W. 801; Cook *v.* Carroll Land, etc., Co., (Civ. App. 1897) 39 S. W. 1006.

Vermont.— *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

See 20 Cent. Dig. tit. "Evidence," § 1147.

Contra.— Banert *v.* Day, 2 Fed. Cas. No. 836, 3 Wash. 243.

63. Elder *v.* State, 123 Ala. 35, 26 So. 213; Henderson *v.* Cargill, 31 Miss. 367.

64. Elder *v.* State, 123 Ala. 35, 26 So. 213; Lamar *v.* Allen, 108 Ga. 158, 33 S. E. 958.

65. Morgan *v.* Purnell, 11 N. C. 95.

66. See *supra*, IX, C, 3.

67. Smith *v.* Kenney, (Tex. Civ. App. 1899) 54 S. W. 801. But see Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81.

68. Smith *v.* Henney, (Tex. Civ. App. 1899) 54 S. W. 801.

69. "It will be observed that some of the authorities speak of repute, reputation and tradition, as convertible terms when applied to cases of pedigree. Now tradition is knowledge, belief or practices, transmitted orally from father to son, or from ancestors to posterity. When these authorities speak of repute, reputation or tradition in matters of pedigree, we think they mean such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives in such a way that even though it cannot be said or determined which of the deceased relatives originally made them, or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history, *ante litem motam*, by a deceased person connected by blood or marriage with the person whose pedigree is to be established." *In re* Hurlburt, 68 Vt. 366, 377, 35 Atl. 77, 35 L. R. A. 704.

70. Eisenlord *v.* Clum, 126 N. Y. 552, 27

reputation,[71] and is admissible to prove the same facts of genealogy [72] — as death,[73] marriage,[74] or relationship [75] — or any inquiry of pedigree. It has been held that evidence of tradition in the family is inadmissible unless the members of the family among whom it arose are dead,[76] but that it will not be entirely rejected because shown to be in part erroneous,[77] or should the declarant appear to have had but little personal knowledge.[78] Tradition may be proved by evidence of persons not members of the family;[79] but the essential element of relevancy can be established only by evidence that the tradition arose among persons presumably of adequate knowledge and without interest to misrepresent.[80]

b. Oral Statements. A declaration regarding pedigree may be oral,[81] and in that form is equally competent with written evidence on the same point,[82] even if the latter is a family bible.[83]

c. Written Statements. A declaration concerning pedigree may be in writing,[84] but is not on that account conclusive.[85] The statement may be in the form of an affidavit,[86] deed,[87] deposition,[88] family bible[89] or other family record,[90] genealogical

N. E. 1024, 12 L. R. A. 836; Eaton *v.* Tallmadge, 24 Wis. 217; Johnston *v.* Todd, 5 Beav. 597.

71. Pancoast *v.* Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520; Carter *v.* Montgomery, 2 Tenn. Ch. 216; *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794; Johnston *v.* Todd, 5 Beav. 597.

72. Jackson *v.* King, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; Jackson *v.* Browner, 18 Johns. (N. Y.) 36; Jackson *v.* Cooley, 8 Johns. (N. Y.) 128; Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915; Davis *v.* Wood, 1 Wheat. (U. S.) 6, 4 L. ed. 22. See also Grand Lodge A. O. U. W. *v.* Bartes, (Nebr. 1904) 98 N. W. 715 [*overruling* on rehearing (Nebr. 1903) 96 N. W. 186].

73. Anderson *v.* Parker, 6 Cal. 197; Pancoast *v.* Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520; Van Sickle *v.* Gibson, 40 Mich. 170; Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352.

74. Van Sickle *v.* Gibson, 40 Mich. 170.

75. Van Sickle *v.* Gibson, 40 Mich. 170.

76. Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352.

77. Johnston *v.* Todd, 5 Beav. 597.

78. Lovat Peerage Case, 10 App. Cas. 763.

79. Carter *v.* Montgomery, 2 Tenn. Ch. 216.

80. Whitelocke *v.* Baker, 13 Ves. Jr. 511, 9 Rev. Rep. 216, 33 Eng. Reprint 385.

81. Morrill *v.* Foster, 33 N. H. 379; Mason *v.* Fuller, 45 Vt. 29. And see Wren *v.* Howland, (Tex. Civ. App. 1903) 75 S. W. 894. Declarations of a father denying his marriage to his child's mother have been held to outweigh reputation as evidence of marriage. Murray *v.* Milner, 12 Ch. D. 845, 48 L. J. Ch. 775, 41 L. T. Rep. N. S. 213, 27 Wkly. Rep. 881.

82. Clements *v.* Hunt, 46 N. C. 400; Swink *v.* French, 11 Lea (Tenn.) 78, 47 Am. Rep. 277; Currie *v.* Stairs, 25 N. Brunsw. 4. But see Webb *v.* Haycock, 19 Beav. 342.

83. Currie *v.* Stairs, 25 N. Brunsw. 4.

84. Mason *v.* Fuller, 45 Vt. 29; Jamieson *v.* Mill, 1 Jur. 790; Hill *v.* Hibbit, 19 Wkly. Rep. 250. See also Smith *v.* State, (Tex. Cr. App. 1903) 73 S. W. 401. It is not absolutely essential that the written statement should be contemporaneous with the event which it purports to record. Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535.

85. Walker *v.* Wingfield, 18 Ves. Jr. 443, 11 Rev. Rep. 232, 34 Eng. Reprint 384.

86. Winder *v.* Little, 1 Yeates (Pa.) 152; Hurst *v.* Jones, 12 Fed. Cas. No. 6,934, 1 Wall. Jr. appendix iii; Jamieson *v.* Mill, 1 Jur. 790; Hill *v.* Hibbit, 19 Wkly. Rep. 250. But see Bowen *r.* Preferred Acc. Ins. Co., 82 N. Y. App. Div. 458, 81 N. Y. Suppl. 840.

87. *Kentucky.*— Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854, 23 Ky. L. Rep. 238.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

New York.— Jackson *r.* Cooley, 8 Johns. 128.

Pennsylvania.— Carter *v.* Tinicum Fishing Co., 77 Pa. St. 310.

Texas.—Wren *v.* Howland, (Civ. App. 1903) 75 S. W. 894.

United States.— Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915; Stokes *v.* Dawes, 23 Fed. Cas. No. 13,477, 4 Mason 268.

See 20 Cent. Dig. tit. "Evidence," § 1154.

88. Davis *v.* Forrest, 7 Fed. Cas. No. 3,634, 2 Cranch C. C. 23; Gee *v.* Ward, 7 E. & B. 509, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509.

89. *Arkansas.*— Kelly *v.* McGuire, 15 Ark. 555.

Georgia.— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535.

Iowa.— Greenleaf *v.* Dubuque, etc., R. Co., 30 Iowa 301.

Maryland.— Jones *v.* Jones, 45 Md. 144.

New York.— Chamberlain *v.* Chamberlain, 71 N. Y. 423; Hunt *v.* Johnson, 19 N. Y. 279.

Texas.— Wren *v.* Howland, (Civ. App. 1903) 75 S. W. 894.

United States.— Lewis *v.* Marshall, 5 Pet. 470, 8 L. ed. 195.

See 20 Cent. Dig. tit. "Evidence," §§ 1145, 1146.

90. *Arkansas.*— Kelly *v.* McGuire, 15 Ark. 555.

Indiana.— Collins *v.* Grantham, 12 Ind. 440, hymn-book.

table,[91] letter,[92] memorandum,[93] pleading,[94] town clerk's record,[95] or a will.[96] Written statements made by a person whose oral declarations to the same effect would be competent,[97] or under his direction,[98] are all equally admissible.[99] It is not necessary that the statement should be contained in an instrument valid and effectual for its original purpose; a declaration in a void will is as admissible as if the will were valid.[1]

D. Declarations as to Matters of Public and General Interest — 1. Rule Stated. The continued influence of a difficulty in procuring other evidence[2] and the feeling that general discussion as to matters of this kind is a guaranty that the statement ultimately prevailing will be accurate[3] has given rise to a rule that in proving relevant matters of public or general interest[4] an unsworn statement affords an inference of the truth of the facts directly,[5] although not of those inci-

Kentucky.— Woodard *v.* Spiller, 1 Dana 179, 25 Am. Dec. 139, register of births.

Maryland.— Jones *v.* Jones, 45 Md. 144, testament.

Massachusetts.— Whitcher *v.* McLaughlin, 115 Mass. 167; North Brookfield *v.* Warren, 16 Gray 171.

New Hampshire.— Eastman *v.* Martin, 19 N. H. 152.

See 20 Cent. Dig. tit. "Evidence," §§ 1145, 1146.

91. Eastman *v.* Martin, 19 N. H. 152; Doe *v.* Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314; Monkton *v.* Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147.

92. *Colorado.*— Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

District of Columbia.— Green *v.* Norment, 5 Mackey 80.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

United States.— Elliott *v.* Peirsol, 1 Pet. 328, 7 L. ed. 164.

England.— *In re* Turner, 29 Ch. D. 985, 53 L. T. Rep. N. S. 528; Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694.

See 20 Cent. Dig. tit. "Evidence," § 1154.

93. Barnum *v.* Barnum, 42 Md. 251; Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855.

94. Wren *v.* Howland, (Tex. Civ. App. 1903) 75 S. W. 894; Goodright *v.* Moss, Cowp. 591.

95. Derby *v.* Salem, 30 Vt. 722.

96. Russell *v.* Langford, 135 Cal. 356, 67 Pac. 331; Pearson *v.* Pearson, 46 Cal. 609; Jennings *v.* Webb, 8 App. Cas. (D. C.) 43; Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186; McClaskey *v.* Barr, 47 Fed. 154; Vulliamy *v.* Huskisson, 2 Jur. 656, 3 Y. & Coll. 80; *In re* Lambert, 56 L. J. Ch. 122, 56 L. T. Rep. N. S. 15.

97. Eastman *v.* Martin, 19 N. H. 152.

98. State *v.* Joest, 51 Ind. 287.

99. "I know no difference between a father writing any thing respecting his son in a bible, and his writing it in any other book, or on any other piece of paper; and therefore the answer I would give is, that such a writing by a father in a bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declarations of the father might be admitted in evidence." Berkeley's Case, 4 Campb. 401, 418, per Mansfield, C. J.

1. Jennings *v.* Webb, 8 App. Cas. (D. C.) 43; *In re* Lambert, 56 L. J. Ch. 122, 56 L. T. Rep. N. S. 15.

2. "It is admissible where no better evidence can be had." King *v.* Watkins, 98 Fed. 913. The rule has been based upon a supposed necessity caused by the assumed absence of the other evidence (Scoggins *v.* Dalrymple, 52 N. C. 46; Birmingham *v.* Anderson, 40 Pa. St. 506; Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896; Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716), and, in respect of declarations as to boundaries, the common mistakes of early surveyors (Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496) and the obliteration of perishable monuments in a new and unsettled country (Scoggins *v.* Dalrymple, 52 N. C. 46; Kennedy *v.* Lubold, 88 Pa. St. 246 (evidence deemed "strong").

3. "The matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of cross-examination, while the persons whose declarations are offered in evidence must have been in a situation to know the truth. After passing such an ordeal it is reasonably safe to accept the result as established fact." Bolton Southwest School Dist. *v.* Williams, 48 Conn. 504, 507, per Loomis, J.

4. The interest covered by the rule is one as to public rights in property. It does not extend so far as to cover statements where the matter is one of historical interest disconnected with rights in property. Swinnerton *v.* Columbian Ins. Co., 9 Bosw. (N. Y.) 361.

5. *California.*— People *v.* Velarde, 59 Cal. 457. See Monterey *v.* Jacks, 139 Cal. 542, 73 Pac. 436.

Connecticut.— Bolton Southwest School Dist. *v.* Williams, 48 Conn. 504.

Dakota.— McCall *v.* U. S., 1 Dak. 320, 46 N. W. 608.

New Hampshire.— Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

North Carolina.— Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240.

Texas.— Tucker *v.* Smith, 68 Tex. 473, 3

dentally,[6] asserted; provided (1) that the reported declarations are relevant,[7] and (2) that the evidence of the declarant is unattainable.[8]

2. Subjects Covered by the Rule. Among subjects of sufficient public interest to admit evidence of declarations concerning them[9] are boundaries of public corporations,[10] including those of territories,[11] counties,[12] or towns;[13] common and manorial rights;[14] the incorporation of municipalities as counties or towns;[15] and the location of highways,[16] town ways or streets,[17] or of large navigable watercourses.[18]

3. Subjects Excluded Under the Rule. Declarations of deceased persons on subjects of quasi-public interest in which private interest predominates,[19] such as the existence of a modus,[20] or the public nature of a way,[21] are to be rejected. *A fortiori* declarations regarding matters of distinctly individual concern are excluded.[22]

4. Private Boundaries. The admissibility of unsworn statements regarding the location of private boundaries and their incidental landmarks involves several lines of decisions easily confused,[23] and is further complicated with a direct con-

S. W. 671; Cox *v.* State, 41 Tex. 1, rule is the same in criminal as in civil cases.

See 20 Cent. Dig. tit. "Evidence," § 1155.

6. Smith *v.* Cornett, 38 S. W. 689, 18 Ky. L. Rep. 818 (date); Peck *v.* Clark, 142 Mass. 436, 8 N. E. 335; Van Deusen *v.* Turner, 12 Pick. (Mass.) 532. "If the fact to be proved is a particular date, though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so as to furnish any guaranty for its correctness; so that the general rule excluding hearsay evidence applies in full force. The human memory is proverbially treacherous even in regard to very recent dates, and little reliance can be placed on the sworn testimony of living witnesses in such matters, unless they are able to associate the date given with some more striking fact." Bolton Southwest School Dist. *v.* Williams, 48 Conn. 504, 507, per Loomis, J. But a declaration is admissible where it undertakes to locate a matter of public interest by reference to the location of something else, such as a house. Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170. See, however, Reg. *v.* Bliss, 7 A. & E. 550, 7 L. J. Q. B. 4, 2 N. & P. 464, W. W. & D. 624, 34 E. C. L. 294.

Private boundaries.— The exclusion of incidental facts has been held not to apply to declarations concerning a private boundary. In jurisdictions where such declarations are received the fact (Hamilton *v.* Menor, 2 Serg. & R. (Pa.) 70) and date (Murray *v.* Spencer, 88 N. C. 357) of making a survey may be proved in this way. On the other hand it has been held that what streams a boundary line crosses (Smith *v.* Chapman, 10 Gratt. (Va.) 445), the location of a stream, claimed as a boundary (Taylor *v.* Glenn, 29 S. C. 292, 7 S. E. 483, 12 Am. St. Rep. 724), or that no conflict exists between the lines of two surveys (Moore *v.* Davis, 4 Heisk. (Tenn.) 540), cannot be shown by an unsworn statement.

7. See *infra*, IX, D, 5.

8. See *infra*, IX, D, 6.

9. As to evidence of reputation concerning matters of public and general interest see *supra*, IX, A, 5, a, (I).

10. Cornwall *v.* Culver, 16 Cal. 423; Morton *v.* Folger, 15 Cal. 275; Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773; Adams *v.* Stanyan, 24 N. H. 405; Stroud *v.* Springfield, 28 Tex. 649.

11. McCall *v.* U. S., 1 Dak. 320, 46 N. W. 608.

12. People *v.* Velarde, 59 Cal. 457; Lay *v.* Neville, 25 Cal. 545; Drury *v.* Midland R. Co., 127 Mass. 571.

13. Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170.

14. Weeks *v.* Sparke, 1 M. & S. 679, 14 Rev. Rep. 546, common of pasture.

15. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

16. Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719; Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543. Where the question in an action of ejectment was whether a highway reserved in 1676 was laid out over certain meadow land, as defendant claimed, or over upland, as plaintiff claimed, testimony of aged men that when young they heard old men, since dead, say that there was a traveled road or highway over the upland was held admissible. Wooster *v.* Butler, 13 Conn. 309.

17. Birmingham *v.* Anderson, 40 Pa. St. 506.

18. Drury *v.* Midland R. Co., 127 Mass. 571; Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584.

19. Wells *v.* Jesus College, 7 C. & P. 284, 32 E. C. L. 615 (farm); Lonsdale *v.* Heaton, Younge 58 (farm).

20. Wells *v.* Jesus College, 7 C. & P. 284, 32 E. C. L. 615.

21. Reg. *v.* Bliss, 7 A. & E. 550, 7 L. J. Q. B. 4, 2 N. & P. 464, W. W. & D. 624, 34 E. C. L. 294.

22. Blackett *v.* Lowes, 2 M. & S. 494, 15 Rev. Rep. 324.

23. "Upon the admissibility of declarations of deceased persons as evidence in land controversies, there is a large volume of law, and it is somewhat confused; and unless we

flict of authority as to the application of the rule itself. A numerous class of unsworn declarations as to private boundaries — those made by a declarant in possession of property and defining the nature of the claim under which such possession is being held[24] are not under the rule, but are relevant circumstantial evidence, admissible under general rules. Even where the declarations are not made by persons in possession of the premises and indicative of their claim, it is agreed that in certain contingencies of limited frequency of occurrence, as where the private boundaries are ancient,[25] or coincide with public boundaries,[26] the declarations are competent. In other cases, as proof of the facts asserted, unsworn declarations of third persons are not admitted in England,[27] Canada,[28] or in some jurisdictions in the United States,[29] to show the location of a private boundary or the landmarks which determine it. On the contrary the declarations are admitted in a majority of the states, both as to the location of the boundary[30]

examine it with an eye open to the purpose for which it is designed, we shall misunderstand and misapply it." High *v.* Pancake, 42 W. Va. 602, 606, 26 S. E. 536, per Brannon, J.

24. See *supra*, VIII, B, 3, b, (II).

25. *Alabama.*— Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824; Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910, 67 Am. St. Rep. 149.

California.— Lay *v.* Neville, 25 Cal. 545; Morton *v.* Folger, 15 Cal. 275.

Connecticut.— Porter *v.* Warner, 2 Root 22.

New Hampshire.— Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 369.

New York.— McKinnon *v.* Bliss, 21 N. Y. 206.

North Carolina.— Smith *v.* Headrick, 93 N. C. 210.

Pennsylvania.— Kramer *v.* Goodlander, 98 Pa. St. 366; Kennedy *v.* Lubold, 88 Pa. St. 246; *In re* Old Eagle School Property, 36 Wkly. Notes Cas. 348.

Texas.— Whitman *v.* Haywood, 77 Tex. 557, 14 S. W. 166; Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244.

Vermont.— Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333; Powers *v.* Silsby, 41 Vt. 288; Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716.

United States.— Boardman *v.* Ried, 6 Pet. 341, 8 L. ed. 415; Conn *v.* Penn, 6 Fed. Cas. No. 3,104, 1 Pet. C. C. 496.

See also *supra*, VII, B, 1; and BOUNDARIES, 5 Cyc. 956.

Received with caution.— "While, as has been heretofore held by this court, hearsay evidence to establish ancient boundaries is, under proper circumstances, admissible, it should be closely scrutinized, and received with proper caution." Welder *v.* Carroll, 29 Tex. 317, 335, per Moore, C. J.

An ancient record is often treated as a matter of public and general interest. McKinnon *v.* Bliss, 21 N. Y. 206; *In re* Old Eagle School Property, 36 Wkly. Notes Cas. (Pa.) 348.

26. Thomas *v.* Jenkins, 6 A. & E. 525, 1 Jur. 261, 6 L. J. K. B. 163, 1 N. & P. 587, 33 E. C. L. 285. This most frequently happens in case of lands which have been part of the public domain of the United States and laid out by meridian, range, and sectional lines, or where, for any other reason, a certain line is common to a number of estates and so constitutes a matter of quasi-general interest. Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584; McKinnon *v.* Bliss, 21 N. Y. 206.

27. Thomas *v.* Jenkins, 6 A. & E. 525, 1 Jur. 261, 6 L. J. K. B. 163, 1 N. & P. 587, 33 E. C. L. 285.

28. Manary *v.* Dash, 23 U. C. Q. B. 580.

29. *Alabama.*— Southern Iron Works *v.* Georgia Cent. R. Co., 131 Ala. 649, 31 So. 723; Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824.

Kentucky.— Cherry *v.* Boyd, Litt. Sel. Cas. 7; Clement *v.* Packer, 125 U. S. 326, 8 S. Ct. 907, 31 L. ed. 721, a case controlled by the Kentucky rule.

Maine.— Sullivan Granite Co. *v.* Gordon, 57 Me. 520; Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

Massachusetts.— Hall *v.* Mayo, 97 Mass. 416.

New Jersey.—Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584; Runk *v.* Ten Eyck, 24 N. J. L. 756.

North Carolina.— Perkins *v.* Brinkley, 133 N. C. 348, 45 S. E. 652.

Texas.— Matthews *v.* Thatcher, (Civ. App. 1903) 76 S. W. 61.

30. *California.*— Cornwall *v.* Culver, 16 Cal. 423; Morton *v.* Folger, 15 Cal. 275.

Illinois.— Noble *v.* Chrisman, 88 Ill. 186.

New Hampshire.— Adams *v.* Stanyan, 24 N. H. 405; Melvin *v.* Marshall, 22 N. H. 379; Great Falls Co. *v.* Worster, 15 N. H. 412.

North Carolina.— Westfeldt *v.* Adams, 131 N. C. 379, 42 S. E. 823; Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Hartzog *v.* Hubbard, 19 N. C. 241; Sasser *v.* Herring, 14 N. C. 340, 342.

Pennsylvania.— Moul *v.* Hartman, 104 Pa. St. 43; Kramer *v.* Goodlander, 98 Pa. St. 366; Buchanan *v.* Moore, 10 Serg. & R. 275; Bender *v.* Pitzer, 27 Pa. St. 333. See also *infra*, note 32.

South Carolina.— Lynn *v.* Thomson, 17 S. C. 129; Coate *v.* Speer, 3 McCord 227, 15 Am. Dec. 627.

Tennessee.— McCloud *v.* Mynatt, 2 Coldw. 163.

Texas.— Tucker *v.* Smith, 68 Tex. 473, 3

and its landmarks.[31] In cases involving the ownership of real property, the federal courts follow the rule established in the courts of the state where they sit.[32]

5. Requirements For Relevancy — a. Adequate Knowledge. It has been held that in regard to matters of public and general interest, any member of the community affected will be assumed to have adequate knowledge so as to qualify him as a declarant;[33] and on the other hand that even as to such matters actual knowledge must be shown.[34] As to matters of quasi-public interest, such as the location of private boundaries,[35] their landmarks,[36] or particular facts connected there-

S. W. 671; Evans *v.* Hurt, 34 Tex. 111; Stroud *v.* Springfield, 28 Tex. 649. See also *infra*, note 32.

West Virginia.— Hill *v.* Proctor, 10 W. Va. 59.

31. *Connecticut.*— Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

Indiana.— Burr *v.* Smith, 152 Ind. 469, 53 N. E. 469.

Kentucky.— Whalen *v.* Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52, trees.

New Hampshire.— Wendell *v.* Abbott, 45 N. H. 349, corner.

North Carolina.— Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823 (tree); McDonald *v.* McCaskill, 53 N. C. 158 (tree); Scoggin *v.* Dalrymple, 52 N. C. 46 (corner tree); Harris *v.* Powell, 3 N. C. 349 (tree).

Pennsylvania.— Kennedy *v.* Lubold, 88 Pa. St. 246, trees.

Tennessee.— McCloud *v.* Mynatt, 2 Coldw. 163.

Texas.— Beal *v.* Asberry, (Sup. 1892) 20 S. W. 115 (corner); Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671 (posts); Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244.

Vermont.— Hadley *v.* Howe, 46 Vt. 142, monuments.

Virginia.— Smith *v.* Chapman, 10 Gratt. 445; Harriman *v.* Brown, 8 Leigh 697.

West Virginia.—High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536 (tree); Corhleys *v.* Ripley, 22 W. Va. 154, 46 Am. Rep. 502 (corner).

See 20 Cent. Dig. tit. "Evidence," § 1121 *et seq.*

32. Ayers *v.* Watson, 137 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093 (admitting declarations under the Texas rule); Clement *v.* Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721 (admitting declarations, pursuant to the Pennsylvania rule); Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113 (following Texas rule); Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 9 L. ed. 475 (rejecting declarations, in accordance with the Kentucky rule); Martin *v.* Hughes, 90 Fed. 632, 33 C. C. A. 198 (following Pennsylvania rule). If a case should occur where the federal court would be at liberty to exercise its independent judgment, it seems that the court would prefer the rule admitting declarations to prove boundaries of lands of private persons. See Ayers *v.* Watson, 137 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093; Clement *v.* Packer, 125 U. S. 321, 8 S. Ct. 907, 31 L. ed. 721. But *compare* the *res gestæ* qualification stated in Hunnicutt *v.* Peyton, 102 U. S. 333, 363, 26 L. ed. 113.

33. Dunraven *v.* Llewellen, 15 Q. B. 791, 14 Jur. 1089, 19 L. J. Q. B. 388, 69 E. C. L. 791.

34. Lay *v.* Neville, 25 Cal. 545; Cornwall *v.* Culver, 16 Cal. 423; Adams *v.* Stanyan, 24 N. H. 405. "In subjects interesting to a comparatively small portion of the community, as a city or a parish, a foundation for admitting evidence of reputation, or the declarations of ancient or deceased persons, must first be laid by showing that from their situation they probably were conversant with the matter of which they were speaking." Bow *v.* Allenstown, 34 N. H. 351, 366, 69 Am. Dec. 489, per Bell, J.

35. *Alabama.*— Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824.

California.— Cornwall *v.* Culver, 16 Cal. 423; Morton *v.* Folger, 15 Cal. 275.

Missouri.—Lemmon *v.* Hartsook, 80 Mo. 13.

New Hampshire.— Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Morse *v.* Emery, 49 N. H. 239 note; Smith *v.* Forrest, 49 N. H. 230; Adams *v.* Stanyan, 24 N. H. 405; Melvin *v.* Marshall, 22 N. H. 379; Smith *v.* Powers, 15 N. H. 546.

Pennsylvania.— Moul *v.* Hartman, 104 Pa. St. 43; Bender *v.* Pitzer, 27 Pa. St. 333; Caufman *v* Cedar Springs Presb. Cong., 6 Binn. 59.

Texas.— Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Smith *v.* Russell, 37 Tex. 247; Stroud *v.* Springfield, 28 Tex. 649.

Vermont.— Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333.

Virginia.— Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500; Clements *v.* Kyles, 13 Gratt. 468.

West Virginia.— Hill *v.* Proctor, 10 W. Va. 59.

In California "the declaration itself presupposes such knowledge or information, for how could he say where a boundary was, unless he did have personal knowledge or the means of arriving at the fact declared? The opportunities which the declarant had, may be inquired into in determining the value, not the competency of the declaration, and, as such, properly furnish a subject for comment before the jury." Smith *v.* Headrick, 93 N. C. 210, 212, per Smith, C. J.

To establish ancient boundaries the declarations should, it seems, be confined to those of aged persons. Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842; Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Smith *v.* Headrick, 93 N. C. 210; Williams *v.* Kivett, 82 N. C. 110.

36. *New Hampshire.*— Morse *v.* Emery, 49 N. H. 239 note, corner.

with,[37] the requirement is well established that the declarant should be proved to have had adequate knowledge.[38] But such knowledge may be proved circumstantially.[39] Knowledge of boundaries of land, sufficient to qualify persons as declarants, may be attributed to surveyors of the land,[40] chain carriers,[41] or others intelligently coöperating in the survey.[42] Sufficient knowledge may also be attributed to owners of the property while in possession,[43] and owners of

Pennsylvania.— Caufman *v.* Cedar Spring Presb. Cong., 6 Binn. 59.

Tennessee.— Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306, corner.

Texas.— Smith *v.* Russell, 37 Tex. 247.

Virginia.— Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500 (corner); Clements *v.* Kyles, 13 Gratt. 468, 477.

37. Lemmon *v.* Hartsook, 80 Mo. 13.

38. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Draper *v.* Stanley, 1 Heisk. (Tenn.) 432; Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896; Hadley *v.* Howe, 46 Vt. 142; Miller *v.* Wood, 44 Vt. 378; Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716. If the declarant had adequate knowledge his declaration may be shown by hearsay, although there be a living witness who can testify to the fact (Beard *v.* Talbot, 2 Fed. Cas. No. 1,182, Brunn. Col. Cas. 201, Cooke (Tenn.) 142), and although the declarant was incompetent when the declaration was made (Whitehurst *v.* Pettipher, 87 N. C. 179, 42 Am. Rep. 520).

Res gestæ.— Upon principle, there is no requirement that the declaration should be made while the declarant is upon the land or engaged in pointing out the bounds of his estate. Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Morse *v.* Emery, 49 N. H. 239 note; Smith *v.* Forrest, 49 N. H. 230. In Pennsylvania (Kramer *v.* Goodlander, 98 Pa. St. 366; Martin *v.* Hughes, 90 Fed. 632, 33 C. C. A. 198, controlled by Pennsylvania rule) and Texas (Welder *v.* Hunt, 34 Tex. 44; Clay County Land, etc., Co. *v.* Montague County, 8 Tex. Civ. App. 575, 28 S. W. 704; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113, controlled by the Texas rule), however, a surveyor's declarations are competent only when made upon the premises. To the same effect see Southern Iron Works *v.* Georgia Cent. R. Co., 131 Ala. 649, 31 So. 723. For consideration of the proposed association of the *res gestæ* rule with declarations by one in possession of land circumstantially relevant as proof of his claim see *supra*, VIII, B, 3, b, (II).

39. McDonald *v.* McCaskill, 53 N. C. 158; Coate *v.* Speer, 3 McCord (S. C.) 227, 15 Am. Dec. 627; Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896; Miller *v.* Wood, 44 Vt. 378; Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716.

Actual lack of knowledge may be proved to negative inference of knowledge arising from circumstances. Cable *v.* Jackson, 16 Tex. Civ. App. 579, 42 S. W. 136.

Merely living on land is not sufficient *per se* to qualify a declarant as to boundaries, there being no "duty or interest to make diligent enquiry and obtain accurate information as to the facts." Clements *v.* Kyles, 13 Gratt. (Va.) 468.

40. *Tennessee.*—Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306; Lannum *v.* Brooks, 4 Hayw. 121; Moore *v.* Davis, 4 Heisk. 540.

Texas.— Beal *v.* Asberry, (Sup. 1892) 20 S. W. 115; George *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

Vermont.— Powers *v.* Silsby, 41 Vt. 288.

Virginia.— Clements *v.* Kyles, 13 Gratt. 468. See also Harrimon *v.* Brown, 8 Leigh 697.

United States.— Tracy *v.* Eggleston, 108 Fed. 324, 47 C. C. A. 357; Martin *v.* Hughes, 90 Fed. 632, 33 C. C. A. 198. See also BOUNDARIES, 5 Cyc. 957.

Declarations when making a different survey from the one in controversy, which was not originally made by him, and of which he had no previous knowledge, are not admissible to identify the corners and lines of the survey in controversy. Cable *v.* Jackson, 16 Tex. Civ. App. 579, 42 S. W. 136. See also Angle *v.* Young, (Tex. Civ. App. 1894) 25 S. W. 798.

A surveyor's opinion as to the effect of what he observed is incompetent. Evans *v.* Greene, 21 Mo. 170; Wallace *v.* Goodall, 18 N. H. 439; Russell *v.* Hunnicutt, 70 Tex. 657, 8 S. W. 500.

41. Coate *v.* Speer, 3 McCord (S. C.) 227; Smith *v.* Russell, 37 Tex. 247; Clements *v.* Kyles, 13 Gratt. (Va.) 468; Smith *v.* Chapman, 10 Gratt. (Va.) 445; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544. A chain carrier, to be competent as a declarant, must have sufficient technical training to recognize the professional significance of what he observes; a mere physical carrying of the chain is not a sufficient qualification. Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500.

42. Overton *v.* Davisson, 1 Gratt. (Va.) 216, 42 Am. Dec. 544; Hill *v.* Proctor, 10 W. Va. 59.

43. *Alabama.*— Payne *v.* Crawford, 102 Ala. 387, 14 So. 854.

Connecticut.— Higley *v.* Bidwell, 9 Conn. 447; Porter *v.* Warner, 2 Root 22.

Illinois.— Noble *v.* Chrisman, 88 Ill. 186.

Indiana.— Burr *v.* Smith, 152 Ind. 469, 53 N. E. 469.

Maine.— Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842.

New Hampshire.— Nutter *v.* Tucker, 67 N. H. 185, 30 Atl. 352, 68 Am. St. Rep. 647.

North Carolina.— Halstead *v.* Mullen, 93 N. C. 252; Mason *v.* McCormick, 85 N. C. 226; Harris *v.* Powell, 3 N. C. 349.

Tennessee.— Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306; Davis *v.* Jones, 3 Head 603.

premises adjoining those as to the boundaries of which the declarations are offered in evidence.[44]

b. Absence of Motive to Misrepresent. The declarant must be disinterested;[45] that is, he must not be so exposed to bias,[46] or the warmth generated by controversy,[47] as to make his declaration an untrustworthy statement of fact.[48] Therefore the declaration should have been made *ante litem motam*.[49] It is not conclusive against the reception of a declaration that it is self-serving.[50]

6. Primary Evidence Unattainable. Unsworn statements under this rule, either generally[51] or in case of declarations regarding the location or marks of private

Texas.— Beal *v.* Asberry, (Sup. 1892) 20 S. W. 115; Whitman *v.* Haywood, 77 Tex. 557, 14 S. W. 166; Hurt *v.* Evans, 49 Tex. 311; Evans *v.* Hurt, 34 Tex. 111.

Vermont.— Child *v.* Kingsbury, 46 Vt. 47; Powers *v.* Silsby, 41 Vt. 288.

Virginia.— Clements *v.* Kyles, 13 Gratt. 468, 479; Harriman *v.* Brown, 8 Leigh 697.

West Virginia.— High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

United States.— Robinson *v.* Dewhurst, 68 Fed. 336, 15 C. C. A. 466; Beard *v.* Talbot, 2 Fed. Cas. No. 1,182, Brunn. Col. Cas. 201, Cooke (Tenn.) 142. See also *supra*, VIII, B, 3, b, (II).

44. Lewis *v.* John L. Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Bender *v.* Pitzer, 27 Pa. St. 333; Harriman *v.* Brown, 8 Leigh (Va.) 697; King *v.* Watkins, 98 Fed. 913. Possession of an adjoining estate is not sufficient to raise an inference of a satisfactory state of knowledge. King *v.* Watkins, 98 Fed. 913.

45. *California.*— Cornwall *v.* Culver, 16 Cal. 423; Morton *v.* Folger, 15 Cal. 275.

Connecticut.— Porter *v.* Warner, 2 Root 22.

Illinois.— Noble *v.* Chrisman, 88 Ill. 186.

Maine.— Wilson *v.* Rowe, 93 Me. 205, 44 Atl. 615.

Maryland.—Medley *v.* Williams, 7 Gill & J. 61; Jarrett *v.* West, 1 Harr. & J. 501.

New Hampshire.— Adams *v.* Stanyan, 24 N. H. 405; Melvin *v.* Marshall, 22 N. H. 379; Great Falls Co. *v.* Worster, 15 N. H. 412.

North Carolina.— Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Whitehurst *v.* Pettipher, 87 N. C. 179, 42 Am. Rep. 520; Caldwell *v.* Neely, 81 N. C. 114.

South Carolina.— Coate *v.* Speer, 3 McCord 227, 15 Am. Dec. 627.

Texas.— Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Evans *v.* Hurt, 34 Tex. 111; Stroud *v.* Springfield, 28 Tex. 649.

Vermont.— Evarts *v.* Young, 52 Vt. 329.

Virginia.— Harriman *v.* Brown, 8 Leigh 697.

United States.— Scaife *v.* Western North Carolina Land Co., 90 Fed. 238, 33 C. C. A. 47.

An adjoining owner is not necessarily interested so as to make him incompetent as a declarant in respect of boundaries. Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Turner Falls Lumber Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896; Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333; Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716.

Probative effect is increased where the declaration is against the interest of the declarant. Powers *v.* Silsby, 41 Vt. 288.

If interest to misrepresent is shown the declaration is inadmissible. Corbleys *v.* Ripley, 22 W. Va. 154, 46 Am. Rep. 502.

46. Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Harriman *v.* Brown, 8 Leigh (Va.) 697, 713, where Tucker, J., said: "Always, however, excluding those declarations which are liable to the suspicion of bias from interest."

47. Dancy *v.* Sugg, 19 N. C. 515.

48. Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842; Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Mason *v.* McCormick, 85 N. C. 226; Child *v.* Kingsbury, 46 Vt. 47.

49. *Connecticut.*— Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

Dakota.— McCall *v.* U. S., 1 Dak. 320, 46 N. W. 608.

Michigan.— Stockton *v.* Williams, Walk. 120.

New Hampshire.— Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

New York.— Partridge *v.* Russell, 2 N. Y. Suppl. 529.

North Carolina.— Lewis *v.* John L. Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Whitehurst *v.* Pettipher, 87 N. C. 179, 42 Am. Rep. 520.

Pennsylvania.— *In re* Old Eagle School Property, 36 Wkly. Notes Cas. 348.

Tennessee.— McCloud *v.* Mynatt, 2 Coldw. 163.

Texas.— Stroud *v.* Springfield, 28 Tex. 649, 670.

United States.— Robinson *v.* Dewhurst, 68 Fed. 336, 15 C. C. A. 466.

Corroboration.—If the statements are made *post litem motam* they may be corroborated by proof of similar statements, made before the question was agitated. Coate *v.* Speer, 3 McCord (S. C.) 227, 15 Am. Dec. 627; Whitman *v.* Haywood, 77 Tex. 557, 14 S. W. 166; Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333.

50. Child *v.* Kingsbury, 46 Vt. 47; Tracy *v.* Eggleston, 108 Fed. 324, 47 C. C. A. 357.

51. *California.*— Lay *v.* Neville, 25 Cal. 545.

Connecticut.— Wooster *v.* Butler, 13 Conn. 309.

Maine.— Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

New Hampshire.— Lawrence *v.* Tennant, 64

boundaries,[52] are admitted only when the declarant is dead; his absence from the jurisdiction is not sufficient ground for deeming the secondary evidence necessary.[53]

7. Form of Declaration. Declarations as to matters of public and general interest may be oral[54] or in any written form,[55] including, in case of private boundaries,[56] deeds, depositions,[57] field notes,[58] plans,[59] or surveys.[60]

E. Declarations Part of the Fact in the Res Gestæ — 1. In General. Among instances where the law of evidence permits the use of the inference that a statement is true simply because it has been made are declarations competent only because the fact asserted is relevant to the issue[61] and is so blended with a

N. H. 532, 15 Atl. 543; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

Pennsylvania.— *In re* Old Eagle School Property, 36 Wkly. Notes Cas. 348.

West Virginia.— High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

52. *Alabama.*— Barrett *v.* Kelly, 137 Ala. 378, 30 So. 824; Payne *v.* Crawford, 102 Ala. 387, 14 So. 854; Lamar *v.* Minter, 13 Ala. 31.

Connecticut.— Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884; Higley *v.* Bidwell, 9 Conn. 447; Porter *v.* Warner, 2 Root 22.

Illinois.— Noble *v.* Chrisman, 88 Ill. 186.

Kentucky.— Whalen *v.* Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52.

Maine.— Royal *v.* Chandler, 83 Me. 150, 21 Atl. 842.

New Hampshire.— Morss *v.* Emery. 49 N. H. 239 note; Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Great Falls Co. *v.* Worster, 15 N. H. 412.

New York.— Partridge *v.* Russell, 2 N. Y. Suppl. 529.

North Carolina.— Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Smith *v.* Headrick, 93 N. C. 210.

Ohio.— Detwiler *v.* Toledo, 13 Ohio Cir. Ct. 572, 6 Ohio Cir. Dec. 297.

Declarations of former owners, while in possession, have been admitted, although they were still alive. Davis *v.* Jones, 3 Head (Tenn.) 603, 606.

53. *North Carolina.*— Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Gervin *v.* Meredith, 4 N. C. 439.

Pennsylvania.— Birmingham *v.* Anderson, 40 Pa. St. 506; Buchanan *v.* Moore, 10 Serg. & R. 275.

Texas.— Beal *v.* Asberry, (Sup. 1892) 20 S. W. 115; Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Evans *v.* Hurt, 34 Tex. 111.

Vermont.— Miller *v.* Wood, 44 Vt. 378.

United States.— Clement *v.* Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721; Tracy *v.* Eggleston, 108 Fed. 324, 47 C. C. A. 357; Scaife *v.* Western North Carolina Land Co., 90 Fed. 238, 33 C. C. A. 47; Robinson *v.* Dewhurst, 68 Fed. 336, 15 C. C. A. 466.

54. For the use of composite hearsay in the form of reputation or tradition as evidence, including proof of matters of public and general interest, see *supra*, IX, A, 5, a, (I), (III).

55. Bow *v.* Allentown, 34 N. H. 351, 69 Am. Dec. 489; New Boston *v.* Dunbarton, 15 N. H. 201 (deed); Plaxton *v.* Dare, 10 B. & C. 17, 8 L. J. K. B. O. S. 98, 5 M. & R. 1, 21 E. C. L. 17; Brett *v.* Beales, M. & M. 416, 22 E. C. L. 553 (deed). Incorporation of a town may be shown by a venire for jurors. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

56. Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Daniels *v.* Fitzhugh, 13 Tex. Civ. App. 300, 35 S. W. 38.

57. Morton *v.* Folger, 15 Cal. 275; McNiel *v.* Dixon, 1 A. K. Marsh. (Ky.) 365, 10 Am. Dec. 740.

58. Detwiler *v.* Toledo, 13 Ohio Cir. Ct. 572, 6 Ohio Cir. Dec. 297.

59. Birmingham *v.* Anderson, 40 Pa. St. 506.

60. Cottingham *v.* Seward, (Tex. Civ. App. 1894) 25 S. W. 797.

61. Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16. "It is not the law that any and all conversations which happen to be going on at the time of an act can be proved if the act can be proved. Com. *v.* Chance, 174 Mass. 245, 251, 54 N. E. 55, 75 Am. St. Rep. 306, per Holmes, C. J. In cases of this character, it is important to ascertain what, if any, relevancy the declaration has, in other words, what it tends to prove; for unless its natural effect is to prove or explain a point in issue or a controverted fact, it is not admissible." Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 34, 54 Atl. 289, 61 L. R. A. 495, per Walker, J.

A memorandum made by a witness during a conversation with a party, containing statements of the latter, of the existence of which he is ignorant, is no part of the *res gestæ*. Gans *v.* Wormser, 83 N. Y. App. Div. 505, 82 N. Y. Suppl. 441. But where, as part of the transaction of measuring logs purchased by plaintiff from defendant, the defendant, who did most of the measuring, wrote down the number of feet of timber on a board, and his assistant measured the balance of the logs, and all such measurements as made by himself and his assistant were on the same day transferred by defendant to his day-book, and the correctness of his measurements and entries were testified to by defendant and his assistant, and defendant further stated that he could not, from memory alone, recall the number of feet in each log, it was held that such entries were part of the *res gestæ* and might be read by defendant as part of his testimony. Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852.

primary [62] fact in the *res gestæ* as to be part of that fact.[63] The case presented is

62. See *supra*, VIII, A, 2.

63. *Alabama.*— Hooper *v.* Edwards, 20 Ala. 528.

California.— People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49. See also Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Colorado.— Equitable Mut. Acc. Assoc. *v.* McCluskey, 1 Colo. App. 473, 29 Pac. 383. See also Trumbull *v.* Donahue, 18 Colo. App. 460, 72 Pac. 684; Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Connecticut.— Pinney *v.* Jones, 64 Conn. 545, 30 Atl. 762, 72 Am. St. Rep. 209.

Georgia.— Mitchum *v.* State, 11 Ga. 615, 622, " the idea of the *res gestæ* presupposes a main fact."

Illinois.— Chicago West Side Div. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144; Lander *v.* People, 104 Ill. 248.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; Wood *v.* State, 92 Ind. 269; Pittsburg, etc., R. Co. *v.* Wright, 80 Ind. 182.

Iowa.— Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877; Stephens *v.* McCly, 36 Iowa 659. See also Sutcliffe *v.* Iowa State Travelingmen's Assoc., 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298.

Massachusetts.—Blake *v.* Damon, 103 Mass. 199; Lund *v.* Tyngsborough, 9 Cush. 36.

Michigan.— People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84; People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; Lambert *v.* People, 29 Mich. 71. See also Ensley *v.* Detroit United R. Co., (1903) 96 N. W. 34; Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

Minnesota.—Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880.

Mississippi.— Mayes *v.* State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 58.

Missouri.— State *v.* Rider, 95 Mo. 474, 8 S. W. 723; Shaefer *v.* Missouri Pacific R. Co., 98 Mo. App. 445, 72 S. W. 154.

Nebraska.— Pledger *v.* Chicago, etc., R. Co., (1903) 95 N. W. 1057.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Sessions *v.* Little, 9 N. H. 271; Hadley *v.* Carter, 8 N. H. 40.

New Jersey.— Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

New York.— Butler *v.* Manhattan R. Co., 143 N. Y. 417, 38 N. E. 454, 42 Am. St. Rep. 738, 26 L. R. A. 46; Martin *v.* New York, etc., R. Co., 103 N. Y. 626, 9 N. E. 505; Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Ahern *v.* Goodspeed, 72 N. Y. 108. See also Scheir *v.* Quirin, 177 N. Y. 568, 69 N. E. 1130 [*affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956].

North Carolina.— Harrill *v.* South Carolina, etc., Extension R. Co., 132 N. C. 655, 44 S. E. 109.

Ohio.— Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052; Wetmore *v.* Mell, 1 Ohio St. 26, 59 Am. Dec. 607.

Pennsylvania.— Laudon *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 727. See also Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Haggart *v.* California Borough, 21 Pa. Super. Ct. 210.

South Carolina.— Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Tennessee.— Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. 713.

Texas.— Colquitt *v.* State, 34 Tex. 550. See also Fort Worth, etc., R. Co. *v.* Partin, (Civ. App. 1903) 76 S. W. 236; Missouri, etc., R. Co. *v.* Schilling, (Civ. App. 1903) 75 S. W. 64; Hicks *v.* Galveston, etc., R. Co., (Civ. App. 1902) 71 S. W. 322 [*reversed* on other points in 96 Tex. 355, 72 S. W. 835]. *Compare* Southern Kansas R. Co. *v.* Crump, (Civ. App. 1903) 74 S. W. 335.

Vermont.— Worden *v.* Powers, 37 Vt. 619.

Virginia.— Scott *v.* Shelor, 28 Gratt. 891.

Washington.— Lambert *v.* La Conner Trading, etc., Co., 30 Wash. 346, 70 Pac. 960; Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

Wisconsin.— Christianson *v.* Pioneer Furniture Co., 92 Wis. 649, 66 N. W. 699. See also Hupfer *v.* Nat. Distilling Co., 119 Wis. 417, 96 N. W. 809; Charley *v.* Potthoff, 118 Wis. 258, 95 N. W. 124.

England.— Rouch *v.* Great Western R. Co., 1 Q. B. 51, 4 P. & D. 686, 41 E. C. L. 432; Wright *v.* Doe, 7 A. & E. 313, 7 L. J. Exch. 340, 2 N. & P. 303, 34 E. C. L. 178; Rawson *v.* Haigh, 2 Bing. 99, 9 E. C. L. 499, 1 C. & P. 77, 12 E. C. L. 55, 9 Moore C. P. 217; Reg. *v.* Lunny, 6 Cox C. C. 477; Milne *v.* Leisler, 7 H. & N. 786, 8 Jur. N. S. 121, 31 L. J. Exch. 257, 5 L. T. Rep. N. S. 802.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

"The most dangerous exception ingrafted upon the rule [excluding hearsay] is that which admits the declarations of a party or an agent uttered at the time of the principal transaction, and therefore taken to be a part of it, because it is supposed to be illustrative and evidence of the principal fact which is the subject of the inquiry. It probably had its origin in the trouble sometimes experienced in criminal cases to identify the perpetrator of a crime. The desire of the courts to prevent what would be an evident miscarriage of justice gradually led to the extension of the rule to civil controversies; and it is possibly as well settled as any of the rules of evidence that the declaration of a party, made at the time of an act which may be given in evidence, if it be calculated to explain, qualify, or characterize the act itself, and is so connected with it that it may be taken as a part of one and the same transaction, and is in no sense a narrative of something which has passed, may be proven as a part of the *res gestæ*." Equitable Mut. Acc. Assoc. *v.* McCluskey, 1 Colo. App. 473, 29 Pac. 383, 384, per Bissell, J.

that of a primary fact admissible in and of itself, part of the *res gestæ*; and accompanying it, a declaration which so explains, characterizes, illustrates, and, as it were, completes the admissible fact as to be necessary to its full understanding.[64] Admissibility of the statement, if itself relevant, is therefore dependent[65] upon the admissibility of the fact of which it forms part.[66] In dealing with declarations of this kind the guaranty for truth is found in such a correlation between the statement and the fact of which it forms part as strongly tends to negative the suggestion of fabrication or invention;[67] and the rule admitting the evidence under such circumstances meets the needs of justice when other evidence of the same fact cannot be procured.[68]

64. "This is the principle, it is believed, that is involved in the somewhat obscure doctrine of *res gestæ*, which is often resorted to, apparently, more on account of its convenient indefiniteness than for its scientific precision." Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 34, 54 Atl. 289, 61 L. R. A. 495, per Walker, J. See also Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

65. Independent relevancy distinguished.— The use of a single phrase, "declarations part of the *res gestæ*," has made it easy to confuse declarations independently relevant (see *supra*, VIII, A, 2) with those whose admissibility is dependent upon constituting part of an admissible fact. The confusion is made easier by the fact that the two sets of declarations present certain common features. (1) Declarations independently relevant may, like those dependently admissible, accompany, explain and characterize the doing of a relevant act. (2) Both may, under practically the same conditions, be competent, although self-serving to the declarant. (3) In many jurisdictions, either set of declarations continues to be competent, although made subsequent to the fact or event to which they relate, if such prior fact or event may fairly be supposed to dominate the mind of the declarant to an extent which makes the declaration relevant. (4) A merely narrative statement of a past transaction is excluded in either connection. These aspects of similarity do not, however, conceal certain essential differences. (1) Independently relevant statements are evidentiary, *per se*; those dependently admissible are not. (2) Statements independently relevant may, within the limits prescribed by judicial discretion in the matter of remoteness, precede, accompany, or follow the happening of a principal event or the existence of a connotated fact or mental state at a particular time. Declarations part of a fact in the *res gestæ*, properly so called, must accompany the fact of which they are part, the controlling mental effect of a fact being regarded, by certain courts, as an extension of time in this particular. (3) Statements dependently admissible are evidence of the facts asserted. Independently relevant statements dentiary, *per se*; those dependently admissible can properly be part only of a primary fact, i. e., of a fact from which, either singly or in connection with others, the right or liability directly arises. A statement independently relevant may have been made at any time at which its existence is relevant, in any degree, to the existence of such right or liability. See *supra*, VIII, A, 2.

66. See *infra*, IX, E, 2, a.

67. Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76; Lander *v.* People, 104 Ill. 248; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36. "This view of the common experience of mankind shows that, if the declaration has that character, it possesses an important element of reliability and significance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it, and that it should be admitted like any other material fact or evidentiary detail." Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 38, 54 Atl. 289, 61 L. R. A. 495, per Walker, J. "The plural phrase [*res gestæ*] has certainly contributed to a mistaken impression that hearsay is always admissible if only it be evidential without requiring trust in the credit of the declarant." Thayer Cas Ev. 630. See also Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495. If it appear from all the circumstances that the declarations were intended to deceive, and not made in good faith, the court may exclude them. Meek *v.* Perry, 36 Miss. 190.

That the declaration is self-serving does not necessarily render it incompetent. Boyden *v.* Moore, 11 Pick. (Mass.) 362; Allen *v.* Duncan, 11 Pick. (Mass.) 308.

68. Equitable Mut. Acc. Assoc. *v.* McCloskey, 1 Colo. App. 473, 29 Pac. 383; People *v.* Dewey, 2 Ida. (Hasb.) 83, 6 Pac. 103; Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 439; Rex *v.* Foster, 6 C. & P. 325, 25 E. C. L. 455. "If this principle of evidence may be difficult of application in practice, its soundness is not thereby weakened. A discriminating observance of it will promote the successful discovery of truth, which, without its aid, is often involved in great obscurity." Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 38, 54 Atl. 289, 61 L. R. A. 495, per Walker, J.

The modern tendency is, it has been said, toward extending the application of this rule. Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 34, 54 Atl. 289, 61 L. R. A. 495, where Walker, J., said: "Its development has been promoted, in modern times, by an effort to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of

2. Requisites of Admissibility — a. Fact Must Be Admissible — (I) *In General.* The fact embodying the declaration must be admissible in order to make the latter admissible as part of the *res gestæ*.[69]

(II) *Fact Must Be Primary.* As hereinbefore stated,[70] the original and proper scope of the *res gestæ* is the primary occurrence or other fact from the existence of which the right or liability involved in the judicial inquiry directly arises.[71] Under such a limitation, preliminary, subsequent, or subordinate facts, which tend to render the existence of primary facts probable or improbable, are rejected; the declarations being confined to the period during which acts are done or occurrences take place upon which the right or liability in question rests.[72]

(III) *Relaxation of Rule.* The broad extension of the scope of the *res gestæ* in case of declarations independently relevant[73] to the border lines of relevancy[74] has led to a similar extension as to declarations dependently relevant. In the practice and even in the decisions[75] of many courts a declaration is admissible, other conditions being fulfilled, if the fact itself is relevant to an issue in the

exclusion. The question is not now, how little, but how much, logically competent proof is admissible." See also Chicago Travelers' Ins. Co. *v.* Moseley, 8 Wall. (U. S.) 397, 19 L. ed. 439; Jack *v.* Mutual Reserve Fund L. Assoc., 113 Fed. 49, 51 C. C. A. 36. *Contra*, People *v.* Dewey, 2 Ida. (Hasb.) 83, 6 Pac. 103.

Possibility of procuring the declarant's evidence has been held to furnish a reason for excluding the statement offered as part of a fact in the *res gestæ*. State *v.* Oliver, 39 La. Ann. 470, 2 So. 194.

69. *Alabama.*— Fail *v.* McArthur, 31 Ala. 26; Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

Connecticut.— Pinney *v.* Jones, 64 Conn. 545, 30 Atl. 762, 42 Am. St. Rep. 209.

Maryland.— State *v.* Ridgely, 2 Harr. & M. 120, 1 Am. Dec. 372.

Massachusetts.— Lund *v.* Tyngsborough, 9 Cush. 36; Kingsley *v.* Slack, 5 Cush. 585.

New Hampshire.— Ordway *v.* Sanders, 58 N. H. 132; Patten *v.* Ferguson, 18 N. H. 528.

New York.— People *v.* Williams, 3 Park. Cr. 84.

England.— Wright *v.* Doe, 4 Bing. N. Cas. 489, 33 E. C. L. 821, 5 Cl. & F. 676, 7 Eng. Reprint 559, 2 Jur. 461, 6 Scott 58 [*affirming* 7 A. & E. 313, 7 L. J. Exch. 340, 2 N. & P. 303, 34 E. C. L. 178].

See 20 Cent. Dig. tit. "Evidence," § 301 *et seq.*

70. See *supra*, VIII, A, 2; IX, E, 1.

71. *Alabama.*— Fouville *v.* State, 91 Ala. 39, 8 So. 688; Alabama Great Southern R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403; Masterson *v.* Phinizy, 56 Ala. 336; Gassenheimer *v.* State, 52 Ala. 313.

Delaware.— State *v.* Frazier, Houst. Cr. Cas. 176.

Indiana.— Jones *v.* State, 71 Ind. 66.

North Carolina.— State *v.* Whitt, 113 N. C. 716, 18 S. E. 715.

England.— Reg. *v.* Bedingfield, 14 Cox C. C. 341.

The original conception included the thought of action or transaction. Wright *v.* Doe, 7 A. & E. 313, 7 L. J. Exch. 340, 2 N. & P. 303, 34 E. C. L. 178.

A definition affirming facts, so far as relates to criminal cases, given by Chief Justice Cockburn in a pamphlet which appeared in course of a controversy as to the propriety of his rule in Reg. *v.* Bedingfield, 14 Cox C. C. 341, is as follows: "Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment,— whether on the part of the agent or wrong-doer, in order to its performance, or on that of the patient or party wronged, in order to its prevention,— and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,— as, e. g., in the case of flight or applications for assistance,— form part of the principal transaction, and may be given in evidence as part of the *res gestæ*, or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer,— such as, e. g., statements made with a view to the apprehension of the offender,— do not form part of the *res gestæ*, and should be excluded." Bedingfield's Case, 14 Am. L. Rev. 817, 822.

72. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Tucker *v.* Peaslee, 36 N. H. 167; Currier *v.* Boston, etc., R. Co., 34 N. H. 498; Scott *v.* Sheler, 28 Gratt. (Va.) 891.

73. See *supra*, VIII, A, 2.

74. See *supra*, VII.

75. Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

case, whether it precedes[76] or follows the doing of the principal acts or the happening of the important events, even though, as in case of the appearance of an injured person,[77] his condition,[78] or the presence "of all the surrounding physical facts connected with" the transaction,[79] no idea of action or of the progress of events is necessarily implied. Thus, statements by one accused of crime, made at the time of his detection or arrest,[80] or while endeavoring to escape with the fruits of a crime,[81] and statements of what an assaulted person says while seeking to escape injury,[82] procure assistance,[83] or punish the offender[84] are part of the *res gestæ*. The period over which such facts may legitimately extend is a question of remoteness, that is, of logical relevancy, and varies with the facts of the particular case.[85] In other instances a further extended range of facts seems to have been deemed necessary. Thus, where the criminal use of poison is in question, any statements of the sufferer, after taking the drug, relating to its administration or operation have been admitted as part of the *res gestæ*.[86]

76. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; State *v.* Thompson, 141 Mo. 408, 42 S. W. 949; Cunningham *v.* Wabash R. Co., 79 Mo. App. 524; Mack *v.* State, 48 Wis. 271, 4 N. W. 449. That the accused and deceased were together shortly before a homicide is such a relevant fact that declarations made while in company are part of the *res gestæ*. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

77. Plaintiff came into a mill about three minutes after he was hurt, with his clothes covered with dirt. An employee asked what was the matter, and he replied that he had fallen into an excavation, and was hurt. It was held that such declaration was admissible as *res gestæ*, and competent as explanatory of his appearance. Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

78. *Alabama.*— Starks *v.* State, 137 Ala. 9, 34 So. 687.

Colorado.— Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Maine.— State *v.* Wagner, 61 Me. 178.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

Texas.— St. Louis Southwestern R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010.

Wisconsin.— Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

"Of the nature of res gestæ," which the condition of an injured person is said to be (Com. *v.* McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727), is lack of definiteness which has had, when reinforced by the authority of the supreme court of the United States (Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437), a strongly formative marked effect in producing the present chaotic state of the law upon this subject.

79. Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 475. See also Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

80. Merritt *v.* State, 107 Ga. 675, 34 S. E. 361; Darter *v.* State, 39 Tex. Cr. 40, 44 S. W. 856. The conduct of parties who arrested a defendant, after the arrest was made (Carroll *v.* State, 130 Ala. 99, 30 So. 394), and statements made at an inquest several days after the commission of an alleged offense (Tye *v.* Com., 3 Ky. L. Rep. 59), form no part of its *res gestæ*.

81. Dismukes *v.* State, 83 Ala. 287, 3 So. 671; Drumright *v.* State, 29 Ga. 430. On a prosecution for larceny, where the evidence showed that cattle were stolen in one county and taken into another, evidence of what was said and done along the route was admissible as a part of the *res gestæ*. Crittenden *v.* State, 134 Ala. 145, 32 So. 273.

82. Bejarano *v.* State, 6 Tex. App. 265.

83. State *v.* Carter, 106 La. 407, 30 So. 895.

84. Bow *v.* People, 160 Ill. 438, 43 N. E. 593.

85. "The difficulty of formulating a description of the *res gestæ* which will serve for all cases, seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a very numerous family." Cox *v.* State, 64 Ga. 374, 410, 37 Am. Rep. 76. "The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history or part of a history of a completed past affair. In the one case it is competent, in the other it is not. We are not to be understood as attempting to lay down any rule for the decision of what, under all circumstances, is the limit of the existence of the principal fact, which may be explained by contemporaneous declarations. In some cases the *res gestæ* may extend over weeks or months, in others they are limited to hours, or to minutes, or to seconds." Mayes *v.* State, 64 Miss. 329, 333, 1 So. 733, 60 Am. Rep. 58.

86. People *v.* Benham, 30 Misc. (N. Y.) 466, 63 N. Y. Suppl. 923, 14 N. Y. Cr. 434; Johnson *v.* State, 30 Tex. App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930; Puryear *v.* Com., 83 Va. 51, 1 S. E. 512; Jack *v.* Mutual Reserve Fund L. Assoc., 113 Fed. 49, 51 C. C. A. 36. In a prosecution for murder alleged to have been caused by poison contained in a

b. Statement Must Be Explanatory. To be part of a fact in the *res gestæ*, the declaration must characterize, explain, and in a sense complete it.[87]

c. Statement Must Be Contemporaneous. Except where spontaneity has been substituted for other requisites, to be part of an act a declaration must accompany[88]

lunch said to have been handed deceased by defendant, statements by deceased to another person while both were eating the lunch as to how and from whom he received it were held admissible as *res gestæ*. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31.

A more conservative view was adopted in Smith *v.* State, 53 Ala. 486; Graves *v.* People, 18 Colo. 170, 32 Pac. 63; Hall *v.* State, 132 Ind. 317, 31 N. E. 536; Field *v.* State, 57 Miss. 474, 34 Am. Rep. 476.

87. *Alabama.*— Stevens *v.* State, 138 Ala. 71, 35 So. 122; Robertson *v.* Smith, 18 Ala. 220; Tomkies *v.* Reynolds, 17 Ala. 109.

Connecticut.— Rockwell *v.* Taylor, 41 Conn. 55; Russell *v.* Frisbie, 19 Conn. 205; Wooden *v.* Cowles, 11 Conn. 292; Enos *v.* Tuttle, 3 Conn. 247.

Florida.— Hardee *v.* Langford, 6 Fla. 13.

Georgia.— Sims *v.* Macon, etc., R. Co., 28 Ga. 93; Clayton *v.* Tucker, 20 Ga. 452; Robinson *v.* Lane, 19 Ga. 337.

Illinois.— Chicago West. Div. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144.

Indiana.— Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271.

Kentucky.— Massie *v.* Com., 29 S. W. 871, 16 Ky. L. Rep. 790; Tabor *v.* Hardin, 9 Ky. L. Rep. 491; McLeod *v.* Ginther, 4 Ky. L. Rep. 276.

Massachusetts.— Lund *v.* Tyngsborough, 9 Cush. 36.

Minnesota.— Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778.

Mississippi.— Meek *v.* Perry, 36 Miss. 190; Wells *v.* Shipp, Walk. 353.

Nevada.— State *v.* Daugherty, 17 Nev. 376, 30 Pac. 1074; Rollins *v.* Strout, 6 Nev. 150.

New Hampshire.— Tucker *v.* Peaslee, 36 N. H. 167; Morrill *v.* Foster, 33 N. H. 379; Plumer *v.* French, 22 N. H. 450.

New Jersey.— Frome *v.* Dennis, 45 N. J. L. 515.

New York.— Smith *v.* National Ben. Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616 (the declarations "must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction"); Tilson *v.* Terwilliger, 56 N. Y. 273, 277; Gibbs *v.* Huyler, 41 N. Y. Super. Ct. 190.

North Carolina.— State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416.

Ohio.— Wetmore *v.* Mell, 1 Ohio St. 26, 59 Am. Dec. 607.

Pennsylvania.— Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Stein *v.* Railroad Co., 7 Leg. Gaz. 223.

South Carolina.—Turpin *v.* Brannon, 3 McCord 261; Hall *v.* James, 3 McCord 222.

Tennessee.— Nelson *v.* State, 2 Swan 237.

Vermont.— Elkins *v.* Hamilton, 20 Vt. 627.

Virginia.— Scott *v.* Shelor, 28 Gratt. 891.

Wisconsin.— Mack *v.* State, 48 Wis. 271, 280, 4 N. W. 449. "It becomes a part of the act itself, is explanatory of it, and gives it, to a great extent, its character." Mack *v.* State, 48 Wis. 271, 280, 4 N. W. 449.

United States.—See Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 19 L. ed. 437.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

Inadmissible declarations.— In an action by a passenger to recover on account of injuries, where the issue was whether the company negligently permitted or caused the street car to be overcrowded, and, if so, whether such overcrowding was the cause of plaintiff's injuries, evidence that the conductor said to the witness when she yelled at him to stop the car, after the injury, "Never mind. . . . Just give me your fare," was not a part of the *res gestæ*, although it may have been contemporaneous in point of time, as it did not illustrate, explain, or characterize the transaction in any degree. Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778. Declarations of one computing interest on certain notes as to what his motive and purpose will be in trying to collect them are not part of the *res gestæ*. Plumer *v.* French, 22 N. H. 450.

88. *Alabama.*— Gandy *v.* Humphries, 35 Ala. 617.

Georgia.— Monroe *v.* State, 5 Ga. 85.

Kentucky.—Howard *v.* Com., 70 S. W. 295, 24 Ky. L. Rep. 950.

Maine.— Collagan *v.* Burns, 57 Me. 449.

Massachusetts.— Com. *v.* Hackett, 2 Allen 136.

Mississippi.— Head *v.* State, 44 Miss. 731.

Missouri.— State *v.* Banks, 10 Mo. App. 111.

North Carolina.— State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.

England.— Reg. *v.* Bedingfield, 14 Cox C. C. 341.

Compare infra, IX, E, 2, d.

Declaration of deceased in a homicide case, made as he fell at defendants' feet, when shot by them, "Oh, Lord, they have murdered me for nothing," is not inadmissible because deceased did not call the names of his slayers. State *v.* Mace, 118 N. C. 1244, 24 S. E. 798; Stitt *v.* Wilson, Wright (Ohio) 505. The exclamation of the deceased at the moment of receiving the fatal injury, "Banks has shot me," was held competent. State *v.* Banks, 10 Mo. App. 111.

The precise act.— It is not sufficient that the declaration should accompany some act in the series constituting the entire transaction; it must accompany the act of which it is alleged to be part.

Alabama.— Cooper *v.* State, 63 Ala. 80.

Connecticut.— Baxter *v.* Camp, 71 Conn.

and be contemporaneous[89] with it. A declaration made before[90] is as incompe-

245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

Iowa.— Hoover *v.* Cary, 86 Iowa 494, 53 N. W. 415.

Maine.— McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760.

Massachusetts.—Haynes *v.* Rutter, 24 Pick. 242.

Texas.—Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519.

Vermont.— Barnum *v.* Hackett, 35 Vt. 77.

Washington.— Spokane, etc., Gold, etc., Co. *v.* Colfelt, 24 Wash. 568, 64 Pac. 847.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

89. *Alabama.*— Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176.

California.— People *v.* Piggott, 126 Cal. 509, 59 Pac. 31.

Connecticut.—Rockwell *v.* Taylor, 41 Conn. 55. See also Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778.

Georgia.— Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Illinois.— Reiten *v.* Lake St. El. R. Co., 85 Ill. App. 657.

Iowa.— Frink *v.* Coe, 4 Greene 555, 61 Am. Dec. 141.

Kansas.— State *v.* Montgomery, 8 Kan. 351. See Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878.

Louisiana.— De Mahy *v.* Morgan's Louisiana, etc., R., etc., Co., 45 La. Ann. 1329, 14 So. 61.

Maryland.— Johnson *v.* Johnson, 96 Md. 144, 53 Atl. 792.

Massachusetts.— Eastman *v.* Boston, etc., R. Co., 165 Mass. 342, 43 N. E. 115; Lund *v.* Tyngsborough, 9 Cush. 36.

Michigan.— Mabley *v.* Kittleberger, 37 Mich. 360.

Missouri.—Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503.

Nebraska.— Clancy *v.* Barker, (1904) 98 N. W. 440. See also Davidson *v.* Davidson, 2 Nebr. (Unoff.) 90, 96 N. W. 409.

New Jersey.— Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637; Luse *v.* Jones, 39 N. J. L. 707.

North Carolina.— Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 948. See also Lyman *v.* Southern R. Co., 132 N. C. 721, 44 S. E. 550.

Ohio.— Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185.

Pennsylvania.— Elkins *v.* McKean, 79 Pa. St. 493.

South Carolina.— State *v.* Wyse, 32 S. C. 45, 10 S. E. 612. See also Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810.

South Dakota.— Fallon *v.* Rapid City, (1904) 97 N. W. 1009; Tenney *v.* Rapid City, (1903) 96 N. W. 96.

Vermont.— State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312.

United States.— Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 19 L. ed. 437. See also Atchison, etc., R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314.

England.—Reg. *v.* Bedingfield, 14 Cox C. C. 341.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.* But see *infra*, IX, E, 2, d.

Admissible declarations.— Where prosecuting witness in a trial for larceny testified that when defendant pulled his hand out of witness' pocket he grabbed him, and, on seeing him pass something to a co-defendant, grabbed him also, and shouted to a friend, "They are robbing me," such statement was a part of the *res gestæ*, and hence admissible. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31. The declaration of a person injured, made at the moment of the accident, that she alone was to blame for it, is admissible as part of the *res gestæ*. De Mahy *v.* Morgan's Louisiana, etc., R., etc., Co., 45 La. Ann. 1329, 14 So. 61. Words spoken by a driver in the effort to control a runaway horse are admissible as part of the *res gestæ* in an action for damages for injuries resulting from the frightening of the horse. Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637.

Inadmissible declarations.— "It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction, made after it has ended, are a part of it. It would be a moral impossibility." Sullivan *v.* Oregon R., etc., Co., 12 Oreg. 392, 400, 7 Pac. 508, 53 Am. Rep. 364. See also Williams *v.* Bowdon, 1 Swan (Tenn.) 282. In an action for personal injuries, declarations of plaintiff, not made at the same time of the accident, or so nearly contemporaneous with it as to characterize it or throw light upon it, are inadmissible, being in no sense a part of the *res gestæ*. McCabe *v.* Dry-Dock, etc., R. Co., 15 Daly (N. Y.) 504, 8 N. Y. Suppl. 336. The declaration of a locomotive engineer as to the rate of speed at the time of an accident "is not to be deemed part of the *res gestæ*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it." Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99, 106, 7 S. Ct. 118, 172, 30 L. ed. 299.

90. Oder *v.* Com., 4 Ky. L. Rep. 18; State *v.* Shafer, 22 Mont. 17, 55 Pac. 526. The theory of the prosecution being that defendant decoyed deceased into the woods to kill and rob him, and certain merchandise such as deceased was peddling being found in defendant's trunk after his arrest, evidence that defendant stated several days before the homicide that he bought similar articles of a peddler is not part of the *res gestæ*, and is inadmissible. Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460. Where letters offered in evidence are the declarations of third per-

tent as one made after[91] the fact which it explains. In few cases, however, can the doing of an act and the making of the statement be precisely synchronous. Part of the essential difficulty of the subject lies in the fact that almost invariably an interval, however slight, must elapse between the act and the declaration.[92] The question of admissibility is thus placed largely within the judicial discretion, even in courts which do not treat spontaneity as the sole test.

d. Spontaneity as a Substitute For Other Requisites — (i) *The Extended Doctrine.* Consistently and concurrently with the extension of the scope of the *res gestæ* beyond the primary facts, to be coextensive with the relevant facts in a particular case,[93] a broad and almost unrecognizable doctrine of dependent relevancy has arisen, substituting spontaneity for other requisites of admissibility. The rule, as announced in many American jurisdictions, is to the effect that an unsworn statement is evidence of what it asserts, although it constitutes part of no particular fact in the *res gestæ*, however defined, provided it is so connected with the transaction as a whole that the utterance, in the opinion of the court, may be regarded as an expression of feeling forced instinctively from the declarant by pressure of the circumstances under which it is made, rather than be deemed the narrative result of thought.[94] Contemporaneousness is no longer required. Thus, fear of an impending peril may compel an utterance which, in this sense, precedes the relevant fact;[95] the declaration may accompany or be contemporaneous with the act, condition, or other fact which forces it from the speaker;[96] or, on the

sons, written long prior to the controversy upon which the action is founded, they are not part of the *res gestæ*, and are properly excluded. Frank *v.* Brewer, 4 Silv. Supreme (N. Y.) 155, 7 N. Y. Suppl. 182.

91. See *infra*, IX, E, 3.

92. *California.*— People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

Georgia.— Mitchum *v.* State, 11 Ga. 615.

Louisiana.— State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

Massachusetts.—Com. *v.* Hackett, 2 Allen 136.

Mississippi.—Archer *v.* Helm, 70 Miss. 874, 12 So. 702; Head *v.* State, 44 Miss. 731.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Caverno *v.* Jones, 61 N. H. 623.

South Carolina.— State *v.* Belcher, 13 S. C. 459.

Texas.— Boothe *v.* State, 4 Tex. App. 202.

England.— Rex *v.* Foster, 6 C. & P. 325, 25 E. C. L. 455.

See 20 Cent. Dig. tit. "Evidence," § 302 *et seq.*

"Soon afterward."— "The *res gestæ* or transaction was the accident, and how it occurred. It is not essential that the declaration sought to be introduced in evidence was uttered at the identical time the accident occurred, but, if made soon afterwards, and explanatory thereof, it is admissible." Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 132, 30 N. W. 42, per Seevers, J.

Contemporaneousness not sole criterion.— "While proximity in point of time with the act . . . is . . . essential to make what was said by a third person, competent evidence against another as part of the *res gestæ*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself." Butler *v.* Manhattan R. Co., 143 N. Y. 417, 423, 38 N. E. 454, 42 Am. St. Rep. 738, 26 L. R. A. 46, per Andrews, C. J.

93. See *supra*, IX, E, 2, a, (III).

94. Herren *v.* People, 28 Colo. 23, 62 Pac. 833; T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608. "When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character." Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, per Walker, J.

95. Monroe *v.* State, 5 Ga. 85; Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746. But see Flynn *v.* State, 43 Ark. 289. Upon a trial for murder, it appeared that the deceased was shot while in church by someone outside. It was held that his declaration, made just before the shot was fired, and after looking from the window, that A, the defendant, "is outside, fixing to shoot me," was admissible as part of the *res gestæ*. Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640. See also Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348, holding that a letter written by a passenger on a vessel and found in his stateroom, indicating an intention to commit suicide, was admissible as a part of the *res gestæ* on an issue as to his death. See SUICIDE.

96. Sullivan *v.* State, (Miss. 1902) 32 So. 2; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396. In case of alleged burglary, the impulsive utterances of a member of the family, in the presence of the accused and while he is in the act of committing the crime charged, are admissible as part of the *res gestæ*. State *v.* Desroches, 48 La. Ann. 423, 19 So. 250. See also State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182.

other hand, it may follow such act, condition, or fact, even by a considerable interval[97] — as where voluntary and spontaneous declarations, although made after the principal transaction, were utterances under such circumstances as to preclude the idea of deliberate design.[98] A controlling thought, apparently oper-

97. *California.*— People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49.

Colorado.— Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Georgia.— Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Stevenson *v.* State, 69 Ga. 68.

Indiana.— Green *v.* State, 154 Ind. 655, 57 N. E. 637.

Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri.—Stevens *v.* Walpole, 76 Mo. App. 213.

Texas.— Stagner *v.* State, 9 Tex. App. 440.

Virginia.— Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747.

98. *Alabama.*— Nelson *v.* State, 130 Ala. 83, 30 So. 728.

California.— People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49.

Colorado.— Graves *v.* People, 18 Colo. 170, 32 Pac. 63. See also Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Georgia.— Glover *v.* State, 89 Ga. 391, 15 S. E. 496; Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Flanegan *v.* State, 64 Ga. 52; Barns *v.* State, 61 Ga. 192; Rutland *v.* Hathorn, 36 Ga. 380; Mitchum *v.* State, 11 Ga. 615.

Indiana.— Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714.

Iowa.— Alsever *v.* Minneapolis, etc., R. Co., 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748; State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 420.

Kentucky.— O'Donnell *v.* Louisville Electric Light Co., 55 S. W. 202, 21 Ky. L. Rep. 1362.

Louisiana.— State *v.* Blanchard, 108 La. 110, 32 So. 397; State *v.* Maxey, 107 La. Ann. 799, 32 So. 206; State *v.* Robinson, 52 La. Ann. 541, 27 So. 129; State *v.* Euzebe, 42 La. Ann. 727, 7 So. 784.

Maine.— State *v.* Wagner, 61 Me. 178; Stewart *v.* Hanson, 35 Me. 506.

Massachusetts.— Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727. See also Com. *v.* Hackett, 2 Allen 136.

Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Mississippi.— Mobile, etc., R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 14, 522; Head *v.* State, 44 Miss. 731; Meek *v.* Perry, 36 Miss. 190.

Missouri.— State *v.* Lockett, 168 Mo. 480, 68 S. W. 563; State *v.* Martin, 124 Mo. 514, 28 S. W. 12; Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

Nebraska.— Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 50. See also Pledger *v.* Chicago, etc., R. Co., (1903) 95 N. W. 1057.

New York.— Casey *v.* New York Cent., etc., R. Co., 78 N. Y. 518 [*affirming* 8 Daly 220]; Spatz *v.* Lyons, 55 Barb. 476; Courtney *v.* Baker, 34 N. Y. Super. Ct. 529.

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Oregon.— State *v.* Garrand, 5 Oreg. 216.

Pennsylvania.—Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396, 402.

Texas.— Pilkinson *v.* Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. 805; Continental Ins. Co. *v.* Pruitt, 65 Tex. 125; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; Gulf, etc., R. Co. *v.* Pierce, 7 Tex. Civ. App. 597, 25 S. W. 1052; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297; *Ex p.* Albitz, 29 Tex. App. 128, 15 S. W. 173; Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Stagner *v.* State, 9 Tex. App. 440; Boothe *v.* State, 4 Tex. App. 202.

Vermont.— Hawkes *v.* Chester, 70 Vt. 271, 40 Atl. 727.

Virginia.— Andrews *v.* Com., 100 Va. 801, 40 S. E. 935; Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747.

West Virginia.— Sample *v.* Consolidated Light R. Co., 50 W. Va. 472, 40 S. E. 597, 694, 57 L. R. A. 186.

Wisconsin.— Charley *v.* Potthoff, 118 Wis. 258, 95 N. W. 124, declarations of audience, on leaving theater during performance, as to reason for doing so, on an issue as to the merit of the performance.

United States.— Mutual Ben. L. Ins. Co. *v.* Newton, 22 Wall. 32, 22 L. ed. 793; Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 19 L. ed. 437; Westall *v.* Osborne, 115 Fed. 282, 53 C. C. A. 74; Doyle *v.* Clark, 7 Fed. Cas. No. 4,053, 1 Flipp. 536. See also Kansas City Southern R. Co. *v.* Moles, 121 Fed. 351, 58 C. C. A. 29.

England.— Aveson *v.* Kinnaird, 6 East 188, 2 Smith K. B. 286, 8 Rev. Rep. 455; Thompson *v.* Trevanion, Skin. 402.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

Self-serving statements are competent as far as they are spontaneous. Thus, on a prosecution for murder, statements of accused immediately after the fatal shot was fired tending to indicate an accidental discharge were held admissible. Teel *v.* State, (Tex. Cr. App. 1902) 69 S. W. 531. See also Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348; and *supra*, IX, A, 2, b, (II), (B), (2), (a), note.

A bystander's spontaneous statement is within this rule. Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17; State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182; State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; Missouri, etc., R. Co. *v.* Vance, (Tex. Civ. App. 1897) 41 S. W. 167.

ative with courts in establishing the rule under consideration, is that such an unsworn statement is not really within the hearsay rule, because its credibility does not rest in any considerable degree upon the credit of the declarant. It logically follows, on the same line of relevancy, that it is not necessary that the declarant should have been competent as a witness.[99] It is proceeding in a circle to use the declarations as proof of facts necessary to constitute the declarations part of the *res gestæ*.[1]

(II) *Discretion of Court*—(A) *In General.* The question of spontaneity, being one preliminary to reception of the declaration, is necessarily confided to the discretion of the presiding judge, the burden being upon the proponent of the evidence to show that a statement made after an occurrence and concerning it was in fact spontaneous.[2] If under the circumstances a sufficient opportunity for the invention or fabrication of a story was afforded, it will be assumed that the opportunity was utilized, and the statement will be rejected.[3] Should the proponent fail to discharge the burden of proving spontaneity, the statement is designated as narrative, and deemed mere hearsay.[4] A further and indeed logically inevitable step has been taken by courts which declare that no precise rule can be formulated on the subject; that each case stands upon its own footing, and that an unsworn statement is to be admitted or rejected, "in the sound

Confessions and dying declarations.— The spontaneous nature of declarations admitted as part of the *res gestæ* denies them the weight attaching to a deliberate confession of guilt (Allen *v.* State, 60 Ala. 19; Head *v.* State, 44 Miss. 731), and rules applicable to confessions do not apply to them; for example, the declarant need not have been warned that what he says will be taken against him (Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836). Although declarations regarded as part of the *res gestæ* because spontaneous may be made when the declarant is dying, a sense of impending death is not essential to admissibility, as in the case of "dying declarations" properly so called (Brownell *v.* Pacific R. Co., 47 Mo. 239); and, on the other hand, if the declaration is not spontaneous, it is not admissible in a civil suit because made under the solemn sanction of consciously approaching death (Waldele *v.* New York Cent., etc., R. Co., 19 Hun (N. Y.) 69). As to confessions see, generally, Criminal Law, 12 Cyc. 459. As to dying declarations see, generally, Homicide.

No privilege attaches to such statements by reason of the relation of husband and wife. State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

Opinions or conclusions of competent physicians stated while examining a patient are or may be admissible as part of the *res gestæ*. New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294.

Opinion of declarant.— It is not conclusive against a spontaneous exclamation of an injured person that it involves the expression of opinion as to the legal or physical effect of his injury. State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.

99. Croomes *v.* State, 40 Tex. Cr. 677, 51 S. W. 924, 53 S. W. 882.

1. State *v.* Williams, 108 La. 222, 32 So. 402.

2. *Arkansas.*— Blair *v.* State, 69 Ark. 558, 64 S. W. 948.

Georgia.— O'Shields *v.* State, 55 Ga. 696. And see Everett *v.* State, 62 Ga. 65.

Iowa.— Hoover *v.* Cary, 86 Iowa 494, 53 N. W. 415.

Kentucky.— Tucker *v.* Hood, 2 Bush 85.

Nebraska.— Pledger *v.* Chicago, etc., R. Co., (1903) 95 N. W. 1057.

New Mexico.— Territory *v.* Armijo, 7 N. M. 428, 37 Pac. 1113.

Texas.— Carter *v.* State, (Cr. App. 1902) 70 S. W. 971; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723. See also International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93.

West Virginia.— State *v.* Abbott, 8 W. Va. 741.

Wisconsin.— Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542, 44 N. W. 1085.

3. State *v.* Seymour, Houst. Cr. Cas. (Del.) 508; Everett *v.* State, 62 Ga. 65; Lloyd *v.* State, 70 Miss. 251, 11 So. 689; Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534. In a recent New Hampshire case the pregnant suggestion is made that as evidence of an injured man's position when found shortly after an accident may be shown, notwithstanding the fact that it might have been voluntarily assumed by him to his supposed advantage, no reason exists why a statement made at the same time should be rejected because a sufficient period of time has elapsed to allow the invention of a self-serving statement. Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495. Logically, the position is impregnable and undoubtedly indicates the growth of legal ideas in this direction. The salient characteristic of the present law of evidence in distinguishing between unsworn statements as proof of facts and all other proof of facts is not a logical one and has been broken into in a hopelessly inconsistent way.

4. See *infra*, IX, E, 3.

discretion of the court."[5] This discretion is further invoked in many cases when the scope of the *res gestæ* is extended beyond the primary facts.[6] Relevancy under such circumstances is largely a question of remoteness, in the determination of which discretion plays an important part.[7] It has not escaped notice that such a rule places the rights of the parties, as to the use of hearsay, in one of its most dangerous forms, largely on the decision of a preliminary question of fact which it is difficult, if not practically impossible, to review. The propriety, as a matter of principle, of treating the admissibility of testimony upon which in many instances the decision of the case may and indeed frequently does turn, as a matter of discretion, has been earnestly controverted.[8]

(B) *Elements For Consideration* — (1) TIME ELAPSED. Spontaneity, as presented in actual cases, is a function of so many variables, that no single element necessarily exerts a controlling influence. While it is obvious that a declaration is usually spontaneous in proportion as it is near, in point of time, to the fact which compels its automatic expression, the inference of the circumstance of nearness in time may in any given case be offset and indeed nullified by the presence of other and in that particular case more controlling considerations. No more general rule can be laid down than that, other things being equal, the shorter the interval of elapsed time, the greater the probability that the declaration is spontaneous.[9] The element of time has therefore no controlling effect.[10] Thus, where the declaration is shown to have been made "immediately after" the fact which calls it forth, the evidence has been rejected[11] in almost as large a proportion of cases as those in which it has been received.[12] On the other hand,

5. State *v.* Blanchard, 168 La. 110, 32 So. 397; Com. *v.* McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Pledger *v.* Chicago, etc., R. Co., (Nebr. 1903) 95 N. W. 1057. It has on the contrary been held, under statutory provisions (Mont. Code Civ. Proc. §§ 3126, 3146) that the question as to whether a declaration is part of the *res gestæ* is for the jury. State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

6. See *supra*, IX, E, 2, a, (III).

7. See *supra*, VII, A, 2.

8. Equitable Mut. Acc. Assoc. *v.* McClusky, 1 Colo. App. 473, 29 Pac. 383; Sullivan *v.* Oregon R., etc., Co., 12 Oreg. 392, 7 Atl. 508, 53 Am. Rep. 364. See also Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36. Whether it is worth while to continue the rule against hearsay where the declaration is logically probative and the absence of the declarant is satisfactorily accounted for is an entirely different question. See *supra*, IX, A, 1, b.

9. State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181; Houston, etc., R. Co. *v.* Weaver, (Tex. Civ. App. 1897) 41 S. W. 846; Boothe *v.* State, 4 Tex. App. 202.

10. Jones *v.* State, 71 Ind. 66; State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

11. *California.*— People *v.* Ah Lee, 60 Cal. 85.

Georgia.— Western, etc., R. Co. *v.* Beason, 112 Ga. 553, 37 S. E. 863.

Illinois.— Hellmuth *v.* Katschke, 35 Ill. App. 21.

Indiana.— Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125, 66 N. E. 433.

Iowa.— State *v.* Deuble, 74 Iowa 509, 38 N. W. 383.

Kansas.— Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878.

Kentucky.—Early *v.* Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807.

Massachusetts.— Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227; Williamson *v.* Cambridge R. Co., 144 Mass. 148, 10 N. E. 790; Lane *v.* Bryant, 9 Gray 245, 247, 69 Am. Dec. 282, where Bigelow, J., said: "It is no more competent because made immediately after the accident than if made a week or a month afterwards."

Michigan.— Detroit, etc., R. Co. *v.* Van Steinberg, 17 Mich. 99.

Missouri.— Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637.

Nevada.— State *v.* Daugherty, 17 Nev. 376, 30 Pac. 1074.

Ohio.— Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185; Forrest *v.* State, 21 Ohio St. 641.

Oregon.— Sullivan *v.* Oregon R., etc., Co., 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364.

South Carolina.— Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810.

South Dakota.— Tenney *v.* Rapid City, (1903) 96 N. W. 96.

Virginia.— Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

12. *Alabama.*— Stevens *v.* State, 138 Ala. 71, 35 So. 122.

Arkansas.— Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230.

Colorado.— Lord *v.* Pueblo Smelting, etc., Co., 12 Colo. 390, 21 Pac. 148; Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677; Trumbull *v.* Donahue, 18 Colo. App. 460, 72 Pac. 684.

closeness of connection, indicated by various indefinite expressions, as "almost immediately after,"[13] "just after,"[14] "a few minutes after,"[15] "a very few

District of Columbia.— McUin *v.* U. S., 17 App. Cas. 323.

Georgia.— Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17; Gaines *v.* State, 108 Ga. 772, 33 S. E. 632; Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72; Flanegan *v.* State, 64 Ga. 52.

Indiana.— Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520.

Iowa.— Sutcliffe *v.* Iowa State Traveling Men's Assoc., 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298; State *v.* Driscoll, 72 Iowa 583, 34 N. W. 428; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518.

Kentucky.— Hughes *v.* Com., 41 S. W. 294; 19 Ky. L. Rep. 497; Norfleet *v.* Com., 33 S. W. 938, 17 Ky. L. Rep. 1137.

Louisiana.— State *v.* Maxey, 107 La. 799, 32 So. 206; State *v.* Euzebee, 42 La. Ann. 727, 7 So. 784.

Massachusetts.— Com. *v.* Hackett, 2 Allen 136; Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727.

Michigan.— Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221; Cleveland *v.* Newsom, 45 Mich. 62, 7 N. W. 222. See also Ensley *v.* Detroit United R. Co., (1903) 96 N. W. 34; Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

Minnesota.— State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583; O'Connor *v.* Chicago, etc., R. Co., 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288.

Missouri.— State *v.* Walker, 78 Mo. 380; Entwhistle *v.* Feighner, 60 Mo. 214; Brownell *v.* Pacific R. Co., 47 Mo. 239. See also Shaefer *v.* Missouri Pacific R. Co., 98 Mo. App. 445, 72 S. W. 154.

New York.— Scheir *v.* Quirin, 177 N. Y. 568, 69 N. E. 1130 [*affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956]; Casey *v.* New York Cent., etc., R. Co., 78 N. Y. 518 [*affirming* 8 Daly 220]; Spatz *v.* Lyons, 55 Barb. 476; Curry's Case, 4 City Hall Rec. 109.

North Carolina.— Seawell *v.* Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850.

Pennsylvania.— Coll *v.* Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89; Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701; Stein *v.* R. Co., 7 Leg. Gaz. 223.

Rhode Island.— State *v.* Epstein, (1903) 55 Atl. 204; State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

South Carolina.— State *v.* Talbert, 41 S. C. 526, 19 S. E. 852. See also Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810; Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; *Ex p.* Albitz, 29 Tex. App. 128, 15 S. W. 173; Weathersby *v* State, 29 Tex. App. 278, 15 S. W. 823; Brunet *v.* State, 12 Tex. App. 521; Black *v.* State, 8 Tex. App. 329; Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217. See also Ft. Worth, etc., R. Co. *v.* Partin, (Civ. App. 1903) 76 S. W. 236; Missouri, etc., R. Co. *v.* Schilling, (Civ. App. 1903) 75 S. W. 64; Hicks *v.* Galveston, etc., R. Co., (Civ. App. 1902) 71 S. W. 322 [*reversed* on other points in 96 Tex. 355, 72 S. W. 835].

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Vermont.— Hawkes *v.* Chester, 70 Vt. 271, 40 Atl. 727.

Washington.— Lambert *v.* La Conner Trading, etc., Co., 30 Wash. 346, 70 Pac. 960.

Wisconsin.— Hupfer *v.* National Distilling Co., 119 Wis. 417, 96 N. W. 809.

United States.— Kansas City Southern R. Co. *v.* Moles, 121 Fed. 351, 58 C. C. A. 29.

England.— Rex *v.* Foster, 6 C. & P. 325, 25 E. C. L. 455.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

13. Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280.

14. Louisville, etc., R. Co. *v.* Earl, 94 Ky. 368, 22 S. W. 607, 15 Ky. L. Rep. 184. *Contra,* Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125, 66 N. E. 433. See also Seawell *v.* Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850.

15. *California.*— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

Georgia.— Ferguson *v.* Columbus, etc., R. Co., 75 Ga. 637.

Idaho.— State *v.* Wilmbusse, 8 Ida. 608, 70 Pac. 849.

Kentucky.— Galloway *v.* Com., 5 Ky. L. Rep. 213. *Contra,* Fitzgerald *v.* Com., 6 S. W. 152, 9 Ky. L. Rep. 664.

Louisiana.— State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390.

Nebraska.— Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913.

North Carolina.— State *v.* Whitt, 113 N. C. 716, 18 S. E. 715. See also Seawell *v.* Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850.

Texas.— Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366; Ingram *v.* State, (Cr. App. 1897) 43 S. W. 518; Morris *v.* State, 35 Tex. Cr. 313, 33 S. W. 539; Lindsey *v.* State, 35 Tex. Cr. 164, 32 S. W. 768; King *v.* State, 34 Tex. Cr. 228, 29 S. W. 1086; Castillo *v.* State, 31 Tex. Cr. 145, 19 S. W. 892, 37 Am. St. Rep. 794; Missouri Pac. R. Co. *v.* Bond, 2 Tex. Civ. App. 104, 20 S. W. 930.

Virginia.— Little *v.* Com., 25 Gratt. 921.

Wisconsin.— Christianson *v.* Pioneer Furniture Co., 92 Wis. 649, 66 N. W. 699.

A contrary view, rejecting a statement made a "few minutes after" a fact or occurrence, has been adopted in several jurisdictions.

Alabama.— Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403.

minutes after,"[16] or within "a short time,"[17] have been held to render the statement competent. The same divergence of decision, often affected by the presence of other considerations than that of time, or some special rule in a particular jurisdiction, is shown where the reporting witness undertakes to state the interval more definitely. The evidence of a subsequent statement has been admitted as a part of the *res gestæ*, although it followed the act, condition, or fact, by the space of two minutes[18] or less;[19] or by three,[20] four,[21] five,[22] six,[23] ten,[24] fifteen,[25]

California.— People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115 [*disapproving* People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49].

Illinois.— Chicago West. Div. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 [*reversing* 30 Ill. App. 200]; Ohio, etc., R. Co. *v.* Cullison, 40 Ill. App. 67.

Indiana.— Jones *v.* State, 71 Ind. 66.

New Jersey.— Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

16. State *v.* Ah Loi, 5 Nev. 99.

17. State *v.* Smith, 26 Wash. 354, 67 Pac. 70. See also Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492.

18. *Alabama.*— Nelson *v.* State, 130 Ala. 83, 30 So. 728.

Georgia.— Thomas *v.* State, 27 Ga. 287.

Iowa.— Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

Pennsylvania.— Coll *v.* Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89.

Texas.— Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725.

Contra.— State *v.* Carlton, 48 Vt. 636. And see Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 946.

19. *Georgia.*— Mitchum *v.* State, 11 Ga. 615.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097.

Kentucky.— McLeod *v.* Ginther, 80 Ky. 399; Brown *v.* Louisville R. Co., 53 S. W. 1041, 21 Ky. L. Rep. 995.

Missouri.— State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483.

Texas.— Missouri, etc., R. Co. *v.* Schilling, (Civ. App. 1903) 75 S. W. 64; Foster *v.* State, 8 Tex. App. 248.

"A little more than a minute" sufficed, however, to exclude the declaration in King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

20. Territory *v.* Davis, 2 Ariz. 59, 10 Pac. 359; Lambert *v.* People, 29 Mich. 71; Sullivan *v.* Salt Lake City, 13 Utah 122, 44 Pac. 1039.

21. Neely *v.* State, (Tex. Cr. App. 1900) 56 S. W. 625; Harrison *v.* State, 20 Tex. App. 387, 54 Am. Rep. 529. *Contra,* Barnes *v.* Rumford, 96 Me. 315, 52 Atl. 844, where, in an action against a town for injuries alleged to have been caused by a defect in a highway on which plaintiff was being driven, a declaration by the driver made three or four minutes after the accident was held inadmissible.

22. Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577; Mitchell *v.* State, 71 Ga. 128; O'Shields *v.* State, 55 Ga. 696; State *v.* Morrison, 64 Kan. 669, 68 Pac. 48; McKinney *v.* State, 40 Tex. Cr. 372, 50 S. W. 708; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; De Walt *v.* Houston East Texas R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

Contra.— It has been held, however, that five minutes may be too long an interval.

Alabama.— Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

Connecticut.—McCarrick *v.* Kealy, 70 Conn. 642, 40 Atl. 603.

Delaware.— State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766.

Georgia.— Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16.

Indiana.— Jones *v.* State, 71 Ind. 66.

Kansas.— Tennis *v.* Rapid-Transit R. Co., 45 Kan. 503, 25 Pac. 876; State *v.* Pomeroy, 25 Kan. 349.

Massachusetts.— Eastman *v.* Boston, etc., R. Co., 165 Mass. 342, 43 N. E. 115.

Mississippi.— Mayes *v.* State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 58.

Texas.— Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971.

23. San Antonio, etc., R. Co. *v.* Gray, 95 Tex. 424, 67 S. W. 763.

24. *District of Columbia.*— Washington, etc., R. Co. *v.* McLane, 11 App. Cas. 220.

Louisiana.— State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

Rhode Island.— State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

South Carolina.— State *v.* Arnold, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867.

Texas.— Farris *v.* State, (Cr. App. 1900) 56 S. W. 336; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297.

Contra.— Hall *v.* State, 48 Ga. 607; Cleveland, etc., R. Co. *v.* Sloan, 11 Ind. App. 401, 39 N. E. 174; State *v.* Estoup, 39 La. Ann. 219, 1 So. 448; State *v.* Whitt, 113 N. C. 716, 18 S. E. 715. See also Clack *v.* Southern Electrical Supply Co., 72 Mo. App. 506; Dewalt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534; Jones *v.* Com., 86 Va. 740, 10 S. E. 1004. See also Missouri, etc., R. Co. *v.* Tarwater, (Tex. Civ. App. 1903) 75 S. W. 937. Eight minutes has been held too long an interval. State *v.* Melton, 37 La. Ann. 78.

25. Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534; International, etc., R. Co. *v.* Smith, (Tex. Sup. 1890) 14 S. W. 642; Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471;

twenty,[26] or thirty[27] minutes; an hour;[28] or, under exceptional circumstances,[29] by even a longer period of time. Two[30] or three[31] hours have been deemed intervals too extended to permit an inference of spontaneity.

(2) Condition of Declarant. A second consideration of importance in determining the question of spontaneity is how far the fact out of which the declaration arises is of a nature to create a more or less permanent impression upon the mind of the declarant.[32] If his condition at the time of making the

Missouri, etc., R. Co. *v.* Vance, (Tex. Civ. App. 1897) 41 S. W. 167. *Contra*, Williams *v.* State, 66 Ark. 264, 50 S. W. 517; Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

26. Benson *v.* State, 38 Tex. Cr. 487, 43 S. W. 527; Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705; Stagner *v.* State, 9 Tex. App. 440. *Contra*, Roach *v.* Western, etc., R. Co., 93 Ga. 785, 21 S. E. 67; Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118; Lynch *v.* State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888. See also Lyman *v.* Southern R. Co., 132 N. C. 721, 44 S. E. 550.

27. Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838; Castillo *v.* State, 31 Tex. Cr. 145, 19 S. W. 892, 37 Am. St. Rep. 794; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

Contra.— *Arkansas.*— Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106.

Delaware.— State *v.* Frazier, Houst. Cr. Cas. 176.

Georgia.— Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158.

Illinois.— Chicago, etc., R. Co. *v.* Fietsam, 19 Ill. App. 55.

Indiana.— Pittsburg, etc., R. Co. *v.* Wright, 80 Ind. 182.

Iowa.— Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42.

Kentucky.— O'Donnell *v.* Louisville Electric Light Co., 55 S. W. 202, 21 Ky. L. Rep. 1362.

Mississippi.— Brown *v.* State, 78 Miss. 637, 29 So. 519, 84 Am. St. Rep. 641.

Pennsylvania.— Keefer *v.* Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366, 88 Am. St. Rep. 822. See also Briggs *v.* East Broad Top R., etc., Co., 206 Pa. St. 564, 56 Atl. 36.

Tennessee.— Denton *v.* State, 1 Swan 279.

Texas.— McNeal *v.* State, (Cr. App. 1897) 43 S. W. 792; Crow *v.* State, (Cr. App. 1893) 21 S. W. 543.

Virginia.— Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737.

It was left to the jury to determine whether a statement made after an interval of "less than thirty minutes" was spontaneous, in Hart *v.* Powell, 18 Ga. 635.

28. Freeman *v.* State, 40 Tex. Cr. 545, 46 S. W. 641, 51 S. W. 230; Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761, declaration within an hour after injury.

Contra.— *Alabama.*— Stewart *v.* State, 78 Ala. 436.

Connecticut.— Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778.

Iowa.— Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42.

Kansas.— State *v.* Petty, 21 Kan. 54.

Louisiana.— State *v.* Johnson, 35 La. Ann. 968.

Virginia.— Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737.

Wisconsin.— Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852.

United States.— Travelers' Protective Assoc. of America *v.* West, 102 Fed. 226, 42 C. C. A. 284.

Three quarters of an hour has been regarded as excessive. People *v.* Dewey, 2 Ida. (Hasb.) 79, 6 Pac. 103; Caudle *v.* State, 34 Tex. Cr. 26, 28 S. W. 810; People *v.* Kessler, 13 Utah 69, 44 Pac. 97; Gowen *v.* Bush, 76 Fed. 349, 22 C. C. A. 196.

29. Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720. An hour and a half in case of the first articulate utterance, voluntary and spontaneous, of an ignorant woman whose throat was nearly cut in two, has been deemed not too long. Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720. See *infra*, IX, E, 2, d, (II), (B), (4). Statement on regaining consciousness see Ft. Worth, etc., R. Co. *v.* Partin, (Tex. Civ. App. 1903) 76 S. W. 236.

Statements to physicians.— A marked extension of time has been permitted where the narrative statement is made to a physician, since a guaranty of truth, as it were, is secured which is deemed equivalent to spontaneity. Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874, an hour and a half. See *supra*, VIII, B, 2, c, (II). An interval of six weeks has been held too long. People *v.* Hawkins, 109 N. Y. 408, 17 N. E. 371. So, while statements as to the character of an injury necessary to secure proper medical treatment are competent, the name of the assailant and the nature of the weapon used are not to be received. Denton *v.* State, 1 Swan (Tenn.) 279. See also People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84.

30. Rutherford *v.* Com., 13 Bush (Ky.) 608; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; Reddick *v.* State, (Tex. Cr. App. 1898) 47 S. W. 993; National Masonic Acc. Assoc. *v.* Shryock, 73 Fed. 774, 20 C. C. A. 3. See also Atchison, etc., R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314.

31. Ray *v.* State, (Tex. Cr. App. 1896) 36 S. W. 446. See also McCowen *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 46. But see Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

32. "The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the

statement is such as to raise an inference that the effect of an occurrence continues, for example, if he is suffering severe pain,[33] or is under intense excitement,[34] the statement will, other conditions existing, be deemed spontaneous.

(3) NATURE OF STATEMENT. Light may be thrown on the issue of spontaneity by the form of the statement itself. Intrinsic marks of premeditation may appear in a long, coherent, closely connected story,[35] which would be entirely lacking in brief, explosive, incoherent exclamations characteristic of spontaneity. Circumstances in any particular case may indicate the same premeditation; as where a declarant, before speaking, inquires how the bystanders will testify.[36] For like reasons a statement has been rejected when elicited by a question,[37] or when

occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration." Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, per Walker, J. The first utterances of one who by protracted efforts at relief has been enabled to articulate may be competent after a considerable interval. Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

33. *Delaware.*— Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

Georgia.— Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Kentucky.— Louisville, etc., R. Co. *v.* Shaw, 53 S. W. 1048, 21 Ky. L. Rep. 1041.

Michigan.— Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

New York.— Scheir *v.* Quirin, 177 N. Y. 568, 69 N. E. 1130 [*affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956].

Pennsylvania.— Elkins *v.* McKean, 79 Pa. St. 493.

South Carolina.— Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810. See also Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Texas.—International, etc., R. Co. *v.* Smith, (Sup. 1890) 14 S. W. 642. See also Ft. Worth, etc., R. Co. *v.* Partin, (Civ. App. 1903) 76 S. W. 236, statement made immediately upon regaining consciousness after an injury.

A passenger, alighting from a train on a dark night, having fallen into a pile of wood, his statement that the conductor made him get off where he fell, made within fifteen minutes, while he was still uttering groans and exclamations of pain, was held admissible as *res gestæ*. International, etc., R. Co. *v.* Smith, (Tex. Sup. 1890) 14 S. W. 642.

34. International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Pool *v.* State, (Tex. Cr. App. 1893) 23 S. W. 891; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297; North American Acc. Assoc. *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392.

Mere continuance of excitement is not sufficient, in the absence of other facts, such as shortness of time. Brown *v.* State, (Tex. Cr. App. 1898) 44 S. W. 174.

Cool demeanor is naturally a circumstance of suspicion (Brown *v.* State, (Tex. Cr. App. 1898) 44 S. W. 174); as where the making of a statement is delayed until witnesses can be procured (Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878), or another and different statement has already been given of the same transaction (Fitzgerald *v.* Com., 6 S. W. 152, 9 Ky. L. Rep. 664), or there is a conscious absence of all danger (People *v.* Dewey, 2 Ida. (Hasb.) 79, 6 Pac. 103; Kraner *v.* State, 61 Miss. 158; Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118).

The effect of an occurrence on spectators is naturally less than upon the principal; and declarations by a bystander, however competent to show the effect itself (see *supra*, VIII, B, 7) have been rejected as evidence of the facts asserted, although made immediately after the occurrence. Marsh *v.* South Carolina R. Co., 56 Ga. 274; Baltimore *v.* Lobe, 90 Md. 310, 45 Atl. 192; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99; Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300. In this connection, as in most others, no single consideration is conclusive for or against admissibility, and the declaration of a spectator when deemed to have been under the circumstances spontaneous has been received. New York, etc., Co. *v.* Rogers, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; Coll *v.* Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89; Missouri, etc., R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157, 6 S. W. 631; Linderberg *v.* Crescent Min. Co., 9 Utah 163, 33 Pac. 692.

35. Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125, 66 N. E. 433; State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194. See also Potter *v.* Cave, 123 Iowa 98, 98 N. W. 569; Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878; Pledger *v.* Chicago, etc., R. Co., (Nebr. 1903) 95 N. W. 1057.

36. Jackson *v.* Com., 37 S. W. 847, 18 Ky. L. Rep. 670. See also Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878.

37. *Alabama.*— Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

Arkansas.— Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106.

California.— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

Illinois.— Chicago West Div. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St.

made in a whisper,[38] or contained in a letter.[39] So a statement against the apparent interest of the declarant would readily be received,[40] while a self-serving declaration,[41] or one on behalf of a fellow conspirator,[42] would be carefully scrutinized.

(4) Influence of Intervening Occurrences. A consideration of prime importance, even in case of occurrences calculated to exert a controlling and, within the period under consideration, permanent effect on the mind of the declarant, is the presence or absence of intervening sensations presented to his mind which may divert it from the influence of the past occurrence and so assist in restoring the mental balance and the use of the temporarily dormant faculty of self-interested thought.[43] A condition of severe bodily injury, unmitigated by medical or other attendance,[44] makes it probable that a statement, made while this

Rep. 144; Elguth *v.* Grueszka, 57 Ill. App. 193.

Iowa.— State *v.* Deuble, 74 Iowa 509, 38 N. W. 383.

Kansas.— Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878.

Massachusetts.— Leistritz *v.* American Zylonite Co., 154 Mass. 382, 28 N. E. 294.

Mississippi.— Meek *v.* Perry, 36 Miss. 190.

Missouri.—State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194; Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; State *v.* Dominique, 30 Mo. 585; Parsons *v.* Yeager Mill Co., 7 Mo. App. 594.

New York.— Lahey *v.* Ottmann, 73 Hun 61, 25 N. Y. Suppl. 897.

Ohio.—Atkinson *v.* Bond Hill, 2 Ohio S. & C. Pl. Dec. 48, 1 Ohio N. P. 166.

Tennessee.— Denton *v.* State, 1 Swan 279.

See 14 Cent. Dig. tit. "Criminal Law," § 819; 20 Cent. Dig. tit. "Evidence," § 375.

Contra.— The weight of authority, however, is that the declaration may still be competent.

Alabama.— Starks *v.* State, 137 Ala. 9, 34 So. 687.

Colorado.— Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

District of Columbia.— Washington, etc., R. Co. *v.* McLane, 11 App. Cas. 220.

Georgia.— Kirk *v.* State, 73 Ga. 620.

Iowa.— Sutcliffe *v.* Iowa State Traveling Men's Assoc., 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298; Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995.

Kentucky.— Louisville, etc., R. Co. *v.* Shaw, 53 S. W. 1048, 21 Ky. L. Rep. 1041.

Maine.— State *v.* Wagner, 61 Me. 178.

Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri.— State *v.* Martin, 124 Mo. 514, 28 S. W. 12.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

South Carolina.— State *v.* Arnold, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867.

Texas.— Berry *v.* State, 44 Tex. Cr. 395, 72 S. W. 170; Houston, etc., R. Co. *v.* Loeffler, (Civ. App. 1899) 51 S. W. 536.

West Virginia.— Crookham *v.* State, 5 W. Va. 510.

United States.— Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 10 L. ed. 437.

See 14 Cent. Dig. tit. "Criminal Law," § 819; 20 Cent. Dig. tit. "Evidence," § 375.

38. Futch *v.* State, 90 Ga. 472, 16 S. E. 102. *Contra*, Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

39. Small *v.* Gilman, 48 Me. 506.

40. O'Shields *v.* State, 55 Ga. 696; State *v.* Estoup, 39 La. Ann. 219, 1 So. 448; Sullivan *v.* State, 58 Nebr. 796, 79 N. W. 721.

41. Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592; U. S. *v.* King, 34 Fed. 302. See also Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878; Pledger *v.* Chicago, etc., R. Co., (Nebr. 1903) 95 N. W. 1057.

42. Draper *v.* State, 22 Tex. 400; Martin *v.* State, 44 Tex. Cr. 279, 70 S. W. 973; Wright *v.* State, 10 Tex. App. 476; Pharr *v.* State, 10 Tex. App. 485.

43. It must affirmatively appear that the spell of the occurrence upon the mind of the declarant has not been broken by the intervention of other occurrences. Ford *v.* State, 40 Tex. Cr. 280, 50 S. W. 350. See also Pledger *v.* Chicago, etc., R. Co., (Nebr. 1903) 95 N. W. 1057.

Occurrences not known to the declarant are immaterial. Thus the first exclamations of returning consciousness are spontaneous, even after a considerable interval. Johnson *v.* State, 65 Ga. 94; Missouri, etc., R. Co. *v.* Moore, 24 Tex. Civ. App. 489, 59 S. W. 282; State *v.* Ripley, 32 Wash. 182, 72 Pac. 1036. But a relapse into unconsciousness after an interval following the injury does not render competent statements made on again returning to consciousness. State *v.* Curtis, 70 Mo. 594.

44. *Alabama.*— Starks *v.* State, 137 Ala. 9, 34 So. 687.

Arkansas.— Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230.

California.— Heckle *v.* Southern Pac. R. Co., 123 Cal. 441, 56 Pac. 56.

Colorado.— Union Casualty, etc., Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

Delaware.— Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

Illinois.— Springfield Consol. R. Co. *v.* Welch, 155 Ill. 511, 40 N. E. 1034; Quincy Horse R., etc., Co. *v.* Gnuse, 137 Ill. 264, 27 N. E. 190; East St. Louis Connecting R. Co. *v.* Allen, 54 Ill. App. 27.

Indiana.— Ohio, etc., R. Co. *v.* Stein, 133

condition continues, is spontaneous, even if made during the effort to secure such help.[45] On the other hand the incidents of relief and distraction arising from the receipt of medical assistance,[46] from attention to other matters,[47] going from the scene of the transaction,[48] and the like, tend to show that a period of deliberation

Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733.

Maine.— State *v.* Wagner, 61 Me. 178.

Michigan.— Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

Missouri.—State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136; State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182; State *v.* Martin, 124 Mo. 514, 28 S. W. 12; Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; Harriman *v.* Stowe, 57 Mo. 93.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495.

New York.— Scheir *v.* Quirin, 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956; Patterson *v.* Hochster, 38 N. Y. App. Div. 398, 56 N. Y. Suppl. 467; Waldele *v.* New York Cent., etc., R. Co., 29 Hun 35.

Rhode Island.— State *v.* Epstein, 25 R. I. 131, 55 Atl. 204.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Moore *v.* State, 31 Tex. Cr. 234, 20 S. W. 563; Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217. See also Missouri, etc., R. Co. *v.* Criswell, (Civ. App. 1904) 78 S. W. 388.

Utah.— Sullivan *v.* Salt Lake City, 13 Utah 122, 44 Pac. 1039.

Wisconsin.— Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

United States.—Chicago Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 19 L. ed. 437.

England.— Rex *v.* Foster, 6 C. & P. 325, 25 E. C. L. 455.

See 14 Cent. Dig. tit. "Criminal Law," § 819; 20 Cent. Dig. tit. "Evidence," § 375.

45. Scheir *v.* Quirin, 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956. After a considerable interval an inference of meditation may arise. State *v.* Frazier, Houst. Cr. Cas. (Del.) 176, twenty-five to thirty minutes.

46. State *v.* Deuble, 74 Iowa 509, 38 N. W. 383; Mutcha *v.* Pierce, 49 Wis. 231, 5 N. W. 386, 35 Am. Rep. 776. See also International, etc., R. Co. *v.* Boykin, (Tex. Civ. App. 1903) 74 S. W. 93.

47. Fitzgerald *v.* Com., 6 S. W. 152, 9 Ky. L. Rep. 664 (making a prior statement of same occurrences); People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84 (seeking a physician); Dodson *v.* State, 44 Tex. Cr. 200, 70 S. W. 969; Cockerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421 (hiding from arrest); Jackson *v.* State, (Tex. Cr. App. 1894) 24 S. W. 896; Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592.

48. *Arkansas.*— Blair *v.* State, 69 Ark. 558, 64 S. W. 948; Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106.

California.— Boone *v.* Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

Colorado.— Herren *v.* People, 28 Colo. 23, 62 Pac. 833.

Delaware.— State *v.* Seymour, Houst. Cr. Cas. 508; State *v.* Frazier, Houst. Cr. Cas. 176.

District of Columbia.—Washington, etc., R. Co. *v.* McLane, 11 App. Cas. 220; U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16; Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976; Augusta, etc., R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674; Ratteree *v.* State, 53 Ga. 570; Hall *v.* State, 48 Ga. 607. *Compare* Mitchum *v.* State, 11 Ga. 615.

Illinois.— Gardner *v.* People, 4 Ill. 83; Ohio, etc., R. Co. *v.* Cullison, 40 Ill. App. 67; Chicago, etc., R. Co. *v.* Howard, 6 Ill. App. 569.

Indiana.— Shoecraft *v.* State, 137 Ind. 433, 36 N. E. 1113; Pittsburgh, etc., R. Co. *v.* Wright, 80 Ind. 182; Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723. See also Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188.

Iowa.— Armil *v.* Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42.

Louisiana.— State *v.* Estoup, 39 La. Ann. 219, 1 So. 448 (seventy yards); State *v.* Johnson, 35 La. Ann. 968.

Michigan.— Merkle *v.* Bennington Tp., 58 Mich. 156, 24 S. W. 776, 55 Am. Rep. 666.

Missouri.— Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; State *v.* Rider, 95 Mo. 474, 8 S. W. 723; State *v.* Rider, 90 Mo. 54, 1 S. W. 825 (two hundred yards); State *v.* Curtis, 70 Mo. 594 (one hundred yards).

Nebraska.— See Davidson *v.* Davidson, 2 Nebr. (Unoff.) 90, 96 N. W. 409.

New York.— Martin *v.* New York, etc., R. Co., 103 N. Y. 626, 9 N. E. 505; Lahey *v.* Ottmann, 73 Hun 61, 25 N. Y. Suppl. 897. But see Scheir *v.* Quirin, 177 N. Y. 568, 69 N. E. 1130 [*affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956].

Oregon.— State *v.* McCann, 43 Oreg. 155, 72 Pac. 137; State *v.* Smith, 43 Oreg. 109, 71 Pac. 973.

Pennsylvania.— Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701.

Texas.— Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971; Cockerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421; Crow *v.* State, (Cr. App. 1893) 21 S. W. 543; Lynch *v.* State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888. See also Missouri, etc., R. Co. *v.* Tarwater, (Civ. App. 1903) 75 S. W. 937. But *compare* Craig *v.* State, 30 Tex. App. 619, 18 S. W. 797.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49, three or four miles.

may have been reached. The fact that a witness has had an opportunity to think the situation over affords ground for an inference that the declarant has done the same.[49]

3. Narrative Excluded — a. General Rule. Narrative of a past transaction, civil, as in the case of an injury for which it is sought to recover damages,[50] or

Vermont.— State *v.* Carlton, 48 Vt. 636.

Virginia.— Jones *v.* Com., 86 Va. 740, 10 S. E. 1004.

United States.— Atchison, etc., R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314.

See 14 Cent. Dig. tit. "Criminal Law," § 819; 20 Cent. Dig. tit. "Evidence," § 375.

Running away from an assailant is not deemed a distracting circumstance, under this rule. Berry *v.* State, 44 Tex. Cr. 395, 72 S. W. 170; Bejarano *v.* State, 6 Tex. App. 265. But a statement made "immediately after" the running had ceased is hearsay. People *v.* Ah Lee, 60 Cal. 85; Mayes *v.* State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 58. Under the definition of *res gestæ* given by Cockburn, C. J. (Am. L. Rev. 822; quoted *supra*, IX, E, 2, a, (II)) it would probably be immaterial whether the assailant were actually pursuing or not, if the fleeing person understood that he was doing so.

The test of admissibility is not removal, but the inference of the recovery of mental balance through the distracting influence of new sensations. Carrying an unconscious or intensely suffering person to another locality would not give rise to the natural inference of lack of spontaneity. State *v.* Martin, 124 Mo. 514, 28 S. W. 12. Nor would his own instinctive effort to seek assistance necessarily have that effect. Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747.

49. Wright *v.* State, 88 Md. 705, 41 Atl. 1060.

50. *Alabama.*— Louisville *v.* Pearson, 97 Ala. 211, 12 So. 176; Tamplin *v.* Still, 77 Ala. 374; Humes *v.* O'Bryan, 74 Ala. 64. See also Moore *v.* Nashville, etc., R. Co., 137 Ala. 495, 34 So. 617.

Arkansas.— Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

California.— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35; Boone *v.* Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

Connecticut.—Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778.

Georgia.— Poole *v.* East Tennessee, etc., R. Co., 92 Ga. 337, 17 S. E. 267; Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158; East Tennessee, etc., R. *v.* Maloy, 77 Ga. 237, 2 S. E. 941.

Illinois.—Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95; Elguth *v.* Grueszka, 57 Ill. App. 193; Chicago, etc., R. Co. *v.* Johnson, 36 Ill. App. 564; Chicago, etc., R. Co. *v.* Howard, 6 Ill. App. 569.

Indiana.— Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188.

Iowa.— Hall *v.* Cedar Rapids, etc., R. Co., 115 Iowa 18, 87 N. W. 739.

Kansas.—Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878; Stark *v.* Cummings, 5 Kan. 85.

Kentucky.— Early *v.* Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807; New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438; Standard L. Ins. Co. *v.* Holloway, 72 S. W. 796, 24 Ky. L. Rep. 1056.

Louisiana.— Marler *v.* Texas, etc., R. Co., 52 La. Ann. 727, 27 So. 176.

Maryland.— Handy *v.* Johnson, 5 Md. 450. See also Johnson *v.* Johnson, 96 Md. 144, 53 Atl. 792.

Massachusetts.— McKinnon *v.* Norcross, 148 Mass. 533, 20 S. E. 183, 3 L. R. A. 320; Johnson *v.* Sherwin, 3 Gray 374; Lund *v.* Tyngsborough, 9 Cush. 36.

Michigan.— Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404; Mabley *v.* Kittleberger, 37 Mich. 360.

Mississippi.— Mayes *v.* State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 58.

Missouri.— State *v.* Beard, 126 Mo. 548, 29 S. W. 592; State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; State *v.* Ware, 62 Mo. 597. See also Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637; Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125.

Nebraska.— Clancy *v.* Barker, (1904) 98 N. W. 440; Davidson *v.* Davidson, 2 Nebr. (Unoff.) 90, 96 N. W. 409; Pledger *v.* Chicago, etc., R. Co., (1903) 95 N. W. 1057.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Banfield *v.* Parker, 36 N. H. 353.

New York.— Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; Kays *v.* Eugert, 8 N. Y. St. 505. See also Union Trust Co. *v.* Leighton, 83 N. Y. App. Div. 568, 82 N. Y. Suppl. 7.

North Carolina.— Butler *v.* South Carolina, etc., R. Co., 130 N. C. 15, 40 S. E. 770. See also Lyman *v.* Southern R. Co., 132 N. C. 721, 44 S. E. 550; Bumgardner *v.* Southern R. Co., 132 N. C. 438, 43 S. E. 948.

North Dakota.— Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305.

Oregon.— Johnston *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 94, 31 Pac. 283.

Pennsylvania.— Bradford *v.* Downs, 126 Pa. St. 622, 17 Atl. 884. See also Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

South Carolina.— Petrie *v.* Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837.

South Dakota.— Fallon *v.* Rapid City, (1904) 97 N. W. 1009.

Tennessee.— Parkey *v.* Yeary, 1 Heisk. 157; Williams *v.* Bowden, 1 Swan 282.

criminal,[51] is rejected as hearsay, although the transaction be recent;[52] for the credibility of such a statement rests, in the average instance, upon the trustworthiness of the declarant and lacks the sanction for truth required in the

Texas.— Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884; Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222, 7 S. W. 709; St. Louis, etc., R. Co. *v.* Gill, (Civ. App. 1900) 55 S. W. 386; Ward *v.* Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125; Huth *v.* Huth, 10 Tex. Civ. App. 184, 30 S. W. 240. See also Missouri, etc., R. Co. *v.* Criswell, (Civ. App. 1904) 78 S. W. 388; Missouri, etc., R. Co. *v.* Tarwater, (Civ. App. 1903) 75 S. W. 937; International, etc., R. Co. *v.* Boykin, (Civ. App. 1903) 74 S. W. 93; McCowen *v.* Gulf, etc., R. Co., (Civ. App. 1903) 73 S. W. 46. But see St. Louis, etc., R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010.

Utah.— Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432.

Vermont.— Richards *v.* Moore, 62 Vt. 217, 19 Atl. 390; Ross *v.* White, 60 Vt. 558, 15 Atl. 184.

Wisconsin.— Schillinger *v.* Verona, 88 Wis. 317, 60 N. W. 272; Felt *v.* Amidon, 43 Wis. 467.

United States.—Fidelity, etc., Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379. See also Atchison, etc., R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314.

See 20 Cent. Dig. tit. "Evidence," § 297 *et seq.*

"The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair. In the one case it is competent, in the other it is not." Chicago West. Div. R. Co. *v.* Becker, 128 Ill. 545, 548, 21 N. E. 524, 15 Am. St. Rep. 144.

Agency.— Narrative statements of a fellow conspirator (Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882) or of a municipal agent (Dixon *v.* Liberty Tp. Sub-Dist. No. 5, 3 Ohio Cir. Ct. 517, 2 Ohio Cir. Dec. 298; Circleville *v.* Throne, 1 Ohio Cir. Ct. 359, 1 Ohio Cir. Dec. 200) are within the rule.

Field-notes made subsequent to a survey are not admissible as part of the *res gestæ*. Cable *v.* Jackson, 16 Tex. Civ. App. 579, 42 S. W. 136.

51. *Alabama.*— Griffith *v.* State, 90 Ala. 583, 8 So. 812.

California.— People *v.* Wasson, 65 Cal. 538, 4 Pac. 555.

Colorado.— Herren *v.* People, 28 Colo. 23, 62 Pac. 833.

Florida.— Lambright *v.* State, 34 Fla. 564, 16 So. 582, twelve hours.

Georgia.— Williams *v.* State, 108 Ga. 748, 32 S. E. 660; Green *v.* State, 74 Ga. 373; Hall *v.* State, 48 Ga. 607.

Indiana.— Hall *v.* State, 132 Ind. 317, 31 N. E. 536; Doles *v.* State, 97 Ind. 555; Janes *v.* State, 71 Ind. 66; Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.

Louisiana.— State *v.* Oliver, 39 La. Ann. 470, 2 So. 194; State *v.* Rutledge, 37 La. Ann. 378.

Maine.— State *v.* Maddox, 92 Me. 348, 42 Atl. 788.

Maryland.— Hays *v.* State, 40 Md. 633.

Minnesota.— State *v.* Gallehugh, 89 Minn. 212, 94 N. W. 723.

Mississippi.— Loyd *v.* State, 70 Miss. 251, 11 So. 689; King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. Rep. 681.

Missouri.—State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194; State *v.* Norton, 121 Mo. 537, 26 S. W. 551; State *v.* Raven, 115 Mo. 419, 22 S. W. 376; State *v.* Curtis, 70 Mo. 594; State *v.* Brown, 64 Mo. 367; State *v.* Dominique, 30 Mo. 585.

Montana.— State *v.* Pugh, 16 Mont. 343, 40 Pac. 861.

Nebraska.— Collins *v.* State, 46 Nebr. 37, 64 N. W. 432.

New Jersey.— Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

New York.— Maine *v.* People, 9 Hun 113.

Ohio.— Forrest *v.* State, 21 Ohio St. 641.

Oregon.— State *v.* Smith, 43 Oreg. 109, 71 Pac. 973.

South Carolina.— State *v.* Green, 48 S. C. 136, 26 S. E. 234; State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Texas.—Beckman *v.* State, (Cr. App. 1902) 69 S. W. 534; Poyner *v.* State, 40 Tex. Cr. 640, 51 S. W. 376; Jones *v.* State, 22 Tex. App. 324, 3 S. W. 230.

Vermont.— State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312.

West Virginia.— Crookham *v.* State, 5 W. Va. 510.

United States.— U. S. *v.* Angell, 11 Fed. 34.

See 14 Cent. Dig. tit. "Criminal Law," § 819 *et seq.*

In a prosecution for incest, the statement of the prosecutrix to her father, soon after giving birth to a child, that accused was its father, is inadmissible as part of the *res gestæ*, either of the unlawful intercourse or of the birth itself. Poyner *v.* State, 40 Tex. Cr. 640, 51 S. W. 376.

52. *Alabama.*— Dean *v.* State, 105 Ala. 21, 17 So. 28; Kennedy *v.* State, 85 Ala. 326, 5 So. 300.

Georgia.— Fink *v.* Ash, 99 Ga. 106, 24 S. E. 976.

Indiana.— Parker *v.* State, 136 Ind. 284, 35 N. E. 1105.

Louisiana.— State *v.* Ramsay, 48 La. Ann. 1407, 20 So. 904.

Maryland.— Baltimore *v.* Lobe, 90 Md. 310, 45 Atl. 192.

Massachusetts.— Com. *v.* James, 99 Mass. 438.

Michigan.— Edwards *v.* Foote, 129 Mich.

case of declarations part of a fact in the *res gestæ*.[53] Consequently, whether spontaneity be adopted as the sole test of admissibility or not, it is clearly within the mischief against which the hearsay rule was intended to provide. A "suspicion of after thought" prevents the use of a narrative as part of the *res gestæ*.[54]

b. Admissions — (1) *In General.* The relevant statement of a party, being competent by the rules of procedure,[55] is not within the hearsay rule and by consequence is competent as an admission in either a civil[56] or a criminal[57] case; although the statement, not being spontaneous and relating to a past transaction, would, if offered in the declarant's favor or for a third person, be rejected as narrative. The rule is the same as to so-called "admissions by conduct"; that is, in case of statements made in the presence and hearing of a party, coupled with evidence of silence or other relevant conduct on his part.[58] Such statements

121, 88 N. W. 404; People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84.

New York.— People *v.* Davis, 56 N. Y. 95; Smith *v.* Webb, 1 Barb. 230.

North Carolina.— Simon *v.* Manning, 99 N. C. 327, 6 S. E. 101.

Ohio.— Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185; Donald *v.* State, 21 Ohio Cir. Ct. 124, 11 Ohio Cir. Dec. 483.

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Pennsylvania.— Klein *v.* Commercial Nat. Bank, 44 Leg. Int. 144.

Texas.— McCulloch *v.* State, 35 Tex. Cr. 268, 33 S. W. 230.

Vermont.— Downer *v.* Strafford, 47 Vt. 579.

See 14 Cent. Dig. tit. "Criminal Law," § 297 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 819 *et seq.*

Stating name of alleged criminal.— On trial of an indictment for murder, a witness for the commonwealth testified that she had seen the two defendants come from a room where the dead body was found, under such circumstances as tended to show that they were guilty of the crime. It was held that the commonwealth could not show by other witnesses that immediately, and while giving the alarm, she gave the names of the two persons. Com. *v.* James, 99 Mass. 438.

Although a statement be narrative in form, yet if it amount to a declaration of the present existence of a relevant fact, it may be competent as part of the *res gestæ*. Lovett *v.* State, 80 Ga. 255, 4 S. E. 912; Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Edwards *v.* Edwards, 39 Pa. St. 369.

53. See *supra*, IX, E, 1.

Written narratives.— A narrative gains nothing in relevancy because made in writing. Henkel *v.* Trubee, (Conn. 1887) 11 Atl. 722; Wilson *v.* Sherlock, 36 Me. 295.

54. People *v.* Dici, 120 Cal. 189, 52 Pac. 477; Thornton *v.* State, 107 Ga. 683, 33 S. E. 673; Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257, 268, 10 S. E. 200, 14 Am. St. Rep. 158 ("if subject to suspicion at all [the declarations] . . . were not admissible, although in the particular case the suspicion might be erroneous"); Hoover *v.* Cary, 86 Iowa 494, 53 N. W. 415; Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592.

55. See *supra*, IV, A.

56. *California.*— Gulzoni *v.* Tyler, 64 Cal. 334, 30 Pac. 981.

Colorado.— Lord *v.* Pueblo Smelting, etc., Co., 12 Colo. 390, 21 Pac. 148.

Iowa.— Lindsay *v.* Carpenter, 90 Iowa 529, 58 N. W. 900; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518.

Kansas.— Walker *v.* Brantner, 59 Kan. 117, 52 Pac. 80, 68 Am. St. Rep. 344.

Louisiana.— Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431.

Michigan.— Tyler *v.* Nelson, 109 Mich. 37, 66 N. W. 671.

Mississippi.— Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283.

New York.— Barrett *v.* New York Cent., etc., R. Co., 157 N. Y. 663, 52 N. E. 659; Thomas *v.* Beebe, 25 N. Y. 244.

Pennsylvania.— Ellison *v.* Namer, 1 Phila. 205.

Vermont.— Lewis *v.* Barker, 55 Vt. 21.

Such an admission is not conclusive in the absence of facts raising an estoppel. Cooper *v.* Central R. Co., 44 Iowa 134; Zemp *v.* Wilmington, etc., R. Co., 9 Rich. (S. C.) 84, 64 Am. Dec. 763.

57. People *v.* Simonds, 19 Cal. 275; State *v.* Davis, 104 Tenn. 501, 58 S. W. 122; McGee *v.* State, 31 Tex. Cr. 71, 19 S. W. 764; Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761. Evidence of defendant's declarations during flight is admissible as a part of the *res gestæ*, and they cannot be excluded merely because they are prejudicial to him. Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

58. *Georgia.*— Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523.

Indiana.— Surber *v.* State, 99 Ind. 71.

Louisiana.— Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431.

Michigan.— People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Missouri.— State *v.* Ragsdale, 59 Mo. App. 590.

Pennsylvania.— O'Mara *v.* Com., 75 Pa. St. 424.

Texas.— Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823.

Virginia.— Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

Canada.— Reg. *v.* Drain, 8 Manitoba L. Rep. 535.

See also *supra*, IV, B, 6, 7.

when admitted are spoken of as "part of the *res gestæ*," [59] although this is evidently a misapplication of the phrase. Conversely a narrative statement is said not to be part of the *res gestæ*, when the real ground of decision is that it is not competent as an admission; [60] as where a plaintiff, suing in his own right, is not affected by the statements of the person for whose death or injury [61] the action is brought.

(II) *AGENTS.* Spontaneous declarations of an agent,[62] or such declarations as are properly part of a fact in the *res gestæ*, present no peculiarity in the law of evidence. The representative nature of the declarant's position does not affect the admissibility of his statements. These have the same probative value, for or against his principal, as those of any other observer with equal knowledge and the same interest would have. In dealing, however, with narrative statements by agents, a double ambiguity in the use of the phrase "*res gestæ*" demands notice. (1) As the relevant statements of an agent, within the scope of his employment and while *bona fide* engaged in carrying it out, affect the principal,[63] his narrative [64] statements are competent as admissions of the principal and when admitted these

59. See *supra*, VIII, A, 2.

60. Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687; Fitzgerald *v.* Weston, 52 Wis. 354, 9 N. W. 13. Thus, where the evidence showed that there were two people in the wagon at the time of its collision with a street car testimony by the motorman that "they said they did not blame" him was held incompetent when offered as a part of the *res gestæ*, and it was not shown that the plaintiff spoke the words. City R. Co. *v.* Wiggins, (Tex. Civ. App. 1899) 52 S. W. 577.

61. Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371.

62. *California.*— Durkee *v.* Central Pac. R. Co., (1885) 9 Pac. 99.

Colorado.— Trumbull *v.* Donahue, 18 Colo. App. 460, 72 Pac. 684.

Indiana.— Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520.

Iowa.—Alsever *v.* Minneapolis, etc., R. Co., 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748.

Kentucky.— McLeod *v.* Ginther, 80 Ky. 399, 4 Ky. L. Rep. 276.

Michigan.— Ensley *v.* Detroit United R. Co., (1903) 96 N. W. 34.

Minnesota.— O'Connor *v.* Chicago, etc., R. Co., 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288.

Nebraska.— Union Pac. R. Co. *v.* Elliott, 54 Nebr. 299, 74 N. W. 627.

North Dakota.— Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 315.

Texas.— Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; Gulf, etc., R. Co. *v.* Milner, 28 Tex. Civ. App. 86, 66 S. W. 574.

Washington.— Lambert *v.* La Conner Trading, etc., Co., 30 Wash. 346, 70 Pac. 960; Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

Wisconsin.— Hermes *v.* Chicago, etc., R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69; Bass *v.* Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437. See also Hupfer *v.* Nat. Distilling Co., 119 Wis. 417, 96 N. W. 809.

United States.— Kansas City Southern R. Co. *v.* Moles, 121 Fed. 351, 58 C. C. A. 29.

See 20 Cent. Dig. tit. "Evidence," § 908 *et seq.*

63. See *supra*, IV, D, 4.

64. *Colorado.*— New York, etc., Min. Syndicate, etc. *v.* Rogers, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72, letters.

Georgia.— Columbus, etc., R. Co. *v.* Kennedy, 78 Ga. 646, 3 S. E. 267.

Iowa.— Mosgrove *v.* Zimbleman Coal Co., 110 Iowa 169, 81 N. W. 227.

Kansas.— Western Union Tel. Co. *v.* Getto-McClung Boot, etc., Co., 9 Kan. App. 863, 61 Pac. 504.

Kentucky.— Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866, 15 Ky. L. Rep. 17.

Massachusetts.— Ingledew *v.* Northern R. Co., 7 Gray 86.

Michigan.— Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390, 33 N. W. 867.

Mississippi.— Yazoo, etc., R. Co. *v.* Jones, 73 Miss. 229, 19 So. 91; Illinois Cent. R. Co. *v.* Tronstine, 64 Miss. 834, 2 So. 255.

Nebraska.— Homan *v.* Boyce, 15 Nebr. 545, 19 N. W. 590.

Pennsylvania.— Union R., etc., Co. *v.* Riegel, 73 Pa. St. 72.

Texas.— International, etc., R. Co. *v.* Bryant, (Civ. App. 1899) 54 S. W. 364.

Washington.— Lambert *v.* La Conner Trading, etc., Co., 30 Wash. 346, 70 Pac. 960; Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

Wisconsin.— Robinson *v.* Superior Rapid-Transit R. Co., 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897, 34 L. R. A. 205.

United States.— Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492; Wabash Western R. Co. *v.* Brow, 65 Fed. 941, 13 C. C. A. 222.

See 20 Cent. Dig. tit. "Evidence," § 908 *et seq.*

Facts relating to accident.— In an action against a railroad company for injuries to a person on a crossing, caused by his attempt

are said, for the reasons hereinbefore stated,[65] to be part of the *res gestæ*. (2) The business of the principal, in doing which alone can the agent's statements, narrative or otherwise, affect the former, is also spoken of as "*res gestæ*." It follows that since as a rule the duties of an agent call upon him to do something rather than talk about it after it is done, it frequently happens that an agent's narrative declaration is rejected as "not part of the *res gestæ*,"[66] when the actual ground of rejection is that the declaration was not made in the line of the agent's duty to the principal; and so is not to be received as his admission. This line of ambiguous thought occurs with special frequency in cases of actions against railroad companies,[67] for example, to recover damages for personal or other injuries

to evade an approaching train, the engineer's statements shortly after the accident that he would have killed such person had he not applied the air is admissible as part of the *res gestæ*. International, etc., R. Co. *v.* Bryant, (Tex. Civ. App. 1899) 54 S. W. 364.

65. See *supra*, IX, E, 3, b, (I).

66. *California.*— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Boone *v.* Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

Connecticut.—Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778.

Georgia.— Weinkle *v.* Brunswick, etc., R. Co., 107 Ga. 367, 33 S. E. 471.

Illinois.— Druecker *v.* Sandusky Portland Cement Co., 93 Ill. App. 406.

Indiana.— Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

Kentucky.— Early *v.* Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807.

Maryland.— Franklin Bank *v.* Pennsylvania, etc., Steam Nav. Co., 11 Gill & J. 28, 33 Am. Dec. 687.

Massachusetts.— Lane *v.* Bryant, 9 Gray 245, 69 Am. Dec. 282.

Missouri.—Aldridge *v.* Midland Blast Furnace Co., 78 Mo. 559. See also Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637; Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125; Helm *v.* Missouri Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148.

Nebraska.— Clancy *v.* Barker, (1904) 98 N. W. 440.

New York.— Sherman *v.* Delaware, etc., R. Co., 106 N. Y. 542, 13 N. E. 616; Green *v.* New York Cent. R. Co., 4 Daly 553, 12 Abb. Pr. N. S. 473.

North Dakota.— Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305.

Pennsylvania.— Briggs *v.* East Broad Top R., etc., Co., 206 Pa. St. 564, 56 Atl. 36.

South Carolina.— Patterson *v.* South Carolina R. Co., 4 S. C. 153.

Texas.— Gulf, etc., R. Co. *v.* York, 74 Tex. 364, 12 S. W. 68.

United States.—Fidelity, etc., Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379. See also Marande *v.* Texas, etc., R. Co., 124 Fed. 42, 59 C. C. A. 562.

See 20 Cent. Dig. tit. "Evidence," § 910 *et seq.*

67. *Alabama.*— Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618; Alabama Great Southern R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403; Tanner *v.* Louisville, etc., R. Co., 60 Ala. 621.

Arkansas.—St. Louis, etc., R. Co. *v.* Kelley, 61 Ark. 52, 31 S. W. 884.

California.—Durkee *v.* Central Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562.

Colorado.— Trumbull *v.* Donahue, 18 Colo. App. 460, 72 Pac. 684.

Georgia.— Newsom *v.* Georgia R. Co., 66 Ga. 57; Central R., etc., Co. *v.* Kelly, 58 Ga. 107; Marsh *v.* South Carolina R. Co., 56 Ga. 274.

Iowa.— Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818; Norman *v.* Chicago, etc., R. Co., 110 Iowa 283, 81 N. W. 597.

Kentucky.— Hughes *v.* Louisville, etc., R. Co., 104 Ky. 774, 48 S. W. 671, 20 Ky. L. Rep. 1029; McLeod *v.* Ginther, 80 Ky. 399, 4 Ky. L. Rep. 276; Earley *v.* Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807; Chesapeake, etc., R. Co. *v.* Reeves, 11 S. W. 464, 11 Ky. L. Rep. 14; Kentucky Cent. R. Co. *v.* Fox, 10 Ky. L. Rep. 399.

Missouri.— Barker *v.* St. Louis, etc., R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843; Smith *v.* St. Louis, etc., R. Co., 91 Mo. 58, 3 S. W. 836; Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553, 41 Am. Rep. 333; Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154; Helm *v.* Missouri Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148; Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19.

North Carolina.— Willis *v.* Atlantic, etc., R. Co., 120 N. C. 508, 26 S. E. 784; Southerland *v.* Wilmington, etc., R. Co., 106 N. C. 100, 11 S. E. 189.

Pennsylvania.— Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. Rep. 895.

Texas.— Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; Houston, etc., R. Co. *v.* Norris, (Civ. App. 1897) 41 S. W. 708; Houston, etc., R. Co. *v.* Hicks, 2 Tex. Unrep. Cas. 437. See also Southern Kansas R. Co. *v.* Crump, (Civ. App. 1903) 74 S. W. 335.

Virginia.— Jamison *v.* Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813.

West Virginia.—Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

United States.— Vicksburg, etc., R. Co. *v.*

alleged to have been caused by their negligence, and similar or other actions against street railway companies,[68] and other corporations.[69]

X. CHARACTER AND REPUTATION.*

A. Definitions. "Character" and "reputation" are terms used at times interchangeably.[70] As used here, "character" denotes a particular collection of actual moral qualities or traits pertaining to and distinguishing from others an individual man or animal.[71] "Reputation" indicates that portion of reputation as a whole which consists of a current, popular impression as to the existence of such qualities in some relevant particular.[72] In other words reputation as to character is alone specifically treated in this connection.[73]

B. Evidence of Character — 1. Civil Cases — a. Rule Stated. That a person did or did not do a certain act because his character would predispose him to do or not to do it is an inference which, although sometimes logically probative,[74] the English law of evidence, with some exceptions,[75] absolutely rejects, in civil cases.[76]

O'Brien, 119 U. S. 99, 7 S. Ct. 118, 172, 30 L. ed. 299.

68. *Arkansas.*— Little Rock Traction, etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

California.— Boone *v.* Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

District of Columbia.—Metropolitan R. Co. *v.* Collins, 1 App. Cas. 383.

Maryland.— Dietrich *v.* Baltimore, etc., R. Co., 58 Md. 347.

Massachusetts.— Williamson *v.* Cambridge R. Co., 144 Mass. 148, 10 N. E. 790.

Missouri.— Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626. See also Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637; Gotwald *v.* St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125.

New Jersey.— Blackman *v.* West Jersey, etc., R. Co., 68 N. J. L. 1, 52 Atl. 370.

New York.— Hendricks *v.* Sixth Ave. R. Co., 44 N. Y. Super. Ct. 8.

Tennessee.— Citizens' St. R. Co. *v.* Howard, 102 Tenn. 474, 52 S. W. 864.

69. Lissak *v.* Crocker Estate Co., 119 Cal. 442, 51 Pac. 688; T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608; Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335; Leistritz *v.* American Zylonite Co., 154 Mass. 382, 28 N. E. 294; Agassiz *v.* London Tramway Co., 27 L. T. Rep. N. S. 492, 21 Wkly. Rep. 199.

70. Character and reputation are frequently confused, in a perplexing way. It is, for example, said by a tribunal of such high standing as the supreme judicial court of Massachusetts in Peterson *v.* Morgan, 116 Mass. 350, 352, that: "Proof of false rumors alone must of necessity be by hearsay evidence in its most objectionable form." Yet it seems clear that the evidence of rumor is hearsay so far as relates to proof of some trait of actual character. It may be competent in mitigation of damages as circumstantial evidence of impairment of reputation. See *infra*, X, B, 1, d. The reasons for this confusing of character and reputation are apparently two: (1) In defending under a plea of the truth of an alleged libel or slander the defendant may prove the actual existence of the trait of character charged. Matthews *v.* Huntley, 9 N. H. 146. See, generally, Libel and Slander. (2) The existence of a trait of character is properly proved by establishing the existence of a reputation regarding it. See *infra*, X, C, 1.

71. "The combination of properties, qualities, or peculiarities which distinguishes one person or thing, or one group of persons or things, from others; specifically, the sum of inherited and acquired ethical traits which give to a person his moral individuality." Century Dict. See also Character, 6 Cyc. 892.

72. See, generally, Reputation.

73. For some consideration of reputation in other connections see *supra*, IX, A, 5, a, (I).

74. Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436. See *infra*, X, B, 1, b. Being relevant, the evidence, when introduced without objection, is competent. Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545. But the mere fact that a party gives without objection evidence of good character does not authorize his opponent to give improper evidence on the same subject. Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

75. See the sections following. Where a defendant is improperly permitted to assail the character of plaintiff, there is no error in permitting the latter to sustain it by evidence of good character. Goldsmith *v.* Picard, 27 Ala. 142; Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

76. *Alabama.*— Lord *v.* Mobill, 113 Ala. 360, 21 So. 366; South, etc., R. Co. *v.* Chappell, 61 Ala. 527.

Arkansas.— Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. 228.

California.— Vance *v.* Richardson, 110 Cal. 414, 42 Pac. 909.

Connecticut.— Humphrey *v.* Humphrey, 7

* By Charles F. Chamberlayne. Revised and edited by Wm. Lawrence Clark.

b. Character in Issue. Only as constituting a basis for the inference of conduct is proof of character rejected.[77] Where the existence of a particular trait of character is relevant for any other purpose, no rule excludes evidence of it. Thus, it is competent where it is a fact in issue,[78] as chastity in an action for breach of promise of marriage,[79] indecent assault,[80] rape,[81] seduction,[82] and, in certain states

Conn. 116. See also Roberts *v.* Ellsworth, 11 Conn. 290; Woodruff *v.* Whittlesey, Kirby 60.

Georgia.— Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763.

Indiana.— Church *v.* Drummond, 7 Ind. 17. See also Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194; Gebhart *v.* Burkett, 57 Ind. 378, 26 Am. Rep. 61; Harrison *v.* Russell, Wils. 391.

Kansas.— Southern Kansas R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113. See also Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Kentucky.— Revill *v.* Pettit, 3 Metc. 314.

Maine.— Dunham *v.* Rackliff, 71 Me. 345; Soule *v.* Bruce, 67 Me. 584; Thayer *v.* Boyle, 30 Me. 475. See also Potter *v.* Webb, 6 Me. 14.

Maryland.— Brooke *v.* Berry, 2 Gill 83. See also Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545.

Massachusetts.— Lamagdelaine *v.* Tremblay, 162 Mass. 339, 39 N. E. 38; McCarty *v.* Leary, 118 Mass. 509; McDonald *v.* Savoy, 110 Mass. 49; Clement *v.* Kimball, 98 Mass. 535; Atwood *v.* Dearborn, 1 Allen 483, 79 Am. Dec. 755; Tenney *v.* Tuttle, 1 Allen 185; Heywood *v.* Reed, 4 Gray 574.

Michigan.— Wolf *v.* Troxell, 94 Mich. 573, 54 N. W. 383; Klein *v.* Bayer, 81 Mich. 233, 45 N. W. 991.

Mississippi.—Leinkauf *v.* Brinker, 62 Miss. 255, 52 Am. Rep. 183.

Missouri.— Dudley *v.* McCluer, 65 Mo. 241, 27 Am. Rep. 273; Gutzwiller *v.* Lackman, 23 Mo. 168; Boggs *v.* Lynch, 22 Mo. 563; Alkire Grocer Co. *v.* Tagart, 78 Mo. App. 166; Home Lumber Co. *v.* Hartman, 45 Mo. App. 647.

New Hampshire.— Dame *v.* Kenney, 25 N. H. 318. See also Boardman *v.* Woodman, 47 N. H. 120.

New York.— Houghtaling *v.* Kilderhouse, 1 N. Y. 530; Jacobs *v.* Duke, 1 E. D. Smith 271; Meyer v. Suburban Home Co., 25 Misc. 686, 55 N. Y. Suppl. 566; Rollins *v.* Griffin, 7 Misc. 232, 27 N. Y. Suppl. 269; Gough *v.* St. John, 16 Wend. 646 [*overruling* Ruan *v.* Perry, 3 Cai. 120]; Fowler *v.* Ætna F. Ins. Co., 6 Cow. 673, 16 Am. Dec. 460. See also New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503, 7 Abb. N. Cas. 334; Senecal *v.* Thousand Island Steamboat Co., 79 Hun 574, 29 N. Y. Suppl. 884.

North Carolina.— Butler *v.* South Carolina, etc., R. Co., 130 N. C. 15, 40 S. E. 770; Marcom *v.* Adams, 122 N. C. 222, 29 S. E. 333; Emery *v.* Raleigh, etc., R. Co., 102 N. C. 209, 9 S. E. 130, 11 Am. St. Rep. 727; McRae *v.* Lilly, 23 N. C. 118; Jeffries *v.* Harris, 10 N. C. 105. See also Clements *v.* Rogers, 95 N. C. 248; Heileg *v.* Dumas, 65 N. C. 214.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Colvin, 118 Pa. St. 230, 12 Atl. 337; American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605; Battles *v.* Laudenslager, 84 Pa. St. 446; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341; Wood *v.* Bradbury, 42 Leg. Int. 436. See also Shirley *v.* Keagy, 126 Pa. St. 282, 17 Atl. 607; Painter *v.* Drum, 40 Pa. St. 467; Atkinson *v.* Graham, 5 Watts 411; Anderson *v.* Long, 10 Serg. & R. 55.

Rhode Island.— Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

South Carolina.— McKenzie *v.* Allen, 3 Strobh. 546.

Texas.— Stone *v.* Day, 69 Tex. 13, 5 S. W. 642, 5 Am. St. Rep. 17; Redus *v.* Burnett, 59 Tex. 576; Rankin *v.* Busby, (Civ. App. 1894) 25 S. W. 678.

Vermont.— Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 151. See also Wright *v.* McKee, 37 Vt. 161.

United States.— Thompson *v.* Bowie, 4 Wall. 463, 18 L. ed. 423; Ketland *v.* Bissett, 1 Wash. 144, 14 Fed. Cas. No. 7,742.

See 20 Cent. Dig. tit. "Evidence," § 177 *et seq.*

On an issue of due care evidence of plaintiff's character in the particular involved is incompetent. McDonald *v.* Savoy, 110 Mass. 49. See, generally, NEGLIGENCE.

77. See the cases cited in the preceding note.

78. Ficken *v.* Jones, 28 Cal. 618; Falkner *v.* Behr, 75 Ga. 671; McNabb *v.* Lockhart, 18 Ga. 495; Largent *v.* Beard, (Tex. Civ. App. 1899) 53 S. W. 90.

79. Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745; McCarty *v.* Coffin, 157 Mass. 478, 32 N. E. 649; Von Storch *v.* Griffin, 77 Pa. St. 504; McGregor *v.* McArthur, 5 U. C. C. P. 493. See also BREACH OF PROMISE TO MARRY, 5 Cyc. 1013, 1015.

Cross-examination may extend to general badness of character (McGregor *v.* McArthur, 5 U. C. C. P. 493), or to specific instances of misconduct (Von Storch *v.* Griffin, 77 Pa. St. 504), in which case a female plaintiff may in rebuttal prove her general character for chastity and morality (Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745).

80. Bingham *v.* Bernard, 36 Minn. 114, 30 N. W. 404. See ASSAULT AND BATTERY, 3 Cyc. 1094.

81. Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363. See ASSAULT AND BATTERY, 3 Cyc. 1095.

82. Goldsmith *v.* Picard, 27 Ala. 142; Burnett *v.* Simpkins, 24 Ill. 264; Dudley *v.* McCluer, 65 Mo. 241, 27 Am. Rep. 273; McCreary *v.* Grundy, 39 U. C. Q. B. 316. See SEDUCTION.

of the evidence, in an action for criminal conversation,[83] or competency for certain work in an action against a master for keeping an incompetent servant.[84]

c. Character Relevant. Character may be relevant, as well as a fact in issue,[85] and apart from any inference as to conduct.[86] The character of a third person may be relevant[87] as bearing on the probability that a certain course of conduct was adopted[88] either by the party[89] or by a third person,[90] or to show the purposes for which a certain building is used as a place of resort.[91] Where the damages claimed in any action embrace injury to feelings, as in actions involving chastity[92] or false imprisonment,[93] it may be shown that the plaintiff's actual character is such that less than a normal injury in this particular could be inflicted by the acts of defendant.

d. In Mitigation of Damages. As an injurious act is less serious in its consequences than it otherwise would be if it affects something which is already damaged, defendant, in actions where plaintiff seeks damages for injury to reputation, may show that plaintiff did not at the time in question possess an unimpaired reputation in the particular involved in the inquiry.[94] Whether defendant may

83. In an action for criminal conversation the chastity of the wife is not part of the plaintiff's original case. Pratt *v.* Andrews, 4 N. Y. 493. But if her character in this particular is attacked directly or on cross-examination evidence is admissible to defend it. Pratt *v.* Andrews, 4 N. Y. 493. See also HUSBAND AND WIFE.

84. Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; East Line, etc., R. Co. *v.* Scott, 68 Tex. 694, 5 S. W. 501. See MASTER AND SERVANT.

85. Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939; Mullins *v.* Cottrell, 41 Miss. 291; Rowt *v.* Kile, Gilm. (Va.) 202.

86. *Kansas.*— Allison *v.* McClun, 40 Kan. 525, 20 Pac. 125; Holmberg *v.* Dean, 21 Kan. 73.

Michigan.— Daniels *v.* Dayton, 49 Mich. 137, 13 N. W. 392.

New York.— Warner *v.* New York Cent. R. Co., 45 Barb. 299.

Pennsylvania.— Kauffman *v.* Swar, 5 Pa. St. 230.

South Carolina.— Werts *v.* Spearman, 22 S. C. 200.

Tennessee.—Henry *v.* Brown, 2 Heisk. 213; Scott *v.* Fletcher, 1 Overt. 488.

See 20 Cent. Dig. tit. "Evidence," § 177 *et seq.*

87. Chamberlain *v.* Torrance, 14 Grant Ch. (U. C.) 181.

88. Tompkins *v.* Starr, 41 Ohio St. 305.

89. Thus in a suit for services rendered by a sister to a brother, where defendant claimed that plaintiff was to live with him only as long as they could agree, evidence was received to show that the sister was of a nervous, peevish, and disagreeable temper, and that none of her relatives who had tried to live with her could do so, and that the brother knew these facts at the time of making the arrangement. Tompkins *v.* Starr, 41 Ohio St. 305.

90. Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939 (forcible eviction); Chamberlain *v.* Torrance, 14 Grant Ch. (U. C.) 181 (forged deed).

In actions of trespass the mental character of the defendant may be shown upon the issue of damages. Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939. See ASSAULT AND BATTERY, 3 Cyc. 1093.

Rebuttal permitted.— Where evidence of good character is introduced by one party the other may rebut it by evidence along similar lines. Townsend *v.* Graves, 3 Paige (N. Y.) 453. See also TRIAL.

91. Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207, holding that evidence of the character of the inmates and frequenters of a house is admissible to show that it was being used for prostitution and assignation. See DISORDERLY HOUSES, 14 Cyc. 505.

92. Burnett *v.* Simpkins, 24 Ill. 264; McNutt *v.* Young, 8 Leigh (Va.) 542. Among the elements of damages is the injury to the feelings and the injury to reputation. But both these injuries would be less in the case of a woman of bad reputation than in one of good. Burnett *v.* Simpkins, 24 Ill. 264. See ASSAULT AND BATTERY, 3 Cyc. 1094; BREACH OF PROMISE TO MARRY, 5 Cyc. 1015; SEDUCTION.

93. Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772. See, generally, FALSE IMPRISONMENT.

94. *Alabama.*—Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773.

Illinois.— Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93 (malicious prosecution); Burnett *v.* Simpkins, 24 Ill. 264 (breach of promise); Mark *v.* Merz, 53 Ill. App. 458.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205; Gregory *v.* Thomas, 2 Bibb 286, 5 Am. Dec. 608.

Maine.— Fitzgibbon *v.* Brown, 43 Me. 169.

Massachusetts.—Leonard *v.* Allen, 11 Cush. 241; Bacon *v.* Towne, 4 Cush. 217.

Michigan.— Proctor *v.* Houghtaling, 37 Mich. 41.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

Missouri.— Gregory *v.* Chambers, 78 Mo. 294; Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693.

New Jersey.—O'Brien *v.* Frazier, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170.

prove that plaintiff's reputation was already impaired by the existence of rumors is a mooted question, it having been held that such evidence is admissible [95] and, with apparently sounder reasoning, that it is not; as, for example, in an action for libel or slander,[96] or for malicious prosecution.[97]

2. CRIMINAL CASES — a. Rule Stated. The inference of action from traits of character cannot be used by the prosecution as part of its original case; either as to the conduct of the accused,[98] or that of any other person directly involved in

South Carolina.— Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 633.

Vermont.— Barron *v.* Mason, 31 Vt. 189.

Virginia.— McNutt *v.* Young, 8 Leigh 542.

England.— Bell *v.* Parke, 11 Ir. C. L. 413.

Canada.— McGregor *v.* McArthur, 5 U. C. C. P. 493. But see Myers *v.* Currie, 22 U. C. Q. B. 470.

See LIBEL AND SLANDER; MALICIOUS PROSECUTION.

Reputation among minority.— Defendant may show in reduction of damages that plaintiff's reputation is bad among the minority of his neighbors. Powers *v.* Presgroves, 38 Miss. 227, 241.

Such evidence may extend to proof of bad reputation after the doing by the defendant of the acts in question. Bostick *v.* Rutherford, 11 N. C. 83.

Where evidence of reputation is not offered on the question of damages but as circumstantial evidence of actual character, the latter fact to be, in turn, made the basis of an inference as to conduct, it is within the general rule excluding character evidence and incompetent. Harding *v.* Brooks, 5 Pick. (Mass.) 244; Matthews *v.* Huntley, 9 N. H. 146; Dodd *v.* Norris, 3 Campb. 519, 14 Rev. Rep. 832; Bamfield *v.* Massey, 1 Campb. 460; Cornwall *v.* Richardson, R. & M. 305, 27 Rev. Rep. 753, 21 E. C. L. 758.

95. Holley *v.* Burgess, 9 Ala. 728, slander. See, generally, LIBEL AND SLANDER.

96. Leonard *v.* Allen, 11 Cush. (Mass.) 241; Bodwell *v.* Swan, 3 Pick. (Mass.) 376; Proctor *v.* Houghtaling, 37 Mich. 41; Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772; Scott *v.* Sampson, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. N. S. 412, 30 Wkly. Rep. 541; Bracegirdle *v.* Bailey, 1 F. & F. 536. See also, generally, LIBEL AND SLANDER. "As to the second head of evidence or evidence of rumours and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. To admit evidence of rumours and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked from the most disreputable sources, and what no man of sense, who knows the plaintiff's character, would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant himself who has started them." Scott *v.* Sampson, 8 Q. B. D. 491, 503, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. N. S. 412, 30 Wkly. Rep. 541.

It is not ground for admissibility that the rumors are to the same effect as the alleged slanderous words. Jones *v.* State, 76 Ala. 8; Holley *v.* Burgess, 9 Ala. 728; Peterson *v.* Morgan, 116 Mass. 350; Proctor *v.* Houghtaling, 37 Mich. 41; Scott *v.* Sampson, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. N. S. 412, 30 Wkly. Rep. 541. See, generally, LIBEL AND SLANDER.

97. Powers *v.* Presgroves, 38 Miss. 227, 241. See, generally, MALICIOUS PROSECUTION.

98. *Alabama.*— Harrison *v.* State, 37 Ala. 154.

Delaware.— State *v.* Lodge, 9 Houst. 542, 33 Atl. 312.

Florida.— Mann *v.* State, 22 Fla. 600.

Georgia.— Pound *v.* State, 43 Ga. 88.

Iowa.— State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865.

Kansas.— State *v.* Thurtell, 29 Kan. 148.

Kentucky.— Young *v.* Com., 6 Bush 312; Petty *v.* Com., 15 S. W. 1059, 12 Ky. L. Rep. 919.

Massachusetts.— Com. *v.* Hardy, 2 Mass. 303; Rex *v.* Doaks, Quincy 90.

Missouri.— State *v.* Nelson, 98 Mo. 414, 11 S. W. 997; State *v.* Creson, 38 Mo. 372.

New Hampshire.— State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69.

New York.— Adams *v.* People, 9 Hun 89; People *v.* White, 14 Wend. 111; People *v.* Bodine, 1 Edm. Sel. Cas. 36.

North Carolina.— State *v.* Hare, 74 N. C. 591; State *v.* Merrill, 13 N. C. 269.

Ohio.— Hamilton *v.* State, 34 Ohio St. 82.

Rhode Island.— State *v.* Hull, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609; State *v.* Ellwood, 17 R. I. 763, 24 Atl. 782.

Texas.— Dimry *v.* State, 41 Tex. Cr. 272, 53 S. W. 853; Felsenthal *v.* State, 30 Tex. App. 675, 18 S. W. 644; Coffee *v.* State, 1 Tex. App. 548.

United States.— U. S. *v.* Carrigo, 25 Fed. Cas. No. 14,735, 1 Cranch C. C. 49; U. S. *v.* Jourdine, 26 Fed. Cas. No. 15,499, 4 Cranch C. C. 338; U. S. *v.* Kenneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122; U. S. *v.*

the inquiry,[99] if objection is made.[1] The option as to whether the question as to what inferences shall be drawn from certain traits of defendant's character rests in the first instance entirely with himself. He may invoke the aid of such inferences by introducing evidence showing the existence in himself of some relevant trait,[2] although he does not himself take the witness' stand,[3] and even where his character is not directly assailed.[4] This election must be directly declared and cannot be legitimately inferred from his doing something else; as introducing evidence of impaired intelligence[5] or taking the stand as a witness. In the latter case, while character for truth and veracity is in issue,[6] the general issue of character is not raised.[7] When the accused has opened up the issue, the prosecu-

Warner, 28 Fed. Cas. No. 16,642, 4 Cranch C. C. 342.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

Canada.— Rex *v.* Long, 11 Quebec K. B. 328.

See 14 Cent. Dig. tit. "Criminal Law," § 839. And see CRIMINAL LAW, 12 Cyc. 413.

Impeachment of a witness for the defense cannot be so employed as to introduce evidence of defendant's character. Carter *v.* State, 36 Nebr. 481, 54 N. W. 853.

In connection with the "presumption of innocence," the rule forbidding the prosecution to take the initiative has been said to place the state at a great disadvantage (People *v.* Fair, 43 Cal. 137), a difficulty based on the false assumption that the "presumption" possesses evidentiary weight.

99. Ben *v.* State, 37 Ala. 103, deceased. See, generally, HOMICIDE.

1. If no objection is made, the evidence, being relevant, is admissible. Baker *v.* Com., 17 S. W. 625, 13 Ky. L. Rep. 571.

Defendant may open up an issue as to the character of a person other than himself. Thomas *v.* People, 67 N. Y. 218.

2. *Alabama.*— Jones *v.* State, 120 Ala. 303, 25 So. 204; Balkum *v.* State, 115 Ala. 117, 22 So. 532, 67 Am. St. Rep. 19; Butler *v.* State, 91 Ala. 87, 9 So. 191; Morgan *v.* State, 88 Ala. 223, 6 So. 761; Kilgore *v.* State, 74 Ala. 1; Dupree *v.* State. 33 Ala. 380, 73 Am. Dec. 422; Rosenbaum *v.* State, 33 Ala. 354.

Arkansas.— Kee *v.* State, 28 Ark. 155.

California.— People *v.* Shepardson, 49 Cal. 629; People *v.* Ashe, 44 Cal. 288; People *v.* Fair, 43 Cal. 137; People *v.* Josephs, 7 Cal. 129.

District of Columbia.—U. S. *v.* Neverson, 1 Mackey 152; U. S. *v.* Bowen, 3 MacArthur 64.

Indiana.— McQueen *v.* State, 82 Ind. 72; State *v.* Bloom, 68 Ind. 54, 34 Am. Rep. 247; Baehner *v.* State, 25 Ind. App. 597, 58 N. E. 741.

Iowa.— State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775; State *v.* Lindley, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139; State *v.* Northrup, 48 Iowa 583, 30 Am. Rep. 408.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Michigan.— People *v.* Mills, 94 Mich. 630, 54 N. W. 488.

Minnesota.— State *v.* Dumphey, 4 Minn. 438.

Mississippi.—Westbrooks *v.* State, 76 Miss. 710, 25 So. 491.

Missouri.— State *v.* King, 78 Mo. 555; State *v.* Alexander, 66 Mo. 148; State *v.* O'Connor, 31 Mo. 389; State *v.* Dalton, 27 Mo. 13; State *v.* Bradford, 79 Mo. App. 346.

Nevada.— State *v.* Pearce, 15 Nev. 188.

New Jersey.— State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211.

New York.— Ackley *v.* People, 9 Barb. 609.

North Carolina.— State *v.* Merrill, 13 N. C. 269.

Ohio.— State *v.* Gardner, Tapp. 124.

Pennsylvania.—Com. *v.* Weiland, 1 Brewst. 312.

United States.— U. S. *v.* Jones, 31 Fed. 718; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505; U. S. *v.* Crow, 25 Fed. Cas. No. 14,895, 1 Bond 51; U. S. *v.* McKee, 26 Fed. Cas. No. 15,686, 3 Dill. 551.

See 14 Cent. Dig. tit. "Criminal Law," § 840. And see CRIMINAL LAW, 12 Cyc. 412.

3. State *v.* Hice, 117 N. C. 782, 23 S. E. 357; Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467.

4. State *v.* Donohoo, 22 W. Va. 761.

Whether the attention of the jury can be called to the fact that defendant alone can raise the issue and that he has not seen fit to do so is in dispute. While the course has been deemed legitimate (State *v.* McAllister, 24 Me. 139), it has more often been repudiated as subversive of the privilege itself (People *v.* Gleason, 122 Cal. 370, 55 Pac. 123; People *v.* Evans, 72 Mich. 367, 40 N. W. 473; State *v.* O'Neal, 29 N. C. 251). When the argument is made, the error is not cured by an instruction to disregard it. "As well might one attempt to brush off with the hand a stain of ink from a piece of white linen. One, in the very nature of things, is just as impossible as the other." People *v.* Evans, 72 Mich. 367, 382, 40 N. W. 473 [*quoting* Quinn *v.* People, 123 Ill. 333, 15 N. E. 46]. See, generally, CRIMINAL LAW, 12 Cyc. 621.

5. State *v.* Merrill, 13 N. C. 269.

6. Adams *v.* People, 9 Hun (N. Y.) 89. See CRIMINAL LAW, 12 Cyc. 414. And see, generally, WITNESSES.

7. Calhoon *v.* Com., 64 S. W. 965, 23 Ky. L. Rep. 1188; State *v.* Traylor, 121 N. C.

tion may not only rebut the favorable evidence, but may lay a foundation in the evidence on which to base an affirmative inference adverse to defendant.[8]

b. Character in Issue. It may be an integral part of the state's original case to establish a relevant trait of character in a third person,[9] as chastity on an indictment for carnal knowledge of a girl under sixteen "theretofore chaste,"[10] or for seduction.[11]

c. Character Relevant. Either the government or the accused may in criminal cases make use as to third persons of the inference of conduct from character which is provisionally excluded in case of defendant. On prosecutions for certain sexual offenses, as rape, indecent assault, and the like, defendant may show that the prosecuting witness consented,[12] and the state may show that she did not consent,[13] to the doing of the alleged wrongful act by evidence of her actual character in respect to chastity.[14] In like manner on an indictment for homicide defendant, in aid of a plea of self-defense, may show the violent character of the deceased.[15]

3. Quasi-Criminal Cases. Certain actions present features of both civil and criminal proceedings. Although civil in form, they raise much the same issue as might properly be tried in an appropriate criminal prosecution. The modern law of evidence treats such actions, in connection with inferences from character, as civil cases. It refuses to permit a party to such an action, including actions which involve assault,[16] bastardy,[17] embezzlement,[18] fraud,[19] incendiarism,[20] malicious injury,[21] slander imputing crime, when the truth is pleaded,[22] and including also suits for a penalty,[23] to introduce evidence of good character, although certain facts

674, 28 S. E. 493. See Criminal Law, 12 Cyc. 414.

8. People *v.* Fair, 43 Cal. 137; Com. *v.* Hardy, 2 Mass. 303; People *v.* White, 14 Wend. (N. Y.) 111. See Criminal Law, 12 Cyc. 414.

9. People *v.* Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438. See Criminal Law, 12 Cyc. 418.

10. People *v.* Mills, 94 Mich. 630, 54 N. W. 488. See, generally, Rape.

11. Smith *v.* State, 118 Ala. 117, 24 So. 55; People *v.* Wade, 118 Cal. 672, 50 Pac. 841; People *v.* Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; People *v.* Clark, 33 Mich. 112. See, generally, Seduction.

12. *Florida.*— Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245.

Georgia.— Camp *v.* State, 3 Ga. 417.

Massachusetts.— Com. *v.* Kandall, 113 Mass. 210, 18 Am. Rep. 469.

New Jersey.— O'Blenis *v.* State, 47 N. J. L. 279.

New York.—Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309; Conkey *v.* People, 1 Abb. Dec. 418, 5 Park. Cr. 31.

North Carolina.—State *v.* Murray, 63 N. C. 31; State *v.* Jefferson, 28 N. C. 305.

Vermont.— State *v.* Reed, 39 Vt. 417, 94 Am. Dec. 337.

See Assault and Battery, 3 Cyc. 1056; and, generally, Rape.

13. O'Blenis *v.* State, 47 N. J. L. 279; Conkey *v.* People, 1 Abb. Dec. (N. Y.) 418, 5 Park. Cr. (N. Y.) 31.

14. **Effect of specific acts as circumstantial evidence of consent** see *infra*, X, C, 3, a, (v).

15. Williams *v.* State, 74 Ala. 18; Thomas *v.* People, 67 N. Y. 218. See, generally, Homicide.

16. Gillespie's Case, 4 City Hall Rec. (N. Y.) 154; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341; Markey *v.* Angell, 22 R. I. 343, 47 Atl. 882. See also Assault and Battery, 3 Cyc. 1093.

17. Low *v.* Mitchell, 18 Me. 372. See Bastards, 5 Cyc. 660, 661.

18. Wright *v.* McKee, 37 Vt. 161.

19. *Arkansas.*— Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. 228.

Massachusetts.— Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529.

Missouri.— Dudley *v.* McCluer, 65 Mo. 241, 27 Am. Rep. 273.

New York.— Fowler *v.* Ætna F. Ins. Co., 6 Cow. 673, 16 Am. Dec. 460.

Pennsylvania.— Anderson *v.* Long, 10 Serg. & R. 55.

Texas.— Roach *v.* Crume, (Civ. App. 1897) 41 S. W. 86; Philadelphia F. Assoc. *v.* Jones, (Civ. App. 1897) 40 S. W. 44.

20. Munkers *v.* Farmers' Ins. Co., 30 Oreg. 211, 46 Pac. 850 [*citing* as "directly in point" Stone *v.* Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870; Schmidt *v.* New York Union F. Ins. Co., 1 Gray (Mass.) 529]; American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605.

21. Thayer *v.* Boyle, 30 Me. 475. See, generally, Malicious Mischief.

22. Matthews *v.* Huntley, 9 N. H. 146; Houghtaling *v.* Kilderhouse, 1 N. Y. 530. See Libel and Slander.

23. Atty.-Gen. *v.* Bowman, 2 B. & P. 532 note.

Action for penalty for keeping false weights. — "[In the case of] Atty.-Gen. *v.* Bowman, 2 B. & P. 532 note, at Westminster, . . . upon the trial of an information against the Defendant for keeping false weights, and

alleged to exist would constitute an adequate basis for criminal proceedings.[24] The rule is the same where moral, rather than legal, wrong-doing is charged in the pleadings or proof.[25] There is authority to the effect that where the nature of the action directly assails the moral character,[26] or where, as in slander, truth being pleaded,[27] it is directly attacked,[28] or where the evidence of fraud[29] or other wrong-doing[30] is entirely circumstantial; or the charge impugns the party's credibility as a witness,[31] evidence of character will be received. It is agreed that a party's character is not put in issue by the mere fact that the evidence, if believed, tends to assail it.[32] Thus in an action to recover damages for personal injuries testimony

for offering to corrupt an officer, the Defendant's counsel called a witness to character," but Eyre, C. B., said: "I can not admit this evidence in a civil suit. The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this; that in a direct prosecution for a crime, such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not." Huntley *v.* Luscombe, 2 B. & P. 530, 532 note *a*, 5 Rev. Rep. 697.

24. *Arkansas.*— Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. 228.

Connecticut.— Woodruff *v.* Whittlesey, Kirby 60.

Indiana.— Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194; Gebhart *v.* Burkett, 57 Ind. 378, 26 Am. Rep. 61; Harrison *v.* Russell, Wils. 391.

Maine.— Thayer *v.* Boyle, 30 Me. 475; Potter *v.* Webb, 6 Me. 14.

Maryland.— Brooke *v.* Berry, 2 Gill 83.

Massachusetts.— Lamagdelaine *v.* Tremblay, 162 Mass. 339, 39 N. E. 38; Atwood *v.* Dearborn, 1 Allen 483, 79 Am. Dec. 755; Heywood *v.* Reed, 4 Gray 574; Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529.

Michigan.— Klein *v.* Bayer, 81 Mich. 233, 45 N. W. 991.

Mississippi.—Leinkauf *v.* Brinker, 62 Miss. 255, 52 Am. Rep. 183.

Missouri.— Dudley *v.* McCluer, 65 Mo. 241, 27 Am. Rep. 273; Gutzwiller *v.* Lackman, 23 Mo. 168; Home Lumber Co. *v.* Hartman, 45 Mo. App. 647.

New Hampshire.— Boardman *v.* Woodman, 47 N. H. 120; Matthews *v.* Huntley, 9 N. H. 146.

New York.— Houghtaling *v.* Kilderhouse, 1 N. Y. 530; Gough *v.* St. John, 16 Wend. 646 [*overruling* Ruan *v.* Perry, 3 Cai. 120]; Flower *v.* Ætna F. Ins. Co., 6 Cow. 673, 16 Am. Dec. 460.

Pennsylvania.— American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605; Anderson *v.* Long, 10 Serg. & R. 55.

South Carolina.— Smets *v.* Plunket, 1 Strobb. 372.

Vermont.— Wright *v.* McKee, 37 Vt. 161.

See 20 Cent. Dig. tit. "Evidence," § 177 *et seq.*

In early cases evidence of character was admitted in civil actions of a quasi-criminal nature where intent was a material element. Ruan *v.* Perry, 3 Cai. (N. Y.) 120 [*overruled* in Gough *v.* St. John; 16 Wend. (N. Y.) 646]; Henry *v.* Brown, 2 Heisk. (Tenn.) 213; Scott *v.* Fletcher, 1 Overt. (Tenn.) 488.

Proof of general reputation is not admissible merely because the party has been asked questions implying wrong-doing. Munroe *v.* Godkin, 111 Mich. 183, 69 N. W. 244.

25. Lamagdelaine *v.* Tremblay, 162 Mass. 339, 341, 39 N. E. 38, where it is said: "On principle as well as authority evidence of good reputation is not competent to show that one is not guilty of a dishonorable or unlawful act which is not punishable as a crime."

26. Falkner *v.* Behr, 75 Ga. 671 (misappropriation of funds); McNabb *v.* Lockhart, 18 Ga. 495; Allison *v.* McClun, 40 Kan. 525, 20 Pac. 125; Werts *v.* Spearman, 22 S. C. 200; Continental Nat. Bank *v.* Nashville First Nat. Bank, 108 Tenn. 374, 68 S. W. 497; Spears *v.* International Ins. Co., 1 Baxt. (Tenn.) 370.

27. Inman *v.* Foster, 8 Wend. (N. Y.) 602.

28. Goldsmith *v.* Picard, 27 Ala. 142. See, generally, LIBEL AND SLANDER.

29. Werts *v.* Spearman, 22 S. C. 200; Scott *v.* Fletcher, 1 Overt. (Tenn.) 488.

This view has been distinctly repudiated in later cases. Gregory *v.* Chambers, 78 Mo. 294; Pratt *v.* Andrews, 4 N. Y. 493; Gough *v.* St. John, 16 Wend. (N. Y.) 646 [*overruling* Ruan *v.* Perry, 3 Cai. (N. Y.) 120]; American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341. See, generally, LIBEL AND SLANDER.

30. Henry *v.* Brown, 2 Heisk. (Tenn.) 213.

31. Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142.

32. *Arkansas.*— Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. 228.

Indiana.— Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194; Harrison *v.* Russell, 1 Wils. 391.

Maine.— Low *v.* Mitchell, 18 Me. 372; Potter *v.* Webb, 6 Me. 14.

Maryland.— Brooke *v.* Berry, 2 Gill 83.

Massachusetts.— Atwood *v.* Dearborn, 1 Allen 483, 79 Am. Dec. 755; Heywood *v.* Reed, 4 Gray 574.

Michigan.— Klein *v.* Bayer, 81 Mich. 233, 45 N. W. 991.

Mississippi.— Leinkauf *v.* Brinker, 62 Miss. 255, 52 Am. Rep. 183.

Missouri.— Gregory *v.* Chambers, 78 Mo. 294; Dudley *v.* McCluer, 65 Mo. 241, 27 Am. Rep. 273; Gutzwiller *v.* Lackman, 23 Mo.

tending to show that plaintiff's alleged injuries were simulated does not put his character in issue.[33]

4. Relevant Traits — a. In General. That the existence of a particular trait should furnish an inference as to specific conduct, it is necessary that, in accordance with common experience, similar conduct usually results from such a stimulus. In other words it must be relevant.[34] General moral character is not sufficiently specific to be relevant in cases of homicide,[35] illegal sale of liquor,[36] or larceny.[37] But where, as in case of indecent assault[38] or rape,[39] the relevant traits are not well identified, evidence covering a broader range of character has been received.

b. Instances. That a person is careful is irrelevant in a question of assault.[40] Evidence that a person is chaste may be relevant in proceedings involving adultery,[41] indecent assault[42] or rape,[43] but not in case of homicide.[44] Evidence that defendant is conscientious or conservative is not relevant on any issue involved in

168; Home Lumber Co. *v.* Hartman, 45 Mo. App. 647.

New Hampshire.— Boardman *v.* Woodman, 47 N. H. 120.

New York.— Gough *v.* St. John, 16 Wend. 646; Flower *v.* Ætna F. Ins. Co., 6 Cow. 673, 16 Am. Dec. 460.

Pennsylvania.— American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

South Carolina.— Smets *v.* Plunket, 1 Strobh. 372.

Vermont.— Wright *v.* McKee, 37 Vt. 161.

See 20 Cent. Dig. tit. "Evidence," § 177 *et seq.*

In a civil action for assault with a knife, defendant offered evidence of his good character as a peaceable and orderly person. In affirming the rejection of the evidence the court say, in substance, after a full examination of the authorities, that these authorities assert two principles: (1) That in civil suits evidence of the character of the parties, except where the character is directly in issue, is not admissible; (2) that putting character in issue is a technical expression, which does not mean simply that the character may be affected by the result, but that it is of particular importance in the suit itself, as the character of plaintiff in an action of slander, or that of a woman in an action on the case for seduction. The remark of Professor Greenleaf, in his Treatise on Evidence, vol. 1, § 54, that "generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it," is not sustained by any authority which I can find, save Ruan *v.* Perry, 3 Cai. (N. Y.) 120, and this is expressly overruled in Gough *v.* St. John, 16 Wend. (N. Y.) 646, above referred to. Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

33. Austin, etc., R. Co. *v.* McElmurry, (Tex. Civ. App. 1895) 33 S. W. 249.

34. State *v.* Dexter, 115 Iowa 678, 87 N. W. 417; State *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041; Blasland-Parcels-Jordan Shoe Co. *v.* Hicks, 70 Mo. App. 301. Evidence of the personal bad habits of defendant, not material to any issue in the case, was inadmissible. Blasland-Parcels-Jordan Shoe Co. *v.* Hicks, *supra.*

Cross-examination of witnesses testifying as to character, when in issue, may extend beyond the precise trait involved in the inquiry to evidence of character in general (McGregor *v.* McArthur, 5 U. C. C. P. 493), or as to another trait (State *v.* Knapp, 45 N. H. 148, liquor selling on indictment for rape). See *supra,* VII, A.

35. Walker *v.* State, 102 Ind. 502, 1 N. E. 856. But it has also been held that a party on trial for murder is not confined to evidence of his good character for peace and quietness, but may show his general reputation and his character as to such particular moral qualities as have pertinence to the charges against him. State *v.* Parker, 7 La. Ann. 83. See, generally, Homicide.

36. Baehner *v.* State, 25 Ind. App. 597, 58 N. E. 741; Westbrooks *v.* State, 76 Miss. 710, 25 So. 491. See, generally, Intoxicating Liquors.

37. State *v.* Bloom, 68 Ind. 54, 34 Am. Rep. 247. See, generally, Larceny.

38. Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436, moral and well conducted man. See Assault and Battery, 3 Cyc. 1093.

39. State *v.* Knapp, 45 N. H. 148. See, generally, Rape.

40. State *v.* Surry, 23 Wash. 655, 63 Pac. 557. See Assault and Battery, 3 Cyc. 1056, 1093.

41. Cauley *v.* State, 92 Ala. 71, 9 So. 456; U. S. *v.* Bredemeyer, 6 Utah 143, 22 Pac. 110. See Adultery, 1 Cyc. 961.

42. Balkum *v.* State, 115 Ala. 117, 22 So. 532, 67 Am. St. Rep. 19; Com. *v.* Kendall, 113 Mass. 210, 18 Am. Rep. 469; Bingham *v.* Bernard, 36 Minn. 114, 30 N. W. 404. See Assault and Battery, 3 Cyc. 1056, 1093.

43. State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; Com. *v.* Knapp, 45 N. H. 148; State *v.* Snover, 63 N. J. L. 382, 43 Atl. 1059, holding that on an indictment for having carnal intercourse with a woman under the age of consent, defendant can prove his reputation for morality, virtue, and "honesty in living," since the word "honesty," as therein used, means chastity, or sexual propriety. See, generally, Rape.

44. People *v.* Fair, 43 Cal. 137. See, generally, Homicide.

an assault.[45] Reputation as a valiant soldier is incompetent on an indictment for homicide.[46] On indictments for homicide the dangerous character of deceased is relevant where self-defense is pleaded.[47] That a person is honest is relevant on an issue of contract,[48] fraud,[49] homicide,[50] larceny,[51] malicious mischief,[52] or receiving stolen goods.[53] Reputation for industry has been rejected in cases of arson.[54] Kindliness to children may be relevant in case of infanticide.[55] Loving kindness is competent on an indictment for seduction.[56] That a person is law-abiding is admissible in case of assault,[57] carrying concealed weapons,[58] homicide[59] or rape;[60] but the trait is not material on a charge of illegally selling liquor.[61] Reputation as an orderly person may be excluded in a case involving arson[62] or libel.[63] It is relevant on an indictment for homicide[64] or train-wrecking.[65] That a person is peaceable is relevant in actions for assault,[66] carrying concealed weapons,[67] homicide,[68]

45. State *v.* Surry, 23 Wash. 655, 63 Pac. 557. See ASSAULT AND BATTERY, 3 Cyc. 1056, 1093.

46. People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162. See, generally, HOMICIDE.

47. Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277; Horbach *v.* State, 43 Tex. 242, 250, where it is said: "They, and all like helps, ever have been, and ever will be, elements in the formation of belief as to what a man designs by an act to which they are pertinent." See, generally, HOMICIDE.

48. Largent *v.* Beard, (Tex. Civ. App. 1899) 53 S. W. 90, upright and honorable.

49. Hanney *v.* Com., 116 Pa. St. 322, 9 Atl. 339.

50. Com. *v.* Winnemore, 1 Brewst. (Pa.) 356. But it has been held proper to exclude testimony as to the reputation for "truth, honesty, and integrity" of defendant, who was a witness in his own behalf, where those traits of character were not questioned by the prosecution. People *v.* Cowgill, 93 Cal. 596, 29 Pac. 228. See, generally, HOMICIDE.

51. State *v.* Conlan, 3 Pennew. (Del.) 218, 50 Atl. 95; Long *v.* State, 11 Fla. 295; State *v.* Bloom, 68 Ind. 54, 34 Am. Rep. 247. Honesty has been said to be the only relevant trait. State *v.* Bloom, 68 Ind. 54, 34 Am. Rep. 247.

52. Browder *v.* State, 30 Tex. App. 614, 18 S. W. 197. See, generally, MALICIOUS MISCHIEF.

53. Com. *v.* Gazzolo, 123 Mass. 220, 25 Am. Rep. 79; Berneker *v.* State, 40 Nebr. 810, 59 N. W. 372. See, generally, RECEIVING STOLEN GOODS.

54. State *v.* Emery, 59 Vt. 84, 7 Atl. 129. See, generally, ARSON.

55. State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775.

56. People *v.* Mills, 94 Mich. 630, 54 N. W. 488. See, generally, SEDUCTION.

57. State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105. See, generally, ASSAULT AND BATTERY.

58. Lann *v.* State, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445. See, generally, WEAPONS.

59. Morgan *v.* State, 88 Ala. 223, 6 So. 761; Nelson *v.* State, 32 Fla. 244, 13 So. 361; State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387; Oliver *v.* State, 11 Nebr. 1, 7 N. W. 444. See, generally, HOMICIDE.

60. Lincecum *v.* State, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727. See, generally, RAPE.

61. Chung Sing *v.* U. S., (Ariz. 1894) 36 Pac. 205; Baehner *v.* State, 25 Ind. App. 597, 58 N. E. 741, holding that in a prosecution for selling liquor on Sunday it was not error to sustain objections to questions as to defendant's moral character, his general character as a law-abiding citizen and for peace and quietude, since the character a defendant is permitted to introduce in evidence is the character involved in the charge. See, generally, INTOXICATING LIQUORS.

62. State *v.* Emery, 59 Vt. 84, 7 Atl. 129. See, generally, ARSON.

63. Com. *v.* Irwin, 2 Pa. L. J. 329. See, generally, LIBEL AND SLANDER.

64. State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387. See, generally, HOMICIDE.

65. State *v.* Douglass, 44 Kan. 618, 26 Pac. 476. See, generally, RAILROADS.

66. People *v.* Gordan, 103 Cal. 568, 37 Pac. 534; State *v.* Ferguson, 71 Conn. 227, 71 Atl. 769; State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105; Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325. See ASSAULT AND BATTERY, 3 Cyc. 1014.

67. Lann *v.* State, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445. See, generally, WEAPONS.

68. *Alabama.*— Jones *v.* State, 120 Ala. 303, 25 So. 204; Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Morgan *v.* State, 88 Ala. 223, 6 So. 761; De Arman *v.* State, 71 Ala. 351.

Arkansas.— Campbell *v.* State, 38 Ark. 498.

California.— People *v.* Bezy, 67 Cal. 223, 7 Pac. 643; People *v.* Stewart, 28 Cal. 395.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361.

Indiana.— Carr *v.* State, 135 Ind. 1, 34 N. E. 533, 41 Am. St. Rep. 408, 20 L. R. A. 863; Hall *v.* State, 132 Ind. 317, 31 N. E. 536; Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460; Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

Iowa.— State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387, 68 Iowa 76, 25 N. W. 936.

Louisiana.— State *v.* Donelon, 45 La. Ann.

rape,[69] or train-wrecking.[70] In rebuttal the same class of evidence is competent.[71] It is not material on an issue of libel.[72] Habitual profanity is not relevant on an issue of embezzlement[73] or larceny.[74] That a person is quiet is admissible on an indictment for homicide.[75] Sobriety is immaterial on an issue of larceny.[76] Sturdiness of character is not relevant in larceny.[77] However important a reputation for truth and veracity may be in case of a witness,[78] it is irrelevant on indictment for assault with intent to kill,[79] for homicide,[80] or larceny.[81] The evidence has been deemed competent, however, in case of malicious mischief[82] and perjury.[83] To aid a plea of self-defense on an indictment for homicide it may be shown that the deceased was a violent man.[84] That an individual is merely "worthless" is irrelevant on an indictment for homicide.[85]

5. Ground of Irrelevancy. It very frequently happens that offered evidence is rejected on the ground that it is "character evidence" when the real ground for the court's action in rejecting it is that the fact is irrelevant.[86] Thus, where the offer is to prove a trait of character not logically connected with the issue,[87] to show that a character not involved possesses certain qualities,[88]

744, 12 So. 922; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

Ohio.— Harrington *v.* State, 19 Ohio St. 264; Gandolfo *v.* State, 11 Ohio St. 114.

Pennsylvania.— Com. *v.* Winnemore, 1 Brewst. 356.

South Carolina.— State *v.* Dill, 48 S. C. 249, 26 S. E. 567.

See, generally, Homicide.

69. State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788; Lincecum *v.* State, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727; Johnson *v.* State, 17 Tex. App. 565. See, generally, Rape.

70. State *v.* Douglass, 44 Kan. 618, 26 Pac. 476. See, generally, Railroads.

71. People *v.* Fair, 43 Cal. 137; Com. *v.* Hardy, 2 Mass. 303; People *v.* McKane, 143 N. Y. 455, 38 N. E. 950; People *v.* White, 14 Wend. (N. Y.) 111; King *v.* U. S., 112 Fed. 988, 50 C. C. A. 647.

72. In a prosecution for libel, evidence as to defendant's character as a "peaceable and orderly man" is inadmissible, since his orderly and peaceable character is not repugnant to his liability to commit the offense of libel. Com. *v.* Irwin, 2 Pa. L. J. 329. See, generally, Libel and Slander.

73. Butler *v.* State, 91 Ala. 87, 9 So. 191. See Embezzlement, 15 Cyc. 486.

74. Butler *v.* State, 91 Ala. 87, 9 So. 191. See, generally, Larceny.

75. Jones *v.* State, 120 Ala. 303, 25 So. 204; Hall *v.* State, 132 Ind. 317, 31 N. E. 536; Com. *v.* Winnemore, 1 Brewst. (Pa.) 356. The use of the word "inoffensive," in connection with "peace and quietude," is not objectionable, since describing one as inoffensive conveys the impression that he is peaceful and quiet. Hall *v.* State, 132 Ind. 317, 31 N. E. 536. See, generally, Homicide.

76. People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136. See, generally, Larceny.

77. People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136. See, generally, Larceny.

78. See, generally, Witnesses.

79. Morgan *v.* State, 88 Ala. 223, 6 So. 761. See, generally, Homicide.

80. Morgan *v.* State, 88 Ala. 223, 6 So. 761. The evidence may be excluded where the prosecution do not dispute the claim. People *v.* Cowgill, 93 Cal. 596, 29 Pac. 228. See, generally, Homicide.

81. Hays *v.* State, 110 Ala. 60, 20 So. 322. See, generally, Larceny.

82. Browder *v.* State, 30 Tex. App. 614, 18 S. W. 197. See, generally, Malicious Mischief.

83. Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467. See, generally, Perjury.

84. Williams *v.* State, 74 Ala. 18; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Thomas *v.* People, 67 N. Y. 218. See, generally, Homicide.

85. Williford *v.* State, 36 Tex. Cr. 414, 37 S. W. 761. See, generally, Homicide.

86. People *v.* Fair, 43 Cal. 137; Battles *v.* Laudenslager, 84 Pa. St. 446. See *supra*, VII, A.

Evidence that one is morally capable of committing a crime is not proof that he committed it. People *v.* Benedict, 21 N. Y. Suppl. 58. See also Criminal Law, 12 Cyc. 413.

87. *Alabama.*— South, etc., R. Co. *v.* Chappell, 61 Ala. 527.

California.— People *v.* Moan, 65 Cal. 532, 4 Pac. 545; People *v.* Fair, 43 Cal. 137.

Massachusetts.— Clement *v.* Kimball, 98 Mass. 535; Bruce *v.* Priest, 5 Allen 100.

North Carolina.— Clements *v.* Rogers, 95 N. C. 248; Heileg *v.* Dumas, 65 N. C. 214.

South Carolina.— Marshall *v.* Mitchell, 59 S. C. 523, 38 S. E. 158, where plaintiff sought to recover for services rendered to defendant's testator during his last illness, and evidence of testator's good reputation for payment of debts was held inadmissible.

Texas.—Rankin *v.* Busby, (Civ. App. 1894) 25 S. W. 678.

See 20 Cent. Dig. tit. "Evidence," § 177 *et seq.*

88. State *v.* Staton, 114 N. C. 813, 19 S. E. 96. On a trial for burning a barn, where a witness testified that defendant told him that

or to establish a fact already admitted,[89] or clearly proved,[90] the evidence never comes within the scope of the rule excluding character evidence; for that rule excludes only evidence otherwise admissible, while that excluded in such cases is merely irrelevant.

6. NEGATIVE FACTS. Negative facts relating to character, as that a witness well acquainted with the accused in the locality where he lived never heard anything evil said of him,[91] or his character even discussed or spoken of,[92] are admissible as tending to establish circumstantially an excellent character.

C. Proof of Character — 1. IN GENERAL. The rules regulating proof of character are illogical, unscientific, anomalous; explainable only as archaic survivals of compurgation[93] or of states of legal development when the jury personally knew the facts on which their verdict was based. Evidence of common reputation in the community is entirely proper when the reputation is itself the ultimate fact.[94] But as proof of actual character, the evidence, whether viewed as a relevant fact, or as composite hearsay,[95] is probatively weak[96] and practically on many occasions inaccurate and misleading. It possesses the sole advantage that it makes a simple issue and one which the person affected may fairly be supposed to be able to meet without surprise.[97] But it is obvious that the community's estimate of character must usually be above or below the actual situation.[98] In point of principle the inference of a disinterested person of competent

he sold to a certain person the property taken from the barn which he had burned, defendant is not entitled to show that such person is a man of good character. State *v.* Staton, 114 N. C. 813, 19 S. E. 96.

89. Tedens *v.* Schumers, 14 Ill. App. 607; McCarty *v.* Leary, 118 Mass. 509. The rule applies also to an admission as to the reputation itself. Beard *v.* State, 44 Tex. Cr. 402, 71 S. W. 960.

The party may deny having made the admission or that it stated the truth, in which case a relevant trait of character is admissible. Tedens *v.* Schumers, 14 Ill. App. 607.

90. Southern Kansas R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113; Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447; Tenney *v.* Tuttle, 1 Allen (Mass.) 185.

91. *Alabama.*— Hussey *v.* State, 87 Ala. 121, 6 So. 420.

Arkansas.— Cole *v.* State, 59 Ark. 50, 26 S. W. 377.

Georgia.— Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

Minnesota.— Bingham *v.* Bernard, 36 Minn. 114, 30 N. W. 404; State *v.* Lee, 22 Minn. 407, 21 Am. Rep. 769.

Mississippi.— French *v.* Sale, 63 Miss. 386.

Missouri.— State *v.* Grate, 68 Mo. 22.

Montana.— Matusevitz *v.* Hughes, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467.

Ohio.— Gandolfo *v.* State, 11 Ohio St. 114.

Texas.— Boon *v.* Weathered, 23 Tex. 675.

Virginia.— Davis *v.* Franke, 33 Gratt. 413.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

See 14 Cent. Dig. tit. "Criminal Law," § 843. See also CRIMINAL LAW, 12 Cyc. 416.

92. Hussey *v.* State, 87 Ala. 121, 6 So. 420; Cole *v.* State, 59 Ark. 50, 26 S. W. 377; State *v.* Lee, 22 Minn. 407, 21 Am. Rep. 769; State *v.* Grate, 68 Mo. 22.

93. Starkie Ev. 76 note.

94. See *infra*, X, E.

95. See *supra*, IX, A, 5, a, (I).

96. In similar connections reputation is not regarded as relevant to the existence of facts; as the accuracy of a set of account-books (Roberts *v.* Ellsworth, 11 Conn. 290), or the doing of specific acts (Overstreet *v.* State, 3 How. (Miss.) 328).

97. *Alabama.*— McQueen *v.* State, 108 Ala. 54, 18 So. 843.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205.

Massachusetts.—Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

New York.— People *v.* White, 14 Wend. 111.

North Carolina.— Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154.

Danger from surprise, however, may readily be removed by a requirement for notice. Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773; Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

98. "Evidence of character is, however, admissible on the part of the prisoner, not only in the sense of what people in general think of him, which is mere rumour, but also in the sense of what is known of him generally in the judgment of the particular witness, which judgment is superior in quality and value to mere rumour. Numerous cases may be put in which a man may have no general character in the sense of any reputation or rumour about him at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One

knowledge would be equally probative, and often more so than the estimate of the community at large;[99] and little objection apparently exists to receiving the inference as is now done in case of the influence of the emotions upon appearance,[1] or upon conduct,[2] or as to the existence of definite mental conditions[3] or states,[4] in connection with an enumeration of the relevant facts observed by him;[5] and that such facts of conduct, including habits, should be received not

man may deserve that character without having acquired it which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but the members of his master's family: so the character of a child is only known to its parents and teachers, and the character of a man of business to those with whom he deals. I apprehend that there is nothing to prevent a man of business from calling every person with whom he has dealt for years, and asking each in succession whether he was a person, according to the witness's observation, of an honest and just character; and such evidence would be of the highest value. But, if a witness to character were to say that the man had got a good character in the parish, it might be that he had gained it because he had gone through the parish offices with decency, and the witness may have had no opportunity of judging of the man's real character and disposition. According to the experience of mankind one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a Court of law?" Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 542, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436, per Willes, J. A further difficulty, not readily foreseen at the time this limitation upon means of proof was adopted in England, frequently presents itself in that communities may be either too scattered or too dense to have made any estimate on the matter whatever.

99. The arguments in favor of permitting other proof of character than reputation are well given by Erle, C. J., in dissenting from the opinion of the court for crown cases reserved in Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 533, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436: "What is the principle on which evidence of character is admitted? It seems to me that such evidence is admissible for the purpose of shewing the disposition of the party accused, and basing thereon a presumption that he did not commit the crime imputed to him. Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man, which must be founded either on personal experience, or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. The question between us is, whether the Court is at liberty to receive a statement of the disposition of a prisoner, founded on the personal experience of the witness, who attends to give evidence and state that estimate which long personal knowledge of and acquaintance with the prisoner has enabled him to form. I think that each source of evidence is admissible. You may give in evidence the general rumour prevalent in the prisoner's neighbourhood, and, according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial, guiding opinion than that which is to be gathered from general rumour. I never saw a witness examined as to character without an inquiry being made into his personal means of knowledge of that character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony. Suppose a witness to character were to say, 'This man has been in my employ for twenty years. I have had experience of his conduct; but I have never heard a human being express an opinion of him in my life. For my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world.' The principle the Lord Chief Justice has laid down would exclude this evidence; and that is the point where I differ from him. To my mind personal experience gives cogency to the evidence; whereas such a statement as, 'I have heard some persons speak well of him,' or 'I have heard general report in favour of the prisoner,' has a very slight effect in comparison. Again, to the proposition that general character is alone admissible the answer is that it is impossible to get at it. There is no such thing as general character; it is the general inference supposed to arise from hearing a number of separate and disinterested statements in favour of the prisoner. But I think that the notion that general character is alone admissible is not accurate. It would be wholly inadmissible to ask a witness what individual he has ever heard give his opinion of a particular fact connected with the man. I attach considerable weight to this distinction, because, in my opinion, the best character is that which is the least talked of." See *infra*, X, C, 3, b.

1. See *infra*, XI, C, 2.
2. See *infra*, XI, C, 3.
3. See *infra*, XI, C, 7.
4. See *infra*, XI, C, 8.
5. The opinion of the majority of the court for crown cases reserved, given in a well-considered case, not only states the English rule but illustrates in an interesting way the practical difficulties of excluding facts and opinion. "It is quite clear," said Cockburn, C. J., "that, as the law now stands, the pris-

only as constituting the basis of the inference, but as furnishing circumstantial evidence of its correctness, and generally as to the existence of the trait in question.

2. REPUTATION IN COMMUNITY — a. In General. The appropriate proof of actual character is by establishing general reputation,[6] as to the particular trait involved,[7] as it existed at the time of the occurrence rendered important by the evidence,[8] in the community in which the person in question is known,[9] whether the

oner cannot give evidence of particular facts, although one fact would weigh more than the opinion of all his friends and neighbours. So too, evidence of antecedent bad conduct would form equally good ground for inferring the prisoner's guilt, yet it is quite clear evidence of that kind is inadmissible. The allowing evidence of good character has arisen from the fairness of our laws, and is an anomalous exception to the general rule. It is quite true that evidence of character is most cogent, when it is preceded by a statement shewing that the witness has had opportunities of acquiring information upon the subject beyond what the man's neighbours in general would have; and in practice the admission of such statements is often carried beyond the letter of the law in favour of the prisoner. It is, moreover, most essential that a witness who comes forward to give a man a good character should himself have a good opinion of him; for otherwise he would only be deceiving the jury; and so the strict rule is often exceeded. But, when we consider what, in the strict interpretation of the law, is the limit of such evidence, in my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness." Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 530, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

6. *Alabama.*— McQueen *v.* State, 108 Ala. 54, 18 So. 843; Jones *v.* State, 76 Ala. 8; Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773.

California.— People *v.* Gordon, 103 Cal. 568, 37 Pac. 534.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361.

Georgia.— Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Indiana.— Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205.

Massachusetts.— Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861; Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325; Boynton *v.* Kellogg, 3 Mass. 189, 3 Am. Dec. 122.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

Missouri.— State *v.* Welsor, 117 Mo. 570, 21 S. W. 443; Patrick *v.* The J. Q. Adams, 19 Mo. 73.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; Patterson *v.* State, 41 Nebr. 538, 59 N. W. 917; Dorsey *v.* Clapp, 22 Nebr. 564, 35 N. W. 389.

North Carolina.— Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154; State *v.* Laxton, 76 N. C. 216; Luther *v.* Skeen, 53 N. C. 356.

North Dakota.—State *v.* Thoemke, 11 N. D. 386, 92 N. W. 480.

Oregon.— State *v.* Garrand, 5 Oreg. 156.

Pennsylvania.— Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467.

Texas.— Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436; Sheen *v.* Bumpstead, 2 H. & C. 193, 10 Jur. N. S. 242, 32 L. J. Exch. 271, 8 L. T. Rep. N. S. 832, 11 Wkly. Rep. 734.

See 14 Cent. Dig. tit. "Criminal Law," §§ 844, 845; 20 Cent. Dig. tit. "Evidence," §§ 187, 1204. And see CRIMINAL LAW, 12 Cyc. 415, 416.

"Reputation is the index of character." Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861.

The mere statements as to character of persons not sworn are incompetent. Asher *v.* Beckner, 41 S. W. 35, 19 Ky. L. Rep. 521.

"General character" is that which is general throughout the entire community; not that which covers the entire character. Gandolfo *v.* State, 11 Ohio St. 114.

"It is not competent to show what two or three persons only think or say concerning the witness, but the inquiry must be confined to the general estimation in which he is held by his neighbors and acquaintances." Matthewson *v.* Burr, 6 Nebr. 312, 317; Carter *v.* Com., 2 Va. Cas. 169.

Rumors excluded.—A witness at a criminal trial cannot be asked "if he knew the general character of the defendant in his neighborhood, from rumor." Haley *v.* State, 63 Ala. 83; Campbell *v.* State, 23 Ala. 44; Drew *v.* State, 124 Ind. 9, 23 N. E. 1098; State *v.* Austin, 108 N. C. 780, 13 S. E. 219.

7. *Alabama.*— Thompson *v.* State, 100 Ala. 70, 14 So. 878; Jones *v.* State, 76 Ala. 8.

Massachusetts.— Bodwell *v.* Swan, 3 Pick. 376, 15 Am. Dec. 228.

Nebraska.— Matthewson *v.* Burr, 6 Nebr. 312.

North Carolina.— Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154.

Texas.— Gay *v.* State, 40 Tex. Cr. App. 242, 49 S. W. 612.

8. Graham *v.* State, 29 Tex. App. 31, 13 S. W. 1013.

9. *Alabama.*— Evans *v.* State, 109 Ala. 11, 19 So. 535; McQueen *v.* State, 108 Ala. 54, 18 So. 843.

Georgia.— Columbus, etc., R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411.

Iowa.— State *v.* Dexter, 115 Iowa 678, 87

character to be proved is that of a party[10] or of a third person, as the deceased in a homicide,[11] and whether the proof is offered in a civil[12] or criminal[13] case. Directly rebutting evidence of character should in like manner be by proof of general reputation.[14] It is not necessary that the witness should know that the reputation he states is the opinion of the majority of the community.[15] He should know that it is the prevailing impression.

b. Function of Judge. One who offers a witness as to character must prove[16] on direct examination[17] to the reasonable satisfaction of the court that the witness is duly qualified by the possession of adequate knowledge.[18] Whether the time at which it is offered to show a person's reputation is too remote to be relevant,[19]

N. W. 417; State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

New York.— Hart *v.* McLaughlin, 51 N. Y. App. Div. 411, 64 N. Y. Suppl. 827; Sawyer *v.* People, 1 N. Y. Cr. 249.

Ohio.—Searles *v.* State, 6 Ohio Cir. Ct. 331, 3 Ohio Cir. Dec. 478.

Texas.— Mynatt *v.* Hudson, 66 Tex. 66, 17 S. W. 396; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

See 14 Cent. Dig. tit. "Criminal Law," §§ 844, 845. See also CRIMINAL LAW, 12 Cyc. 415.

10. See the cases in the preceding notes.

11. Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Columbus, etc., R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411. See, generally, HOMICIDE.

12. Columbus, etc., R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411; and other cases in the preceding notes.

13. Bush *v.* State, 109 Ga. 120, 34 S. E. 298.

14. *Alabama.*— Steele *v.* State, 83 Ala. 20, 3 So. 547.

California.— People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361.

Iowa.— State *v.* Grinden, 91 Iowa 505, 60 N. W. 37.

Louisiana.— State *v.* Donelon, 45 La. Ann. 744, 12 So. 922; State *v.* Farrer, 35 La. Ann. 315.

Massachusetts.—Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325.

Pennsylvania.— Com. *v.* Gibbons, 3 Pa. Super. Ct. 408, 39 Wkly. Notes Cas. 565.

Texas.— Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 531, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436, where Cockburn, C. J., said: "Within what limits must the rebutting evidence be confined? I think that that evidence must be of the same character and confined within the same limits,— that, as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description, shewing that the evidence which has been given in favour of the prisoner is not true, but that the man's general reputation is bad."

15. Robinson *v.* State, 16 Fla. 835.

16. **Claiming or disclaiming knowledge.**— A claim to knowledge has been deemed a *prima facie* qualification. Conkey *v.* People, 1 Abb. Dec. (N. Y.) 418, 5 Park. Cr. (N. Y.) 31. The reverse is not equally true. Such are the difficulties of making the average witness understand this form of inquiry, that a disclaimer is not necessarily fatal to the competency of the witness (Sullivan *v.* State, 66 Ala. 48), although such is the usual ruling (State *v.* Grinden, 91 Iowa 505, 60 N. W. 37). Positive certainty is not required. A witness may state how he has always "understood." State *v.* Wright, 112 Iowa 436, 84 N. W. 541.

17. Peeples *v.* State, 103 Ga. 629, 29 S. E. 691.

18. Peeples *v.* State, 103 Ga. 629, 29 S. E. 691; Thomas *v.* People, 67 N. Y. 218; People *v.* Seldner, 62 N. Y. App. Div. 357, 71 N. Y. Suppl. 35.

19. *Arkansas.*—Snow *v.* Grace, 29 Ark. 131.

Illinois.— Halloway *v.* People, 181 Ill. 544, 54 N. E. 1030.

Kansas.— Coates *v.* Sulau, 46 Kan. 341, 26 Pac. 720.

North Carolina.— Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154.

Washington.— State *v.* Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154, holding that one charged with murder, who has been permitted to introduce proof as to his reputation, covering all the later years of his life, cannot complain because the court refused to allow a witness to testify as to his reputation from his boyhood up to the time of the homicide.

Review.— The court's action in passing on remoteness in this connection will not be reviewed in the absence of gross abuse.

Alabama.— Kelly *v.* State, 61 Ala. 19.

Arkansas.— Lawson *v.* State, 32 Ark. 220; Snow *v.* Grace, 29 Ark. 131.

Illinois.— Brown *v.* Luehrs, 1 Ill. App. 74.

Indiana.— Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459; Louisville, etc., R. Co. *v.* Richardson, 66 Ind. 43, 32 Am. Rep. 94.

Kansas.— Coates *v.* Sulau, 46 Kan. 341, 26 Pac. 720.

North Carolina.— State *v.* Lanier, 79 N. C. 622.

See also CRIMINAL LAW, 12 Cyc. 415.

Instances.— Two (Kelly *v.* State, 61 Ala. 19; Lawson *v.* State, 32 Ark. 220; Louisville, etc., R. Co. *v.* Richardson, 66 Ind. 43, 32 Am. Rep. 94), three (State *v.* Lanier, 79

or whether a community is too distant for the purpose,[20] are preliminary questions to be decided by the judge. Ordinarily remoteness of time and place will affect the weight rather than the competency of the evidence.[21] The court may exclude further evidence if a satisfactory test of its value has been made[22] and it is shown that it would be slight.[23] The court may make a reasonable limitation upon the number of witnesses permitted to testify on the issue of character.[24] It has been intimated that the court may in its discretion permit a defendant to use other means of establishing his character than by proof of reputation.[25]

c. Requirements For Admissibility — (I) *In General.* That reputation as to character may be relevant it should fulfil two conditions: (1) The reputation must arise among the members of a community who may fairly be assumed to know that of which they speak. (2) It must be an expression of persons who have no motive to misrepresent; in other words, the statement must be made *ante litem motam*, or before the existence of a criminal charge.

(II) *Relevancy* — (A) *Adequate Knowledge.* The community whose estimate of a person's character is important is, other things being equal, that through which he is best known.[26] If he has lived long enough in his present residence to have acquired a reputation there special weight attaches to the estimate formed there,[27] although reputation in places of former residence is not excluded.[28] Where the person has not acquired a reputation in his present neighborhood, that acquired at a prior residence will be received,[29] provided the residence is not so long ago as to be excluded as remote.[30] The inquiry in cross-examination may extend to cover reputation existing in any community deemed relevant by the presiding justice.[31] The same practice obtains on rebuttal. When defendant introduces witnesses as to his character in certain communities of his residence,

N. C. 622), four (Sleeper *v.* Van Middlesworth, 4 Den. (N. Y.) 431; Mynatt *v.* Hudson, 66 Tex. 66, 17 S. W. 396), six (Fry *v.* State, 96 Tenn. 467, 35 S. W. 883); seven or eight (Jones *v.* State, 104 Ala. 30, 16 So. 135; Graham *v.* Chrystal, 2 Abb. Dec. (N. Y.) 263, 2 Keyes (N. Y.) 21, 37 How. Pr. (N. Y.) 279) years, under the circumstances of particular cases, have not been deemed too long an interval; while, *per contra*, a period of five (State *v.* Potts, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814) years has been held too remote.

On cross-examination a wider range is permitted (Halloway *v.* People, 181 Ill. 544, 54 N. E. 1030), even fifteen years not proving a barrier (State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677).

20. Prater *v.* State, 107 Ala. 26, 18 So. 238. The decision, in the absence of abuse, will be final. Prater *v.* State, 107 Ala. 26, 18 So. 238, six miles.

21. Jones *v.* State, 104 Ala. 30, 16 So. 135; Brown *v.* Luehrs, 1 Ill. App. 74.

22. Where a witness had resided for the last five years in his present residence "and there was abundant evidence as to his reputation," it was held incompetent to inquire as to his character for truth and veracity at the place of former residence. State *v.* Potts, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814.

23. Waddingham *v.* Hulett, 92 Mo. 528, 534, 5 S. W. 27. So the character of a witness at a distant place where he has resided but three months on a temporary visit is not competent. "A man's character is to be judged by the general tenor and current of his life and not by a mere episode in it." Waddingham *v.* Hulett, 92 Mo. 528, 534, 5 S. W. 27.

24. Browder *v.* State, 30 Tex. App. 614, 18 S. W. 197. See Criminal Law, 12 Cyc. 416.

25. State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

26. Waddingham *v.* Hulett, 92 Mo. 528, 5 S. W. 27; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

27. State *v.* Ward, 73 Iowa 532, 35 N. W. 617; State *v.* Thoemke, 11 N. D. 386, 92 N. W. 480; Mynatt *v.* Hudson, 66 Tex. 66, 17 S. W. 396.

A prison may be a suitable community to form a reputation as to a party's character. Thomas *v.* People, 67 N. Y. 218.

Place of business.— Evidence as to the reputation of the accused is not necessarily confined to his reputation in the vicinity of residence, but may be given with reference to the locality in which he is in the habit of dealing. State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

That the party is little known in the neighborhood of the place of trial does not alter the rule. Timmony *v.* Burns, (Tex. Civ. App. 1897) 42 S. W. 133.

28. Sleeper *v.* Van Middlesworth, 4 Den. (N. Y.) 431.

29. Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459; Coates *v.* Sulau, 46 Kan. 341, 26 Pac. 720.

30. Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154. See *supra*, X, C, 2, b.

31. Beauchamp *v.* State, 6 Blackf. (Ind.) 299.

the state may rebut as to those and other communities where he has lived,[32] under relevant circumstances.[33] But character as a citizen cannot be rebutted by evidence of character as a soldier.[34] The circumstances must have been such as to make the reputation relevant. It is not competent to rebut evidence of good character by proof of a bad local reputation, limited to a neighborhood remote from defendant's residence,[35] where he has never lived and where he is not shown to be generally known,[36] nor by proof of reports relating to particular facts.[37]

(B) *Ante Litem Motam.* Evidence must be directed to proof of the person's reputation as it existed *ante litem motam* in a civil case, and on a criminal proceeding before the accused was charged[38] or generally suspected of the offense; actual arrest not being the crucial fact.[39] Evidence of a reputation arising under other circumstances is equally incompetent in the party's favor.[40]

3. Other Proof of Character — a. Circumstantial Evidence — (I) *In General.* Although admitted in certain cases, apparently without objection,[41] and continually received to prove mental states,[42] it is settled by the great weight of authority that character cannot be proved by evidence of its operation in specific instances,[43] even when the conduct has become habitual, whether the character is

32. State *v.* Foster, 91 Iowa 164, 59 N. W. 8.

33. Burns *v.* State, 23 Tex. App. 641, 5 S. W. 140.

34. Burns *v.* State, 23 Tex. App. 641, 5 S. W. 140.

35. Griffin *v.* State, 14 Ohio St. 55.

36. Griffin *v.* State, 14 Ohio St. 55.

37. Griffin *v.* State, 14 Ohio St. 55.

38. *Alabama.*— White *v.* State, 111 Ala. 92, 21 So. 330.

California.— People *v.* McSweeney, (1894) 38 Pac. 743; People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396.

Kentucky.— White *v.* Com., 80 Ky. 480, 4 Ky. L. Rep. 373.

Louisiana.— State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111.

Nebraska.— Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

New Jersey.— State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788.

North Carolina.— State *v.* Johnson, 60 N. C. 151.

Ohio.— Wroe *v.* State, 20 Ohio St. 460.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046; Lea *v.* State, 94 Tenn. 495, 29 S. W. 900.

Texas.— Hill *v.* State, 37 Tex. Cr. 415, 35 S. W. 660; Skaggs *v.* State, 31 Tex. Cr. 563, 21 S. W. 257; Graham *v.* State, 29 Tex. App. 31, 13 S. W. 1013.

Virginia.— Carter *v.* Com., 2 Va. Cas. 169.

England.— Foulkes *v.* Sellway, 3 Esp. N. P. 236.

See 14 Cent. Dig. tit. "Criminal Law," §§ 837, 840. And see Criminal Law, 12 Cyc. 415.

Statement and reason of rule.— "A different rule will expose the defendant to the great danger of having his character ruined or badly damaged, by the arts of a popular or artful prosecutor, stimulated to activity by the hope of thus making his prosecution successful. Evidence of character is of the nature of hearsay, and the general rule in relation to that kind of testimony is, that it shall not be received if the hearsay be *post litem motam.* . . . The reason for this is, 'that no man is presumed to be indifferent in regard to matters in actual controversy; for when the contest has begun, people, generally, take part on the one side or the other — their minds are in a ferment, and if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs, which would otherwise result, all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected.'" State *v.* Johnson, 60 N. C. 151, 152.

On the contrary it has been held that if on the trial of an indictment defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent to the government to prove that subsequently to that time his character has been bad. Com. *v.* Sacket, 22 Pick. (Mass.) 394.

39. White *v.* Com., 80 Ky. 480, 4 Ky. L. Rep. 373. The period between the discovery of the offense and the arrest of defendant may be covered by the evidence. White *v.* Com., *supra.*

40. White *v.* State, 111 Ala. 92, 21 So. 330; State *v.* Kinley, 43 Iowa 294. Evidence of defendant's good character while confined in jail under the charge for which he is being tried is not admissible. White *v.* State, 111 Ala. 92, 21 So. 330; Hill *v.* State, 37 Tex. Cr. 415, 35 S. W. 660.

41. Plummer *v.* Ossipee, 59 N. H. 55; State *v.* Parks, 109 N. C. 813, 13 S. E. 939; Gandolfo *v.* State, 11 Ohio St. 114.

42. See *supra*, VIII, B, 10. See also Reddick *v.* State, 25 Fla. 112, 433, 5 So. 704.

43. *Alabama.*— McQueen *v.* State, 108 Ala. 54, 18 So. 843; Walker *v.* State, 91 Ala. 76, 9 So. 87; Morgan *v.* State, 88 Ala. 223, 6 So. 761; Davenport *v.* State, 85 Ala. 336, 5 So. 152; Jones *v.* State, 76 Ala. 8; Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773.

Arkansas.— Campbell *v.* State, 38 Ark. 498.

California.— People *v.* Gordan, 103 Cal. 568, 37 Pac. 534; Jones *v.* Duchow, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

that of a party, witness, or third person.[44] The rule applies equally in a criminal case, whether the evidence is offered by the prosecution,[45] or by defendant;[46] and in a civil case, whether it is offered by plaintiff or defendant.[47] Particular facts, as that there have been no quarrels,[48] or that one is a church member,[49] or a preacher,[50] or that his neighbors have given him a certificate of good character,[51] or the government has issued to him an honorable discharge from military service,[52] are not received to show good character;[53] and facts which tend to show

Connecticut.— State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769; Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189.

Delaware.— State *v.* Briscoe, 3 Pennew. 7, 50 Atl. 271.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361.

Georgia.— Columbus, etc., R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411.

Illinois.— Hirschman *v.* People, 101 Ill. 568; Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Mark *v.* Merz, 53 Ill. App. 458.

Indiana.— Stalcup *v.* State, 146 Ind. 270, 45 N. E. 334.

Iowa.— State *v.* Dexter, 115 Iowa 678, 87 N. W. 417.

Kentucky.— White *v.* Com., 80 Ky. 480, 4 Ky. L. Rep. 373; Campbell *v.* Bannister, 79 Ky. 205, 2 Ky. L. Rep. 72.

Louisiana.— State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

Massachusetts.— McCarty *v.* Coffin, 157 Mass. 478, 32 N. E. 649; Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807; Com. *v.* Hardy, 2 Mass. 303.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292; King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

Missouri.— State *v.* Welsor, 117 Mo. 570, 21 S. W. 443; State *v.* Parker, 96 Mo. 382, 9 S. W. 728; State *v.* King, 78 Mo. 555; Patrick *v.* The J. Q. Adams, 19 Mo. 73.

Nebraska.— Berneker *v.* State, 40 Nebr. 810, 59 S. W. 372; Dorsey *v.* Clapp, 22 Nebr. 564, 35 N. W. 389.

New Hampshire.— It cannot be thus shown that the accused has a tendency or disposition to commit offenses of the class on trial. State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69; State *v.* Renton, 15 N. H. 169.

New York.— New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503, 7 Abb. N. Cas. 334; Hart *v.* McLaughlin, 51 N. Y. App. Div. 411, 64 N. Y. Suppl. 827; Hilton *v.* Carr, 40 N. Y. App. Div. 490, 58 N. Y. Suppl. 134.

North Carolina.— Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154; State *v.* Hare, 74 N. C. 591; Luther *v.* Skeen, 53 N. C. 356.

Pennsylvania.— Snyder *v.* Com., 85 Pa. St. 519; Painter *v.* Drum, 40 Pa. St. 467; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467 (care, skill, truth, etc.); Com. *v.* Gibbons, 3 Pa. Super. Ct. 408, 39 Wkly. Notes Cas. 565.

Texas.— Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772; East Line, etc., R. Co. *v.* Scott, 68 Tex. 694, 5 S. W. 501; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523; Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

Wisconsin.—Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

United States.— Bird *v.* Halsy, 87 Fed. 671.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

Canada.— Rose *v.* Cuyler, 27 U. C. Q. B. 270.

See 14 Cent. Dig. tit. "Criminal Law," §§ 844, 845; 20 Cent. Dig. tit. "Evidence," §§ 187, 1204. See also CRIMINAL LAW, 12 Cyc. 415, 416.

Reason for exclusion.— "Evidence of particular facts is excluded, because a robber may do acts of generosity; and the proof of such acts is therefore irrelevant to the question whether he was likely to have committed a particular act of robbery. Such evidence is excluded, partly for the reason already given, and partly because no notice has been given to the other side that such an inquiry is going to be made." Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 541, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436, per Willes, J.

44. St. Louis, etc., R. Co. *v.* Stroud, 67 Ark. 112, 56 S. W. 870; Campbell *v.* State, 38 Ark. 498; King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681; Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; and other cases in the preceding note.

On an indictment for homicide the character of the deceased cannot be shown by specific acts of misconduct, although illustrative of the trait involved. Campbell *v.* State, 38 Ark. 498. See, generally, HOMICIDE.

45. State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69; and other cases above cited.

46. See the cases above cited.

47. McCarty *v.* Coffin, 157 Mass. 478, 32 N. E. 649; Parkhurst *v.* Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639; and other cases above cited.

48. State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769.

49. Hussey *v.* State, 87 Ala. 121, 6 So. 420.

50. State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038.

51. Jones *v.* Duchow, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

52. People *v.* Eckman, 72 Cal. 582, 14 Pac. 359.

53. State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769; Com. *v.* Mullen, 150 Mass. 394, 23

bad character, as disreputable associates,[54] frequent quarrels,[55] imprisonment,[56] keeping a disreputable house,[57] or pursuit by police officers,[58] are equally inadmissible.

(II) *ANIMALS.*[59] In the case of lower animals character may be shown by evidence of specific instances in which a relevant trait was manifested.[60] It may thus be shown that a horse is gentle,[61] kind,[62] safe[63] or vicious;[64] even where the acts are subsequent to the occurrence involved in the inquiry.[65] Similarly, the character of animals may be established by the inference of competent observers,[66] as well as by general reputation.[67]

(III) *CROSS-EXAMINATION.*[68] A party whose reputation is attacked may test the evidence by calling, on cross-examination, for the particular charges which have been made against him and for the persons who made them,[69] but facts so elicited are not evidence of the truth of the statement.[70] In criminal cases a witness who testifies to a good reputation of accused may be tested by asking, on cross-examination, as to reports which he has heard,[71] or facts otherwise known to

N. E. 51 (holding that whether an employer had made inquiries as to a defendant and had any fault to find with him was irrelevant); State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038; Howard *v.* State, 37 Tex. Cr. 494, 36 S. W. 475, 66 Am. St. Rep. 812 (holding that evidence that defendant held a position of trust at a fair salary was incompetent to prove reputation).

54. Cheney *v.* State, 7 Ohio 222; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

55. Campbell *v.* State, 38 Ark. 498; State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387; King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

56. Murphy *v.* State, 108 Ala. 10, 18 So. 557 (holding that where evidence was offered of defendant's good character, it was error to permit a deputy sheriff to testify in rebuttal that he nearly always had a warrant for defendant's arrest); State *v.* Bysong, 112 Iowa 419, 84 N. W. 505; People *v.* White, 14 Wend. (N. Y.) 111.

57. People *v.* Christy, 65 Hun (N. Y.) 349, 20 N. Y. Suppl. 278, 8 N. Y. Cr. 480.

58. Reddick *v.* State, 25 Fla. 112, 433, 5 So. 704; Sanford *v.* Craig, 52 Nebr. 483, 72 N. W. 864.

59. See also ANIMALS, 2 Cyc. 382, 385, 387, 388.

60. *Connecticut.*— Sydleman *v.* Beckwith, 43 Conn. 9.

Massachusetts.—Lynch *v.* Moore, 154 Mass. 335, 28 N. E. 277; Todd *v.* Rowley, 8 Allen 51.

Michigan.— Noble *v.* St. Joseph, etc., St. R. Co., 98 Mich. 249, 57 N. W. 126.

Montana.— Kennon *v.* Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45.

New Hampshire.— Chamberlain *v.* Enfield, 43 N. H. 356.

Tennessee.— Lebanon, etc., Turnpike Co. *v.* Hearn, 87 Tenn. 291, 10 S. W. 510.

See also ANIMALS, 2 Cyc. 385.

61. Chamberlain *v.* Enfield, 43 N. H. 356; Lebanon, etc., Turnpike Co. *v.* Hearn, 87 Tenn. 291, 10 S. W. 510.

62. Sydleman *v.* Beckwith, 43 Conn. 9.

63. Sydleman *v.* Beckwith, 43 Conn. 9; Todd *v.* Rowley, 8 Allen (Mass.) 51; Noble *v.* St. Joseph, etc., St. R. Co., 98 Mich. 249, 57 N. W. 126.

64. Lynch *v.* Moore, 154 Mass. 335, 28 N. E. 277; Kennon *v.* Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45; Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185. See also ANIMALS, 2 Cyc. 385.

65. Kennon *v.* Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45; Lebanon, etc., Turnpike Co. *v.* Hearn, 87 Tenn. 291, 10 S. W. 510. See also ANIMALS, 2 Cyc. 386.

66. Sydleman *v.* Beckwith, 43 Conn. 9; Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453.

67. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453, horse. This, however, has been questioned (Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185), and even denied (Norris *v.* Warner, 59 Ill. App. 300).

Independent relevancy.—An animal's reputation may be independently relevant; e. g. to show notice. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453.

68. See, generally, WITNESSES.

69. Leonard *v.* Allen, 11 Cush. (Mass.) 241; Eifert *v.* Sawyer, 2 Nott & M. (S. C.) 511, 10 Am. Dec. 633. "The propriety of allowing the party whose character is impeached by a general statement of his bad reputation for moral worth, to elicit particulars on a cross-examination, seems to follow from the general practice in reference to evidence of bad reputation of a party, more frequently occurring in the case of witnesses, who are impeached. It has been thought useful and favorable to the elucidation of truth in such cases to allow on cross-examination an inquiry as to particulars in the charges, and also in reference to the persons who made them, or gave their opinion as to the character of the individual impeached. We think the ruling was right upon this point." Leonard *v.* Allen, 11 Cush. (Mass.) 241, 245.

70. Peterson *v.* Morgan, 116 Mass. 350; Teese *v.* Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479.

71. Smith *v.* State, 103 Ala. 57, 15 So. 866; Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Hawes *v.* State, 88 Ala. 37, 7 So. 302; Jackson *v.* State, 78 Ala. 471; De Arman *v.* State, 71 Ala. 351; People *v.* Gordan, 103 Cal. 568, 37 Pac. 534; People *v.* Ah Lee Doon, 97 Cal.

him,[72] or as to what he has himself said at a particular time and place as to matters affecting the character of the person about whom inquiry is made,[73] or what the reputation is in connection with certain specified transactions within the reasonable range of the direct examination;[74] the object of this line of inquiry being, not to discredit the person whose reputation is involved,[75] the facts so elicited, as in civil cases, not being evidence on the issue,[76] but to test the accuracy and candor of the witness himself.[77]

(iv) *Rebuttal.* Since, in a criminal prosecution, defendant cannot prove particular acts of good conduct, the state cannot in rebuttal prove particular acts of bad conduct,[78] even when these are assumed to be relevant as furnishing the

171, 31 Pac. 933; McDonel *v.* State, 90 Ind. 320; Baehner *v.* State, 25 Ind. App. 597, 58 N. E. 741; People *v.* Elliott, 163 N. Y. 11, 57 N. E. 103.

72. *Alabama.*— White *v.* State, 111 Ala. 92, 21 So. 330; Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Thompson *v.* State, 100 Ala. 70, 14 So. 878; Moulton *v.* State, 88 Ala. 116, 6 So. 758, 6 L. R. A. 301; Holmes *v.* State, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17; Jackson *v.* State, 78 Ala. 471; Tesney *v.* State, 77 Ala. 33; De Arman *v.* State, 71 Ala. 351; Ingram *v.* State, 67 Ala. 67.

Connecticut.— State *v.* Jerome, 33 Conn. 265.

Illinois.— Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265.

Iowa.— State *v.* Arnold, 12 Iowa 479.

Massachusetts.—Leonard *v.* Allen, 11 Cush. 241.

Michigan.— People *v.* Mills, 94 Mich. 630, 54 N. W. 488.

Nebraska.— McCormick *v.* State, 66 Nebr. 337, 92 N. W. 606 (arrest); Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

New Hampshire.—State *v.* Knapp, 45 N. H. 148.

New York.— People *v.* Elliot, 163 N. Y. 11, 57 N. E. 103.

North Carolina.—State *v.* Murray, 63 N. C. 31.

South Carolina.— Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 633.

Vermont.— State *v.* Reed, 39 Vt. 417, 94 Am. Dec. 337.

United States.— King *v.* U. S., 112 Fed. 988, 50 C. C. A. 647.

Statement and application of rule.— "Opinions, therefore, and rumors and reports, concerning the conduct or particular acts of the party under inquiry are the source from which, in most instances, the witness derives whatever knowledge he may have on the subject of general reputation; and, as a test of his information, accuracy and credibility, but not for the purpose of proving particular acts or facts, he may always be asked on cross-examination as to the opinions he has heard expressed by members of the community and even by himself as one of them, touching the character of the defendant or deceased, as the case may be, and whether he has not heard one or more persons of the neighborhood impute particular acts or the commission of particular crimes to the party under investigation, or reports and rumors to that effect." Moulton *v.* State, 88 Ala. 116, 119, 6 So. 758, 6 L. R. A. 301. In a prosecution for rape it was held proper for the state to ask witnesses testifying to defendant's good character whether they had heard of divorce proceedings in which a divorce had been granted to defendant's wife, and whether it qualified their opinion as to defendant's good character. People *v.* Elliot, 163 N. Y. 11, 57 N. E. 103.

73. Jackson *v.* State, 78 Ala. 471.

74. People *v.* McKane, 80 Hun (N. Y.) 322, 30 N. Y. Suppl. 95.

75. Terry *v.* State, 118 Ala. 79, 23 So. 776.

76. *Alabama.*— Moulton *v.* State, 88 Ala. 116, 6 So. 758, 6 L. R. A. 301.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361.

Indiana.— Jones *v.* State, 118 Ind. 39, 20 N. E. 634; Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494; Redman *v.* State, 1 Blackf. 96.

Iowa.— State *v.* McGee, 81 Iowa 17, 46 N. W. 764; State *v.* Arnold, 12 Iowa 479; Gordon *v.* State, 3 Iowa 410.

Massachusetts.—Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

77. Smith *v.* State, 103 Ala. 57, 15 So. 866.

78. *Alabama.*— Murphy *v.* State, 108 Ala. 10, 18 So. 557; Thompson *v.* State, 100 Ala. 70, 14 So. 878; Morgan *v.* State, 88 Ala. 223, 6 So. 761; Steele *v.* State, 83 Ala. 20, 3 So. 547; Franklin *v.* State, 29 Ala. 14.

California.— People *v.* Bishop, 81 Cal. 113, 22 Pac. 477; People *v.* Bezy, 67 Cal. 223, 7 Pac. 643.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361; Reddick *v.* State, 25 Fla. 112, 433, 5 So. 704.

Georgia.— Columbus, etc., R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411.

Illinois.—Aiken *v.* People, 183 Ill. 215, 55 N. E. 695; Gifford *v.* People, 87 Ill. 210; McCarty *v.* People, 51 Ill. 231, 99 Am. Dec. 542.

Indiana.— Stitz *v.* State, 104 Ind. 359, 4 N. E. 145.

Iowa.— State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387.

Louisiana.— State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

basis of the witness' opinion of the party's reputation,[79] or where a government witness testifies on cross-examination to the good character of accused.[80] On a civil proceeding evidence of reputation cannot be rebutted by evidence of specific acts, although this has been permitted where character has been itself shown by specific instances.[81]

(v) *Independent Relevancy.* Specific instances of conduct, especially where these have developed the regularity and force of a habit,[82] may be independently relevant, as to establish consent,[83] motive,[84] or probable cause in an action for malicious prosecution;[85] or to establish other relevant facts.[86] An act of this nature will not be excluded simply because it tends also to show character.[87] Proof of specific acts may be a necessary part of the state's case, as where the crime charged is one of a habitual nature or involves the doing of repeated acts, as common gambling.[88]

b. Inference From Observation. It is well settled that the existence of an inference on the part of a competent observer as to the existence of a particular relevant trait of character is inadmissible,[89] either as direct evidence or in

Massachusetts.— Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

Nebraska.— Oliver *v.* State, 11 Nebr. 1, 7 N. W. 444, holding that where a person accused of crime introduces evidence of his good character or reputation, it is not competent for the prosecution in reply to put in evidence particular facts tending to prove it to be bad; but if particular facts be admitted, either with or without objection, the accused has the right to show the circumstances under which they occurred.

New Jersey.— Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668.

New York.— People *v.* White, 14 Wend. 111.

Ohio.— Griffin *v.* State, 14 Ohio St. 55.

Pennsylvania.— Com. *v.* Gibbons, 3 Pa. Super. Ct. 408.

Texas.— Gibbs *v.* State, 34 Tex. 134; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

See 14 Cent. Dig. tit. "Criminal Law," § 845. See also Criminal Law, 12 Cyc. 416.

Rebuttal cannot extend to inquiry as to details of specific instances brought out on cross-examination. Carson *v.* State, 128 Ala. 58, 29 So. 608; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444. It has been held, however, that the government may prove in rebuttal facts inconsistent with the character set up by the prisoner. State *v.* Williams, 77 Mo. 310; State *v.* Parks, 109 N. C. 813, 13 S. E. 939.

79. People *v.* Gibson, 4 N. Y. Suppl. 170, 6 N. Y. Cr. 390, holding that in a criminal prosecution, where a witness is called to rebut evidence of defendant's good character, it is error to allow the prosecution to interrogate the witness with regard to the particulars upon which he founds his opinion as to defendant's reputation.

80. Evans *v.* State, 109 Ala. 11, 19 So. 535.

81. Plummer *v.* Ossipee, 59 N. H. 55.

82. People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002; State *v.* Jerome, 33 Conn. 265; Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763; Dowling *v.* State, 5 Sm. & M. (Miss.) 664.

83. Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245; State *v.* Murray, 63 N. C. 31; State *v.* Jefferson, 28 N. C. 305; State *v.* Reed, 39 Vt. 417, 94 Am. Dec. 337. See also, generally, Rape.

Habitual unchastity has been admitted (Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309; U. S. *v.* Bredemeyer, 6 Utah 143, 22 Pac. 110); but that the prosecuting witness habitually used indecent language has been held immaterial (People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002).

In Illinois, the right to prove bad character for chastity by specified acts of incontinence, as distinguished from general reputation, has been denied, although such evidence may be admitted to contradict the government's theory on other points. Shirwin *v.* People, 69 Ill. 55.

84. Kelly *v.* State, 49 Ga. 12; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65.

85. Mark *v.* Merz, 53 Ill. App. 458.

86. Russell *v.* State, 66 Nebr. 497, 92 N. W. 751.

87. Edmunds *v.* State, (Tex. Cr. App. 1901) 63 S. W. 871; Bell *v.* State, (Tex. Cr. App. 1900) 56 S. W. 913; Hinds *v.* State, 11 Tex. App. 238; Antle *v.* State, 6 Tex. App. 202.

That an accused person has had various aliases is entirely competent. Edmunds *v.* State, (Tex. Cr. App. 1901) 63 S. W. 871.

88. Com. *v.* Moore, 2 Dana (Ky.) 402.

89. *Alabama.*— McQueen *v.* State, 108 Ala. 54, 18 So. 843; Hussey *v.* State, 87 Ala. 121, 6 So. 420, timid.

Delaware.— State *v.* Briscoe, 3 Pennew. 7, 50 Atl. 271.

Georgia.— Bowens *v.* State, 106 Ga. 760, 32 S. E. 666.

Illinois.— Beasley *v.* People, 89 Ill. 571.

Mississippi.—McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* King, 78 Mo. 555.

rebuttal;[90] even where it is an inference from observed conduct.[91] The evidence has been received, in the absence of objection,[92] or when placed in issue by the pleadings.[93]

D. Weight of Evidence of Character. The inference that a person will act in accordance with what a community assumes will be the prompting of his moral nature is affected by at least two serious infirmative considerations: (1) It is by no means certain that the reputation represents the actual character or disposition. (2) The inference presents no uniformity of a natural law. Impulse, trivial or undiscoverable motive, or even apparently purposeless volition, constantly intercede within the field of observation. The inference accordingly becomes increasingly unreliable as a guide in proportion as the conduct involved is of an unusual nature and the case is one presenting the objection of extraordinary motives.[94] It also, although usually to a lesser degree, suffers under the same logical difficulties as evidence derived from the doing of similar acts.[95] The probative value of the inference varies also with its relevancy, in the existing state of the evidence.[96] Its probative value is greater in criminal than in civil cases,[97] or in connection with other proceedings, as for the violation of a municipal

Nebraska.—Berneker *v.* State, 40 Nebr. 810, 59 N. W. 372.

New York.— People *v.* Elliott, 163 N. Y. 11, 57 N. E. 103.

Ohio.— Gandolfo *v.* State, 11 Ohio St. 114.

Texas.— East Line, etc., R. Co. *v.* Scott, 68 Tex. 694, 5 S. W. 501.

United States.— Bird *v.* Halsy, 87 Fed. 671.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

90. State *v.* Grinden, 91 Iowa 505, 60 N. W. 37; Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

91. Hart *v.* McLaughlin, 51 N. Y. App. Div. 411, 64 N. Y. Suppl. 827; Sawyer *v.* People, 1 N. Y. Cr. 249.

92. People *v.* Wade, 118 Cal. 672, 50 Pac. 841; McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682; Conkey *v.* People, 1 Abb. Dec. (N. Y.) 418, 3 Park. Cr. (N. Y.) 31; Gandolfo *v.* State, 11 Ohio St. 114. One who resides in a family may state whether from his observation the prosecutrix in an action for seduction is a chaste and virtuous girl. People *v.* Wade, 118 Cal. 672, 50 Pac. 841. See also Kearney *v.* State, 68 Miss. 233, 8 So. 292; Sheen *v.* Bumpstead, 2 H. & C. 193, 10 Jur. N. S. 242, 32 L. J. Exch. 274, 8 L. T. Rep. N. S. 832, 11 Wkly. Rep. 734.

The early law of England admitted the inference. Jones' Case, 31 How. St. Tr. 251, 309; Davison's Case, 31 How. St. Tr. 99; Hardy's Case, 24 How. St. Tr. 199, 999.

93. State *v.* Sterrett, 68 Iowa 76, 25 N. W. 936; State *v.* Lee, 22 Minn. 407, 21 Am. Rep. 769; Ardmore Coal Co. *v.* Bevil, 61 Fed. 757, 10 C. C. A. 41. Since the purpose of evidence of the character of accused is to show his disposition, and to base thereon a presumption that he would not be likely to commit the crime charged, such presumption rests, not on the ground that in general repute accused possesses a disposition which would render it unlikely that he would commit the crime, but on the fact that he possesses such disposition, and hence a witness knowing such disposition may testify to it as a fact, and is not confined to general reputation. State *v.* Lee, 22 Minn. 407, 21 Am. Rep. 769. "Witnesses may give their opinion concerning the general character of a person for prudence or carelessness, when an issue of that kind is raised by the pleadings. To avoid the trial of numerous collateral issues concerning the conduct of a person on particular occasions, it is competent for a witness to give the result of his observation of a person's general conduct, with respect to his being negligent or otherwise, provided always that the witness has had a fair opportunity to observe his conduct. Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104; Baltimore, etc., R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6. The rule in question, permitting witnesses to give their opinion on such questions, rests largely upon grounds of convenience and necessity." Ardmore Coal Co. *v.* Bevil, 61 Fed. 757, 760, 10 C. C. A. 41.

94. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Com. *v.* Bloes, Wilcox (Pa.) 39.

95. See *infra*, XII.

96. See *supra*, X, B, 5.

97. Fry *v.* State, 96 Tenn. 467, 35 S. W. 883; State *v.* Daley, 53 Vt. 442, 38 Am. Rep. 694; State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

The good character of an accused party in respect of the trait involved in the act imputed to him, where intent is essential to its criminality, is admissible, whether the guilt of the accused be doubtful or not. State *v.* Daley, 53 Vt. 442, 38 Am. Rep. 694.

Evidence of character more readily affects proof of the animus with which an act was done than proof of the doing of the act itself. Voght *v.* State, 145 Ind. 12, 43 N. E. 1049; State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037; State *v.* Tarrant, 24 S. C. 593; U. S. *v.* Kenneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122.

by-law,[98] or selling liquor to a minor,[99] where the moral qualities are less involved. As proof of good character suggests caution in weighing the incriminating evidence rather than constitutes a defense, the inference of conduct from character becomes strong in proportion as the case which it is to meet is weak;[1] and it has been held that the inference may be disregarded when opposed to a case strongly proved[2] by direct evidence.[3] Such, however, is not the prevailing view, nor indeed the reasonable one. Evidence of good character, if otherwise competent, is

98. Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861; Com. *v.* Worcester, Thach. Cr. Cas. (Mass.) 100. "This rule [allowing defendant to introduce proof of good character] has little or no application to penal acts which have no moral quality, but are merely *mala prohibita*. That one is of good reputation as an honest, peaceable citizen has little tendency to show that he has not violated a statute or ordinance forbidding him to catch trout out of season, or to drive certain vehicles faster than a walk, or requiring him to keep the sidewalks abutting on his premises free from snow and ice. The sale of intoxicating liquor to minors is strictly forbidden by the statute, but it does not necessarily involve any moral turpitude." Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861.

99. Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861. See, generally, INTOXICATING LIQUORS.

1. *Alabama.*— Armor *v.* State, 63 Ala. 173.

Arkansas.— Edmonds *v.* State, 34 Ark. 720.

Delaware.— State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

District of Columbia.— U. S. *v.* Gunnell, 5 Mackey 196.

Florida.— Long *v.* State, 11 Fla. 295.

Georgia.— Epps *v.* State, 19 Ga. 102.

Indiana.— Walker *v.* State, 136 Ind. 663, 36 N. E. 356.

Iowa.— State *v.* House, 108 Iowa 68, 78 N. W. 859; State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Turner, 19 Iowa 144.

Massachusetts.— Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861, where it is said: "The defendant in a criminal case may put in evidence his general good reputation in regard to the elements of character involved in the commission of the crime charged against him, for the purpose of establishing the improbability of his having done the wrong imputed to him. A man of good character is unlikely to be guilty of a crime involving moral turpitude."

Mississippi.— Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.—State *v.* McMurphy, 52 Mo. 251; Schaller *v.* State, 14 Mo. 502.

Nebraska.— Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

New Jersey.— State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211.

New York.— People *v.* Vane, 12 Wend. 78; People *v.* Hammill, 2 Park. Cr. 223; People *v.* Kirby, 1 Wheel. Cr. 64; *In re* Freeland, 1 City Hall Rec. 82; *In re* Riley, 1 City Hall Rec. 23.

Pennsylvania.— Com. *v.* Platt, 11 Phila. 421; Com. *v.* Smith, 6 Am. L. Reg. 257.

United States.— U. S. *v.* Means, 42 Fed. 599; U. S. *v.* Jones, 31 Fed. 718; U. S. *v.* Jackson, 29 Fed. 503; U. S. *v.* Johnson, 26 Fed. 682; U. S. *v.* Emerson, 25 Fed. Cas. No. 15,051, 6 McLean 406; U. S. *v.* Noblom, 27 Fed. Cas. No. 15,896 (where it is held that evidence of good character may always be considered by the jury, and should lead them to scrutinize the evidence against defendant, and further should be considered as an independent fact in his favor; but if, after giving such testimony this effect, the whole evidence in the case is sufficient to warrant a conviction, the jury are not authorized to withhold from the other evidence its proper effect, or to refuse to draw from it the legitimate conclusions). U. S. *v.* Smith, 23 Fed. Cas. No. 16,322, 2 Bond 323.

See 14 Cent. Dig. tit. "Criminal Law," § 846. See also CRIMINAL LAW, 12 Cyc. 417.

Evidence in addition to that of character has been required from a defendant to secure an acquittal. Coppin *v.* State, 123 Ala. 58, 26 So. 333; Cobb *v.* State, 115 Ala. 18, 22 So. 506; Murphy *v.* State, 108 Ala. 10, 18 So. 557; Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Ford, 3 Strobh. (S. C.) 517 note. See also CRIMINAL LAW, 12 Cyc. 417.

2. *Massachusetts.*—Com. *v.* Hardy, 2 Mass. 303.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— Schaller *v.* State, 14 Mo. 502.

New Jersey.— State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211.

New York.— Wagner *v.* People, 54 Barb. 367; People *v.* Cole, 4 Park. Cr. 35; People *v.* Hammill, 2 Park. Cr. 223; *In re* James, 1 City Hall Rec. 132.

South Carolina.— State *v.* Ford, 3 Strobh. 517 note.

Tennessee.— Bennett *v.* State, 8 Humphr. 118.

United States.— U. S. *v.* Allen, 24 Fed. Cas. No. 14,432; U. S. *v.* Mayer, 26 Fed. Cas. No. 15,753, Deady 127; U. S. *v.* Roudenbush, 27 Fed. Cas. No. 16,198, Baldw. 514.

See 14 Cent. Dig. tit. "Criminal Law," § 846. And see CRIMINAL LAW, 12 Cyc. 417.

3. State *v.* Beebe, 17 Minn. 241; State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211; People *v.* Hammill, 2 Park. Cr. (N. Y.) 223; State *v.* Ford, 3 Strobh. (S. C.) 517 note. See also CRIMINAL LAW, 12 Cyc. 417.

admissible even where the adverse case is strongly established,[4] whatever the grade of the offense,[5] and whether the evidence is direct or circumstantial,[6] for evidence of good character is admissible for defendant in a criminal case, not only where a doubt exists but in order to generate one.[7] In other words, in case of reasonable doubt as to the guilt of the accused, evidence of previous good charac-

4. *Alabama.*—Armor *v.* State, 63 Ala. 173; Hall *v.* State, 40 Ala. 698; Felix *v.* State, 18 Ala. 720.

California.— People *v.* Raina, 45 Cal. 292; People *v.* Josephs, 7 Cal. 129.

Delaware.— Daniels *v.* State, 2 Pennew. 586, 48 Atl. 196, 54 L. R. A. 286.

District of Columbia.— U. S. *v.* Gunnell, 5 Mackey 196; U. S. *v.* Neverson, 1 Mackey 152.

Florida.— Long *v.* State, 11 Fla. 295.

Georgia.— Seymour *v.* State, 102 Ga. 803, 30 S. E. 263.

Illinois.— Guzinski *v.* People, 77 Ill. App. 275.

Indiana.— Holland *v.* State, 131 Ind. 568, 31 N. E. 359; Wagner *v.* State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79; Kistler *v.* State, 54 Ind. 400.

Iowa.— State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775; State *v.* House, 108 Iowa 68, 78 N. W. 859; State *v.* Lindley, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139 (holding that evidence of good character should be given such weight as it is fairly entitled to, in determining the question of guilt or innocence, and, although a state of facts against defendant may be strongly proved, yet the jury may be justified, in view of an unblemished character, in finding a verdict of not guilty); State *v.* Gustafson, 50 Iowa 194; State *v.* Northrup, 48 Iowa 583, 30 Am. Rep. 408.

Kansas.— State *v.* Pipes, 65 Kan. 543, 70 Pac. 363; State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037; State *v.* Douglass, 44 Kan. 618, 26 Pac. 476.

Massachusetts.— Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Missouri.— State *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041; State *v.* Howell, 100 Mo. 628, 14 S. W. 4.

New Mexico.— Trujillo *v.* Territory, 6 N. M. 589, 30 Pac. 870.

New York.— People *v.* Sweeney, 133 N. Y. 609, 30 N. E. 1005; Stover *v.* People, 56 N. Y. 315; People *v.* Friedland, 2 N. Y. App. Div. 332, 37 N. Y. Suppl. 974; People *v.* Moett, 23 Hun 60; People *v.* Pollock, 4 N. Y. Suppl. 297.

Ohio.— Harrington *v.* State, 19 Ohio St. 264; State *v.* Strothers, 8 Ohio S. & C. Pl. Dec. 357, 7 Ohio N. P. 228.

Pennsylvania.— Hanney *v.* Com., 116 Pa. St. 322, 9 Atl. 339 (holding that in criminal prosecutions evidence of the good character of defendant is to be regarded as a substantive fact, like any other fact tending to establish the defendant's innocence, and ought to be so regarded both by court and jury); Heine *v.* Com., 91 Pa. St. 145; Com. *v.* Bloes, Wilcox 39; Com. *v.* Stone, 6 Lack. Leg. N. 241.

Texas.— Lee *v.* State, 2 Tex. App. 338.

Utah.— State *v.* Blue, 17 Utah 175, 53 Pac. 978.

Vermont.— State *v.* Totten, 72 Vt. 73, 47 Atl. 105; State *v.* Daley, 53 Vt. 442, 38 Am. Rep. 694.

West Virginia.— State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

United States.— Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467; U. S. *v.* Hutchins, 26 Fed. Cas. No. 15,430; U. S. *v.* McKee, 26 Fed. Cas. No. 15,686, 3 Dill. 551.

See 14 Cent. Dig. tit. "Criminal Law," § 846. See also CRIMINAL LAW, 12 Cyc. 417.

Evidence of character can only be considered in reference to the whole case, and not to any isolated fact. People *v.* Milgate, 5 Cal. 127.

5. Harrington *v.* State, 19 Ohio St. 264; Hanney *v.* Com., 116 Pa. St. 322, 9 Atl. 339.

6. *Illinois.*— Mark *v.* Merz, 53 Ill. App. 458.

Indiana.— Voght *v.* State, 145 Ind. 12, 43 N. E. 1049.

Iowa.— State *v.* Turner, 19 Iowa 144.

Massachusetts.— McDonald *v.* Savoy, 110 Mass. 49.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

New York.— Stover *v.* People, 56 N. Y. 315.

Ohio.— Barrington *v.* State, 19 Ohio St. 264.

South Carolina.—State *v.* Tarrant, 24 S. C. 593.

Tennessee.— Fry *v.* State, 96 Tenn. 467, 35 S. W. 883.

Wisconsin.— Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

See 14 Cent. Dig. tit. "Criminal Law," § 846. See also CRIMINAL LAW, 12 Cyc. 417.

Evidence of character, however, by no means necessarily outweighs the effect of circumstantial proof. Mitchell *v.* State, 103 Ga. 17, 29 S. E. 435; State *v.* Hogard, 12 Minn. 293.

7. *Alabama.*— Bryant *v.* State, 116 Ala. 445, 23 So. 40; McQueen *v.* State, 108 Ala. 54, 18 So. 843; Newsom *v.* State, 107 Ala. 133, 18 So. 206; Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; Armor *v.* State, 63 Ala. 173; Carson *v.* State, 50 Ala. 134.

California.— People *v.* Lee, (1885) 8 Pac. 685.

Florida.— Bacon *v.* State, 22 Fla. 51.

Georgia.— Brazil *v.* State, 117 Ga. 32, 43 S. E. 460; Seymour *v.* State, 102 Ga. 803, 30 S. E. 263.

ter is conclusive in his favor.[8] What weight shall be accorded to the evidence is entirely for the jury.[9] The court therefore cannot properly rule that proof of good character raises a reasonable doubt,[10] or that good character is conclusive in doubtful cases.[11]

E. Evidence of Reputation — 1. In General. While actual character is unaffected thereby,[12] and the reputation affected need not be limited to the existence of any particular moral quality,[13] the conventional reputation of a person may suffer from the doing of certain acts for which damages may be claimed. Reputation, as an ultimate fact, may be proved by the same methods and under the same conditions as are employed in establishing it as circumstantial evidence of character.[14] The objections to the limitation of the proof to general reputation in a community possessed of adequate knowledge and without motive to misrepresent which have been stated regarding proof of character[15] do not apply when the reputation itself is the *factum probandum*.

2. Reputation in Issue. In actions involving injury to reputation, such as actions for libel or slander, etc., three main issues of fact are presented: (1) Did plaintiff have a good reputation in the particulars involved? (2) Has it been injured by the acts of defendant? (3) If so, how much, stated in money, has it been damaged? In the first and third of these issues evidence of reputation is competent. In actions for breach of promise of marriage,[16] or for false

Indiana.— Wagner *v.* State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79.

Iowa.— State *v.* Northrup, 48 Iowa 583, 30 Am. Rep. 408.

Louisiana.—State *v.* Garic, 35 La. Ann. 970.

New Jersey.— Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858.

New York.— People *v.* Sweeney, 133 N. Y. 609, 30 N. E. 1005; People *v.* Pollock, 4 N. Y. Suppl. 297; People *v.* Nileman, 8 N. Y. St. 300.

Pennsylvania.— Becker *v.* Com., (1887) 9 Atl. 510; Com. *v.* Carey, 2 Brewst. 404; Com. *v.* Shaub, 5 Lanc. L. Rev. 121; Com. *v.* Clegget, 3 Leg. Gaz. 9; Com. *v.* Bargar, 2 L. T. N. S. 37.

Texas.— Lee *v.* State, 2 Tex. App. 338.

Washington.— Klehn *v.* Territory, 1 Wash. 584, 21 Pac. 31.

United States.— Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 72, 42 L. ed. 467.

See 14 Cent. Dig. tit. "Criminal Law," § 846. See also Criminal Law, 12 Cyc. 417.

On a trial for murder, if, from all the other evidence, the jury would be satisfied of the guilt of defendant, they must still determine whether or not his previous good character, when weighed with all the other facts and circumstances in the case, raises a reasonable doubt as to his guilt; and if such reasonable doubt remains the jury must acquit. State *v.* Keefe, 54 Kan. 197, 38 Pac. 302. See, generally, Homicide.

8. Kilpatrick *v.* Com., 31 Pa. St. 198.

9. *Florida.*— Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Bacon *v.* State, 22 Fla. 51.

Illinois.— Hartzell *v.* Warren, 77 Ill. App. 274.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Wagner *v.* State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

New York.— People *v.* Moett, 23 Hun 60, 65, where it is said: "It is true that where a clear case of guilt is made out, aside from evidence of good character, such evidence is of comparatively little importance. But of how much importance it is for the jury to say."

Pensylvania.— Com. *v.* Carey, 2 Brewst. 404.

Tennessee.— Bennett *v.* State, 8 Humphr. 118.

Wisconsin.— Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

See 14 Cent. Dig. tit. "Criminal Law," § 846. See also Criminal Law, 12 Cyc. 417.

10. Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Guzinski *v.* People, 77 Ill. App. 275.

11. Shields *v.* State, 149 Ind. 395, 49 N. E. 351.

12. Evidently the plaintiff's actual character in any particular involved is entirely unaffected by defendant's act in any suit involving reputation. It seems equally plain that the reputation referred to in many instances has no especial reference to a particular trait of character at all; but indicates his general standing in a community in which he is known. Leonard *v.* Allen, 11 Cush. (Mass.) 241. It is nevertheless said, that in cases involving reputation plaintiff's "character" is in issue; and it is deduced as a corollary that proof of such character in the particular involved may be given.

13. In an action for slander in charging plaintiff with burning a school-house evidence was admitted to impeach "the general character for integrity and moral worth as to his reputation in regard to conduct similar in character to the offence" with which he was charged. Leonard *v.* Allen, 11 Cush. (Mass.) 241. See Libel and Slander.

14. See *supra*, X, C.

15. See *supra*, X, C, 1.

16. Burnett *v.* Simpkins, 24 Ill. 264; McGregor *v.* McArthur, 5 U. C. C. P. 493. See Breach of Promise to Marry, 5 Cyc. 1013.

imprisonment,[17] libel and slander,[18] or malicious prosecution,[19] plaintiff is entitled to rely, in the absence of evidence, upon the legal assumption that his reputation is good, as to the particular in question; or he may produce, before[20] or after[21] his reputation has been attacked,[22] evidence that it is good,[23] to enhance the damages,[24] or maintain his action.

3. Reputation Relevant to the Issue. Reputation as to character may be a relevant fact in other connections. The existence of a good reputation in some relevant particular tends on an action for malicious prosecution to negative the existence of "probable cause" for instituting criminal proceedings;[25] while a bad reputation in the same particulars tends to establish it.[26] That a house is

17. Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772. See also False Imprisonment.

18. *Alabama.*— Jones *v.* State, 76 Ala. 8; Holley *v.* Burgess, 9 Ala. 728.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205.

Massachusetts.— Peterson *v.* Morgan, 116 Mass. 350; Leonard *v.* Allen, 11 Cush. 241; Bodwell *v.* Swan, 3 Pick. 379, 15 Am. Dec. 228.

Michigan.— Proctor *v.* Houghtaling, 37 Mich. 41.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

Missouri.— Dudley *v.* McCluer, 65 Mo. 241, 27 Am. Rep. 273.

New York.— Paddock *v.* Salisbury, 2 Cow. 811.

South Carolina.— Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 333.

Virginia.— McNutt *v.* Young, 8 Leigh 542.

England.— Scott *v.* Sampson, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. N. S. 412, 30 Wkly. Rep. 541.

See, generally, Libel and Slander.

19. *Alabama.*— Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773.

Illinois.— Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; Mark *v.* Merz, 53 Ill. App. 458.

Kentucky.— Gregory *v.* Thomas, 2 Bibb 286, 5 Am. Dec. 608.

Maine.— Fitzgibbon *v.* Brown, 43 Me. 169.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

Missouri.— Gregory *v.* Chambers, 78 Mo. 294; Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693.

New Jersey.— O'Brien *v.* Frasier, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170.

Vermont.— Barron *v.* Mason, 31 Vt. 189.

See also, generally, Malicious Prosecution.

20. Adams *v.* Lawson, 17 Gratt. (Va.) 250, 260, 94 Am. Dec. 455, where it is said: "It being thus important to the decision of the case that the jury should hear evidence as to the character of the plaintiff, either generally or in reference to the particular subject matter of the slander or libel, can any good reason be assigned why it should depend on the option of the defendant whether they shall hear such evidence or not? Such a one-sided rule would not be fair and equal as between the parties, would often defeat the justice of the case, and might operate great hardship upon a plaintiff who is unknown to the jury. The defendant would not open the door by an attack on his character, and he would not be allowed to sustain it by evidence in chief. It does not appear to me to be a satisfactory answer to say, that the plaintiff ought to stand upon the presumption which the law makes, in the absence of evidence to the contrary, that his character is good. Why should the plaintiff be compelled to rely upon such a general presumption, when he offers to prove that the presumption, in his particular case, is in accordance with the fact? And what right has the defendant to complain, since the evidence is only offered to establish with more certainty what the law would presume to be true in the absence of all evidence?"

21. Holley *v.* Burgess, 9 Ala. 728; Inman *v.* Foster, 8 Wend. (N. Y.) 602. A defendant, in an action for slander, who has introduced evidence and reports injurious to plaintiff's character, cannot object to the admissions of proof of his good character. Dame *v.* Kenney, 25 N. H. 318. See also, generally, Libel and Slander.

22. See *infra*, X, E, 3.

23. Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189; Adams *v.* Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455; Shroyer *v.* Miller, 3 W. Va. 158.

24. Shroyer *v.* Miller, 3 W. Va. 158.

25. *Illinois.*— Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; Israel *v.* Brooks, 23 Ill. 575.

Indiana.— Blizzard *v.* Hayes, 46 Ind. 166, 15 Am. Rep. 291.

Massachusetts.— McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517.

Missouri.— Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693.

North Carolina.— Bostick *v.* Rutherford, 11 N. C. 83.

Wisconsin.— Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

See, generally, Malicious Prosecution.

26. *Alabama.*— Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773.

Illinois.— Mark *v.* Merz, 53 Ill. App. 458.

Kentucky.— Gregory *v.* Thomas, 2 Bibb 286, 5 Am. Dec. 608.

Missouri.— Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 673.

Vermont.— Barron *v.* Mason, 31 Vt. 189.

See, generally, Malicious Prosecution.

one of "ill fame" may be shown by the reputation which it sustains in the community.[27] A particular reputation as to character may be a relevant fact entirely apart from any consideration of its truth or falsity;[28] as to show an attempt to select proper mechanics or agents;[29] to establish due care in intrusting property to,[30] or conferring responsibility on,[31] a servant;[32] to show improper selection of a trustee;[33] to indicate to whom credit was given;[34] or to prove notice of a fact reputed to exist,[35] as the dangerous nature of a deceased on an indictment for homicide.[36]

27. *Connecticut.*— Cadwell *v.* State, 17 Conn. 467.

Florida.— King *v.* State, 17 Fla. 183.

Georgia.— Hogan *v.* State, 76 Ga. 82.

Idaho.—Territory *v.* Bowen, 2 Ida. (Hasb.) 640, 23 Pac. 82; People *v.* Buchanan, 1 Ida. 681.

Indiana.— Graeter *v.* State, 105 Ind. 271, 4 N. E. 461; Betts *v.* State, 93 Ind. 375.

Iowa.— State *v.* Hand, 7 Iowa 411, 71 Am. Dec. 453.

Louisiana.— State *v.* Mack, 41 La. Ann. 1079, 6 So. 808.

Michigan.— O'Brien *v.* People, 28 Mich. 213.

Minnesota.— State *v.* Smith, 29 Minn. 193, 12 N. W. 524.

Nebraska.— Drake *v.* State, 14 Nebr. 535, 17 N. W. 117.

South Carolina.— State *v.* McDowell, Dudley 346.

Texas.— Sylvester *v.* State, 42 Tex. 496; Morris *v.* State, 38 Tex. 603; Sara *v.* State, 22 Tex. App. 639, 3 S. W. 339; Allen *v.* State, 15 Tex. App. 320.

Wisconsin.— State *v.* Brunnell, 29 Wis. 435.

See also DISORDERLY HOUSES, 14 Cyc. 503.

The fact that defendant is the keeper of such a house cannot be shown by reputation. Allen *v.* State, 15 Tex. App. 320. See also DISORDERLY HOUSES, 14 Cyc. 503.

[X, E, 3]

28. *California.*— People *v.* Anderson, 39 Cal. 703; Ficken *v.* Jones, 28 Cal. 618.

Connecticut.— Fitch *v.* Woodruff, etc., Iron Works, 29 Conn. 82.

Kansas.— Holmberg *v.* Dean, 21 Kan. 73.

Massachusetts.— Monahan *v.* Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226; Buswell Trimmer Co. *v.* Case, 144 Mass. 350, 11 N. E. 549.

Michigan.— Daniels *v.* Dayton, 49 Mich. 137, 37 N. W. 392.

29. Fitch *v.* Woodruff, etc., Iron Works, 29 Conn. 62. See Plummer *v.* Ossipee, 59 N. H. 55. And see, generally, MASTER AND SERVANT; PRINCIPAL AND AGENT.

30. Ficken *v.* Jones, 28 Cal. 618.

31. Monahan *v.* Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226.

32. See, generally, MASTER AND SERVANT.

33. Holmberg *v.* Dean, 21 Kan. 73. See, generally, TRUSTS.

34. Buswell Trimmer Co. *v.* Case, 144 Mass. 350, 11 N. E. 549; Daniels *v.* Dayton, 49 Mich. 137, 13 N. W. 392.

35. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453; Williford *v.* State, 36 Tex. Cr. 414, 37 S. W. 761.

36. People *v.* Anderson, 39 Cal. 703. See, generally, HOMICIDE.